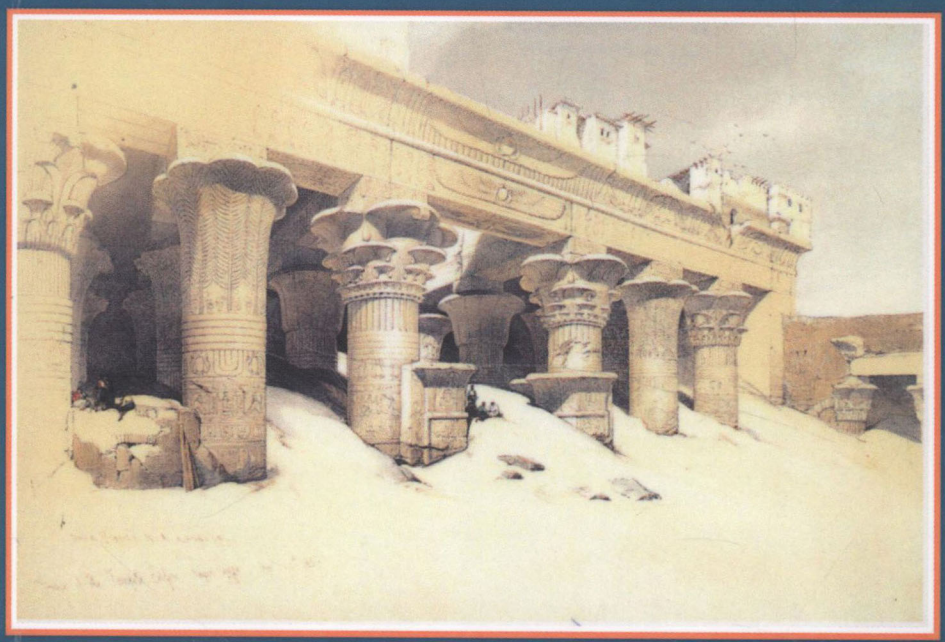
THE LOST LAWYER

FAILING IDEALS OF THE LEGAL PROFESSION



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The Lost Lawyer

For Nancy

Preface

In the spring of 1981, the student editors of the *Yale Law Journal* sponsored a symposium on the nature and purposes of legal scholarship. They invited my colleague Arthur Leff to make some introductory remarks at its opening session, but, weakened by cancer, Art had to withdraw shortly before the event. The *Journal's* editors asked me to take his place and I accepted. In my talk (with which Art surely disagreed, though he was much too kind to say so) I spoke about the difference between scholarship and advocacy. Scholarship, I said, aims at the truth. Advocacy, by contrast, is concerned merely with persuasion. I said that practicing lawyers are interested only in persuasion, whereas law teachers are dedicated mainly to the truth-seeking enterprise of scholarship instead. This I pictured as a higher and better calling than the advocate's (which, I claimed, corrupts the soul by encouraging a studied indifference to the truth). I ended by suggesting that the law teacher's highest responsibility is to convey a scholarly love of truth to his or her students, whose work as practicing lawyers promotes bad habits to which legal academics are happily immune.

Afterward, my colleagues Paul Gewirtz and Barbara Underwood asked me how, if I had such a low opinion of law practice, I could in good conscience go on training students for it. Isn't it true, they asked, that a practicing lawyer needs powers of judgment an academic lawyer does not—a practical wisdom as honorable as the scholar's love of truth but very different from it? Their question disturbed me, and I have been trying to answer it ever since.

It has taken me a long time to do so, and the list of those who have helped has lengthened with the years. I have first to thank all those outside the Yale Law School who gave me their encouragement and support. These include the dean and faculty of the University of Michigan Law School, who invited me to give the Cooley Lectures in 1987, on which the first three chapters of this book are based. I

presented later versions of these chapters at workshops at the UCLA, University of California, University of Toronto, and Columbia law schools. Each gave me an opportunity to rethink my views, and I have benefited from the sharp but friendly criticisms of those who participated in these sessions. I also presented an early draft of Chapter 2 to the Society for Ethical and Legal Philosophy. Over the years I have learned much from this extraordinary group; its meetings have been for me a model of what philosophical friendship can be.

