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THE PURSUIT OF A CLIENT'S INTEREST

Warren Lehman*

I

[I]t is sometimes more fun to have a bad case than a good one for it tests your powers of persuasion more severely. Certainly I have seldom felt better pleased than when I persuaded three out of five law Lords to come to a decision which I was convinced was wrong

The Rt. Honorable Lord Cross of Chelsea

There has been recently a resurgence of interest in how the lawyer serves his client. Much of that interest has been occasioned by the indigestibility of the idea that the lawyer is, as it is said, a hired gun. There are those who think that instead the lawyer ought to act toward his client as a therapist. Others are concerned with rationalizing for the lawyer the ethical discomforts of servanthood (which many might guess have been brought to the fore by Watergate). Yet others see the client as victim of a structure — represented by the lawyer — that frustrates his interests while appearing to further them. Whether the tragedy is personal or structural, whether the victim is the lawyer or the client, the character of the lawyer-client relation is a persistent issue. This paper is concerned with that relation. It was written while I was unaware of all this recent work on the subject. There are some losses as a result of that innocence; there are, however, enough advantages to justify my leaving the Article essentially as I wrote it. It would certainly have been more difficult to write and probably much longer, for no reason but to inflate my ego or improve my image, had I been tempted to turn the Article into a contribution to a debate. It would also, I think, have been a worse Article. It has been hard enough to put together in straightforward fashion what I want to say. Equally important, the tone would have changed from meditation to argument. That, too, would have been a loss. We are dealing with the most difficult problems of the interior and virtuous life. Ethical dilemmas do not resolve under the assault of argument. We must speak more gently to the spirit. I have not found the way to score points gently.

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II

Clients come to lawyers for help with important decisions in their business and private lives. How do lawyers respond to these requests, and how ought they? Doubtless many clients, thinking they know what they want — or wishing to appear to know — encourage the lawyer to believe he is consulted solely for a technical expertise, for a knowledge of how to do legal things, for his ability to interpret legal words, or for the objective way he looks at legal and practical outcomes. It is as if the lawyer were being invited to join the client in a conspiracy of silence; the point of the conspiracy is that in silence neither shall question the assumption that the means can be truly separated from the end and that the end is the client's sole problem and solely his. Such an idea of the lawyer's job seems to relieve him of the ethical responsibility that might be his were he to assume a duty to comment on the wisdom or virtue of what his client is about. I do not think the burden of commenting upon the client's purposes can be so easily avoided. The interaction of lawyer and client is a moral event, whether morals are explicitly broached in conversation or not. The question is not whether the lawyer can or ought comment, but what message does he convey?

It is not self-evident that the transactions of lawyers and their clients are as I have stated, so let me say a little more. The view of the lawyer as a technician in service of a client-principal we may call instrumentalism: the lawyer is an instrument of his client's purposes. Instrumentalism of this sort is, interestingly, a psychological theory as well as a theory of legal ethics. That idea of how the lawyer ought to respond to his client is very like a widely held picture of the relation between the parts attributed to our conscious selves, which are commonly called either mind and will or reason and emotion. This notion of self is peculiar. It appears to be merely a description. However, in discourse about what it means to be human, we place value on these two parts, preferring one to the other, or describing one as more noble or more human. These judgments seem at times so contradictory as to call into question the model on which they are based. Reason is commonly thought to be our better or higher part — our noble, truly human part, the part that seeks truth and adapts itself to the world. Yet reason is an instrument in service of the irrational will, our recalcitrant, given, animal part. On the other hand, we find in that stubborn, irrational, emotive part the individuality often thought to be crying for expression. So it is that reason tells

us how to get what we want. But what we want is what we want, and that's the end of it.

Instrumentalism as a philosophy of legal practice implies that the lawyer and client together carry on a discussion of the kind a proponent of the psychology just discussed would say goes on inside a man's head: The will (the client) says, "This is what I want." The brain (the lawyer), may answer, "Here is how to get it," or, "If you try to get that, you will lose this other thing you cherish. (If you agree to fix prices, you may go to jail.)" That idea of how the mind works is widely held but woefully incomplete, and, in all but routine matters, so is the corresponding idea of the relation between a lawyer and a client. A problem common to both cases is the assumption that mind and will do not interact but are independent entities. That psychology ignores how preferences affect (some would say corrupt) the reason and how preferences in turn may be shaped by rhetoric, time, and experience. The conscious mind can influence the preferences attributed to will or emotions. The mind can and does say, "That act is demeaning," or more often, "Despite your qualms, that act is O.K." Life will imitate art, and people try to live their interior lives as if this model truly described the parts of the self. In consequence, we commonly allow reason to overbear feelings of discomfort. It is exactly so between lawyer and client. The lawyer's reason can overbear the client's feelings. He can be persuaded to do that which he would have felt badly about doing or not to do that which it would have comforted him to do. But even the lawyer's silence plays an influential part. The lawyer is always a third-party commentator upon the client's interior dialogue. To be silent in the face of a decision to let rational self-interest override feelings is to approve that decision. Whatever the lawyer does, he cannot be simply an instrument but is inevitably a party.

