

# Ethics, Legal Ethics, and the Classical Tradition\*

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## I. INTRODUCTION

When Bill Waddell<sup>1</sup> asked me to speak on ethics, I sat down to read, again, the Arkansas Rules of Professional Conduct.<sup>2</sup> I will aim my remarks at suggesting how to understand these Rules, not by commenting on the specific provisions, but by answering the following questions: (1) what kind of document is the Rules of Professional Conduct;<sup>3</sup> (2) how does this kind of document fit in the landscape of our intellectual and moral heritage;<sup>4</sup> and (3) how does legal ethics relate to the larger field of ethics?<sup>5</sup> In trying to answer these questions, I will focus mostly on the landscape of our intellectual and moral heritage; nonetheless, I hope this focus shows the Rules in a better light and provides a better understanding of them. Finally, I will narrow the focus to comment on one specific ethical temptation—the temptation to try to make the facts (or the law) what we want them to be.<sup>6</sup>

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\* This essay is adapted from a presentation given at the United Methodist Lawyers Conference on September 17, 2013.

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2. The Arkansas Rules are based upon the American Bar Association's Model Rules of Professional Conduct, but they depart from the Model Rules in some provisions. See HOWARD W. BRILL, ARKANSAS PROFESSIONAL AND JUDICIAL ETHICS 1-5 (8th ed. 2011).

3. See *infra* Part II.

4. See *infra* Part III.

5. See *infra* Part IV.

6. See *infra* Part V.

## II. THE MULTIFACETED CHARACTER OF THE ARKANSAS RULES OF PROFESSIONAL CONDUCT

When we think of the term *ethics*, rules that govern our conduct necessarily come to mind. The document that describes and prescribes ethics for lawyers is called the Rules of Professional Conduct. Thus, we expect this document to contain rules prescribing, permitting, or prohibiting certain behavior. Sure enough, on reading the document, we see that it contains several rules.

Yet, a reading of the document also reveals other provisions that do not qualify so easily as rules or commandments prescribing what attorneys must do or not do. In fact, the Preamble to the Rules of Professional Conduct makes it clear that the document contains provisions that really are not “rules.” The Preamble begins by describing, if not defining, what a lawyer is and what functions or purposes a lawyer fulfills.<sup>7</sup> These statements of the purposes that lawyers fulfill are not merely window dressing. According to the Preamble, the Rules “should be interpreted with reference to the purposes of legal representation and of the law itself.”<sup>8</sup> The Preamble states that “[s]ome of the Rules are imperatives, cast in the terms ‘shall’ or ‘shall not.’”<sup>9</sup> Others, however, are permissive. For example, Rule 2.1 is a permissive rule, providing: “In rendering advice, a lawyer may refer not only to law but to other considerations such as moral . . . factors[] that may be relevant to the client’s situation.”<sup>10</sup> Some provisions state ideals to which lawyers should aspire. For example, “A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.”<sup>11</sup> Some Rules define the nature of the relationships between a lawyer and others.<sup>12</sup> In summarizing what the Rules are, the Preamble states: “The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a

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7. ARK. R. PROF’L CONDUCT pmb. ¶¶ 1-3.

8. ARK. R. PROF’L CONDUCT pmb. ¶ 14.

9. ARK. R. PROF’L CONDUCT pmb. ¶ 14.

10. ARK. R. PROF’L CONDUCT 2.1.

11. ARK. R. PROF’L CONDUCT pmb. ¶ 7.

12. See ARK. R. PROF’L CONDUCT 4.1-4.

lawyer's professional role."<sup>13</sup> Even so, "the Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules."<sup>14</sup> Indeed, the Preamble notes that "a lawyer is also guided by personal conscience and the approbation of professional peers."<sup>15</sup>

Thus, the Rules of Professional Conduct is a document that comprises rules, definitions, statements about the purposes that lawyers fulfill and ideals to which lawyers should aspire, without purporting to exhaust the moral and ethical considerations that should inform a lawyer; personal conscience also guides a lawyer's conduct.

### III. JERUSALEM AND ATHENS: OUR INTELLECTUAL AND MORAL HERITAGE AS A BACKGROUND FOR LEGAL ETHICS

To understand the Rules of Professional Conduct and to place the document in the landscape of our intellectual and moral heritage, we may appropriately begin with the Bible. Historically, the Bible has been the dominant influence, or certainly one of the dominant influences, for understanding right and wrong in Western civilization.

A reading of the Bible reveals a recurrent theme, a drama that begins with a commandment or a set of commandments. "[O]f the tree of the knowledge of good and evil you shall not eat . . ." <sup>16</sup> "You shall have no other gods before me."<sup>17</sup> "You shall not kill."<sup>18</sup> "You shall not steal."<sup>19</sup> "Love your enemies and pray for those who persecute you."<sup>20</sup> The Bible does not present humans with questions to explore, but with choices to make. "[C]hoose this day whom you will serve."<sup>21</sup>

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13. ARK. R. PROF'L CONDUCT pmb. ¶ 14.

