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Service to the Nation: A Living Legal Value for Justice Lawyers in Canada

Josh Wilner

Federal Court of Canada

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Lawyers working within a living government require a living ethics, an approach to ethics that accounts for their day-to-day professional lives within the Department of Justice Canada. There are different archetypes of Justice lawyers, and thus a living ethics is also an ethics of place, one which is sensitive to the government institutions within and for which lawyers work and the functions they accomplish. The focus of this paper, which employs a virtue ethics methodology, is primarily civil litigators.

Distinguishing between values (enduring beliefs that influence action) and ethics (the application of values in practice), the paper proposes “service to the nation” as a value that all Justice lawyers share, and describes how that value grows into an ethics that is specific to Justice civil litigators. Service to the nation comprises in its very fabric a conception of public service which, in turn, requires an investigation of who Justice lawyers’ clients are and how the lawyers’ public interest mandate informs their professional lives.

In the language of virtue ethics, “service to the nation” is the “characteristic function” common to all Justice lawyers. Virtue ethics teaches that the ethical practice of a lawyer can be facilitated through developing professional mentorship relationships with virtuous people. Both rules and roles provide ethical direction, but it is role models, not rules in professional codes of conduct, that are the focal point of ethical deliberation.

Les avocats qui travaillent au sein d’un gouvernement vivant ont besoin d’une éthique vivante, éthique qui s’applique dans leurs activités professionnelles quotidiennes à l’intérieur du ministère canadien de la Justice. Il existe différents archetypes d’avocats au sein du Ministère. Ainsi, une éthique de vie est également une éthique de lieu, éthique sensible aux institutions gouvernementales où les avocats travaillent et aux fonctions qu’ils remplissent. L’accent de cet article, qui emploie une méthodologie d’éthique de la vertu, est principalement sur les avocats qui pratiquent en litige civil.

Faisant la distinction entre les valeurs (convictions profondes qui influent sur les actions) et l’éthique (application des valeurs dans la pratique), l’auteur propose “au service de la nation” comme valeur partagée par tous les avocats de Justice Canada; il décrit comment cette valeur donne naissance à une éthique particulière aux avocats qui pratiquent en litige civil. Le service à la nation comporte, dans son essence même, le concept de fonction publique. Ce point, à son tour, exige que l’on s’interroge sur la nature des clients des avocats de Justice Canada et sur la façon dont leur mandat en matière d’intérêt public influe sur leur vie professionnelle.

Dans la langue de l’éthique de la vertu, “service à la nation” est la fonction caractéristique commune à tous les avocats du Ministère. L’éthique de la vertu enseigne que la pratique éthique d’un avocat peut être facilitée s’il noue des liens de mentorat professionnel avec des personnes vertueuses. Les règles et les rôles donnent une orientation éthique, mais ce sont les personnes qui donnent l’exemple et non les règles énoncées dans les codes de conduite professionnelle qui sont au centre des délibérations éthiques.

* B.A. (Hons.) Economics and Philosophy, McGill University, 2005; B.C.L./LL.B. McGill University, 2009; Student-at-Law, Department of Justice Canada, Ontario Regional Office, 2009-2010; clerk to the Honourable Mr. Justice Robert Mainville, Federal Court of Canada, 2010-2011. The author can be contacted at josh.wilner@gmail.com.

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Introduction

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“Service to the nation provides me with a philosophy of work.”

F.R. Scott, journal, 26 June 1924.

Introduction

Lawyers working within a “living government” require a living ethics. My goal is to develop the beginnings of an account of legal ethics rooted in the lived experience of government lawyering, a theory that accounts for the day-to-day realities of legal practice in the federal government, with a particular (though not exclusive) focus on civil litigation lawyers practising at the federal Department of Justice (DoJ). Public sector legal ethics has not received a great deal of attention in Canada—with some notable exceptions—and a lot more work remains to be done.

The emphasis throughout is on applied ethics—ethics as lived (the deed) as opposed to as read (the word). Ethics is about implementing abstract values—enduring beliefs that influence action—in concrete circumstances of decision-making. Ethics is about operationalizing values in lived practices. I propose service to the nation as a living legal value for DoJ lawyers and demonstrate how it grows into an ethics of place—that of civil litigation practice in the federal government.

The centrality in this essay of the idea of “life,” and the frequent use of its cognates “alive,” “living” and “lived,” is meant to point to two basic premises concerning legal ethics: first, legal ethics is not so much about rules as it is about people; and second, once legal ethics as a discipline devotes more attention to the daily lives of practising lawyers, it may be difficult to sustain the traditional view that law and ethics are completely distinct. It is people themselves who personify these ambiguities, since their lives cannot be separated into bright-line normative compartments.

