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Can A Good Person Be a Lawyer

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CAN A GOOD PERSON BE A LAWYER?

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The question I propose to tackle in this paper is one that goes to the heart of legal ethics: *Can a good person be a lawyer?* In other words, *is the practice of law compatible with the wholehearted pursuit of a good human life?* Although much thought has been put into this question in the academy,[1] this topic deserves, indeed requires, ongoing reflection and discussion for a number of reasons. First, like many deep and broad ethical questions, giving a full answer to this question is not the work of an essay or debate, but the work of a lifetime. Second, the ethical significance of the role of a lawyer, beyond legalistic codes of conduct with a fairly

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1. There is no shortage of literature on legal ethics. *See generally* JOSEPH G. ALLEGRETTI, THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE (1996); GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: ETHICS AND PROFESSIONAL RESPONSIBILITY (1981); CAN A GOOD CHRISTIAN BE A GOOD LAWYER?: HOMILIES, WITNESSES, AND REFLECTIONS (Thomas E. Baker & Timothy W. Floyd eds., 1998); THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban ed., 1983); KENT D. KAUFFMAN, LEGAL ETHICS (2003); VINCENT LUIZZI, A CASE FOR LEGAL ETHICS: LEGAL ETHICS AS A SOURCE FOR A UNIVERSAL ETHIC (1993); DONALD NICOLSON & JULIAN WEBB, PROFESSIONAL LEGAL ETHICS: CRITICAL INTERROGATIONS (2000); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975). For an interesting debate on the relevance of conscience and moral convictions to the lawyer's role, see Andrew L. Kaufman, *A Commentary on Pepper's* The Lawyer's Amoral Ethical Role, 1986 AM. B. FOUND. RES. J. 651 (1986); David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637 (1986); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (1986) [hereinafter *The Lawyer's Amoral Ethical Role*]; Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. B. FOUND. RES. J. 667 (1986) [hereinafter *Rejoinder*].

narrow professional focus,[2] is often given short shrift by aspiring and practicing lawyers alike. Thirdly, the widespread neglect of the ethical dimension of the lawyer's role is reinforced by current tendencies within the academy to treat the role of a lawyer as quite distinct from the moral judgments or "impositions" of his conscience.[3] With these three points in mind, I aim in this essay to contribute towards a healing of the breach between the lawyer's reasoning and choices *qua lawyer* and his reasoning and choices *qua human person*, i.e. to contribute towards a restoration of the *ethical integrity* of legal practice, both in the academy and in the profession.

I will begin by sketching a model of lawyering that I will call the "amoral" view and arguing that it fragments a lawyer's moral life to a disturbing degree, yet it continues to exert substantial influence both in the theory and practice of law. Second, I will suggest that the enduring appeal of the amoral view of legal practice can be attributed in large part to the unwitting collaboration of legal realism and neo-Kantian morality. Third, I will briefly outline a natural-teleological view of law,[4] which is sharply at odds with legal realism, as an essential part of my virtue-based alternative to the amoral view of legal practice. Fourth, I will set out an alternative vision of the lawyer's role, inspired by an Aristotelian/virtue-based, rather than Kantian/rule-based picture of moral agency—a vision that affirms the aspiration and affords the hope of ethical integrity and emphatically rejects the amoral view. Finally, I will illustrate the practical stakes of this debate by applying the virtue-based model to some aspects of legal practice.

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2. There is an abundance of published ethical guidelines or rules of conduct for lawyers. At the national level in the United States, the two most influential codes in the profession are the American Bar Association's Model Rules of Professional Conduct and the Association of Trial Lawyers' American Lawyer's Code of Conduct. These and similar codes of conduct for lawyers can be found in THOMAS D. MORGAN & RONALD D. ROTUNDA, 2004 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (2004). When I say that these codes are "legalistic," I do not mean that all their requirements have legal force, but that their requirements, for the most part, express very general rules of permission, prohibition, or obligation, rather than aspirations touching on character, virtue, or the all-round personal integrity and ethos of the lawyer.

3. Stephen Pepper's case for the amoral role of the lawyer, for example, presupposes a rigid distinction between the "private morality" of the lawyer and the rules of legal practice. *See* Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 1.

4. By "natural-teleological" I mean a view that is premised on law being intended ultimately (though not always immediately) as a means to certain ends that are naturally good for man, e.g., justice and public order.

I. THE AMORAL VIEW OF LAWYERING

One prominent articulation of the amoral view of lawyering can be found in an essay by Stephen Pepper published in 1986, entitled "The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities."[5] In this essay, Pepper argues that there is a moral reason, based on respect for the autonomy of clients and the value of equal access to legal services, for a lawyer to extend his services on a strictly legal basis without allowing his professional conduct or availability to be colored by his own moral judgments about the purposes and actions of clients—providing, at least, that such purposes and actions are lawful. Though Pepper does not spend much time explaining his central thesis, namely, that the "amoral role" is the proper and "good" role for a lawyer to assume,[6] the gist of his position seems to be that there is a division of labor between lawyer and client: the lawyer concerns himself with the law and legal procedures, while the client is ethically responsible for whatever (lawful) ends for which he wishes to enlist the lawyer's services.

I am less concerned to counter Pepper's argument blow by blow—others have already exposed some of its central weaknesses[7]—than to use his argument to showcase a particularly powerful paradigm of the lawyer-client relationship and of the ethical significance of the lawyer's role. Nonetheless, I do wish to briefly consider Pepper's central argument, which has to do with the value of equality and individual autonomy, and show that it results in a disturbing fragmentation of a person's moral life. Later, I will attempt to explain the enduring appeal of the position in spite of its grave drawbacks for ethical integrity.

The core of Pepper's argument is that, since law is a valuable service necessary in order to redeem the full worth of our citizenship (what he calls "first-class citizenship"), and since we are com-

5. Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 1, at 613–35.