The instrumentalists' view fails not only because the lawyer cannot avoid being a party to the client's decision, but because the client has no decision before he sees his lawyer. It is required by the instrumentalist view that a client have, when he comes to the lawyer's office, a clear set of preferences, intransigent to discussion or circumstances. But there is no such set of preferences inside an individual that he can trot out when he gets to the lawyer's office. There is, then, no clear will of which the lawyer can be the simple instrument. The client may say, to take an obvious example, "I want a divorce." That goal of the client is a result, usually of his feeling trapped, hurt, and hopeless of any other way of coming to terms with his wife. It is not in any pro-

found sense what he wants. If a lawyer could magically return that marriage to a happy state, we should certainly call him a fool or worse if he were to bypass that opportunity on the ground that the client, having said, "I want a divorce," had defined beyond question the scope of the lawyer's obligation. The best that can be said of a divorce is that it is not what the client wants, but only that which at the moment seems to him most likely to move him toward that interior state of comfort or satisfaction that all of us ultimately seek.

In fact, everything we want to achieve we want ultimately because of the connection we suppose it to have to a desired feeling. Therefore, what we want is not the things we say we want, but the feelings we suppose they will produce. The list a client brings to a lawyer's office is not a ranking of desired states, but only of what the client supposes may produce them. Our judgment on issues of that sort is especially likely to be bad at the crucial time we go to a lawyer. We say we want justice when we want love. We say we were treated illegally when we hurt. We insist upon our rights when we have been snubbed or cut. We want money when we feel impotent. We are likely to act most sure of ourselves when most desperately we want a simple, human response. If this is true, the lawyer presenting himself as an uncritical mirror is not a satisfaction but a disappointment. The lawyer is in the deeper sense *not* then doing what the client wants. It may well be that in a given situation a lawyer can do no more than accept a particular client's statement of his desires. But that is not because he ought to be his client's tool or because he must be. (The reason for not pressing a particular client on the issue of his goals must be found elsewhere. It is a question I shall return to in a moment).

The problem of all — client, lawyer, judge — is the choice of acts: which to do, which to advise to do, what to say of those that have been done. I have adopted the traditional view that all people seek the good, or happiness, which is achieved in living and doing in the world. The relation between particular acts that might be done or things that might be gotten in the world and that interior state of being called happiness is not a necessary or simple one. Logic does not tell us which acts will produce that state; that is the subject matter of what Aristotle and St. Thomas Aquinas called practical wisdom. Practical wisdom, the virtue of those who know how to live well, is the poorly understood product of age and experience. Through time and with sensitivity we may learn to recognize what in a given situation will most advance us

toward that inner comfort that is *the* good and the sum of what we want.

The lawyer is consulted as a man of practical wisdom. People, despite an insistent undercurrent of distrust of the profession, widely look to lawyers as worthy advisers and take seriously what they have to say. Surely every lawyer has at some time dissuaded a client from some wasteful or destructive pursuit. Every lawyer, no matter what he says of the rhetoric of instrumentalism, has at some time recognized and taken advantage of a client's being malleable in his preferences, getting him to drop a personally malicious suit, or to settle rather than fight and thereby to reestablish a friendship, a business relation, or a marriage. The occasions may be few, but they are sufficient to demonstrate that the simple instrumentalist view does not describe a necessary reality. A lawyer can obtrude a personal judgment upon the wisdom of a client's expressed desires, and the client can change his mind.

III

About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.

Elihu Root

I suspect that many adopt the instrumentalist view less because of any very firm belief that it describes what the lawyer ought to do than because it is so difficult to broach with the client a touchy moral or emotional issue. For most of us such moral and personal points are hard to make under any circumstances. How much harder to risk making such a point with an apparently self-confident stranger. How do I tell him it is small to pursue a petty claim, unbecoming to maneuver an advantage, destructive to organize one's life around the hope of a successful suit? How do I say to an alcoholic client that he ought to suffer the penalty for a drunk driving charge, rather than be gotten off, or tell a sex offender that he ought to be committed for treatment?

There is the problem. I do not think I like what this client wants to do, but I would feel very uncomfortable raising the issue. What, then, do I as a lawyer do? Here is the difficult answer: I admit to myself that I cannot talk to a particular client who is off-putting or overwhelming or cock-sure, and that I would probably be a better person and lawyer if I could. This seems costly because it requires first that I take the trouble to discover in each

case what I ought to do, and second that I recognize that, like every other human being, I cannot do everything. Neither the introspection nor the confession is comfortable. It is no wonder we are tempted to avoid them. And seemingly we can. We can attempt to rationalize our engaging upon a distasteful course chosen by a client on the ground that what is to be done is the client's decision and we are but tools. That way we try to persuade ourselves that internal discomforts can be safely ignored.