14. ARK. R. PROF'L CONDUCT pmb. ¶ 16.

15. ARK. R. PROF'L CONDUCT pmb. ¶ 7.

16. *Genesis* 2:17. All scripture quotations are from the Revised Standard Version.

17. *Exodus* 20:3 (internal quotation marks omitted).

18. *Exodus* 20:13 (internal quotation marks omitted).

19. *Exodus* 20:15 (internal quotation marks omitted).

20. *Matthew* 5:44.

21. *Joshua* 24:15.

In the biblical drama, man is sometimes confronted with a commandment that seems to make no sense. “Take your son, your only son Isaac, whom you love, and go to the land of Mori’ah, and offer him there as a burnt offering upon one of the mountains of which I shall tell you.”<sup>22</sup> “[G]o, sell what you possess and give to the poor . . . and come, follow me.”<sup>23</sup> “[T]ake up [your] cross and follow me. For whoever would save his life will lose it, and whoever loses his life for my sake will find it.”<sup>24</sup> What this biblical drama requires is not so much understanding as obedience. “Trust and obey, For there’s no other way.”<sup>25</sup>

Out of this drama, in which we are confronted with commandments, comes a series of stark alternatives, of forces in conflict, of polar oppositions: obedience and disobedience, sin and grace, light and darkness, life and death, condemnation and redemption, heaven and hell, God and the Devil. The fundamental movement of the Bible is one of conflict between these opposites, culminating in the final conflict told in the final book of the Bible.<sup>26</sup> That conflict takes place not only in the world but also in each soul. As Dmitri said in Dostoevsky’s great novel, *The Brothers Karamazov*, “[M]an is broad, too broad, indeed. I’d have him narrower. . . . God and the devil are fighting there and the battlefield is the heart of man.”<sup>27</sup>

Now, the moral and ethical thinking of Western civilization was formed not only by the Bible but also by classical philosophy—the philosophy of the ancient Greeks and Romans.<sup>28</sup> In fact, the word *ethics* comes not from the

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22. *Genesis* 22:2 (internal quotation marks omitted).

23. *Matthew* 19:21.

24. *Matthew* 16:24-25.

25. J. H. Sammis, *Trust and Obey*, in HEAVENLY HIGHWAY HYMNS No. 99 (Luther G. Presley ed., 1956).

26. See *Revelation* 20:1-22:15.

27. FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 106-07 (Constance Garnett trans., The Macmillan Company 1955) (1880).

28. See, e.g., Leo Strauss, *Jerusalem and Athens: Some Preliminary Reflections*, reprinted in LEO STRAUSS, *STUDIES IN PLATONIC POLITICAL PHILOSOPHY* 147 (University of Chicago Press 1983) (“Western man became what he is and is what he is through the coming together of biblical faith and Greek thought. In order to understand ourselves and to illuminate our trackless way into the future, we must understand Jerusalem and Athens.”).

Bible but, instead, from classical philosophy—from the Greeks.<sup>29</sup>

Classical philosophy begins not with a commandment but with a question: “What is?”<sup>30</sup> This question asks how we should understand a particular object. What is a cow, a carriage, an eye, an ear, a general, a tight end, or a lawyer—that is, how can we understand what it means to be one of these things? For the classical thinkers, one of the first steps in answering this kind of question was to look for the purpose of this kind of thing.<sup>31</sup> A cow, a carriage, an eye, an ear, a general, a tight end, and a lawyer each has a purpose. We cannot understand what it means to be one of these things without knowing its respective purpose. To be a cow, a carriage, an eye, an ear, a general, a tight end, or a lawyer means, in part, to fulfill the purpose of a cow, a carriage, an eye, an ear, a general, a tight end, or a lawyer. The purpose of the eye, for instance, is to see. Someone who does not know that the purpose of an eye is to see does not understand the eye, no matter how much else he may know about it. The purpose of a general is to lead an army to victory. Someone who does not know that the purpose of a general is to lead an army to victory does not understand what it means to be a general, no matter how much else he may know about any given general.

If we must know the purpose of an eye or a general to understand the eye or the general, then we understand the eye or the general in the light of what it means to be a good eye or a good general. A thing that fulfills its purpose is good. A thing that fulfills its purpose better is better. An eye that sees well is a good eye. An eye that sees better is a better eye. A general who can lead an army to victory is a good general. A general who can lead an army to a quicker,

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29. See, e.g., ARISTOTLE, *NICOMACHEAN ETHICS* (c. 350 B.C.E.) (Robert C. Bartlett and Susan D. Collins trans., University of Chicago Press 2011) [hereinafter *NICOMACHEAN ETHICS*].