Within the Yale Law School, my debts are likewise heavy. To Harry Wellington—during whose deanship this book began—and Guido Calabresi—during whose it was completed—I owe thanks for their support. Many other colleagues have also helped me with their criticisms and suggestions and doubts. I am indebted to them all, and especially to Bo Burt, Mirjan Damaska, Bob Ellickson, Paul Gewirtz, Henry Hansmann, Paul Kahn, Harold Koh, John Langbein, George Priest, Jed Rubenfeld, and Alan Schwartz. Above all I have benefited from the skeptical encouragement of two of my colleagues, Bruce Ackerman and Owen Fiss. I doubt that I shall ever persuade these two good friends that I am right. But the debt I owe them for helping me to know my own mind is immeasurable and can never be discharged.

I also want to thank three of my student research assistants for their help in preparing the manuscript—Steve Garvey and Brett Scharffs, both of the Class of 1992, and Claire Finkelstein, of the Class of 1993. They have checked, corrected, and instructed me and helped me sustain my enthusiasm for the book. To the readers who reviewed the manuscript for Harvard University Press, I must express my thanks as well for their perceptive suggestions and for the supportive spirit in which they were made.

Over the years I have had the good luck to work with two very able secretaries, Diane Hart and Isabel Poludnewycz. Their efforts have been indispensable, and I appreciate all they have done.

Finally, there is my family—my children Emma, Hope, and Matthew and my wife, Nancy. They have borne more of the trauma of the birth of this book than I had any right to ask, and Nancy's wisdom has been my example and guide from the start. Gratitude is too weak a word to describe what I owe them.

There is nothing to encourage us to believe that what has captured current fancy is the most valuable part of our inheritance, or that the better survives more readily than the worse. And nothing survives in this world which is not cared for by human beings.

Michael Oakeshott

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Introduction

This book is about a crisis in the American legal profession. Its message is that the profession now stands in danger of losing its soul.

In material terms, of course, American lawyers hardly seem to be in any danger at all, let alone the serious sort that would justify an apocalyptic claim of this kind. By most outward measures they appear, in fact, to be thriving. There are now nearly a million lawyers in America. As a group, they are very well paid. And they continue to dominate our public life, at all levels of government, exactly as before. The economic downturn of the 1990s has inevitably affected lawyers along with everyone else. But the legal profession remains one of the most prosperous and powerful groups in American society. Tocqueville said, "It is at the bar or the bench that the American aristocracy is found," and judging by the wealth and influence of lawyers in contemporary America, one might conclude that his famous dictum is as true today as when he uttered it a hundred and fifty years ago.[1]

To be sure, there are critics who claim the legal profession has more influence than it should. Dan Quayle and Derek Bok have recently made statements to this effect.[2] And there have always been those who questioned the honesty and trustworthiness of lawyers (an issue that since Watergate has been very conspicuously in the public eye). Every year produces a fresh crop of scoundrels and renewed doubts about the ability of the profession to police itself, along with familiar complaints about the undue power of lawyers (which any democratic society is bound to regard with suspicion). These criticisms are perennial. They reflect recurrent anxieties and concerns,

some of which are surely justified. But none touch the crisis that now threatens the collective soul of American lawyers.

People choose a career in the law for many reasons. Some do so for money and others for power and prestige, and a few, at least, become lawyers in order to advance their political ideals. But these are all external reasons for choosing a life in the law. They all portray the practice of law as a means to an end that lies beyond it. There is nothing wrong with any of these reasons. They are all respectable, and the last is genuinely admirable. But whatever external goals they aim to achieve through the practice of law, most lawyers also hope that their work will be a source of satisfaction in itself. Indeed, many hope that the intrinsic satisfactions it affords will be important enough to play a significant role in their fulfillment as human beings. Not everyone who becomes a lawyer looks for this kind of fulfillment in his or her work. But many do, and the professional pride of lawyers as a group has always depended on the belief that what they do has the potential to be rewarding in this way.

It is just that belief, however, which is now faltering and whose enfeeblement has caused the crisis in which the American legal profession is now caught. This crisis is, in essence, a crisis of morale. It is the product of growing doubts about the capacity of a lawyer's life to offer fulfillment to the person who takes it up. Disguised by the material well-being of lawyers, it is a spiritual crisis that strikes at the heart of their professional pride.