It only *seems* easier to adopt the instrumentalist rationalization for proceeding unquestioningly in courses we do not really like. But it certainly does seem easier, for there is much in the culture to support such a decision: Everything tells us to isolate our own feelings and to respect even the most obviously riddled barrier the client may have erected. Certain issues are personal. It is in bad taste to explore them. Delicacy urges us not to make a client face his cupidity. Better we be its tool. Reason is trustworthy; feelings are not. Judgments of this sort are mere matters of taste. Taste is idiosyncratic and personal. What right have we to impose our tastes upon others? A becoming modesty urges us not to assert any view that might discomfort another. Everyone needs space to grow, yes, even to make mistakes. We ought stand in no one's way, do nothing to influence the natural course of a personality's flowering according to its own inner motive (a version of the error of the unchangeable set of preferences). And I have not yet touched the rhetoric of the adversary system or of liberal proceduralism. The point is that we are invited by both ideology and apparent convenience into a psychic trap. Instrumentalism offers us an argument with which to bludgeon such feelings as aversion or sympathy, which might lead us to respond as humans to our clients' predicaments. It seems an attractive alternative to the intimidating prospect of living with our clients as judging fellow men. But, as the economist says, there is no free lunch. We pay for such uneasy peace of mind as instrumentalism offers us. If feeling may be influenced by persuasive reflection, it is not talked out of existence by rationality. It is there and accumulates in the form of distaste with ourselves and what we are doing. The consequences of accumulating distaste can be personally disastrous: alcoholism, hypertension, an early heart attack, even suicide.

IV

For, whereas external goods have a limit, like any other instrument, and all things useful are of such a nature that where there is too much of them they must either do harm, or at any rate be of no use, to their possessors, every good of the soul, the greater it is, is also of greater use, if the epithet useful as well as noble is appropriate to such subjects.

Aristotle

On one side of the table an attorney, trying to hide, both from his own feelings and the client's, behind a wall called instrumentalism; on the other side a client, anxious, even if he will not admit it, for any hint he can get from the lawyer of how to be a good client, a good person, and happy. For the ordinary, infrequent user of lawyers, the approach to one is likely to be an important event in exciting, sometimes dangerous, sometimes hopeful circumstances: criminal indictment, divorce, home buying, injury, accident, business expectations, estate matters, or dealing with obtrusive and threatening regulatory agencies. The client does not know the substance of his problem or perhaps even what to expect from his lawyer. It is in large measure up to the lawyer to define what the relation is going to be. It is his ethical responsibility. The client will find judgments in the lawyer's behavior no matter how the lawyer attempts, in the act of protecting himself, to avoid judging. The client will find his guidance, if the attorney is silent, in that silence. As the silent mind approves the errant will, so the compliant attorney approves the client's.

I suppose the effect of silence is clear enough. What may be less evident is that the *way* the lawyer approaches even that narrow range of questions which the instrumentalist will admit are within his expertise will influence the client and involve both in a major moral commitment. The lawyer's style will almost certainly be utilitarian. Utilitarian ethical thinking has been so successful and become so much a part of our culture that we think in the way recommended by utilitarians without our even realizing that we are thinking ethically, let alone that we have made a commitment to an ideology.

Reviewing Charles Fried's book, *Right and Wrong*, Brian Barry remarked in the January 1979 *Yale Law Journal* that there are few utilitarians left — which perhaps has to do with the new concern with morality generally and that of the lawyer particularly. Professor Fried's work is an evidence of that concern, and in a way, so is Barry's. And I suppose it true that there remain

but a handful of serious philosophers who espouse utilitarianism and that Professor Fried's work rides the crest of the new wave. But while it is blessedly true that in the small circle of important thinkers the fashion of ethical thinking has shifted, the problem with which I am concerned is not ethical thinking but ethical doing. Utilitarianism is not just intellectually wrong. It is profoundly, destructively wrong in the everyday lives of all who have been suckered into believing it. And in truth, regardless of the fashions of professional philosophers, we have all become, and in large measure remain, utilitarians. We are all converted. The horse is very much alive, if its master is not. To rid ourselves of its power over us, we must continue to name it and to beat upon it.

Part of utilitarianism's appeal may be the result of a peculiar fact. Utilitarianism is originally an ethical theory, a theory by which it is supposed to be possible to discover the morally right act — as a matter either of public policy or of private behavior. Yet a utilitarian demonstration is viewed as a morally neutral, supremely practical guide to action. Where one would not dare urge that an act is morally right or wrong, one would feel quite free to comment upon its utility. Utility is socially acceptable; morality is not. If pressed, we suppose, though there is no proof, that long-run utilities are moral, that consideration of the long run will lead us to avoid bad behavior. Therefore, when we want to influence people to act in the manner we believe right, we are likely to try to persuade them of the long-run utility of doing so. ("Let us save the environment for our future, despite apparent short-run gains from ransacking it," but not "A good man would so use the world that it is none the worse for his having been here.") The practical utilitarian, therefore, thinks he can have it both ways; he has a moral guide to behavior without the taint of being a moralist or the possibility of ever discomfiting anyone. He is supremely reasonable. But once again, the price of self-delusion can be high.

