

University of St. Thomas Law Journal

Volume 17

Issue 1 *Restorative Justice, Law, and Healing
Symposium*


Article 7

November 2020

Confessions of a Catholic Litigator

David A. Shaneyfelt

Follow this and additional works at: <https://ir.stthomas.edu/ustlj>

 Part of the [Dispute Resolution and Arbitration Commons](#), [Law and Society Commons](#), [Legal Profession Commons](#), [Legal Remedies Commons](#), [Litigation Commons](#), and the [Other Law Commons](#)

Recommended Citation

David A. Shaneyfelt, *Confessions of a Catholic Litigator*, 17 U. ST. THOMAS L.J. 111 (2020).
Available at: <https://ir.stthomas.edu/ustlj/vol17/iss1/7>

This Article is brought to you for free and open access by UST Research Online and the University of St. Thomas Law Journal. For more information, please contact lawjournal@stthomas.edu.

SUBMISSION

CONFESSIONS OF A CATHOLIC LITIGATOR

DAVID A. SHANEYFELT*

I imagine there are Navy Seals whose consciences prick them when they swim aboard an enemy's base in the dead of night, slit the throats of guards on duty, retrieve a hostage, gun down pursuers, and swim back to their escape boat. They do what is necessary under the circumstances, within a framework that renders their actions morally unobjectionable. I am not a Navy Seal. I am a civil litigator. And I am a Catholic, just as I know there are Catholic Navy Seals. I feel like the same lessons that apply to them apply to me, because I, too, seem to be doing the moral equivalent of slitting throats and gunning down enemies, while operating in a framework—the legal profession—that renders my actions morally unobjectionable.

For more than thirty years, I have struggled over my role within the framework of litigation. I want to be a good Catholic. I want to be a good lawyer. Can I be both? Are there things I must do in my practice that offend my faith (and thus offend God)? Conversely, will practicing my faith to the fullest make me an inferior lawyer? Am I binding myself to some higher standard than legal ethics require?

For more than thirty years, I have tried to answer these questions. Try is the operative word, and my reflections may not accord with the reflections of others. As the old saying goes, put two attorneys in one room and you get three opinions. But as Chesterton says, “[i]f a thing is worth doing, it is worth doing badly,”¹ and so I am content to *try* to answer these questions, because they are important questions, even if I may answer them badly according to others.

* David A. Shaneyfelt is among the five percent of attorneys recognized as a Southern California Super Lawyer and has the highest possible ranking for ethical standards and legal ability from Martindale Hubbell. He is a former trial attorney with the U.S. Department of Justice in Washington, D.C., and has more than thirty years' experience in litigating complex civil matters in state and federal courts across the country. He is a graduate of Thomas Aquinas College and Willamette College of Law. He practices with The Alvarez Firm in Calabasas, California.

1. GILBERT KEITH CHESTERTON, *WHAT'S WRONG WITH THE WORLD*, ch. 14 (1910). For the record, Chesterton did not mean to excuse poor performance, but to encourage the pursuit of goals worthy in themselves.

My focus is simple. I first look to the external effects I have on others. Second, I think of the internal risks to me. Combat soldiers certainly do. Allow me, then, to look through the lens of my faith and reflect on the external and internal effects of my life as a Catholic litigator.

I. A LITIGATOR'S EXTERNAL EFFECTS: MAKE WAR, NOT LOVE

How can we not reflect on any of our actions and their external effects? "For," as the Apostle says, "we must all appear before the judgment seat of Christ, so that each one may receive compensation for his deeds done through the body, in accordance with what he has done, whether good or bad."² Five questions come to mind: (1) What does a litigator do, generally? (2) Why is killing, as it were, part of the job? (3) What are the limits on killing? (4) What is dirty fighting, and should you engage in it? and (5) Is virtue relevant?

A. *Litigators as a Breed*

To repeat, I am a litigator. I handle court cases. I file and answer complaints; launch and respond to discovery; file, brief, and argue motions; negotiate settlements; and, uncommonly, try cases. We litigators are distinct from those many attorneys who do not handle court cases, but who trade in other vast areas of the law—business formation, estate planning, government contracts, real estate, intellectual property, bankruptcy, and tax law to name just a few. And criminal law is about as foreign to us as the Justinian Code.

We litigators are a dime a dozen among lawyers who, as a class, are a nickel a dozen. There are more than 1.3 million licensed attorneys in the United States, roughly one for every three hundred Americans.³ Three out of four are in private practice, meaning that they do not work for the government or a private company, and that same proportion accounts for attorneys who work in firms of two to five lawyers.⁴ About one-third of all lawyers work as litigators,⁵ although that proportion increases if you add

2. 2 *Corinthians* 5:10. Biblical references herein are taken from the New American Standard Bible translation (NASB) from <https://www.biblegateway.com/versions/New-American-Standard-Bible-NASB>.

3. AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION, 5 (Aug. 2019), <https://www.americanbar.org/content/dam/aba/images/news/2019/08/ProfileOfProfession-total-hi.pdf>.

4. AM. BAR ASS'N, LAWYER DEMOGRAPHICS YEAR 2016 (2016), <https://45e2ly1gtqp9jmqme2fiw751-wpengine.netdna-ssl.com/wp-content/uploads/sites/3/2016/11/Incubators-The-Next-Wave-in-the-Access-to-Justice-Movement.pdf>.

5. Normally, this footnote would provide support for this claim. But I cannot find any current statistical source to support it. I suspect this is because litigation extends, in theory, to every area of the law and every practicing lawyer may claim, at one time or another, to be involved, or not involved, in litigation. In other words, whether one is a "litigator" depends on the definition, and the definition may take many forms. I take it in the sense I think most practitioners do—a "litigator" is one whose predominant practice is involved in litigation. Many lawyers will be quick to say "never;" many will say, "occasionally;" and (according to my reckoning) maybe as much as

those who occasionally venture into litigation. Indeed, we litigators are distinct from “trial lawyers” because we rarely try cases. Like some 90 percent of all cases, most of our cases settle short of trial,⁶ and we know we have achieved the perfect settlement when all sides in the case are equally miserable.

We litigators, by definition, litigate, meaning that we prosecute or defend cases in the court system. And because we litigate, we are fighters who must battle an opponent, either willingly or unwillingly. Our job is to win, to trounce our opponents, to kill them every bit as thoroughly as if life were on the line. Litigators, like soldiers, come in all sorts of shapes and personas, from brash cowboys to quiet assassins. But all of us, as a friend of mine once put it, are “quirky.” We have to be, because our common characteristic is uncommon to most practitioners—we are uniquely confident in our ability to fight. Herein lies the recurring itch: How am I supposed to be a good Catholic and a trained fighter?

B. *Our Job is to Kill*

Law is war carried on by other means, whether through politics or a courtroom, and litigators, consciously or unconsciously, track Sun Tzu’s *Art of War* and Carl von Clausewitz’s *On War*.⁷ The lexicon of the legal system is drawn almost entirely from bellicose action imagery. Professor Elizabeth Thornburg has a fine compilation of war (and sports and sex) metaphors commonly used in litigation practice—we shoot down arguments, draw battle lines, compile war chests, plan preemptive strikes, fire opening salvos, undertake frontal assaults, sandbag opponents, drop bombs, throw hand grenades, launch missiles, fight in trenches, and make arguments ironclad or bombproof, as we skirmish, battle, or vanquish an oppo-

a third will say, “predominantly.” That means (again, by my reckoning) that about two-thirds of all lawyers do not litigate, primarily.

