Essay

How the Butler Was Made to Do It: The Perverted Professionalism of *The Remains of the Day*

Rob Atkinson[†]

O wad some Pow'r the giftie gie us
 To see oursels as others see us!
It wad frae monie a blunder free us
 An' foolish notion:
What airs in dress an' gait wad lea'e us,
 And ev'n Devotion!¹

INTRODUCTION

Somewhat counter to prevailing academic tradition, I have prefaced this Essay with a prayer. But essays on professionalism are a rather special genre. Most have the distinctive air of the sermon about them,² and sermons

[†] Associate Professor of Law, Florida State University. My thanks to Larry Garvin, Steven Gey, Adam Hirsch, Rebecca O'Hara, and Jim Rossi for commenting on drafts and to Maureen Hernandez, Jennifer Watkins, and Jacqueline Lebel for their research assistance. For reasons that lie near the heart of my Essay, I am especially indebted to my wife, Stephanie Gamble, and our friend Arden Andrews McKenzie: They told me Ishiguro's story. I am always inspired by my friends Mark Seidenfeld and Don Weidner, who practice what they preach. See, e.g., Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992) (arguing that if we reasoned together, we could even make bureaucracy better); Donald J. Weidner, *A Dean's Letter to New Law Faculty About Scholarship*, 44 J. LEGAL EDUC. 440 (1994) (noting that for scholars who fear that virtue will be their only reward, a sympathetic administration can help). The Florida State University College of Law generously supported my work, materially and otherwise.

This Essay is an expansion of a speech I gave at St. Thomas University School of Law on November 18, 1994, as part of a symposium on Race, Gender, Power, and the Public Interest. I would like to thank Peter Margulies, organizer of the symposium, for that auspicious beginning and the St. Thomas Law Review for publishing the original speech, in the Fall 1995 issue.

1. ROBERT BURNS, *To a Louse, On Seeing One on a Lady's Bonnet at Church*, in POEMS AND SONGS 156, 157 (James Kinsley ed., 1969).

2. As with sermons, the tone ranges from the exhortation, see, e.g., Warren E. Burger, *The Necessity*

generally begin with some sort of invocation. Furthermore, my epigraph is a rather unorthodox prayer. For one thing, it is not exactly addressed to God. For another, although it is most definitely canonical, at least in a literary sense,³ it was offered by a prophet, Robert Burns, who was more often inspired by the third muse than by the third person of the Trinity.⁴ It is based on an epiphany in a sacred place, but the vision is marvelously mundane and the spirit fervently iconoclastic: Burns offered his prayer at the end of a poem he entitled *To a Louse, On Seeing One on a Lady's Bonnet at Church*.

Burns's poem implies that we see others—indeed, see through others—clearly, and prays for similar insight about ourselves. Not without gratitude for Burns's intercessory prayer, I nevertheless doubt that we will ever see ourselves as well as we see others, especially when the others have been revealed to us in all their messy humanness by literary masters like Burns himself. Other students of professional ethics have suggested that one way to approach this insight—to begin to see ourselves as others see us—is to look for important aspects of ourselves in the others we see so well in works of literature.⁵

for Civility, 52 F.R.D. 211 (1971), through the lamentation, see, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); SOL M. LINOWITZ, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994), to the jeremiad, see, e.g., JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981), punctuated at the latter end of the range with that most percussive of prayers, the imprecation, see, e.g., FRED RODELL, *WOE UNTO YOU, LAWYERS!* (2d ed. 1957).

3. On the concept of literary canonicity, see HAROLD BLOOM, *THE WESTERN CANON* 15–41 (1994). On the concept of canonicity in its original reference to religious texts, see 1 *THE CAMBRIDGE HISTORY OF THE BIBLE: FROM THE BEGINNINGS TO JEROME* 113–59, 284–307 (P.R. Ackroyd & C.F. Evans eds., 1976) (Old and New Testament canons, respectively). On the much less widely explored concept of a legal canon, see Symposium, *Multiple Cultures and the Law: Do We Have a Legal Canon?*, 43 J. LEGAL EDUC. 1 (1993). For a canonical critique of literary canonicity, see STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980). For an exploration of how authority is treated in texts from various cultures and genres, see JAMES B. WHITE, *ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS* (1994).

4. See ROBERT BURNS, *Holy Willie's Prayer*, in *POEMS AND SONGS*, *supra* note 1, at 56 (poetically parodying smugness of lecherous but theologically orthodox Scottish Presbyterian).

5. See ROBERT COLES, *THE CALL OF STORIES: TEACHING AND THE MORAL IMAGINATION* 1–30 (1989); THOMAS L. SHAFFER, *FAITH AND THE PROFESSIONS* 1–35 (1987); Robert Coles, *The Keen Eye of Charles Dickens: A Great Storyteller's View of the Law and Its Application, for Better or for Worse*, HARV. L. SCH. BULL., Summer–Fall 1984, at 30. See generally RICHARD WEISBERG, *POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE* (1992) (recommending study of literature as means of filling ethical void in current legal theory and practice); ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* (1993) (same); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (discussing general jurisprudential importance of narratives); *Pedagogy of Narrative: A Symposium*, 40 J. LEGAL EDUC. 1 (1990) (including extensive bibliography on narrativism); Kim L. Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989) (introducing symposium issue on narrativism in legal scholarship); Mark G. Yudof, *"Tea at the Palaz of Hoon": The Human Voice in Legal Rules*, 66 TEX. L. REV. 589 (1988) (relying on literary sources to stress importance of human voice in lawyering). Narratives are particularly important in feminist jurisprudence, see, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987), critical race theory, see, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Richard

That is why I have chosen as the text for my professionalism homily a passage from Kazuo Ishiguro's *The Remains of the Day*.⁶ In its depiction of the tragic life of an aging English butler, recounted in his own voice,⁷ Ishiguro's novel invites us to take seriously the title of the ABA's encyclical

Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987), and in the scholarly writings of others who consider themselves outsiders, *see, e.g.*, William N. Eskridge, *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994). The importance of stories to moral development has also been emphasized by ancient radicals, *see, e.g.*, PLATO, *THE REPUBLIC* 54-73, 93-94, 290-91 (Allan Bloom trans., 1968) (describing role of imaginative literature in ideal commonwealth), and modern conservatives, *see, e.g.*, WILLIAM J. BENNETT, *THE BOOK OF VIRTUES* (1993) (offering stories for moral education of young, compiled by former Secretary of Education), some of whom are at pains to conserve ancient radicalism, *see, e.g.*, ALLAN BLOOM, *LOVE AND FRIENDSHIP* 13 (1993) (offering "an attempt to recover the power, the danger, and the beauty of eros under the tutelage of its proper teachers and knowers, the poetic writers"). *But cf.* BLOOM, *supra* note 3, at 40 ("The greatest enemies of aesthetic and cognitive standards are purported defenders who blather to us about moral and political values in literature.").

The American legal establishment has also placed its imprimatur on the use of stories in teaching legal ethics. *See* LAWRENCE J. FOX, *LEGAL TENDER: A LAWYER'S GUIDE TO HANDLING PROFESSIONAL DILEMMAS* (1995) (presenting collection of fictional stories written by prominent litigator as vehicles for analysis of various issues in legal ethics, published under auspices of ABA Section of Litigation and introduced by Geoffrey C. Hazard, Jr., reporter for ABA's 1983 *Model Rules of Professional Conduct*); *see also* AMERICAN BAR ASS'N, COMM'N ON PROFESSIONALISM, "... IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 25 (1986), reprinted in 112 F.R.D. 243, 274 (1986) [hereinafter ABA COMMISSION] (recommending "that the American Bar Association prepare a series of six to eight films or videotapes dealing with ethical and professional issues").

Even those who have expressed reservations about the law-and-literature movement and about narrative jurisprudence have acknowledged the importance of stories, properly read. *See, e.g.*, RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 13-14, 16 (1988) (disputing more ambitious claims of law-and-literature movement but arguing that "a number of the monuments of Greek and Elizabethan literature stimulate reflection on issues of the highest jurisprudential importance"); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 809 (1993) (concluding that "legal storytelling can contribute to legal scholarship," but that storytellers need to meet criteria of traditional scholarship); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 251, 259 (1992) (conceding that narrative jurisprudence "has offered an exciting and provocative alternative to traditional jurisprudence," but pointing out "failures of integrity and judgment" in some of its exemplars).

6. KAZUO ISHIGURO, *THE REMAINS OF THE DAY* (Alfred A. Knopf 1989) (1989). The book is already well on its way to canonical status. It won the 1989 Booker Prize and was the basis for the movie *THE REMAINS OF THE DAY* (Columbia Pictures 1993), which received eight Academy Award nominations including Best Picture, Best Director, Best Actor, and Best Actress. Susannah Herbert, *Gloom Is All that Remains of the Day*, DAILY TELEGRAPH (London), Mar. 23, 1994, at 9. In this Essay, I follow the book, though the differences are not material for my purposes except, perhaps, in the final scene. *See* Stanley Kauffmann, *An Elegy*, NEW REPUBLIC, Dec. 6, 1993, at 32 (favoring book); Anthony Lane, *In Which They Serve*, NEW YORKER, Nov. 15, 1993, at 114 (same). *But see* Richard Alleva, *Stunts*, COMMONWEAL, Dec. 17, 1993, at 14 (favoring movie); Richard Corliss, *Still Life of Anthony Hopkins*, TIME, Nov. 8, 1993, at 87 (same).

7. ISHIGURO, *supra* note 6. The butler proves to be a most unreliable narrator. In employing that device, Ishiguro involves us even more intimately in the protagonist's problem. *See* DAVID LODGE, *The Unreliable Narrator*, in *THE ART OF FICTION* 155 (1992) (analyzing butler, Stevens, as unreliable narrator and noting that "[t]he point of using an unreliable narrator is indeed to reveal in an interesting way the gap between appearance and reality, and to show how human beings distort or conceal the latter"); *see also* Matt Z. Seitz, *Never Trust a Narrator Who's Under 16*, N.Y. TIMES, Oct. 30, 1994, at 34 (citing Stevens as example of unreliable narrator).

The literary device of an unreliable narrator must be distinguished from inadvertent or disingenuous lapses in narrative integrity that sometimes undermine the use of stories in legal and other scholarship. *See* Farber & Sherry, *supra* note 5, at 830-40; Tushnet, *supra* note 5, at 263-65.

on professionalism, *In the Spirit of Public Service*,⁸ and, more fundamentally, that document's insistence that all lawyering involves service.⁹ Like the ABA's report, Ishiguro's story reminds us that (to paraphrase Milton) those who serve are not only those who stand and wait.¹⁰

The Remains of the Day depicts the tragic consequences of flawed professional visions. Closely analogous visions figure prominently in the contemporary debate on the professionalism of lawyers.¹¹ In the two contexts, there are parallel dangers. On the one hand is the risk of embracing, individually or collectively, flawed perfectionist ideologies of professionalism, mirages that seduce us with the promise of either moral nonaccountability or easy moral answers.¹² On the other hand is the risk of discarding all forms of professionalism as discredited ideology or hypocritical cant, thus despairing of meaningful professional lives. A careful analysis of *The Remains of the Day* reveals a mediating, tragic vision of professionalism,¹³ somewhere between the perfectionist and the nihilistic. It is a professionalism that accepts the imperfection—indeed, the imperfectibility—of both individuals and institutions without rejecting the possibility of virtuous professional lives and cultures.

In this Essay, I add my voice to the voices of those who believe that professionals, and perhaps even professionalism, can be redeemed, though

8. ABA COMMISSION, *supra* note 5.

9. *See id.* at 261; *see also* Joint Conference on Professional Responsibility, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1159 (1958); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 615 ("The very idea of a profession connotes the function of service, the notion that to some degree the professional is to subordinate his interests to the interests of those in need of his services.").

10. *Cf.* JOHN MILTON, *Sonnet XIX: On His Blindness*, in *THE COMPLETE POETICAL WORKS OF JOHN MILTON* 134 (Harris F. Fletcher ed., 1941) ("They also serve who only stand and wait."). In the novel, as in the sonnet, there are higher orders of servers. Along with the theme of the butler's "downstairs" professionalism, Ishiguro gives us its "upstairs" counterpoint, the conflict between the idealistic, amateur diplomacy of Lord Darlington and the professional realpolitik of his nemesis, an American senator. *See* ISHIGURO, *supra* note 6, at 114–21.

11. This debate has produced a burgeoning literature of both primary and secondary sources, much of it in response to the ABA COMMISSION, *supra* note 5. *See generally* LAWYERS' IDEALS/LAWYERS' PRACTICES (Robert L. Nelson et al. eds., 1992); Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 20 SOC. RESP.: BUS., JOURNALISM, L., MED. 16 (1994). The term "professionalism" has an extremely protean quality in this debate, a point not only noted by scholars, *see, e.g.,* Eliot Friedson, *Professionalism as Model and Ideology*, in LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra*, at 215, but also conceded by proponents of the concept, *see, e.g.,* ABA COMMISSION, *supra* note 5, at 261 ("'Professionalism' is an elastic concept the meaning and application of which are hard to pin down."). The term has a fairly well-established meaning in the social sciences as a particular nonmarket mode of occupational organization, *see* Friedson, *supra*, at 219–22, though the desirability of that mode is hotly debated, *see* Robert W. Gordon & William H. Simon, *The Redemption of Professionalism*, in LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra*, at 230, 230–35 (summarizing debate). For purposes of this discussion, it is enough to note that practitioners of various occupations, including lawyering and butlering, aspire to standards of performance beyond those dictated by pure market forces, and that those standards will have to accommodate conflicts of interests among the professionals, their principals, and third parties.

12. *See* THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 3–20 (1981) (identifying these antipodal approaches to legal ethics and rejecting each as equally unsatisfactory).

13. In speaking of professional life as tragic, I am indebted to Thomas Shaffer. *See* SHAFFER, *supra* note 5, at 227 (describing professional practice as tragic).

never perfected.¹⁴ A principal means of that redemption, Ishiguro shows, lies in the inseparable and almost sacramental acts of telling one another stories and analyzing them together. *The Remains of the Day* is a story about professionalism with a protagonist and narrator who explicitly insists on moral analysis. That story implicitly invokes its complement, a moral analysis of the professions that accounts for their members' need to tell stories.

Part I outlines the butler's story, focusing on a particular incident that set him at odds with his closest colleague, the head housekeeper. Part II identifies parallels between their respective positions and two contemporary theories of lawyer professionalism: "neutral partisanship" and "moral activism." This part then traces the butler and the housekeeper's common lapse into moral isolationism, which is not a logical consequence of either theory. Part III explores the causes and consequences of that lapse, particularly its undermining of two critical professional dialogues, those between professionals and their principals on the one hand and those between professionals and their colleagues on the other. Finally, the conclusion suggests how careful attention to stories can supplement general theorizing and save other professionals, including lawyers, from similar lapses.

I. THE STORY

A. *The Setting*

The larger story is about an English butler looking back over his career in one of the great English country houses. The butler's name is Stevens,¹⁵ and he has been in service for most of his professional life to the fictitious but typical Lord Darlington. His retrospective is set in 1956, when the great era of the country house is over, and with it the age of the classic English butler.¹⁶ The Labor Government's wealth transfer taxes have begun to break up the ancestral estates of people like Lord Darlington. Members of the aristocracy are now opening their houses to throngs of tourists or, worse still, conveying them to the National Trust or, worst of all, selling them to foreign, even American, millionaires. This last indignity has befallen Lord Darlington's house.

Even for those with the money, like Darlington Hall's new owner, things are not what they were. In Stevens's words, "finding [staff] recruits of a

14. In my use of the religious imagery of redemption, I am following both Thomas Shaffer, *see id.* at 34–35, and Gordon & Simon, *supra* note 11, at 230. I use the language of redemption more literally and theologically than Gordon and Simon, but without necessarily implying the orthodox theism of Shaffer.