The center of utilitarian ethical theory is the command that I so act as to produce the greatest good, or, at least a net gain in utilities. It is a powerful, persuasive idea. It is a command to do good. What could be more reasonable? How do I know what is good? I compare outcomes, imagining the sequence of events that would follow upon my taking one course or another. The destructive implication of the seductive idea is that imagined future states are the test of present acts. Therefore, Marxists, covert utilitarians that they are, judge acts in history by their conse-

quences. "The Communist Party in Germany in the interwar period made a mistake in not seeing that the Nazis rather than the center party represented the real threat. Had they allied with the center, perhaps Hitler would never come to power." So, in my private life, had I not wasted my time in school, I would have made more money. This concern with outcomes is sometimes called consequentialism. As a means of determining how to act, it can be distinguished from ethical theories that say acts are good or bad in themselves at the time they are done. We operate with a stock of such judgments about the native wrongness of lying, cheating, stealing, or hurting and in ordinary conversations often treat this old stock as if it were still fresh and salable. But when we think the least bit about such matters, we are likely to think in outcome terms, even going so far as to say "lying is bad because . . .," followed by a list of consequentialist reasons: to lie is to encourage distrust, set a bad example, lose credibility. And if we cannot think of an undesirable outcome, we are hard put to accept that we should nonetheless not do that bad act. Utilitarian consequentialism has so swept the field and become so deeply ingrained a way of thinking that it is hard to think about acts wrong in themselves without adding a consequentialist explanation. I daresay any number of readers will find it hard to decide any matter of importance without relying upon a comparison of outcomes. (The way to do it is to act as you please.)

This pervasive way of thinking about everyday decisions we might call practical utilitarianism. By that I mean the use of outcome analysis not in search of the general good, or even in the name of historic public policy issues, but in the service of self-interest in ordinary personal matters. There is, of course, a theory that the general good is promoted by the seeking of private good, that the general good is, in fact, the sum of private goods. If that is so, there is no need for a governing hand and we are licensed to seek our ends as we see fit. Such truth as there is in the identity of general and private good — and it is a profound truth — is perverted when the ends we seek are chosen on the assumption that people rationally maximize egoistic self-interest. In a word, I can so choose what it is I seek as to disconnect my idea of my good from the general good. But at this point that is an aside. The claims of welfare economics and liberal politics are for the political arena. At the moment, I am concerned only to make the point that a client's contact with a lawyer is quite likely to involve a lesson in practical utilitarianism. Even when the lawyer tries to be neutral, he gives a lesson in the particular philosophy of moral

analysis that judges acts by their consequences. It is a lesson that is not less sweeping in its implications and not less destructive because other classes in the same subject meet elsewhere.

One of the ways a client and lawyer are likely to be corrupted by utilitarianism is the result of its being not a closed but an open system — a fact easily overlooked. What I mean is that utilitarianism is not sufficient without more to answer a moral question. Before we can weigh outcomes, we need to know how they are to be valued. If a public policy under consideration would result in greater egg production, we do not know whether it is a good policy unless we know — from somewhere else — whether we want more or fewer eggs. Utilitarianism does not answer that question. It says only that we should ask it.

One reason we seldom notice the open character of utilitarianism is because to make decisions we normally consider only noncontroversial outcomes. The general presumption would be that more eggs is a good. So long as all agree upon the advantage of perpetually increasing the gross national product, the limits of public debate will be narrow, and the impression will be sustainable that we are engaged simply in minor problems of assessing the utilities. Utilitarianism collapses, however, when the consensus that is its necessary support collapses, as when a significant minority becomes committed to environmental protection. There is no utilitarian resolution to the argument between the paper manufacturers who emit wastes and the fisherman and others who do not want mercury in the Wisconsin River.

Much of what the lawyer does may seem to be based upon consensus and hence to raise no such difficult question, but often it is only the force of the lawyer's experience and position that makes a real conflict disappear. The substantive ethical act that the lawyer cannot avoid, even through instrumentalism, is the act of filling in the blanks in the utilitarian calculus. And there is the rub. The values or ends the lawyer chooses are likely to be equivalents in private life of a greater gross national product in public debate, the readily assumed, the safe, the self-evident: more money, freedom from incarceration or procedural delay. Yet for many clients, such goods are neither what they want nor what they need. Hardly anyone will dispute that the goods a utilitarian seeks are desirable. The getting of money is generally a good. So is freedom, so is time. William Simon, writing in the 1978 *Wisconsin Law Review*, says the lawyer creates a standardized person to whom he attributes standardized ends. The lawyer then acts for that hypothetical client rather than the one before him.

