

The Bencher®

THE MAGAZINE OF THE AMERICAN INNS OF COURT®

Seasoned
 Success
 Civility
 Informal
 Interest
 Ease
 Focus
 Professionalism
 Iterative
Mentoring
 Ethics
 Questions
 Excellence
 Volunteer
 Positive
 Competence
 Formal
 Wisdom
 Skills
 Answers
 Goals
 Strategies

Apprenticing for a Flourishing Life in the Law: The Virtues of Judicial Clerkships

By Professor Michael S. McGinniss

In 2007, the Carnegie Foundation for the Advancement of Teaching published a report entitled *Educating Lawyers: Preparation for the Profession of Law*.¹ Commonly referred to in academic discussions as the Carnegie Report, its recommendations for reform were premised on understanding legal education as a process of “apprenticeship.”² It described three aspects of this process:

- the cognitive apprenticeship, concentrating on legal doctrines and the profession’s “way of thinking”³
- the practical apprenticeship, pertaining to “the forms of expert practice shared by competent practitioners”⁴
- the apprenticeship of “identity and purpose,” which is directed to the “ethical standards, social roles and responsibilities that mark the professional,” and to the formation of a law student’s own identity within the profession.⁵

The Carnegie Report made “a compelling case that preparation for legal practice should involve learning experiences that help to *integrate* the three basic apprenticeships or dimensions of professional work—thinking, performing, and valuing like a lawyer.”⁶ It also described the practice of law as a craft,⁷ a concept in harmony with its apprenticeship-based model of legal education. In its emphasis on promoting the development of students’ professional judgment,⁸ the report was greatly influenced by Aristotle’s virtue of practical wisdom.⁹ Although not specifically addressed in the Carnegie Report, a lawyer’s independence in the exercise of professional judgment is a critically important consideration in legal ethics.¹⁰ After building a foundation in core professional qualities through their education in law school,¹¹ to flourish¹² in the profession it is essential for novice lawyers to continue cultivating the virtue of practical wisdom,¹³ as well as the character and skills necessary for the effective exercise of independent professional judgment.

How may this progression after law school most effectively be accomplished? If the practice of law is a craft,¹⁴ then the principles of apprenticeship in other crafts should be of value to teach us about how a newly graduated lawyer may grow in mastery of the law.¹⁵ In his article “Law As Craft”,

Brett G. Scharffs recognizes the special connection between the relationship of a judge with a law clerk and the traditions of apprenticeship:

Perhaps it is not surprising that the place in the law where the ideal of apprenticeship still has some professional resonance is in the judicial clerkship. The judge, as master, guides the novice lawyer, as apprentice, through the early stages of developing professional competence. If judging is a craft, then in the clerkship we should find evidence of the ideals of apprenticeship.... A judge who is committed to the idea of viewing her work as a craft will treat her clerks as apprentices, and will see in the relationship the opportunity to pass on to succeeding generations the knowledge and skills pertaining to the craft of the law.¹⁶

As Scharffs notes, “Crafts are learned first and foremost by observing and following the example of others.”¹⁷ A novice lawyer must learn to accept lived responsibility¹⁸ for clients and for the impacts of actions taken on their behalf; a good judge embodies lived responsibility for the law as it affects both individuals and society. A novice lawyer must learn to make principled decisions and to act with integrity in the face of a variety of pressures and uncertainties; a good judge exemplifies principled decision-making¹⁹ when confronting the distinctive challenges arising in adjudication. Because a judicial clerkship provides unique opportunities to observe and follow a judge’s good example, such service is an ideal capstone to the law school experience in preparing a novice lawyer for life in the legal profession.