Francis Reginald Scott, a young teacher at Lower Canada College in Montreal, having just returned from completing his B.Litt. at Oxford, wrote in his journal in 1924, “Service to the nation provides me with a philosophy of work.” With this resolution he decided to take up the profession of law, with its promise of political public service, and enrolled at McGill University. From this private, personal communication I derive the guiding principle of this essay, the bedrock value that runs through the distinctive issues in legal ethics faced by government lawyers. What is the nation? What are the dimensions of service, particularly public service? How can, and should, government lawyers serve the nation?

The analysis throughout is animated by two additional fundamental premises of a living legal ethics for government lawyers. First, concrete action is influenced more by values and aspirations (including role models,
who are aspirations "in the flesh") than by rules (such as those found in
codes of conduct). That formal rules will always fall short of being able to
capture, contain, define and control human action, however, does not mean
that there is no place for them. It simply means that prohibitions coupled
with penalties do not facilitate the full normative potential of human
imagination and agency. No set of rules can fully capture the subtlety and
ambiguity of everyday life. That is why legislative solutions to ethical issues
are often inadequate by themselves. Second, ethics cannot be divorced
from place. To act ethically is to know one’s place, an expression which
can be unpacked in various ways: it points to (i) the individual’s personal
characteristics and temperament; (ii) the specific factual situation in which
one finds oneself; (iii) the specific government agency, department or office
in which a lawyer works (which also determines the lawyer’s roles and
functions, the lawyer’s “role morality”), and (iv) the lawyer’s position
within the larger state structure of Canada’s constitutional democracy.

It is the idea of a role model that leads me to attempt to renew the
preoccupation with virtue, a concept that has not received adequate
treatment to date in the literature on Canadian legal ethics, largely
because of a prevailing view of legal ethics as being about lawyer’s rules
instead of about people and their interpersonal relationships. In a major
survey article reviewing the historical “waves” of ethics scholarship and
also looking towards future doctrinal tides, the word virtue is noticeably
absent. Virtue ethics teaches that the ethical practice of a lawyer can be
facilitated through developing professional mentorship relationships with virtuous people.

I. Demographics and characteristics of public sector lawyers

There are presently no reliable statistics on how many public sector lawyers are currently practising in Canada, although in 1996 there were approximately 10,000. In the DoJ specifically there were forty-two lawyers in 1962, 250 in 1971, 1,200 in 1997, and almost 1,800 in 2000. It is clear from the numbers that federal government lawyers are in high demand. Indeed, it has been compellingly argued that the DoJ is now the central actor in the Government of Canada. The increases in DoJ lawyers between 1997 and 2000 are all the more significant in light of the serious contraction in the overall size of the federal public service from 1995 through 1999, during which time the total number of federal employees diminished from 382,000 to 326,500 (a seventeen percent reduction).

The demographics tell only a small part of the story. Describing, in addition, the institutional context in which public sector lawyers work will help in building the ethics of place already described in the Introduction. A living ethics for government lawyers should grow from their everyday legal practice. A model developed in isolation from professional reality will have little explanatory, descriptive, or prescriptive power.

The functions and roles of government lawyers will, in large part, be determined by the institutional context—the agency, department or office—in which a lawyer works. Institutions should not be assumed away as “black boxes,” as they are normally considered, for example, in classical economics. Professional structures are of profound ethical significance. Deborah MacNair, Corporate Counsel with the DoJ in Ottawa, outlines five examples of Justice lawyers—Crown prosecutor, legislative drafter,

15. Ibid. at 137; Tait, supra note 3 at 545.
16. James B. Kelly, “Bureaucratic Activism and the Charter of Rights and Freedoms: The Department of Justice and Its Entry into the Centre of Government” (1999) 42 Canadian Public Administration 476. Because there is a distinction between the role of the DoJ lawyer, as a person, and the role of the DoJ proper, as an institution, the author’s argument that the DoJ is now an executive support-agency can be reconciled with the view that the DoJ is more than merely the “government’s lawyer.” See infra note 24 and accompanying text.
18. H. Patrick Glenn, “Professional Structures and Professional Ethics” (1990) 35 McGill L.J. 424 (noting at 427 that in Germany “one does not speak of legal ethics or deontology but of Standardsrecht, the law defining one’s place (where one stands) or role, since it is one’s role which defines the standards of conduct one must meet.”) [Glenn].
legal advisor, policy lawyer, and civil litigator.19 These archetypes serve as a helpful typology for the purposes of fleshing out future ethics of places. The focus of this paper is primarily civil litigators. Service to the nation will invariably mean different things in different institutional contexts, and therefore a one-size-fits-all approach to the professional ethics of government lawyers may be inadequate. Still, some unity of approach is possible, a corporate cohesion that service to the nation is meant to stand for. Any unifying (centripetal) forces must always remain sensitive to the fragmenting (centrifugal) forces that tend to disintegrate the analysis.

