

IMMORALLY RELATIVE CODES OF CONDUCT & THE VALUE OF CHRISTIAN VIRTUE IN THE PRACTICE OF LAW

By William Wagner¹

Concerned with the integrity of our legal institutions, law professors, lawyers, and judges repeatedly speak to the importance of ethics in the practice of law. We promulgate and re-promulgate codes of professional conduct and call it “progress”. CS Lewis noted,

“We all want progress. But progress means getting nearer to the place where you want to be. And if we have taken a wrong turning, then to go forward does not get us any nearer. If we are on the wrong road, progress means doing an about-turn and walking back to the right road; and in that case the person who turns back soonest is the most progressive person.”²

Reliance on morally relative codes for our ethical roadmap takes our justice institutions down the wrong road. It is a dangerous journey, doing nothing to advance the Kingdom, while at the same time seriously threatening constitutional democracy under the rule of law.

Integrity in our justice institutions cannot exist without Christian virtue. The hope for institutional integrity depends less on adopting codes of professional conduct, than on whether Christian character and moral virtue exist on the hearts of lawyers subject to these codes. Thus, before we piously travel down a road defending justice, we should pause to check the roadmap we plan to use for our journey.

We can approach our conduct as lawyers using a secular-based roadmap where morality and truth are relative, or a faith-based roadmap where some moral absolutes divinely exist naturally on our heart. Where we end up, of course, depends upon which map we use.

Although not often accepted in legal circles today, Christians believe God made us in His image, and that moral absolutes in God’s law naturally exist on each of our hearts.³ Underlying many codes of conduct, however, is a rejection of God’s inviolable standard present in the natural law, divine law, and positive law -- in favor of a secular standard where morality and truth are relative to the situation or individual. Unfortunately, many legal scholars around the world teach that this is a good thing. Following morally relative roadmaps like the Canadian Bar Association’s Code of Professional Conduct, or the American Bar Association’s Model Rules, often leads lawyers into a precarious uncertainty. The human-made roadmaps say to go right, but when you do, you discover that “right” no longer is “right.” Worse, before you know it, you find yourself stepping around ethical land mines, justifying immoral conduct with the very provisions of an ethics code supposedly designed to guide one’s ethical conduct in the practice of law. You find yourself going forward, yet making no progress -- either toward an ethical practice of law, or in furthering the Kingdom.

My observations over the years in the classroom, in practice, and from the bench, all verify for me the futility of our human approach to solving legal ethics problems with moral relativism.⁴ Conduct does not become moral just because lawyers make a rule deeming or justifying the conduct as legally ethical. To illustrate, consider a few examples from the ABA and CBA ethics rules governing the conduct of lawyers.

The ABA’s model rule defining disciplinable misconduct includes criminal acts reflecting adversely on an attorney’s conduct involving “honesty, trustworthiness or fitness as a lawyer,” as well as non-criminal conduct involving dishonesty.⁵ Nonetheless, under the rule it is conceivable

that engaging in adultery, using illegal drugs, running a house of prostitution, and distributing obscene pornography, all fall *outside* the definition of disciplinable misconduct.⁶ Likewise, the CBA rules require lawyers with deeply held faith-based beliefs to lay aside those beliefs in favor of secularly established standards – even where such secular standards are inherently inconsistent with ancient moral tenets underlying the lawyer’s faith.⁷

Incredibly, by deeming it so, we lawyers legally establish standards for ourselves where dishonesty and immorality do not reflect on our trustworthiness and fitness to practice law.

Another illustration of a morally relevant ethical roadmap is the ABA model rule ostensibly requiring lawyers to be truthful in their statements of material fact to others.⁸ Under the rule, whether a statement is even one of fact depends on the circumstances.⁹ Moreover, because of certain role responsibilities of the lawyer, some types of “statements of material fact” are deemed by the rule not to be taken as “statements of material fact.”¹⁰ So when is a lie about a material statement of fact not a lie about a material statement of fact? When those who make the rules say so.