6. Actual settlement numbers are hard to pin down. See e.g. Theodore Eisenberg and Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 111 (2009) (“[N]o reasonable estimate of settlement rates supports an aggregate rate of over 90 percent of filed cases, despite frequent references to 90 percent or higher settlement rates.”); John Barkai et al., *A Profile of Settlement*, 42 J. AM. JUDGES ASS’N 34, 35 (2006) (“Although ‘most cases settle,’ the percentage of cases that settle varies dramatically by the type of case. About 84% of tort, 45% of contract, 20% of foreclosure, and 51% of ‘other’ cases settle. Contrary to the popular saying, nowhere near 90% or more of cases settle (although torts come close).”).

7. *The Art of War*, an ancient Chinese military treatise dating from the 5th century BC, and Clausewitz’s treatise, written mostly after the Napoleonic Wars between 1816 and 1830, are both regarded as among the most important treatises on military strategy ever written; both have spawned extensive application to litigation tactics. See generally David C. Nelson, *On Military Strategy and Litigation*, 31 VT. L. REV. 557 (2007); see also Antonin I. Pribetic, *The “Trial Warrior”: Applying Sun Tzu’s The Art of War to Trial Advocacy*, 45 ALTA. L. REV. 1017 (2008); see also MELINDA L. DAVIS-PERRITANO, CLAUSEWITZ ON TRIAL: AN APPLICATION OF MILITARY STRATEGIC THOUGHT TO LITIGATION (BiblioScholar 2012).

ment or win by attrition. Our tactics are scorched earth, we take no prisoners, and we go Rambo, Pearl Harbor, or Hiroshima.⁸

The analogy to war is apt because at the root of every war and every lawsuit is a conflict. Conflicts are not inherently bad. They are a natural occurrence on this side of the Garden of Eden. Indeed, conflict can be good, as even the Good Book admits: *Iron sharpens iron*.⁹ But sharp iron also cuts and causes one to bleed; I am that iron. Someone has hired me to cut and cause another to bleed. Clients do not hire litigators to get justice. They hire us to win a dispute that has arisen in law. We are participants in the adversarial system. Adversaries fight; judges resolve fights. There are rules for the fight, but those rules make it no less a fight than the rules of the Geneva Convention make a war not a war.

I am not a pacifist; the Church neither encourages nor discourages me to be one. Indeed, Catholic “just war” theory parallels sound litigation advice in many ways. Before you sue, you must consider whether (1) the damage inflicted by the aggressor is lasting, grave, and certain; (2) all other means of resolving the conflict are impractical or ineffective; (3) serious prospects of success exist; and (4) the measures taken will not produce evils graver than the evil to be eliminated.¹⁰ I have counseled many clients not to sue, based roughly on these same criteria. There is nothing particularly Catholic about my counsel; it just makes sense given financial realities and judicial uncertainties. All litigators offer this counsel, more or less. And so did Our Lord: “For when you are going with your accuser to appear before the magistrate, on the way, make an effort to settle with him, so that he does not drag you before the judge, and the judge hand you over to the officer, and the officer throw you into prison.”¹¹

The operative words are “make an effort.” Sometimes efforts fail. I may want to mediate; I may want to settle. My opponent does not. I have no choice but to go to court. If I cannot heal wounds (try as I might and try as I should), I must aim to avenge them or defend against their affliction. In the end, the choice to go to court is not mine; it is the client’s. As a litigator, I strive to get the client the best result possible. It is for the client to decide whether to walk an extra mile when someone presses him to walk it, or to give the cloak off his back when he is asked for his shirt.¹² That is not my job.

My job, as the law permits it, is to take the other’s cloak and shirt, to seek damages for making my client walk one mile, to obtain injunctive relief to prevent him from walking another one, and to make him pay my

8. Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN’S L.J. 225, 232–37 (1995).

9. *Proverbs* 27:17.

10. CATECHISM OF THE CATHOLIC CHURCH, ¶ 2309 (2nd ed. 1997).

11. *Luke* 12:58–59.

12. *See Matthew* 5:40–41.

fees for my efforts. The love of money may be the root of all sorts of evil,¹³ but I leave that love to my client to address. My job is to get or protect someone's money, and my prayer is not a prayer for peace, but for success: "Blessed be the Lord, my rock, who trains my hands for war, *And* my fingers for battle."¹⁴

As a litigator, I start wars, and I defend wars. I am not insensitive to the fact that litigation is war. Often, more than just expense is at stake. I understand the proverb's truth that "he who goes to law for a sheep loses his cow."¹⁵ I see why Romani makes this curse: "May you have a lawsuit in which you know you are right."¹⁶ The emotional toll is considerable. The esteemed Judge Learned Hand echoed this gravity when he said, "I should dread a lawsuit beyond almost anything else short of sickness and death."¹⁷ A friend of mine never imagined he would be an agent in proximate cause; a witness he was cross-examining at trial had a heart attack and died on the witness stand. I once gave a witness a bloody nose under similar circumstances. Extreme stress abounds on both sides of the witness box. It comes when least expected, which is why the maxim applied to a soldier's life applies in force to the life of the litigator—litigation entails hours and hours of endless boredom punctuated by brief moments of abject terror. Anything can happen; anything will happen. You can be destroyed in an instant. Your life can be made hell with one email, one phone call, one letter: "We are going to do this to you." What now? *Quo vadis?*

"Blessed are the peacemakers, for they will be called sons of God."¹⁸ I love to be a peacemaker when I can, but sometimes I can't. Cutting and running is not always an option, either. Sometimes you have to be the plaintiff when the defendant is a bully. Sometimes you have to be the defendant when the plaintiff is a bully. Sometimes you have to be the bully.

C. *Limits on Killing*

Whether you are the bullied or the bully, limits exist on how you may fight. As in war, some conduct crosses the line and is wrong.¹⁹ In war, we do not shoot medics, we do not kill prisoners, we do not bomb schools or

13. See 1 Timothy 6:10.

14. Psalm 144:1.

15. HAROLD V. CORDRY, THE MULTICULTURAL DICTIONARY OF PROVERBS: OVER 20,000 ADAGES FROM MORE THAN 120 LANGUAGES, NATIONALITIES, AND ETHNIC GROUPS 152 (No. 10429).

16. ROSEMARIE JARSKI, WORDS FROM THE WISE: OVER 6,000 OF THE SMARTEST THINGS EVER SAID 289 (Skyhorse Publishing 2007).

17. JUSTICE LEARNED HAND, *Deficiencies of Trials to Reach to the Heart of the Matter*, 3 LECTURES ON LEGAL TOPICS 89, 105 (N.Y., Macmillan 1926), quoted in FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 304 (1993).

18. Matthew 5:9.

19. "The Geneva Conventions and their Additional Protocols is a body of Public International Law, also known as the Humanitarian Law of Armed Conflicts, whose purpose is to provide minimum protections, standards of humane treatment, and fundamental guarantees of respect to individuals who become victims of armed conflicts." *Geneva Conventions and their Additional*

hospitals, and we do not deny treatment to wounded enemies. Rules of professional ethics offer similar limits on litigators. We do not contact opponents apart from their attorneys,²⁰ we do not make secret contact with the judge,²¹ we do not trade on privileged information,²² we do not suborn perjury,²³ and (this is hard for nonlawyers to believe) we do not misrepresent facts or law.²⁴ These are rules of fairness and fair applications of the natural law. Because a litigator may receive the professional equivalent of capital punishment for violating them—loss of license, loss of job—litigators tend to observe them strictly. Not necessarily because they have integrity, but because they are risk averse.