6. Pepper expresses the central claim regarding a lawyer's moral detachment somewhat indirectly when he argues, for example, that "[f]or the lawyer to have moral responsibility for each act he or she facilitates, for the lawyer to have a moral obligation to refuse to facilitate that which the lawyer believes to be immoral, is to substitute lawyers' beliefs for individual autonomy and diversity." *Id.* at 617. Later, he puts the rhetorical question, "[i]f access to a lawyer is achieved . . . , should the extent of that access depend upon individual lawyer conscience?" implying a minimal, if not absent, role for the lawyer's conscience in serving the ends of his client. The only escape from the obligation to defer to the client's conscience on non-legal, ethical questions is conscientious objection, but even this should only be employed by lawyers in "extreme cases." *Id.* at 632.

7. *See* Kaufman, *supra* note 1; Luban, *supra* note 1. *But see* Pepper, *Rejoinder*, *supra* note 1.

mitted as a society to the belief that "free choice is better than constraint, that each of us wishes, to the extent possible, to make our own choices rather than to have them made for us,"[8] lawyers ought to administer their services (which are, after all, essential for citizens who wish to remain "first-class") without allowing their "personal morality" to interfere with the autonomous purposes of clients.[9] For a lawyer to selectively or wholly withhold his or her services on moral as opposed to legal grounds would be to deprive a client of a vital public good on grounds the client does not accept or view as justifiable.[10] But this would be to discriminate against some citizens on grounds that they cannot autonomously affirm.[11] This, I take it, is Pepper's central argument.

One of the most disturbing consequences of Pepper's argument, if it turns out to be right, is that lawyers are effectively obligated—or better, *doomed*—to serve the legal purposes of their clients however ethically problematic or detrimental those purposes may be to society or to other individuals. Thus, if Pepper is right, lawyers are called to employ their legal skills blindfolded to the social and ethical consequences of the larger purposes their services are being put to. It is as if one were to say to a lawyer working for a corporation or government entity whose purposes he considered extremely dubious from an ethical perspective, "Don't worry, you do not bear ethical responsibility for the larger purposes your professional work serves, *just focus on the law.*" Why should we find this approach to professional responsibility disturbing? Perhaps it is because it places ethical blinders on the lawyer so restrictive that he loses the right and indeed the *duty* to take at least some responsibility for the social and moral purposes to which his services are put. Pepper's amoral view of lawyering results in a dramatic bifurcation of a lawyer's practical reasoning into two compartments: on one hand, the "ethical" compartment, which concerns his pursuit of good and right conduct all things considered, and on the other, the "professional" compartment, which concerns the furthering of his client's legal purposes, *whatever they may be, and however objectionable they may seem from an ethical standpoint.* This way of conceptualizing the lawyer's role effectively exempts a certain sphere of human action from the usual sway of personal conscience or ethical rea-

8. Pepper, *The Lawyer's Amoral Ethical Role, supra* note 1, at 616–17.

9. *Id.* at 617–18.

10. *Id.* at 618–19.

11. *Id.*

soning. A doctrine like this makes lawyers the slaves of their clients' consciences, however warped.

Before suggesting an explanation for the enduring appeal of such a disturbing position, let me briefly show why Pepper's defense of the view fails. The main flaw in Pepper's argument is that he holds an implausibly demanding view of autonomy. While few would deny that we ought to allow others room to make their own choices, even to the point of making erroneous choices, other values, such as the beauty of our shared environment, the stability of the social and political order, and the well-being and health of other people, may well trump the value of autonomy. Autonomy is not an absolute value that automatically trumps all other goods.[12] Furthermore, Pepper's extreme interpretation of autonomy leads him to conflate the general right of access to the law with a right of access to the law *on whatever terms one pleases, with whatever legal purposes one may happen to have, unimpeded by the moral choices and judgments of the legal profession.* But just as one's everyday interactions and projects are "hampered" by the ethical judgments and occasional disapproval of one's fellow citizens, it seems perfectly fitting and to be expected that one's legal interactions and projects would likewise be "hampered" by the ethical judgments of potential collaborators, whether they be witnesses, lawyers, juries, or others involved in the case. The only way to eliminate that sort of "interference" would be to provide a sphere of ethical sovereignty to citizens pursuing a legal action that gives them a frightening degree of mastery and control over the choices of the persons around them, in particular the choices of legal personnel as to the terms on which to take a case, or whether to take a case at all. Pepper's exaltation of the autonomy of clients results in the most deplorable *loss* of moral autonomy on the side of lawyers!

Yet the amoral view of lawyering continues to exert a remarkable influence, not only in academic writing, but also, per-

12. For example, William Galston attempts to problematize the primacy of consent as a criterion of legitimacy in law and policy-making by thinking about the case of a drug addict:

> Freeing an individual from heroin addiction is good even though the afflicted individual may not consciously will his or her liberation. Indeed, it may well be that the individual cannot affirm the worth of non-addiction before having been coerced to attain it. Similarly, the outcome of education may be worthwhile, and students may retrospectively affirm its worth, even if the process of education frequently thwarts the exercise of their own inclinations.

WILLIAM GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES AND DIVERSITY IN THE LIBERAL STATE 86–87 (1991).

haps even more so, in the practice of law.[13] It is worth asking then why, if it results in a deeply disturbing fragmentation of the ethical life of the lawyer, it continues to hold its appeal among practitioners of the law? I would suggest that it derives its appeal primarily from two unlikely and unwitting collaborators: neo-Kantian morality on the one hand, and legal realism on the other. I will begin with the less likely contender, neo-Kantian morality.