15. Significantly, we never learn his given name; Stevens is much too formal a fellow to allow us even that modicum of intimacy.

16. *See* DAVID CANNADINE, *THE DECLINE AND FALL OF THE BRITISH ARISTOCRACY* 341–55 (1990) (discussing the "[l]owering of High Society").

satisfactory standard is no easy task nowadays."¹⁷ Even in the old days, as Stevens frequently laments, the less ambitious often opted out of domestic service to marry and raise families of their own.¹⁸ Stevens himself, however, has no children; he has never been married. For that matter, he has never taken a vacation.

When Stevens's new American employer learns of this, he insists that Stevens take the estate's Ford out for a week's holiday in the late summer when he is himself away in the United States. Stevens eventually assents, but only when he is able to convince himself that the trip has a professional purpose. He has just received the first letter in a long while from a former head housekeeper at the Hall, Miss Kenton, and he interprets this to mean that she may be ready, after twenty years of married life, to leave her husband¹⁹ and return to domestic service. He recalls "her great affection for this house, . . . her exemplary professionalism."²⁰ His taking a trip to her home in the West Country, he persuades himself, may convince her to return in her former professional capacity. But we begin to suspect that he has been interested in more than her exemplary professionalism, and that her affection was not always limited to the house.

In the course of his trip, Stevens reflects that social life in the country house is not all that has suffered since the war; the personal reputation of the recently deceased Lord Darlington is at a low ebb as well. In the mid-thirties, he had hosted several "unofficial" meetings between the British Foreign Secretary and German Ambassador von Ribbentrop, in an effort, as we would now say, to reanchor Germany in the West. In recognition of his good offices, he had been rather graciously received in the reconstituted Reich. Stevens is at pains to point out that many entirely loyal English aristocrats were initially inclined to trust the new German leadership, and that Lord Darlington was not the last to realize the true nature of Nazism.²¹ More ominously, Stevens admits, Darlington had flirted, intellectually and otherwise, with a female member of the British Union of Fascists and had entertained that organization's leader, Sir Oswald Mosley, at the Hall.²² But Stevens tries to minimize Darlington's association with the Black Shirts, reducing it to a very few

17. ISHIGURO, *supra* note 6, at 6.

18. *Id.* at 157-58.

19. As Stevens explains, he refers to her as "Miss Kenton" throughout his story, even after she is married. *Id.* at 47-48.

20. *Id.* at 9.

21. *Id.* at 136. On the attitudes of the English elite towards the new German leadership, see MARTIN GILBERT, *THE ROOTS OF APPEASEMENT* 56-67 (1966); 1 ROBERT SKIDELSKY, *JOHN MAYNARD KEYNES: HOPES BETRAYED 1883-1920*, at 368-75 (1983).

22. On aristocratic Britain's disillusionment with democracy and the initial appeal of fascism, see CANNADINE, *supra* note 16, at 545-55. See generally NICHOLAS MOSLEY, *BEYOND THE PALE: SIR OSWALD MOSLEY AND FAMILY 1933-1980* (1983); NICHOLAS MOSLEY, *RULES OF THE GAME: SIR OSWALD AND LADY CYNTHIA MOSLEY 1896-1933* (1982).

incidents over a very brief time.²³ It is on one of those incidents that I want to focus.

B. *What the Butler Did*

One summer afternoon Lord Darlington calls Stevens into the study, and, after the usual pleasantries, asks whether there are any Jews on the house staff. When informed that there are two Jewish housemaids, Lord Darlington tells Stevens, “Of course, you’ll have to let them go.”²⁴ Apparently prompted by Stevens’s barely perceptible surprise, Lord Darlington explains: “It’s regrettable, Stevens, but we have no choice. There’s the safety and well-being of my guests to consider. Let me assure you, I’ve looked into this matter and thought it through thoroughly. It’s in all our best interests.”²⁵

Because the two maids are under Miss Kenton’s direct supervision as housekeeper, Stevens thinks it appropriate to inform her of their dismissal. He brings the matter up that very night at their routine meeting for cocoa in her parlor.²⁶ Stevens offers Miss Kenton the opportunity to speak with the maids herself before sending them along to his pantry for their dismissal the next morning. Miss Kenton expresses outrage and warns Stevens that if the maids are dismissed, she will leave as well.²⁷ But Stevens carries out the order, and Miss Kenton does not leave.

Before examining the incident in more detail, I want briefly to reassure the skittish, those who are beginning to wonder how this tale can possibly relate to the practice of law other than perhaps to imply a deprecating comparison between lawyers and domestic servants. Thus, for those of you who think the assertedly parallel lines are diverging, let me offer a brief aside. Suppose Lord Darlington, punctilious in all his affairs, had called his London solicitors to confirm that his firing of the maids was legally proper. He might have asked for a written opinion on the subject and for carefully drafted dismissal papers to effect their discharge. Predictably, Lord Darlington would have rung up a senior member of the firm, and that member might well have assigned the research and drafting to a junior associate.²⁸ The subordinate would have discovered that, under traditional common law notions of employment, the Jewish maids could be dismissed for even immoral reasons.²⁹ I suspect,

23. ISHIGURO, *supra* note 6, at 137.

24. *Id.* at 147.

25. *Id.*

26. These meetings, he points out, are “overwhelmingly professional in tone” and “predominantly professional in character.” *Id.*

27. *Id.* at 149.

28. See RICHARD L. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* 203 (1988) (noting historically heavy reliance of solicitors on subordinate personnel, including law writers, engrossers, salaried assistant solicitors, and copying, managing, and articulated clerks).

29. See N.M. SELWYN, *LAW OF EMPLOYMENT* 218 (6th ed. 1988) (under pre-1971 English law, “an employer was entitled to dismiss an employee for any reason or no reason at all; the only issues involved

however, that both he³⁰ and his senior would have been troubled by the prospect of playing a part in that morally sordid but perfectly legal action. It thus takes no great stretch of the imagination to see the dilemma of the butler and the maid played out in perfectly parallel fashion in a law firm of their day—or of ours.

As the next part shows, the responses of Stevens and Kenton are typical of two competing approaches open to contemporary American lawyers in such a situation. Either answer, standing alone, is inadequate, and the story itself presents a more satisfactory, but by no means perfect, response. The medium in which Stevens and Kenton give their answers—a story—reveals not only the relative merits of the alternative answer, but also why Stevens and Kenton failed to choose that alternative, and at what cost. The factors influencing their choices operate on us as well, and we are at risk of incurring similar costs. To shift from the terminology of economics to the language of literature, we are in danger of suffering the same fate.

II. PERVERTED PROFESSIONALISM

Whenever someone serves another, that service poses a question: Should the service be limited by anything other than the principal's will? Modern society imposes one obvious set of constraints: the outer bounds of the state's positive law.³¹ But are there other limits? That is a fundamental question of professional ethics: Should a professional always do all that the law allows, or should the professional recognize other constraints, particularly concerns for the welfare of third parties? This question divides scholars of legal ethics and thoughtful practitioners into two schools: those who recognize constraints other than law's outer limit,³² and those who do not. Mr. Stevens and Miss Kenton,

were whether or not the employee was entitled to a certain period of notice, or whether his conduct was such as to warrant instant (summary) dismissal without notice"); I.T. SMITH & JOHN C. WOOD, *INDUSTRIAL LAW* 193, 217 (3d ed. 1986) (observing that, with proper notice, employer could dismiss employee for any reason); see also PAUL DAVIES & MARK FREEDLAND, *LABOUR LAW* 422, 430–33, 459 (2d ed. 1984) (noting that British labor law during late-nineteenth and early-twentieth centuries included broad employer discretion to dismiss and no effective remedy for wrongful dismissal). As a matter of custom, the notice required for the dismissal of domestic servants was one month. See D.W. CRUMP, DIX AND CRUMP ON *CONTRACTS OF EMPLOYMENT* 138 (6th ed. 1980); HENRY SLESSER & ARTHUR HENDERSON, *INDUSTRIAL LAW* 33–34 (1924).

30. I use the masculine gender advisedly here; a solicitor's firm would not likely have had a female associate in the relevant capacity at the time of the story. See ABEL, *supra* note 28, at 79–80.

31. But cf. *Genesis* 22:1–19 (describing dilemma posed by God's ordering Abraham to sacrifice his only son Isaac).

32. Scholars have identified three principal sources of these additional constraints: the spirit, as opposed to the mere letter, of the law, see, e.g., William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); "ordinary morality," the morality the professional shares with the rest of the political community, see, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); and the lawyer's own deeply held moral convictions, which may diverge both from the spirit of the law and from ordinary morality, see, e.g., Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853 (1992). For an explanation of these sources as available to Miss Kenton, see *infra* notes 76–89 and accompanying text.

in their treatment of the maids and in their professional lives generally, fall on opposite sides of this divide. The course of their lives suggests not so much that one answer is wrong and the other right, but that each poses distinct dangers to moral integrity and that each is the beginning, rather than the end, of moral analysis.

A. *Mr. Stevens's Neutral Partisanship*

Stevens's position closely parallels what students of the legal profession call "neutral partisanship."³³ The second of these two correlated principles,³⁴ partisanship, entails advancing client ends through all legal means, and with a maximum of personal determination, as long as the ends are within the letter of the law. The first principle, neutrality, lets the professional claim personal disinterest in, or even antipathy toward, client ends and moral nonaccountability for helping to advance them. So it was with Stevens's firing of the Jewish maids. Looking back on the incident, he sees it this way:

[M]y every instinct opposed the idea of their dismissal. Nevertheless, my duty in this instance was quite clear, and as I saw it, there was nothing to be gained at all in irresponsibly displaying such personal doubts. It was a difficult task, but as such, one that demanded to be carried out with dignity.³⁵

When Miss Kenton expresses her outrage, he reminds her that "our professional duty is not to our own foibles and sentiments, but to the wishes of our employer."³⁶

For Stevens and the neutral partisans, the ultimate decision, in matters of morality and public policy, is the client's to make. Furthermore, this has an

33. See DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 132-33 (1992) (describing neutral partisanship); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 *STAN. L. REV.* 589, 605 (1985) (describing individualist premise of neutral partisanship). This position is also described as the lawyer's amoral ethical role, see Pepper, *supra* note 9, at 615; the traditional conception, see Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060, 1061 (1976); the standard conception, see LUBAN, *supra* note 32, at 7 (following Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 *N.Y.U. L. REV.* 63, 73 (1980)); the full advocacy model, see ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 92 (1980); the libertarian approach, see Simon, *supra* note 32, at 1084-85; and positivist advocacy, see William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *WIS. L. REV.* 29, 39.

34. For early and explicit identification of these two principles, see Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 *CAL. L. REV.* 669, 672-74 (1978) (employing terms "advocacy" and "nonaccountability"); Simon, *supra* note 33, at 36-37. These principles are now firmly ensconced in the literature on professional responsibility. See, e.g., CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* §§ 10.2.1, 10.3.1 (1986) (discussing principles of professional detachment and zealous advocacy).

35. ISHIGURO, *supra* note 6, at 148.

36. *Id.* at 149.

important corollary: The professional's job is essentially technical.³⁷ In the words of a prominent academic proponent of neutral partisanship, the client is like an "individual facing and needing to use a very large and very complicated machine (with lots of whirring gears and spinning data tapes) that he can't get to work."³⁸ In Stevens's words, "Let us establish this quite clearly: a butler's duty is to provide good service. It is not to meddle in the great affairs of the nation."³⁹ Neutral partisanship tends to reduce the human dimensions of one's professional life, to deal with its unpleasanties in abstract and impersonal terms. Thus, for example, Stevens speaks of the "particular contracts to be discontinued," and refers to the maids as "the two employees concerned."⁴⁰ And as neutral partisanship reduces professional service to technical assistance, so it tends to reduce moral concerns to matters of individual taste, if not idiosyncrasy.⁴¹ We have already heard Stevens dismiss his moral qualms as "foibles and sentiments."⁴²

This is not to say, however, that Stevens's position is totally divorced from morality, any more than is the contemporary justification of neutral partisanship as practiced by lawyers. Rather, Stevens firmly grounds his position in morality, in very much the same way today's neutral partisan lawyers do. Stevens insists that the moral dimension of one's professional role as a butler derives from the moral standing of one's employer:

[T]he question was not simply one of how well one practised one's skills, but *to what end* one did so; each of us harboured the desire to make our own small contribution to the creation of a better world, and saw that, as professionals, the surest means of doing so would be to

37. See Simon, *supra* note 33, at 38, 63 (citing "the notion that the law is an apolitical and specialized discipline" as another fundamental principle of one version of neutral partisanship and noting that, according to a second version of neutral partisanship, "the lawyer's role is a social function designed to facilitate the advancement of norms through the application of legal technique," which "involves abstract cognition and requires aptitude, study, and training"); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 6 (1975) ("Provided that the end sought is not illegal, the lawyer is, in essence, an amoral technician whose peculiar skills and knowledge in respect to the law are available to those with whom the relationship of client is established."); see also Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 22 (1951) (praising virtues of pure craft); Robert W. Gordon, "The Ideal and the Actual in the Law": *Fantasies and Practices of New York City Lawyers, 1870-1910*, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 65-66 (Gerard W. Gawalt ed., 1984) (describing as "probably the most common" response of late-nineteenth-century New York lawyers to the disintegration of an earlier professional ideal "the path of withdrawal altogether from issues of public concern and retreat into the role of apolitical technician with no ideology save that of craftsmanlike client service").

38. Pepper, *supra* note 9, at 623.

39. ISHIGURO, *supra* note 6, at 199.

40. *Id.* at 149.

41. See Simon, *supra* note 32, at 1114 (noting that phrasing criticism of neutral partisanship in terms of law versus morality tends to "impl[y] that the lawyer who adopts [the moral alternative] is on her own and vulnerable both intellectually and practically"). But see *infra* notes 91-93 and accompanying text (discussing argument that adopting moral stance vis-à-vis position of one's client is not necessarily inconsistent with neutral partisanship).

42. ISHIGURO, *supra* note 6, at 149.

serve the great gentlemen of our times in whose hands civilization had been entrusted.

... A "great" butler can only be, surely, one who can point to his years of service and say that he has applied his talents to serving a great gentleman—and through the latter, to serving humanity.⁴³

Unlike earlier generations of butlers, Stevens insists, his generation did not see the world as a ladder descending from the houses of royalty through the nobility and gentry to the merely wealthy, with the professional status of servants running along the same scale.⁴⁴ Rather, according to Stevens, his generation saw the world as a wheel revolving around the hub of great country houses. There, affairs of state were debated and often resolved before being discussed in official fora like Parliament and formal diplomatic conferences. In that world, one's professional status as a butler turned on how close one was to the hub, and on how active one's employer was in "furthering the progress of humanity."⁴⁵ The key to professional status in Stevens's more idealistic generation was, accordingly, "the *moral* status of an employer."⁴⁶ This attitude, he maintains, had significantly influenced the course of his career, particularly his decision to work for Lord Darlington.⁴⁷

Defenders of neutral partisan lawyering are also at pains to show how the professional role they prescribe serves the public good. In contrast to Stevens, they do not focus on the humanitarian impulses, or even on the moral status, of the client.⁴⁸ Rather, the reverse is true: They are at pains to show that whenever the lawyer helps a client exercise legal rights, even in an immoral way, the lawyer has acted well as a professional. Yet this professional probity, like Stevens's, is grounded in an ethical good. In the case of neutral partisan lawyers, that ethical good is the client's exercise of moral autonomy as authorized by the law.⁴⁹ Society recognizes individual autonomy as a good of the highest order, so the argument runs, and carves out a sphere in which individuals can exercise that autonomy without interference. By helping lay folk operate within that envelope—sometimes even by pressing its edge—the

43. *Id.* at 116–17.

44. *Id.* at 115.

45. *Id.* at 114.

46. *Id.*

47. *Id.* at 116, 199–201.