Other rules of fairness cannot be written down or can be written down but not enforced. Litigators must observe those, too. In 2014, the California State Bar added this language to the oaths taken by all new attorneys: “As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity.”²⁵ Many bar associations, including the Los Angeles County Bar Association, of which I am a member, go further and offer particulars on civility:

I pledge to be able to disagree without being disagreeable . . . I will seek to present information truthfully, and will not knowingly misrepresent, mischaracterize, or misquote information in seeking to advance any point of view . . . I will not use language that is rude, demeaning, insulting, hostile, threatening or slanderous.²⁶

These terms will not prevent attorneys from crossing lines when they want to. Many find it odd—and sad—that such lines had to be expressed, when they have always been assumed. Whether codified or not, these rules

Protocols, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/geneva_conventions_and_their_additional_protocols (last visited Dec. 5, 2020).

20. MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS’N 2020) (“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”).

21. MODEL RULES OF PRO. CONDUCT r. 3.5(b) (AM. BAR ASS’N 2020) (“A lawyer shall not: * * * (b) communicate ex parte with [a judge] during the proceeding unless authorized to do so by law or court order”).

22. *See* *Rico v. Mitsubishi Motors*, 272 P.3d 1092 (Cal. 2007).

23. MODEL RULES OF PRO. CONDUCT r. 3.3(a)(3) (AM. BAR ASS’N 2020) (“A lawyer shall not knowingly: . . . (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.”).

24. MODEL RULES OF PRO. CONDUCT r. 3.3(a)(1) (AM. BAR ASS’N 2020) (“(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . .”).

25. CAL. R. CT., 9.7 (2018).

26. CODE OF CIVILITY GUIDELINES (2015) (L.A. CNTY. BAR ASS’N, amended 2018), <https://www.lacba.org/docs/default-source/lacba-overall/code-of-civility-guidelines.pdf>.

are certainly worthy and noble aspirations that all should observe, because they are grounded in natural law. Civility is good for its own sake, because it presumes the dignity of the participants, and all participants deserve for us to treat them as we would be treated, as the Golden Rule requires. Civility tends to degrade in proportion to the likelihood that adversaries will never see each other again. It is always easier to be an ass to a stranger than to an acquaintance.

Many judges post their own rules about how to behave in their courtrooms. Not infrequently, others admonish the parties explicitly to “follow the Golden Rule.” The rule is oxymoronic for fighters. How are you supposed to fight if you don’t want someone fighting you? But nobody thinks about the contradiction; everybody knows *what* the admonition means—fight fairly, fight reasonably.

Litigators say they love litigation best when they can fight someone hard and never take it personally. Friends can litigate against each other and remain friends, just as boxers or wrestlers do. I have developed lasting friendships with adversaries against whom I have had the hardest fights. One of the highest compliments a litigator can get is a client referral from a past opponent. But, to paraphrase Sherman,²⁷ litigation is still Hell, and it surely is when your opponent is a demon. You come to hate your opponent and to hate your case, and if the judge favors the demon over you, you hate the judge, too.

D. *Fighting Dirty*

Most litigators respect the line and can tell when someone has crossed it. Some cross it with glee. Everyone knows that if you cross the line, you give your opponent cause to cross it against you. *Do unto others as you would have them do unto you*. This is a hard saying when your opponent is sneaky or cunning and living at the edge of unethical behavior. These “sharp practices” (as they are called) are not professionally unethical, and they are too difficult to catalogue and punish under even the state bar guidelines. Most litigators, I think, eschew sharp practices and regard them as offensive. I do. I even regard them as morally objectionable. To return to the war metaphor, it may or *may not* be morally appropriate to slit throats in the middle of the night. It may or may not be morally appropriate to file certain motions at certain times or on certain issues, or to make objections regarding certain documents or certain testimony. To borrow Justice Potter Stewart’s definition of pornography,²⁸ I may not be able to define a sharp practice, but I know it when I see it.

27. The words commonly attributed to William Tecumseh Sherman—“war is hell”—have no contemporary verification, but have several sources, including, “There is many a boy here today who looks on war as all glory, but, boys, it is all hell.” See MARGARET MINER & HUGH RAWSON, *War*, THE OXFORD DICTIONARY OF AM. QUOTATIONS 703 (2nd ed. 2006).

28. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring).

And so, when I see it done to me, am I excused from the Golden Rule? Must I fight fairly, even if my opponent does not? Do I, as a Catholic, have to answer to some higher standard and “turn the other cheek”?

I once took a course titled “Dealing with the S.O.B. Litigator.” The SOB litigator is insulting, demeaning, bullying, threatening, obstructing, and, most often, accusatory. The term “Satan” is drawn from the Hebrew (שטן) “accuser,”²⁹ and Scripture tells us he “accuses” the faithful “before our God day and night.”³⁰ He is one hell of a lawyer. He has many imitators whose technique is to make incessant accusations against their adversaries, often to detract from their own wrongdoing. Sometimes the mud thrown against the wall will stick, so they enjoy throwing heaping handfuls of it.

The recommended tactic for dealing with an SOB litigator is surprisingly close to the model of Christian charity—do not respond in kind, try to understand what is motivating the conduct, seek effective paths of least resistance. Then, more to the point, document the behavior and go to the judge for relief. You feel like a kid vying for a parent to grant relief from a bullying sibling. Most of the time, judges will help. The operative word is “most,” as judges are harried, they dislike personality feuds, and they look at complainers like the parent who assumes that the child yelling loudest is the one who pinched first. After all, you are showing charity toward “Satan.”

The advice is practical, as Christian charity almost always is. You will be a better, more effective advocate if you do not act like an SOB, as tempting as it is to retaliate. Guerilla attacks often breed intemperate and imprudent responses. Indeed, a non-Catholic friend of mine takes a higher road than I am able to take. As she says, “You have to feel sorry for people who act so miserably to others.” She is so wonderfully right. I’m afraid I’m not there. Oh, how I feel the hate. And so, I sin.

Depositions present fertile opportunities for SOB-like behavior. Opponents sit in a room, and one party’s attorney questions another party’s witness under oath, while a reporter takes down the questions and answers. With no judge present, plenty of mischief occurs. Shouting and yelling are only one form of abuse. Interposing objections to prevent the witness from answering and coaching the witness to answer a certain way are other forms of abuse. At what point do you terminate the deposition and seek relief from the judge (who might sanction *you* instead)? When do you yell back? When do you object? When do you kick your witness under the table to keep from giving a wrong answer to a dangerous question? When may you kick your opposing counsel in the teeth? I don’t know. These are the questions that prick at my conscience, but they prick (or they should prick) at

29. *Catholic Encyclopedia: Devil*, NEW ADVENT, <https://www.newadvent.org/cathen/04764a.htm> (last visited Dec. 5, 2020).

30. *Revelations* 12:10.

anyone's conscience. I do not want to be an SOB litigator, because it is not effective. But I sure am not going to be bullied.