It would hardly be said of the standard client that his best interest may be a result that stings him or one that, at first blush, he would prefer to avoid. The values furthered by such decisions are likely to be less obvious than, for instance, the greatest net improvement in financial position. Yet the real client may in some sense want or need that seemingly less attractive result. What I want to discuss in the balance of this Article is how utilitarianism in specific kinds of familiar counseling situations leads to giving clients bad advice, advice that sacrifices their humanity in the name of seemingly self-evident goods.

My father-in-law, Charles Wooster, tells of clients of his, a husband and wife, who had been moved to give a sizeable gift to a friend who had shown them care and love. Mr. Wooster encouraged them to put off giving until the next year because a gift given that year would have been taxed less heavily. The following January, husband and wife were killed in the same accident, before the gift was delivered; there was thereafter no way to transfer the gift. The intended donee had lost out because of Mr. Wooster's tax advice. So, too, the donors had been denied the pleasure of bestowing the gift. The event suggests to a nice conscience that perhaps the advice had been wrong in the first place. Mr. Wooster was unhappy with the result, but could see nothing else — with the clients alive before him and no crystal ball — that would have been right for him to have done.

I described the problem to another lawyer-kinsman, Robert Keegan, whose response was, "Those are the breaks." I for a moment suspected him of being unfeeling, but, of course, Keegan's is the conclusion Wooster finally reached, too. Keegan had been over that ground. He wisely refused to be led into guilt-inducing reflections. A lawyer can but make the best projection his lights allow. He is not responsible for the acts of God. Keegan's is the reasonable judgment of a sane man in the face of an unhappy result. But the question remains whether there had been any practical way a lawyer in Wooster's position might avoid that kind of unhappy result. Does the necessity of giving advice on tax *consequences* trap a lawyer into encouraging his client in the belief that those *consequences* should guide his action?

A practicing lawyer, call him Doe, who also teaches client counseling, said that he is very concerned, in doing estate matters, with the possibility that a client will be overborne by information about tax consequences. His tactic to avoid that result is to persuade his client — before there is any mention of those consequences — to expand in as much detail as possible upon

what it is he wants to do. Only after that does Doe point out costs and mention ways the client's plan could be changed to save money. In teaching as well as in practice, Doe is trying to take account of the power a lawyer has to impress upon a client the importance of his lawyerly considerations. The progress represented by Doe's concerned approach is the recognition that the client's values may not be the lawyer's, or more precisely, that the real, live client's interests may not match those of the "standard client" for whom lawyers are wont to model their services.

An increasing awareness that the lawyer may improperly affect the client's decision is one tolerably healthy outgrowth of the pop psychology of the *Miranda* decision. In the lawyer's office, the client is likely, as *Miranda* in the police station, to conform his behavior to the expectations of the authority figure in residence. This is a grossly inadequate model of *Miranda's* behavior as either detainee or client, but the problem it was developed to describe, the protection of genuinely free decision making, is more serious in the law office than in the police station. If the problem is described in *Miranda* terms, the solution must isolate the client from corrupting influence, must let the lawyer say what he has to say without rearranging the preferences the client came in with. That is the worthy goal of Doe's manipulation of the order in which he presents tax information and an attractive-seeming goal that would find wide support in both psychological and legal literature.

I told Doe of a friend of mine, a widow recovering from alcoholism, who is fifty-four years old. Her house has become a burden to her, perhaps even a threat to her sobriety, although it might seem overly dramatic to say as much to a stranger. If she waits until she is fifty-five, the better part of a year, the large capital gain on the house will be tax free. She decided she did not want to go to a lawyer for fear he might talk her into putting off the sale. I asked Doe if that were realistic. He said her fear was well grounded; a lawyer might well give her the impression that another year in the house ought to be suffered for the tax saving. (I expect a lawyer's inclination to press the merits of his money-saving advice reflects, among other things, a desire to feel that his expertise is really useful. We may know no other way to judge our own usefulness.)

One possible analysis of these cases is that suggested by Doe: that the lawyer needs to be careful to discover what it is the client is really about, to give fullest possible opportunity for her interests to be explored, and to avoid the over-bearing assertion of

simple money saving. That point is made dramatically in the case of the alcoholic widow. It might appear as well that such an approach would ameliorate if not solve Wooster's problem. The point is, perhaps, that no advice should be shown favor by the lawyer. Then he need not fear responsibility for the client's decision should it come out badly.

