# GOOD JUDGMENT AS A MANIFESTATION OF CHARACTER IN THE OPINIONS OF JUSTICE BYRON R. WHITE

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It is an honor for me to be invited to say a few words about Justice White. It is particularly an honor to do so in Boulder, Colorado, near the town he grew up in, and in the college town where he made such a mark as an athlete and a scholar.

I am mindful, though, of the circumstances of this invitation. I am the last speaker at a day-long conference whose participants have loaded us with fresh ideas about how we might view judges and the judicial function. Even if I could match their performances, it might be like pouring water into a glass that is already full. This might be a good time to tell some stories about Justice White, and I have plenty of them, rather than to tax you further with my own attempt at an idea. Still, you are an opportunity, and ideas, whether ultimately useful or not, will die in secret unless they are shared and tested.

I began practicing law in Denver in 1972. Over the years since then, I have met many people who knew Justice White as a practicing lawyer, and then followed his work as a Supreme Court Justice. Many of them told me—and they seemed to have arrived at this judgment independently—that Justice White had brought to the job of judging many of the virtues of a good practicing lawyer. By this they meant the virtues of practicality, interest in how things actually work, attention to the specifics of a case, and skepticism about generalities. They found the down-to-earth quality of Justice White's opinions a welcome antidote to the academic style of judging, which emphasizes both rhetorical skillfulness and the use of judges as arbiters of our deepest social problems. Their point was not that the academic style was inferior, or that Justice White's approach was necessarily better. Rather, they thought there

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should be a balance, and that the Supreme Court could benefit from the experience and perspective of a practicing lawyer.

I think it is undeniable that for the last forty, perhaps fifty years, we in the legal profession, and academics in particular, have been enamored of a certain style in constitutional adjudication. It is also undeniable that Justice White does not fit comfortably into this tradition. I have no doubt that his experience as a practicing lawyer played an important part in molding this disposition. I would like to take this idea a step further and relate it to the concepts of character we have been discussing at this conference. My suggestion is that issues of character involved in lawyering are also present in judging and help explain Justice White's philosophy.

I cannot readily define the term "character" as it applies to lawyering, but I am persuaded it is something real—and not just a conclusory word disguising an expression of preferences—and that it involves acting in ways that are contrary to personal interests, or what we perceive them to be. Examples might be: the lawyer who takes on unpopular causes and risks ostracism; the lawyer who represents the poor and sacrifices financially; the lawyer who declines a lucrative or popular representation because he or she believes the cause is unjust. We admire this conduct because the lawyer has taken a difficult path, rather than an easy one, by acting contrary to evident self-interest.

Of course, most lawyers, like most of the rest of humanity, are not heroes. We do not routinely put our livelihoods or our reputations at risk in the way we practice law. Even so, our work is far from cut and dried. In smaller, but significant ways, we encounter tests of character in our practices each and every day. How we meet these tests shapes the kinds of lawyers we become. I am sure that if I asked the many lawyers in this room for examples, we would come up with a long list of ethical dilemmas, or tests of character, that lawyers routinely face.

One fundamental set of problems, for a litigator at least, is created by the tension between the lawyer's role as advocate and the lawyer's role as counselor. Most clients in litigation think they want an advocate. Whether plaintiff or defendant, they are likely to feel they have been mistreated, and they seek vindication. Most lawyers, myself included, are pleased to accommodate them. We like the role of the gladiator engaged

in a kind of civilized warfare. We relish a contest of wit, imagination, and preparation. There is a deep satisfaction in championing a client's cause, and the client is grateful to have a lawyer who believes his cause is just.

But no matter how skilful we are at advocacy, no matter how strongly we may believe that our client's case is winnable, or the cause is just, we are all aware of the dangers in untempered advocacy. There are at least two sides to every story. We may be wrong in believing that the case is winnable, or the price of winning may be too high. Winning may be less important than accomplishing some other objective. For these and many other reasons, it may be unwise to encourage litigation, to reinforce the client's passions, by identifying too closely with his cause. In other words, what the client may need is a counselor and a peacemaker, not an advocate.