This crisis has been brought about by the demise of an older set of values that until quite recently played a vital role in defining the aspirations of American lawyers. At the very center of these values was the belief that the outstanding lawyer—the one who serves as a model for the rest—is not simply an accomplished technician but a person of prudence or practical wisdom as well. It is of course rewarding to become technically proficient in the law. But earlier generations of American lawyers conceived their highest goal to be the attainment of a wisdom that lies beyond technique—a wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess. They understood this wisdom to be a trait of character that one acquires only by becoming a person of good judgment, and not just an expert in the law. To those who shared this view it seemed obvious that a lawyer's life could be deeply fulfilling. For the character-virtue of practical wisdom is a

central human excellence that has an intrinsic value of its own. So long as the cultivation and exercise of this virtue remained an important professional ideal, lawyers could therefore be confident that their work had intrinsic value too. But in the last generation this ideal has collapsed, and with it the professional self-confidence it once sustained.

I have given this ideal an old-fashioned name to stress its roots in the past and the air of obsolescence that now surrounds it. I call it the ideal of the lawyer-statesman. It is an ideal that has had distinguished representatives in every age of American law. Lincoln, for example, was one. In the years before the Civil War, as he struggled to find a way to save the Union and democracy too, Lincoln had no formula to guide him. He possessed no technical knowledge that could tell him where the solution to America's dilemma lay. He had only his wisdom to rely on—his prudent sense of where the balance between principle and expediency must be struck.[3] A century later Earl Warren needed the same wisdom as he lobbied patiently to produce a unanimous opinion in *Brown v. Board of Education*.[4] When in the midst of the Second World War Robert Jackson reasserted the value of toleration in a case that made its conflict with the most potent forms of patriotism obvious to all, he needed Lincoln's prudence too.[5] And just yesterday we saw this virtue again in the plurality opinion in the Court's most recent abortion decision: an opinion marked by its judicious search for a middle course and wise balancing of principle and precedent.[6] In all these cases it was judgment, not expertise, that counted, and it is this quality of judgment that the ideal of the lawyer-statesman values most.

This ideal is now dying in the American legal profession. As it does, lawyers will find it harder to believe their work provides intrinsic fulfillment of any kind. Of course, the external benefits of law practice remain as obvious as before. But by themselves these are not enough to sustain the pride that lawyers have always taken in their craft; nor are the anemic new ideals that have arisen to replace the failing ideal of the lawyer-statesman. The result is a growing sense, among lawyers generally, that their yearning to be engaged in some lifelong endeavor that has value in its own right can no longer be satisfied in their professional work.

This is a catastrophe for lawyers. Beyond that, it is a disaster for the country as well. A disproportionate number of America's political

leaders have always come from the legal profession. If lawyers are especially well equipped to play a leading role in politics, however, it is not because of their technical legal expertise. It is because their training and experience promote the deliberative virtues of the lawyer-statesman ideal. As this ideal fades and these virtues come to seem less important within the profession, they will be less consciously cultivated by lawyers themselves. And as that happens, the ability of lawyers to provide sound political leadership must eventually deteriorate too. In the future, the legal profession will continue to supply a large percentage of the country's political leaders. But the demise of the lawyer-statesman ideal means that the lawyers who lead the country will on the whole be less qualified to do so than before. They will be less likely to possess the traits of character—the prudence or practical wisdom—that made them good leaders in the past. Like ripples on a pond, the crisis of values that has overtaken the legal profession in the last twenty-five years must thus in time spread through the whole of our political life with destructive implications for lawyers and nonlawyers alike.

In this book I have tried to do two things. I have tried, first, to make the ideal of the lawyer-statesman fresh and appealing to a contemporary audience. In the eyes of many, that ideal has grown stale and unconvincing. My first objective has therefore been to make it attractive again by explaining, in new but simple terms, the timeless value of the virtue that it honors and the crucial role this virtue plays in the practice of law. That is the aim of Part One ("Ideals").

Second, I have sought to describe the intellectual and institutional forces that are now arrayed against the ideal of the lawyer-statesman and that together have caused its decline. These include the currently dominant movements in American legal thought, which share a powerful antiprudentialist bias; the explosive growth of the country's leading law firms, which has changed forever the practice of the lawyers in them and created a new, more openly commercial culture in which the lawyer-statesman ideal has only a marginal place; and the bureaucratization of our courts, which has transformed the ancient art of judging into a species of office management whose main virtue is efficiency rather than wisdom. Each of these developments has contributed to the demise of the lawyer-statesman ideal, and in Part Two ("Realities") I discuss them all in detail.