The problem being described occurs because utilitarian analysis is incomplete until someone fills in the price tags of costs and benefits. When the lawyer's standard array of price tags doesn't quite work, the first solution is to pass the buck to the client. Give him some uncolored information and let him decide. Modifying the sequence in which information is presented can be at best palliative, no more effective than most other efforts to make people free and wise by manipulating information, whether by pressing it on people, withholding it from them, or shaping the circumstances in which it is passed on. All are based upon the faulty psychological model with which we began, the one adopted by the Supreme Court in *Miranda*: At the human core is the will, the irrational, emotive drive, at its best when under the rein of an intellect that guides it to its long-run self-interest. But, as we notice, rationality can lose control. The will can be corrupted by external, nonrational things or events, like the authority of a lawyer or policeman, or shares of stock in the defendant firm, or appeals to emotion. The problem of the lawyer or government agency is to assure that only rational influences play upon those in their charge so that the presumed internal preferences will be able to realize themselves freely by the best light of reason. (As we have said, there is no such fixed core of the self.) Rational behavior is, as we are wont to see it, the maximization of egoistic self-interest (which is presumably the will's real preference). Our great intellectual problem is to account for altruism. The only time we are sure that people are behaving rationally is when they are behaving badly. We are, therefore, driven to give people the opportunity to behave so, because we are a free society. Life follows art and they misbehave. The only cure for antisocial behavior consistent with freedom is information addressed to reason. If, after the administration of more information, the subject still decides egoistically or in a self-destructive way, we who gave the information claim no responsibility. That is our model of the political order, of how to deal with cigarette smoking, the integrity of politicians and judges, the doctor-patient relation when a serious medical procedure is under consideration, fair campaign practices, medical experimentation, legal education, the relation

between the police and the arrestee, and so on, and on and on. We wash our hands of responsibility for participating in moral discussion by transmitting largely useless, often incomprehensible information about outcomes. We talk and talk and talk. We criticize those who fail to collect boring information. We inundate ourselves with news. And we so greatly fear the impropriety of any other kind of influence that we fly to purified procedure and ethical "neutrality," hoping to absolve ourselves of responsibility. No, a higher antiseptis is not the answer to the lawyer's undue influence. It is engaged in not for the client's benefit but for our own.

Indeed, the only way, finally, that a lawyer can deal with the problem is to cease to deal with it. It is impossible so to organize my behavior that it is not manipulative. It is impossible to act so as to make another man free. Whether I plan to say my piece on the tax advantages of deferral first or last or in the middle, loudly or softly, with deprecation or enthusiasm, my influence will be corrupting and destructive. The only thing the lawyer can do for his client is be free himself, which means free to be honest in saying exactly what he thinks and feels, to confront himself. It is transcendence for a lawyer to say to a client: "I am fearful of influencing you unduly in this matter. The tax saving is there. It may be important to you to save the money. If so, by all means defer the gift. But money saving is not everything. One should hardly organize one's life around a revenue code. I will think none the less of you whether you choose to defer or not. Some people, I suspect, may be embarrassed — odd as it may sound — to ignore an apparent financial advantage, for to do so sounds irrational. Let me assure you, I would respect most highly a man who will do now what seems right to him now. What sounds rational is not always humanly reasonable. . . ." The important thing about any such message is not that it be calculated to neutralize the legal-rational bias, the legal influence, but that it be honest and not intended to manipulate. Sometimes a side benefit of the speaker's honesty is a shock in the listener that shakes him loose and helps him be free.

V

Run where you have light, lest the shadow of death come upon you.
John 12:35

The objection to utilitarian advice that we have been talking about is that there is a need to insert moral values into the calcu-

lation utilitarianism urges us to make. Once the choice of values comes out into the open, the question is whether it is to be done by the lawyer alone, by the client alone, or jointly. Once the choice comes out into the open the attractive apparent neutrality of utilitarian consequentialism disappears. The value questions must finally be faced. It is possible through self-awareness and honesty, which is the important basis of Doe's style of advice, to reduce the likelihood of the lawyer's imposing either his own values or the set presumed to be adopted by the standard, rationally self-interested ego. But there is an even more general problem with the utilitarian giving of advice that is independent of the values we assign to specific outcomes. That general problem is consequentialism itself: the idea that the way to decide how to act now is not to consider one's present disposition and the merit of the act in question, but to consider the value of the consequences of doing the act.

One of the reasons utilitarianism has such a seductive, sweetly reasonable character is that our most serious moral qualms concern present behavior rather than outcomes. Utilitarianism appears to avoid the controversies about the ethical character of present acts by placing the facts relevant for decisions in a future where only the outcomes, and no longer the acts, are in question. Present acts are neutral save in their consequences. We need never ask if we are doing right, so long as we survive the judgment of history. It is a Faustian kind of promise.

The conflict in Wooster's case is not only between two values but also between present and future, between the gratification of a present desire to be munificent and the value in the future of a tax saving. Surrender to the present inclination is an act of indifference to outcome. To do that which is pleasing now seems natural, and so it would seem that outcomes ought in our decisions to be at quite a discount to present satisfaction. That is seldom true in these strange days. Indeed the contrary is true. The present is at discount to the future. That is the essence of utilitarianism. We always judge how to act now by imagined future states. What was grasped at as an apparently easy way to make decisions rationally has so taken hold that maturity is defined by the ability to defer a present gratification. A person who fails to do so is childish. That ideological prop is assisted by another equally sturdy one (which we have already come upon): that our rational is our better part and ought to control the nonrational. Feeling about how to act in a present situation is always nonrational; the disposition to act — to reach out or draw back or whatever — is exactly

a feeling. It feels good to do. The body aches to reach out to someone; fear holds it back, or, happily, does not. That feeling is in the way we apprehend the situation. Whatever it is, it is not the product of what we ordinarily mean by rational analysis. We may choose to respond to those feelings or not. When we do, we are in the present; when we do not, we are guiding our actions by a reason that refers forward toward outcome or backward for authority. In doing so, we are apt to lose the force of the unique and only present — and consequently to act inappropriately or ineffectively or so as not to have the pleasure of our lives.