A notable characteristic of federal government lawyers, which serves to unite them, is that they all wear multiple “hats” at once.20 They are not only public servants and salaried employees of the Crown, but also lawyers, each one of whom, as a condition of employment, must be a member of a law society. As employees they have been unionized since April 2006, are paid with monies from the Consolidated Revenue Fund (the treasury), and are subject to the Public Service Employment Act and the Public Service Labour Relations Act.22 Crown lawyers are not employed by the departments within which they work; they are agents of the Attorney General of Canada.

As lawyers they are not only subject to the disciplinary oversight of their provincial law society, but also have unique duties, in their capacity as agents of the Attorney General, to serve as guardians of the rule of law, keep a constant focus on the public interest, fulfill their statutory duties, and be faithful to their “higher duty” to the Canadian constitution.23 The consensus seems to be that the Attorney General’s duty to the constitution includes the discretion to concede the unconstitutionality of a statute, which suggests that the Attorney General is not just the “government’s lawyer.”24 She is, in fact, the Crown’s lawyer, despite the uncomfortable fact that the

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19. MacNair, “From Polyester to Silk,” supra note 3 at 145-154. Since December 2006, all federal Crown prosecutors have been employed by the Public Prosecution Service of Canada, which is an independent organization reporting to Parliament through the Attorney General of Canada. The Public Prosecution Service of Canada is technically not part of the DoJ.
20. For a more detailed account of much of what is described in this paragraph, see MacNair, “From Polyester to Silk,” supra note 3 at 139-140, 144, 165; MacNair, “In the Service of the Crown,” supra note 3 at 506.
22. S.C. 2003, c. 22, s. 2.
Crown is less a corporeal entity than it is a concept floating about in the monarchical ether. Although Crown lawyers are advocates, they neither win nor lose their cases, but instead are meant to ensure that justice is done.\textsuperscript{25} Section 5(a) of the *Department of Justice Act*\textsuperscript{26} has generally been understood to mean that the Attorney General, and of necessity her agents, must safeguard the public interest.\textsuperscript{27}

As public servants DoJ lawyers are governed by the *Values and Ethics Code for the Public Service*\textsuperscript{28} and the *Conflict of Interest and Post-Employment Code for Public Office Holders*.\textsuperscript{29} They are also subject to security clearance checks as a condition of employment, and must swear an oath of loyalty.\textsuperscript{30} Public servants’ functions are constrained by, and benefit from, an “iron triangle” of constitutional conventions, namely, political neutrality, ministerial responsibility, and anonymity.\textsuperscript{31}

The *Values and Ethics Code for the Public Service* forms part of the conditions of employment.\textsuperscript{32} This code was created from the recommendations of the so-called Tait Report,\textsuperscript{33} which described, inductively and from the bottom-up, four families of public sector values (democratic, professional, ethical, and people values). In her dedication honouring the late John Tait, the former Clerk of the Privy Council,
Jocelyne Bourgon, describes these values as "living truths." As is noted in the Tait Report itself, "abstract statements are less powerful than living models and broadly shared practices, and are relatively powerless where these do not exist."

Having set out some basic characteristics of government lawyers, and specifically DoJ lawyers, I now move to a wider discussion of DoJ lawyers within the Canadian context.

II. The Crown and service to the nation

1. The Crown

To continue to develop the ethics of place described in the Introduction, we must understand the DoJ lawyer's position within the larger state structure of Canada's constitutional democracy. To serve one's country one must know one's country, and a discussion of law officers of the Crown cannot proceed without an understanding of what the Crown itself is. We must let in daylight upon the magic of the Crown.