II. LEGAL REALISM AND NEO-KANTIAN MORALITY

By neo-Kantian morality, I do not mean Kant's moral writings or interpretations of them. Rather, I mean the tradition of moral thinking whose broad themes, ideas, and vision of morality have a close affinity with the broad themes, ideas, and moral vision of Immanuel Kant, and whose existence would be difficult to imagine without Kant's intellectual legacy.[14] Neo-Kantian morality has been the most dominant strand of Anglo-American moral theory in the second half of the twentieth century and includes among its proponents figures such as John Rawls, Ronald Dworkin, Thomas Nagel, Thomas Scanlon, and Jurgen Habermas.[15] What all of these thinkers have in common, among other things, is (a) a conception of morality as a system of general rules of conduct applicable to all moral persons; (b) a tendency to view morality as a system of permissions, obligations, and prohibitions, with little to say about the vast territory of moral life governed by prudential choices that are *underdetermined* by the rules; (c) an emphasis on the moral quality of discrete actions, rather than of human lives taken as a whole; (d) a general separation of questions of *moral right* from ques-

13. Indeed, in 1986, Pepper could almost casually remark that "this amoral role is the accepted standard within the profession." Pepper, *The Lawyer's Amoral Ethical Role*, *supra* note 1, at 614.

14. For Kant's most important moral and political writings, see IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON (Karl Ameriks ed., Mary J. Gregor trans., Cambridge Univ. Press 1997) (1788); IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT? (Lewis White Beck trans., Prentice-Hall 2d ed. 1997) (1785); IMMANUEL KANT, THE METAPHYSICS OF MORALS (Karl Ameriks ed., Mary Gregor trans., Cambridge Univ. Press 1966) (1785); IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS (Ted Humphrey trans., Publ'g Co. 1983) (1784–1795).

15. Works in this tradition include RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (Thomas McCarthy ed., William Rehg trans., 1996) (1992); THOMAS NAGEL, THE VIEW FROM NOWHERE (1986); JOHN RAWLS, POLITICAL LIBERALISM (1996); JOHN RAWLS, A THEORY OF JUSTICE (2d ed. 1999); T.M. SCANLON, WHAT WE OWE TO EACH OTHER (1998).

tions of the good life, happiness, or virtue, such that one can be treated largely independently from the other; (e) an emphasis within morality on certain unconditional rules binding everywhere irrespective of changing circumstances; (f) a prioritization of the value of autonomy over competing values such as the virtues, both in morality and in political theory; and (g) a tendency to spend a lot of time discussing "moral dilemmas," or cases in which moral norms appear to conflict rather than harmonize with each other.[16]

Since one of the hallmarks of neo-Kantian morality is its emphasis on the universal and general reach of morality, a Kantian believes that no compartment of human life can escape the demands of the moral law. Thus, to suggest that neo-Kantian morality contributes to, or even reinforces, the amoral view of lawyering seems, at first glance, highly implausible and perhaps even foolish. However, I want to argue that it is problems generated by the *application of neo-Kantian moral theory* to professional roles that make the amoral view so attractive. First, a universalist and rule-based morality has a hard time explaining how our moral decisions can be shaped by unrepeatable or singular relationships, or bonds with other persons, e.g., the bond between lawyer and client. It appears that favoring the interest of *my* client over someone else's is *prima facie* wrong, given the *equal* obligation to respect each and every person. Thus, somebody of a neo-Kantian mindset will be tempted to think that moral decisions shaped by particular roles are morally suspect and must be viewed as somehow falling outside the scope of ordinary morality. This sort of "amoral" interpretation of roles leads some authors, such as Pepper, to the paradoxical and puzzling task of seeking a moral justification for a putatively "amoral" role.

Second, a rule-based morality, to the extent that it equates morality with the application of pre-existing universal laws or rules to new situations, has a hard time recognizing as "moral" the messy and particularistic business of making prudential decisions that cannot be captured by any "rule book" in advance, something any professional must do on a frequent basis.[17] Thus,

16. Notice that these traits are each opposed by virtue ethics. Regarding (e), an emphasis within morality on unconditionally binding norms, it is not that virtue ethics necessarily *denies the existence* of such norms, but it views a preoccupation with such norms as obscuring the often particularized, personalized, or prudential nature of moral deliberation. For a concise catalogue of the essential features of a virtue-ethical account of human action, see JUSTIN OAKLEY & DEAN COCKING, VIRTUE ETHICS AND PROFESSIONAL ROLES 9–25 (2001).

17. Just think of innumerable factors that must be taken into account in the decision whether to prosecute a case, from the likely cost of the case, to the

a neo-Kantian thinker (whether or not he realizes it) will tend to place many prudential decisions outside the pale of morality, "de-moralizing" or perhaps technologizing the deliberations and choices of lawyers, doctors, administrators, and many other professionals whose professional life is littered with prudential choices.[18]

Thirdly, and perhaps most importantly, neo-Kantian morality separates questions of happiness, personal flourishing, and virtue, from questions of rightful and wrongful conduct. This bifurcation of the moral life into the pursuit of happiness on one hand, and the pursuit of "morality," or right conduct on the other, while it does not immediately entail an amoral view of professional roles, does drive a wedge between personal flourishing, happiness, and virtue on one side, and moral behavior on the other. Thus, this model creates a habit of mind that permits us to imagine a lawyer acting for a cause that he finds despicable, and that goes against almost everything he believes in, for the sake of an abstract moral principle such as autonomy or impartiality. Indeed, in the end it is misleading to describe the lawyer's role as "amoral" on Pepper's view—instead, we must describe it as *rendered morally impotent for the sake of a moral principle*: the autonomy and access to the law of one's client. This sort of abstract moral principle could only have the hold it does on us if we were already primed to dismiss as morally irrelevant or peripheral the overall ethical quality of a lawyer's life *qua person*.

Three features of the neo-Kantian perspective then prepare the ground for the amoral view: first, its incapacity to reconcile decisions based on particularistic relationships (e.g., lawyer-client relationships) with its universalist conception of morality, and its consequent tendency to view role-based reasoning as morally suspect; second, its tendency to view prudential reasoning, which is the bread and butter of the legal profession, as somehow "amoral" or lacking intrinsic moral worth; and third, its tendency to isolate questions of right conduct from the question of the good life, and thus its capacity to sacrifice overall ethical integrity to an abstract moral principle such as autonomy. As we will see

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likelihood of winning it, the merits of the case, the justice of the case (assuming one is interested in doing justice), and so on.