48. Even this contrast should not be drawn too sharply, however. The staunchest defenders of neutral partisanship insist—in considerable tension with the general thrust of their theory—that lawyers may decline representation of particular clients on moral grounds, unless that forecloses the prospective client's access to law. See Fried, *supra* note 33, at 1086–87; Pepper, *supra* note 9, at 634; see also MONROE H. FRIEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 66–70 (1990) (arguing that lawyers are morally accountable for their choice of clients, but duty bound to use all legally available means to advance the ends of clients chosen).

49. See Fried, *supra* note 33, at 1072–73; Pepper, *supra* note 9, at 616–19. Both Fried and Pepper defend the principles of neutral partisanship in terms of advancing client autonomy.

lawyer is accomplishing a moral and social, not just professional, good. When, accordingly, proponents of neutral partisanship describe their model as amoral,⁵⁰ they are not referring to its ultimate grounding, which is emphatically moral. They are referring, rather, to the lawyer's immunity from the task of scrutinizing the morality of particular client acts. Theirs is morality at the wholesale but not the retail level; a morality of the long run, not the particular case;⁵¹ a morality of fidelity to role obligations, not attention to particular acts.⁵²

In this sense, it is quite reminiscent of Stevens's professional morality. Just as the neutral partisan's moral inquiry ends with a determination of the legality of the client's act, so Stevens believes that the butler's moral inquiry ends when he convinces himself that "[t]his employer embodies all that I find noble and admirable."⁵³ Just as the neutral partisan is not concerned with the morality of particular acts within the law, so Stevens does not take it upon himself to question the particular judgments of employers of the right general character. Rather, Stevens condemns in no uncertain terms "the sort of misguided idealism which . . . suggested that any butler with serious aspirations should make it his business to be forever reappraising his employer—scrutinizing the latter's motives, analysing the implications of his views" with the implied threat of leaving.⁵⁴ Similarly, defenders of neutral partisanship condemn withdrawing from cases on grounds of moral disagreement with the client.⁵⁵

Both of these laissez-faire attitudes—that of Stevens the butler on the one hand and that of neutral partisan lawyers on the other—rest on varieties of moral skepticism. Stevens's skepticism is the less radical. For him, it is a matter of expertise, a division of labor. As we have seen, Stevens deeply believes that butlers should choose employers who serve lofty public ends. But he also believes that people of his station, unlike their employers, cannot keep up with the more subtle refinements of what he calls high affairs of state, what we would call matters of public policy. As a general matter, he says, "The fact is, such great affairs will always be beyond the understanding of those such as you [the reader] and I."⁵⁶ Thus, in the case of the maids, he tells Miss Kenton that "[t]here are many things you and I are simply not in a position to understand concerning, say, the nature of Jewry. Whereas his lordship, I might venture, is somewhat better placed to judge what is for the best."⁵⁷

50. See, e.g., Pepper, *supra* note 9.

51. Simon, *supra* note 33, at 73.

52. LUBAN, *supra* note 32, at 104–27.

53. ISHIGURO, *supra* note 6, at 200.

54. *Id.* at 199–200.

55. See Fried, *supra* note 33, at 1073, 1086; Pepper, *supra* note 9, at 617–19, 634.

56. ISHIGURO, *supra* note 6, at 199.

57. *Id.* at 149.

The skepticism at the root of neutral partisanship in lawyering generally takes a less personal, and more radical, form. It has been traced to the Hobbesian, positivist notion that "[e]nds are natural, individual, subjective, and arbitrary."⁵⁸ On that view, the only ends individuals share are the desire to be free to pursue their private ends and the corollary desire for security in that pursuit. The legitimate function of law is to define limits within which individuals can exercise autonomy without impinging upon each other. The lawyer's job is to advise the client, faced with a bafflingly complex legal order, about where the outer edge of this sphere of autonomy lies. Not to assist the client in exercising autonomy up to the very margin allowed by law would be to usurp the role not just of judge and jury, but of the legislature as well. Ultimately, it would undermine the legitimacy of government itself.⁵⁹ Thus, though the moral skepticism of neutral partisan lawyers is more global and less self-effacing than that of Stevens, it produces the same result: deferring to clients on moral judgments within the letter of the law. Thus, moral skepticism, somewhat paradoxically, is the foundation of Stevens's and the neutral partisan lawyers' faith in the rightness of fidelity to clients' ends.⁶⁰

The foregoing comparison, moreover, understates the similarity between Stevens's version of butlering and the neutral partisan theory of lawyering by eliding an important distinction. It compares a practicing butler's perspective with that of the theoretical defenders of neutral partisanship; the perspectives of practicing lawyers and practicing butlers are much closer. Not surprisingly, Stevens, a practitioner rather than a theoretician, does not cite any specific theoretical authorities. Nevertheless, implicitly underlying Stevens's notion of butlering is a theoretical position elaborated by the moral philosopher F.H. Bradley, nicely captured in the phrase "my station and its duties,"⁶¹ which Bradley borrowed from the Anglican *Book of Common Prayer*.⁶² It was not a theory addressed to the specific relationship between servant and master; it was, rather, a theory that attempted to account for the deference appropriate in hierarchical social relations generally.⁶³ The justification would probably not have been known to Stevens. But he almost certainly would have known its creedal embodiment in *The Book of Common Prayer*, and hierarchical social arrangements were, of course, pervasive in his culture.⁶⁴

58. Simon, *supra* note 33, at 40.

59. See Pepper, *supra* note 9, at 617–18; Simon, *supra* note 33, at 41–42; see also Wasserstrom, *supra* note 37, at 9–10.

60. This is not to suggest, however, that even the most thoroughgoing ethical skepticism logically implies deference to client wishes. For an argument to the contrary, see Atkinson, *supra* note 32, at 872–89, 954–79.

61. FRANCIS H. BRADLEY, *ETHICAL STUDIES* 145–92 (Thoemmes Antiquarian Books Ltd., photo. reprint 1990) (1876).

62. LUBAN, *supra* note 32, at 106; see CHURCH OF ENGLAND, *A Catechism*, in *THE BOOK OF COMMON PRAYER* 629, 630 (Cambridge Univ. Press 1920).

63. See LUBAN, *supra* note 32, at 106.

64. Several phrases in particular presage Stevens's position. In response to the question, "What is thy

Like Stevens, most practitioners of neutral partisan lawyering probably operate with the theoretical underpinnings of their position very much in the background, taking them on faith. What Thurman Arnold said about practitioners' attitudes toward the justifications of law itself may well be true of theoretical defenses of the lawyer's role today: Most of us can find adequate comfort in knowing that the defenses exist without feeling compelled to know their content.⁶⁵ On the other hand, there are today obvious parallels in the legal profession to Stevens's conversations with fellow butlers about greatness in their profession⁶⁶ and to the debates on that question in the journal of the Hayes Society, a corps of the occupation's elite.⁶⁷

B. *Miss Kenton's Moral Activism*

Miss Kenton's reaction to the firing of the maids offers a striking contrast to Mr. Stevens's response, and it implies a vision of professionalism quite different from neutral partisanship. She recoils from the technocratic, antiseptic attitude of Stevens, his treatment of the dismissals "as though [he] were discussing orders for the larder."⁶⁸ In contrast to his references to "contracts" and "employees," she persistently refers to the maids by their first names, Ruth and Sarah, and invokes her long, personal relationship with them.⁶⁹ And she does not dismiss deeply held personal aversions as "foibles and sentiments."⁷⁰ She says she's outraged, and she puts her position in unmistakably moral terms: "Does it not occur to you, Mr Stevens, that to dismiss Ruth and Sarah on these grounds would be simply—*wrong*? I will not stand for such things."⁷¹ A bit later, she refers to the dismissals as "a sin as any sin ever was one."⁷² Most significantly, she takes direct moral responsibility for the immediate consequences of her actions, rather than insulating herself within

duty towards thy Neighbour?" the Catechism directs in part: "To order myself lowly and reverently to all my betters And to do my duty in that state of life, unto which it shall please God to call me." CHURCH OF ENGLAND, *supra* note 62, at 630, quoted in LUBAN, *supra* note 32, at 106 n.6.

65. See THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 70 (Harbinger Books 1962) (1935).

66. ISHIGURO, *supra* note 6, at 30–35. Think, for example, of the recent spread of the Inns of Court movement, explicitly designed to bring practitioners, judges, and academics together to discuss issues of lawyer professionalism, see AMERICAN INNS OF COURT, NATIONAL HANDBOOK & MEMBERSHIP DIRECTORY at xi (1992), and the spate of state-bar-sponsored professionalism commissions in the wake of the 1986 report of the American Bar Association Commission on Professionalism, see ABA COMMISSION, *supra* note 5; Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Professions*, in LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra* note 11, at 1, 1–2.

67. ISHIGURO, *supra* note 6, at 32–33 (describing efforts of official organ of Hayes Society to explain what makes a great butler); cf. Joint Conference on Professional Responsibility, *supra* note 9, at 1159 (providing defense of lawyer's role morality promulgated by Joint Conference of Association of American Law Schools and ABA and published in official organ of ABA).

68. ISHIGURO, *supra* note 6, at 148.

69. *Id.* at 148–49.

70. *Id.* at 149.

71. *Id.*

72. *Id.*

her role. She will not be a partisan for what she believes to be a moral wrong, because she cannot be neutral professionally toward what she opposes personally.

In all of these respects, and most fundamentally in the last, Miss Kenton implicitly anticipates the growing ranks of scholarly critics of neutral partisanship in the legal profession. Although they differ on details, these critics all agree that, with narrow exceptions like criminal defense work and other David-versus-Goliath analogues,⁷³ lawyers cannot claim moral absolution for unquestioningly assisting their clients in unjust acts, however legally proper.⁷⁴ In their view, lawyers should not merely decline to assist in such acts; they should also act affirmatively to promote justice in their representation of private clients. Accordingly, following one of its chief proponents, I will call this position "moral activism."⁷⁵

Defenders of moral activism in the legal profession look to several sources outside the letter of the law for additional limits on what lawyers may properly do for clients, and these sources support Miss Kenton's position. Some moral activists factor ordinary morality, the shared moral norms of society—in particular, our common obligation not to harm the innocent—directly into the professional's ethical calculus. On that view, because the function of the professional role itself is to advance ordinary moral values, such as the discovery of truth and the protection of individual rights, any departure that the professional role requires from ordinary morality must be strongly justified in terms of ordinary morality itself.⁷⁶ Ordinary morality is the most obvious source of Miss Kenton's resistance, sounded in her objection that "to dismiss Ruth and Sarah on these grounds would be simply—*wrong*."⁷⁷ And moral objections can be grounded in religious as well as secular ethics;⁷⁸ lawyers, like Miss Kenton, can conclude that complying with their employers' wishes would be "a sin as any sin ever was one."⁷⁹

Other moral activists, anticipating Stevens's dismissal of moral limits as subjective or idiosyncratic, find limits to the law's letter in its spirit.⁸⁰ At the most basic level, they point out, lawyers justify their role in service to the law as "officers of the court," and the purpose of the law itself is to promote

73. See LUBAN, *supra* note 32, at 58–66; Rhode, *supra* note 33, at 605–06; Wasserstrom, *supra* note 37, at 6, 12–15.

74. For a look at the contemporary theorists of this stripe, see LUBAN, *supra* note 32; Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Postema, *supra* note 33; Rhode, *supra* note 33; Schwartz, *supra* note 34; Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987); Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988); Wasserstrom, *supra* note 37. For the classic and classical account, see PLATO, *GORGIAS* (E.R. Dodds trans., 1959).

75. See LUBAN, *supra* note 32, at 160.

76. See GOLDMAN, *supra* note 33, at 137–48; LUBAN, *supra* note 32, at 128–47.

77. ISHIGURO, *supra* note 6, at 149.

78. See generally SHAFFER, *supra* note 5; SHAFFER, *supra* note 12.

79. ISHIGURO, *supra* note 6, at 149.

80. See, e.g., Simon, *supra* note 32, at 1114.

justice. Thus, when lawyers invoke particular laws on behalf of clients in ways that threaten to subvert justice, they undercut the very basis of their professional status.⁸¹

Not being a lawyer, of course, Miss Kenton cannot draw on service to the law's end, justice, as quite so direct a source of limits on how far she can go in serving Lord Darlington. At a more fundamental level, however, she does have a closely analogous response. Like moral activists who invoke the spirit of the law, she too can invoke the norms of her profession itself as limits on what members of that profession can do to third parties. Like the practice of law, her profession also has its specific virtues, which derive from its essential purpose,⁸² and these may impose implicit obligations that limit the scope of her agency.

A sense of these obligations informs Miss Kenton's initial response to Mr. Stevens's announcement that the maids must be fired: "Mr. Stevens, I cannot quite believe my ears. Ruth and Sarah have been members of my staff for over six years now. I trust them absolutely and indeed they trust me. They have served this house excellently."⁸³ She here invokes the cardinal virtues of domestic service and attests that the maids have demonstrated them: loyalty, as evidenced by the length of their service; honesty, as evidenced by her trust in them; and mastery of the skills of their occupation, as warranted in her testimonial to the excellence of their service. Significantly, the loyalty and trust here are reciprocal, and both are grounded in the professional relationship itself. Good help rightly expects to be rewarded as such; arbitrary dismissals destroy staff morale; high turnover undermines efficient service.⁸⁴ Contrary to Mr. Stevens's immediate response, it is not the case that Miss Kenton has

81. See *id.* at 1090-91; see also EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* 1-13 (Cornelia Brookfield trans., Routledge & Kegan Paul 1957) (1950) (invoking professional standards as source of resistance to debasing of civic morals to standards of unfettered market).

82. The idea that specific occupations derive their characteristic virtues from their essential functions is deeply rooted in classical moral philosophy. See, e.g., ARISTOTLE, *NICOMACHEAN ETHICS* 3-5 (Martin Ostwald trans., 1962); PLATO, *supra* note 5, at 19-20, 32, 45-54.

83. ISHIGURO, *supra* note 6, at 148.

84. This reciprocity has close analogues in other markets for human capital, including legal services. See Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567 (1989); see also ROBERT W. HILLMAN, *LAW FIRM BREAKUPS: THE LAW AND ETHICS OF GRABBING AND LEAVING* 144 (1990) ("At least a modicum of cooperation is required to maximize the value of a firm to both its lawyers and clients," and "firms need some sense of confidence concerning the client base in order, as businesses, to engage in long-term planning and commitments in such areas as the hiring and promotion of associates and support staff."). Indeed, partners and associates in law firms face a problem parallel to that of Stevens and Kenton on the one hand and the maids on the other. For their part, Stevens and Kenton, like law firm partners, run the risk that, if they provide their subordinates with transferable skills, the subordinates will leave before the employer's investment in training has been fully recouped. See Gilson & Mnookin, *supra*, at 572-75; cf. ISHIGURO, *supra* note 6, at 157-58, 170 (lamenting number of housemaids who leave domestic service to marry). On the other hand, the maids, like law firm associates, face not only the prospect of being dismissed before they realize the value of their own investment in firm-specific, nontransferable knowledge such as their employer's particular modes of operation, but also the negative signal that dismissal sends to future employers. See Gilson & Mnookin, *supra*, at 576-78.

