

**John Marshall:
Hidden Hero of American Self-Government**

A Professionalism CLE Presentation by
Kevin C. Walsh
Professor, University of Richmond School of Law
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Presentation Outline & Lecture Notes

- Do we really need heroes?
 - Individual heroes vs. national heroes
 - The example of George Washington
- What is the Johnny Carson effect?
 - Why do we need someone other than George Washington as a hero today?
- In what way does looking to John Marshall as a hero imitate how Marshall looked to Washington?
- Should this really count as an “Ethics CLE”?
 - The distinction between legal ethics and legal professionalism
- Virginia’s Principles of Professionalism
 - Purpose
 - Conduct toward everyone with whom we deal professionally
 - Conduct toward clients
 - Conduct toward courts and other institutions
 - Conduct toward opposing counsel
- From Professionalism to Character, Character to Virtue, and Virtue to Heroism

- From Professionalism to Character
 - The preamble to the principles describes professionalism as about “how” we do things as lawyers, as compared with “what” we do. But the principles are still organized around conduct in particular settings: conduct toward everyone; conduct toward clients; conduct toward courts and other institutions; conduct toward opposing counsel.
 - There are some words repeated in every area: “respect” and “courtesy.” There are other concepts at work as well: self-governing profession, professional integrity. Even though the principles recognize the distinction between “what” and “how,” they are still largely focused on behaviors, combined with some adverbial feature, like “promptly” or “diligently” or “with dedication.”
 - When you add all of these adverbial features up, you can form something of a picture of what the lawyer who acts with professionalism is like, you get the idea of a certain kind of person. To be a professional is to inhabit a certain kind of role in a particular kind of way; it is to be a character.
 - In thinking about the principles of professionalism, we see something about how our moral imagination tends to work these days. We tend to work from outward to inward: begin the right kinds of outward actions; move to the right kinds of features one exhibits when engaging in those actions; then move to the right kinds of habitual dispositions that one possesses that enable one to exhibit the right kinds of features in connection with the right kinds of actions; then, finally, move to some account of the kind of character that one should have to give rise to the right kinds of habitual dispositions that give rise to the right kinds of features in connection with the performance of the right kinds of actions.
 - The principles of professionalism operate primarily at the second level, although there are some hints of the third level, and a small hint of the fourth.
 - From the point of view of our nineteenth-century forebears, as well as their classical models, the modern way of approaching

professional behavior is backwards. They would have started with some idea of character; they would have described the character of a legal professional by reference to the virtues or excellences of that character; they would have described those virtues, understood as habitual dispositions, by reference to the characteristics of actions performed by one possessing the requisite virtues; and they would have understood the right kinds of actions to be those of the sort that would be performed by persons presenting the requisite virtues.

- Because the ideas of character and virtue have been displaced in the modern professional imagination, we have to begin with the idea of professionalism that is in the promulgated principles, and do some recovery work to get to what really matters when it comes to professional formation. But the connections are there to be recognized once we know what we're looking for.
- From Character to Virtue
 - “Character” can be understood as “an ensemble of settled dispositions—of habitual feelings and desires. To have a character of a certain sort is to possess a set of such dispositions that is identifiable and distinct.” (Anthony Kronman, The Lost Lawyer 15).
 - “[T]he claim that someone has good judgment is understood to be a claim about his character and not merely the breadth of his learning or the brilliance of his mind.” (Kronman at 16)
 - In classical moral thought, a virtue is a moral excellence manifest in habit or disposition. But, “[a] virtue such as honesty or generosity is not just a tendency to do what is honest or generous, nor is it to be helpfully specified as a ‘desirable’ or ‘morally valuable’ character trait. It is, indeed a character trait—that is, a disposition which is well entrenched in its possessor, something that, as we say ‘goes all the way down,’ unlike a habit such as being a tea-drinker—but the disposition in question, far from being a single track disposition to do honest actions, or even honest actions for certain reasons, is multi-track. It is concerned with many other actions as well, with emotions and emotional reactions,

choices, values, desires, perceptions, attitudes, interests, expectations and sensibilities. To possess a virtue is to be a certain sort of person with a certain complex mindset.”