18. For some interesting treatments of the modern neglect of the need for prudence in practical reasoning, see MARTIN BENJAMIN, *Judgment and the Art of Compromise, in* SPLITTING THE DIFFERENCE: COMPROMISE AND INTEGRITY IN ETHICS AND POLITICS 107, 107–21 (1990); CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY ch. 1 (1987); and, Julia Annas, Being Virtuous and Doing the Right Thing, Speech at the University of Notre Dame Philosophy Colloquium (Sept. 26, 2003).

in Part IV, a virtue-ethical approach is much more sensitive to the particularities of role-based activities and is better equipped to integrate them into a well-lived human life.

Whereas the neo-Kantian perspective creates problems that make the amoral view attractive, legal realism provides a theory of law that gives the amoral view of lawyering a congenial philosophical home. Legal realism, though it does not explicitly prescribe an ethical stance for lawyers, does advance an understanding of law that sufficiently "de-moralizes" the law to make a strictly amoral conception of the lawyer's role plausible if not inevitable. One of the most famous expositions of legal realism can be found in a speech delivered by Justice Oliver Wendell Holmes in 1897 entitled "The Path of the Law."[19] The basic view proposed in this speech is that law is best understood from the point of view of the "bad man" who wants to avoid getting fined, imprisoned, or inconvenienced as a consequence of his behavior. Essentially, the law is nothing more or less than the "prediction of the incidence of the public force through the instrumentality of the courts."[20] Holmes insisted that the proper theoretical standpoint from which to understand the law is not that of the law-abiding citizen whose heart and mind embrace the spirit of the law but that of the citizen who is motivated mainly or exclusively by the anticipated negative consequences of infractions of the rules.[21]

Although Holmes professed to act only out of reverence and respect for the law,[22] the consequences of this "realist," "bad man's" view of the law continue to make themselves felt in the legal academy, in legal practice, and in American society more generally, which remains one of the most—perhaps *the* most—litigious legal cultures in the world, where often one gets the sense that the glue holding society together is not friendship or respect for the law but fear of losing in court.[23] If the *theoretical*

19. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (originally published at page sixty-one).

20. *Id.* at 457.

21. Holmes is unambiguous about this:

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

Id. at 459.

22. *See id.* (Holmes takes it for granted "that no hearer of mine will misinterpret what I have to say as the language of cynicism.").

23. One central aspect of America's litigiousness is the public salience of "rights talk" and its tendency to displace talk of goods, personal or interper-

standpoint privileged by legal realism is the view of the bad man, then it is hardly surprising that a legal culture dominated by legal realism tends to view the lawyer's function as bereft of significant moral content and as being constrained exclusively by the lawyer's informed prediction about the advantages or disadvantages likely to be bestowed on his client by a court or by parties in pre-court arbitration.

III. THE NATURAL-TELEOLOGICAL VIEW OF LAW

Though this essay is not primarily about legal realism, my understanding of the lawyer's role is supported by a view of law that is deeply at odds with the central claims of legal realism. This view of law is presupposed by my virtue-based model of good lawyering, so let me state it briefly and anticipate a possible misunderstanding. The view of law my account presupposes is of law as an institution, or set of interlocking institutions, intended to contribute to central human goods, in particular the furtherance of justice, public order, and the common good. Though law is clearly designed to restrain "bad men," it is also designed to coordinate benign human endeavors and teach people to subordinate their private ends to the good of the wider community.[24] The realist view of law as an elaborate power game cannot explain the reasoning of judges as they apply the law (are they "predicting" their own behavior, or predicting the behavior of government entities?) anymore than it can explain the reasoning and behavior of voluntarily law-abiding citizens. It applies such a corrosive "cynical acid"[25] to the law that what is left is an empty shell or a travesty compared with the way in which citizens and officials routinely conceive of it (they recognize its value as a deterrent to crime, but they also associate it with justice, equity, and public goods, such as peace and prosperity).

Now, my claim about the purpose of law should not be understood to imply that people *universally* treat law as an institution designed to further justice and the common good. However, just because people frequently use law for private or selfish gain to the detriment of public goods does not mean we must re-

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sonal, and duties. Prominent critics of rights talk include Michael Sandel and Mary Ann Glendon. *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81 (1984).

24. On the pedagogical function of law, see Mary M. Keys, *Aquinas's Two Pedagogies: A Reconsideration of the Relation between Law and Moral Virtue*, 45 AM. J. POL. SCI. 519 (2001).

25. The term was first coined by Holmes. *See* Holmes, *supra* note 19.

describe law as a means to private satisfactions. Law, like other public institutions, such as art galleries, museums, universities, and so on, is only intelligible in light of the ends it is designed to serve when it functions well. Even when people use the law for selfish purposes, the law itself is meant to constrain their selfish projects with the demands of equity and justice. That law is subject to abuse or can be practiced with base motives does not rob it of its moral purposes anymore than doctors who abuse their patients rob the medical profession of its healing purposes.

Once we accept that law is designed to promote key aspects of human flourishing such as peace, public order, justice, and the common good, the *practice* or profession of law must take its place within the context of the proper ends of the institution of law. Legal practice only makes sense as a human activity that contributes towards justice and the common good according to its own special function and methods. The function of lawyering, as I reiterate below, is not to slavishly follow the impulses of clients, nor to slavishly observe the letter of the law, but to further justice, public order, and the rule of law by prosecuting those who act unlawfully or unjustly and ensuring the accused a fair trial. In other words, the function of a lawyer is inherently normative, oriented towards justice. It cannot be reduced to either utilitarian (e.g., economical) or positivist (i.e. legalistic) terms. These remarks intimate the general direction of my alternative to the amoral view of legal practice. But they will only take on flesh as I begin to outline a virtue-based model of the good lawyer[26] and draw out some of its practical implications for the legal profession.[27]

IV. A VIRTUE-BASED MODEL OF THE GOOD LAWYER

Though the main focus of my discussion will be upon the role of the lawyer, I propose to view this problem in light of the ethical significance of human roles in general, whether they are roles of elected or judicial office, of professional service, or roles of kinship and community.[28] My overarching claim is that we

26. *See infra* Part IV.