30. See LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 121 (University of Chicago Press 1953). The following account represents my own summary of the aspects of classical philosophy that are relevant here. For a more detailed, thorough, and scholarly account, see generally 1 FREDERICK COPLESTON, *A HISTORY OF PHILOSOPHY: GREECE AND ROME* (rev. ed. 1963) (discussing the history and developments of classical philosophy).

31. See COPLESTON, *supra* note 30, at 104.

more decisive victory with fewer casualties is a better general. If we can have a good eye and a better eye, a good general and a better general, then we can have degrees of goodness for any particular kind of thing.

Moreover, we observe that things come into being and develop so as to fulfill their purposes. A calf grows into a cow. A soldier develops into a general. A boy learns to be a tight end. The fundamental form of movement in classical philosophy is one of growth or development.<sup>32</sup>

This line of thought, answering the question—“what is?”—by determining an object’s purpose and considering the object in the light of its purpose, also applies to man or, as we would say today, the human person.<sup>33</sup> The classical thinkers asked the question—“what is a man?”—meaning, what is a human person?<sup>34</sup> Answering that question led to reflections on what it means to be a good man or a good human person.<sup>35</sup> Ethics is the inquiry into what it means to be a good human person.<sup>36</sup>

When the classical philosophers considered these questions, they answered them by looking to what makes man different from all other animals.<sup>37</sup> They concluded that man is different from all other animals in that he asks and answers questions of this sort. Man, or the human person, is the animal who asks what does it mean to be a good man. So far as we can tell, cows grazing in a pasture do not contemplate the meaning of being a good cow, nor do they discuss the question. A human person is an animal who has a faculty by which he poses questions, seeks knowledge of why things are as they are, and engages in conversation about those things. The human person is the “rational animal,” or the thinking animal.<sup>38</sup>

If to be human is to be a rational animal, then a good human person must be one who thinks and reasons well. A

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32. *See id.* at 306-07.

33. *See id.* at 290.

34. *See id.* at 104, 290.

35. *See generally id.* at 332-50; *see also* NICOMACHEAN ETHICS, *supra* note 29, bk. 1, ch. 7, 1097a15-1098a19; JACQUES MARITAIN, AN INTRODUCTION TO PHILOSOPHY 196 (E.I. Watkin trans., Sheed and Ward 1962).

36. *See* NICOMACHEAN ETHICS, *supra* note 29, bk. 1, ch. 2, 1094a18-26.

37. *See* COPLESTON, *supra* note 30, at 290.

38. *Id.* at 104, 290 (internal quotation marks omitted).

good man is a wise man. Wisdom falls into two basic types.<sup>39</sup> One type of wisdom seeks understanding, not for the sake of action but for the sake of understanding.<sup>40</sup> The classical philosophers called this type of wisdom “theoretical wisdom,” in contrast to the second type, which is “practical wisdom.”<sup>41</sup> As an example of theoretical wisdom, you might think of astronomy—the study of the movement of the heavens just for the sake of knowing how the heavens move. In contrast, as an example of practical wisdom, think of navigation, where the navigator also studies the stars but does so for a practical reason: to guide the ship. Practical wisdom is concerned with understanding for the sake of action, not with understanding for the sake of understanding.

Practical wisdom is the habitual disposition to make good judgments about what is to be done—that is, to make good decisions.<sup>42</sup> Two conclusions follow. First, one acquires practical wisdom mostly through experience.<sup>43</sup> No one is born with it; no one acquires it primarily from books. A person can learn from the elders—the ones with more experience—but practical wisdom is still a matter of experience. Second, practical wisdom is one of the key ingredients—perhaps *the* key ingredient—in ethics.<sup>44</sup> A good person is someone who exercises good judgment about what action to take.<sup>45</sup> Once again, a good person is a wise person, a person who thinks well.<sup>46</sup>

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39. MARITAIN, *supra* note 35, at 102-03.

40. *See id.*

41. TIMOTHY A. ROBINSON, ARISTOTLE IN OUTLINE 54 (1945).

42. *See* NICOMACHEAN ETHICS, *supra* note 29, bk. 6, chs. 5-13, 1140a19-1145a11; 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA, pt. I-II, q. 57, art. 4-5 at 830-32 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1948) [hereinafter SUMMA THEOLOGICA].

43. *See* COPLESTON, *supra* note 30, at 344; NICOMACHEAN ETHICS, *supra* note 29, bk. 6, ch. 7, 1141b17 (“[S]ome who are without knowledge—those who have experience, among others—are more skilled in acting than are others who do have knowledge.”).