According to Queen Elizabeth II, the Crown is "an idea more than a person ..." Technically, the Canadian Crown includes all executive powers exercised by Her Majesty the Queen or on Her behalf by the Governor General and Lieutenant Governors. And yet, although the Queen is the embodiment of the Crown, she is not the Crown itself. The Crown is technically an institution, not a person, which safeguards the exercise of power on behalf of all citizens, uniting the legislative, executive and judicial functions of government, as well as uniting the provinces and territories with the federal government. The Crown, simply put, is a convenient symbol for the state and the nation.

What, if any, are the practical consequences of being a law officer of the Crown? What does this mean in the daily lives of practising DoJ

34. Ibid. at iv.
35. Ibid. at 60 [emphasis added].
38. Ibid., Appendix at XII.
39. Ibid. at 16.
40. Ibid. at 17.
lawyers? Civil litigation lawyers at the DoJ are not concerned in their day-to-day practices with abstruse political theory. What they are concerned about, throughout the hectic routines of litigation, is advocating for, protecting and defending Canada’s interests. On the assumption, which I take to be uncontroversial, that determining the best interests of Canada in any given case is itself a difficult process, we are left with the plain fact that the lived experience of DoJ lawyering is replete, if only subtly so, with philosophical questions about what service to the nation means.

To move, then, from the descriptive to the prescriptive: to be able to give real shape to his or her role in a particular circumstance, to implement values in ethical decision-making, a DoJ lawyer should be able to think philosophically. As Fritz Morstein Marx observed in 1946, government lawyers must be "clear-headed philosophers of democratic governance." Combined with this philosophical outlook should be a deep understanding of the Canadian state and the living institutions that comprise it. But these two qualifications are not enough. DoJ lawyers must be more than thinkers who know who and what they work for; they must also be doers, people who exercise practical wisdom (that is, judgment).

2. The nation
Many of the problems associated with DoJ lawyers being employees of the Crown parallel those inherent in the value of service to the nation, for nation too is an idea which does not have a final, concrete embodiment. That weakness is also its strength. It is precisely the problematic connotations of nation that will keep DoJ lawyers attuned to the difficulty of their tasks,
the contested nature of their roles, and the questions inherent in their functions. Ethical deliberation requires a perceptual sense that has an inherently affective dimension to it: being good does not only involve doing good, but also having a certain kind of disposition, an ability to engage emotionally in a situation—though without surrendering judgment to utter Dionysian madness. Judgment involves a combination of sympathy and detachment. A consensus in the field of neurobiology is emerging which suggests that moral thinking is inherently affective and intuitionist. The problematic connotations of nation—the fact that it is a contested idea and as much a thing to be felt than to be characterized objectively—will allow DoJ lawyers to remain sensitive to the everyday challenges of moving from values to ethics, of applying the spirit of service to the practice of service.

In imagining the nation, we serve it. It would be going too far to say that the path itself becomes the destination, but it is likewise not going far enough to assert that “a celebration of indeterminacy may be an appropriate philosophy for some scholars, but it is not an appropriate one for a law officer of the Crown.” Indeterminacy is compatible with decision-making. So long as in deciding one remains sensitive to the problems that plague the decision, those very problems are celebrated. They are not overcome through taking action, but instead are reaffirmed as problems, and left to be struggled with another day. Constructing a false sense of precision in the face of the inexorable necessity to decide would be equally inappropriate. The indeterminacy of the government lawyer’s

45. Service to the nation, of course, conjures up the spectre of nationalism. Below, I discuss the importance for the DoJ lawyer of patriotism, which I hope to demonstrate is not a distinction without a difference.


47. Roach, supra note 24 at para. 43.
client and the lawyer's public interest mandate is an everyday lived reality of public sector practice. It would be a mistake to forget this.  

In describing the beginnings of Canada in 1867, Eugene Forsey writes: "For the nation, there was a Parliament, with a Governor General representing the Queen; an appointed Upper House, the Senate; and an elected Lower House, the House of Commons." That is the institutional structure of government that serves (is "for") the nation, but what is the nation? Forsey continues:

The word "confederation" is sometimes used to mean a league of independent states, like the United States from 1776 to 1789. But for our Fathers of Confederation, the term emphatically did not mean that. French-speaking and English-speaking alike, they said plainly and repeatedly that they were founding "a new nation," "a new political nationality," "a powerful nation, to take its place among the nations of the world," "a single great power."

They were very insistent on maintaining the identity, the special culture and the special institutions of each of the federating provinces or colonies.

