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## Living in the Law

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### Introduction

Legal ethics is largely concerned with questions of moral permissibility. Is a lawyer morally permitted, for example, to destroy the character of an innocent witness through ruthless cross-examination or to withhold information, unknown to the authorities, regarding his client's participation in past crimes? A lawyer has a duty to advance the interests of his clients with maximum effectiveness, within the limits of the law,<sup>1</sup> and to do this must often perform actions that from a moral point of view may seem dubious or even indefensible. Whether, despite the appearance of impropriety, these actions are in fact morally allowable is generally assumed to be the central question of legal ethics.<sup>2</sup> Most affirmative

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The traditional use of the male pronoun "he" to refer to persons of both sexes is a practice that has in recent years become a subject of controversy. Writers have adopted different strategies to deal with the problems they believe this practice presents. Some, for example, never use "he" alone, but always substitute "he or she" instead, and others alternate the use of "he" and "she," either randomly or in some regular way. The first of these strategies I find cumbersome and the second has always seemed to me (as a reader) more distracting than enlightening or refreshing. I have therefore elected to follow a modified version of the traditional practice, using "he" alone most of the time and "he or she" occasionally. Whatever its vices, this approach at least possesses the virtues of clarity and economy. When I use the pronoun "he" and its variant forms in a general or impersonal sense, I mean, of course, to refer to men and women alike.

\* See Comment accompanying Rule 12 of the American Bar Association, Model Rules of Professional Conduct (1983) ("Model Rules"), noting that "[t]he client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." The lawyer's professional obligations are quite limited; a lawyer is not, for example, supposed to lie to a tribunal or fail to make disclosures necessary to avoid a fraud on the court. *Id.*, Rule 3.3.

<sup>1</sup> For works on legal ethics dealing primarily with issues of moral permissibility, see, e.g., L. Ray Patterson, *Legal Ethics: The Law of Professional Responsibility* (1982); David Luban, ed., *The Good Lawyer: Lawyers' Role and Lawyers' Ethics* (1983); Geoffrey C. Hazard, *Ethics in the Practice of Law* (1978); Monroe H. Freedman, *Lawyers' Ethics in an Adversary System* (1975); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. Rev. 83 (1980); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 Cal. L. Rev. 669 (1978).

answers to this question appeal to the advantages of an adversarial system of adjudication and attempt to show that various actions that would indeed be objectionable if performed outside the context of such a system must be encouraged, or at a minimum allowed, if the advantages of the system as a whole are to be secured.<sup>3</sup> Arguments of this sort lead, in turn, to the further question of whether adversarial procedures are themselves morally acceptable, a question that grows directly from our doubts about the permissibility of the more specific things that lawyers do. These doubts culminate in uncertainties about the moral propriety of the adversarial system as a whole, and it is to this latter topic that Anglo-American writers on legal ethics have devoted the greatest attention—unsurprisingly, given their preoccupation with the issue of moral permissibility in general.

In this article, I raise, and attempt to answer, a question of a different sort. My question does not concern the moral justifiability of what lawyers do, but the reasons a person might have for choosing the life of a practicing lawyer in the first place.<sup>4</sup> What is it about the life of a lawyer that justifies the very large commitment which the decision to pursue it entails? Put differently, why should anyone care about being or becoming a lawyer, or leading the life to which the choice of law as a career confines one?

This question raises what is, in one sense, a subordinate problem, for it makes no sense to ask it unless we assume that the life of a practicing lawyer is indeed a morally acceptable one (which in turn presupposes that the actions a lawyer must routinely perform in the course of his or her professional duties are not themselves indefensible from a moral point of view). The life of a tyrant, as Socrates observed, may be immensely attractive, but since it necessarily involves wrongdoing, one can never have a reason to choose

<sup>3</sup> See, for example, Freedman, *Lawyers' Ethics in an Adversary System* (cited in note 2) (defending various seemingly unethical practices— withholding information about a client's previous crimes, presenting perjured testimony, "chasing ambulances"—on the grounds that they are needed to sustain the adversary system mandated by the Constitution and by humanitarian concerns). See also Stephan Landman, *The Adversary System: A Description and Defense* (1984) (arguing that the adversary system is itself a good thing and that the lawyer's role in it therefore should be considered morally meritorious).

<sup>4</sup> For another, recent attempt to answer this question, see James Boyd White, *The Study of Law as an Intellectual Activity: A Talk to Entering Students*, in James Boyd White, *Heracles Bow: Essays on the Rhetoric and Poetics of the Law* 49-59 (1985) (suggesting that the life of a lawyer provides a particularly good opportunity to "learn both how to function in an inherited culture, as a member of it, and how to function at the same time as an individual," giving one "a double identity, as lawyer and as mind").

it in preference to a life of moral rectitude.<sup>5</sup> If the life of a lawyer were like a tyrant's—if it, too, inevitably entangled one in a web of wrongdoing—it would be difficult to see what could be said on its behalf. I shall assume, however, that this is not the case. It is true, of course, that lawyers sometimes act immorally, but in contrast to the tyrant they are not regularly required to do so by their work: moral evil is not an intrinsic feature of the goals they pursue or the actions they perform. I shall assume, in other words, that the life of a lawyer is one of those a person is morally permitted to choose. To say this, however, is only to say that such a life is among those one may choose without disgrace. It is not to offer any reasons for the choice itself or to suggest why one should care about becoming a lawyer rather than anything else. This latter topic is the one I propose to explore in this article. It is a topic that has been overshadowed, in the large literature on legal ethics, by the issue of moral permissibility. Yet I believe it is a subject of far greater personal importance to those in the profession, to those, that is to say, who have chosen to make their living in the law.

Why this topic has been ignored, to the degree it has, by those interested in legal ethics is itself an interesting question, but one I shall not pursue here. It is worth pointing out, however, that its neglect is by no means peculiar to the field of legal ethics but is broadly characteristic of modern moral philosophy as a whole (with a few notable recent exceptions). The philosopher Harry Frankfurt has observed that ethical theorists tend, in general, to be more concerned with questions of obligation and permissibility—what am I required to do and what choices do my moral duties allow?—than with the distinct problem of what it is that I have any reason to care about.<sup>6</sup> The general silence of moral philosophy on the subject of what we should care about suggests that this is a topic that falls outside the domain of ethics altogether, being largely a matter of personal taste, unassailable but also indefensible. To assume that this is so, however, is to trivialize many of the most agonizing questions of value that we face in our lives and to write out of ethics precisely those problems that stand most in need of our reflective scrutiny.

In the past few years, there has been a discernible reaction against this assumption on the part of many moral philosophers, particularly (and perhaps surprisingly) English-speaking philoso-

<sup>5</sup> See, for example, Plato, *Gorgias* 469-72 (W. C. Helmbold trans. 1952).

<sup>6</sup> See Harry Frankfurt, *The Importance of What We Care About*, 53 *Synthese* 257 (Nov. 1982).

phers trained in the analytic tradition. In addition to Frankfurt, I would mention Bernard Williams, Alasdair MacIntyre, Susan Wolf, Stuart Hampshire, Richard Wollheim, and Martha Nussbaum.<sup>7</sup> I write in the spirit of this reaction, and though my immediate concern is with lawyers and the lives they lead, it is my hope that what I say will contribute to the current revival of interest in the question of what it means, more generally, to live the life of a person,<sup>8</sup> to have the cares and commitments, the character traits and dispositional attitudes, that give the lives of persons their distinctive shape.

### I. INSTRUMENTALISM

#### A. Money and Honor

What sorts of reasons might one give, then, for the decision to pursue a career in the law? It is best, perhaps, to begin with the answer that many will think the least respectable, even if they also consider it the most honest. A large number of lawyers undoubtedly believe that the life they have chosen is a desirable one because it offers great opportunities for wealth and prestige, for a disproportionate share of society's material resources and high professional status. Lawyers are generally well-compensated for their work and, though as a group they are often the object of popular vilification, tend, individually, to occupy positions of distinction in their communities. This, one might think, is reason enough to choose a career in the law, and other explanations can easily seem by comparison either unnecessary or disingenuous. Many, of course, will find this view repellent and judge the lawyer who candidly admits that his or her professional goal is money and honor and nothing else irresponsibly selfish. I, too, think this conception of the worth or value of law practice deficient, but would place the deficiency at a different point.

To enter the practice of law for money and honor alone is, at bottom, to view one's professional career as a vehicle for accumulating those things that are needed in other areas of life in order to acquire or accomplish what seems intrinsically important—important, that is, for its own sake and not as a means to

some yet further end. The lawyer who takes this view of his practice treats it as a means to the things he truly cares about, the things that claim his attention, so to speak, at the end of the working day. In this general respect, however, he is no different from the rest of us, for we all do certain things not because we enjoy them or find them rewarding on their own terms but because they enable us to engage in other activities that do have these characteristics. Whether the lawyer who cares only about the pecuniary and honorific benefits of his professional work, who treats his profession as an instrumental good with no intrinsic value of its own, leads a life that in an overall sense is to be admired or regarded with pity and contempt, is a question that ultimately turns on the nature of the ends he uses the external rewards of his work to pursue. The corporate lawyer, for example, who works twelve hours a day at tasks he finds dull and unchallenging may nevertheless be leading a life that not only makes sense as a whole but even has appeal or a measure of nobility. Everything depends on what happens after hours and on whether this way of accumulating the instrumental goods needed to do the important things in life is preferable to the alternatives, both in terms of what it yields and what it takes. So a lawyer should not feel deeply ashamed to say that he is in it just for the money and prestige, though, to be sure, he must give us some account of what these things are for before we can decide whether his life is one we can admire. The question of whether he has reason to care about his professional career merges, at this point, into the larger and less focused question of whether he has reason to care about the things that give his life its meaning as a whole. He may or may not; what I want to stress is that this question is an open one even for the lawyer who values his profession not for what it is but for what it brings.

Still, as I have said, there is something deficient in this view. The deficiency lies, I think, in the breadth of the instrumental attitude that it endorses. No doubt, we must all take an instrumental attitude toward some of the things we do and even, in certain circumstances, toward other people (though our treatment of others as means—in the process of contractual exchange, for example—is usually circumscribed by obligations that reflect what might be called a noninstrumental conception of the other person).<sup>9</sup> What

<sup>7</sup> See Bernard Williams, *Moral Luck* (1981); Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (1981); Susan Wolf, *Moral Saints*, 79 *J. Phil.* 419 (1982); Stuart Hampshire, *Morality and Conflict* (1983); Richard Wollheim, *The Thread of Life* (1984); Martha Nussbaum, *The Fragility of Goodness* (1986).

<sup>8</sup> I borrow the phrase "the life of a person" from Wollheim, *The Thread of Life* at 2 (cited in note 7).