As with other crafts, acquiring expertise in law requires the novice to develop the skills and technical prowess necessary to accomplish its component tasks. In Aristotle’s *Nicomachean Ethics*,

the word translated as “craft” is *techne*,²⁰ which carefully distinguishes it from practical wisdom (*phronēsis*).²¹ For Aristotle, practical wisdom is both an intellectual and a moral virtue²² concerned with deliberation, choice and action that “enables its possessor to make good choices with respect to practical matters.”²³ Aristotle regards *techne* (craft) as an intellectual virtue of a person “skilled in making or production.”²⁴ As adjudication or as practice, the law is fully realized as a “craft” to the extent the judge or lawyer combines and exercises these two virtues (*techne* and *phronēsis*).²⁵ Scharffs points to an additional reason why both of these virtues are essential to good judging or lawyering:

Although Aristotle was not entirely correct in maintaining that craftsmanship does not involve habits of character, but only intellectual dispositions, there is a kernel of truth in Aristotle’s claim. Craftsmanship involves dispositions such as patience, a love of deliberation, care in the use of materials and tools, and a respectful attitude towards the past, which can accurately be characterized as virtues of character. But in spite of this, there is a sense in which craftsmanship is an amoral ideal. Craft skills and craft dispositions can be used in the furtherance of worthwhile as well as objectionable ends. Practical wisdom, in contrast, depends explicitly and categorically upon virtue of character. Practical wisdom helps ensure that the craftsman’s ends will be right.²⁶

Upon my graduation from law school in 1993, I was privileged to be the law clerk for Justice Randy J. Holland, who presently is serving an unprecedented third twelve-year term on the Supreme Court of Delaware. Holland is also a past president of the American Inns of Court and a long-time champion of its history, values, and ideals. The year of my clerkship was the most transformative experience of my professional life. It was truly an apprenticeship in the legal craft. In working with Holland, I observed a model of integrity in making principled decisions and of excellence in writing about them. Through his words and his example, he indelibly impressed on me the fundamental importance of good character and ethical conduct in the legal profession—a moral world in which judges and lawyers are entrusted with distinct responsibilities for how the law affects the lives, liberty, and property of others.

During my clerkship, I observed Holland’s patience—with counsel in oral arguments, with court personnel both in and out of chambers, and with me. I witnessed his love of delibera-

tion, as in the process of making decisions he scrutinized legal arguments with passionate reason.²⁷ I saw the care he took in his preparation for consideration of appeals, including meticulous reading and research of the details of case precedents and statutes, and in the writing and revising of opinions and orders. In seeing his care, and his standards, I was inspired to perform my duties as law clerk with my own best thought and attention.²⁸ I was also greatly affected by his “respectful attitude towards the past,” as reflected by his scholarly interest and explorations of the history of the legal profession and its honorable traditions across international borders,²⁹ in our nation,³⁰ and in the state of Delaware.³¹

Most significantly, through the experience of clerkship I came to know Holland more deeply as a person whose character and actions manifest the virtue of practical wisdom, not only pertaining to the law but also on matters beyond the walls of the courthouse. I came to understand more profoundly the vital role judicial independence plays in sustaining the rule of law and serving the interests of justice.³² And from his example as an independent judge, as I practiced and studied the law in the years that followed, I was prepared to understand the cardinal value of a lawyer’s independent professional judgment in representing a client. I found in Holland a leader, a teacher, and a mentor.³³ My own decision to become a full-time law professor was inspired by my desire to pass on to the next generations of lawyers the professional knowledge, skills, and values that I began to cherish in a new and special way during my clerkship.

If law is a craft, its tools may be wielded by hands guided by a virtuous character, or led astray by a vicious one. Exercising the moral virtues such as justice, courage and honesty—and deliberating, choosing and acting with practical wisdom—are essential to a lawyer’s forming and sustaining a good character for the practice of law. When the fullness of its responsibilities are accepted and fulfilled by the law clerk and the judge in accordance with its best traditions, a judicial clerkship offers a novice lawyer an apprenticeship in the lawyering virtues and an enduring foundation for a flourishing life in the law. ♦

Please visit our website to view the endnotes.

Michael S. McGinniss is an Associate Professor of Law at the University of North Dakota School of Law in Grand Forks, ND, where he teaches Professional Responsibility, Evidence, Conflict of Laws and Advanced Legal Ethics. He is a master of the Randy H. Lee American Inn of Court.

© 2015 PROF. MICHAEL S. MCGINNIS. This article, used with permission from the American Inns of Court and Michael S. McGinniss, was originally published in the March/April 2015 issue of *The Bench*, a bi-monthly publication of the American Inns of Court. This article, in full or in part, may not be copied, reprinted, distributed, or stored electronically in any form without the express written consent of the American Inns of Court.