So little are we allowed to regard the present that a client is likely to have difficulty even expressing the wise, human inclination to do the presently right-seeming and satisfying thing, especially if the lawyer is telling him how this or that will be saved or protected by deferral. The lawyer becomes an ally of the mean spirit that tells us we ought to live in and for the future; we ought to suffer and deprive ourselves of the only gratification possible — that which occurs presently. Present gratification in the law office is the prerogative of the eccentric client, the crotchety and willful. The solid everyday client does not do that kind of thing, and the lawyer will not let him.

That is, I think, a common problem in legal counseling. Consider another example, attorney Ken Hur's commercials in the Madison, Wisconsin, area for his Legal Clinic. As a part of his ad, Hur offers a word of advice to indicate what it is the lawyer can do for the client. In one ad he tells the listener who might be involved in an accident not to say to an injured victim, "I am sorry"; such a statement might be taken as an admission of responsibility. Whatever the merits of this bit of advice, it is exactly *legal* advice, embodying all the smug satisfaction of the inadequate practitioner's access to a black art and all the insensitivity the critic would like to attribute to law and lawyers. That it flies in the face of all instinct, that it calls upon us to be inhumane, that it bespeaks the complete surrender of feeling to rationality are all reasons why one wants so desperately as a lawyer to find an audience to whom that advice can be given.

It might be argued that these instances are but the perverse results of the ignorant and insensitive trying to make utilitarian decisions. Certainly no utilitarian philosopher would be so bold as to claim that the lawyer's function is to assess "objective," external utilities, so as to counteract the humanly irrational desire to be nice now, or to reach out, or to be modest and accepting. Those, too, are weighable utilities. The trouble is, I think, that

they are weighable utilities to you and me discussing in utilitarian terms whether to adopt a policy such that, in the future, people might be discouraged from their then-present inclinations. We have, in a word, put the present into the future, so that utilitarians can weigh it in their own terms. But when the trade-off is not, by such a trick, between two futures, but between a present and a future, the practical, if not the necessary result, seems to be precisely that sacrifice of present to future. And the inclination to make that sacrifice is supported, as we have seen, by the widespread notion that maturity is self-denial and that reason is better than feeling.

The fruit of that attitude in cases such as those I have described is that a surrender to admirable and wholesome present feelings is resisted by reason and replaced by an unbecoming self-interest based upon long-run calculation. The puritanism by which the mind gains ascendancy over the spirit generates exactly the evil it was expected to prevent.

In healthy decision making, reason is a critical force. I am unhappy that "critical" has been taken over by the Left, as in the Critical Legal Studies conference, to describe a character of mind that belongs properly to anyone who believes in the possibility of rational discourse on ethical questions. Decision making is an art, concerned with the particular and *sui generis*. Criticism by the rational mind plays the same role in making decisions that it does in making art. Unfortunately the Left can lay claim to the term by default, for only on the Left may one find today widespread faith in the possibility of rational criticism of ethical questions.

In the art of decision making, which is a process in which criticism can play a direct role, and often (at least) ought to, the possible consequences are a relevant consideration. I would like to know what the consequences might be. But I am deciding what to do in a present situation. The rightness of a decision inheres in its responsiveness to the situation I am in. That present situation includes some knowledge on my part of possible outcomes. I am not likely to think it right to do now that which I am reasonably persuaded will later seriously and inevitably hurt another. But a list of possible outcomes is only a small part of the *situation* in which I want to act.

The situation in Wooster's case includes a feeling of indebtedness on the part of the clients, a welling up of the desire to give, in a continuing emotional exchange with the party who, by the clients' death, lost his reward. We continually give things to each other to generate in ourselves the sense of rightness that comes

from the alternating experiences of gratitude as recipient and gratitude as donor. In the exchange we find most of the psychological support we need to survive as content people: the feelings of worth, of effectiveness, of loving and being loved. The external product, the by-product as it were, is a web of good feelings and obligation. Indeed, one may say that the exchange of gifts, kindnesses, service, and hospitality are, if not the substance, at least the warp and woof of all social life. The need for ties even at the price of rationality is demonstrated by the widespread practice of men alternately buying drinks for each other. Such gifting pairs are to be found in every bar, for the inclination to enter them is profound.