<sup>9</sup> Consider, for example, a contract for the sale of goods. The purchaser, seeking to obtain a particular item as inexpensively as possible, looks to the seller solely for the fulfillment of his desire. The seller, wishing to maximize profit, views the buyer solely as a source of profit. The two regard each other as means, each being prepared to discard the other if a

makes the nakedly instrumental view of law practice that I have just described so unattractive is that it takes in too much of life, or more exactly, too much of what is important in life. This should first be understood in a purely quantitative sense. The lawyer who works the kind of hours at the kind of pace necessary to achieve great wealth or fame is likely to discover he has little time or energy left in which to pursue the things for whose sake he has made his professional career the instrument or vehicle. Faulkner, it is true, wrote *As I Lay Dying* in six weeks while working the night-shift in a boiler room, but his tasks were intermittent and mindlessly physical and, in any case, he was a genius. No matter how humdrum, the practice of law is always a mental exercise and often an emotional one, and the intellectual and spiritual resources that a lawyer has available for his extraprofessional pursuits, whatever they may be, are bound to be depleted in the course of his work itself—significantly so if the work is as long and as demanding of careful attention as it often is.

There is a second, nonquantitative sense in which the instrumental view is deficient and this, it seems to me, is more important still. The deficiency I have in mind can best be brought out if we begin by taking note of a basic fact about the nature of personal identity. Of the various things a person does, many have no bearing on who he is, on his character or personality; he would be the same person and have the same identity whether he happened to do them or not. I myself feel this way, for example, about washing the dishes and commuting to work. There are good reasons, of course, why I do these things but I am quite confident that I would be the same person if I had never done them or never did them again. To be sure, others may view these particular activities in a different light and think of them as being more directly connected with their own distinctive identities (though I must admit that I find this difficult to imagine). What seems to me indisputable, however, is the presence in every person's life of some rough division between those involvements and activities that constitute his character or personality, on the one hand, and those, on the other, that do not, between those that make someone the person he or she is and those one merely *has* or *does*.<sup>10</sup>

better offer comes along. Their exploitation of one another is nevertheless bounded in a number of ways, for example, by the doctrine of unconscionability and duress. These impose upon the parties a limited obligation to treat one another as ends in the context of what is otherwise a mutually instrumental transaction.

<sup>10</sup> I follow Michael Sandel's useful distinction between those traits, interests, abilities,

Now the whole of a person's professional life can, in theory at least, be placed on either side of this line. There is nothing, in the nature of things, that absolutely requires that the various activities of which one's professional existence is composed be character-forming in the sense I have suggested. I believe, however, that the practice of law exerts a very strong pull in this direction. To practice law well requires not only a formal knowledge of the law (a knowledge of what the legal realists termed the "paper" rules or rules "on the books"<sup>11</sup>) but certain qualities of mind and temperament as well. Most lawyers recognize this and recognize, too, that the qualities in question are also the ones that experience in law practice tends to encourage and confirm.

I shall have more to say, later in the article, about the nature of these qualities, about the way they are acquired, and the role they play in law practice. My central claim will be that they are traits of character, permanent dispositional attitudes rooted in the realm of feeling and desire. To accept this claim, however, is to acknowledge that these are qualities a person cannot lose or acquire without experiencing a change of identity. It is to accept the idea that to be a lawyer is to be a person of a particular sort, a person with a distinctive set of character traits as well as an expertise.<sup>12</sup> I believe that something like this is true, in a general way, of other professions as well and that the very notion of a profession—as distinguished from a mere technique—implies the possession of certain character-defining traits or qualities.<sup>13</sup> Whatever the case may be in other professional disciplines, however, it is the aim of this article to show that the dispositional habits which the practice of law both requires and encourages have a bearing not only on what a person can do (like the habit, say, of touch-typing) but on who he or she is as well (like the habits of generosity and temperance).

The instrumental view of law practice does not give adequate weight to this fact. If, in addition to requiring a large expenditure of time and energy, the practice of law also has an important influ-

and desires that are "mine" and those that are simply "me." See Michael J. Sandel, *Liberalism and the Limits of Justice* 55 (1982).

<sup>11</sup> The term "paper rules" was coined by Karl Llewellyn in *A Realistic Jurisprudence—The Next Step*, 30 *Colum. L. Rev.* 431, 451 n.18 (1930).

<sup>12</sup> For unflattering characterizations of those who possess expertise without character, see MacIntyre, *After Virtue* at 79-87 (cited in note 7); Max Weber, *Politics as a Vocation*, in H. H. Gerth and C. Wright Mills, eds., *From Max Weber* 72-128 (1946).

<sup>13</sup> For an excellent account of "professionalism," see Samuel P. Huntington, *The Soldier and the State* 8-10 (1957).

ence on the kind of person one becomes, then the professional lawyer has reason to worry about the intrinsic value of his career as well as its external or instrumental worth. It is perfectly legitimate to wonder whether the sort of person one is likely to become through long immersion in the law is the sort one may reasonably take pride in being or have reason to wish to become. The problem with the instrumental view is not that it answers this question one way rather than another, but that it fails to ask it altogether and thus obscures an important dimension of the commitment entailed by the choice of law as a career.

#### B. Public-Spiritedness

There is a second, equally familiar but more respectable way of justifying this choice. I have in mind the justification of law practice as a life of public service. In my view, this second justification often has the same central weakness as the first, though not as obviously nor to the same degree.

Some men and women choose the law because they are committed to the public good and believe that law, in America at least, is the most direct path to its attainment.<sup>14</sup> This attitude, of course, is compatible with a great diversity of opinion regarding the nature of the public good itself, and to subscribe to it one need not subscribe to any particular political orthodoxy (even an anarchist who believes in the abolition of law may consistently endorse it). I wish to make three points about this attitude, which might be called the "public-spirited" view of law practice. The first is that any lawyer who lacks it altogether is to that extent a professional failure. Lawyers or not, we all have certain basic obligations of citizenship that require us to attend, sporadically at least, to matters of public concern, to the overall well-being of the communities in which we live. Lawyers have these general obligations but they also have certain special responsibilities, deriving from their status or position, to preserve and perfect the legal institutions that in our society constitute a very large part of the public order itself.<sup>15</sup> I shall not attempt here to justify these special responsibilities or to describe their contours in more detail; the reasons for them are, I hope, self-

evident, or nearly so.

My second point is that the public-spirited view, as I have called it, is not the only view capable of justifying the choice of law as a career. It is as much a mistake to think that the only ethically defensible conception of law practice is one that places the pursuit of the public good at the center of things as it is to think that lawyers have no special duties in this regard at all. Among those who practice law, some will find their moral fulfillment in the public interest, as some who belong to the wider community of citizens find theirs in a wholehearted commitment to politics. But just as it is wrong to think that a person can lead a morally respectable life only in case he chooses politics as his vocation, so it is wrong to assume that a lawyer who fails to carry his commitment to the public good beyond the point that his special, but limited, professional responsibilities require is somehow morally inferior to the lawyer who regards the attainment of these same values as the sole justification for all he does.

The third, and most important, point I want to make about the public-spirited conception of law practice is that it sometimes bears a resemblance to the instrumental view described above—or, more exactly, that it sometimes is a variant of that view and hence vulnerable to similar criticisms. At first glance, this may seem obviously false, for we tend to assume that the instrumental lawyer, the lawyer who works only in order to accumulate the resources he requires in his extraprofessional life, is a person motivated by selfish desires and characterized, above all, by a total lack of that feeling for the public good that distinguishes his public-spirited counterpart. But the difference between the two can be much narrower than our ordinary assumptions suggest. On the one side, for example, even the most thoroughgoing instrumentalist may use the material freedom he gains through work to pursue projects that, though lacking in public-spiritedness, cannot fairly be called selfish in the ordinary sense (like writing *The Life of Johnson*, for example, or working to achieve a Buddhistic selflessness through systematic meditation).

On the other side, an unbending devotion to the public good can sometimes be in theory, and often is in psychological fact, coupled with an instrumental view of the contribution one is expected to make toward it. The lawyer who chooses his career for public-spirited reasons alone may see himself merely as the instrument by which some communal good is to be achieved. He may even hate his work, find it dull and unrewarding in itself, but still consider it the most economical route to whatever political arrangements he

<sup>14</sup> Consider, for example, Anne Fagan Ginger, *The Relevant Lawyers* (1972); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 *Harv. L. Rev.* 561 (1983).

<sup>15</sup> See Model Rules, preamble (cited in note 1) (noting that a lawyer is "a public citizen having special responsibility for the quality of justice. . . . As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession").

values for their own sake.<sup>16</sup> Under other circumstances, he would perhaps have chosen another career and he may look forward to the abolition of the state, the law, and the class of professional lawyers.<sup>17</sup> For the time being, however, it is politically imperative that he continue to practice law, and the decision to do so will not seem to him irrational so long as the instrumental value of his work remains clear.

In this respect, the lawyer who views his career merely as a vehicle for justice or equality or some other public value bears a certain resemblance to the lawyer who regards his career as a means, say, to the production of musical comedies or the education of his own children. Both find the point of their professional work in something that lies outside it, and both may be inclined to view their choice of career as an accommodation to external necessity, which greater family wealth or a more just political system might have permitted them, quite happily, to avoid. To be sure, a public-spirited lawyer may find intrinsic satisfaction in his work if he believes that it not only leads to but actually constitutes an element of the public good. If a lawyer believes, for example, that the representation of indigent clients has moral value not only because it is likely to result in a fairer distribution of society's resources but because it is itself one part or aspect of what such a distribution includes, he will be more likely to think that his work has intrinsic as well as instrumental worth.<sup>18</sup> Whether he does in fact think this, however, depends on the particular conception of the public good to which he subscribes and not merely on the fact that he happens to take a public-spirited view of his own career. It is perfectly possible for someone to view all that he or she does for the sake of the public good as a necessary historical expedient that forms no lasting part of the public good itself, a ladder to be discarded once the goal has been attained, and there is evidence to suggest that some, at least, who count themselves among the public-spirited see the

<sup>16</sup> Consider, for example, Stephen Weiler, *Practicing Law for Poor People*, 79 *Yale L. J.* 1049, 1051-52, 1067 (1970) (noting that public interest law practice often "is not intellectually stimulating," acknowledging that "[i]n much of it is dull and routine," but nevertheless advocating it because "it is the only kind of practice which offers any hope of meeting the needs of poor people").

<sup>17</sup> See, e.g., Unger, 96 *Harv. L. Rev.* at 667-68 (cited in note 14); Harold Berman, *Justice in the U.S.S.R.* 28-29 (1963) (discussing Pashukanin's view that law will wither away after the socialist revolution).