44. *See* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 154 (2d ed. 1984) (“*Phronésis* is an intellectual virtue; but it is that intellectual virtue without which none of the virtues of character can be exercised.”); *see* JOSEPH PIEPER, THE FOUR CARDINAL VIRTUES 3 (Richard Winston et al. trans., University of Notre Dame Press 1966) (1954–55, 1959).

45. MACINTYRE, *supra* note 44.

46. *See id.* (“According to Aristotle then excellence of character and intelligence cannot be separated.”).

I defined practical wisdom as the habitual disposition to make good judgments about what is to be done. In doing so, I have classified practical wisdom as a virtue. In the classical tradition, a virtue is a habitual disposition to goodness of some kind; it is a developed ability to do the right thing, in the right way, at the right time.<sup>47</sup>

I am one of those old-timers who thinks Michael Jordan was the best basketball player ever to play the game. The ancient Greeks and Romans would say that he had the virtues proper to a basketball player. No doubt, Michael Jordan had a lot of God-given ability, but he became the best largely because of his moral characteristics—discipline, tenacity, an aspiration to excel, and a determination to develop his skills so that he could and would excel. He became a basketball player who habitually did the right thing, in the right way, at the right time. Moral virtue, in the classical tradition, is something like that.

The classical tradition produced the notion that four moral virtues are more fundamental than others in regard to the meaning of being a good person.<sup>48</sup> These are called “cardinal virtues”<sup>49</sup>—from the Latin term for “hinge.”<sup>50</sup> The cardinal virtues are those upon which the moral life depends.<sup>51</sup> According to this traditional view, the four cardinal virtues are practical wisdom (also called prudence); justice; temperance; and fortitude (also called courage).<sup>52</sup>

I have mentioned practical wisdom, or prudence, which classical philosophers regarded as the most important of the cardinal virtues.<sup>53</sup> What classical philosophy meant by

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47. See BRIAN DAVIES, *THE THOUGHT OF THOMAS AQUINAS* 239 (1992); MACINTYRE, *supra* note 46, at 150; SERVAIS PINCKAERS, *THE SOURCES OF CHRISTIAN ETHICS* 364 (Mary Thomas Noble trans., Catholic University of America Press 1995) (1985).

48. THOMAS AQUINAS, *THE CARDINAL VIRTUES: PRUDENCE, JUSTICE, FORTITUDE, AND TEMPERANCE* vii-viii (Richard J. Regan trans., Hackett Publishing Co. 2005) (c. 1274) [hereinafter *CARDINAL VIRTUES*].

49. *Id.* at vii.

50. *THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY* 145 (T. Onions et al. eds., 1994).

51. See *CARDINAL VIRTUES*, *supra* note 48, at vii.

52. *SUMMA THEOLOGICA*, *supra* note 42, pt. I-II, q. 61, art. 2, at 846-47; Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 *ST. THOMAS L. REV.* 113, 117-18 & n.14 (1995).

53. *SUMMA THEOLOGICA*, *supra* note 42, pt. I-II, q. 61, art. 2, at 846-47.



prudence is conceptually related to the common-law notion of “a reasonable man.”<sup>54</sup> Under the Rules of Professional Conduct, “[r]easonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.<sup>55</sup> Similarly, “reasonably should know” means “that a lawyer of reasonable prudence and competence would ascertain the matter in question.”<sup>56</sup> To put it another way, a lawyer must be prudent—that is, he must have a measure of practical wisdom.<sup>57</sup>

The next most important cardinal virtue is justice.<sup>58</sup> The classical definition of justice as a virtue is the habitual disposition to give to each person his due.<sup>59</sup> Oddly enough, whenever I think of that definition in the context of lawyers, I think of discovery. The lawyer who is just—or fair—gives the opposing lawyer whatever he is owed during discovery.

Now, in considering what impedes someone from having a habitual disposition to make good decisions and to give to each person his due, we notice two types of impediments. Both pleasure and pain can move a person to bad decisions and unjust actions; or, to put it another way, the uncontrolled desire to acquire something or the unconquered fear of some result can cause someone to make a bad decision.<sup>60</sup> These reflections led our ancestors to conclude that, in addition to practical wisdom and justice, there are two more virtues or habitual dispositions upon which the moral life hinges: temperance and fortitude.<sup>61</sup>

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54. See CARDINAL VIRTUES, *supra* note 48, at 2.

55. ARK. R. PROF'L CONDUCT 1.0(h).

56. ARK. R. PROF'L CONDUCT 1.0(j).

57. A body of literature has developed on the topic of practical wisdom as it relates to lawyering. See generally Mark Neal Aaronson, *We Ask You to Consider: Learning About Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247 (1998) (discussing how to learn about and exercise practical judgment); Deborah J. Cantrell, *Teaching Practical Wisdom*, 55 S.C. L. REV. 391 (2003) (explaining how to teach practical wisdom).