27. *See infra* Part V.

28. There has been quite an explosion of philosophical treatments of roles in the past few decades, including ARTHUR ISAK APPLBAUM, ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE (1999); R.S. DOWNIE, ROLES AND VALUES: AN INTRODUCTION TO SOCIAL ETHICS (1971); Gerald A. Cohen, *Beliefs and Roles*, *in* 67 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 17 (1966–1967); Michael O. Hardimon, *Role Obligations*, 91 J. PHILOSOPHY 333 (1994); W.T. Jones, *Public Roles, Private Roles, and Differential Moral Assessments of Role Performance*, 94 ETHICS 603 (1984); Samuel Scheffler, *Relationships*

cannot make sense of social and political roles without considering their contribution to a good or flourishing human life.[29] In light of this claim, I will discuss the role of a lawyer and investigate how it fits into a good human life. My understanding of this role could be described roughly as virtue-based or neo-Aristotelian in the sense that it takes its bearings from Aristotle's account of human excellence in the *Nicomachean Ethics* and *Politics*[30] and is inspired by the relatively recent revival of "virtue ethics" among analytic philosophers.[31]

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and Responsibilities, 26 PHIL. AND PUB. AFF. (1997); A. John Simmons, *External Justifications and Institutional Roles*, 93 J. PHILOSOPHY 28 (1996); Wasserstrom, *supra* note 1, at 25. In addition, there is a field in sociology known as "role theory," and some of the more lucid sociological treatments of roles include ERVING GOFFMAN, ENCOUNTERS: TWO STUDIES IN THE SOCIOLOGY OF INTERACTION (1961); ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959); STUART PALMER, DEVIANCE AND CONFORMITY: ROLES, SITUATIONS AND RECIPROCITY (1970).

29. Putting all-round human flourishing at the center of the discussion, rather than moral rightness and wrongness, makes my approach Aristotelian or virtue-based, rather than neo-Kantian. Professional ethics has been, and continues to be, dominated by neo-Kantian or rule-based models, i.e. ethical approaches that emphasize adherence to general moral rules, rather than discrete character traits, or the demands of particular social roles. My proposal to treat professional roles in light of their contribution to human flourishing, including at the center of flourishing the exercise of the virtues, has only been applied in a sustained way to professional ethics relatively recently. One of the few detailed discussions of professional ethics along these lines is Justin Oakley and Dean Cocking, *supra* note 16, which provides both a good theoretical overview of the issues and a fairly detailed application of virtue ethics to the roles of medical and legal practitioners respectively.

30. One of the most consistent and reliable translations is ARISTOTLE, NICOMACHEAN ETHICS, *reprinted in* 2 THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed., 1984).

31. This revival was given its first serious impetus with the publication of Elizabeth Anscombe's famous essay *Modern Moral Philosophy* in 1958, in which she launched a scathing critique of Kantian morality and suggested the need to return to Aristotle in order to make sense of our moral categories. But it was not until the 1980s, with the appearance of MacIntyre's *After Virtue*, that we began to see a proliferation of articles and books engaging the classical understanding of the moral life, including some attempts to reconcile Aristotelian and Kantian approaches. Some of the most interesting and influential contributions to this burgeoning movement are PHILIPPA FOOT, NATURAL GOODNESS (2001); ROSALIND HURSTHOUSE, ON VIRTUE ETHICS (1999); ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (1981); CHRISTINE SWANTON, VIRTUE ETHICS: A PLURALISTIC VIEW (2003); BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY (1985); G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1 (1958). Helpful edited volumes of essays on virtue ethics include ETHICAL THEORY: CHARACTER AND VIRTUE, 13 MIDWEST STUDIES IN PHILOSOPHY (Peter A. French et al. eds., 1988); HOW SHOULD ONE LIVE? ESSAYS ON THE VIRTUES (Roger Crisp ed., 1996); VIRTUE ETHICS (Roger Crisp & Michael Slote eds., 1997).

Virtue ethics, like Kantian morality, is not susceptible to any single, neat definition, but it tends to present itself as an alternative to Kantian, rule-based accounts of human action and utilitarian or consequentialist accounts. As the label suggests, virtue ethics is centered on the concept of human flourishing—in particular, the virtues or dispositions that constitute an all-round good human character—rather than the concept of moral rightness. Some of the features that distinguish virtue ethics from other accounts of human action are singled out by Oakley and Cocking in *Virtue Ethics and Professional Roles*:[32] (a) an action is right, on this account, "if and only if it is what an agent with a virtuous character would do in the circumstances"; (b) goodness is prior to rightness; (c) the virtues are irreducibly plural intrinsic goods; (c) the virtues are objectively good; (e) some intrinsic goods are agent-relative; and (f) acting rightly does not require that we maximize the good. Some might dispute whether all virtue ethicists are committed to every item on this list, but I believe the list is fair to most theorists who would accept the label of "virtue ethicist."

A. *Human Roles and Human Flourishing*

In order to understand how the role of lawyer or legal advocate might contribute to a successful human life—how it might be a role a person could embrace in good conscience—we need to say more about (a) what a role is, and (b) what is distinctive about the role of lawyer, i.e. what distinguishes it from other human roles. Let us start with the general concept of a role: A role is (i) a *function* within society constituted by (ii) one's social position or relation towards others and (iii) social and institutional norms, goals, and standards of excellence associated with the function, which (iv) shape the practical reasoning of the role-holder and related parties in distinctive ways.