<sup>18</sup> See, e.g., Weiler, 79 *Yale L. J.* at 1049 (cited in note 16) (people want to be poverty lawyers "because they have a moral concern which speaks . . . in favor of legal representation for everyone").

choice of law as a career in this perspective.<sup>19</sup>

To espouse such a view is to be public-spirited in a ruthlessly instrumental way, and any lawyer who does so in an effort to justify his professional existence runs the risks that I have associated with instrumentalism generally. Chief among these is the risk that he will fail to give due weight to the character-forming consequences of law practice, to the fact that by living in the law one not only accomplishes certain things but tends to become a certain sort of person as well. Most law students have a suspicion that this is so, but for the instrumentalist—whether of the public-spirited variety or not—the suspicion can easily become a nightmare if he or she has reason to believe that the traits of character formed in law practice are different from, or destructive of, the traits associated with whatever extraprofessional ends one happens to have embraced. The lawyer, for example, who lives for art may fear that his professional work will eventually dull his capacity for aesthetic understanding, and the lawyer who lives for justice may worry that too long an immersion in the balanced complexities of concrete cases will dissipate his passion for systemic reform. Both fears reflect a recognition of the fact that a lawyer's profession is part of his identity and can't be put on or off like a suit of clothes. For the instrumentalist, who finds no intrinsic satisfaction in his work, the realization that this is so poses a special challenge, and to meet it he may conclude that his views must be modified in certain fundamental ways.

Whether or not the public-spirited lawyer sees his career in an instrumentalist perspective, however, his conception of what gives it dignity and worth will not be shared by everyone in the profession. Though I do not find this disturbing in itself, it does raise an important question. For those who ask what reason they might have to choose the life of a practicing lawyer, or if they have already made that choice, who wonder what can be said on behalf of the lives they are now leading, but who find the instrumentalist view that I have sketched depressing and feel themselves, for whatever reason, unable to embrace the public-spirited conception of law practice—for those lawyers and would-be lawyers (a large fraction, I believe, of the profession as a whole), is there some other way of thinking about the life of a practicing lawyer that better explains its appeal? I think there is and will attempt, in the

<sup>19</sup> Roberto Unger characterizes modern leftist legal movements as aimed at "the merely instrumental use of law and legal thought for leftist ends." 96 *Harv. L. Rev.* at 666 (cited in note 14).

remainder of the article, to describe the alternative conception I have in mind. One of the main elements in the view I shall propose I have introduced already: this is the notion that law practice both requires and tends to encourage certain dispositional attitudes or traits of character, the notion, to put it differently, that a practicing lawyer not only possesses a set of distinctive skills but is likely to be a particular sort of person as well. It is the connection between this idea and the all-important, though obscure, concept of judgment that I want to examine in more detail. At the juncture of the notions of character and judgment there emerges a conception of law practice different from those I have so far considered, one that sees the value of what lawyers do, for the lawyers themselves, not so much in the fruits of their work as in the excellences of character their work requires them to develop and permits them to display.<sup>20</sup> Conceived in this way, the value of law practice is clearly something intrinsic to it, a fact that distinguishes the view I shall be developing from any form of instrumentalism, whether personal or political.

## II. JUDGMENT

My starting point is the phenomenon of judgment itself. By judgment I mean the process of deliberating about and deciding personal, moral, and political problems. We are all required to exercise judgment—almost continually about trivial matters and occasionally about very important ones. We all also recognize that some people have better judgment than others, and that the possession of good judgment is a virtue, a quality that reflects well on the person who possesses it in the way that other virtues, like courage or temperance, do. What is this virtue of good judgment that we are so accustomed to praising?

Given the pervasiveness of the phenomenon of judgment in our personal and political lives, one might assume that this would be a central question in moral and political philosophy but, interestingly enough, it is not. It is true that some philosophers (Aristotle in particular)<sup>21</sup> have addressed the subject, but none with

systematic thoroughness. Indeed, since Hobbes's rational reconstruction of political theory in the seventeenth century, the nature of judgment seems largely to have disappeared as a topic of interest among professional thinkers (with the one important exception of Kant<sup>22</sup>). The reasons for this are unclear, but it is a fact that anyone who takes up the subject today can expect only limited guidance from the past.

### A. Deduction and Intuition

If we begin by reflecting on our own experience, it must be observed that one striking feature of the process of judgment is what might be called its "nondeductive" character. To make a judgment about how to behave in a given situation or in the context of a particular relationship is rarely, if ever, a matter simply of deriving the appropriate conclusion from a set of established maxims by means of a fixed method or procedure, of deducing the answer one seeks in the same way a geometrician deduces the truth or falsity of a proposed theorem by the rigorously exact technique we call "proof."<sup>23</sup> A judgment may be sound or unsound, but this cannot be established by deductive proof alone. There are, of course, situations in which a question is nominally raised as to what one should do where the answer follows immediately and unambiguously from some general rule of conduct to which one is already committed. Should I, for example, steal my friend's watch when I find it lying on a table? To grasp the right answer in situations of this sort, however, is not normally understood to require or reveal sound judgment, though some other virtue, like courage or steadfastness, may be involved.<sup>24</sup>

Good judgment, and its opposite, are in fact most clearly revealed in just those situations where the method of deduction is least applicable, where the ambiguities are greatest and the demand for proof most obviously misplaced. To show good judgment in such situations is to do something more than merely apply a general rule with special care and thoroughness, or follow out its

<sup>20</sup> The reverse argument—that law practice often corrupts character—is made in Andrea Eshete, *Does a Lawyer's Character Matter?*, in Luban, *The Good Lawyer* at 270-85 (cited in note 2).

<sup>21</sup> See Aristotle, *Nicomachean Ethics* 1139a-1140b. Useful discussions of Aristotle's theory of practical judgment may be found in John M. Cooper, *Reason and Human Good in Aristotle* 1-88 (1975); Norman O. Dahl, *Practical Reason, Aristotle, and Weakness of the Will* 61-73 (1984); Troels Engberg-Pedersen, *Aristotle's Theory of Moral Insight* 188-222 (1983); David Wiggins and Amelie Rorty, *Deliberation and Practical Reason*, in Amelie

Rorty, ed., *Essays on Aristotle's Ethics* 221-40 (1980).

<sup>22</sup> For a discussion of Kant's theory of political judgment, based upon an inventive interpretation of his account of aesthetic judgment, see Hannah Arendt, *Lectures on Kant's Political Philosophy* (1982); Ronald Beiner, *Political Judgment* 31-71 (1983).

<sup>23</sup> See Thomas Grey, *Langdell's Orthodoxy*, 46 *U. Pitt. L. Rev.* 1, 16-20 (1983) (describing in detail the way Langdell and his followers attempted to apply the methods of geometry to legal doctrines and legal education).

<sup>24</sup> For a discussion of steadfastness and courage in the judicial arena, see Robert Cover, *Violence and the Word*, 95 *Yale L. J.* 1601, 1607 (1986).

consequences to a greater level of detail. Judgment often requires such analytic refinement but does not consist in it alone. That this is so is to be explained by the fact that we are most dependent on our judgment, most in need of *good* judgment, in just those situations that pose genuine dilemmas by forcing us to choose between, or otherwise accommodate, conflicting interests and obligations whose conflict is not itself amenable to resolution by the application of some higher-order rule. It is here that the quality of a person's judgment comes most clearly into view and here, too, that his or her deductive powers alone are least likely to prove adequate to the task.

If judgment is more than deduction, it is tempting to conclude that it must, to that extent, be a process of the very opposite sort, a process that usually goes under the name of "intuition." By intuition we normally mean a form of direct insight or apprehension distinct from any species of understanding at which one is able to arrive by reasoning alone. To be sure, intuitive insight may be preceded by a more or less elaborate process of abstract reflection. It is not itself, however, merely one more step in this same process, but represents instead a break with what has come before and the introduction of a radically different form of comprehension. We sometimes express this idea by saying that intuition is nonreflective, and in attempting to explain what we mean often find ourselves driven back to visual metaphors in an effort to express the peculiar immediacy of this mode of understanding. To have an intuition, we say, is simply to see that something is the case, to apprehend its obviousness in the same direct way that I apprehend, for example, the physical shape of the room in which I am at present sitting. Conceived in this way, intuition is analogous to vision—it is how we see things with the mind's eye—and while we all possess the power of intuitive insight to some degree, it also seems undeniable that the abilities of human beings fall, in this regard as in most others, along a scale, those with exceptional intuitive powers being able to see farther and more clearly than those of ordinary ability whose vision is by comparison clouded or confined.

If every problem requiring the exercise of judgment calls for an act of intuition at the critical moment of decision regardless of how long or how well one has deliberated about the problem in a reflective way, if, in other words, judgment always demands that at some crucial point one stop thinking and look instead, then the people who show good judgment will simply be those whose powers of intuitive vision are the most acute. There is obviously some truth in this, for we all know that clear thinking and good judgment

ment are not the same thing. Yet the notion that judgment is a form of intuition, though not as obviously mistaken as the contrasting view that it is merely a species of deduction, is misleading too, and if anything, rather more discouraging.

It is more discouraging because it tends to bring inquiry to a halt. Since intuition itself is nonreflective in nature, it can easily seem intellectually inaccessible, one of those subjects that philosophers want badly to pursue but about which they have, and can have, nothing much to say. Intuition, it is sometimes said, is a mystery that can be experienced but never understood, at least in the way philosophers would like to understand it.<sup>28</sup> If one assumes this to be true and assumes, in addition, that judgment is at its heart an intuitive process, then it will seem less surprising that the subject of judgment should have been so rarely discussed in the long tradition of western political philosophy. The conclusion that judgment is not a fit topic for philosophical analysis is a troubling one, however, and seems inconsistent with the fact that many of the most basic problems in philosophy treat matters not fully transparent to reflective reason: the nature, for example, of aesthetic and religious experience, of death, love, imagination, and desire. Judgment is as suitable a subject for philosophy as any of these others, and given the large role it plays in our lives, as important. If the equation of judgment and intuition is understood to imply a contrary view, then that alone is reason to reject it.

The characterization of judgment as a form of intuition is also importantly misleading for the following reason. If judgment is conceived of as a process of reflection followed by a moment of intuitive insight, then our assessment of the soundness of a particular judgment can never depend on the reasons given to support it, since the goodness or badness of the judgment will be a function of its intuitive brilliance and originality and these are qualities that, by assumption, no reasoned argument can express. But as a matter of fact, in assessing the judgments that others make and even in evaluating the soundness of our own past decisions, we take into account the supporting reasons offered to explain and justify them. A person of good judgment is not someone who from time to time merely makes certain strikingly appropriate oracular pronouncements—that is what prophets and seers do—but who is able, as well, to provide a compelling framework of ideas for the decisions he or she arrives at. These decisions are not deducible by reason

<sup>28</sup> For a discussion of this claim, see Richard Rorty, *Intuition*, in 3-4 *The Encyclopedia of Philosophy* 210-92 (1967).



alone, but neither is their soundness entirely self-evident—something we either see or not depending on our own powers of intuitive comprehension. Good judgment, to put it differently, has an argumentative dimension which its equation with intuitive genius obscures.