“allow[ed] sentiment to creep into [her] judgement.”⁸⁵ Rather, she has drawn an obvious conclusion from basic, shared professional norms: These women have been excellent maids; therefore, they should not be fired.⁸⁶

Finally, some moral activists, skeptical of finding general agreement on either ordinary moral norms or professional values, look for the limits of professional conduct in the fundamental beliefs of smaller communities united in a common faith.⁸⁷ Such faiths need not be conventionally religious and need not rest on anything beyond their adherents' personal commitments.⁸⁸ Miss Kenton, echoing the prototypical Protestant, sounds this theme as well, albeit in a minor key: “I will not stand for such things.”⁸⁹

C. *Stevens and Kenton's Common Ground: Moral Isolationism*⁹⁰

Stevens's vision of professionalism, like that of the neutral partisan lawyer, leaves the ultimate moral judgment to the client; Kenton, like neutral partisanship's critics, reserves that judgment for herself. It is important to note at this point, however, that it is the *ultimate* decision on which neutral partisans and their critics divide. More subtle proponents of neutral partisanship agree with their detractors on one critical point: the appropriateness of raising moral concerns with a client in an effort to discourage the client from committing what the professional believes to be a moral wrong.⁹¹

85. ISHIGURO, *supra* note 6, at 148.

86. As we will see, Stevens himself might well have invoked such norms in his own response to Lord Darlington. See *infra* notes 99–111 and accompanying text.

87. See, e.g., Atkinson, *supra* note 32, at 947–79; see also Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES*, *supra* note 11, at 177, 179 (“[L]awyer professionalism is not a fixed, unitary set of values, but instead consists of multiple visions of what constitutes proper behavior by lawyers.”).

88. Atkinson, *supra* note 32, at 872–88.

89. ISHIGURO, *supra* note 6, at 149. Compare Martin Luther's more positive statement of that position at the Diet of Worms: “Here I stand. I can do no other.” See E.G. Rupp & Benjamin Drewery, *Headnote to MARTIN LUTHER, Luther's Answer Before the Emperor and the Diet of Worms, 18 April 1521*, in *MARTIN LUTHER 57, 57* (E.G. Rupp & Benjamin Drewery eds., 1970) (noting that passage does not exist in oldest, primary version, but observing that “as has so often been said, it is a true myth”); see also ROLAND H. BAINTON, *HERE I STAND: A LIFE OF MARTIN LUTHER* 185 (1950) (citing similar words and noting that although they were not recorded on spot and were added in earliest printed version of proceedings, they may be genuine); cf. ERIK H. ERIKSON, *YOUNG MAN LUTHER: A STUDY IN PSYCHOANALYSIS AND HISTORY* 231 (1962) (“If Luther did not really say the words which became most famous: ‘Here I stand,’ legend again rose to the occasion; for this new credo was for men whose identity was derived from their determination to stand on their own feet, not only spiritually, but politically, economically, and intellectually.”).

90. See SHAFFER, *supra* note 12, at 3–20 (discussing isolationist tendencies of both neutral partisanship and moral activism). Shaffer implies, however, that isolationism is inherent in the theories themselves. See *id.* My point is, rather, that isolationism is an extraneous element that the adherents bring with them to the theories, an element that can only be understood by looking beyond the logical implications of the theories to the biographies of their practitioners.

91. See Fried, *supra* note 33, at 1088; Gordon, *supra* note 74, at 68–83 (defending moral counselling against array of objections that might be raised from aggressively neutral partisan perspective); Joint Conference on Professional Responsibility, *supra* note 9, at 1161 (urging provision of moral advice to

On this point, both schools of lawyering would fault Stevens and Kenton—Stevens, for going along without remonstrating; Kenton, for believing that she should resign without remonstrating. Moreover, the official codes of legal ethics stand squarely behind the united front of neutral partisans and their critics on the point of giving moral advice to clients.⁹² The codes and virtually all commentators agree that, having determined that a client is about to do something legal but morally reprehensible, lawyers have an option before they reach the decision that divides neutral partisans from moral activists. Before deciding to assist in the wrong or terminate the representation, the lawyer may—in some views, should—try to persuade the client to do the morally right thing. Curiously, both Miss Kenton and Mr. Stevens skipped this step; in fact, this step does not seem to have occurred to either of them as a live option.⁹³

There was, in addition, another element of moral isolationism in Stevens and Kenton's story. They failed not only to talk with Lord Darlington, but also to talk in any meaningful way with each other. The importance of this second dialogue, a dialogue among professionals themselves or between professionals and their personal friends, is not well reflected either in codes of legal ethics⁹⁴ or in academic treatments of lawyer professionalism.⁹⁵

clients from moderately neutral partisan position); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1600–07 (1995); Pepper, *supra* note 9, at 630–32. In fact, neutral partisans themselves tend to object not to advising clients to act morally, but either to declining client representations or withdrawing from them on moral grounds. *See id.* at 632 n.64 (criticizing Simon, *supra* note 33, at 52–59, from perspective of neutral partisanship, for exaggerating difficulties of moral counselling).

92. The ABA's official codes urge such a course, variously stating: "[I]t is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible," MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7–8 (1980), and "[i]t is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice," MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 cmt. (1993). The degree of enthusiasm for such advice, however, has obviously waned. What the earlier code embraced as "often desirable," the present code standoffishly declares merely "proper."

93. As Mr. Stevens's subordinate, Miss Kenton would presumably have routinely reported to him rather than directly to Lord Darlington, just as the junior solicitor in my hypothetical law firm would normally have raised ethical issues with his superior in the firm, *see supra* text accompanying note 28, rather than taking them up with the client. In her defense, Miss Kenton may well have been without any clear sense of when, if ever, it was professionally appropriate to go over the head of her immediate supervisor. Subordinate lawyers in contemporary America would also be hard put to find authoritative guidance in a situation parallel to hers. Model Rule 5.2(b) permits subordinate lawyers to act "in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty," and the official comment opines that authority to make such decisions "ordinarily reposes in the supervisor." MODEL RULES OF PROFESSIONAL CONDUCT 5.2(b) & cmt. (1993). But it is not at all clear that failure to advise a client against taking legal but immoral action raises any question of professional duty. *See supra* note 92. Furthermore, Model Rule 5.2(b) is designed to give subordinate lawyers a safe harbor from official sanction for acting under their superiors' legal orders, not to offer them guidance in charting a morally appropriate course around or above such orders.

94. The lawyer codes rather unenthusiastically allow a lawyer to discuss client matters with another lawyer, but the emphasis here seems to be much more on getting technical advice for the client rather than moral advice or support for the lawyer. The tone, moreover, is one of permission, of exception to a rule of strict confidentiality, rather than one of exhortation or encouragement. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4–2 (1980) ("Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1993) ("Lawyers in a firm may, in the course of the firm's practice, disclose to each other

D. *The Consequences of Moral Isolationism*

In the next section I will try to account for Stevens's and Kenton's failure to engage in dialogues with each other and with Darlington. First, however, I want to sketch the consequences of that failure: personal and professional disaster.

The maids, of course, lose their jobs. Miss Kenton, who sees departing from Darlington Hall as her only moral course, feels tremendous guilt when she procrastinates. She tells Stevens over a year later, "'Had I been anyone worthy of any respect at all, I dare say I would have left Darlington Hall long ago.'"⁹⁶ She eventually does leave, but only when it becomes apparent to her that Stevens will not—or cannot—reciprocate her affection. To spite him, she marries someone she does not love, and, she tells him at the end, lives with recurrent bouts of deep regret.

Stevens's sense of professional propriety keeps Miss Kenton at arm's length, denying her the solace of discussing a deep moral dilemma with a friend. That sense of propriety also keeps him from making as clean a breast as she of his part in the incident with the maids. Indeed, his unconfessed guilt about this incident and his involvement with Lord Darlington's fascistic activities gnaw away at Stevens for the rest of his career, threatening to destroy his quest for a morally meaningful life.

This failure is clearly professional as well as personal, as we see in the fact that Stevens fails Lord Darlington. For his own part, Lord Darlington repents of the maids' case shortly afterward, expressing to Stevens regret at his conduct and sadness at not being able ever to set the matter right. Indeed, he

information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers."); see also *id.* Rule 5.1 (requiring supervisory lawyers to take reasonable steps to ensure that lawyers practicing with them comply with Rules of Professional Conduct).

95. The importance of this dialogue is better reflected in the literature on public service and law reform work than in the literature on traditional private practice. See Randy Bellows, *Notes of a Public Defender*, in PHILIP B. HEYMANN & LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS* 69, 73 (1988) (describing professionally and personally supportive atmosphere of District of Columbia Public Defender Service); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 410–11 (1982–83) (calling for mutually supportive movement of radically leftist lawyers). An exception is the work of Thomas Shaffer, who emphasizes friendship and community as essential to the ethical practice of law generally. See SHAFFER, *supra* note 5, at 178–87, 193–222, 254–67. Shaffer, however, does not draw the sharp distinction I do between friendship with clients and friendship with others. Implicit acknowledgement of the need for this form of dialogue may be evident in the enthusiasm in some quarters of the profession for the Inns of Court movement. For descriptions of the often painful isolation of private practice, especially in the litigation departments of elite law firms, see CHARLES REICH, *THE SORCERER OF BOLINAS REEF* 25–43 (1976) (describing alienation from early work in litigation department of large law firm) and Wayne D. Brazil, *The Attorney as Victim: Toward More Candor About the Psychological Price Tag of Litigation Practice*, 3 J. LEGAL PROF. 107, 115 (1978) ("When I wanted to be open, candid, and cooperative I felt pressure to be closed, self-conscious, and contrived.").

96. ISHIGURO, *supra* note 6, at 152.

comes to see the matter very much in Miss Kenton's moral terms: "It was wrong what happened and one would like to recompense them somehow."⁹⁷

Lord Darlington's change of heart highlights an essential oversight of Stevens's and Kenton's moral isolationism: One's professional principals, when tactfully approached with the moral consequences of their actions, may well choose to do the right thing. For professional agents to assume otherwise is fundamentally to slight their principals' status as moral beings,⁹⁸ sometimes seriously harming not only third parties, but also both the principals and their agents. We have the strong impression not only that a proper word from Stevens might have averted the firing of the maids, but also that such a word might have helped alert Lord Darlington sooner to the dangers of Nazism generally. We need to consider, then, why Mr. Stevens and Miss Kenton, but especially the former, fall into an isolationist professional stance, and what that fall tells us about the risks we run as American lawyers.

That examination will show that moral lawyering necessarily involves the two dialogues we have identified. We will take these dialogues up in turn: first, the dialogue between professionals and principals, particularly between Stevens and Darlington, and then the dialogue between professionals and their friends, particularly between Stevens and Kenton. With respect to each, we will examine what the dialogue might have contained, and why it failed. In both cases, we will see that problems not apparent on the face of abstractly articulated professional ideologies can become glaringly obvious as those ideologies are put into practice by their adherents. Ideologies can be logical, internally consistent, and coherent without being viable—literally, livable—for the individual human beings to whom they are presented as models for living.

III. THE LOST DIALOGUES

A. *The Dialogue Between Professionals and Their Principals*

The dialogue between Stevens and Lord Darlington on the matter of the maids was, as we have seen, aborted. It degenerated into a protofascist monologue, both in substance and in form, with Darlington as the local *gauleiter* spouting racist dogma to a doubting but cowed subordinate. It is left to us, therefore, to reconstruct what might have been.⁹⁹

97. *Id.* at 151. Darlington's use of the passive voice and indefinite pronouns does, however, suggest that his repentance was something less than profound.

98. See Fried, *supra* note 33, at 1088; Pepper, *supra* note 91, at 1600–01.

99. For the reconstruction of aborted dialogues as a means of extracting their implicit positive message, see JAMES B. WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY (1984); James B. White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 865–66, 870–71 (1983).

1. *What the Dialogue Might Have Revealed*

As a step toward that reconstruction, consider Stevens, upon being asked to fire the maids, responding as follows:

I'm terribly sorry, sir, but I consider it part of my duty, in discharging an employee, to give an account of why he or she is being dismissed. I feel a duty to my profession, and to the individuals personally, to rehabilitate if possible those who have fallen short. Moreover, I have a duty to my employer not to convey to anyone, of whatever station, the impression that my employer has acted without good reason, much less arbitrarily or dishonorably. Since I cannot understand why you have chosen to fire these employees, I cannot explain their firing to them, and thus I cannot, as a matter of professional duty, dismiss them. Indeed, Sir, I cannot help but remark that this dismissal is worse than unaccountable to me; it seems to me contrary to a central principle of my profession, rewarding merit evenhandedly. And that, Sir, I have always taken to be my obligation under the spirit of fair play incumbent upon English folk of every rank, from the lowest to the Crown.

I think that this is an entirely plausible response¹⁰⁰ for several reasons. At the most general level, fair play and resistance to tyranny are part of the heritage of every English school child.¹⁰¹ In his *Elegy Written in a Country Churchyard*, Thomas Gray exalts, along with common folk generally, "Some village Hampden, that with dauntless breast / The little tyrant of his fields withstood."¹⁰² A man like Stevens would almost certainly have read the *Elegy* in his ceaseless self-improvement program,¹⁰³ if not as a schoolboy.¹⁰⁴ Even if he had not, the sentiment expressed there informs the culture—the shared stories and histories—of all English folk. During the very era in which Stevens's story is set, Churchill tapped into this tradition to rally

100. In the movie, Stevens does respond very much along these lines, albeit more briefly: "'M'Lord, may I say: They work extremely well; they're intelligent and polite; they're very clean.'"

101. See, e.g., ISHIGURO, *supra* note 6, at 40 (Stevens's describing incident during Boer War as "a most un-British attack on civilian Boer settlements"). This is not to suggest, of course, that the fabled English sense of fair play is not honored, to use an Anglicism, as often in the breach as in the observance, or that resistance to tyranny is a universally or uniquely English attribute. Without looking as far afield as Africa, America, or Asia, the histories of Ireland, Scotland, and Wales offer ample evidence to the contrary. The point here is, rather, that fairness and independence are attributes available to all English folk in their own national history.

102. Thomas Gray, *Elegy Written in a Country Churchyard*, in 1 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 2480, 2481 (M.H. Abrams ed., 5th ed. 1986).

103. See ISHIGURO, *supra* note 6, at 167–68 (describing how Stevens rationalizes his reading of "sentimental romances" as "an extremely efficient way to maintain and develop one's command of the English language").

104. See 1 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE, *supra* note 102, at 2475 (describing Gray's *Elegy* as "the English poem best known and most loved by those whom [Samuel] Johnson called 'the common reader'").

English people of all classes against the threat of fascism.¹⁰⁵ In one of the most painful episodes for Stevens, a Socialist tavern-roarer—explicitly no fan of Sir Winston in matters of domestic politics¹⁰⁶—affirms Churchill's greatness and the nation's common purpose against the Nazis while reminding Stevens where Lord Darlington's early sympathy had lain.¹⁰⁷

If the chivalrous tradition of the Round Table was closed to commoners, the mythology of Robin Hood's forest band, a mythology soon to include the Dunkirk rescue, was not.¹⁰⁸ It is important to note that this tradition of resistance embraces butlers. Critics have wondered why Ishiguro did not have Stevens tap into the very rich tradition of independence and resistance available to English domestics in the "Jeeves" tradition of P.G. Wodehouse's comic novels.¹⁰⁹ In that tradition, mere valets—not to mention lordly butlers—save their masters from many a blunder and foolish notion through tactful but firm intercession.¹¹⁰

One might object that Ishiguro's treatment of domestic service is both more serious and more realistic than Wodehouse's, but Ishiguro himself makes clear that the answer lies deeper. He shows us that Stevens's father and idol was very much a part of this tradition. One of Stevens's favorite stories about

105. As Churchill himself put it: "It was a nation and race dwelling all around the globe that had the lion heart. I had the luck to be called upon to give the roar." Winston S. Churchill, Eightieth Birthday, Presentation from Both Houses of Parliament, Westminster Hall (Nov. 30, 1954), in 8 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES 1897-1963, at 8607, 8608 (Robert R. James ed., 1974), quoted in PAUL ADDISON, CHURCHILL ON THE HOME FRONT 1900-1955, at 335 (1992) (giving slightly different version of same passage) (quoting MARTIN GILBERT, NEVER DESPAIR: WINSTON S. CHURCHILL 1945-1965, at 318 (1988)); see also Judith W. Wegner, *AALS as a Learning Society*, THE NEWSLETTER (Association of Am. Law Sch., Washington, D.C.), Feb. 1995, at 1 (quoting this passage of Churchill's "lion heart" speech with approval). But cf. ADDISON, *supra*, at 334-35 (noting Churchill's reluctance early in World War II to make radio speeches).