One time I kept getting procedurally outmaneuvered by an SOB, who was at least friendly. He had a way of keeping me from getting critical documents through various delays and misrepresentations. After getting burned twice, I turned the tables on him and did the same thing. I will never forget his reaction when he realized his predicament and said, under his breath, "Well, you're finally learning, David." So, what did I learn? Burn me once, shame on you; burn me twice, shame on me. I also learned to despise litigators I cannot trust and to love litigators I can trust. Despicable litigators take all the fun out of litigating. Worse, they tempt you to be like them. In such cases, one must keep in mind Nietzsche's worthy observation: "He who fights with monsters should be careful lest he thereby become a monster."³¹

Is it wrong for a Catholic to be an SOB litigator? Probably, but that's because it is wrong for anyone to be an SOB litigator. For me, the lesson is that it is *stupid* to be an SOB litigator, which is not exactly a moral or Catholic precept. The particularly cunning advocate knows and exploits this notion. Beware the deposition taken by the utterly charming counsel. She will find a way of handing you your head on a plate and getting you to thank her for your deed.

But the point remains, that being the opposite of an SOB litigator (shall we say, a "wimp"?) reflects moral weakness, too. Cowardice is the moral opposite of brashness or foolhardiness. As Aristotle explains, every vice has its opposite, and virtue is found in the middle.³² Litigation virtue is found in the mean between extremes, which explains not only why virtue is its own reward, but is widely recognized as the better, more effective legal practice, too.

Just because this virtue lies in the mean does not mean the fight need be less intense. A hard, fair fight gives one the same pride and euphoria as one has after a tough athletic contest. Think Stallone's *Rocky*. Watch a rugby match, then go to the party afterwards. It was common, at least at some points in history, for adversaries to meet up at the same bar after a trial, like in *Rumpole of the Bailey*.³³ That has not been my experience, probably because of other factors, but I have formed lasting relationships with fierce litigation opponents.

31. FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 87 (Carlton House 1930) (1886).

32. ARISTOTLE, *Nicomachean Ethics*, Book II, ch. 6, in *THE BASIC WORKS OF ARISTOTLE* 959 (Richard McKeon ed., Random House 1941).

33. John Mortimer created and wrote a popular British television series by that name and later presented his stories in book and radio format. They chronicle the life and times of a fictional English barrister who practices in the famed Old Bailey in London.

E. *Limits of Virtue*

My duty to fight might conflict with common virtue. My client has blown the statute of limitations, but my opponent has not noticed. Do I tell my opponent? I have disclosed the existence of a witness who has damaging information against me, but my opponent fails to pursue the witness and find it out. Do I volunteer it? I suspect my opponent's witness is truthful, but I bring out facts that call into question the witness's credibility. Should I bring them out? My expert witness will testify to any opinion I want for a price. Should I care that my expert does not care about the truth? A nonlawyer might have qualms over issues like these, because they seem to transgress duties of honesty and transparency found in common virtue.

The litigator has no such qualms, because the litigator understands the ground rules that allow for distinctions in when, how, and under what conditions honesty and transparency are to be honored and when they are to be suppressed. They are suppressed when I am compelled to act by a different duty—the duty *not* to volunteer adverse information.³⁴ Not only would volunteering this information compromise my ethical duties as an advocate to represent my client “zealously within the bounds of law,”³⁵ but it would get me sued for malpractice. The volunteering of adverse information to my opponent is inconsistent with the ground rules for litigation, and no virtue can be found in exercising honesty and transparency under those circumstances. If an enemy combatant drops his gun in the heat of battle, it is not an act of charity for me to hand it back to him. Sports teams win when they capitalize on their opponents' mistakes.

Litigators communicate with each other, especially on paper, in a strange, limited manner guided by the notion that anything we say can, and will, be used against us. As a Catholic friend says, “Lawyering is the art of choosing one's words *very* carefully.” He bears in mind the moral allowance of “mental reservation”—when someone has no right to know the information you possess, you have no duty to disclose it.³⁶ Mental reservation is the norm; candor is the exception. Indeed, the entire practice of written discovery is predicated on this principle. Answers to the simplest and clear-

34. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2009) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”).

35. MODEL RULES OF PRO. CONDUCT, Preamble and Scope (AM. BAR ASS'N 2009).

36. Theologians define “mental reservation” as “[s]peech in which the common and obvious sense of one's words is limited to a particular meaning. The morality of this kind of speech depends on whether the listener can reasonably conclude from the circumstances that a mental reservation is being used.” *Mental Reservation*, *Modern Catholic Dictionary*, <http://www.thealpresence.org/dictionary/mdict.htm> (last visited Dec. 22, 2020). See also CATECHISM OF THE CATHOLIC CHURCH, *supra* note 10, at ¶ 2488 (“The *right to the communication* of the truth is not unconditional. Everyone must conform his life to the Gospel precept of fraternal love. This requires us in concrete situations to judge whether or not it is appropriate to reveal the truth to someone who asks for it.”) (emphasis in original).

est of special interrogatories and other discovery requests are greeted with the same standard response: “The request is vague, ambiguous, overbroad, unduly burdensome, oppressive, and harassing; it is neither relevant nor reasonably calculated to lead to the discovery of relevant evidence; and it seeks information protected by the attorney-client privilege, the work product doctrine, and other applicable privileges.”³⁷ Courts know this game is played and therefore require the parties to “meet and confer” extensively before any discovery motion is brought to their attention.³⁸

One might think that, if my duty to fight precludes me from otherwise virtuous acts, fighting necessarily transgresses virtue. Strangely, I cannot think of any litigation strategies or tactics that transgress my religious beliefs, nor can I think of any application of those strategies that does so, although I wonder at times if my examination of conscience (in and out of confession) should be more finely tuned. *Bless me Father, for I have sinned. I sent out excessive interrogatories to harass my opponent . . . I failed to stipulate to a reasonable request to postpone a hearing and forced my opponent to file a motion . . . I scheduled depositions of multiple witnesses, when I really needed to depose only a few . . . I made a witness cry in her deposition . . . I produced a haystack of documents, knowing my opponent would be less likely to find the needle in it.*

Are these transgressions? They certainly can be, and if they are, I will avoid doing them from self-interest. Whatever line I cross gives my opponent cause to cross it back against me. If I want an extension on some deadline for filing a brief, I better grant extensions to my opponent. If I expect my opponent to faithfully disclose all requested information, I better not hide any such information myself. You can pick lots of fights over lots of things in litigation if you want to, but you do yourself (and your client) a good turn when you pick as few fights as possible. Looking for fewer fights is not a sign of weakness; it is a mark of trust. And trust is not simply worthy in itself, it is also practical. It helps the client.

II. A LITIGATOR’S INTERNAL EXPERIENCE: WHERE SIN ABOUNDS

The Catholic Catechism summarizes centuries of moral teaching this way: “Human acts, that is, acts that are freely chosen in consequence of a judgment of conscience, can be morally evaluated. They are either good or evil.”³⁹ Sin, it says, “is an offense against reason, truth, and right con-

37. See, e.g., Julie Brook, *12 Grounds for Objecting to Interrogatories*, CONTINUING EDUC. OF THE BAR (CEB) (May 23, 2018), <https://blog.ceb.com/2018/05/23/12-grounds-for-objecting-to-interrogatories>.

38. See, e.g., FED. R. CIV. P. 37(a)(1) (A motion to compel disclosure or discovery “must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.”).

39. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 10, at ¶ 1749.

science.”⁴⁰ My patroness, St. Catherine of Siena, puts it famously this way: “Sin arises simply from loving what God hates and hating what God loves.”⁴¹ Can we identify what God hates in the life of a litigator? I think so. Can we avoid hating what God loves? I think so, too. Four points come to mind: (1) the sins we typically face, (2) the perils of obsession, (3) the opportunities for grace, and (4) the aim to win.

A. *Legal Sins*

Most sins that occur during the course of litigation have nothing to do with litigation. Litigation is enormously stressful, so you can lose your temper—not just with your opponent, but with your colleague, your secretary, or your support staff. Your opponent insults you, so you insult back. You swear at frustrations. You swear about opponents. You swear about the judge and adverse rulings. Swearing is rooted in anger, and Saint Thomas explains that anger is an emotion triggered by a sense of injustice.⁴² When you battle for justice and lose, you get angry, and you are right to be so.

I once heard a client say, after a colleague apologized for dropping an F-bomb in the initial conference call: “Oh, I like swearing in a litigator!” Swearing signals appreciation that an injustice exists, and it reflects the other aspect of anger that Saint Thomas also describes—the impulse to seek revenge,⁴³ which may be exactly why a client is retaining you and why they like the swearing. The quick-witted (and unrestrained) litigator can substitute a foul word for every grammatical component of the English language, down to its last past participle. You justify it because you are the Marine on the sands of Iwo Jima. But, no. You can’t give in. As Saint Paul reminds us, “Let no unwholesome word come out of your mouth.”⁴⁴ He could have been speaking to lawyers in that same passage when he also says, “All bitterness, wrath, anger, clamor, and slander must be removed from you, along with all malice.”⁴⁵ Yes, litigation breeds opportunities for confession, separate and apart from litigation activity.

I understand why lawyers are the butt of so many jokes, most of which are predicated on the assumption that lawyers are inherent liars. I disagree with this assumption vigorously, both in principle and in practice. Nothing about one’s role as an advocate compels any lying, and I do not think, as a practical matter, most attorneys lie. But I get the jokes. The root cause of lawyer jokes is the controversy between two or more people. People dislike

40. *Id.*, at ¶ 1849.

41. ST. CATHERINE OF SIENA, *Learning to Love* (1373), in WRITINGS OF CATHERINE OF SIENA (Upper Room Books 2017).

42. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, pt. II-I, q. 46, art. 7 (Fathers of the English Dominican Province trans., Ave Maria Press 1947) (“Whether anger is only towards those to whom one has an obligation of justice?”).

43. *Id.*

44. *Ephesians* 4:29.

45. *Ephesians* 4:31.

lawyers not because a lawyer is doing another's bidding, but because another is doing the bidding.

At the same time, I realize the agent deserves the opprobrium when the agent goads the client on or invents theories and concocts facts of which the client never dreamed. The agent should know better. True is the proverb that lawyers and painters can soon make what is black, white. I think it was these kinds of lawyers who got the "woe" from Jesus.

Woe to you lawyers as well! For you load people with burdens that are hard to bear, while you yourselves will not even touch the burdens with one of your fingers . . . For you have taken away the key of knowledge; you yourselves did not enter, and you hindered those who were entering.⁴⁶

Brief side note: Jesus did not despise all lawyers or the legal profession. It was a lawyer who posed to him the question of what one must do to inherit eternal life. And it was the lawyer who Jesus said got the answer right: "You have answered correctly. Do this and you will live."⁴⁷ Nicodemus was a Pharisee lawyer, and he may have acted as Jesus's defense counsel at the trial before the Sanhedrin, because he appears to have come to his defense earlier.⁴⁸

"About half the practice of a decent lawyer," said the nineteenth-century jurist Elijah Root, "consists in telling would-be clients that they are damned fools and should stop."⁴⁹ A twenty-first-century jurist, Supreme Court Justice Neil Gorsuch, poses the advice in more genteel words:

[W]e have a duty to avoid taking actions for our clients that involve using means or ends that intentionally do harm to other persons or goods. This rule leaves considerable room for the lawyer to defend the client's interests thoroughly, to interpose alternative defenses, to conduct vigorous cross-examinations. But it does not leave lawyers morally blameless wherever their clients tell them to do something. Saying "the client made me do it" isn't a complete answer to the question of legal ethics. But if knowing this much might be a useful starting point, it's also reasonable for you to ask, Where is the end point? Beyond refraining from intentionally harming others, when should a lawyer decline to follow his or her client off the moral cliff?⁵⁰

Sadly, many lawyers will be quick to jump off the cliff when they are paid to do so. In modern parlance, lawyers call this a "billing opportunity," and they embrace the maxim that fools and blockheads will make lawyers rich. When the client is willing to pay, why question it? The good lawyer

46. *Luke* 11:46–52.

47. *Luke* 10:28.

48. *See John* 7:50–51.

49. 1 PHILLIP C. JESSUP, ELIHU ROOT 133 (1938).

50. NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 299 (2019).

will turn away from this kind of billing opportunity. I think of the glutton at the all-you-can-eat buffet; just because you can does not mean you should.

Turning away bad cases sometimes presents a good lawyer with a conundrum. The profession encourages lawyers to take on unpopular causes or clients. *To Kill A Mockingbird*⁵¹ typically ranks as among lawyers' all-time favorite legal novels, because it champions a small-town lawyer in the segregated South who defends an innocent black man accused of rape. The American Civil Liberties Union is praised for having represented the Nazis in *Skokie*.⁵² But what if the unpopular causes are wrong or the clients are evil? I would not represent the National Abortion Rights Action League no matter how much it paid me. And I do not think any Catholic lawyer should.

When you represent a client, you are trying to advance the client's cause. If the client's cause is evil, then you become the agent of evil. Abortionists, pornographers, and racists may have legal rights; I have no duty to advance them. I can be like Atticus Finch and defend an innocent black man on trial for rape in a racist town. And I might (*might*, with great emphasis) represent Nazis if a government entity wrongly limits free speech on grounds that I may wish to preserve for, say, pro-life groups. Regardless, general representation of such clients for general commercial litigation is simply an employment relationship, and no one should work for an evil employer.

California's ethical rules support me in these respects, although not without giving due consideration to other possibilities. Section 6068(h) of the Business and Professions Code says that I, as an attorney, have a duty "[n]ever to reject, for any consideration personal to [me], the cause of the defenseless or the oppressed."⁵³ I am okay with that. One would be hard pressed to explain how any of the entities that I think are evil could be, in this day and age, "defenseless" or "oppressed." Section 6068(c) also gives me considerable latitude as it defines my duty as one to "counsel or maintain those actions, proceedings, or defenses only as appear to [me] legal or just." For sure, I embrace that duty. The section does note one fascinating exception: "Except the defense of a person charged with a public offense." That means Atticus Finch would have had to defend Tom Robinson, even if he was convinced Robinson was guilty of the rape. But those issues are for the criminal defense world, which is not my world.

51. See generally HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

52. *ACLU History: Taking a Stand for Free Speech in Skokie*, ACLU (Sept. 1, 2010), <https://www.aclu.org/other/aclu-history-taking-stand-free-speech-skokie>; *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977).