(Stanford Encyclopedia of Philosophy, Virtue Ethics, <http://plato.stanford.edu/entries/ethics-virtue/>)

- From Virtue to Heroes
 - The challenge with growing in virtue is that it does not suffice to have rules or principles. One must have role models who have dealt with similar challenges in all of their complexity.
 - This is where heroes come in. Looking to heroes serves two functions: (1) epistemic; (2) energizing. “The epistemic function refers to the knowledge and wisdom that hero stories impart to us. The energizing function refers to the ways that hero stories inspire us and promote personal growth.” (Allison & Goethals, *Hero Worship: The Elevation of the Human Spirit*, 46 *J. Theory Social Behavior* 187 (2015).)
 - Unfortunately, we have lost sight of this. Lawyers hesitate to speak of heroes and prefer the more anodyne language of rules and principles. The insights we gain from emulating the admirable behavior of others are, at base, what give the principles of professionalism whatever power they possess for illuminating and guiding how we ought to act.
- John Marshall’s Superpower # 1
 - John Marshall is the leading hero of the American legal profession. He is the one figure who represents American law, according to even a skeptic like Oliver Wendell Holmes, Jr. What was it about his character that made him so special?
 - Observation of William Wirt, in *The Letters of the British Spy*
 - “He possesses one original, and, almost, supernatural faculty; the faculty of developing a subject by a single glance of his mind, and detecting at once, the very point on which every controversy depends. No matter what the question: though ten times more knotty than “the gnarled oak,” the lightning of heaven is not more rapid nor more resistless, than his

astonishing penetration. Nor does the exercise of it seem to cost him an effort. On the contrary, it is as easy as vision. I am persuaded that his eyes do not fly over a landscape and take in its various objects with more promptitude and facility, than his mind embraces and analyzes the most complex subject.”

- “Possessing while at the bar this intellectual elevation, which enabled him to look down and comprehend the whole ground at once, he determined immediately and without difficulty, on which side the question might be most advantageously approached and assailed. In a bad cause his art consisted in laying his premises so remotely from the point directly in debate, or else in terms so general and so specious, that the hearer, seeing no consequence which could be drawn from them, was just as willing to admit them as not; but his premises once admitted, the demonstration, however distant, followed as certainly, as cogently, as inevitably, as any demonstration in Euclid.”
 - Why is this a superpower? What’s so great about being able to spot the crux of an issue and to reason compellingly from premises to conclusion? It sounds rather normal. But some people are better at this than others, and it can make a big difference in how events turn out.
 - Let me give you three examples from Marshall’s life. The first two are real, and the third is probably not. But it’s one of those episodes that is so close to the truth that it better captures the truth than something that is actually true.
- Illustration # 1: Constitutionality of the Jay Treaty
 - Connection between power of persuasion and courage of conviction: Marshall’s defense of the constitutionality of the Jay Treaty.
 - From Marshall’s autobiography:
 - ¶22Throughout that part of the year which followed the advice of the senate to ratify Mr. Jays treaty, the whole country was agitated with that question. The commotion began at Boston and seemed to rush through the Union with a rapidity and

violence which set human reason and common sense at defiance. The first effort was to deter the President from ratifying the instrument—the next to induce Congress to refuse the necessary appropriations. On this occasion too a meeting of the citizens of Richmond was convened and I carried a series of resolutions approving the conduct of the President.

- ¶23As this subject was one in which every man who mingled with public affairs was compelled to take part, I determined to make myself master of it, and for this purpose perused carefully all the resolutions which were passed throughout the United States condemning the treaty and compared them with the instrument itself. Accustomed as I was to political misrepresentation, I could not view without some surprize the numerous gross misrepresentations which were made on this occasion; and the virulent asperity, with which the common terms of decency in which nations express their compacts with each other, was assailed. The constitutionality of the treaty was attacked with peculiar vehemence, and, strange as it may appear, there was scarcely a man in Virginia who did not beleive that a commercial treaty was an infringement of the power given to Congress to regulate commerce. Several other articles of the treaty were pronounced unconstitutional; but, on the particular ground of commerce, the objectors beleived themselves to be invulnerable.
- ¶24As it was foreseen that an attempt would be made in the legislature to prevent the necessary appropriations, **one or two of my cautious friends advised me not to engage in the debate. They said that the part which it was anticipated I would take, would destroy me totally. It was so very unpopular that I should scarcely be permitted to deliver my sentiments, and would perhaps be treated rudely.** I answered that the subject would not be introduced by me; but, if it should be brought before the house by others, I should undoubtedly take the part which became an independent member. The subject was introduced; and the constitutional objections were brought forward most triumphantly. **There was perhaps never a political question on which any division of opinion took place which was susceptible of**

more complete demonstration; and I was fully prepared not only on the words of the constitution and the universal practice of nations, but to show on the commercial proposition especially, which was selected by our antagonists as their favorite ground, that Mr. Jefferson, and the whole delegation from Virginia in Congress, as well as all our leading men in the convention on both sides of the question, had manifested unequivocally the opinion that a commercial treaty was constitutional. **I had reason to know that a politician even in times of violent party spirit maintains his respectability by showing his strength; and is most safe when he encounters prejudice most fearlessly. There was scarcely an intelligent man in the house who did not yield his opinion on the constitutional question.** The resolution however was carried on the inexpediency of the treaty.

