

## 2011 Mart Vogel Lecture on Professionalism and Legal Ethics

### *Virtue Ethics, Earnestness, and the Deciding Lawyer: Human Flourishing in a Legal Community*

Michael S. McGinniss  
Assistant Professor  
University of North Dakota School of Law

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#### **I. Lecture Presentation**

##### **Introduction – A Tribute to Mart R. Vogel, Esquire**

##### **A. The Ethical Position of the Lawyer**

1. Moral Character and Duties to Clients
2. The Temptations of Authority and Agency
3. The Limits of Role-Based Legal Ethics

##### **B. Virtue Ethics and the Practice of Law**

1. Aristotle's *Nicomachean Ethics*: Virtue and Human Flourishing
2. Duty or Virtue? (Or Both?)
3. Good Habits: Forming Virtuous Character for the Practice of Law

##### **C. Earnestness and the Practice of Law**

1. Kierkegaard's Ethics of Decision
2. Earnestness: Engaging the Heart and Avoiding Self-Deception
3. Professional Responsibility as Personal Responsibility

##### **D. The Deciding Lawyer—Who am I and Who Will I Become?**

1. First-Personal Decision Making: Becoming a Virtuous Lawyer
2. Integrity: A Unifying Virtue for the Practice of Law
3. Repetition of Ethical Action: Remaining a Virtuous Lawyer

**E. Ethical Decision Making in a Legal Community—Who Are We and Who Will We Become?**

1. Living in Legal Community with “Friend and Foe”
2. Sharing Practical Wisdom: Mentorship and Lawyer Flourishing

**(15 minute break)**

**II. Breakout Discussion Session**

In small groups, participants will discuss hypothetical fact patterns involving ethically and morally challenging decisions facing a lawyer in the practice of law. These fact patterns will provide opportunities to consider and apply the concepts developed during the Lecture Presentation. Full-group discussion will follow the small group consideration of each hypothetical fact pattern.

**(15 minute break)**

**III. Updates on the ABA Ethics 20/20 Commission and Professional Conduct Regulation in North Dakota**

**A. ABA Ethics 20/20 Commission (1<sup>st</sup> Round Proposals—comments due July 15, 2011)**

1. Outsourcing of Legal and Law-Related Work
2. Confidentiality-Related Ethics Issues Arising from Lawyers’ Use of Technology
3. Issues Relating to Inbound Foreign Lawyers

**B. ABA Ethics 20/20 Commission (2<sup>nd</sup> Round Proposals) (expected by September 2011)**

Discussion of selected legal ethics topics about which the Commission has published Issue Papers and solicited public comment (including choice of law in cross-border practice and lawyers’ use of Internet-based client development tools).

**C. North Dakota Update**

1. North Dakota RPC 3.8: Special Responsibilities of a Prosecutor
2. North Dakota RPC 1.15: Model Rules for Client Trust Account Records
3. Consideration of Lawyer Mentoring Program

## SELECTED REFERENCE MATERIALS

### **A. The Ethical Position of the Lawyer**

Can a good lawyer be a good person? The question troubles lawyers and law students alike. They are troubled by the demands of loyalty to one's client and by the fact that one can win approval as a good, maybe even great, lawyer even though that loyalty is engrossed by over-privileged or positively distasteful clients. How, they ask, is such loyalty compatible with that devotion to the common good characteristic of high moral principles?

Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 (1976).

[A] person who does work as an attorney cannot disclaim responsibility for all of the consequences of her conduct, merely by virtue of the fact that she is engaging in that conduct in the role of attorney. To put the point in Kierkegaardian dressing, attorneys should not suspend ethical judgment when acting as attorneys. Lawyers should engage in first-order moral judgment in many scenarios as lawyers, rather than casting off all moral judgment in order the more completely to adopt the role of the lawyer. Yet . . . a moderate and tempered position is the key; lawyers should not necessarily act in avoidance of their role, and should not necessarily act as if the decisions in question were their own moral choices in their own lives.

Benjamin Zipursky, *Regulation and Responsibility for Lawyers in the Twenty-First Century*, 70 FORDHAM L. REV. 1949, 1954-55 (2002) (footnotes omitted).

### **B. Virtue Ethics and the Practice of Law**

Virtue ethics is a teleological philosophy rooted in the classical humanism of Aristotle. The course which a moral agent takes is directed toward a "telos," or goal. But unlike consequentialist theories such as utilitarianism, where the ultimate goal of human action is maximizing happiness, the "telos" for a virtue ethicist is individual human flourishing. The concept of the good is prior to the concept of the right, but what is good is determined by intrinsic human excellence rather than external outcomes.

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The proper threshold question for virtue ethicists is . . . not “what should one do?” but “what kind of person should one be?” Only when we answer that question can we possibly hope to discern what to do. Whereas deontological theories are concerned with universal principles or rules (what is “right”), virtue ethics is concerned with the goal of becoming a good person.

R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to “Seek Justice,”* 82 NOTRE DAME L. REV. 635, 643-44 (2006).