Consider, for example, the role of a policeman. How would our definition map onto this role? First, a policeman clearly fulfills a *social function*, namely, that of upholding law and order within society and making citizens more secure in their persons and properties. However, the function is obviously more complex, being shaped by norms, goals, and standards of excellence emanating both ineffably from the social environment (e.g., there is a widespread expectation that the police officer should carry out his duties with courtesy and compassion rather than with cold-hearted mechanical precision); from specific social or legal institutions (e.g., statutory law, professional guidelines of

32. *See* OAKLEY & COCKING, *supra* note 16, at 9–25.

the Police Officers' Association); and from individual police officers as they interpret the role in light of their own judgments (e.g., some police officers may emphasize the importance of building community and, thus, go beyond the call of duty by striking up a chat with people they run across in the course of duty). Finally, the police officer's decisions, insofar as they are relevant to the exercise of his police function, are shaped in distinctive ways by the role he occupies, viz. by the social and institutional norms, goals, and standards of excellence associated by him and others with the police function. In other words, insofar as the police officer takes his role seriously and does not see it merely as a theatrical pretence, he will allow its associated norms, goals and standards of excellence to have a direct bearing on action *at least insofar as the action somehow involves the performance of his role as an officer.* For example, if somebody verbally attacks him in public while on duty, he may consider the dignity of his office and its reputation in the community before responding in kind, whereas it is possible that if verbally attacked off duty, he would be more forthright in responding in kind. Or if he witnesses a crime involving a close friend, he may take steps to distance himself from the friend emotionally in order to prosecute the crime with the full rigor of the law.

Now, compared to the concept of a person, the concept of a role has a notable degree of contingency, in several senses:

(a) Roles do not pertain to human persons *as such,* but to *particular persons or special groups of persons* who, whether by design, personal choice, or happenstance, find themselves invited or expected to perform a certain function within society. Roles are distributed on the grounds of natural attributes (such as gender, physical strength, or ethnicity), acquired competence to perform a task (e.g., medical expertise, or knowledge of a field of science), and special ties or bonds towards others, whether permanent (e.g., fatherhood) or transient (e.g., flight instructor); voluntary (e.g., husband or wife) or involuntary (e.g., brother or sister by birth).

(b) Roles are also contingent in the sense that even if we consider a group of persons so positioned that they unquestionably occupy a given role, the role and its interpretation are to a greater or lesser extent conditioned by large-scale social and political variation across space and time. For example, think of the difference between the way people in an "information age" regard the role of doctor and his relation to the patient, versus the way the role of doctor and the doctor-patient relationship was conceived, say, a hundred years ago. Whereas a hundred years ago, it might have been considered impertinent or inappro-

priate to ask a doctor to disclose the most basic reasons for his medical judgments, it is now considered normal in many situations to do so. Similarly, whereas extended family ties are frequently thought of as incurring an automatic debt of allegiance through thick and thin in Sicily, this is far from the case in the suburbs of California.

(c) Finally, roles are contingent in the sense that their goals and demands are open-textured and "essentially contestable"[33] and, thus, underdetermine the practical judgments of their occupants. A social role would be nothing but a quixotic individual ritual if it was not constituted, at least in part, by standards, i.e. goals and norms, widely thought to underwrite the role. However, individual persons may, without forfeiting their claim to sanity or reasonableness, interpret an identical role, even within the same society and era, in opposing ways. For example, some view the function of the teacher as that of conveying technical skills and information in as value-free a mode as possible, while others view a teacher's function as that of transmitting moral values and "life skills" to his or her students. Or there may be a more localized disagreement, e.g., some believed that Abraham Lincoln was abusing his presidential role by using executive prerogative to suspend *habeas corpus*, while others believed he was remaining faithful to the role; still others believed he was temporarily stepping outside the role, but with good reason.

Unless one simply side-steps a role or refuses to occupy it, one must, perforce, interpret its practical requirements in light of one's own judgments about the goals, norms, and standards of excellence that constitute the role. In other words, the *interpretation* of a role (though certainly some roles a lot more than others) requires creativity and some degree of prudence or practical wisdom rather than the mechanical or rote application of rules—a bit like the performance of a musical symphony, which is clearly much richer than the merely technical performance of the music represented on the page.

Now, in spite of the almost alarming degree of contingency that attaches to social roles—some roles (e.g., the knight errant) can disappear completely—they are not completely idiosyncratic social constructs or isolated attitudes: social roles express functions within human societies, functions that bear some intelligi-

33. *See* WILLIAM E. CONNOLLY, THE TERMS OF POLITICAL DISCOURSE ch. 1 (2d ed. 1983) (1974); *see also* Alasdair MacIntyre, *The Essential Contestability of Some Social Concepts*, 84 ETHICS 1, 1–9 (1973). The term "essentially contested concepts" was originally coined by W.B. Gallie. *See* W.B. Gallie, *Essentially Contested Concepts*, *in* 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY (1955–1956).

ble relation to human well-being. Thus, the role of political ruler, however it may have changed over the ages, has always served the purpose of establishing some sort of order within society, bringing some degree of stability and security into people's lives and contributing to their prosperity by providing an environment in which ordinary people can secure a reasonably stable livelihood for themselves and their families. Though there have been tyrannical rulers who undermined such goals, or ruled only for their own selfish advantage, they have been recognized as deficient to the extent that they thwarted or sabotaged the social function of the role. In making sense of any social role, we must be able to tell a story about how it *either* furthers the good of human persons, whether it is their external flourishing (e.g., health and wealth) or their all-round excellence; *or* how it harms some good of human persons, or damages their all-round integrity or well-being. It is not enough to say, "this is the way things are done around here," or "that was the way things were done back then." To simply point to the role is to give up explaining it. Roles are susceptible to both a genealogical explanation (why and how did they arise over time?) and an ethical evaluation (how does this role contribute to/detract from the success of individual lives or our life together as a society?).