There is a further reason why the equation of judgment and intuition is misleading. Intuition is today most often thought of as a gift: one either possesses it as part of one's original inventory of abilities or one does not and in either case there is little that can be done to alter the situation. This view, which in part reflects the characteristically modern association of intuition with art and artistic ability,<sup>26</sup> renders problematic the connection between intuition, on the one hand, and experience and character on the other. If intuition is a gift, we should expect to see evidence of it even in very young people; but the kind of intuitive insight that good judgment requires is universally associated with long experience and hence with age. There are prodigies in mathematics but none, as Aristotle notes,<sup>27</sup> in the field of practical affairs—which is a reason either to revise our notion of what intuition is or abandon the claim that judgment is intuitive in nature. Furthermore, if we view a person's intuitive abilities as a kind of gift, it is difficult to see what connection they can have with his character, which always takes time to develop and cannot be regarded as a gift at all. This would not raise a problem if good judgment were not thought to be as much a trait of character as an intellectual capacity. But for reasons I shall explain, we do quite properly view it in this way and hence must choose again between modifying our conception of intuition and qualifying the claim that judgment is best understood as a form of intuitive understanding.

### B. Sympathy and Detachment

I have now considered two different ways of thinking about judgment—one that views it as a species of deduction and the other as a kind of intuition—and found both to be inadequate. The time has come for me to say something more positive about my subject. I propose to begin by examining more closely what a philosopher might call the "phenomenology"<sup>28</sup> of judgment,<sup>29</sup> the felt

experience of judging itself. I mean to explore, more exactly, the experience of a certain sort of judging, the sort that we engage in when trying to make an important personal decision about our lives—the decision, for example, to get married, have a child, or pursue a particular career. First-personal decisions of this sort are not, of course, the only ones in which judgment plays a role; we must also exercise judgment in the advice we give to others and in the political choices that we make. It is difficult, in fact, to identify an area of our private or public lives that does not provide a theatre for the exercise of judgment or depend upon its proper use. The phenomenon of judgment has certain general features, however, which are most easily discernible in its first-personal form, and it is for this reason that I have chosen to begin my account of judgment at this point. When I return to the subject of political judgment later in the article, it will be my aim to show that what I have said about the structure of personal deliberation holds in the realm of politics as well.

We must all, from time to time, make hard personal choices—to get married or divorced, go to law school or drop out, support a parent or renounce a friend. If we find such choices difficult, it is usually because the alternatives seem in some fashion incommensurable. Each has its own balance of advantages and disadvantages and there is no common metric that permits us to assess their relative attractiveness in a decisive and unambiguous way. The choice that we must make cannot, therefore, simply be a matter of deduction or calculation, as utilitarians sometimes suggest. Nor is it a matter merely of waiting for the appropriate intuition, the one that will tell us what to do. We tend to deal with our personal dilemmas, even the intractable ones, in a more active and methodical way than that. Choices of the sort I have in mind call not for deduction or intuition but deliberation, which is another name for judgment. Indeed, it is precisely in situations of this kind, where the choice to be made is between alternatives not easily compared, that our reliance upon the faculty of judgment is most evident. In exercising this faculty, what exactly is it that we do?

The answer, I think, is something like the following. When faced with an important personal decision, I am frequently required to make what amounts to a choice among competing ways of life—different ways of life that might be mine though none of them, by assumption, yet is, at least in its fully developed form. To make such a choice, I must explore the alternatives in my imagina-

<sup>26</sup> See Jacques Maritain, *Creative Intuition in Art and Poetry* 223 (1953).

<sup>27</sup> Nicomachean Ethics \*1096a.

<sup>28</sup> I use the term in the loose sense that many philosophers do, and without any intention of endorsing the specific methods associated with the philosophical school that goes under the same name.

tion.<sup>28</sup> That is to say, I must make the effort to see and feel, from within, what each would be like were I to choose it rather than the others. The effort to do this is not unlike the everyday attempts we make to understand the experience of other people,<sup>29</sup> and it resembles, too, the attempt that historians and anthropologists make to understand those who are remote from them in time and cultural attitude.<sup>31</sup> In these latter cases, of course, it is other people and not ourselves that we are struggling to understand. But the self I will become if I embrace a certain way of life may very well seem, at the moment of decision, something of a stranger too, a person both familiar and remote in the way that other people often are. So to grasp the possibilities before me, even where they are only different ways of living my own life, I need the same sort of imaginative powers that are required to make sense of someone else's situation or experience. What is needed, above all else, is a certain measure of compassion, in the literal sense of "feeling with." I must make the effort, in choosing a life for myself, to feel along with each of the persons I might become the special cares and concerns, the risks and opportunities, that give the experience of that possible future self its own distinctive shape.

This is not always easy to do. Much in the experience of my imaginary future selves is bound to remain opaque to me, so opaque, in fact, that I fail even to notice how little I understand. And though I may have an abstract conviction that a particular way of life would be the best one for me, all things considered, my present affections may pull so strongly in another direction that I am unable to feel any genuine compassion for the person I believe I ought to be. Still, even with these qualifications, our powers of compassionate understanding seem sufficiently robust to carry us across the distances that separate us from others and from our own future selves and to permit us to take up—only partially, perhaps, but in a spirit of fellow-feeling—their preoccupations and concerns.

If a person who is faced, say, with a choice between alternative careers must make an effort to grasp in imagination each of the different ways of life these alternatives represent, if it is essential to his deliberations that he entertain their claims sympathetically

and see each in the best possible light (the light in which one devoted to that way of life would see it), it is also necessary that he maintain a certain distance or detachment from the points of view he is attempting to understand. From each imaginative foray into a possible future career, he must be able to withdraw to the standpoint of decision, which is the standpoint he occupies at present. At least he must be able to do this if he is genuinely to make a decision among the alternatives rather than merely be swept along by the tide of feeling that any sympathetic association with a particular way of life—even if it is only an imagined way of life—can easily arouse. To ensure that this does not happen, to ensure that he remains sufficiently detached to survey all the alternatives from a vantage point different from any of their own internal points of view, it is necessary that he hold something in reserve even while making a maximum effort at imaginative understanding. The person faced with a hard choice must give each alternative its due; he must entertain all the possibilities by feeling for himself what is most attractive in each. But he must do this while withholding his commitment to any.

One way of expressing this idea is to say that the process of deliberation is peculiarly bifocal. Through one lens, the alternatives are seen not merely at close range but actually from within; through the other, all the alternatives are held at an identical distance.<sup>32</sup> As anyone who has ever put on a pair of bifocal glasses knows, it takes time to learn to shift smoothly between perspectives and the effort to do so can easily give one a headache. The same is true of deliberation: it is difficult to be sympathetic, and difficult to be detached, but what is most difficult of all is to be both at once. Yet it is in just this combination of opposite-seeming attributes that the process of deliberation consists. Deliberation is neither deduction nor intuition. It is the compassionate survey of alternatives viewed simultaneously from a distance, and those who show excellence in deliberation and whose judgment we value are the men and women best able to meet these conflicting requirements and to endure the often considerable tension between them.<sup>33</sup>

<sup>28</sup> See Anthony Kronman, *Practical Wisdom and Professional Character*, 4 Soc. Phil. & Pol. 203 (Aut. 1986).

<sup>29</sup> Max Scheler, *The Nature of Sympathy* 8-36 (1954).

<sup>31</sup> See Max Weber, *Critical Studies in the Logic of the Cultural Sciences*, in Edward Shils and Henry Finch, eds., *The Methodology of the Social Sciences* (1949).

<sup>32</sup> The tension between these two points of view resembles the tension that Thomas Nagel describes in both thought and morality between the perspective of one's own self and that of the universe as a whole. See Thomas Nagel, *The View from Nowhere* 3 (1986).

<sup>33</sup> For a similar account, see Beiner, *Political Judgment* at 102-28 (cited in note 22).

## C. Deliberation and Choice

To this last proposition, it may be objected that in ascribing sound judgment to a person we mean not only to imply that he or she is able to entertain an especially wide range of alternatives but able, as well, to make the proper choice among them. A person of sound judgment, it will be said, is one who regularly makes the right decision, a fact that my "procedural" account of judgment appears to ignore. I do of course agree that in attributing sound judgment to a person we are saying something about the sorts of decisions he makes as well as the deliberative procedures he employs in making them. I also believe, however, that these two aspects of judgment are connected and that the choices of a person who deliberates well—with sympathy and detachment—are themselves likely to be sound or practically wise in a sense that I shall now explain.

Someone faced with a difficult personal decision must make an effort, as I have said, to entertain the competing concerns that the possibilities before him represent; he must make an effort to enter, in imagination, each of the ways of life between which he will eventually have to choose. Now the critical term here is "entertain." What exactly do I mean by it? By entertain, I mean something different from and *less than* complete endorsement. To entertain a set of values is not to make them one's own without condition or reservation, but to take them up with a measure of detachment that sets these values apart from those to which one is at present actually committed. By the same token, however, I also mean something different from and *more than* a mere knowledge of the fact that the values in question happen to be the ones associated with a particular way of life. I may be said to have entertained a set of values, rather than simply taken account of their existence, only when I have succeeded in seeing them in a sympathetic light and have experienced for myself something of their power and appeal. Entertaining a value or concern, then, is an attitude midway between adopting it and merely acknowledging its existence. Though familiar to us all, this midway attitude is surprisingly difficult to describe. Perhaps the best we can do is say that it is the attitude of fellow-feeling; a term that suggests the combination of compassion and detachment I mean to emphasize.

It is helpful to think of the different ways of life that a person confronts when required to make an important decision about his future as representing different parts or aspects of himself, each part being developed in a way that requires the neglect or subordi-

nation of certain others.<sup>34</sup> Choices of this sort are inevitable in any moderately complicated human existence, and one of the great challenges of personal life is to discover the way of living that best accommodates all the different things one wishes to do and be. Since it is impossible to be them all, however, it is even more important to discover which way of life is most likely to preserve a relation of fellow-feeling or friendship, as Aristotle calls it,<sup>35</sup> among the different parts of one's own self, some of which must necessarily be subordinated for the sake of others. A person whose soul has, in Aristotle's phrase, "friendly feelings" toward itself,<sup>36</sup> a person whose parts are not openly at war or engaged in subtler contests of repression and revenge, possesses a quality of wholeness that is best described by the simple term "integrity." Most often, of course, we use this term to describe the steadiness of action and purpose, the reliability of character, the dignity of self-respect that a person shows in relations with others and in his or her conduct generally. It is difficult, however—if, indeed, it is possible at all—to sustain an outward constancy of this sort without the inward friendship of which Aristotle speaks. If a person's soul is divided against itself the pressures of the world are likely, in time, to explode whatever fragile truce has been established among its parts. The alternative is not the elimination of all conflict in the soul—after Freud we cannot hope or even wish for a psychic unanimity of this sort. Nor is it the kind of harmonic ordering of higher and lower parts that Plato proposes in the *Republic*,<sup>37</sup> an ordering that no longer has for us the naturalness it had for him. The alternative is sympathy toward oneself, and to a large degree it is on this attitude that the basic good of integrity depends.