58. See PIEPER, *supra* note 44, at 64-69.

59. See BLACK'S LAW DICTIONARY 1002 (4th ed. 1951) (defining “justice” in jurisprudence as “[t]he constant and perpetual disposition to render every man his due”). A later edition of *Black's Law Dictionary* defines “justice” as “[t]he fair and proper administration of laws.” BLACK'S LAW DICTIONARY 942 (9th ed. 2009).

60. See PIEPER, *supra* note 44, at 150, 187-88.

61. See, e.g., SUMMA THEOLOGICA, *supra* note 42, pt. I-II, q. 61, art. 1-2, at 846-47; pt. II-II, q. 141, art. 2, at 1760 (“temperance withdraws man from things which

Temperance is the habitual ability and willingness to control desires and pleasures—the things we seek.<sup>62</sup> For example, the person who regularly fails to control his sexual appetite, his appetite for food or drink, or his desire for money lacks the virtue of temperance. Those uncontrolled appetites will lead a person who lacks the virtue of temperance to make bad decisions and, possibly, to act unjustly.<sup>63</sup> I see many cases in which a person's uncontrolled appetite for drugs or alcohol leads that person to commit crimes such as robbery and burglary.

Fortitude is the habitual ability and willingness to conquer fear and pain, hardship and danger—the things we want to avoid.<sup>64</sup> The person who regularly gives in to difficulty—the person who quits when the going gets tough or who “chickens out”—lacks the virtue of fortitude.<sup>65</sup> Unconquered fear and weakness in the face of hardship will lead a person who lacks fortitude to make bad decisions and, perhaps, to act unjustly.<sup>66</sup>

But of course, we are not in the realm of “either/or”; we are in the realm of “more or less.” We all have, to some degree, the virtues of practical wisdom, justice, temperance, and fortitude; and we all are lacking those same virtues to some degree. We start out as infants without these virtues, and we are habituated into them—first by our parents and then, as we mature, by our own decisions and actions. To some extent, we make ourselves good or bad as we pursue courses of conduct that develop good or bad habits. If we live well—that is, if we work at learning to make good decisions—and cultivate justice, temperance, and fortitude, we will develop the dispositions required to become better at making good decisions and at being just, temperate, and strong. We develop the dispositions to give to each person his due, to control our appetites, and to overcome hardship or danger.

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seduce the appetite from obeying reason, while fortitude excites him to endure or withstand those things on account of which he forsakes the good of reason.”).

62. See generally PIEPER, *supra* note 44, at 145-206 (discussing the various aspects of temperance).

63. See generally *id.*

64. See generally *id.* at 117-141 (describing various aspects of fortitude).

65. *Id.* at 127-33 (discussing fortitude as “Endurance and Attack”).

66. See *id.*

If we live well in this sense of developing good habitual dispositions, we will also, according to the classical view, be happy.<sup>67</sup> Happiness is part and parcel of living well, of being a good person.<sup>68</sup> Happiness is not something we give up when we become good, as is commonly thought; nor is it an arbitrary reward tacked onto good deeds as an incentive for good behavior, as we might promise a child candy in return for good behavior. A person is happy to the degree that he fulfills his purpose, which is to say that a person is happy to the extent that he is good. Thus, to be a good person, to live well, to achieve fulfillment, and to be happy all become synonymous. If you saw the movie *Chariots of Fire*, you will recall the scene in which Eric says: “God . . . made me fast. And when I run I feel His pleasure.”<sup>69</sup> We have all had something of that experience. We love to do something that we do well. Virtue is its own reward.

We should note one more aspect of the classical tradition. According to the classical tradition, man, or the human person, is not only a rational animal, but he is also a social animal.<sup>70</sup> He can develop his full potential, he can move toward his perfection, only in community with others.<sup>71</sup> No man is an island. A cow might live apart from other cows and still develop into a good cow, but a person cannot develop into a good person apart from other persons. In large measure, according to the classical tradition, we need one another—we need a community—to develop into good persons. We need a community to attain happiness. Hence, our concern for ourselves is inseparable from our concern for the community. Our concern for our individual good is inseparable from our concern for the common good. A person who does not tend to the common

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67. See MACINTYRE, *supra* note 44, at 160.

68. See PINCKAERS, *supra* note 47, at 11-12; see also MACINTYRE, *supra* note 44, at 160 (“The enjoyment [in human life] which Aristotle identifies is that which characteristically accompanies the achievement of excellence in activity.”).

69. CHARIOTS OF FIRE (Twentieth Century Fox 1981).

70. See ARISTOTLE, THE POLITICS bk. 1, ch. 2, 1253a3 (Carnes Lord, trans., 1984) [hereinafter THE POLITICS] (“[M]an is by nature a political animal.”). See also Strauss, *supra* note 28, at 129 (“Man is by nature a social being. He is so constituted that he cannot live, or live well, except by living with others.”).