106. He may well have had in mind Churchill's enthusiasm as Chancellor of the Exchequer—overridden by the Cabinet—for the use of tanks to suppress the General Strike of 1926. See ADDISON, *supra* note 105, at 264.

107. ISHIGURO, *supra* note 6, at 186-88, 194-201. The ironies here are rich, if indirect. Oxfordshire, the site of Darlington Hall, is also the site of Blenheim Palace, seat of John Churchill, first Duke of Marlborough, granted to him in recognition of his military leadership against the armies of Louis XIV's absolutist France. GEORGE M. THOMSON, THE FIRST CHURCHILL: THE LIFE OF JOHN, 1ST DUKE OF MARLBOROUGH 162-66 (1979). His descendant and fellow Oxfordshireman, Winston Churchill, wrote an admiring biography. See 1 WINSTON S. CHURCHILL, MARLBOROUGH: HIS LIFE AND TIMES (1933); see also *Mr. Churchill's Life of Marlborough*, TIMES LITERARY SUPPLEMENT, Oct. 12, 1933, at 679 ("Some may think that part of Mr. Churchill's book is special pleading . . ."); P.W. Wilson, *Winston Churchill's Life of the Duke of Marlborough*, N.Y. TIMES BOOK REV., Nov. 12, 1933, at 3, 16 ("[W]e have certain blots on the original escutcheon . . . which this author has surrounded with new laurels.").

108. Cf. FRIEDRICH NIETZSCHE, THE USE AND ABUSE OF HISTORY 12 (Adrian Collins trans., Liberal Arts Press 1957) (1874) ("History is necessary above all to the man of action and power who fights a great fight and needs examples, teachers, and comforters; he cannot find them among his contemporaries."). On the use of history as myth, and thus as revelatory of the possibilities of human existence in the world, see NORMAN PERRIN, THE NEW TESTAMENT: AN INTRODUCTION 21-34 (1974).

109. See Jack Kroll, *I Say, Stevens, Bit of a Wasted Life, What?*, NEWSWEEK, Nov. 8, 1993, at 78; Lane, *supra* note 6, at 114.

110. See P.G. WODEHOUSE, THE CODE OF THE WOOSTERS 65 (1938) (chronicling Jeeves's assisting his master in thwarting Roderick Spode, "the founder and head of the Saviours of Britain, a Fascist organization better known as the Black Shorts").

his father involves the elder's wordless refusal to chauffeur a carload of his employer's rowdy house guests after their drunken insults blundered onto the character of their host. In Stevens's telling, his father stopped the car, got out, and quite literally stood against the offenders. That this corrective role was accepted by the upper classes themselves is attested by Ishiguro's having the story told to Stevens in admiring terms by one of its principal targets.¹¹¹

Before we examine why Stevens did not take this route, it is instructive to note that not only our academic accounts of lawyering, but also our fund of lawyer-hero stories, include parallel accounts.¹¹² The paradigm here is Louis Brandeis, who summed up his practice in an oft-quoted memo he wrote to himself: "Advise client what he should have—not what he wants."¹¹³ Contemporary defenders of moral activist lawyering have refined and elaborated the form that such advice might take, noting the importance of tact and sensitivity to context.¹¹⁴

It is also instructive to note that Brandeis was not writing in a vacuum. His memo to himself dated from the days when progressives of all parties were bemoaning the rise of the modern corporate lawyer.¹¹⁵ That lawyer found his credo in the words of Elihu Root, contemporary of Brandeis and founder of Cravath, Swaine & Moore's predecessor firm: "The client never wants to be told he can't do what he wants to do; he wants to be told how to do it, and it is the lawyer's business to tell him how."¹¹⁶

2. *Why the Dialogue Failed*

Why, then, did the dialogue with Darlington fail? Critical to Stevens's notion of both professional and personal moral worth is his understanding of

111. ISHIGURO, *supra* note 6, at 37–40.

112. See Gordon, *supra* note 74, at 34 (emphasizing importance of strong norms as condition of exercise of professional independence).

113. PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 40 (1984). The pantheon also includes Lincoln, who told a client in his Springfield practice: "You must remember that some things legally right are not morally right. We shall not take your case" LUBAN, *supra* note 32, at 174 (quoting WILLIAM H. HERNDON & JESSE W. WEIK, HERNDON'S LINCOLN 345 n.* (Chicago, Belford, Clarke & Co. 1889) (1888) (quoting letter written to William H. Herndon by eyewitness, recounting Lincoln's words)). Thomas Shaffer traces and analyzes a tradition of "dissenters' ethics" in the American legal profession in SHAFFER, *supra* note 5, at 173–228.

114. See, e.g., Gordon, *supra* note 74, at 26–29.

115. See LOUIS D. BRANDEIS, *The Opportunity in the Law*, in BUSINESS: A PROFESSION 329 (Hale, Cushman & Flint 1933) (1914), excerpted in RHODE & LUBAN, *supra* note 33, at 36; Gordon, *supra* note 37, at 56–57.

116. 1 ROBERT T. SWAINE, THE CRAVATH FIRM 667 (1946). Mr. Root could, however, play the other side of the street. He also said that "[a]bout half of the practice of a decent lawyer is telling would be clients that they are damned fools and should stop." STEPHEN GILLERS & NORMAN DORSEN, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 521 (2d ed. 1989). Neutral partisanship readily accommodates the presentation of inconsistent arguments in different trial courts, see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. (1993) (discussing conflicts of interest, including conflicts in litigation), but it is rather a stretch to see how both of Mr. Root's positions could be accommodated in any but the most divided of individual consciences.

"dignity." "[A] dignity in keeping with his position," he says at the outset, is the essence of being a great butler.¹¹⁷ It is Stevens's flawed notion of dignity that leads to his undoing. This dignity, as he unfolds it for us in his story, has two aspects, one substantive, the other procedural. The first involves whom and what one serves; the second, how one performs that service.

The substantive side of Stevens's notion of dignity is not the principal source of his problem. Stevens's case does, however, illustrate some disquieting features—I would say deficiencies—of neutral partisanship, features that have been identified by proponents of moral activism.¹¹⁸ Most obviously, it underscores a point conceded by neutral partisans themselves: That which is legally permitted—in this case, the firing of the Jewish maids—may well be morally objectionable.¹¹⁹ Furthermore, it illustrates that though autonomous decisionmaking is in the abstract a moral good, perhaps even a logical prerequisite of moral goodness, particular exercises of autonomy may be profoundly evil.¹²⁰ The possibility of autonomous but thoroughly evil action becomes quite real in Lord Darlington's decision to fire the maids, and this in turn poses questions for which neutral partisans have no good answer in theory: Will the local harm that professionals help clients wreak in particular exercises of autonomy not sometimes (perhaps oftentimes) outweigh the general goodness of promoting autonomous action? And why is service of one good—client autonomy—to be chosen over other, competing moral values?

As we have seen, Stevens's conception of dignity, like the neutral partisanship model of lawyering, strongly emphasizes deference to one's employer on matters of morality. But even neutral partisanship permits bringing moral qualms to the employer's attention. Indeed, in extreme cases, theoreticians of neutral partisanship recommend an analogy to civil disobedience (at some cost to the elegance of their model): the violation of one's professional obligation not to decline or withdraw from cases on moral grounds.¹²¹ We need, then, to look beyond the substantive aspect of Stevens's notion of dignity, and the corresponding theoretical entailments of neutral partisanship, to understand why Stevens balked here.

What ultimately keeps Stevens from his dialogue with Darlington is a second aspect of his notion of dignity. This aspect has to do with how one serves, as opposed to whom or what one serves; it is a matter of style or form

117. ISHIGURO, *supra* note 6, at 33.

118. See, e.g., David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 638–43 (rejecting Stephen Pepper's defense of lawyers' amoral role).

119. See Fried, *supra* note 33, at 1082; Pepper, *supra* note 9, at 614.

120. See Luban, *supra* note 118, at 639.

121. See Fried, *supra* note 33, at 1086 ("Once again, the inquiry is moral, for if the law enjoins an obligation against conscience, a lawyer, like any conscientious person, must refuse and pay the price."); Pepper, *supra* note 9, at 632 ("Assuming a lawyer feels bound (either morally or under legally enforced professional ethics) to the amoral ethic, he or she may perceive in a particular situation a higher value that supports conduct contrary to the lawyer role.").

of professional service, rather than content. It is perhaps easiest for us American lawyers to get at this from our side, through examining the fetish that the current lawyer professionalism crusade makes of civility. The civility we see ensconced in codes and creeds and pledges of professionalism¹²² tends to be an exaggerated, almost senatorial brand of courtesy, an insistence on never raising one's voice, never losing one's temper, never displaying the slightest sign of emotion or passion.

Revealingly, this notion of civility has its roots in a peculiar Anglophilia.¹²³ Former Chief Justice Burger, in one of the earliest paeans to professionalism of the contemporary crusade, explicitly invoked the studied decorum of the English barrister, calling "the courts of England . . . a model of the disciplined, calm civility that is essential to a trial,"¹²⁴ and cited "English Barristers . . . [as] the most tightly regulated and disciplined in the world."¹²⁵

For Stevens, this model is literally closer to home, and he has taken it very much to heart. The greatness of English butlers, he explains, is like the beauty of the English countryside itself: "[I]t is the very *lack* of obvious drama or spectacle that sets the beauty of our land apart. . . . the calmness of that beauty, its sense of restraint."¹²⁶ "It is sometimes said," he notes with relish, "that butlers only truly exist in England," owing to "the emotional restraint which only the English race are capable of."¹²⁷ His professional goal, in fact, is total concealment of himself in this austere professional persona. "The great butlers," he observes, "are great by virtue of their ability to inhabit their professional role and inhabit it to the utmost; they will not be shaken out by external events, however surprising, alarming, or vexing."¹²⁸ The dubious assumptions and long-term effects of his highly successful effort should not be lost on other emulators.

For one thing, like his American fellow devotees to the civility cult,¹²⁹ Stevens tends to conflate expressing outrage with being outrageous, and to reject the whole as a uniformly bad lot. His shock at Darlington's order to fire the maids barely registers with his master, and he congratulates himself on the concealment. Similarly, he proudly reports that, in discussing the incident with

122. See *What Your Peers Are Saying: Growing Attention to Professionalism*, PROF. LAW., Fall/Winter 1989-90, at 12 (citing extensive list of codes, creeds, pledges, and studies).

123. See Atkinson, *supra* note 11, at 60 n.97; see also Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 695 (1994).

124. Burger, *supra* note 2, at 213.

125. *Id.* at 215.

126. ISHIGURO, *supra* note 6, at 28-29.

127. *Id.* at 43. Stevens declares "Continental . . . as a breed" to be incapable of such restraint. *Id.* Apparently, Stevens never met, in print or in the flesh, Sartre's self-concealing waiter. See JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* 101-02 (Hazel E. Barnes trans., Pocket Books 1956) (1943).

128. ISHIGURO, *supra* note 6, at 42-43.

129. See Atkinson, *supra* note 11, at 50-51, and Mashburn, *supra* note 123, at 683-89, 695-96, for descriptions of the civility cult.

Miss Kenton, he "did so in as concise and businesslike a way as possible."¹³⁰ As we have seen, however, it was concealment and conciseness that cost the three of them and others dearly.

Moreover, as I tried to show in my alternative response to Lord Darlington, it was not a concealment dictated by any plausible understanding of his job. Nor would the alternative response have required acting without dignity. Indeed, a properly nuanced understanding of civility includes a repertoire of tones ranging, as circumstances warrant, from the warm and friendly, through the icily indignant, to the passionately, even angrily, engaged.¹³¹ The Prince of Peace, we are told, drove money-changers from the temple with braided whip, much to the consternation of the high priests.¹³² Surely even the imperturbable Brahmin Holmes would have shouted "Fire!" if his proverbial theater had really been ablaze.¹³³

Both Stevens and his American emulators miss this point, and we are left to wonder why. I think the answer lies less in the conscious fear of loss of decorum, and more in darker, unarticulated anxieties about losing control or admitting that someone else is in control. One of Stevens's favorites of his father's stories involves a butler serving in India during the British raj. Just before dinner, he discovered a tiger lounging beneath the dining table. Calmly requesting his employer's rifle—"Perhaps you will permit the twelve-bores to be used?"—he dispatched the beast with three shots. Back in the drawing room, he announced: "Dinner will be served at the usual time and I am pleased to say there will be no discernable traces left of the recent occurrence by that time."¹³⁴

Lawyers, too, like to indulge the image of aplomb, of perfect control of self and situation, that typified the secret life of Walter Mitty.¹³⁵ In particular, we like to project a persona of infallibility and perfect aim.¹³⁶ And the clients whom we serve, though the service is in court or conference room rather than at table, tend to relish this image as well. Rumpled and bumbling,

130. ISHIGURO, *supra* note 6, at 148.

131. See Atkinson, *supra* note 11, at 52.

132. *John* 2:13-18.

133. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

134. ISHIGURO, *supra* note 6, at 35-37.

135. See JAMES THURBER, *The Secret Life of Walter Mitty*, in *MY WORLD—AND WELCOME TO IT* 72, 72-73 (1942).

136. One of our principal lawyer-heroes, Atticus Finch, killed a rabid dog in the middle of his neighborhood with a single rifle shot, at the sheriff's panicked insistence and much to the amazement of his children. Their neighbor, Miss Maudie Atkinson, greeted him with "I saw that, One-Shot Finch," and chided his daughter: "Well now, Miss Jean Louise, . . . still think your father can't do anything? Still ashamed of him?" HARPER LEE, *TO KILL A MOCKINGBIRD* 101-02 (1960); cf. THURBER, *supra* note 135, at 77 ("You are a crack shot with any sort of firearms, I believe?" said the District Attorney, insinuatingly [to Mitty].").

Rumpole of the Bailey is a comic figure, not a role model, even though he is thoroughly competent.¹³⁷

There is another, even darker, fact here, a fact that comes out nicely in the story but that is likely to be overlooked or minimized in theoretical accounts of lawyer morality: Clients may well not want to hear bad moral news. Running counter to Brandeis's notion of telling clients not what they want, but what they should have, is the position of J.P. Morgan: "I don't know as I want a lawyer to tell me what I cannot do. I hire him to tell me how to do what I want to do."¹³⁸ Such clients may be tempted to fire, if not shoot, the moral messenger.

In this respect, contemporary lawyers in private law firms, long the supposed bastions of professional independence, may be in worse shape not only than their predecessors in Morgan's day, but also than both their contemporary counterparts in corporate legal departments and elite butlers in the heyday of households like Darlington Hall. Until recently, the cost to clients of dismissing outside legal counsel was relatively high. Lack of legal sophistication forced clients—even large corporate clients—to rely on lengthy relationships with their counsel to determine whether that counsel was serving them adequately. The information garnered in such relationships was costly for clients to acquire, making it expensive for them to switch lawyers. Conversely, the high costs of switching gave lawyers a corresponding measure of independence, which allowed them to dissent from client wishes on moral or other grounds.¹³⁹ Of late, however, client sophistication in evaluating legal services has markedly increased. The cost of switching lawyers is accordingly lessened, and lawyers run a correspondingly greater risk of being dismissed for dissenting from client wishes.¹⁴⁰

There are three related ironies here. First, lawyers in elite firms may well suffer this diminution in professional autonomy most, as it is the elite corporate clients they represent that have become the most savvy assessors of legal services. Second, the source of this new sophistication on the part of large corporate clients is their growing reliance on in-house counsel to diagnose their legal needs, to decide when outside counsel needs to be consulted, and to evaluate how outside counsel has performed. Thus, the much-vaunted independence of outside counsel vis-à-vis in-house counsel may be undergoing a radical reversal. In-house counsel, with their intimate, hard-to-duplicate inside knowledge of the client, may be very costly to replace, and

137. See Jamison Wilcox, *The Rumpole Books by John Mortimer: Literature on a Life in the Law*, 55 U. CIN. L. REV. 117, 120–21 (1986) (reviewing series of *Rumpole* books).