The skills of a good counselor are very different from the skills of a good advocate. The advocate's job is to win the case for his client; the counselor may advise compromise. Good advocacy may require unhesitating commitment; good counseling may require detachment. Advocates are gladiators; counselors are diplomats. Most importantly, perhaps, good counseling requires an understanding that winning may be an undesirable, even if achievable, objective, and that no matter how difficult it may be to see, there may be a community of interest between one's client and the client's opponent.

I trust that those of you who are lawyers see something of yourselves in my account. The truth is that, while we may fall generally on one side of the line or the other, we are neither advocates nor counselors all of the time. At any one moment, in any particular case, we may be entirely one or entirely the other, but chances are we are some of both. And isn't it the interplay between these two roles, the tension created by them, the proper adjustment between them that fits the particular situation, that makes a good job of lawyering so satisfying? And isn't it our failure, more often than we would like to admit, to find the proper balance between these roles that, despite our best exercise of skill, results in a bad job for our clients?

The greatest skill of lawyering, I am convinced, is not either advocacy or counseling, but the balance between the two. This skill, which is itself impossible for me to define or even describe because, in some sense, it is beyond categorization, requires not only experience but a degree of detachment that I

associate with the idea of character in lawyering. When we persist, as I think we should, in acting as both advocates and counselors with our clients, because we believe it is in their best interest to do so, we often confuse and displease even the most sophisticated of them. When we act as advocates for, but at the same time are critics of, our clients, we may be rendering our highest service, but at the risk of being perceived as betrayers. It is a modest, but significant, display of character when a lawyer risks losing his or her client by giving that client the best advice he or she has to offer.

All of us have achieved some success in this balancing act. We have also fallen short, and will again. What I am interested in here is the perspective we acquire when we work at developing this skill. It seems to me that we learn to pay attention to the nature of our particular clients, to the particular facts and circumstances of each situation, to the options, and to the practicalities of what we can accomplish, rather than to theoretical possibilities. We learn to be skeptical of formulaic solutions, of grand generalities. By working through the complexities of each matter, we come to appreciate the depth, subtlety, and variety of legal problems, and the delicacy of achieving satisfactory solutions to them.

We associate these skills with good lawyering, but not necessarily with good judging. We do not call judges advocates, nor do we call them counselors or advisors. Judges do not take sides in a litigation; indeed, if they do, they betray the trust vested in them. Nor are judges counselors in any obvious sense. Their job is not to advise the parties or effect compromises, but to decide cases. Because of the way lawsuits are structured, particularly at the appellate level, deciding cases usually means choosing the position of one side over the position of the other.

In other ways, though, perhaps less obvious, judges are both advocates and counselors. Justice White once said to me that a judicial opinion, and especially an opinion from the United States Supreme Court, is an argument just like any other, but it is addressed to the future. In other words, while judges do decide cases, and dispose of the rights of the parties before them, their reasoning, as distinguished from the judgment, is an effort to secure the allegiance of future generations to a view of what the law not only is, but ought to be. Simply put, judges, like lawyers, advocate, and the style of

advocacy we currently admire in our judges, at least our Supreme Court judges, is what Learned Hand, when describing the Due Process Clause, called the style of "majestic generality."[1] Great judicial opinions, we feel, should articulate our historic values. They should speak from the depths of time and address not merely this generation but future generations as well.

There are, of course, many styles of advocacy—in judging as in lawyering. Some judges prefer a less declamatory style than that of "majestic generality." Some prefer narrower, rather than broader, articulations of principle. But there is a common denominator in the advocacy of judges and of lawyers, and that is the selection of one set of values, or principles, in preference to another.