[T]he ideal [of the lawyer-statesman] affirmed that a lawyer can achieve a level of real excellence in his work only by acquiring certain valued traits of character. Though linking professional achievement to character-virtue in this way undoubtedly made the first seem more remote and harder to attain, it also gave it greater value. It put the heroes of the bar high up beyond the point that most practitioners could reach, but at the same time endowed their achievements with a dignity and stature that no amount of technical know-how can confer.

The ideal of the lawyer[-]statesman was an ideal of character. This meant that as one moved toward it, one became not just an accomplished technician but a distinctive and estimable type of human being—a person of practical wisdom. And that was an ennobling thought, even for those who fell short of the ideal or found they had only limited opportunities in their own work to exercise the deliberative virtues that the lawyer-statesman exhibited to an exemplary degree.

ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 16-17 (1993).

. . . [E]xperience and reflection are the focal points of Aristotle’s writings on moral education. In terms of moral legal education, a student comes to understand “ethics” by acting like an ethical lawyer would act and by judging like an ethical lawyer would judge. This is, of course, what professional habituation and practical reasoning are all about. Ultimately, what we are striving for is Aristotelian *phronesis* [practical wisdom]—that keen sense of moral judgment that comes from years of experience and repeated critical reflection on our own actions as well as the actions of others. Thus, law school is only the beginning of what constitutes a life-long education on the “ethics” of law and law practice. However, without this beginning, we will never be successful in our attempt to recover the “human side” of the profession.

Lorie M. Graham, *Aristotle’s Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education*, 20 J. LEGAL PROF. 5, 49 (1996).

### C. Earnestness and the Practice of Law

Kierkegaard insists that the proper mood for ethical contemplation is earnestness (*alvorlighed*) which for him means the ardent desire to eschew transgression. And so, Kierkegaard might press, what is the mood behind professional ethics?

If you click onto the web, you will find hundreds of advertisements such as this one from a company hawking its ethical leadership lessons:

EASY, AFFORDABLE BUSINESS ETHICS TRAINING!

Or again,

ETHICS4EVERYONE—“TRAINING IN A BOX”

[Or,]

“[H]ave ethics will travel” . . .

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. . . For Kierkegaard, wrongdoing is never the result of ignorance, or, if it is, it is an ignorance that you yourself produced. Indeed, Kierkegaard argued that when it comes to ethics it is not more knowledge that we need. As he put it: “And this is how perhaps the great majority of men lived: they work gradually at eclipsing their ethical and ethical-religious comprehension, which would lead them out into decisions that their lower nature does not much care for.” Ethically speaking, the real challenge is to avoid self-deception, to avoid talking ourselves out of what we know.

Gordon Marino, *An Ethics Consult with Kierkegaard*, 23 CRIM. JUSTICE ETHICS 2, 58 (2004) (quoting SOREN KIERKEGAARD, *THE SICKNESS UNTO DEATH* 94 (Howard & Edna Hong trans., Princeton Univ. Press 1980) (1849)) (emphases added and footnotes omitted).

. . . Existential virtue ethics [sees] virtues as *volitional* states of resolve that involve the exercise of libertarian freedom. How can this be?

Kierkegaard gives us some clues in his account of “earnestness” as the basic proto-virtue of the will (the lack of which underlies the proto-vices of aestheticism). In the *Concept of Anxiety*, Kierkegaard’s pseudonym Haufniensis says that earnestness cannot be reduced to a conceptual definition without disconnecting it from the first-personal function that makes it earnestness,

namely, the function of engaging the self wholeheartedly in some cause or purpose. He uses love as an analogy for this aspect of earnestness: “Whoever loves can hardly find joy and satisfaction, not to mention growth, in preoccupation with a definition of what love properly is,” since to love is to be focused actively on the good of what one loves. Just as virtue involves *phronesis* [practical wisdom] for Aristotle, earnestness is related to an understanding of truth, but it consists of *taking to heart* the relevant truth, or being “certain” of it in the practical sense of *being willing to act on it*. . . .

John J. Davenport, *Towards an Existential Virtue Ethics: Kierkegaard and MacIntyre* 265, 277, in *KIERKEGAARD AFTER MACINTYRE: ESSAYS ON FREEDOM, NARRATIVE, AND VIRTUE* (John J. Davenport & Anthony Rudd, eds., 2001) (quoting SOREN KIERKEGAARD, *The Concept of Anxiety* 147 (Howard & Edna Hong trans., Princeton Univ. Press 1981) (1844)) (emphases added and internal citation and footnotes omitted).

#### **D. The Deciding Lawyer—Who am I and Who Will I Become?**

[M]ust moral considerations play a role in the reasoning process of the lawyer as he seeks justice? The question takes on further significance as one ponders the statement made by Robert George: “Laws cannot make men moral. Only men can do that; and they can do it only by freely choosing to do the morally right thing for the right reason.”

Robert Araujo, *The Virtuous Lawyer: Paradigm and Possibility*, 50 *SMU L. REV.* 433, 458 (1997) (quoting ROBERT GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 1 (1993)).