138. IDA M. TARBELL, *THE LIFE OF ELBERT H. GARY* 81 (1925).

139. See Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 892–99 (1990); Ronald J. Gilson & 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, 360–68 (1985).

140. See Gilson, *supra* note 139, at 899–903; Gilson & Mnookin, *supra* note 139, at 381–83.

thus able to exercise a correspondingly enhanced degree of professional resistance to client wishes. On the other hand, in-house counsel's expert legal knowledge enables them to evaluate the legal services of outside counsel fairly inexpensively, and so to recommend their replacement at relatively low cost. The professional autonomy of in-house counsel, implicitly denigrated by the very name, with its implications of domestication and captivity, may well come at the expense of the freedom and independence traditionally associated with outside counsel.¹⁴¹

This suggests a final irony. The traditional position of elite butlers like Stevens in the stately homes of employers like Darlington bears a striking similarity to the newly enhanced status of in-house counsel for large corporations. Stevens and his peers presided over elaborate staffs, maintained contacts with a wide network of outside service providers (grocers, repairmen, and the like), and acquired detailed personal knowledge of the tastes and foibles of their masters. Their dismissal would have been highly disruptive, and their replacement quite costly. As a result, these domestic servants, acting literally as in-house counsel, may have had available to them a measure of economically based professional autonomy to be envied by the elite law firms of today.

Faced with the prospect of being dismissed for dissent, the temptation to cloak one's personal misgivings in a mantle of the amoral, impersonal technician is strong indeed. Recall the conclusion of Elihu Root, faced with demands like J.P. Morgan's: "[I]t is the lawyer's business to tell him how."¹⁴² The deference that Root made the cardinal virtue of his neutral partisan ethic corresponds nicely to the necessity he felt to comply with wishes like those of Morgan. This is not, however, to accuse Root and his progeny of insincerity. As George Eliot remarked in her great moral tale, *Middlemarch*, "[T]he egoism which enters into our theories does not affect their sincerity; rather, the more our egoism is satisfied, the more robust is our belief."¹⁴³ To understand Mr. Stevens's adoption and practice of neutral partisanship, it is not enough to examine that particular theory of professional ethics, or even to

141. See Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 278 (1985); Gilson, *supra* note 139, at 902-03; Gilson & Mnookin, *supra* note 139, at 381-83; Robert E. Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 483-84 (1989); Ted Schneyer, *Professionalism and Public Policy: The Case of House Counsel*, 2 GEO. J. LEGAL ETHICS 449, 477-78 (1988); David S. Machlowitz, *Lawyers Move In-house*, A.B.A. J., May 1989, at 66, 69.

142. See 1 SWAINE, *supra* note 116, at 667.

143. 2 GEORGE ELIOT, *MIDDLEMARCH* 83 (Alfred A. Knopf 1991) (1874); see also Wasserstrom, *supra* note 37, at 8-9 (noting attractiveness to practicing lawyers of neutral partisan's "simplified, intellectual world" as "often a very comfortable one to inhabit"). Short of being fired, of course, those who express moral qualms may simply find themselves left out of the loop or "kept in the dark" regarding matters of such delicacy in the future. See ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* 123 (1988) (describing this phenomenon as experienced by in-house corporate counsel).

develop a theory of egoism. To these we need to add an analysis of his ego.¹⁴⁴

Before turning to that analysis, we should note that, if projecting an image of cool competence to clients is important, taking it too seriously ourselves is dangerous. Stevens concedes that the tiger story may have been apocryphal, but he fails to see that it is something of a joke, a reduction of self-confidence to the absurdity of recklessly endangering oneself and others. He takes the story not as a parody, but as a paradigm.¹⁴⁵

We need to acknowledge our human finitude and fallibility, even frailty, not, perhaps, in front of our clients, but at least to ourselves and among ourselves, in the presence of trusted professional colleagues. We need to admit not just the uncertainty of the law itself, but our own uncertainty about the law; not just the murkiness of what is morally right to do for a client, but our hesitance in discussing our qualms with our clients. These conversations are central to the second, and much more critical, dialogue of professionalism, a dialogue at which Stevens also failed.

B. *The Dialogue Between Professionals and Their Peers*

Let us look, then, at Stevens's dialogue with his peers, particularly with Miss Kenton, to see what it might have revealed, and why, for the most part, he missed it. Here again, because the dialogue failed, we must reconstruct its content from its fragments. The first of these we have already seen: the abortive dialogue in Miss Kenton's parlor about the Jewish maids. The second is a poignant postlude to that incident, over a year later in the summerhouse, when Stevens tells Miss Kenton about Lord Darlington's change of heart. The final fragment turns up twenty years afterward, at the end of Mr. Stevens's trip to Cornwall to visit Miss Kenton.

1. *What the Dialogue Might Have Revealed*

Part of these conversations with peers is quite mundane. It involves what we call "bouncing an idea off" colleagues, "running something by" them. You can ask your colleagues what your clients won't know, and what perhaps you don't want your client to know you don't know—things outside your area of expertise that you need to watch out for or things within your area of expertise that you want to confirm.¹⁴⁶ And you can ask your colleague for what your

144. For that, see *infra* text accompanying notes 163–88.

145. See ISHIGURO, *supra* note 6, at 37.

146. This seems to be the principal sort of advice that lawyer codes contemplate lawyers seeking from one another. See *supra* note 94.

client cannot give: logistical support in staffing a big case¹⁴⁷ and tactical advice on arguing before particular courts or agencies.¹⁴⁸ These are the synergies that lead lawyers to practice in firms;¹⁴⁹ these are the kinds of practical concerns that Stevens and Kenton discuss in their close-of-day cocoa sessions. Faced with his American employer's un-British bantering, a baffled Stevens longs to discuss the appropriate response with a fellow butler who used to accompany his master on visits to the Hall.¹⁵⁰

Such conversations are necessary for efficient professional practice, but they are far from sufficient for satisfactory professional lives. The need for conversation with colleagues is not just a matter of two heads being quantitatively better than one; it has to do with the other's seeing you as you cannot see yourself, from a perspective necessarily outside yourself. The more of yourself you let the other see, the more you can learn of yourself. This, of course, transcends the practical details of how to perform good service, legal or domestic. It includes not just how to get things done, but what to do and, ultimately, who to be.¹⁵¹

Stevens kept his meetings with Miss Kenton strictly on the former, shallower level; had he let them reach the latter, deeper level, their conversation over the maids would have gone quite differently. Miss Kenton clearly meant for it to take a turn toward the fundamental. They had identified a serious moral crisis, and she hoped that they could rectify it together. Had Stevens been willing to take that turn, Miss Kenton might have helped him craft a tactful, but firm, reply to Darlington along the lines I have suggested.¹⁵² As we have seen, such a reply might have brought Darlington around and made things go very much better for all concerned.

But there is another, profoundly significant, possibility, which we must take up at this point. In the course of these conversations, it may have become clear that Darlington would not budge. Stevens and Kenton would then have faced the dilemma we have long deferred, the dilemma over which moral

147. See HEYMANN & LIEBMAN, *supra* note 95, at 108, 110 (describing partner in law firm's corporate department calling on litigation partner when staffing big securities law case for help in resisting hostile takeover bid).

148. *Id.* at 127 (describing New York law firm's use of local counsel to draft and argue briefs on Florida law).

149. See WOLFRAM, *supra* note 34, at 877 (describing solo practitioners' "inability to perform specialized or multilawyer tasks"); Gilson & Mnookin, *supra* note 139, at 321-39 (explaining corporate law firm as mechanism for obtaining advantages of diversifying investments in human capital while controlling agency costs associated with cooperative behavior).

150. ISHIGURO, *supra* note 6, at 19.

151. See Atkinson, *supra* note 32, at 947-79 (recommending that values be elaborated and reinforced in communities of like-minded individuals).

152. Both anecdotal and experimental data suggest that peer support strengthens resistance to authority. See MYRON P. GLAZER & PENINA M. GLAZER, *THE WHISTLEBLOWERS: EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY* 81 (1989); STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY* 113-22 (1974). Milgram's experiments, it should be noted, have been criticized virtually from the time of their performance and would now violate generally accepted standards for experimentation on human subjects. See RHODE & LUBAN, *supra* note 33, at 385 n.8.

activist and neutral partisan lawyers divide: whether to assist in a legally authorized moral wrong or to resign.¹⁵³ Stevens and Kenton's story suggests a problem that advocates of moral activism seldom face directly: the costs of conscientious withdrawal.¹⁵⁴

This problem is clearest in the case of Miss Kenton. She, as we have seen, feels morally compelled to resign but finds that she cannot bring herself to do it. She explains to Mr. Stevens in the Hall's summerhouse, over a year after the maids incident:

"It was cowardice, Mr. Stevens. Simple cowardice. Where could I have gone? I have no family. Only my aunt. I love her dearly, but I can't live with her for a day without feeling my whole life is wasting away. I did tell myself, of course, I would soon find some new situation. But I was so frightened, Mr. Stevens. Whenever I thought of leaving, I just saw myself going out there and finding nobody who knew or cared about me. There, that's all my high principles amount to. I feel so ashamed of myself. But I just couldn't leave, Mr. Stevens. I just couldn't bring myself to leave."¹⁵⁵

Here we have again, in poignant terms, the tragic dimension of professional life. Sometimes doing the right thing is too costly, and we are left with the lesser evil. And sometimes it is a particularly repellent evil that we choose. We weigh the harm we are asked as professionals to do to third parties against the harm that refusing would work on ourselves, and we choose the former: to hurt rather than be hurt.

When this happens, we are inclined to feel, with Miss Kenton, that we have acted in cowardice, that our high principles have indeed come to naught. We need to be reminded that this is not necessarily so. The defense rejected at Nuremberg, after all, was "I did it under orders," not "I did it under duress."¹⁵⁶ We need to be reminded, too, that duress comes not only in the shape of physical threats, but also in the form of threatened economic or

153. Cf. Gordon, *supra* note 74, at 27–28 (discussing multitude of options open to lawyer whose client overrules lawyer's initial opposition to planned course of action).

154. *But see id.* at 35–36, 54 (acknowledging market position as important factor influencing law firms' exercise of political independence from clients and noting decline in market position of elite firms since the 1970s); Rhode, *supra* note 33, at 645 (recognizing that "some limits to self-sacrifice demand recognition"); Simon, *supra* note 32, at 1093 (acknowledging importance of "[t]he lawyer's financial interests" in moral activist selection of cases); cf. GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 136 (1978) (arguing that if lawyers applied most exacting moral scrutiny to their clients' acts to decide whether or not to continue their professional association, "there would be few of either clients or lawyers").

155. ISHIGURO, *supra* note 6, at 152–53; *see also* VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* 63–64 (1929) (describing narrow professional opportunities of even upper-class women of Miss Kenton's generation and "poison of fear and bitterness" engendered by "always to be doing work that one did not wish to do . . . like a slave, flattering and fawning, not always necessarily perhaps, but [because] it seemed necessary and the stakes were too great to run risks").

156. *See* RHODE & LUBAN, *supra* note 33, at 383–84, 386–87. For a discussion of the Nuremberg war crimes trials, *see generally* TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992).

personal ruin, the very prospect Miss Kenton thought she faced.¹⁵⁷ Not being a hero or a martyr in such circumstances is not tantamount to being a coward.¹⁵⁸

But choosing not to be heroic will have its own costs, as Miss Kenton found in the deep anguish that threatened her very sense of moral self-worth. These costs, moreover, are heavier if you try to bear them by yourself.¹⁵⁹ As Miss Kenton puts it, "I suffered all the more because I believed I was alone."¹⁶⁰ Conversely, knowing that we are not alone makes the burden lighter, the tragic yoke of lesser evil easier to bear. Miss Kenton is astonished to learn that Mr. Stevens shared her concern over the incident with the maids, and she rebukes him: "Do you realize, Mr. Stevens, how much it would have meant to me if you had thought to share your feelings last year? . . . Do you realize how much it would have helped me?"¹⁶¹ Here she puts the question to which we must ourselves soon turn, the question that points to the fatal flaw in Stevens's professional vision: "Why, Mr. Stevens, why, why, why do you always have to *pretend*?"¹⁶²

Before turning to that question, which is the question of why Stevens's dialogue with his peers failed, we need to look at one more aspect of what that dialogue might have revealed. It might have kept him and others from serious moral error, and it might have helped one of his colleagues bear a painful moral burden. It might, reciprocally, have helped him bear the same burden, his own inability, perhaps, to face the economic consequences of leaving Lord Darlington's employ. Beyond that, however, it might have helped him bear a potentially greater burden: not the burden of choosing the lesser evil with open eyes, but that of making a serious moral misjudgment about the right thing to

157. See 1 WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* 623 (1986) (arguing that criminal law defense of duress, traditionally limited to situations where threatened harm is death or serious bodily injury, should be expanded to include "a threat to destroy property or reputation," if wrong done in response to threatened harm is less serious).

158. We need to be reminded that our heroes, too, sometimes hesitated. See Thomas L. Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181, 203 (1981) ("Our profession tends to insist on a hagiography of purified lawyers rather than the sobering study of legitimate lawyer-heroes." (citations omitted)). Thus, for example, Lord Coke, celebrated defender of the common law and English liberties against Stuart divine-right monarchism, seems to have been more than a little intimidated by the fulminations of James I. See CATHERINE D. BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE* 372-74 (1956). Luther, awestruck by the display of ecclesiastical and imperial authority at the Diet of Worms, requested and received permission to postpone his answer for a day. See ROLAND H. BAINTON, *THE REFORMATION OF THE SIXTEENTH CENTURY* 60 (1952). And Luther's great English adversary, the Roman Catholic martyr Thomas More, recommended the example of "fearful martyrs" to bolster the consciences of the wavering. See LOUIS L. MARTZ, *THOMAS MORE: THE SEARCH FOR THE INNER MAN* 94-95 (1990).

159. See SHAFFER, *supra* note 5, at 227-28 (noting that supreme value "liberal-democratic professionalism" places on autonomy as highest good for clients leads its adherents to conclude that "the awesome circumstances that people bring to professionals—death, disease, dispute, ignorance, malaise, sin—are finally and inevitably and *appropriately* borne alone").

160. ISHIGURO, *supra* note 6, at 154.

161. *Id.* at 153-54.

162. *Id.* at 154.

do. In the summerhouse, Miss Kenton admits—I am inclined to say confesses—her failing and no doubt feels better for it, albeit belatedly. Mr. Stevens, on the other hand, does not admit his mistake for decades more. For the rest of his career, in the face of Miss Kenton's potentially liberating question, he continues to pretend. Now we need to examine her question: Why?

2. *Why the Dialogue Failed*

Here again, part of the problem is attributable to economic and social forces outside the professional's personal control, and thus is tragic. Mr. Stevens looks back nostalgically on the "true camaraderie" of a bygone era when he could discuss professional issues in leisurely end-of-the-day fireside chats with the valets of visiting dignitaries.¹⁶³ This, of course, has parallels in the much bemoaned decline in the quality of lawyerly life today, particularly the increased pressure for billable hours and the attendant crowding out of personal, family, and civic time.¹⁶⁴

But at the time of his great testing, Stevens was indeed setting aside time for end-of-the-day chats with Miss Kenton over cocoa, and visits from professional peers were very much in vogue. Something other than time and opportunity was lacking. At the height of his professional career, Stevens did not bewail the loss of personal life; rather, he insisted on it as the mark of the true professional. One gets the distinct impression that he thought he had nothing to gain from a fuller personal life, and much to lose. We must look deeper for an understanding of why he kept his fireside chats about professional values at a very high level of generality, why he sabotaged his evening cocoa time with Miss Kenton when she began to turn their discussions to matters more personal than household management, and why he deferred his voyage of self-discovery until the eleventh hour. Here, too, we may find disturbing but instructive parallels in our lives as lawyers.