But while it seems clear that judges are, in some sense, advocates, it is equally clear that they often avoid the role. In so doing, they are acting very much like the lawyer as counselor. The lawyer as counselor may recognize that there are better solutions than winning or losing, and may advise compromise. Similarly, judges recognize that it is not necessarily desirable to choose between competing values, and may, to the extent possible, deliver opinions that avoid doing so. We are all familiar with the techniques judges use to avoid deciding questions: they may resort to a procedural device; they may select a narrow ground for decision; they may decide the case on a basis not urged by any party; they may make a tentative, but not final, choice between competing positions.

While a particular judge may fall more on one side of this line than the other—the line between advocacy and counseling—in fact, judges always do some of both. They move back and forth continually between these poles, adjusting more toward one or the other depending upon their sense, perhaps unstated and perhaps not even articulable, of what is best under the particular circumstances. Of the lawyer who moves skillfully between these roles, we say that he or she has "good judgment." Oddly, this is not an expression we apply to judges, but perhaps we should.

If there is a continuum, as I think there is, between advocacy on the one hand and counseling on the other, Justice

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1. *See* Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Fortas, J., concurring).

White belongs somewhere on the counseling side. He distrusted "majestic generality." He was more interested in how things actually work than in the words we use to talk about them. He was skeptical of the Supreme Court's ability to enact social policy. He preferred the democratic process. While there were some areas in which he was a strong advocate,[2] Justice White was more comfortable drawing modest conclusions often based upon the intricacies of the particular matter before him. For this reason, he was regarded as "unpredictable," and seemed to have no overarching constitutional philosophy.

I think Justice White did have a philosophy, but we have had difficulty finding it because we have been looking in the wrong place. We have been measuring Justice White by his advocacy rather than his "good judgment." I am not sure what kind of judge Justice White would have been, or might have been, in a different era in the Supreme Court's history. I am guessing that, when he joined in 1962, he found an imbalance, and balance was one of the Justice's virtues, both as an athlete and as a judge. The imbalance then lay in favor of advocacy, and that remained true for most of the time he served on the Court.

There is much to be said for the modesty of Justice White's approach. It rests not merely on the judgment, the "good judgment," that judges have no particular warrant to choose among competing values vying for social ascendancy in this Republic. Nor is it simply that judges are not very good at the role of Platonic Guardian. There is a complementary idea at work here, and I think it was essential to Justice White's philosophy. In a democracy such as ours, where there is profound disagreement about what our society should be, there is much to be said for not deciding irrevocably among competing claims. Judges must often do so, of course. That is their job. But it is equally their job, I submit, to avoid doing so from time to time, especially when the legitimization of one set of claims, by holding that they are constitutionally compelled, enfranchises one segment of our citizenry at the expense of another.

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2. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972); Palmer v. Thompson, 403 U.S. 217, 240 (1971) (White, J., dissenting); Reitman v. Mulkey, 387 U.S. 369 (1967).

*Roe v. Wade*[3] and *Miranda v. Arizona*[4] are obvious examples of decisions that have caused great divisiveness. We can debate whether these decisions were worth the price. Perhaps they were. But it may be, nevertheless, that our well-being as a democracy hinges more closely upon the willingness of the judiciary to leave great social questions open than upon their willingness to resolve, and thus foreclose, them. It seems to me that this is one of the themes that runs through Justice White's work.

Justice White's tenure on the Supreme Court extended over a thirty year period, and he wrote almost 1,300 opinions. Even if I had mastered them, which I have not, there would not be time today to trace this theme through the body of his work. The best I can do is to give an illustration. In *Duncan v. Louisiana*,[5] petitioner was convicted of simple battery, a crime punishable by up to two years in prison. His request for a jury trial was denied because, in Louisiana, juries were made available only for capital offenses. In reversing petitioner's conviction, the Supreme Court held that the states must provide a jury trial to defendants in serious criminal cases. The word "must" is an overstatement, a point I will come back to.