53. Section 6068 of the California Business and Professions Code itemizes fifteen duties required of an attorney admitted to practice law in California. Breach of any one of these duties is reportable to the State Bar of California within 30 days of when one has knowledge of the triggering event. CAL. BUS. & PROF. CODE, §§ 6002.1(a), 6068(o), 6086.8(b) and (c).

B. *Obsession*

Probably the singularly most evil thing I have noticed about litigation is its ability to shut out all life outside it. I am not talking about the evils of neglect—neglect of spouse, children, and loved ones, although much can be said about that. The legal profession breeds workaholism different from that bred by other professions. One becomes a workaholic when one works excessively for work-related goals. However, a litigator becomes a workaholic because of the law itself. “The law is a jealous mistress,” said Justice Story in 1829, “and [it] requires a long and constant courtship. It is not to be won by trifling favors, but by lavish homage.”⁵⁴ While this can be said about other professions, the litigator is particularly seduced, not by the charms of the subject, but by the illusion of certainty.

There are always more facts to uncover, more case law to consider, more distinctions to make, more phrases to turn. It takes discipline to *not* keep thinking about a case in the middle of the night, in the middle of a shower, in the middle of a sermon at church. You cannot stop thinking. You get inspirations. I know of attorneys who keep writing pads next to their beds so they can jot down ideas when they wake in the night. (They really should sleep instead.) I feel like all my best ideas come not when working on a case, but when I am *not* working on a case. Vacations, if you get them, tend to be hell, especially if the vacation is sedentary. Most litigators I know take vacations involving vigorous activity. You need to do something very much other than work, like mountain climbing or jungle trekking, to keep you from obsessing over your cases.

Obsession occurs because almost everything is arguable. As rooted as I am in Catholic truth, I have come to see in litigation, as in life, almost everything is arguable. Even Our Lord noted the same: “For John the Baptist has come neither eating bread nor drinking wine, and you say, ‘He has a demon!’ The Son of Man has come eating and drinking, and you say, ‘Behold, a gluttonous man and a heavy drinker, a friend of tax collectors and sinners!’”⁵⁵ His point is that people—that is, people not disposed to the truth—will argue anything.

Not that the law is open to anything. To the contrary, the law offers a good measure of predictability and it is not, as it were, up for grabs. But when law involves application of some rule to some set of facts, then a good (and honest!) litigator will almost find ways to argue against, over, under, or around an opponent’s position. I unconsciously confirmed this reality when I once complained to a fellow attorney that I felt my best legal work was always on cases I lost. “Of course it is,” she said. “You do your

54. JOSEPH STORY, DISCOURSE PRONOUNCED UPON THE AUTHOR AS DAME PROFESSOR OF LAW AT HARVARD UNIVERSITY, ON AUGUST 25, 1829 (republished by Kessinger Publishing, 2008).

55. *Luke* 7:33–34.

best legal work when you are on the losing side of the law.” She meant that it takes creative genius to overcome the obvious.

Perhaps the warrior spirit in me neglects to consider whether I have any moral business striving to overcome the obvious. Thomas Jefferson spoke only a modest overstatement when he said it is the trade of lawyers to question everything, yield nothing, and talk by the hour.⁵⁶ All I can say is I have never felt moral blame in trying to overcome the obvious; to the contrary, I usually feel a sense of injustice when I do not succeed. I thought I was making a proper distinction on why the law applied to the facts the way I argued it did. The effect of a proper distinction is a result different from the one expected, and when I think a distinction is proper, I expect a different result. I admit my expectations may be based more on emotion than on reason. Rabbinical midrash observes that even God in the Garden of Eden gave Adam and Eve a chance to explain their transgressions before He punished them—the first due process ever recognized.⁵⁷ I doubt God would have faulted them for having a lawyer to help them make their case better. I am certain the lawyer should not have felt bad about losing.

This habit of seeking counterargument, though, is spiritually dangerous and can root evil in one’s soul in at least two ways. First, a good litigator is profoundly agnostic, even paranoid, about the litigator’s own case. The best litigators are those who doubt everything about the merits of their case and frame their opponent’s case in the best possible light. Good tactical decisions depend on knowing all weaknesses. Charles Lamb’s maxim is as true today as it was in 1833—he is no lawyer who cannot take two sides.⁵⁸ This habit of mind, of questioning everything, can extend to one’s faith. Saint Thomas questioned everything too, but he did so to achieve certainty. The litigator who questions everything believes nothing when he forgets that certain questions point to certain truth. I do not know, but I suspect, that the number of litigators who profess religious faith is lower, as a class, than those in other legal practice groups.

Second, a litigator’s vigor is morally neutral but spiritually deadening. A vigorous litigator *does absolutely nothing else* but litigate. Litigators in big law firms are especially so consumed. When you arrive at the office early and return home late, seven days a week, for months at a time, you have no time to sin. You are reading cases, writing memos, digesting transcripts, coursing documents, and consulting colleagues all the livelong day and night. You do not, as a general rule, have time to commit the seven

56. Founders Online, *Thomas Jefferson: Autobiography*, 6 Jan.–29 July, 1821, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/98-01-02-1756> (last visited Feb. 15, 2021).

57. See Timothy D. Lytton, *Due Process and Legal Authority in the Garden of Eden: Jurisprudence in Aggadic Midrash*, 16 JEWISH L. ANN. 185 (2006).

58. Charles Lamb, *Letter to Mr. Rogers, Dec. 1833*, THE WORKS OF CHARLES LAMB, Vol. VII, 923, <https://www.lordbyron.org/monograph.php?doc=CHLamb.1905&select=L1833> (last visited Feb. 15, 2021).

deadly sins—pride, greed, lust, envy, gluttony, anger, and sloth—although, a successful law firm is sure to make each of these freely available from time to time by virtue of that success.

The all-consuming obsession to work does not come only from the work itself, but also from a law firm’s billing model. These models can be a “structure of sin,” in the sense Saint John Paul II used the phrase to describe “powerful cultural, economic and political currents” that cause economic hardship or inequality.⁵⁹ Lawyers bill by the hour. The more hours they bill, the more money they make. Lawyers also promise excellent services for their clients, and excellent services typically require many billable hours. Clients who want excellent services know this and will pay those bills. When bills become predictable, law firms set budgets according to the predictions. They expect attorneys to meet those budgets through billable-hours requirements. Big budgets entail high billable requirements.⁶⁰ High billable requirements mean one inescapable consequence: no life for the biller.⁶¹ When one has no life, one becomes prey to the usual consequences—depression, infidelity, divorce, substance abuse, health problems, early death, suicide.⁶²

59. POPE JOHN PAUL II, *EVANGELIUM VITAE* ¶ 12 (Encyclical Letter, Mar. 25, 1995); JOHN PAUL II, *RECONCILIATIO ET PAENITENTIA* ¶ 16 (Apostolic Exhortation, Dec. 2, 1984).

60. In 1958, the American Bar Association recommended a 1,300 hour-a-year target for attorneys. Ronda Muir, *A Short History of the Billable Hour and the Consequences of Its Tyranny*, LAW PEOPLE (June 18, 2007), <http://www.lawpeopleblog.com/2007/06/articles/profitability/a-short-history-of-the-billable-hour-and-the-consequences-of-its-tyranny>. Today’s expectations exceed 2,000 in most large law firms. See *Law Firm Hours—the Real Story*, ABOVE THE LAW (July 24, 2012, 1:30 PM), <https://abovethelaw.com/career-files/law-firm-hours-the-real-story>.