Though the measure of integrity that a person achieves is in part, like most things, a matter of luck (including the luck of his original endowment of feeling and intelligence),<sup>38</sup> it is also a function of the various choices that he makes, for these are likely, over time, either to strengthen the friendly attitude that Aristotle describes or to encourage its opposite—self-hatred and a spirit of regret.<sup>39</sup> It is this difference, a difference in the consequences that

<sup>34</sup> This is of course an ancient metaphor. See Plato, *Republic* \*435e-445e (Allen Bloom trans. 1968).

<sup>35</sup> *Nicomachean Ethics* \*1168b.

<sup>36</sup> *Id.*

<sup>37</sup> *Republic* \*444d.

<sup>38</sup> See Williams, *Moral Luck* at 20-39 (cited in note 7).

<sup>39</sup> *Nicomachean Ethics* \*1150b. My account of the good of integrity draws heavily on Aristotle's analysis of the phenomenon of "moral weakness" or weakness of will. *Id.* \*1145a.

important choices have for the achievement or preservation of integrity, that marks the line, in personal matters at least, between those decisions that show good judgment and those that do not. If we say, for example, that someone has shown good judgment in his choice of a career, it is not because the particular career he has chosen—the career, say, of a scholar, artist, athlete, or entrepreneur—is intrinsically superior to the others he might have pursued instead. We have no basis for making such comparisons, at least with regard to those ways of life that have a *prima facie* claim to worthiness (of which the number is large even if it is not infinite). There is, however, another way of understanding what is meant by the claim that a person has shown good judgment in making the decisions that have turned his life in one direction rather than another. To assert this is to claim that he has chosen a life which allows him the reasonable hope of a stable friendship among his different parts, among the interests he has had to abandon or subordinate and those at the center of his life (a condition of the soul which, though often associated with some rough matchup between a person's career and his abilities, may be present where the matchup is absent and missing where it exists). When we call a personal decision wise or say that it shows good judgment, what we mean is that it promotes integrity by increasing the chances that the person who has made it will be able to live with himself on amicable terms. In the domain of personal life, wise judgments lead to integrity and unwise ones to disintegration and regret. This is the only meaning these terms can have, in this domain at least, so long as we lack a scale along which to rank the worthiness of the different ways of life to which human beings may reasonably and responsibly devote themselves.

With one additional observation, I can complete my explanation of why those who deliberate well are also likely to make wise choices. I have said that excellence in deliberation requires a certain combination of sympathy and detachment; without these qualities, a person cannot entertain the different values associated with the ways of life between which difficult decisions compel him to choose. A person who deliberates with sympathetic detachment, however, will just for that reason be more likely to make those choices that increase his chances of living a life of integrity—wise choices, in the sense that term must be understood in first-per-

sonal matters. The reason is that all genuine deliberation, as distinguished from mere deduction and delphic intuition, demands the exercise of the very fellow-feeling in which integrity consists. To deliberate about a personal problem is to show this fellow-feeling toward oneself, and it is impossible to develop such an attitude and employ it regularly over any considerable period of time without becoming the kind of person for whom the attitude itself has value, the kind of person, that is to say, who thinks it important to try to understand concerns other than those that are at present most centrally his own and who takes pleasure in his ability to do so. A person like this is bound to value his integrity. Indeed, the pleasure he takes in his powers of fellow-feeling, in his ability to be at once sympathetic and detached toward his own conflicting concerns, is just another way of describing the experience of integrity itself. The person who deliberates well is likely, as a result, to have a taste for that special form of self-regarding friendship in which integrity consists and to choose for himself a life that assigns the good of integrity a central place. Or, to put the same point differently, someone who shows good judgment in the way he deliberates is likely to show the same good judgment in the decisions that he makes, which is what I have been trying to establish.

#### D. Judgment and Character

This last argument rests on a series of assumptions that I want to clarify before proceeding, even at the risk of repeating what I have already said. I have claimed that sympathy and detachment are crucially important features of first-personal deliberation and have suggested that together they make possible a form of understanding that is unattainable without them. It would be a mistake, however, to think that either this particular form of understanding or the qualities that make it possible can be adequately described in cognitive terms alone. The person who is able to entertain a certain way of life with sympathetic detachment does indeed know something that the person unable to adopt this attitude does not. What he or she knows, however, is what it is like to have that way of life as one's own, and this is a type of knowledge that can only be acquired by taking on, in a tentative way, the cares and concerns of the life itself.

We all recognize the difference between knowing, for example, that alcohol can change a person's behavior and knowing what it is like to be drunk. Even little children and lifelong teetotalers have the former sort of knowledge, but it takes some experience with alcohol to acquire an understanding of the latter kind. What dis-

For an illuminating discussion of Aristotle's treatment of this subject, see Davidiggins, *Weakness of Will, Commensurability, and the Objects of Deliberation and Desire*, in Rorty, ed., *Essays on Aristotle's Ethics* at 241-66 (1990) (cited in note 21).

tinguishes this second sort of knowledge is its affectual component. Such knowledge is more than merely cognitive, for it consists, in part at least, of a residue of feeling that can be described in positions but acquired only through experience. The person who seeks, in a spirit of sympathetic detachment, to understand some way of life other than the one he happens to be leading aims at a similar kind of knowledge through the imaginative analogue of experience and to the extent he is successful, also takes away a residue of feeling. It is this that distinguishes his knowledge of the life in question from the knowledge he would possess if he merely understood, in the way an unsympathetic observer might, that those who lead it have certain attitudes and preferences. And just as the knowledge he acquires has an affectual component, so too the capacities he exercises in acquiring it have an affectual dimension as well; more exactly, they include certain capacities for feeling along with other, unambiguously cognitive powers. Sympathy is a capacity for the production of feeling, and detachment a capacity for the moderation or confinement of feeling. Both belong to the economy of our affective life and serve to regulate its forces. To deliberate well—which requires both sympathy and detachment—one must therefore be able not only to think clearly but to feel in certain ways as well. The person who shows good judgment in deliberation will thus be marked as much by his affective dispositions as by his intellectual powers, and he will know more than others do because he feels what they cannot.

Where these dispositions are habitual, they constitute traits of character, defining features of one's person. That this is so appears to be confirmed by our ordinary understanding of what is meant by the claim that someone possesses good judgment, for we generally interpret this as an observation about the person's character, about the kind of person he or she is, and not merely as a comment about his or her intellectual abilities. Character traits are generally associated with distinctive patterns of feeling, patterns of desire and aversion as well as modes of thought. On this familiar view, to have a particular trait is not only to hold certain beliefs or to think in a particular way, but to like some things and dislike others with steady regularity. What the person of good judgment habitually desires, and hence what defines this particular trait of character, we have seen already. In first-personal deliberation, at least, it is that wholeness of soul in which the good of integrity consists.

## E. Politics

In my account of judgment I have, up to this point, been

speaking exclusively of the sort of judgment that individuals exercise in their own private lives with regard to their personal fates. Judgment also has a public face, however, and it is to this dimension of it that I now turn.

Many important human activities are pursued collectively and have goals that can be achieved only through the coordinated action of many individuals. Certain activities belonging to this broad class are further distinguished, however, by the fact that they have as their goal the well-being of some community or collectivity itself. To take a simple example, most of those who join a voluntary association (a political party or church society or museum foundation) are likely to do so because they believe in the association's goals and wish to see them realized. In almost every association of this sort, however, there will be some who are charged with responsibility for preserving the well-being of the association itself, for seeing that the rent is paid, circulars mailed, meetings held, and disputes among members (when they arise) resolved in the way that is best from the association's point of view. Those who bear these responsibilities have a set of special concerns that most members do not, concerns we may call "organizational" or "associational" to indicate that their focal point is the well-being of the whole community to which the individual members belong.

In many communities, of course, there is likely to be little disagreement among the members regarding the nature and purpose of their common enterprise (though the absence of such disagreement is always a contingent matter that is subject to change). Where there is disagreement about the character and aims of a community, however, the associational concerns of those who are responsible for maintaining its well-being assume a much greater scope and urgency. When this happens, we may say that the concerns in question become "political" in character. To be sure, this way of speaking is broader than ordinary usage might appear to warrant, and does not coincide with the familiar distinction between public and private activities. It does, however, mark out a class of endeavors that have something important in common and helps to explain what we mean when we describe the actions of people even in a private setting (a corporate boardroom, for example, or law school faculty meeting) as essentially political in nature.

Politics, broadly defined in the way I have proposed, includes a great deal. It certainly includes, for example, the administration of many private organizations—universities, foundations, and profitmaking corporations—as well as the management of cities, states, and nations. Each of these activities, of course, has special

requirements of its own. To the extent they are political in the broad sense, however, all require judgment of a type that is analogous to the personal judgment each individual must exercise on his or her own behalf in the sphere of private life. What makes these two forms of judgment analogous is the fact that both have as their object the construction of a friendly or fraternal whole out of conflicting parts, in one case the parts of a single soul and in the other the parts of a community, the separate individuals who make it up.

In any given community, politics is the business of attending to the community's overall well-being, and the practitioners of politics will be most visible—and badly needed—when the aims or purposes of the community are in dispute. One who engages in politics must of course have some conception of what these aims or purposes are; without such a conception, political activity would literally be pointless.<sup>40</sup> In arriving at his own views, however, and in attempting to guide the community by them, it is essential that he exercise good judgment—which here, as in first-personal deliberation, requires both sympathy and detachment and the ability to combine the two. Before he decides in which direction his community should move and how current controversies about its future ought to be resolved, any would-be leader must survey the alternatives, place himself imaginatively in the position of each of the controversialists, and make an effort to see matters from their point of view. He must entertain their concerns in the sense suggested earlier. The different possible futures that an institution faces at every critical juncture in its history resemble the different ways of life between which an individual must choose at certain decisive moments in his own career. In the former case, as in the latter, what deliberation requires above all else is the effort to see each of these futures in its best possible light.<sup>41</sup>

Once this has been done, of course, a decision must still be made. But the standard by which we assess the wisdom of the choices in which deliberation terminates is the same here, in the political realm, as in first-personal matters. It is the mark of a wise or statesmanlike political decision that it enables the members of a community—its constituent parts—to live together in fellow-feeling despite the real differences of opinion that have divided them in the past and that will undoubtedly continue to divide them in

the future. Put differently, it is the sign of a wise political judgment that it promotes community, not through the construction of a false and unattainable unanimity, but in the only way that human beings with strongly divergent interests are ever likely to achieve it: by strengthening the capacity of each to entertain the views of those with whom he disagrees, a capacity that has traditionally gone under the name of political fraternity.<sup>42</sup> Fraternity is at once something less than unanimity and more than tolerance; like the midway attitude of sympathy, it belongs between these extremes of identity and indifference. Among the members of a community, we might say, fraternity is the analogue of integrity in the soul of a single person.<sup>43</sup> Those who know how to achieve these two related goods, and who have as in the other, and for essentially similar justification in the one case as in the other, and for essentially similar reasons, be said to exhibit the virtue of good judgment.