In one sense, *Duncan* had little practical significance. All of the states required jury trials in some form. Only Louisiana limited the right to cases in which the punishment could be death. Aside from peculiarities in New York and New Jersey law, the rest of the states provided jury trials for crimes punishable by more than six months in prison. In another sense, however, *Duncan* was important. It was one in a line of Supreme Court decisions that altered the relationship between the federal government and the states. Earlier in this century, the Court's view had been that the Due Process Clause of the Fourteenth Amendment does not incorporate provisions of the Bill of Rights and apply them to the states. What the Due Process Clause was thought to require was "fundamental fairness," not a particular procedural safeguard such as the

3. 410 U.S. 113 (1973).
4. 384 U.S. 436 (1966).
5. 391 U.S. 145 (1968).

right to counsel, jury trial, or the privilege against self-incrimination.[6]

This *ad hoc* approach, if faithfully carried out, could require the Court, in a particular case, to review the entire record of a criminal conviction and judge its fairness. Understandably, there was a move toward recognizing certain procedural safeguards articulated in the Bill of Rights as "fundamental" to the American scheme of justice and therefore implicit in the Due Process Clause. Justice Frankfurter described this as a process of "selective incorporation."[7] Writing for a seven-member majority in *Duncan*, Justice White reviewed the history of jury trial in England, in the colonies, and in the early period of the Republic, and concluded that the Sixth Amendment right was fundamental to the American system of adjudicating criminal cases. He conceded that a jury was not necessary to a fair result in every case. It was enough that criminal systems in the United States had developed in reliance on jury trial, making the safeguard an integral part of their structures.

Justice Black concurred in the judgment. Justice Harlan dissented. Both took what I would describe as strongly adversarial positions. Justice Black reiterated his conviction that the framers of the Fourteenth Amendment intended to incorporate all of the provisions of the Bill of Rights and apply them to the states. Justice Harlan reiterated his equally strong conviction that what the Due Process Clause requires is not incorporation of the Bill of Rights, selectively or altogether, but instead an evolutionary process that reflects the conscience of the Nation regarding such matters as the conduct of criminal trials. Because he did not view jury trial as necessary to a fair result, Justice Harlan was unwilling to impose it upon the states.

The opinions of Justices Black and Harlan both appeal to great, but opposing, values, and are full of the strong rhetoric and harsh criticism we associate with the articulation of fundamental values. Harlan was a champion of states' rights and the concept of limited government. Black was equally a champion of individual liberties. Justice Harlan criticized

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6. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319 (1937); Twining v. New Jersey, 211 U.S. 78 (1908).

7. *See* Adamson v. California, 332 U.S. 46, 65 (1947) (concurring opinion).

Justice Black for putting the states into a "constitutional straightjacket."[8] Justice Black accused Justice Harlan of giving unlimited power to judges. Both were critical of the majority. Black thought "selective incorporation" was improper; judges should not be selecting. Harlan thought Justice White's opinion an uneasy and illogical compromise among the views of the majority of Justices.

What I find interesting is how Justice White reacts to the tension between Harlan's and Black's views. First, he does not directly answer the charge that his position is a compromise. Nor does he seek to devalue Harlan's or Black's position, but instead adopts elements of each. You have to read carefully, or you are likely to miss Justice White's understated, but distinctive, voice. It is not accusatory. It is not declamatory. It proceeds in a carefully-reasoned way that explains why Justice White made the choice he did in this particular case, but also acknowledges that other choices are reasonable.

This acknowledgment is not merely rhetorical. Clearly, Justice White thought his approach was better than Harlan's or Black's, but that does not mean he was entirely convinced that his own thinking was right. His opinion implicitly communicates the concession that the majority's approach may not be the best one, for that time or for the future. He makes this clear in footnote fourteen, in which he offers the remarkable suggestion that states might be able to abolish jury trial if they revamp their criminal systems.[9] In other words, because he sees jury trial as tied to the American scheme of justice, he is willing to entertain the possibility that another kind of system could do without it. This suggestion not only leaves room for true state experimentation, while at the same time protecting individual liberties, it also suggests a meaning of the great phrase "Due Process" that tries to keep in balance our concern for fairness, procedural safeguards, states' rights, the role of the federal judiciary, and the practicalities of administering the law.