71. See THE POLITICS, *supra* note 70, bk. 1, ch. 2, 1252b27-30 (explaining that the city or *polis* exists for the sake of living well).

good is not a good person. We see this notion also reflected in the Rules of Professional Conduct:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. . . . [A] lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. . . . [A]ll lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.<sup>72</sup>

In short, lawyers should tend to the common good.<sup>73</sup>

Thus, with respect to ethics, the classical tradition asserts that man, or the human person, is the rational animal, which means that a good person, by definition, must think well. He must make good decisions about what to do and what not to do, which means that he must have practical wisdom. A fool is not a good person. Man learns from experience—personal experience and the experience of others—to have good judgment. Having good judgment or making good decisions requires, in part, giving to each person his due, which means that a good person is a just person. A crook is not a good person. In order to make good decisions, a person must be able to control his desires and conquer his fears, which is to say that he must have the virtues of temperance and fortitude. Every person possesses and lacks these virtues to some degree. A person who strives to live well can, in some measure, make himself or herself better. The adage, “practice makes perfect,” is true in the sense that practice can bring one closer to perfection. A person who practices and, therefore, improves experiences happiness or fulfillment as part and parcel of that practice and that improvement.

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72. ARK. R. PROF'L CONDUCT pmb. ¶ 6.

73. See generally Robert J. Araujo, *The Lawyer's Duty to Promote the Common Good: The Virtuous Law Student and Teacher*, 40 S. TEX. L. REV. 83 (1999).

## IV. THE CONFLUENCE OF RULES AND VIRTUES

As noted, a discussion of ethics usually involves rules, commandments, and statements of what a person must do or not do. The Bible, which contains many commandments, supports this notion.

Rules relate to specific actions and deeds. Rules lead to these kinds of questions: Did the defendant steal or not? Did the driver run the red light or not? Did the lawyer file the answer on time or was he late? When it comes to rules, we are concerned with whether an action violates the rules, and the answer is, in principle, yes or no: either the person violated the rules or not.

Contrasted with biblical ethics, the ethics of the ancient Greek and Roman philosophers focuses more on virtues—that is, habitual dispositions to do the right thing, in the right way, at the right time.<sup>74</sup> Moral virtues also concern action, but the focus is more on the qualities of the acting person: which means that we are in the realm of “more or less” rather than “either/or.” Is this person just? Is this person prudent? Does this person have temperance and fortitude? Is this a good person? The truthful answer is always a matter of degree. No person is wholly bad, and no person is wholly good. When speaking of the virtues, the focus is less on specific deeds and more on character.

Because virtues concern character, we realize that the antithesis drawn earlier between biblical tradition and classical philosophy was a bit too sharp. The classical tradition is concerned with character, but so is the Bible. In the fifth chapter of Romans, for instance, St. Paul says: “[W]e rejoice in our sufferings, knowing that suffering produces endurance, and endurance produces character, and character produces hope . . . .”<sup>75</sup> The term “endurance” here is akin to, if not identical with, the virtue of fortitude. A similar passage is found in Second Peter: “[M]ake every effort to supplement your faith with virtue, and virtue with knowledge, and knowledge with self-control, and self-

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74. See PINCKAERS, *supra* note 47, at 364; see also Robert Aroujo, *The Virtuous Lawyer: Paradigm and Possibility*, 50 SMU L. REV. 433 (1997) (discussing the differences between ethics based on virtues and rules in the legal context).

75. *Romans* 5:3-4.

control with steadfastness . . . .”<sup>76</sup> The word that is translated here as “virtue” is the same Greek term that is translated as “virtue” in the writings of Plato and Aristotle.<sup>77</sup> The notion of self-control in this passage relates closely to the virtue of temperance, as do many passages in the New Testament that enjoin us to control the desires of the flesh. Perhaps the clearest example is in the book of James, which states: “What causes wars, and what causes fightings among you? Is it not your passions that are at war in your members? You desire and do not have; so you kill. And you covet and cannot obtain; so you fight and wage war.”<sup>78</sup> Here, James describes what happens when we lack the virtue of temperance. Thus, the New Testament speaks clearly of temperance and fortitude, or of aspects of good character that are very similar.

The Bible also speaks of justice in a manner similar to classical philosophy. Many passages in the New Testament direct people, at minimum, to give others what they are due. For example, St. Paul says in Romans: “Pay all of them their dues, taxes to whom taxes are due, revenue to whom revenue is due, respect to whom respect is due, honor to whom honor is due. Owe no one anything, except to love one another . . . .”<sup>79</sup>

The New Testament likewise commends the virtue of practical wisdom. The parable of the wise and foolish virgins comes to mind.<sup>80</sup> Furthermore, the book of Ephesians says: “Look carefully then how you walk, not as unwise men but as wise . . . .”<sup>81</sup> The book of James adds: “If any of you lacks wisdom, let him ask God who gives to all men generously and without reproaching, and it will be given him.”<sup>82</sup> Thus, the New Testament reflects each of the cardinal virtues in some way.