The friction that lies at the heart of Canada is the same tension exemplified in the principle of federalism: it is not a league of independent states but a single state, and yet a single state that maintains the special cultures and institutions of its component parts. Canada is a society built from the unity of difference, a "political nationality" to use Sir George-Étienne Cartier's famous words, that is committed to an ethos of difference and grows from the fertile opportunity for deep disagreement that is our very togetherness. It was the distinctively federal soils of Canada—the place—into which the unitary British parliamentary-Westminster tradition was transplanted that has allowed our living government, to say nothing of our living tree,
to grow into the uniquely Canadian organism that it is today. Successful federations require and encourage multiple identities and loyalties, and Canadians have a “deep and abiding sense of place.”

To make more explicit what is already entailed by my appropriation of nation as the end which DoJ lawyers should serve, I should make clear that I am advocating that DoJ lawyers should personify a qualified and characteristically Canadian version of patriotism. Service to the nation requires “love or devotion to one’s country.” To be patriotic is to be “marked by devotion to the well-being or interests of one’s country.” That is an essential part of the job description of a DoJ lawyer.

It is the crudest form of nationalism that usurps the idea of shared commitments for the purpose of asserting homogeneity as the basis of a nation. Nationhood is not an ethnodemographic or ethnocultural fact; it is more properly a political claim on people’s loyalty, on their attention, and on their solidarity. If the concept of nation is too heavily imbued with the former idea based on ethnicity, and not enough with the latter idea based on common commitments, then it is helpful to speak not of nationalism but of patriotism, as this latter word has already been defined. Whereas the enemies of nationalism are cultural contamination, heterogeneity,

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52. Alexander Brady, “Canada and the Model of Westminster” in William B. Hamilton, ed., The Transfer of Institutions (London: Cambridge University Press, 1964) 57; Jacques Monet, The Canadian Crown (Toronto: Clarke, Irwin & Company, 1979). Indeed, one of the primary distinguishing features of the Canadian Crown is its ongoing special relationship with the aboriginal peoples of Canada. For further evidence of a multiform Canadian identity and symbolic life, see Jean- Benoît Nadeau & Julie Barlow, The Story of French (Toronto: Alfred A. Knopf Canada, 2006) at 225 (noting that it was in fact the Sociét6 St-Jean Baptiste that devised the anthem “O Canada,” and that the mandate of the Société to defend the rights of Francophone Canadians spawned a wide array of symbols, including the maple leaf and the beaver!).


54. Although a more negative view of patriotism qualifies it as the “last refuge of the scoundrel” (the phrase is Samuel Johnson’s), a more positive view suggests that it “must be founded in great principles, and supported by great virtues.” Henry James Bolingbroke, The Idea of a Patriot King, ed. by Sydney W. Jackman (Indianapolis: Bobbs-Merrill, 1965) at 27.


56. Rogers Brubaker, “In the Name of the Nation: Reflections on Nationalism and Patriotism” in Philip Abbott, ed., The Many Faces of Patriotism (Lanham, MD: Rowman & Littlefield, 2007) 38. In the locus classicus of what constitutes a “nation,” Ernest Renan had already pointed out in 1882 that the ethnodemographic basis of nationhood is a very great error. He rejected other foundations for a nation—religious, racial, martial, linguistic, geographic and even common interests—and instead declared that a nation is a spiritual principle, a large-scale solidarity that is the result of the complexities of history and the sharing of a past and future. His lecture delivered at the Sorbonne on 11 March 1882 is published in Henriette Psichari, ed., Oeuvres Complètes d’Ernest Renan, t.1 (Paris, Calmann-Lévy,1947-61) 887.
racial impurity, and social, political, and intellectual disunion, the enemies of patriotism are tyranny, despotism, oppression, and corruption. If government no longer embodies the moral unity of a nation, perhaps the more procedural idea of a “political” nationality founded on the federal principle is what unites Canada. Attachment is found through a common commitment to working out disagreements together. It might even be said that “social, political, and intellectual disunion” is a defining aspect of Canada. That says a lot about Canada as a nation.