There is another aspect of Justice White's opinion that I admire. Louisiana argued that applying the Sixth Amendment jury trial right to the states would also require that the states follow all of the federal decisions interpreting the scope of that

8. *See Duncan*, 391 U.S. at 176 (Harlan, J., dissenting).
9. *See id.* at 150 n.14.

right. Surely, Louisiana contended, these federal decisions cannot all be viewed as enunciating fundamental rights. Justice White responded by saying that "our decisions interpreting the Sixth Amendment are always subject to reconsideration."[10] This is a rare kind of candor. How many cases can you recall in which a majority of the Supreme Court, even in footnote, suggests that it might change its mind? Part of the reason may have been a lack of agreement among the majority regarding the scope of jury trial as applied to the states, for example, whether the right mandated a jury of twelve or a unanimous verdict. But such a disagreement does not entirely explain a sentence that so forthrightly acknowledges the fragility of the Court's reasoning and judgment.

For me, there is a close association between Justice White's approach to judging and what I call the quality of "good judgment" in lawyering. Both require an ability not merely to articulate opposing views, but to internalize them. Both require a vision of community that goes beyond advocacy, beyond the championing of great values. Advocacy is important, even critical, but we do live in a society whose members disagree profoundly about bedrock values. These disagreements seem to be getting stronger and more numerous as the Nation matures. The great work for our institutions, including the courts, in the coming years may be to find a way to accommodate those interests rather than to choose irrevocably among them.[11]

In 1971, when I clerked for Justice White, the word among his law clerks was that the Justice would consider opinions drafted by us, but only if we could beat him to the punch. When an opportunity came up for me, I jumped at it. Before law school, I had been a newspaper reporter. I admired good writing, and thought I knew something about it. I wanted to impress the Justice. Because the room in which we clerks worked was crowded, I took my typewriter to an empty office on the second floor of the Supreme Court building. In the quiet of that empty north wing, I labored away on my draft. The work went very slowly. I wrote sentences and threw them

10. *Id.*

11. Alasdair MacIntyre expresses a similar idea in his book. *See* ALASDAIR MACINTYRE, AFTER VIRTUE 244–55 (2d ed. 1984).

away. I wrote paragraphs and threw them away. It took me days to get a draft I was willing to show the Justice. It was not as good as I wanted, but I ran out of time.

I left my draft on the Justice's chair and returned to work in chambers. A day later, my phone rang. My heart stopped. Sure enough, Justice White wanted to see me. He was sitting behind his desk with my draft rolled up in his hand, as if he had been using it to swat flies. He waved me into the room.

"Sit down, Jim," he said. His voice was cheerful, and I relaxed a bit. When I had taken my seat, he unrolled the draft, laid it before him on his desk, and looked me in the eye.

"You write very well." This was the compliment that, without acknowledging it to myself, I had been seeking, and, just as I was beginning to bask in the glow of it, the Justice added: "Justice Jackson had that problem."

For me, this was what is euphemistically called "a learning experience." Justice Jackson, you may recall, was a good writer whose prose occasionally got the better of him. No matter how hard I tried, I could not disentangle the compliment from the criticism. They were two sides of the same coin.

Many of Justice White's qualities as a judge—his attention to the specifics of the case, his avoidance of generalizations, his interest in finding a middle way, his seeming unpredictability—can all be traced to a simple truth. He had a modest view of his own ability to see the future, and he was skeptical of anyone else's ability to see it more clearly. I associate this modesty with a kind of detachment. Justice White was not interested in drawing attention to himself. He was not promoting a political agenda. He saw judging as a necessary part of the great peacekeeping function performed by all good legal systems.

Justice White's work on the Court expresses a conviction that good judgment is to be preferred to rhetorical skillfulness. It is a tribute to Justice White's character that he maintained this position, even though it attracted little attention to him and was not popular among Court watchers. If, in the longer run, "good judgment" lasts, as I think it does, so will the opinions of Justice White.