Although the Bible contains many commandments and creates a drama presenting a series of stark alternatives—from obedience and disobedience to God and the Devil—it

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76. *II Peter* 1:5-6.

77. The Greek term for virtue used in these writings is *areté*.

78. *James* 4:1-2.

79. *Romans* 13:7-8.

80. See *Matthew* 25:1-13.

81. *Ephesians* 5:15.

82. *James* 1:5.

is also concerned with character. Thus, the Bible is concerned with the virtues that, for all of us, are a matter of degree—a matter of “more or less” rather than a matter of “either/or.” The classical philosophers, while emphasizing the virtues, also recognized that some specific deeds like adultery, theft, and murder are always wrong.<sup>83</sup>

As to the Rules of Professional Conduct, that document provides more than rules; it also contains definitions—statements about the purposes that lawyers fulfill and ideals to which lawyers should aspire.<sup>84</sup> It not only contains commandments and prohibitions, but it also explains what a lawyer is and what a good lawyer should be.<sup>85</sup> Thus, the Rules of Professional Conduct has something in common with the Bible’s commandments and prohibitions, as well as the classical tradition, which begins with definitions and proceeds to the development of virtues.

I do not contend that the authors of the Rules of Professional Conduct composed that document with the Bible in one hand and Aristotle in the other. Nor is my primary point that the Bible or classical philosophy influenced the Rules indirectly. My primary point is that a full account of ethics requires two related, but distinct, aspects: first, a full account of ethics requires lawyers to recognize the commandments and rules that they must always obey and never violate; and secondly, a full account of ethics requires a lawyer to understand the meaning of being a good person and a good lawyer, which means more than simply complying with the Rules. In this light, we can see that the authors of the Rules of Professional Conduct made a good effort to give a full account of legal ethics, for they not only stated the rules but also defined what a good lawyer is and stated the purposes that lawyers fulfill so they can interpret the Rules in light of those purposes. As the authors of the Rules recognized, “rules” are necessary for legal ethics but not sufficient: ethics requires more than rules.

The provisions of the Rules do not mention character; instead, they presuppose it. One of the standards for

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83. See NICOMACHEAN ETHICS, *supra* note 29, bk. II, ch. 6, 1107a9-18.

84. See ARK. R. PROF’L CONDUCT pmb1.

85. See ARK. R. PROF’L CONDUCT pmb1. ¶¶ 6, 13.

admission to the bar is that the applicant must have good moral character.<sup>86</sup> In my mind, someone cannot really be a good lawyer without being a person of good moral character.<sup>87</sup> To follow the Rules of Professional Conduct, a lawyer must do more than simply follow the Rules of Professional Conduct. The Preamble to the Rules explains that the Rules do not exhaust the moral and ethical considerations that should inform a lawyer; conscience must also guide a lawyer.<sup>88</sup> Conscience is a reliable guide only for a person of good moral character. And a person can have good moral character only if he possesses the cardinal virtues—prudence, justice, temperance, and fortitude. In other words, being a person of good moral character means more than simply never violating the Rules. A person of good moral character is habitually disposed to making good judgments about what actions to take; to rendering each person what he or she is entitled to receive; and to controlling the desire for pleasures and fear of pain or hardship so that they do not interfere with the disposition to do the right thing.

A person with good moral character will follow the Rules without necessarily adverting to them directly. St. Paul said, “[T]he law is not laid down for the just but for the lawless and disobedient.”<sup>89</sup> My point here is much the same. Of course, a lawyer of good moral character follows the Rules, but he or she will do so as a result of having good character rather than fear of the disciplinary board.<sup>90</sup>

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86. ARK. R. GOVERNING ADMISSION TO BAR XIII(B) (“[E]very applicant for admission and every applicant for readmission or reinstatement of license to practice must be of good moral character . . .”).

87. For more extended discussions, see generally 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 (2006) (focusing on the individual character of prosecutors); Michael S. McGinniss, *Virtue Ethics, Earnestness, and the Deciding Lawyer: Human Flourishing in a Legal Community,* 87 N.D. L. REV. 19 (2011) (examining the moral philosophy behind a lawyer’s ethical position, decisions, and conduct); Aaronson, *supra* note 55 (emphasizing the character lawyers need to practice self-discipline).

88. ARK. R. PROF’L CONDUCT pmb. ¶ 7.

89. *I Timothy* 1:9.

90. Christianity, of course, is concerned not only with character but also with holiness, which transcends good character.