### III. THE GOOD LAWYER

At the end of Part I, after criticizing the instrumental and public-spirited conceptions of law practice, I suggested a third possible justification for the choice of a lawyer's life, one that locates the worth and appeal of such a life not in anything it leads to or produces but in the excellences of character that are demanded by and displayed in law practice itself. I suggested, in addition, that this third conception could best be approached through an analysis of the phenomenon of judgment, and in Part II examined this subject in some detail. My aim in Part III is to show that a proper understanding of the faculty of judgment gives lawyers grounds for believing in the intrinsic value of what they do and hence for choosing a life in the law, whatever other (instrumental and public-spirited) reasons they may have.

To achieve competence in the practice of law one must, of course, master a considerable body of doctrine and be familiar with the distinctive forms of argument the law employs. The truly distinguished lawyer, however, the one who is recognized by his or her peers in the profession as an exemplary practitioner and whose work is marked by subtlety and imagination, possesses more than mere doctrinal knowledge and argumentative skill. What sets such a lawyer apart and makes him a model for the profession as a

<sup>40</sup> See Weber, *Politics as a Vocation* in Gerth and Mills, eds., *From Max Weber at 115-17* (cited in note 12).

<sup>41</sup> See Alasdair MacIntyre's account of the evolution and self-critical refinement of traditions in *After Virtue* at 222-23 (cited in note 7).

<sup>42</sup> See Aristotle, *Politics* 1280b-1281a, \*1295b. For a discussion of these concepts, see Anthony T. Kronman, *Aristotle's Idea of Political Fraternity*, 24 *Amer. J. Jurisprudence* 114 (1979).

<sup>43</sup> See Plato, *Republic* \*435e-449a.

whole is not how much law he knows or how cleverly he speaks, but how wisely he makes the judgments that his professional tasks require. When one lawyer wishes to praise the work of another, the compliment he is most likely to pay him is to say that he is a person of sound judgment. Nothing counts more among practicing lawyers than this. Indeed, if one looks mainly to the rhetoric of the profession<sup>44</sup> (which, at the very least, can tell us something about how lawyers see themselves), it would appear that chief among the virtues lawyers admire and believe essential to their work is the virtue of sound judgment or prudence, to use an older term whose meaning has undergone a radical alteration in modern times.<sup>45</sup>

Law is not, of course, the only activity in which sound judgment is highly valued. It is generally thought, for example, that an outstanding statesman or diplomat is distinguished by his possession of this same capacity. But whatever the case may be in other fields of endeavor, high achievement in the law is most often associated by practitioners themselves not only, or even primarily, with knowledge and intellect, but rather with the faculty of judgment, the power of deliberation and discernment that the most troubling cases invariably require and for which no doctrinal sophistication, or sheer intellectual brilliance, is ever a satisfactory substitute.

There is some danger of confusion here and I want, therefore, to make my position as clear as possible. My claim is that law practice is an activity (more exactly, an ensemble of related activities) that can be performed well or badly or merely adequately, and that to excel at these activities, one must possess the quality I

call good judgment. I also mean to make a second and closely related claim: that the practice of law tends to promote the development of this same trait, for the general reason that long participation in any activity encourages those powers and abilities that excellence in the activity requires. From these two claims, it does not follow, and I do not mean to suggest, that anyone who practices law is bound to acquire good judgment, or that good judgment cannot be acquired outside the law in other professional disciplines or, indeed, through the experience of living generally. There are, as I have indicated, fields of endeavor other than the law in which good judgment is required and that tend, in turn, to foster it. There are also many people who learn good judgment outside the arena of work, in their private relations with family, friends and lovers. None of this, however, is inconsistent with the belief that some activities depend more than others on the exercise of good judgment (as distinguished from mere skill, which all complex activities require) and show a special tendency to call it forth in those who regularly perform them. Nor is it inconsistent with the claim that law practice is one of the activities belonging to this class. I maintain that it is, and maintain, as well, that good judgment, unlike mere skill, is a trait of character. The lawyer who accepts this last proposition can justify his choice of career in terms of the instrumentalist cannot—as the choice of a way of life and type of character. That this same justification, or something close to it, is available to the practitioners of other professions (though not, I believe, to those engaged in every line of work) does not make it less available to lawyers or detract from the significance it has for them.

It remains to be shown that law practice does in fact require the exercise of good judgment, as lawyers generally assume. I have taken note of this assumption, and endorsed it, but so far have said nothing in its defense. Instead of defending the broad claim that a good lawyer must possess sound judgment, however, I shall defend three somewhat narrower propositions: that a good judge, a good counselor, and a good advocate must each possess this quality. These are, in Karl Llewellyn's phrase,<sup>46</sup> the three main "law-jobs" and it will be useful to decompose the global concept of law practice into them. Though lawyers do other things, these are their principal occupations and if it can be shown that good judgment is required in all three, we may reasonably conclude that it is needed

<sup>44</sup> See, for example, William Rehnquist, *Sound Advice to Young Lawyers*—and Older Ones Too, *The Reporter* 21:22 (Summer 1966) ("The senior partner in the law firm—the 'rainmaker'—does not know more about the law than the junior partners or the associates. But he has that indefinable something that makes clients turn to him, not just for an opinion on strictly legal matters, but for his judgment as to how they ought to conduct their affairs."); *Judicial Conference*—D.C. Circuit, 100 F.R.D. 111, 119 (1983) (remarks of Judge Cotler praising the sound judgment of Judge John Lewis Smith); Milton Freeman, *Abel Fortas Was My Partner*, *The Reporter* 17:18 (Dec. 1983) (praising Fortas's wisdom and sound judgment and noting that it was this quality of his that led the Supreme Court to appoint him defense counsel in the famous *Gideon* case: "They were seriously considering overruling a 21 year old precedent. They wanted counsel from a wise adviser as to the means of doing so without causing important conflict within the Court. He so understood his mission, and it was indeed accomplished with a unanimous judgment and three concurring opinions, all consistent with a calm and nondivisive resolution of the important problem.");

<sup>45</sup> Kant is largely responsible for this. In Kant's moral philosophy, the term "prudence," as a result of its equation with enlightened self-interest, loses its ancient meaning and takes on the characteristically modern one. See Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals* 18-19, in Thomas K. Abbott, ed., *Kant's Critique of Practical Reason and Other Works* (1873).

<sup>46</sup> Karl N. Llewellyn, *The Normative, the Legal and the Law-Jobs: The Problem of Juristic Method*, 49 *Yale L. J.* 1355 (1940).

in law practice generally.

I begin with adjudication. Judges are lawyers who have been selected from the ranks of their profession on the assumption that they possess in special measure the excellences of the profession as a whole. It is therefore natural to assume that these same excellences will be displayed with special clarity in the work they do. My claim is that a good judge is distinguished by his capacity for sympathetic detachment, by his possession of the two qualities that form the basis of good judgment generally. I shall argue that the same is true of counselors and advocates as well.

#### A. Judging

Before reaching his decision in a case, a judge must make an effort to see the claims of the parties before him in their best possible light, which means with as much sympathy as he is able short of actually endorsing any of the positions in question. It is not enough that a judge be an interpretive genius, a Hercules of the law who is able to construct out of the resources of his own intellect a deep and elegant theory to support his decision in the case at hand. It is also necessary that he appreciate what the decision means to the parties and to those who identify with or support them, for how he presents the decision, the words he chooses to explain and defend it and often the content of the decision itself, will depend on his estimate of its meaning to the parties and the groups they represent. This is something no mere comparison of the depth and elegance of different theories can reveal.<sup>17</sup> Only by sympathetically reviewing the case from the parties' own perspectives can a judge gain such understanding. In doing so, of course, he must also maintain his distance from the parties' concerns, and the great challenge in judging is to remain detached while simultaneously exercising a maximum of sympathy toward the parties and their conflicting claims. A judge who falls in the first respect shows bias or favoritism and one who fails in the second, hardheartedness—the twin vices between which every judge must thread his way.

A judge who succeeds in doing so is likely to see the function of his decisions in a certain light: to clarify the law and improve it, of course, but also to preserve the bonds of community that legal conflict often strains. He will do this by searching out solutions

that make it possible for the parties, and those who identify with them, to live on amicable terms even after a judgment has been rendered that places the prestige and power of the law on one side rather than another. Any judge habituated to the practice of sympathy will be inclined to view this last task as one of his chief responsibilities. The exercise of his own sympathetic powers is likely to awaken in such a judge an appetite for the fellow-feeling in which the community of law itself consists, and he will be anxious to do what he is able to establish and preserve it. A judge may be intellectually brilliant and socially farsighted, but what makes his judgments wise is another quality altogether—his own personal capacity to satisfy the conflicting claims of sympathy and detachment, and the tendency of his decisions to promote a similar attitude among the members of his community generally.<sup>18</sup>

#### B. Counseling

A lawyer representing a client is in a very different position from that of a judge. Judges are obliged to remain scrupulously neutral among the interests of those who appear before them, but lawyers are expected to show a zealous partiality toward the interests of their clients, to do what they are able, within the limits of the law, to advance these interests and to serve as their champion when they come into conflict with the interests of other parties. Yet like their counterparts on the bench, practicing lawyers are regularly required to exercise judgment in their professional work and the deliberative powers they employ in doing so are essentially the same. Soundness of judgment is needed as badly in the representation of clients as it is in the decision of cases and though the contexts differ, the nature of the faculty itself does not.

Consider, first, the work of a lawyer to whom a client has come seeking counsel regarding some contemplated course of action. Many people conceive, or perhaps I should say misconceive, the lawyer's role in situations of this sort to be purely instrumental: the client declares his objective and the lawyer (after researching the matter) tells him whether the goal in question is attainable by

<sup>17</sup> See generally Robert A. Bart, *Constitutional Law and the Teaching of the Parables*, 93 *Yale L. J.* 465 (1984).