61. To put in perspective a 2,000 hour-a-year target, consider that eight hours a day times five days a week times fifty weeks a year will reach that target, and leave an attorney with a two-week vacation. Consider further, that such a goal will be reached if one is willing to forfeit all nine of the customary holidays (New Year’s Day, Martin Luther King Day, President’s Day, Memorial Day, Fourth of July, Labor Day, Columbus Day, Thanksgiving, and Christmas). Consider further the day or two required to fulfill continuing legal education courses. Consider days for illness, birthday parties, funerals, and inescapable social obligations. Consider time needed for firm meetings and retreats, department meetings, client development obligations, and non-billable and internal administrative matters. And we are not counting time for chit-chat and coffee breaks. (A friend tells me he “double bills” during bathroom breaks, because he is more productive there). Billing eight hours a day will only be done with early arrival and late departure times and supplemental hours gained on Saturdays and Sundays. For a detailed analysis of real-life impact of billable hours on lifestyle, see YALE L. SCH. CAREER DEV. OFF., *THE TRUTH ABOUT THE BILLABLE HOUR* (July 2018), https://law.yale.edu/sites/default/files/area/department/cdo/document/billable_hour.pdf.

62. Bar associations and mental health professionals have devoted considerable attention to the growing problem of lawyer mental health. Several state bars offer hotlines, public education and lawyer assistance programs; seven state bar associations have added a mandatory mental-health component to their continuing legal education requirements. See Debra Cassens Weiss, *State Bars Battle Lawyer Depression; Legal Profession Ranks Fourth in Suicide Rate*, ABA J. (Jan. 22, 2014, 11:45 AM), https://www.abajournal.com/news/article/state_bars_battle_lawyer_depression_legal_profession_ranks_fourth_in_suicid. A 2016 ABA survey of 13,000 lawyers found that 21 percent qualify as problem drinkers (a rate more than triple the rate for the general population, and nearly double the rate for other highly educated professionals); 28 percent struggle with

Who bears responsibility for this structure of sin? Everybody and nobody. Big budgets may or may not be set by greed. Lawyers may have a sincere desire to serve clients excellently, and billing attorneys may or may not bill high hours for the sake of greed, envy, or power. Associate attorneys, for instance, have no choice; they are given billable minimums, and they will be fired if they fail to meet them. Partners may fare no differently. If a client wants advice about something first thing Monday, the lawyer will work all weekend to provide it. Everyone is responsible, and most are miserable. No Catholic litigator should want to be miserable. In theory, an all-consumed litigator might be able to practice the seven virtues—prudence, justice, temperance, courage, faith, hope, and charity—but those who do so are as rare as hen’s teeth. As a Scottish proverb goes, he who loves the law will soon get his fill of it.⁶³ This is especially true for young attorneys on the track to partnership in big firms. A friend of mine described the experience as trying hard to win a pie-eating contest where the prize for winning is *more pie*.⁶⁴ Not surprisingly, litigators tend to be of two kinds: those who die at their desks and those who decide to leave them.

With or without any structure of sin, lawyers overwhelmed with billable requirements face temptations to meet those requirements unscrupulously. If they catch the client looking the other way, extra time goes on the bill. Lawyers call this “padding the bill,” which is simply a euphemism for theft.⁶⁵ Unnecessary billing and phantom billing are in the province of professional ethics, civil law, natural law, and the Ten Commandments too. There is nothing uniquely Catholic about refraining from such conduct.

C. Opportunities

These sentiments also address conduct apart from the grist of litigation. In my mind, Christian virtue makes one a better Christian, but not a better Christian lawyer. By Christian virtue, I mean that which transcends natural virtue. Natural virtue makes one better, too. Be kind and civil to

depression; and 19 percent have symptoms of anxiety). ABA, PROFILE OF THE LEGAL PROFESSION 59 (2019), <https://www.americanbar.org/content/dam/aba/images/news/2019/08/ProfileOfProfession-total-hi.pdf>; see also Debra Cassens Weiss, *Perfectionism, ‘Psychic Battering’ Among Reasons for Lawyer Depression*, ABA J. (Feb. 18, 2009, 3:40 PM) https://www.abajournal.com/news/article/perfectionism_psychic_battering_among_reasons_for_lawyer_depression (“[T]he likelihood of depression is 3.6 times higher for lawyers than other employed people.”).

63. CORDRY, *supra* note 15, at 151 (No. 10370).

64. This aphorism is now making its way into the public domain. See Sara Randazzo, *Being a Law Firm Partner Was Once a Job for Life. That Culture Is All but Dead*, WALL ST. J. (Aug. 11, 2019), <https://www.wsj.com/articles/being-a-law-firm-partner-was-once-a-job-for-life-that-culture-is-all-but-dead-11565362437>.

65. The problem of bill padding is so widespread that the California Bar appointed a committee to address and make recommendations regarding it. See STATE BAR OF CAL. COMM. ON MANDATORY FEE ARB., ARBITRATION ADVISORY 2016-02: ANALYSIS OF POTENTIAL BILL PADDING AND OTHER BILLING ISSUES (Mar. 25, 2016), https://www.calbar.ca.gov/Portals/0/documents/mfa/2016/2016-02_Bill-Padding_r.pdf.

your opponent, even when your opponent is not civil in return. Treat your support staff fairly and be in good cheer. Be honest in all your dealings—with clients, colleagues, opponents, judges, court personnel, or anyone involved in a case. Virtue, to be sure, is its own reward, and those who practice it, while practicing law, will succeed or fail in the same measure that others succeed or fail in whatever endeavors they do. Contrary to one canard, nice guys do not finish last. And to confirm another, what goes around comes around—even to bad people.

Does Christian virtue augment a litigation practice? I do not know, but I do know that a litigation practice can augment Christian virtue. Opportunities abound for spiritual growth. Turn your cheek (when it harms not your interest). Hold your temper. Hold your tongue. Bear insult. Accept blame. Fret not. Boast not. Covet not. Lust not. Avenge not. Disparage not. Shun vanity. Shun fame. Shun goods. Shun pride. Work hard. Be kind. Be patient. Be compassionate. Befriend the lowly. Pray always. Pray for your client. Pray for your opponent. Suffer hardship. In a word, take up your cross and follow Him.⁶⁶ Supernatural virtue requires supernatural grace, and one must ask for it, not muscle oneself into it, which is ironic, as all such acts require heavy lifting. As such, they also require earnest asking.

D. *Winning*

A separate, but related, issue then arises: Should I pray that I win? If I am merely a participant in a system designed to produce justice through conflict, how can I presume my side is always “right” and ask God to let me win? Put another way, why should God answer my prayer unless I am seeking the most “just” result? Over time, I have resolved to address these matters systematically. First, I take seriously Our Lord’s command, “Pray always.”⁶⁷ So, I try to pray for all sorts of things. Second, I pray I perform well: “Dear Lord, don’t let me screw up.” This is important to me and to every litigator, because someone has hired us to do a job, and we want to make sure we do our job well. I rather liked the grave comment a woman once gave me after a contested hearing: “I would never, *ever*, want to be cross-examined by you.” Cool.