- ¶25I do not know whether the account given of this debate, which was addressed to some members of Congress in letters from Richmond, and was published, was written by strangers in the gallery or by some of my partial friends. Be this as it may my arguments were spoken of in such extravagant terms as to prepare the federalists of Congress to receive me w^{ith} marked attention and favour, the ensuing winter when I attended in Philadelphia to argue the cause respecting British debts before the Supreme court of the United States.¹⁴ I then became acquainted with Mr. Cabot, Mr. Ames, & Mr. Dexter & Mr. Sedgewic, of Massachusetts, with Mr. Wadsworth of Connecticut, and with Mr. King of New York. I was delighted with these gentlemen. The particular subject which introduced me to their notice was at that time so interesting, and **a Virginian who supported with any sort of reputation the measures of the government was such a rara avis, that I was received by them all with a degree of kindness which I had not anticipated.** I was particularly intimate with Ames, & could scarcely gain credit with him when I assured him that the appropriations would be seriously opposed in Congress.
- ¶26It was about or perhaps a little after this time that I was invited by **General Washington to take the office of Attorney General of the United States.** I was too deeply

engaged in the practice in Virginia to accept this office, though I should certainly have preferred it to any other.

- Marshall to Hamilton 25 April 1796: Dear Sir Richmond, April 25, 1796 Yours of the 14th only reachd me by the mail of this evening. I had been informd of the temper of the house of representatives & we had promptly taken such measures as appeard to us fitted to the occasion. We could not venture an expression of the public mind under the violent prejudices with which it had been impressd so long as a hope remaind that the house of representatives might ultimately consult the interest or honor of the nation. But now when all hope of this has vanishd, it was deemd adviseable to make the experiment however hazardous it might be. **A meeting was calld which was more numerous than I have ever seen at this place & after a very ardent & zealous discussion which consumd the day a decided majority declard in favor of a resolution that the welfare & honor of the nation requird us to give full effect to the treaty negotiated with Britain.** This resolution with a petition drawn by an original opponent of the treaty will be forwarded by the next post to Congress. The subject will probably be taken up in every county in the state or at any rate in very many of them. It is probable that a majority of the counties will avow sentiments opposd to ours, but the division of the state will appear to be much more considerable than has been stated. In some of the districts there will certainly be <many> a majority who will concur with us & that perhaps may have some effect. **As Man is a gregarious animal we shall certainly derive much aid from declarations in support of the constitution & of appropriations if such can be obtaind from our sister States.** The ground we take here is very much that of Mr. Hillhouse. We admit the discretionary constitutional power of the representatives on the subject of appropriations but contend that the treaty is as completely a valid & obligatory contract when negotiated by the President & ratified by him with the assent & advice of the Senate as if sanctiond by the house of representatives also under a constitution requiring such sanction. I think it woud be very difficult perhaps impossible to engage Mr. H. on the right side of this question. If you have any communications which might promote a

concurrence of action we shall be proud to receive them. With much respect & esteem I am dear Sir your obedt. J Marshall

- Illustration # 2: The Thomas Nash/Jonathan Robbins Extradition
 - From Story's Discourse on Life, Character, Services:
 - On one occasion, however, he took a leading part in a most important debate, which acquired for him a wide public fame, and therefore requires notice in this place. I allude to the debate on the case of Thomas Nash, otherwise called Jonathan Robbins, who had been surrendered to the British government for trial for a supposed murder, committed by him on board of a British ship of war. Certain resolutions were brought forward, censuring the conduct of the Executive for this act, in terms of decided disapprobation, as unconstitutional and improper. Mr. Marshall, in the course of the debate, delivered a speech in vindication of the right and duty of the Executive to make the surrender, which placed him at once in the first rank of constitutional statesmen. The substance of it is now in print It is one of the most consummate juridical arguments which was ever pronounced in the halls of legislation; and equally remarkable for the lucid order of its topics, the profoundness of its logic, the extent of its research, and the force of its illustrations. **It may be said of that speech, as was said of Lord Mansfield's celebrated Answer to the Prussian Memorial, it was Riponse sans replique, an answer so irresistible, that it admitted of no reply. It silenced opposition, and settled then and for ever, the points of national law upon which the controversy hinged. The resolutions did not, indeed, fall lifeless from the Speaker's table, though they were negatived by a large majority. But a more unequivocal demonstration of public opinion followed. The denunciations of the Executive, which had hitherto been harsh and clamorous everywhere throughout the land, sunk away at once into cold and cautious whispers only of disapprobation. Whoever reads that speech even at this distance of time, when the topics have lost much of their interest, will be struck with the prodigious powers of analysis and reasoning which it displays; and which are enhanced by**

the consideration, that the whole subject was then confessedly new in many of its aspects.