<sup>18</sup> See the remarks of Dean Acheson in praise of Justice Cardozo, in Roger F. Jacobs, ed., *1 Memorials of the Justices of the Supreme Court 456-57* (1981) ("He was able to bring to the aid of judgment an appreciation of phases of life which he had not experienced and respect for the values and ideas of other men which he understood, even if he did not share. . . . This inner grace enabled [him] . . . to speak with understanding and tolerance of the conditions of men and ideas, and, at the same time, with a rugged practicality and common sense.").



legal means and, on the assumption that it is, outlines the most effective method of doing what the client wishes. A large part of law practice does consist, no doubt, in giving ministerial advice of this sort—but not the most interesting, or rewarding, or estimable part. For one thing, in addition to finding means for ends their clients have already set, lawyers regularly help to clarify these ends themselves and even on occasion act as midwives without whom the ends might never come to light.<sup>49</sup> By this I do not mean that lawyers function as their clients' conscience, passing moral sense on their goals and plans (though every responsible lawyer recognizes that he or she must, from time to time, be prepared to do precisely this). What I mean is simply that clients often come to lawyers with confused or conflicting ends and that it is frequently part of a lawyer's job to help the client see what it is that he wishes to do and to decide whether, on reflection, he really wants to do it.

To design an efficient legal strategy for the attainment of some predetermined end requires a knowledge of the law and often considerable cleverness as well. Something more is needed, however, if a lawyer is to play a responsible role in helping his client identify and choose an appropriate set of ends in the first place. What is needed is judgment, the same combination of sympathy and detachment that a person must possess in order to deliberate wisely about his own ends. The wise counselor is one who is able to see his client's situation from within and yet, at the same time, from a distance, and thus to give advice that is at once compassionate and objective.<sup>50</sup> The merely clever<sup>51</sup> lawyer, the hired gun, is incapable of giving such advice, and though clients may rely upon his tactical assessments, they are unlikely to seek his counsel, or value his judgment, in matters where practical wisdom is required.

A second task that lawyers regularly perform, and one that also requires real judgment as distinct from mere cleverness or legal erudition is one that is analogous to the task of community-building that I have argued is an important part of the judicial enterprise. When a client wishes to embark with others on some common venture, it is the lawyer's job—or the job of several law-

yers working together—to give the undertaking a legally effective form. In general, however, it is also the lawyer's job to find, or rather to invent, a framework of rights and obligations that will accommodate the different and frequently conflicting interests of those involved. The framework in question, whether it takes the shape of a partnership or contract or corporation, may quite properly be described as a community of sorts and the lawyers working to create it must know not only what the law allows and their own clients wish, but what the other members of the community want as well. This they can discern only through the exercise of a sympathetic imagination, and the lawyer who lacks such imagination will be handicapped in his efforts to fashion a community able to withstand even the mildest shocks that an unpredictable future holds in store. Every lawyer who has ever drafted a contract, or created a partnership, has participated in the foundation of a small commonwealth, and the excellences he requires in his work might be described as the excellences, in miniature, of a founding statesman. Chief among these is good judgment—the combination of sympathy and detachment that makes it possible to hold in view a range of different interests and to anticipate, in imagination, those arrangements most likely to preserve some measure of amicability among them.

### C. Advocacy

Can it be said that advocates, like judges and counselors, require wisdom, rather than mere cleverness or cunning, in the work they do? This is an important question, for although the practice of law includes much more than advocacy in the narrow sense, it is advocacy that is most often taken, by lawyers and laypersons alike, to reveal the truth about the profession as a whole and the character of those engaged in it.<sup>52</sup> It is a question, moreover, which one might think must be answered in the negative, for it is unclear that practical wisdom, as I have characterized it, is in any sense required for the successful advocacy of a client's cause.

The job of an advocate, unlike that of a counselor, generally begins only when his client's interests have already been fixed with a high degree of certainty and his primary task cannot properly be described as that of building a community of any sort. Indeed, the

<sup>49</sup> For an analysis of the role lawyers play in shaping preferences, as distinguished from merely executing them, see Case R. Sunstein, *Legal Interference With Private Preferences*, 53 U. Chi. L. Rev. 1129 (1986).

<sup>50</sup> See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L. J. 1060 (1976).

<sup>51</sup> See Aristotle, *Nicomachean Ethics*, \*1144a-1144b (distinguishing between cleverness and wisdom).

<sup>52</sup> See Schwartz, 66 Cal. L. Rev. at 672 (cited in note 2) (noting that non-advocate functions often are regarded "almost as exceptions to the primary role of lawyers as advocates").

aim of the advocate often seems to be precisely the opposite: to destroy communities (of contract, sentiment, and shared experience) for the sake of the particular interest he represents. It is thus hard to discern, in the work of an advocate, elements that correspond to those that in the fields both of adjudication and counseling call for the exercise of sound judgment and create room for its display. All an advocate needs, many have concluded, is the sheer manipulative power that Socrates had in mind when he described rhetoric, the art of the advocate who appears before juries and other assemblies, as a technique for making bad arguments appear good and vice versa.<sup>53</sup> An advocate must be cunning, he must know what will persuade and what will not, he must, perhaps, have a touch of ruthlessness and be prepared to say and do things that under other circumstances even he would regard as reprehensible. Where in the work of an advocate is there room for those qualities of sympathy and detachment, and for the spirit of community building, that I have identified with the faculty of judgment and claim is the mark of the practically wise?

It is tempting to respond that an advocate must often act as a counselor, for it is his job not only to champion his client's cause, but also to help him decide, at every stage along the way, whether to pursue some other, less combative course of action instead (by setting a claim, for example, or pleading guilty to a reduced criminal charge).<sup>54</sup> Here, as in the work of settlement itself, there is a need for something more than cleverness or cunning, and a place for practical wisdom. But this, it must be admitted, is an unsatisfying response, for it meets the charge that a successful advocate need not be practically wise merely by pointing out that lawyers rarely act in this capacity alone. This may be true—I happen to believe it is—but what of advocacy itself, considered independently of the other functions lawyers perform? Can it in any sense be said to require genuine wisdom as distinguished from slickness and a talent for manipulation?

It is possible, I think, to construct an affirmative answer to this question if one begins by taking seriously a puzzling remark that Aristotle makes in his treatise on rhetoric. According to Aristotle, the persuasiveness of a speech depends, among other things, on "the personal character of the speaker."<sup>55</sup> "We believe good men more fully and readily than others," he observes, and notes that

"this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided." Thus "[i]t is not true," Aristotle concludes, "that the personal goodness revealed by the speaker contributes nothing to his power of persuasion; on the contrary, his character may almost be called the most effective means of persuasion he possesses."<sup>56</sup>

This last observation, which seems flatly inconsistent with the Socratic portrait of the successful rhetorician as a person of unscrupulous cunning, states a truth of great importance. Among the people with whom we live and work, some we recognize as having greater probity, prudence, and compassion than others, and we tend instinctively to give their opinions greater weight than we give to the views of those who lack these qualities. If a person widely respected for sound judgment recommends that we pursue a particular course of action, or takes a position in an institutional debate, we treat his or her advice with special seriousness just because it comes from the person it does, regardless of its content. In this sense, our assessment of a person's opinions is always, in part at least, a function of our assessment of the person himself, though, of course, other considerations enter in as well. All moral and political argument is, to this extent, irreducibly *ad hominem*, from which it follows that anyone wishing to be effective in debate will have an interest in becoming the sort of person whose opinions are respected, that is to say, a person of good judgment.

To this it might be objected that all anyone really needs in order to be successful in debate is a reputation for practical wisdom and not the trait itself.<sup>57</sup> But a person's character is more difficult to conceal than this cynical advice implies. Our characters reveal themselves in all we do and are open to view, on the public surface of our lives, for everyone to see. Indeed, a person's character is often the first thing we feel with any confidence that we know about him. The reason is that our characters (unlike our beliefs and intentions, which are more easily concealed) have a dispositional dimension—more exactly, they consist in a set of dispositions or habitual desires. What we desire is generally harder to hide than what we think or intend, and the most difficult desires to conceal are those that have congealed into habits. The character a person possesses constitutes his habit of living, and though he may be intermittently successful in keeping it from view, it is likely to

<sup>53</sup> See Plato, *Gorgias* \*455.

<sup>54</sup> See, for example, Andrew McThemia and Thomas Shaffer, *For Reconciliation*, 94 *Yale L. J.* 1660 (1985).

<sup>55</sup> Aristotle, *Rhetoric* \*1356a.

<sup>56</sup> This is the argument that Glaucon makes in order to force Socrates to give a more persuasive account of why justice is an intrinsic good. See Plato, *Republic* \*360d-361d.

show through in most of what he does. Living out of character for any period of time is like living out of one's own skin, and about as difficult. One who seeks a reputation for practical wisdom without its substance is therefore likely to be seen for what he really is—a puppeteer dissembling to the world, the kind of person whose opinions we are unlikely to accept with trust or confidence.

But surely, it will be objected, none of this has any bearing on advocacy in law. The legal advocate typically argues his case before strangers who are unacquainted with his character and who have neither the time nor opportunity to learn much, if anything, about it. Moreover, though a person's character may reveal itself quickly in informal settings, the ceremonies of the law tend to conceal rather than accentuate the individual traits of those involved by requiring them to play already scripted parts.<sup>87</sup>

To this, I would reply as follows. One of the main responsibilities of a judge is to preserve the community of law, to discover and articulate the conditions under which political fraternity is possible. It is the judge's direct responsibility to do this; he must attend to the community of law, to its construction and preservation, and cannot simply assume that it will come into existence as the indirect consequence of what he does by means of an invisible mechanism of coordination. We are used to thinking of the advocate's role as a different one: the advocate's attention is directed to his client's welfare, and if his efforts promote the community of law they do so in a roundabout way by helping to ensure the effective operation of our adversarial system of adjudication. It is a commonplace, however, that to be successful in the representation of his client, a lawyer must imaginatively place himself in the position of the judge who will decide his case. (He must do this even in a jury trial, for it is a judge who will ultimately decide the controversy on appeal.) If he cannot place himself in the judge's position and see the case from his perspective, an advocate will necessarily be limited in his ability to predict which of the arguments he might make on his client's behalf are most likely to meet with judicial favor, and thus be less effective in representing the client than he otherwise would be.

To be a good advocate, then, one must be in the habit of looking at one's own case from a judicial point of view, and since a judge's direct concern is with the community of law, an advocate who sees things from the judge's perspective and attends to his

concerns will be careful to frame his own arguments so as to emphasize the congruence between his client's interests and the interests of the legal community as a whole. Every good judge knows the difference between a wise argument and a merely clever one. A clever argument shows inventiveness in the way it uses legal and other materials to promote a client's cause. A wise argument establishes a convergence between that cause and the community of law, the community the law both expresses and sustains and whose existence it is the special obligation of judges to protect. In the cases they decide, judges are likely to give arguments of the latter sort a special weight, for these are made from their own perspective and address the issue that is of paramount importance from a judicial point of view. Wise arguments, in short, win cases, and if you are an advocate, the only way to ensure that your arguments exhibit wisdom with any regularity is to acquire the habit of looking at your client's case from the point of view of a judge whose job it is to superintend the legal system as a whole.