What if I do my job “too well”? What I mean is, what if I outperform my adversary and cause an injustice to occur? I cannot think of that ever happening, but, in theory, if it did, I would say that is God’s problem, not mine. But God is used to this problem. He lets people on opposing sports teams pray for a win and then answers only one side’s prayers, sometimes irrespective of merits. That is the mystery of life and prayer. The farmer prays for rain, the bride prays for a clear day. God, then, answers our prayers “always,” but in ways we may not expect. If I pray to win, and I

66. See Matthew 16:24.

67. Luke 18:1; see also 1 Thessalonians 16–17 (“Rejoice always, pray without ceasing.”).

then lose, I can trust some higher purpose is achieved. Of course, I especially pray to win when I especially think I am “right.” So, what if I am wrong? I entrust the result to God. Prayers always get answered, and whether they are the proximate cause of something good or bad is something we always entrust to God’s care.⁶⁸

Just because God answers the farmer’s prayer for rain does not mean He does not have good things in store for the bride on her rainy wedding. If I pray to win and I do win, I thank God for answering my prayer. If I pray to win and I lose, I trust that some better purpose was served—even if I think (nay, *know*) the result is unjust. I once lost a high-profile, critically important pro-life case in what I still consider a manifestly unjust result. I will have to wait until Judgment Day to see the higher purpose served in that loss. I cried like a bride on a rainy wedding, a sign of my lack of faith, no doubt. A longtime Catholic friend of mine, who has spent a long career defending and litigating—and often losing unjustly—important pro-life interests, takes a much more sanguine approach in her work: “Well,” she quips, “we can’t lose them all.”

My trust in the outcome strikes at something deeper, which is that the adversary system is a deeply flawed system. Problems exist at every level and in every nook and cranny, which explains the popularity of so many novels, movies, television shows, documentaries, exposés, and commentaries. Why would one *not* pray for justice, given all the problems that exist with our system? I will never forget what a retired judge told me after having spent years presiding over criminal and civil trials. If *she* were ever charged with a crime, she would never go before a jury if she were innocent, only if she were guilty.

Yet, I would take umbrage at the suggestion that my role in that system is either blind or indifferent to those problems or that my role perpetuates, and benefits from, those problems. I do, in fact, accept the problems— income disparities between parties, success through technicalities, differences in the relative skill of counsel, the need to rely on professionals, suppression of credible evidence, undue delay, complex rules, and the biases and prejudices of judges, juries, and witnesses. The system, as they say, is the worst form of justice systems, except for all the others. But I am not king; I cannot fix the system, and I’m not sure I would if I could, apart from tinkering.

Chesterton called tradition the “democracy of the dead,”⁶⁹ and the law is built on that democracy. It is the garbageman’s job to take the trash away without looking in it, and it is my job to represent a client through the

68. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 10, at ¶ 2736 (notes omitted) (“Our Father knows what we need before we ask him, but he awaits our petition because the dignity of his children lies in their freedom. We must pray, then, with his Spirit of freedom, to be able truly to know what he wants.”).

69. GILBERT K. CHESTERTON, ORTHODOXY 85 (1908).

system without questioning it. Through time and experience, we learn to “practice” in that system, because no one ever perfects it. We follow rules, employ strategies, accept consequences, and try not to look at the trash. It is a dirty job, and someone has to do it. Well, we don’t *have* to do it; we choose to do it for a thousand and one reasons. My reasons are common to many: I find the law fascinating, and I am lousy at math.

A devout Jewish friend of mine loves practicing law because he believes he is doing good for people, getting them justice. I want to believe I am doing good for people, too. Ironically, my belief is not exclusive to me and my side of the controversy. I think my opponent can be doing good for people, too, even from the opposite side. This is no endorsement of any moral relativity, but recognition that opposing advocates can each be doing good and just work. It has taken me years of experience to steel myself against the notion that one side is always good, and one side is always bad, at least for purposes of litigating for one side against another. I have no problem with those who earn a living representing polluters, sexual harassers, insurance companies, real estate moguls, and fraudsters, although I do not prefer to do so. These litigators may well earn their path to sainthood through the course of their work, indeed, perhaps they are more likely to do so, to the extent they counsel their clients to justice. Nothing about their representation is damning in itself, apart from those clients whose mission is intrinsically evil.

Conversely, nothing is necessarily salvific about representing good causes or good clients. One can still lose one’s soul representing the Catholic Church or a pro-life cause. I think I know some who have. Conversely, I know devout Catholic attorneys who have represented priest-abuse victims against the Church and did so with gusto and relish, because they believed in their client victims and because they believed (as I do) that, if orthodoxy will not clean up the Church, which is populated by flawed human beings, then God-speed the lawsuit that does. My point is not to undermine the nobility of good causes or good clients. To be sure, religious freedom and the defense of life are paramount, such that those who represent those causes and clients do God’s work. My point is merely that one does not become God-like simply by doing God’s legal work.

So, if one could do God’s work full-time, why not do God’s work full-time? The reasons are as many and the same as would apply to a nonlegal position—interest, temperament, availability, location, pay, and calling. In other words, the reasons are personal to the lawyer and not intrinsic to the job, as nice and rewarding as it may be to serve good causes and good clients. The work is good and enriching for some; it is not so for others.

Yet we all have a duty to “do good” in the law. Bar associations and legal aid groups urge attorneys incessantly to provide pro bono assistance to

the poor or at least to provide funding for those attorneys who do.⁷⁰ I am not entirely convinced that a Catholic's "preferential option for the poor" necessarily includes legal services to aid in divorces, evictions, and recovery of welfare benefits. It might. But those who provide such services might find better options for serving the poor.

Here, I would agree with the sardonic remark that justice is open to everyone in the same way as the Ritz Hotel. The class of people who cannot stay at the Ritz is far wider than just the poor, and no amount of funding ever will get them in the door, much less the same room. To be a good Catholic lawyer, one should do pro bono work, but the *bono* takes on wide import when one considers the relative priorities of those *boni*, and I do not think poverty law lays claim to greater priority than does, say, God's more personal causes, such as life issues and religious liberty issues, at least in this day and age. The Devil has plenty of lawyers to draw from. God does not. His friends are few, His enemies are many, His pay is lousy, His success rate is low, His wounds are deep, and He shares them with you freely. But He offers something no other client can. "Rejoice and be glad, for your reward in Heaven is great."⁷¹

CONCLUSION

Back to our Navy Seal, the Catholic one. The one who slits throats, frees hostages, and guns down pursuers. Thank God for Seals. I do not think for a minute that the choices they have to make are anything like the choices we litigators have to make. But I like thinking that the choices they make can still be measured by Catholic moral law. And in that case, I like thinking that the choices I have to make as a litigator can still be measured by Catholic moral law too.

I do not see that there are things I must do in my practice that offend my faith or that anything in the practice of my faith would make me an inferior litigator. I see that my life as a litigator presents the same general challenges and opportunities as any job does to any Catholic. My faith should enhance my work, and my work should enhance my faith. My faith enhances my work by compelling me to live according to the good standards of my own profession. And my work enhances my faith by presenting me with an endless supply of fears, frustrations, and temptations to overcome.

Does being a better Catholic make me a better lawyer? I do not know. I would like to think so, but being a better Catholic is all that counts.

70. The American Bar Association recommends that all lawyers perform at least fifty hours a year of pro bono services "to those unable to pay." MODEL RULES OF PRO. CONDUCT r. 6.1 (AM. BAR ASS'N 2020).

71. *Matthew* 5:12.