The location of roles within a wider network of human purposes and goods gives us an important clue as to the limited place a role can have in the practical deliberations of a person. We have just seen that the standards constituting a role call for creativity and judgment in order to be interpreted and applied successfully. However, there is another more far-reaching sense in which roles engage the freedom and practical wisdom of their occupants: the goals, norms, and standards of excellence that constitute a role are ultimately intelligible only in light of the overarching goals, norms, and standards of excellence of a human life and community. That is to say, roles are not isolated functions: they take their place within a network of functions, including the personal goals and ideals of their occupants. There is nothing sacrosanct or absolute about a social role—it is only as good as the contribution it makes to the life of its occupant, related parties, and the wider social and political community. Consequently, the judge who applies a facially racist law, the librarian who mistreats customers in the name of official library policies, the father who covers up for his son's crimes, or the union member who puts hospital patients' lives in serious jeopardy in order to strike, cannot justify their actions by pointing to their role and its requirements, *even if* (and this is arguable) the role, correctly interpreted, *did* require such actions.

After all, a person is not ethically accountable primarily for the degree to which she is faithful to her roles, but for the degree to which she evinces integrity in her interpretation and implementation of social roles. To put it another way, the challenge of living well is not to pledge allegiance to a series of roles, understood independently from the good life, but to take ownership or responsibility for one's roles as more or less integral dimensions of a life well-lived. A person is free, even under adverse circumstances, to critically distance himself from the requirements of a role even, in many cases, to the point of repudiating it entirely. This is often a costly decision—think of Socrates' refusal to conform to the popular conception of Athenian citizenship—but it is one that, when made in a responsible and conscientious fashion, is often a tribute to a person's integrity, and thus merits our praise and admiration.

B. *Personal and Professional Excellence in a Lawyer*

Now, we are ready to consider the role of a lawyer in a modern liberal democratic society. I will begin by considering the role on its own terms; then I will consider briefly how it relates to the pursuit of a good human life. First, let us recall our general definition of a social role: A role is *a function within society constituted by one's social position or relation towards others, and social and institutional norms, goals, and standards of excellence associated with the function, which shape the practical reasoning of the role-holder and related parties in distinctive ways.* Now, in applying this definition to the lawyer in a liberal democratic society, we must begin by identifying the *function* of legal advocacy. Its function can be described in an abridged form or in a more expansive form. Put most succinctly, the function of legal advocacy is to further justice, public order, and the rule of law by prosecuting those who act unlawfully or unjustly and ensuring the accused a fair trial. Of course, this is a shorthand definition and we can spell out the function of a lawyer in greater detail by specifying what is just and unjust behavior, what we mean by a fair trial, and so on. There will inevitably be substantial disagreement on particular cases. However, for now, this general account will suffice.

In order to exercise the function of furthering justice, public order, and rule of law, a lawyer, like any role-holder, must rely upon, and interpret, social and institutional norms, goals, and standards of excellence associated with the profession. Examples range from rules of etiquette when dealing with judges and colleagues, to more weighty ethical and legal rules such as client confidentiality and the duty to disclose incriminating evidence to

the court, to general standards of excellence such as the elegance of a brief or the cogency and rhetorical flourish of an oral argument. But all of these norms and standards of excellence can only be properly interpreted and applied in light of the overarching function of legal advocacy, namely to further the cause of justice, public order, and rule of law. To the extent that discrete norms or standards are "exploited" to the detriment of justice, public order, or rule of law, those norms and standards are themselves subverted and not respected. Similarly, to the extent that the role of a lawyer is used to further injustice or social disorder, the role itself is subverted and not respected, distorted in its fundamental significance.

Certain aspects of human excellence—certain virtues—are particularly important for the successful exercise of the function of legal advocacy. These virtues together form an ideal to which lawyers can aspire. Many of those virtues are ones to which other role-holders, and indeed human beings in general, ought to aspire. Some of the human virtues required preeminently by lawyers in order to successfully fulfill their role are diligence (in order to prepare a case well); perseverance (in order to continue with a case in spite of repeated setbacks and delays); tact or diplomacy (in order to negotiate effectively without alienating one's adversaries); rhetorical elegance and effectiveness (in order to make a persuasive case to a jury, judge, or adversary) prudence (in order to judge whether or not to take on a case or how to correctly interpret a professional rule of conduct); magnanimity (in order to bear victory graciously without alienating one's adversaries for good); and, of course, justice (in order to consistently use one's position to further justice, rather than injustice). This list provides a small snapshot of the full panoply of human virtues that are required of a good lawyer.

Finally, the role of lawyer, with its associated norms and standards of excellence, shapes the practical reasoning of lawyers in distinctive ways. In other words, the norms and standards of the legal profession are of central importance for legal practitioners, at least whenever they are practicing law. Nonetheless, as I have argued earlier, no role can be adequately understood or interpreted in isolation from an all-around good human life. The same applies for the role of a lawyer. Even though I act as a lawyer, I do not thereby cease to act as a human being, and I am accountable to others not only as a lawyer but *as a human being*, for my behavior as a lawyer. The role of lawyer, just like any other human role, forms part of a network of social practices and customs that find their ultimate justification in their capacity to furnish human beings with the material, economic, social, and

psychological, conditions necessary for human flourishing.[34] Consequently, the standards of the legal profession, however central to a lawyer's deliberations, must be set in the broader context of the standards of excellence of a good human life and of a good human society. Supposing, for example, that there is a conflict between the code of ethics of one's profession and the requirements of a good human life, the good lawyer, understanding that his role is intended to further, not hinder, justice and the common good, will uphold human goodness against the conventional standards of his profession.

V. SOME PRACTICAL IMPLICATIONS FOR THE LEGAL PROFESSION

So far, this may sound rather abstract, but it represents a general practical orientation that would transform legal practice to the extent that lawyers took it to heart. In these concluding pages, I would like to offer some general principles to guide a lawyer in his or her professional conduct, animated by the conviction that the role of lawyer is only as good as its contribution to a good or flourishing human life. These principles are meant to inform, not supplant, the virtue of prudence, or the capacity to judge how to act well with respect to particular and often unpredictable and unprecedented situations.