Ultimately, the virtuous lawyer sees that legal and moral reasoning are not separate enterprises. While some legal reasoning is not based on moral reasoning (particularly when the questions focus on technical matters such as general procedure), this does not automatically lead to the conclusion “that legal reasoning is impervious to moral reasons.” Although moral reasoning need not permeate the entire process of legal reasoning, neither is it completely absent from the process. Especially in those difficult cases where reasonable people credibly argue conflicting understandings about the meaning of the law, the virtuous lawyer concludes that what clarifies the meaning of the law in such a context is the background consideration of its moral justification.

*Id.* at 464 (quoting Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 *RATIO JURIS* 2 (1993)).

For lawyers, integrity is both an ideal and a resource. It provides inspiration and also raw material for creative reasoning with clients and others about the law and its impacts. Because some aspects of integrity are not readily within a lawyer's grasp, others swell in importance. Wholeness and constancy are imperfect ideals for lawyers. Representing others, by its very nature, distracts the steadfast pursuit of coherent commitments that compose core personal identity. On the other hand, integrity, manifesting itself as strength facing adversity, describes many occasions of a lawyer's career. Legal integrity as sensitivity and aspiration to justice is a distinctive, sustaining ideal.

Reed Elizabeth Loder, *Integrity and Epistemic Passion*, 77 NOTRE DAME L. REV. 841, 886 (2002).

**E. Ethical Decision Making in a Legal Community—Who Are We and Who We Will Become?**

Virtue ethics in moral theory rejects the Kantian emphasis on first principles, as well as the utilitarian focus on preference satisfaction. Instead, it recall an older tradition which suggests that what makes for a good and fulfilling individual life is not so much getting what you want, or even living according to certain right rules. Instead, what conduces to happiness--what happiness perhaps even consists in--is being the right kind of person. What matters is character. Communitarian virtue ethics . . . would call for a similar approach to community life. In addition to asking what a particular rule or practice will accomplish, and whether it is right or wrong, communitarian virtue ethics would ask a third sort of question. What kind of people will it help us to become?

Sherman J. Clark, *Law as Communitarian Virtue Ethics*, 53 BUFF. L. REV. 757, 757 (2005).

It is worth pointing out that, if I acknowledge that I am far from perfect, and am quite unclear what a virtuous agent would do in the circumstances in which I find myself, the obvious thing to do is to go and ask one, should this be possible. This is far from being a trivial point, for it gives a straightforward explanation of an aspect of our moral life which should not be ignored, namely the fact that we do seek moral guidance from people who we think are morally better than ourselves. When I am looking for an excuse to do something I have a horrid suspicion is wrong, I ask my moral inferiors (or peers if I am bad enough), "Wouldn't you do such and such if you were in my shoes?" But when I am anxious to do what is right, and do not see my way clear, I go to people I respect and admire--people who I think are kinder, more honest, more just, wiser, than I myself--and ask them what they would do in my circumstance. How

utilitarianism and deontology would explain this fact, I do not know; but, as I said, the explanation within the terms of virtue ethics is straightforward. If you want to do what is right, and doing what is right is doing what a virtuous agent would do in the circumstances, then you should find out what she would do if you do not already know.

Rosalind Hursthouse, *Normative Virtue Ethics* 184, 189, in *VIRTUE ETHICS* (Stephen Darwell ed., Blackwell Publishing, 2003).

[W]hether law is practiced ethically in any particular community depends not upon the community's formal rules, but upon its culture. . . . [T]he culture of a legal community does not reflect "big" decisions that members of the community make about "big" problems, as much as it reflects the dozens of ordinary, mundane decisions that every attorney makes—and makes intuitively—every day. . . . [T]he intuition that guides these decisions is in large part a product of the mentoring received by the attorney. In sum, conduct is influenced by culture, culture by intuition, and intuition by mentoring.

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A novice attorney learns the value of a mentor either by having one or by not having one. . . .

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Most of those in the legal profession understand that mentors . . . play an important role in teaching novice lawyers how to practice law well. What is not widely understood is that, as important as mentoring is in teaching young attorneys to practice law well, it is far more important in teaching them to practice law ethically.

Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, The Elite Law School, and the Moral Formation of the Novice Attorney*, 82 *MINN. L. REV.* 705, 713, 720-21 (1998) (emphases added).



**III. Updates on the ABA Ethics 20/20 Commission and Professional Conduct Regulation in North Dakota**

**A. ABA Ethics 20/20 Commission (1<sup>st</sup> Round Proposals) (comments due July 15, 2011)**

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[http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html) (home page for the ABA Ethics 20/20 Commission, including news and updates)

[http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20/priorities\\_policy.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/priorities_policy.html) (discussion drafts, issue papers, comments received, transcripts of public hearings, and related material relating to the work of the ABA Ethics 20/20 commission)

**C. North Dakota Update**

[http://www.ndcourts.gov/court/committees/Jt\\_ASC/committee.asp](http://www.ndcourts.gov/court/committees/Jt_ASC/committee.asp) (website of the North Dakota Joint Committee on Attorney Standards, including meeting agendas and minutes)