- From Henry Cabot Lodge Oration on John Marshall Day:
 - “Albert Gallatin sat near the speaker taking notes for a reply. The pencil moved more and more slowly, the notes became fewer and fewer, and at last stopped. **“Do you not mean to reply to him?” said a friend. “I do not,” said Gallatin; “because I cannot.” Many of the opposition thought the same,** and the resolution was defeated by a vote of nearly two to one.
- Illustration # 3: Thomas Jefferson’s Caution
 - From Rutherford B. Hayes diary, reporting on what Justice Story said in class:
 - “Thomas Jefferson said: ‘When conversing with Marshall I never admit anything. So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone. So great is his sophistry you must never give him an affirmative answer or you will be forced to grant his conclusion. Why, if he were to ask me if it were daylight or not, I’d reply, “Sir, I don’t know, I can’t tell.”’
- John Marshall’s Superpower # 2
 - “Disagreeability”: The ability to disagree without being disagreeable.
 - Examples of this:
 - Henry history—opposition, mutual respect, endorsement.
 - Unanimity of court, including Jeffersonian appointees.
 - Friendship with all different people (except Jefferson)
 - A lot of people emphasize Marshall’s moderation. This is not quite what I’m aiming to capture, as some people moderate their own views because they don’t want to be disagreeable. But sometimes it is essential to disagree.

- So this quality is less about a “what” he believed than “how” he operated in the context of disagreement.
 - On Marshall’s effectiveness and its relationship to his temperament, consider the observations of former Chief Justice Rehnquist:
 - “[T]hrough his leadership and his written opinions, Marshall was able to build the Court and the Judiciary into a truly co-equal branch of the federal government, one charged with the ultimate responsibility for determining the constitutionality of governmental acts. Of the other three lawyer-statesmen of the time, **Alexander Hamilton had the intellect and the foresight to have done what Marshall did in his thirty-four years, but he lacked the temperament; he was too often hasty and irascible in his dealings with other people.** James Madison lacked the commanding personality, and Thomas Jefferson never would have been satisfied with so narrow a confining role.”
Rehnquist, *The Lawyer-Statesman in American History*, 9 HARV. J. L. & PUBLIC POLICY 537, 544 (1986).
- Tying back Marshall’s superpowers to the Virginia Principles of Professionalism
 - One of the two features of Marshall’s character I have emphasized, his “virtues,” if you will, makes an appearance in the Virginia Principles of Professionalism.
 - “Disagreeability” appears in the principle relating returning telephone calls, e-mails, and other communications promptly.
 - Marshall’s characteristic reasoning style, however, does not show up. The closest we might be able to come is the call to “[a]ct as a mentor for less experienced lawyers and as a role model for future generations of lawyers.”
 - When younger lawyers looked up to Marshall, this reasoning style was the signal feature that they seized upon.

- When Wirt wrote Letters of a British Spy, he was a young lawyer practicing in Richmond. He would go on to become one of America’s most distinguished lawyers, and a leading lawyer-statesman in his own right.
 - In comparison with the older ways of inculcating professionalism, virtue, and character, the Virginia Principles of Professionalism are more milquetoast than meat (or pick your favorite vegan-friendly food). We can see traces of the character-based approach, but because the professional ideals of the lawyer-statesman no longer hold the near-universal attraction they once held, we are left with a mish-mash of platitudes and practical tips—all of which are helpful and worthy, but which tend to wash over professionals without capturing their imagination or filling their chests.
- Is this hero worship?
 - One of the causes of the demise of the lawyer-statesman ideal was a kind of egalitarianism. The idea that some lawyers are better than other because they have better-formed characters and dispositions cuts against the grain of this egalitarianism. And one manifestation of an egalitarian objection that emerges takes the form of an accusation of hero worship.
 - Adherents of the lawyer-statesman ideal need not be defensive here. They can embrace the hero idea, even while rejecting the “worship” idea. Marshall was not a deity and he is not worthy of worship. He is worthy of emulation, albeit emulation that requires transposition of key for harmony in our own times.
- Concluding reflections
 - In pursuing the path we have followed, we have followed Marshall himself, not only looking to his virtues and character, but to how he went about building those up, including through his biography of Washington. Let’s conclude by looking at what he said of Washington’s character and consider how it is also true of Marshall.
 - Is this not a more satisfactory way of “educating and encouraging attorneys to aspire to and achieve **higher and more noble standards of professional conduct** than the minimum standards set

forth in recognized formulations of rules of professional conduct or codes of professional responsibility”?

- Q & A