The CBA and ABA rules governing a lawyer’s duty of confidentiality concern when a lawyer must keep information related to the representation of a client confidential.¹¹ Under these rules, lawyers may ethically disclose their client’s confidential information in order to collect unpaid fees.¹² On the other hand, under these same rules lawyers may ethically withhold confidential information about a client’s prior conduct -- even if disclosure can prevent an impending death or catastrophic financial harm.¹³

Thus, we see in the immoral relativism of our human-made rules, that immoral conduct is not cleansed of its immorality just because lawyers create a rule deeming it legally ethical. If we are not making progress using a morally relative roadmap, perhaps it is time for Christian lawyers also to consult some divine directions. In Proverbs 3:5 we are assured that if we “[i]n all our ways acknowledge him” that he will direct our paths.¹⁴ Jesus cautions us to:

Enter through the narrow gate. For wide is the gate and broad is the road that leads to destruction, and many enter through it. But small is the gate and narrow the road that leads to life, and only a few find it.

Although not often accepted in legal circles today, the Bible teaches of a divine roadmap where God’s moral law naturally exists on each of our hearts. It is written, “the word is very near you; it is in your...heart so you may obey it.”¹⁶ If we use God’s divine roadmap on our heart, we operate under a worldview where his moral standards guide us through the small gate and down the narrow road on the path of righteousness.¹⁷ In such a case, any journey we envision necessarily must accept that Biblical standards of honesty and integrity are parts of a lawyer’s personal and professional character. What does this mean for the way we practice law?

It means we remember our great commission from the Lord to proclaim his word to the world with the way we live our lives.¹⁸

Do others see Jesus and his Word in our lives and in our practice of law? Do they know we are Christians by our love?¹⁹ Do we show our “love with words” or with “actions and in truth.”²⁰ Our Lord instructed, “In everything, do to others what you would have them do to you...”²¹ Are we walking the walk?

In James we are instructed to “not merely listen to the word” but to “[d]o what it says.”²² We are to offer our “bodies as living sacrifices, holy and pleasing to God” . . . and to not conform “any longer to the pattern of this world...”²³ If we lawyers have faith and claim to follow Jesus, but do nothing to put that faith into action – what good is it for the Kingdom?²⁴

Do not misunderstand. It is not the litigation or other works we do (even for good causes), it

is our faith in Jesus Christ.²⁵ Is our faith in Christ, however, evidenced by the way we practice law and by the way we live our life after office hours? Are we seeking first the Kingdom of God and his *righteousness*?²⁶ The way we practice law and live our lives either frustrates or furthers the Kingdom of God. If we put God's righteousness first, our conduct affects others differently than if we seek to win at any cost. The gospel says: "In the same way, let your light shine before men, that they may see your good deeds and praise your Father in heaven."²⁷ What does our light reveal? Is there evidence of a heart beating for Jesus, as we journey down the road seeking justice? The answer is yes if God's moral standards play a prominent part in your practice of law – in addition to what moral relativists and their human-made ethics codes otherwise teach about a lawyer's professional role-related duties.

"If we live in the spirit,²⁸ let us also walk in the spirit." This means that we, in our private lives, do not engage in immoral conduct, even when such conduct falls outside the definition of professional misconduct under a governing ethics code. This means we do not lie in our practice of law, even if the rules allow it. This means we do not allow others to suffer serious bodily injury or die in favor of protecting our client's secretly communicated evil. Those who walk honestly with integrity "walk securely," but those who take crooked paths will be found out.²⁹ "The way of the sluggard is hemmed in as with thorns, but the path of the diligent is a highway."³⁰

When the legal profession excuses a personal moral failure due to some professional role-related duty, we merely affirm that we failed to measure up to God's higher moral standard.

We should find it interesting that we lawyers never seek to excuse our conduct due to some professional role responsibility when that conduct is consistent with the naturally existing moral standard that God places on each of our hearts. When attorneys bemoan a decline in lawyer professionalism or complain about another lawyer's conduct, they are measuring against something. That something is God's naturally existing higher moral standard on each of our hearts.³¹

Christian lawyers can change the character of the legal profession and further the Kingdom. To do so, however, we must let other lawyers see Jesus in our hearts. If we do, other lawyers might begin to see something different about the integrity in our profession, and be inspired to act likewise. If lawyers begin to acknowledge the higher standards written on their hearts, they will more likely look to those standards to determine what they ought to do – at least when dealing with basic temptations like lying, cheating, and stealing. Imagine if every Christian lawyer, beginning tomorrow, committed to tell the truth in all our personal and professional affairs. From such Christ-like examples, who knows how many will make an about-turn and walk back to the right road, returning our profession to what was once a great calling.