The rhythm of gift-giving has its own rules, so that relations do not become one-sided and oppressive or so infrequent as to fall apart. The art of leadership lies in the timely and measured distribution of rewards (gifts) for services. So does the art of friendship. These are matters far too important to be controlled by the Internal Revenue Code. They are also matters that have supremely to do with the way we apprehend a present situation, not with the calculation of outcomes.

It might at first appear otherwise. Reciprocal transactions are functionally necessary and, in a sense, as obligatory as contracts; in the functional anthropologist's sense, we engage in them instrumentally, for the purpose of creating ties and obligations. But the workability of the system depends upon the actions being taken in a nonmanipulative, non-self-conscious way for the pure satisfaction that arises from the act of giving. We are well advised not to let our one hand know what the other does. Selfish motives telegraph themselves and corrupt the activity. Personal relations become personalized. In individual acts, attention to purpose and outcome is not only irrelevant, it also destroys the whole enterprise. A community exists exactly so far as in our internal experience we behave disinterestedly in the special sense that outcome is not controlling. That an observer sees a larger social purpose demonstrates only that personal satisfaction and development is consonant with the furthering of the community.

But in a way it is peculiar to describe the nonmanipulative ignoring of consequences as disinterested. It is really an important change in the focus of interestedness from the future to the present, to doing what is right in the present because it feels good in the present because it is consonant with our best definition of ourselves. It is a completely interested, completely self-interested, completely present state of mind, in which all-I do for

another is, after all, for myself right now, to make me feel good about myself. And it is a state of mind in which the question is the character of the act, not the outcome. This is the traditional and proper focus of ethical inquiry. It is difficult to deal with because in a real case, being *sui generis*, the problem of how to act cannot be rationally answered. Rationality has nothing to do with the individual, for it is inherently statistical. That means we have no certain guides, no clear answers, but must find our way as best we can.

VI

Whenever an important matter is to be undertaken in the monastery, the abbot should call the entire community together and should set forth the agenda. After hearing the various opinions of the brothers, he should consider all and then do what he thinks best. We feel that all should meet for the Lord often reveals the best course to the younger monk. The brothers should give advice with humility and not presume stubbornly to defend their views. They should leave the question to the abbot's resolution so that they may all obey that which he decides is best.

The Rule, St. Benedict

Among those who first hear what I have to say, it is obvious that I hit some nerve. What I say is appealing. It is the way we would want the world to be. It is common also for readers to say, that may all be well and good in some limited situation; in private life, but not in public life; or in dealing with a naive client, but not with an experienced one; or for old lawyers but not for young ones; or where the client is human but not when it is a corporate entity.

There is no doubt that it is more difficult for a young man than for an old man to be old. But we must all act according to the light we have. If because of youth we have nothing to say, it is no problem to us that we do not say it. If because of youth it is harder to say what we have to say, we had better confess it than pretend to ourselves that we ought not say it because that is not our role or our duty. The sophisticated client and the naive represent really the same problem as the young or old lawyer: the balance of personal power between the client and the attorney. And the answer is no different, because, after all, the ones to be saved are ourselves.

The problem of the corporate client and the lawyer as public official or adviser is of a different sort and worth considerably more attention than that I shall give it here. I think the problem

that readers have had in mind arises because the person who sits across from the lawyer is apparently not the real client. The real client is either the fictitious person (corporation or state) or the absent mass of people who own the corporation or constitute the state. That being so, it would appear that the relation between the lawyer and the client's agent before him has to be somehow different from that which I have suggested. What, one may ask, is the relevance of engaging in a moral discussion with him? The will in question, the will behind the suit, is not in the lawyer's office.

The will in question, public or corporate, is only metaphorically a will. There is nothing there, or nothing very much or very specific. At best there is a mass of wills each as disparate and uncertain as the single will of the client sole. The problem with the corporation and with the state is, at bottom, how ought the real people act whose hands are on the levers of power. The metaphorical group will of the corporate body is at best a helpful guide to the discovery of answers to such difficult questions.

In the case of the corporation, absent such a legislative history as we have sometimes in government, we seek the collective will of a constructed ego that bears a very close similarity to the one lawyers generally attribute to a client as they avoid contact with his individuality and their own: an ego committed to short-run self-interest, a rational calculator, a profit maximizer, Holmes's bad man. But why should this be so? It may appear to offer a firm foundation, just as does historical inquiry into the intent of the legislature. But it is a deceitful appearance. This constructed egoistic intent of stockholders or corporations has no more reality than the constructed historical intent of legislators. It is interesting only that ideology directs judges to find the justification for their acts in the authority of the past, while corporate managers are supposed to justify their acts in the promise of the future. Both methods carefully try to obscure the fact that action must be taken in the present, in circumstances as they are presently. And with corporations the action must be taken by those who are nominally the corporation's agents. Really, however, they are themselves. They can no more disentangle themselves than can lawyers. They, too, must finally decide what it is right for them to do. And the lawyer can help or hinder them in that process just as he can the client sole. There are no other people but people.

Feast of St. Benedict,
The First Day of Spring, 1979
Fox Bluff, Wisconsin