To find what is missing, we must look back to the most fundamental, and most fundamentally failed, dialogue in the story. That is the dialogue between Stevens and his father, a dialogue with important parallels in the lives of other professionals. Not atypically, Stevens, as we have seen, idolizes his father; the elemental myths of his professional career are stories about his father. As Stevens's father was a great butler in his day, so Stevens aspires to be in his own. As he nears the apex of his own career, Stevens brings his aging father

163. *Id.* at 17–18.

164. See, e.g., ABA COMMISSION, *supra* note 5, at 259–61; Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 72–73 (1992). But cf. RICHARD A. POSNER, *OVERCOMING LAW* 92 (1995) (noting that "[t]he practice of law has become more competitive" and that "[c]ompetitive markets are no fun at all for most sellers; the effect of competition is to transform most producer surplus into consumer surplus").

to serve as under-butler at Darlington Hall, where he holds him up as a model to the staff. Stevens's responsibilities increase as his father's abilities decline, and, to his puzzlement, Stevens finds that he and his father speak less and less.¹⁶⁵ Eventually, Lord Darlington directs the younger man to reduce the older man's duties,¹⁶⁶ a painfully sad job for anyone, but much more so for a son asked to demote his idealized father.

Yet the ensuing conversation between father and son in the father's garret bedroom is weirdly anesthetic.¹⁶⁷ The younger Stevens tries to break the news gently, inquiring carefully of his father's health, but his father will have none of it, chiding him for wasting time in talk. At his father's insistence, Stevens is laconic—perfectly in keeping with the Spartan setting of his father's bedroom—and he is forced to give an unpleasant message most unpleasantly, as an order. They exchange words, but do not converse, do not engage emotionally. Indeed, in recounting the story, the younger Stevens twice remarks that his father showed no emotion. The father denies his own decline and ignores the hardship it works on the son; the son carefully restrains any show of either sympathy for or frustration with the father. Moreover, the son explicitly sees here the hero of his stories enact before him the ultimate scene of professional self-concealment. A great butler like his father, the younger man has observed, will remove his professional persona “when, and only when, he wills to do so, and this will invariably be when he is entirely alone.”¹⁶⁸

As the elder Stevens's decline tracks his son's rise, his death comes at his son's zenith, during the great international conference at Darlington Hall in 1923 on the issue of Germany's rehabilitation. As the dignitaries are arriving, the elder Mr. Stevens suffers what proves to be a fatal stroke. In refusing Miss Kenton's entreaties to see about his father, lest he much regret it later, the younger Stevens says, “I know my father would have wished me to carry on just now[;]” he then adds, “[t]o do otherwise, I feel, would be to let him down.”¹⁶⁹ At the inquiry first of Lord Darlington's godson, a secretary at the conference, and then of Lord Darlington himself, Stevens denies that anything is the matter—denies it four times, by my count.¹⁷⁰ Here is Stevens's last exchange with his father:

[Father:] “I'm proud of you. A good son. I hope I've been a good father to you. I suppose I haven't.”

165. ISHIGURO, *supra* note 6, at 63–64.

166. *Id.* at 61–63.

167. *Id.* at 64–66.

168. *Id.* at 43.

169. *Id.* at 106.

170. *Id.* at 105.

[Son:] "I'm afraid we're extremely busy now, but we can talk again in the morning."¹⁷¹

Thus the circle closes perfectly. The professional ultimately supersedes the personal. The son lives up to his father's standards, even as the father dies unconsolated at his appalling parental failure, unanswered in his ultimate prayer for forgiveness. In retrospect, the younger Stevens declares that he attained that night a degree of 'dignity' worthy of his father. "For all its sad associations," he says, "whenever I recall that evening today, I find I do so with a large sense of triumph."¹⁷² In the son's career, both father and son realize their dreams but lose each other, and a large part of themselves.

One does not have to be an old-line Marxist to suspect that most lawyers are the children of professional parents.¹⁷³ Nor does one have to be an orthodox Freudian to see the possibilities of transference and its analogues in the relationships between supervisory and subordinate lawyers.¹⁷⁴ Perhaps the numbingly long hours that associates and junior partners are currently working have as much to do with seeking parental approval, real¹⁷⁵ or surrogate, as with greed or ambition. If so, this places more senior lawyers in a position of almost awesome power. Often, I'm afraid, they haven't the slightest understanding of either the power or the correlative responsibility. This is not to blame them for their ignorance, nor to assign them their own cure. This is clearly a matter with which the profession as a whole should be concerned.¹⁷⁶

171. *Id.* at 97.

172. *Id.* at 110.

173. Cf. Richard L. Abel, *Lawyers*, in *LAW AND THE SOCIAL SCIENCES* 369, 388 (Leon Lipson & Stanton Wheeler eds., 1986) (noting that many lawyers come from privileged backgrounds).

174. The classic account of transference is Sigmund Freud, *The Dynamics of Transference*, 2 *ZETRALBLATT FÜR PSYCHOANALYSE* 167 (1912), reprinted in 12 *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 99, 99-108 (James Strachey ed. & trans., 1958). Among contemporary researchers, the most widely accepted definition of transference is "the experiencing of feelings, drives, attitudes, fantasies, and defenses toward a person in the present which are inappropriate to the person and are a repetition, a displacement of reactions originating in regard to significant persons of early childhood." Susan M. Andersen & Alana Baum, *Transference in Interpersonal Relations: Inferences and Affect Based on Significant-Other Representations*, 62 *J. PERSONALITY* 459, 461 (1994) (quoting R.R. Greenson, *The Working Alliance and the Transference Neurosis*, 34 *PSYCHOANALYTIC Q.* 155, 156 (1965)). A growing body of experimental and therapeutic data tends to confirm the existence of the phenomenon, see Andersen & Baum, *supra*, at 462-65, though there is great variation of opinion on the content of what is transferred, when and how the transferred concepts are acquired in development, and the basic mechanisms through which transference occurs, see *id.* at 461. I am indebted to Professor Colleen Kelley of Macalester College for introducing me to this body of research.

For a popular account of the dangers of transference in a wide range of business and professional relationships, see M. SCOTT PECK, *A WORLD WAITING TO BE BORN* 195-214 (1993). See also JEROME FRANK, *LAW AND THE MODERN MIND* 81 (1936) (discussing law itself as a "father-substitute").

175. See Robert W. Gordon, *Introduction to Symposium on the Corporate Law Firm*, 37 *STAN. L. REV.* 271, 271-72 (1985) (noting that "large metropolitan law firms" offer to "young people who get high grades at school . . . a means of certifying to their parents and to society arrival into or maintenance of authority, power, and status").

176. A salutary step in that direction is the inclusion of some psychological literature on deference to authority in RHODE & LUBAN, *supra* note 33, at 385-86.

Mr. Stevens's recapitulation of his father's sad isolation is clearest in his relationship with Miss Kenton.¹⁷⁷ On visiting his father to discuss the reduction of the latter's duties, Stevens is struck by the prisonlike "smallness and starkness" of his father's garret bedroom.¹⁷⁸ Miss Kenton makes the same observation on interrupting the younger Mr. Stevens's reading late one afternoon in the privacy of the butler's pantry. Stevens preferred to think of that room as "a crucial office, the heart of the house's operations, not unlike a general's headquarters during a battle . . . [and] the one place in the house where privacy and solitude are guaranteed."¹⁷⁹ To his mortification, Miss Kenton discovers him reading a sentimental romance, and, after an unpleasant exchange, he unceremoniously shows her out.¹⁸⁰ It is worth hearing Stevens's analysis of the incident in some detail:

There is one situation and one situation only in which a butler who cares about his dignity may feel free to unburden himself of his role; that is to say, when he is entirely alone. You will appreciate then that in the event of Miss Kenton bursting in at a time when I had presumed, not unreasonably, that I was to be alone, it came to be a crucial matter of principle, a matter indeed of dignity, that I did not appear in anything less than my full and proper role.¹⁸¹

In retrospect, Stevens admits, he had indeed "gain[ed] a sort of incidental enjoyment from these stories. . . of ladies and gentlemen who fall in love and express their feelings for each other, often in the most elegant phrases."¹⁸² But he steadfastly maintains that he was right to exclude Miss Kenton from his private life. Only at the very end of the novel, when in their final meeting she says she sometimes imagines what her life might have been with him, does he realize the cost. "Indeed," he tells us, but still not her, "why should I not admit it?—at that moment, my heart was breaking."¹⁸³

We now have the answer to the question Miss Kenton raises in the critical scene in the summerhouse, at the end of their second discussion about the maids: "Why, Mr. Stevens, . . . why do you always have to *pretend*?"¹⁸⁴ Stevens's professional values are deeply ingrained, coming as they do from paternal example, and fundamentally flawed. The flaw lies in the suppression

177. In what follows, I address the attitude of Stevens toward Miss Kenton as it reflects his father's relation to him. There is, of course, the other side of the coin: Miss Kenton's perception of Mr. Stevens. If she took him, a respected supervisor, as something of a parent substitute, then fear of disappointing or losing him may well have further complicated her decision about whether to leave Darlington Hall after the maids incident.

178. ISHIGURO, *supra* note 6, at 64.

179. *Id.* at 165.

180. *Id.* at 165–67.

181. *Id.* at 169.

182. *Id.* at 168.

183. *Id.* at 239.

184. *Id.* at 154.

of the personal beneath the professional, in concealing himself not only from his professional employer, but also from his colleagues and personal acquaintances, and even from himself. Because he believes that pretending is the essence of his professional life, he cannot engage in the kind of personal dialogue that might well save him not only as a person, but also as a professional. In closing himself off from the inspection of others, he shuts out their critical insights into his character and thus their ability to help him save himself from his airs—and errors—in devotion.

Ironically, this pretending undermines his professional life as well. "It is surely a professional responsibility," Stevens insists, "for all of us to think deeply about these things so that each of us may better strive towards attaining 'dignity' for ourselves."¹⁸⁵ "[A] dignity in keeping with his position," he says at the outset,¹⁸⁶ is the essence of being a great butler; yet by the end he concludes that "'I can't even say I made my own mistakes. . . . [W]hat dignity is there in that?'"¹⁸⁷ To his credit, Stevens knows all along that the unexamined life is not worth living; tragically, only at the very end of his professional life does he begin to appreciate that the examined life cannot be lived alone.¹⁸⁸

His final meeting with Miss Kenton brings him to the verge of this appreciation; it finally comes—tentatively and incompletely—in conversation on a public pier with a loquacious stranger who had himself been a butler, albeit on a more modest scale. Upon learning this, Stevens regales him with

185. *Id.* at 44.

186. *Id.* at 33.

187. *Id.* at 243.

188. For a lawyerly parallel to Stevens, see the thumbnail sketch of Sir Abraham Haphazard, lawyer for the protagonist in Anthony Trollope's *The Warden*:

He might be fifty years old, and would have looked young for his age, had not constant work hardened his features, and given him the appearance of a machine with a mind. His face was full of intellect, but devoid of natural expression. You would say he was a man to use, and then have done with; a man to be sought for on great emergencies, but ill adapted for ordinary services; a man whom you would ask to defend your property, but to whom you would be sorry to confide your love. He was bright as a diamond, and as cutting, and also as unimpressible. He knew every one whom to know was an honour, but he was without a friend; he wanted none, however, and knew not the meaning of the word in other than its parliamentary sense. A friend! Had he not always been sufficient to himself, and now, at fifty, was it likely that he should trust another? He was married, indeed, and had children, but what time had he for the soft idleness of conjugal felicity? His working days or term times were occupied from his time of rising to the late hour at which he went to rest, and even his vacations were more full of labour than the busiest days of other men.

ANTHONY TROLLOPE, *THE WARDEN* 213–14 (Oxford Univ. Press 1961) (1855).

Trollope tells us no more than this of Sir Abraham's personal life; he is a minor character with a cameo appearance in a single chapter. The parallels to Stevens's personal life, however, are obvious even here: the friendlessness, the studied personal isolation, the denigration of family and personal to professional life, even the insistence on "working" vacations. More significant for Trollope's story, and equally pertinent for a comparison with Stevens, is how a professional of this character was constitutionally unable to engage in moral discourse with the one he was supposedly serving, even when the need for such engagement was profoundly great. *Id.* at 215–21; see also Kenney Hegland, *Quibbles*, 67 TEX. L. REV. 1491, 1507–09 (1989) (describing and criticizing Sir Abraham's "neutral partisan" approach to pressing the letter of the law).

stories of the old days, only to break down in tears when he recalls the numerous errors, “[q]uite trivial in themselves,” that had been appearing lately in his work.¹⁸⁹ These are the errors with which the book began, the errors that Stevens attributed to a flawed staff plan that he hoped to remedy by seeking out Miss Kenton.¹⁹⁰ They are the kind of errors that had presaged his father’s literal fall and the end of his career.¹⁹¹ Stevens ominously admits to his new acquaintance that “I know what they signify,”¹⁹² reminding us of his father’s death, alone and unhappy. And reminding us, too, that professional life, unless perverted by excess or truncated by death, returns at last to the personal and familial life out of which it grows and on which it depends for sustenance and support.

The friendly stranger offers Stevens a handkerchief and a bit of encouragement: “‘You’ve got to enjoy yourself. The evening’s the best part of the day. You’ve done your day’s work. Now you can put your feet up and enjoy it.’”¹⁹³ At one level, Stevens clearly appreciates the significance of the remark. He had said virtually the same thing to Miss Kenton in their final meeting—“‘Many say retirement is the best part of life for a married couple’”¹⁹⁴—and he himself resolves to take the stranger’s advice, to look forward rather than backward.¹⁹⁵ It is in struggling to understand its meaning that Stevens recounts the conversation to us.¹⁹⁶

But Stevens cannot quite make an honest peace with the past or authentically face the future. Coming tantalizingly close to confessing his misplaced faith in Lord Darlington to the sympathetic stranger, Stevens ultimately denies responsibility.¹⁹⁷ On the eve of the sabbath of his journey, he looks forward not to rest, as his companion on the pier recommended, but to recommencing the very work that was slipping away from him as the novel opened. Nor is he even conscious of the lapse. He resolves to redouble his efforts to master “the skill of bantering,” the lack of which has bedeviled his service to his playful American employer from the beginning.¹⁹⁸ Pathetically, the humorless Stevens commits himself to working harder at play.

In returning to work, in this redefinition of his professional life, Stevens absurdly hopes to find what is missing from his life, what even he cannot bear to call love—“in bantering,” he suggests on the final page, “lies the key to

189. ISHIGURO, *supra* note 6, at 240–44.

190. *Id.* at 5–10.

191. *Id.* at 61–63.

192. *Id.* at 243.

193. *Id.* at 244.

194. *Id.* at 240.

195. *Id.* at 243–44.

196. *Id.*

197. People like him, he insists, have little choice in the course of their lives. *Id.* at 244. He alludes again to the worthiness of serving “those great gentlemen at the hub of this world,” and claims to find “cause for pride and contentment” in sacrificing much in life for such aspirations. *Id.*

198. *Id.* at 13–17, 245.

human warmth."¹⁹⁹ Thinking his companion on the pier expected banter from him, Stevens fears that he was "something of a sorry disappointment."²⁰⁰ Unable to admit, or perhaps even to recognize, his real shortcomings, and thus unable to forgive himself, Stevens fails to see that others have the grace to accept him as he is and to take him into their conversations when he sincerely tells them his story. Stevens insists to the end on substituting contrivance and artificiality for sincere and spontaneous human dialogue, with its potential for sparking genuine warmth. In a word—Miss Kenton's word—he pretends, hiding himself in his professional role, now redefined to emphasize idle chatter.²⁰¹ Unable to hear the benediction "Well *done*, good and faithful servant . . . Enter into the joy of your lord,"²⁰² Stevens prepares to reenter the alienating mode of work that has made a mockery of his human dignity, the kind of work that cannot make him free. At the end of his professional life, we fear, he can do nothing else, because his professional life has consumed his personal life, cutting him off from redeeming human contact. Perhaps he cannot enjoy himself at the end of his work, as his unsophisticated fellow butler on the pier wisely recommends, because his definition of himself at work has left him no self outside of work.