If it is objected that an advocate can acquire a habit of this sort without, at the same time, acquiring the character trait I call good judgment—that he or she can become a connoisseur of judicial attitudes and perceptions without becoming judicious—my response is that this entirely ignores the dispositional aspect of adjudication and of judgment generally. In order to know what a judge is likely to say in any particular case, the advocate who imaginatively assumes his position must survey the conflicting interests that the case presents with the same sympathetic detachment the judge himself exercises. This is the only way an advocate can gain the insight on which the judge relies and hence the only way in which he can predict what the judge's decision in the case will be. But it is difficult to do this—indeed, I think it is impossible—without sharing in the affective dispositions that the judge's attitude of sympathetic detachment itself entails. And where such sharing becomes habitual, it, in turn, is likely over time to awaken in the advocate who imaginatively plays the role of judge a measure of the same desire for political fraternity that motivates the judge himself. Some of the judge's own good judgment will tend, in this way, to rub off on the advocate who is constantly straining to see his client's case from the judge's point of view. If he succeeds in doing so, it is likely that the advocate will eventually come to share the judge's dispositions, to care about what the judge cares about, and once these dispositions have become settled traits of character, to show the same good judgment that the successful judge displays.

<sup>87</sup> I borrow the idea of the law's ceremonial aspects from Thurman Arnold, *The Folklore of Capitalism* 211-17 (1937).

In the beginning, of course, a lawyer may have only instrumental reasons for making the effort to see his clients' cases from a judicial point of view. Once he has acquired the capacity to do so, however, its exercise is likely to be, for him, a source of independent satisfaction. The same is true of many skills—of the skill, for example, of driving an automobile, or swimming, or even the mundane art of dressing properly. Initially, a person may wish to learn these things only for the sake of some external reward, like physical safety or parental approval, but in time he often grows to value them for their intrinsic interest and the pleasure they afford. Where the skill in question requires the controlled employment of certain affective attitudes—as the advocate's skill of predicting how a judge will view his case does—this general tendency for external goods to be supplemented by internal ones is likely to be particularly pronounced, for here the acquisition of the skill will typically be marked by a change of character, and this is something that can never be of merely instrumental importance to the person undergoing it.

It is only when an advocate has acquired the character trait of good judgment that he can be confident in his ability to see the world of legal disputes as a judge would see it and hence to distinguish wise arguments from merely clever ones. Advocates who do not possess this trait of character may be knowledgeable about the law and quick in argument, but their lack of judgment is a liability: it makes them less effective than they otherwise would be. In this sense we may with justification say that a successful advocate owes his triumphs, in part at least, to the character he possesses, to the fact that he is a person of a certain sort and not merely to his knowledge of the law or mastery of rhetorical techniques. To this extent, the truth of Aristotle's observation holds even here, in the realm of legal advocacy, where the occasions for displaying one's character are briefer and more ceremonial than in other areas of life.

I have now said enough about each of the three main branches of work in which lawyers are engaged—judging, counseling, and advocacy—to have made credible my claim that good judgment is indispensable in each. It is impossible, I believe, to be an outstanding lawyer in any of these fields if one lacks good judgment, and the sorts of tasks that lawyers perform tend in turn to cultivate this capacity by requiring its regular exercise. I do not mean to imply that all lawyers possess good judgment—many don't, of course—or even to suggest that a minimally acceptable competence is unattainable without it. It may be the case, for example,

that a person's character is so decisively formed in a certain way by the time he comes to the law that no length of living in it can give him the traits of character I have just described. But none of this alters the basic fact that good judgment is for lawyers a professional ideal, a virtue that gives meaning and dignity to their craft precisely because the craft itself cannot be practiced well without it.<sup>55</sup>

#### CONCLUSION

To the question, then, of why one would ever choose to spend a lifetime in the law the following answer might be given. To live in the law, rather than *off* it,<sup>56</sup> is to submit to its discipline and to accept its ideals. Among these ideals is the attainment and exercise of good judgment or practical wisdom. To possess good judgment, however, is not merely to possess great learning or intelligence, but to be a person of a certain sort, to have a certain character, as well. It follows that to aim at practical wisdom can never simply be to aim at the appropriation of a skill whose mastery leaves its possessor fundamentally unchanged. To aim at practical wisdom is to aim at a particular conception of character and at the way of life associated with it. To the extent one's aim is true the result is

<sup>55</sup> Though I have said nothing in this section about the teaching branch of the profession, the message of my article is directed to teachers as well as practitioners of law. Indeed, in a sense, it is directed particularly to teachers, for one of the most striking characteristics of our leading law schools today is the attitude of contempt that prevails in them toward the old-fashioned virtue of practical wisdom. Why this should be so is a long and complicated story. One thing, however, is clear: The mistrust of practical wisdom and of argument's appealing to it, which is symptomatic of so much of contemporary legal scholarship, has led to a new and disturbing division within the profession as a whole, between the practicing bar and the professorate.

<sup>56</sup> There will, of course, always be a separation of sorts between those who choose an academic career in law and those who practice their craft in some more worldly setting. In this country, such a separation has existed for at least a century, since legal education began to assume an academic character. In recent years, however, the separation has widened considerably. Most practicing lawyers still believe that excellence in the practice of law requires prudence or sound judgment, a view shared by those law teachers whose primary identification continues to be with the practicing bar. Many law teachers, however (including some of the most widely read and well-respected ones) take a different and more disparaging view of these qualities. In their view, an insistence on the importance of practical wisdom is to be regarded either as an ideological ploy or as a sign of scientific naivete. To be sure, practicing lawyers and law teachers inevitably will have different interests and aims. This difference in outlook becomes troubling, however, when it is accompanied by a loss of respect on the one side for the qualities of mind and temperament whose possession is regarded by those on the other as a badge of professional pride.

<sup>57</sup> See Weber, *Politics as a Vocation* in Gerth and Mills, eds., From Max Weber at 84 (cited in note 12) (distinguishing those who live "for" politics from those who live "off" it).

likely to be what Socrates in the *Republic* describes as a turning about of the soul, a transformation of one's own self, the development of a professional *persona*. Unlike some,<sup>60</sup> I do not regard this as a cause for regret or fear. Instead I see it as a source of pride, for the character that lawyers achieve if they live up to their professional ideals is itself an accomplishment of value marked by the attainment of a central human excellence.

There are, of course, other quite different modes of character and ways of life that are appealing too. I do not mean to suggest—what would in any case be absurdly presumptuous—that the life of a practicing lawyer is the best life anyone could lead. It is, however, one of the lives worth leading, and the virtue of practical wisdom that it holds up as an ideal is one of a small number of character traits to whose cultivation a person may reasonably devote the whole of his professional existence. A life lived in the law in this sense has intrinsic worth for the person living it. He need not look beyond his work to discover its point or find a reason for continuing, but finds reason enough in the work itself, and in the excellences he needs to do it well. Every defense of law practice that locates its good in something extrinsic to it follows a different strategy of argument and one, I think, that is bound to be less satisfying.

I have now answered the question with which I began. There is one last thought that I wish to add, however, a thought that haunts me as I think it must haunt anyone who is attracted to the view of law practice that I have defended here.

The world into which we have been born and in which it is our common fate to live is a world characterized, above all else, by what Max Weber called the process of rationalization.<sup>61</sup> In the countries of Western Europe and North America, every department of life—and this is as true of painting and poetry as it is of government and economic enterprise—has in the last century been rationalized or intellectualized to a degree unimaginable even to those Enlightenment thinkers who prepared the foundations for this development and acted as its early champions. Everywhere, even in areas of life where the intellect has always played at most a minor role, the claims of reason today enjoy a commanding priority over all others. By "claims of reason" I mean two things: first, a demand for intellectual transparency and second, for calculability.

Only those activities and institutions that are based upon rules and processes that are fully accessible to the light of reason and that provide a framework for action calculable to the highest possible degree are rational in this twofold sense. All others are irrational, which today means either unworthy or in-need of repair. Historically speaking, this is a novel idea though for us, as I have said, it is a fateful fact. The rationalization process that today carries our civilization forward has been gaining momentum for centuries, and like a powerful current it now sweeps us all along to a common destiny.

The law is as much caught in this current as everything else. Indeed, the law seems at times to be an accelerating force and has certainly supplied, out of its own particular resources, many of the main ideas that underlie the rationalization process as a whole.<sup>62</sup> There is much in our Anglo-American system of law, however, that is bound to seem anachronistic or even objectionable when viewed from the perspective of the claims of reason, and so to the extent these claims are taken seriously, there will be recurrent, and perhaps ultimately irresistible, demands that these irrational elements be purged. Among these elements, I am afraid, many will include the old-fashioned virtue of practical wisdom. Can practical wisdom remain a professional ideal in a legal world that has internalized the claims of reason?

There is, so far, only inconclusive evidence but it all points in the same direction—towards the transformation of legal education into a branch of social scientific training,<sup>63</sup> of the judiciary into a managerial bureaucracy,<sup>64</sup> and of the private law firm into a rationalized, profitmaking enterprise indistinguishable from any other economic organization.<sup>65</sup> These developments reflect, I believe, a common tendency toward increased rationalization in every branch of our profession, and the consequence has in each case been a weakening of the ideal of practical wisdom as a guiding professional norm. I do not know whether this tendency has a natural

<sup>60</sup> See Anthony T. Kronman, *Max Weber* 72-96 (1983).

<sup>61</sup> See John Monahan and Laurens Walker, *Teaching Social Science in Law: An Alternative to "Law and Society"*, 35 *J. Legal Educ.* 478 (1985) (noting meteoric rise of social science teaching in the law schools from mid-1970s to today).

<sup>62</sup> See Richard A. Posner, *The Federal Courts: Crisis and Reform* 102-19 (1985); Owen Fiss, *The Bureaucratization of the Judiciary*, 92 *Yale L. J.* 1442 (1983); Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 *U. Pa. L. Rev.* 777 (1981).

<sup>63</sup> See Ronald J. Gilson and Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 *Stan. L. Rev.* 313 (1985) (analyzing law firm as profit-making organization).

<sup>64</sup> See, for example, Bahete, *Does a Lawyer's Character Matter?* (cited in note 20).

<sup>65</sup> Max Weber, *Science as a Vocation*, in Gerth and Mills, eds., *From Max Weber at 156-56* (cited in note 12).

limit, or whether it can be deliberately reversed if we make the effort, although I am inclined to think the answer to both questions is no. Beyond a certain point—and this is the thought that haunts me—the rationalization of the law is likely to turn us all, those who teach the law as well as those who make and practice it, into bureaucratic functionaries, characterless experts whose work requires knowledge, precision, and fairness, but never judgment in the sense that I have used that term here. When this happens, the only goods remaining to those who practice law will be external goods. Will it be possible, in the world of law that I fear is growing up around us, to answer someone who asks why he should choose a living in the law or think of it as anything more than a way of passing time and making money?