A. *The Requirements of a Good Human Life Must Take Priority Over the Demands of the Legal Profession*

Whatever the perceived demands of one's role as a lawyer, whether they are formal legal requirements or more informal social expectations of one's peers, they can never be allowed to outweigh the requirements of a good human life. For example, if professional success is measured by the amount of overtime one devotes to the job, then one may be compelled to fail this standard in order to give quality time to one's spouse and family, assuming that vibrant family relationships are an essential component of a good life for someone with a family. Or imagine a situation in which one was assigned a case in which victory would bring much suffering and injustice to one's adversaries: the choice of prosecuting the case or losing one's job would have to be made *as a human being in search of the good*—not *merely* as a lawyer or loyal employee of a firm.

34. This is practically the same as Finnis' interpretation of the common good. *See* John Finnis, *Public Good: The Specifically Political Common Good in Aquinas*, *in* NATURAL LAW AND MORAL INQUIRY: ETHICS, METAPHYSICS, AND POLITICS IN THE WORK OF GERMAINE GRISEZ 186 (Robert P. George ed., 1998).

B. *One Cannot Take For Granted the Demands of One's Role Without Reflecting on its Highest Ethical Goals and the Conditions For Meeting Them*

A lazy lawyer, just as a lazy member of any profession, will tend to take for granted the standards and expectations of his peers and superiors without questioning their compatibility with the overarching goals of the profession. Yet roles and their requirements cannot be taken for granted: they are essentially contestable and their interpretation is no straightforward matter. It is only by carefully reflecting on the highest goals and aspirations of the legal profession, in particular the furtherance of justice, public order, and the rule of law, that a lawyer can correctly interpret the more detailed and derivative demands of his profession. For example, the goal of winning cases and thus establishing a track record of success cannot be embraced in good conscience if one's victories subvert, rather than further, justice and the common good. Whether one is achieving some genuine social and moral good through one's legal practice is something each lawyer must reflect upon. There is no algorithm for deciding upon the quality of one's contribution to justice and the common good—it requires a good dose of prudence or sound judgment.[35]

C. *Integrating One's Job as Lawyer Within a Good Life Requires Both Courage and Moderation*

Although it is easy to see how pursuing a good human life within one's profession requires courage, in particular to resist pressure to conform to unethical or mediocre standards, it is less easy to appreciate the role of temperance or moderation in integrating one's professional role within a good life. The conditions of human life are fragile and imperfect in many ways, and there is no prospect of our achieving heaven on earth this side of death. We must reconcile ourselves with working and living in conditions that imperfectly approximate rather than perfectly instantiate justice and goodness. This means that one of the sensible background assumptions of any attempt to be a good lawyer is that there is no such thing as a perfect legal system any more than there is such thing as a perfect society. We must do what is humanly possible to improve our society and bring about justice in it, but we must also moderate our expectations somewhat so that we can work with imperfect conditions. One of the most challenging tasks facing a lawyer is to distinguish a healthy sense

35. *See* OAKLEY & COCKING, *supra* note 16.

of moderation and patience from resignation, mediocrity, and avoidable injustice.

D. *Professional and Personal Excellence are Fundamentally Interdependent*

If I am right, and the role of lawyer is constituted by the goal of furthering justice, public order, and the rule of law, then anyone who wishes to serve the goals of the legal profession effectively must acquire many human virtues that equip one to achieve those goals. I have already mentioned some of these virtues. They include prudence, justice, courage or fortitude, temperance, diligence, magnanimity, honesty, perseverance, and diplomacy or tact. Notice that a person who is not living these virtues in their everyday life, e.g., at home with their family, or with their neighbors and friends, is unlikely to exercise these virtues habitually in their workplace. Everyday life is a sort of training ground for professional success, to the extent that the practice of the virtues at home is an excellent preparation for the practice of the virtues at work. But by the same token, the demands of professional life provide an excellent opportunity for a person to develop and enhance his or her human virtues, in particular virtues such as justice, diligence, prudence, and tact. Though I would not go so far as to say that the virtues of a lawyer are identical to the virtues any person requires to live well qua person,[36] I would say that they are remarkably similar and that this substantial overlap suggests the possibility of a genuine integration of one's professional and personal lives into one well-lived human life.

CONCLUSION

The main contention of this essay is that the ethical significance of the role of a lawyer can best be understood along the same lines as other social and political roles, viz., in light of its overarching practical purposes and its contribution to a good or flourishing human life. I have suggested that the overarching purpose of the practice of law is to further justice, public order, and the common good, by prosecuting those who act unlawfully or unjustly and ensuring the accused a fair trial. Following from

36. For example, though I have emphasized virtues that both a lawyer and a layperson require to function well, there are certainly virtues that a lawyer requires and many laypersons may do fine without, e.g., rhetorical skills, a high level of diplomacy, and the peculiar kind of intelligence required to quickly identify relevant "fact-patterns" and promising lines of argument in preceding cases.

this characterization of the role, I have made four practical suggestions regarding the day-to-day practices of a lawyer: first, that lawyers ought to put ethical goodness or virtue ahead of the demands of their profession; second, that they ought to interpret the requirements of their role in conformity with its overarching purpose of promoting justice; third, that they need not only courage, but also moderation, in order to integrate their professional activities into a good or well-lived life; and fourth, that there is a fundamental continuity and interdependence between the virtues required for good lawyering on the one hand, and the virtues necessary for a good human life on the other.

Lest anyone infer from these suggestions that I think an ethically integrated life is an easy achievement, I wish to conclude by acknowledging that it is one of the most challenging tasks facing us today, especially with the increasing specialization of professional life and the relentless pressure to subordinate all other goals in life to professional "success" narrowly conceived. Not only is a life of integrity a challenging goal, it is also a goal that is rarely, if ever, fully achieved. Ethical integrity, no less for the lawyer than for the teacher, parent, salesman, business manager, or waiter, is a constant work in progress. But it is one worth persevering in, both for the sake of living a good life, and for the sake of professional excellence.