All is not quite lost, however, or not lost quite irretrievably. If Stevens misunderstands how to achieve human warmth, at least he has come to see warmth as important and to make it the focus of the remains of his day. If he can deal with his past only by minimizing the significance of the human intimacy he has lost, he is nevertheless ready to seek the meaning of his future in the finding of such intimacy. And if he believes to the end that personal fulfillment comes only in professional service, it is now professional service in pursuit of a value—warmth—that he is coming to understand and trying to share. There is hope at the end—albeit a fading, eleventh-hour hope—that in trying pleasantly to surprise his employer, Stevens himself will be surprised by the joy of genuine human contact.²⁰³

Perhaps this is already happening, though it has not yet dawned on Mr. Stevens. He has, after all, not just told a truncated version of his story to the stranger on the pier; he has also told it, in its untidy details, with its tears and its rationalizations, to us. In so doing, he has affirmed that what others think

199. *Id.* at 245.

200. *Id.*

201. See MARTIN HEIDEGGER, BEING AND TIME 214 (John Macquarrie & Edward Robinson trans., Harper & Row 1962) (1927) (analyzing "idle talk" as "uprooted" mode of self-understanding and discourse in which we are "cut off from [our] primary and primordially genuine relationships-of-Being" towards the world, others, and ourselves).

202. *Matthew* 25:21 (New King James).

203. For an example of the saving effects of sincere attention on a lost legal professional at an even later point in the day, see LEO TOLSTOY, THE DEATH OF IVAN ILYCH (1886), reprinted in THE DEATH OF IVAN ILYCH AND OTHER STORIES 95 (New Am. Library 1960). It was obviously significant to Tolstoy that the ingenuous peasant boy Gerasim, called from his usual job in the pantry to serve at his master's deathbed, was the dying man's principal source of comfort and insight. *Id.* at 134–38.

of him matters to him. He has tried to be honest with us and, though he has frequently failed, we have come to forgive his failings, to care for him, to hope he will not fail at last. If he has truly learned to open himself to others, as telling us his story implies, then part of the burden of correcting his misconceptions and self-deceptions becomes theirs. Stevens's having already told his story to us proves that, in what remains of his life, he can talk with others; the kindness of Miss Kenton and the stranger on the pier attests that at least some of them will graciously hear him out.

At this point in his story, lying outside the narrative, we can do nothing to help him. But our very presence as an audience for his story has been essential to its meaning. At the end he does not, like Prospero, explicitly ask us to release him with our applause,²⁰⁴ but he does implicitly pray for us to embrace him with our understanding. Conversely, if we have indeed understood him, and seen ourselves as we see him, we may, with his help, have saved ourselves from similar losses. And if we have already begun to suffer such losses, we may realize that others can embrace us nevertheless, even as we have embraced him.

CONCLUSION: THE MORAL SIGNIFICANCE OF STORIES

Neutral partisanship and moral activism offer very different, if not quite antithetical, visions of professional responsibility. One promises total moral absolution for what professionals do for their principals within the law; the other insists that professionals take personal, moral responsibility for the impact of their professional actions on third parties and the public. Each position has its defenders in contemporary discussions of lawyerly professional responsibility, and, in the positions of Mr. Stevens and Miss Kenton, respectively, each has its analogue in Ishiguro's story of domestic service.

In the story, both Stevens and Kenton had unfulfilling professional lives, and the deficiencies of their professional lives stunted their private lives as well. Yet we are left with the impression not so much that their theories failed them, but that they failed their theories and, more fundamentally, their employer and each other. To be sure, neutral partisanship, particularly in its more Anglophilic manifestations, does instill a measure of seen-but-not-heard, self-effacing servility, and moral activism all too easily degenerates into moral narcissism or unnecessary martyrdom. But in moral crises like Lord Darlington's decision to fire the Jewish maids, both neutral partisanship and moral activism allow, even direct, the professional to remonstrate with the employer, to recommend the morally appropriate, not merely the legally permitted, course of action. Both Stevens and Kenton failed to take this step, a step that is prior to acceding in neutral partisanship and refusing in moral

204. See WILLIAM SHAKESPEARE, *THE TEMPEST* epilogue.

activism. It is, moreover, a step that, if taken with Lord Darlington, might well have averted disaster.

In a larger sense, however, the two models fail not only Stevens and Kenton, as moral agents within the story, but also us, as hearers of the story. This dual failure is attributable not so much to internal inconsistencies or other weaknesses in these particular theories, as to weaknesses in this kind of theory as the basis for moral life. There are several related problems. First is the problem of applying general theory to particular cases; normative theories, even the most elegant and appealing, are, like laws, famously incapable of applying themselves.²⁰⁵ That requires judgment, something theories frequently call for but can never alone provide.²⁰⁶ Stevens's conduct in the maids' case clearly shows just such a lack of judgment, a failure to know when to speak up and when to be silent. That incident and his career generally show that his judgment would have been improved by consulting with others, especially his friends.

But Stevens's story shows something more than that, something that the general theories of neutral partisanship and moral activism could not give him, and cannot give us. These theories tell us at most that Stevens and Kenton failed; they do not tell us *why* they failed or, more importantly, how we can avoid such failure. To see that, we must widen our perspective from a focus on particular acts, whether the acts are conceived in terms of their agent's motives or their effects on others.²⁰⁷ We must include the agent's general dispositions, vices, and virtues—in a word, his or her character.²⁰⁸ In focusing on character and its development, we see how we are made to do what we do, and, conversely, how what we do and why we do it make us who we are. Most importantly, we learn who we want to be.

That is why stories—especially long stories like novels and biographies, the stories of whole lives—are important to the study of virtue.²⁰⁹ Such

205. See Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 14–19 (1984) (summarizing position that legal doctrine is indeterminate).

206. See KRONMAN, *supra* note 2, at 41–44, 367–68 (discussing Aristotle's concept of "practical wisdom"); David Luban, *Epistemology and Moral Education*, 33 J. LEGAL EDUC. 636, 654–55 (1983) (same); Postema, *supra* note 33, at 68 (same).

207. These are, respectively, two of the principal focuses of moral analysis, the deontological and the teleological. See BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 16–18 (1985) (noting these traditional distinctions and criticizing efforts to reduce all ethical considerations to these or other single patterns).

208. On the revived interest in virtue ethics, particularly in the wake of ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984), see ROBERT B. KRUSCHWITZ & ROBERT C. ROBERTS, *THE VIRTUES: CONTEMPORARY ESSAYS ON MORAL CHARACTER* 2–19 (1987), and Bernard Williams, *Professional Morality and its Dispositions*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 259 (David Luban ed., 1983) (urging that attention be paid in legal ethics not just to rules and systems of rules, but to dispositions to adopt and follow them).

209. On the importance of stories in virtue ethics, which draws heavily on ARISTOTLE, *supra* note 82, and ARISTOTLE, *Poetics*, in *ARISTOTLE'S THEORY OF POETRY AND FINE ART* 6 (S.H. Butcher trans., 4th ed. 1951), see MACINTYRE, *supra* note 208, at 217–25, and SHAFFER, *supra* note 5, at 1–38. See generally STANLEY HAUSER, *TRUTHFULNESS AND TRAGEDY: FURTHER INVESTIGATIONS IN CHRISTIAN ETHICS* (1977); Geoffrey C. Hazard, Jr., *Introduction* to FOX, *supra* note 5, at ix–xiii (arguing that pedagogical use

stories remind us that moral decisions have cumulative weight, that action over time shapes character, produces virtue or vice. They hold up for us examples of moral success and failure, virtuous and vicious lives. At the same time, they hold up a counterbalancing reality, the mutability of moral life. They warn us that, to the end, we are at risk of falling from grace, and they console us that, even at the eleventh hour, we can hope to find it.²¹⁰

Stevens astutely points out that his father's generation was given to telling stories about professional excellence, whereas Stevens's own generation preferred general theorizing.²¹¹ What his own story marvelously illustrates, however, is the way the two must fit together.²¹² Stevens's signal lapse was his failure to interpret adequately the stories from which he derived his fundamental values, to apply those values in the moral dilemma he faced, and to see how they fit into a coherent whole, a viable whole—in a word, a life.²¹³

Our most fundamental values, like those of Stevens, come to us in the form of stories—stories of our parents and grandparents, stories of our cultural heroes. Beyond that, our most cherished moral heroes tend to be those who told and interpreted stories. The prophecies of the Old Testament²¹⁴ and the sermons of Jesus are filled with stories,²¹⁵ so are the dialogues of Plato.²¹⁶ Curiously and significantly, our accounts of these moral teachers come to us in the form of stories about their telling stories, as metastories about reciprocally learning and teaching: One day Jesus and his disciples went out in a boat on the Sea of Galilee to a lonely place by themselves;²¹⁷ one day Socrates walked with some friends home from the Piraeus,²¹⁸ in the cool of

of fictional narrative permits presentation of ethical dilemmas in richly developed context).

210. See 2 ELIOT, *supra* note 143, at 273–74 (“[C]haracter is not cut in marble—it is not something solid and unalterable. It is something living and changing, and may become diseased as our bodies do,” [said Mr. Farebrother]. “Then it may be rescued and healed,” said Dorothea.”); see also Stanley Hauerwas, *Constancy and Forgiveness: The Novel as a School for Virtue*, NOTRE DAME ENG. J., Summer 1983, at 23, 23 (using this passage as epigraph).

211. ISHIGURO, *supra* note 6, at 34–35.

212. See RICHARD ELDRIDGE, *ON MORAL PERSONHOOD: PHILOSOPHY, LITERATURE, CRITICISM, AND SELF-UNDERSTANDING* 33 (1989) (arguing that literature helps mediate between universal and particular, each of which is essential to moral personhood); Tushnet, *supra* note 5, at 251, 258–77 (analyzing narrative jurisprudence as alternative means of understanding constitutional adjudication, “the vehicle we use to mediate particular cases and general rules”); see also Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 28 (1986) (“Judgment mediates between the general standard and the specific case.”).

213. Cf. JOHN RAWLS, *A THEORY OF JUSTICE* 19–21, 48–51 (1971) (describing “reflective equilibrium” reached by mutual adjustment of principles and considered judgments).

214. The best example is the prophesy of Hosea, presented as an account of how the prophet, at Yahweh's direction, married a prostitute to illustrate Israel's infidelity to Yahweh. *Hosea* 1.

215. See, e.g., *Matthew* 13 (Parables of the Kingdom of Heaven); see also PAUL RICOEUR, *Listening to the Parables of Jesus*, in *THE PHILOSOPHY OF PAUL RICOEUR* 239 (Charles E. Reagan & David Stewart eds., 1978).

216. See, e.g., PLATO, *supra* note 5, at 193–96 (recounting myth of cave); *id.* at 37–38 (recounting story of ring of Gyges's ancestor, which conferred invisibility on its wearer).

217. See *Mark* 6:32.

218. See PLATO, *supra* note 5, at 3.

the day, God sought out Adam and Eve in the Garden of Eden.²¹⁹ From the bedrock of such fellowship, we are told in our most cherished stories, come both the cornerstone and the capstone of the moral life.

Stevens's story, finally, tells us something about whose stories we listen to and who gets to tell them. The stories I have alluded to just now, you will have noticed, all come from the Western humanist tradition, as does the prayer with which I began. But the prayer seeks the power to see ourselves as *others* see us, and the story I have been interpreting was written by a young, university-educated, Japanese-born man about an aging English butler. The dialogues in that story are hard to maintain because they involve others. Much of what made it difficult for Stevens to speak to Darlington was that Stevens was working class; perhaps Stevens did not listen to Kenton in part because she was both a woman and a subordinate professional. Because they were Jewish, the maids were not merely ignored, but affirmatively dismissed. Ishiguro's story and the Western humanist tradition as a whole hold out the prospect that such lines can be crossed and the imperative that they should be crossed.²²⁰ If we are to learn from that story, if we are to be faithful to that tradition, we must try to cross them.²²¹

We Western humanists take openness to the other to be essential to our own moral lives. It comes as no surprise to us that lawyers have something to learn from butlers and maids; that we all can learn from a living English novelist of Japanese descent and from a dead peasant poet of Scotland; that we may learn as much from the louse on a lady's Sunday bonnet as from her minister's Sabbath sermon. We are saddened to be told, not that we have much to learn, but that we have little to teach.²²² For we covet the epitaph of Chaucer's student cleric, reflecting as it does the inseparable reciprocity of Socratic dialogue: "And gladly wolde he lerne, and gladly teche."²²³

219. See *Genesis* 3:8.

220. See ABA COMMISSION, *supra* note 5, at 26 ("What is needed is a way to stimulate discussion outside of individual firms, between lawyers who differ in experience, specialty, and region, as well as in age, race, and sex."); WEISBERG, *supra* note 5, at 117–23 (urging continued study of canonical Western literary texts on account of their subversive and iconoclastic content); JAMES B. WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* 258 (1990) (assimilating justice to translation understood as "an attempt to be oneself in relation to an always imperfectly knowable other who is entitled to a respect equal to our own").

221. See RICHARD RORTY, *CONTINGENCE, IRONY, AND SOLIDARITY* 198 (1989) (claiming that "we" of liberal humanism is "the 'we' of the people who have been brought up to distrust ethnocentrism").

222. See Farber & Sherry, *supra* note 5, at 809–19 (challenging claim that women and racial minorities "have different methods of understanding their experiences and communicating their understandings to others," as opposed to "a perspective that is not as easily accessible to white men"); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1749 (1989) (arguing that leading critical race theorists "fail to support persuasively . . . their claims that legal academic scholars of color produce a racially distinctive brand of valuable scholarship"); cf. WEISBERG, *supra* note 5, at 121 ("It is also more than faintly demeaning to audiences to assume they can appreciate the creativity only of those just like them.").

223. GEOFFREY CHAUCER, *THE CANTERBURY TALES*, in 1 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE, *supra* note 102, at 95, 102.

This faith that dialogue—openness to others—offers redemption, personal as well as professional, also has, of course, its religious expression. Come, prayed a prophet greater even than Burns, in a canon older than the West: And let us reason together; though our sins be as scarlet, they shall be as white as snow.²²⁴

224. See *Isaiah* 1:18. Invoking these terms does not, of course, necessarily imply acceptance of traditional Judaism or Christianity, or even theism. As a number of theologians have suggested, the traditional language of redemption may itself be in need of redemption. See generally MARTIN BUBER, *I AND THOU* (Ronald G. Smith trans., Charles Scribner's Sons, 2d ed. 1958) (1923); RUDOLF BULTMANN, *JESUS CHRIST AND MYTHOLOGY* (1958); LUDWIG FEUERBACH, *THE ESSENCE OF CHRISTIANITY* (George Eliot trans., Harper & Brothers 1957) (1841); FRIEDRICH SCHLEIERMACHER, *ON RELIGION: SPEECHES TO ITS CULTURED DESPISERS* (John Oman trans., Harper & Row 1958) (1799); PAUL TILICH, *THE COURAGE TO BE* (1952); Paul Ricoeur, *Religion, Atheism, and Faith*, in ALASDAIR MACINTYRE & PAUL RICOEUR, *THE RELIGIOUS SIGNIFICANCE OF ATHEISM* 57 (1969).