## V. THE GREAT TEMPTATION

As promised from the outset, I now want to focus on one particular ethical point. A lawyer sometimes acts as an advisor and sometimes as an advocate. Whether acting as an advisor or as an advocate, the Rules require a lawyer to be honest.<sup>91</sup> Thus, Rule 2.1, which governs a lawyer's obligation as an advisor, requires a lawyer to render candid advice.<sup>92</sup> Similarly, Rule 3.3, which governs advocacy, prohibits a lawyer from advancing an argument that has no basis in law and fact, requires a lawyer to exercise candor toward the tribunal, and forbids a lawyer from knowingly presenting false evidence or making a false argument.<sup>93</sup> Truth and honesty lie at the heart of being a good lawyer, which leads us to the point with which I will close.

German philosopher Joseph Pieper stated the following on the four cardinal virtues:

The pre-eminence of prudence means that realization of the good presupposes knowledge of reality. He alone can do good who knows what things are like and what their situation is. The pre-eminence of prudence means that so-called "good intention" and so-called "meaning well" by no means suffice. Realization of the good presupposes that our actions are appropriate to the real situation, that is to the concrete realities which form the "environment" of a concrete human action; and that we therefore take this concrete reality seriously, with clear-eyed objectivity.<sup>94</sup>

Pieper's statements mean that a person cannot exercise good judgment without seeing things for what they really are—both the universal principles that govern moral action and the reality of the given situation. To exercise good judgment, a person must be realistic and accept reality for what it is.

The provisions from the Rules of Professional Conduct requiring a lawyer to give candid advice, to exercise candor

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91. *See, e.g.*, ARK. R. PROF'L CONDUCT 4.1 ("In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.").

92. ARK. R. PROF'L CONDUCT 2.1.

93. ARK. R. PROF'L CONDUCT 3.3.

94. PIEPER, *supra* note 44, at 10 (emphasis omitted).

toward the court, to advance only arguments that have a basis in law and in fact, and so forth—like the virtue of prudence—presuppose that a lawyer must be realistic and accept reality for what it is. However, the great temptation for lawyers is not to do that. Lawyers sometimes tend to think that defining something in a document in a certain way makes it true. For example, in the two criminal cases over which I have presided where the defendants were lawyers, the lawyer–defendants prepared, or were responsible for, documents that treated certain matters as something other than what they really were. I witnessed this conduct many times in my law practice; and as a judge, I sometimes see this practice in briefs. People find it hard to accept reality when it conflicts with their self-interest. Lawyers are no different, except that the nature of the profession is such that lawyers are tempted more often than others to mold, rather than to accept, reality.

Whatever we call it—prudence, realism, or something else—lawyers must have the capacity and willingness to accept reality. Accepting reality is essential for all lawyers because they must give sound advice and direct others to the truth. Coping with the truth is often difficult. As Jack Nicholson famously stated to Tom Cruise in *A Few Good Men*: “You can’t handle the truth!”<sup>95</sup> We run across aspects of reality that seem to stand in the way of doing or accomplishing what we want, both in our private lives and as lawyers. Our lives would be easier if we could only change reality by wishing it were different or by defining it otherwise in a document. But we cannot.

Jesus said:

The eye is the lamp of the body. So, if your eye is sound, your whole body will be full of light; but if your eye is not sound, your whole body will be full of darkness. If then the light in you is darkness, how great is the darkness!<sup>96</sup>

This passage from the book of Matthew is mysterious, but let me suggest a possible interpretation. The eye is that by which we see reality. If our eye is sound—that is, if we see

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95. *A FEW GOOD MEN* (Columbia Pictures 1992).

96. *Matthew* 6:22-23.

reality correctly—then our whole body will be full of light, which means that we will see the way and we will make good decisions about what to do. But if our eye is not sound and if we do not see reality for what it is, our whole body will be full of darkness, and we will make foolish decisions.

The following prayer attributed to St. Thomas More illustrates the temptation lawyers face to alter reality:

Lord, grant that I may be able in argument, accurate in analysis, strict in study, candid with clients, and honest with adversaries. Sit with me at my desk and listen with me to my client's complaints. Read with me in my library, and stand beside me in court, so that today I shall not, in order to win a point, lose my soul.<sup>97</sup>

A lawyer's soul is in the most danger of being lost when the lawyer does not accept reality but, instead, tries to mold it, to shape it, to make it what the lawyer or client wants or needs it to be, in order to win a point. That is a great temptation for us as lawyers and for our society. We must resist that temptation so that we do not, in order to win a point, lose our souls.

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97. ST. THOMAS MORE SOCIETY OF SOUTH FLA., *St. Thomas More Prayer*, RED MASS ONLINE, <http://www.redmass.com> (last visited May 21, 2014).