Once we accept a worldview where God's higher moral standards naturally exist, it will not be long before we find ourselves furthering the Kingdom and putting the interests of others before our own. Those who understand the greater responsibilities of our profession know our calling demands more than just providing a service for a fee.

We live among the greatest nations on earth, with wealth and resources well beyond even the wildest dreams of most of our brothers and sisters in the world. The ancient Biblical truth still most certainly applies today: To whom much is given, much *is* required. Somewhere near to you, an individual goes to sleep tonight hungry without adequate clothing and shelter. Others wake each morning oppressed and persecuted for their faith. Alone, these children of God are unable to vindicate their inalienable rights. We are instructed in the Word that, "As we have opportunity, let us do good to all people, especially to those who belong to the family of believers."³² Envision nations of Christian lawyers with a sincere commitment to service. For we ". . . were called to be free" and to use this freedom to "serve one another in love."³³

We can, and ought to, leave the world better than we found it. Even the non-Christian lawyer might envision how a servant heart fosters good client relations and reduces grievances. So

again, each one of us must ask ourselves each day we travel down the road seeking justice, is there evidence that my heart is beating for Jesus.

Why does our conduct matter? What is at stake? The greater responsibilities of our profession include the duty to ensure that our legal institutions administer justice fairly and under the rule of law. In order to carry out such responsibilities, the public must believe our legal institutions are made up of individuals with integrity, capable of administering justice in such a manner. In Joshua 14:9 God's people were told: "... The land on which your feet have walked will be your inheritance and that of your children forever, because you have followed the Lord my God wholeheartedly."³⁴ We must envision a legal profession where we practice and live our private lives knowing something greater than our temporal reputation is at stake.

In a constitutional democracy, the people give the executive branch immense power to carry out its role of executing the laws, (e.g., as commander-in-chief of the armed forces).³⁵ Likewise, the people give a parliament or the legislative branch immense power to carry out its role of making the law (e.g., through its constitutional power to choose who, what and how much to tax, as well as where and how much to spend).³⁶ Unlike the military power of an executive branch, or the tax and spending power of a parliament, the only thing the judiciary receives from the people to assist it in carrying out its role, is their trust in the institution's ability to resolve disputes fairly under the rule of law.

The people's trust in a justice institution's ability to resolve disputes fairly, under the rule of law, is the *only thing* that gives legitimacy to the court's power of judicial review. Thus, each time a lawyer behaves badly, (whether inside or outside authorized ethics rules), the lawyer's action chips away at the foundation of trust underlying our legal institutions. If the people lose confidence in the ability of legal institutions to resolve disputes fairly with integrity, they may, as in other parts of the world, resort to violence to resolve their disputes. Ultimately, governance under the rule of law ends.

Will constitutional democracy collapse tomorrow, or even in our lifetime? Perhaps not. Structural institutions of free government may stand for a time. The very essence, for which they stand, however, sometimes ceases to exist.³⁷ Thus, more is at stake here for lawyers than just our temporal professional reputation. We bear the serious duty and responsibility of preserving constitutional governance under the rule of law. When it comes to matters of trust, history and the public will hold us accountable to God's naturally existing higher moral standard, for it is that internal standard against which they measure their own conduct. Thus, to retain the trust of the people and preserve constitutional democracy under the rule of law, we must first return to being a profession with Christian principles where each one of us personally measures our conduct against God's divinely given higher moral standard. God's divine roadmap provides directions down a narrow road of righteousness that inevitably leads to institutional integrity. Not a bad destination if we are interested in preserving a constitutional democracy under the rule of law.

If anything could be more important than preserving constitutional democracy for our children, it is our great commission to proclaim his Word to the world. If others do not see Jesus in us, and in our behavior, we will never reach them. We should be encouraged that everyday many Christian lawyers around the world follow a Biblical roadmap in the way they practice law and live their lives. In their walk, we see the Lord use them to accomplish great things for His Kingdom, serving as shining examples to others passing by along the way. It happens every time a Christian law professor challenges a law student to love their neighbor. It happens every time a Christian lawyer is honest, and treats an opposing lawyer with kindness and decency.