Part One is, as its title implies, deliberately high-minded. It seeks

to define and defend a very demanding standard of professional excellence. I am aware, of course, that real human beings with their ordinary flaws do not always live up to their ideals in the real world, with its pitfalls and temptations. But that is no reason to aim lower in defining our ideals. To the contrary: it is important to aim high precisely because events and our imperfect natures drag us down; otherwise the aspirational pull of our ideals is lost, and we are defeated at the start. I understand, too, that lawyers in the past were not giants with extraordinary gifts that dwarfed our own, and on the whole had no more success in living up to their ideals than their counterparts today do. But their ideals were different from those our law schools, firms, and courts now encourage, and in certain ways they were much better. The profession's past had its shameful aspects too, including, most obviously, its racial, religious, and sexual exclusivity. But these failings are so striking, and our sense of rectitude in having overcome them so intense, that we lose sight of what was better in its past and fail to notice how impoverished the ideals of American lawyers have become. It is this better part of the profession's past—the richness and appeal of its lost ideals—that I want to rescue in Part One.

To do so, it is not enough merely to restate these ideals in their original form. If the ideal of the lawyer-statesman is to be more than a historical curiosity—if it is to be a live ideal for us today—what is permanently valuable in it must be identified more explicitly than before. In the past it was enough simply to praise a lawyer for possessing good judgment, without inquiring too deeply into the nature of this complex power. That is no longer true. The belief that prudence is the lawyer's central virtue has lost its credibility, and to restore it a new and more thorough account of practical wisdom is required. Anyone who attempts to provide such an account, however, immediately confronts difficult philosophical questions. Is prudence a form of calculation? How does it differ from intuition? What role does feeling (as opposed to thought) play in it? Is it the same in public and private deliberation? And will the prudent man or woman be disposed to adopt a distinctive political outlook of some kind? To build a foundation on which lawyers may again base their belief in the value of prudence as a professional virtue, I have found it necessary to discuss these questions at some length. This gives the first part of my book a philosophical character—though not in any technical sense,

for its argument is presented in simple terms and without the use of specialized jargon. Still, I am aware that there is a kind of tension between the philosophical spirit of my argument and the practical nature of its subject. But this means only that philosophy is not a substitute for prudence. It does not mean it cannot help us understand what prudence is. It can—just as it can help us understand the nature of love and courage and other nonphilosophical dispositions. And more important, it must, for lawyers have lost their faith in the value of practical wisdom, and thought alone now has the power to revive it.

Part Two has a more sociological focus. It is primarily concerned with institutions and their cultural dynamics. In the last quarter-century a scholarly culture has emerged in the country's leading law schools that depreciates the ideal of the lawyer-statesman. The same has happened—for different reasons but with similar effect—in our most influential firms and courts. In each case the result has been the growth of an environment hostile to this ideal. Part Two analyzes the cultural shifts that have occurred in these three areas of professional life and examines their effect on lawyers' expectations and beliefs.

Some readers will find the sociological approach of Part Two a relief after the more abstract discussion that precedes it. Those who are most interested in the changing character of legal education may wish to start with Chapter 4 and then work backward to the book's beginning. Readers who are especially interested in the nature of law practice may want to follow a similar strategy, starting with Chapter 5. Those who are philosophically inclined will find it easiest to read the chapters in the order they appear, though Part Two is likely to be as challenging for them as Part One is for others. But wherever he starts, and whichever aspect of my argument he finds most congenial, any student of the legal profession who wants to understand its current crisis must combine the philosophical and sociological perspectives of the book's two parts. Moving in one direction, he must ask what practical wisdom is, and moving in the other, how the ideal that honors this virtue has come to lose its authority in every branch of professional life. Only when these two approaches are joined, in a venture of philosophical sociology, do the scope and meaning of the crisis that has overtaken the American legal profession come fully into view and the question of its fate force itself upon us with the urgency it merits.

Regarding its fate, I have reached a gloomy conclusion. I do not think the ideal of the lawyer-statesman can be revived, at least at an institutional level. Nor do I think there are any plausible successors to it—new ideals that can provide an equally secure foundation for the lawyer's professional pride. Individuals, perhaps, may find a way to honor this ideal in their own careers. But increasingly, I fear, they will be able to do so only by openly rejecting the announced values of their profession and by searching out the cracks and crevices in which a person devoted to the ideal of the lawyer-statesman may still make a living in the law. To these lawyers I hope my book will give encouragement and support. The continued existence of the lawyer-statesman ideal—even marginally, interstitially, contrapuntally—depends on them. They must nourish this ideal and keep it alive. For in the end, as Oakeshott observed, "nothing survives in this world which is not cared for by human beings."