With the help of our forgiving and omnipotent Lord, may each of us commit to a journey on the narrow path. The Bible assures us that our Father in heaven equips us "with everything good for doing his will," so that he may "work in us what is pleasing to him ..."³⁸ So let us be sure we are heading down the right road using His roadmap -- and get on with our journey today! □

Endnotes:

¹William Wagner has been married to his wife Marilyn for over 18 years. Together they home school their two children, Luke and Katherine. Professor Wagner served with distinction in all three branches of the United States government, including as a member of the federal judiciary where he served as United States Magistrate Judge (NDFL). Prior to his service on the federal bench, Wagner served as an American diplomat and senior United States prosecutor in the United States Department of Justice. Before his service in the executive branch, he served as a legal counsel in the United States Senate. He also served as chief counsel to the Senate Judiciary Committee in Michigan Legislature. Wagner currently is a member of the full-time teaching faculty at Cooley Law School, where he serves as Director of the Center for Ethics and Responsibility. This essay is based in part on previous works by the author including: *Codes of Conduct, Christian Virtue and the Ethical Practice of Law*, paper presented at the Alliance Defense Fund 's National Litigation Academy Symposium XVIII (July, 2004 Cancun, Mexico); *The Root of Institutional Integrity*, 82 (6) *Michigan Bar Journal* 48 (2003); *Some Thoughts on Preserving Democratic Institutions and Protecting Children*, 5 *TMC Journal of Practical and Clinical Law* 227 (2002). Unless otherwise indicated, scripture taken from the HOLY BIBLE, NEW INTERNATIONAL VERSION ®. Copyright © 1973, 1978, 1984 by International Bible Society. Used by permission of Zondervan. All rights reserved.

²C.S. Lewis, *Mere Christianity*, p 28. (HarperCollins Publishers Inc., HarperCollins Ed 2001).

³Genesis 1:26; Deut. 30:14, Rom. 10:8; See also Pr 7:1-3.

⁴Despite increased emphasis on ethics and professionalism in legal education, increasing numbers of law students cheat and treat their fellow students with disrespect. Likewise, increasing numbers of lawyers misrepresent matters to the court, and treat their colleagues with aggressive enmity.

⁵See ABA Model Rule 8.4 and comment.

⁶*Id.*

⁷See e.g., CBA Code of Professional Conduct Chapter XX and commentary.

⁸See ABA Model Rule 3.4 and comment.

⁹*Id.*

¹⁰*Id.*

¹¹See CBA Code of Professional Conduct Chapter IV and commentary; ABA Model Rule 1.6 and comment.

¹²*Id.*

¹³*Id.*

¹⁴Pr. 3:5

¹⁵Matt. 7:13-14.

¹⁶Deut. 30:14, Rom. 10:8; See also Pr. 7:1-3.

¹⁷Matt. 7:13-14; Ps. 23:3.

¹⁸See Matt.28:19-20

¹⁹See John13:33-35.

²⁰1John3:16-18.

²¹Matt. 7:12

²²James 1:22.

²³Rom.12:1-2; See also James1:5-8.

²⁴See James 2:14-17; Gal. 5:6.

²⁵See James 2: 18-19; Eph. 2:9-10

²⁶See Matt. 6:33.

²⁷Matt. 5:16.

²⁸Gal.5:25 (KJV).

²⁹Pr. 10:9.

³⁰Pr. 15:19

³¹For a more serious treatment of these matters, see the discussion of natural law in C.S. Lewis, *The Law of Human Nature; Some Objections; and The Reality of the Law*, compiled in *Mere Christianity*, pp 3-20.

³²Gal.6:10.

³³Gal.5:13.

³⁴Joshua 14:9

³⁵See, e.g., U.S. Const. art. II; Canadian Constitution Act of 1867 §§ 9-16

³⁶See, e.g., U.S. Const. art. I; Canadian Constitution Act of 1867 §§ 53, 92, 106

³⁷See Wm. Wagner, *Fundamental Virtues and Nation Building: Foundations for Functional Democracy in Liberia*, 27 *U. P.A. LIBERIAN STUD. J.* (2002), and sources cited therein.

³⁸Heb.13:20-21.