3. Service to the nation

The next question that arises is what service to the nation involves. Public sector lawyers are not just lawyers; they are also public servants. The living legal value of service to the nation comprises, in its very fabric, a conception of public service. That issue, in turn, requires an investigation of the client or clients of the DoJ lawyer: a description of what service is will be barren unless it sustains an in-built hypothesis of who and/or what the DoJ lawyer is meant to serve. The value of service to the nation, therefore, also carries within it the issue of who the government lawyer’s client is (hereinafter referred to as the “client identity problem”). Finally, the question of who and/or what the DoJ lawyer serves is bound up with another question—that of determining, in serving the DoJ lawyer’s client(s), just what the public interest is (hereinafter referred to as the “public interest problem”). Thus, service to the nation also carries within it the problem of giving sufficient content to the notion of the public interest, so that it is able to direct decisions. I begin with a general discussion of public service, then move to the longstanding problem of the identity (or, more properly, the lack thereof) of the government lawyer’s client, and end by suggesting a practical approach that is meant to allow DoJ lawyers to resolve the public interest problem.

a. Public service in general

The title of this paper should not suggest that service to the nation is only, or even primarily, a legal value. Indeed, part of what makes practice at the DoJ unique is that it involves a special emphasis on various non-legal values, the most important of which is public service. We should hesitate, however, in thinking that public service values and legal values

57. Maurizio Virolì, *For Love of Country: An Essay on Patriotism and Nationalism* (New York: Oxford University Press, 1995) at 1-2. It was the enemies of patriotism that led Dick the Butcher in Shakespeare’s *Henry VI* to declaim, “The first thing we do, let’s kill all the lawyers.” (Part II, Act IV, Scene ii, lines 83-4.) Although on its face this remark seems to suggest that all lawyers are unethical and that therefore they should be gotten rid of, Dick was in fact urging the killing of all the lawyers as a necessary precondition to a coup d’état.
are completely distinct.\textsuperscript{58} We need a better model for the exercise of the discretion of both the administrator (prudence) and the juridical officer (jurisprudence).\textsuperscript{59}

Since one of the “hats” worn by DoJ lawyers is that of public servant, how the public service literature defines service is important. I will not attempt here to survey this vast body of research, but only to point to one of its touchstones. Thanks in large part to the Tait Report, we have the following definition of service:

The role of the Public Service is to assist the Government of Canada to provide for peace, order and good government. The Constitution of Canada and the principles of responsible government provide the foundation for Public Service roles, responsibilities and values.\textsuperscript{60}

The public service is meant to provide “professional, candid and frank advice,”\textsuperscript{61} and the notion of service has a number of dimensions (namely, democratic, professional, ethical and people values). These were the “living truths” uncovered by the Tait Report when it interviewed members of the public service. In this very exercise of inductive discovery, as opposed to top-down decree, public servants were affirmed as normative agents in their own right. As outlined by the \textit{Values and Ethics Code for the Public Service}, democratic values involve helping Ministers, under law, to serve the public interest; professional values include serving with competence, excellence, efficiency, objectivity and impartiality; ethical values require acting at all times in such a way as to uphold the public trust; and people values entail demonstrating respect, fairness and courtesy in dealings with both citizens and fellow public servants.\textsuperscript{62}

These values, the enduring beliefs described by public servants themselves, are a central part of the DoJ lawyer’s virtues. Like values, virtues are incomplete without the capacity of judgment (practical wisdom) that facilitates their prudent exercise in ethical life. What’s more,

\begin{itemize}
  \item \textit{Values and Ethics Code, supra} note 28 at 5-6. One can only imagine what service might mean today had the \textit{British North America Act, 1867} (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 provided instead for “peace, welfare, and good government”, as all the preparatory constitutional documents had provided.
  \item Values and Ethics Code, \textit{supra} note 28 at 7.
  \item For a more detailed description of these values, see \textit{Values and Ethics Code, supra} note 28 at 7-10.
\end{itemize}
we see in this very description of the values inherent in public service that the problems of the identity of the DoJ lawyer’s client(s) and the public interest problem are already contained in service to the nation.

To understand the notion of public service, we must understand, in turn, what the role of the Government of Canada is. Eugene Forsey sets this out in striking fashion:

Governments in democracies are elected by the passengers to steer the ship of the nation. They are expected to hold it on course, to arrange for a prosperous voyage, and to be prepared to be thrown overboard if they fail in either duty.

This, in fact, reflects the original sense of the word “government,” as its roots in both Greek and Latin mean “to steer.”

Public servants are given a course by their Ministers, and they are meant to work towards arriving at the final destination. Government lawyers might then be thought of as helping to keep the government “on course.” Another way of framing service is to say that the lawyer is a keeper of her client’s conscience, serving as a moral (not simply navigational) compass. This too is a kind of service. The lawyer instills the rule of law into the workings of public administration.

Precisely how DoJ lawyers do so will become clearer below in the context of the discussion of the client identity and public interest problems, which are themselves difficult to tease apart.

b. The client identity problem

Government lawyers may have ethical duties to a number of different clients. In his leading text on professional responsibility, Gavin MacKenzie has this to say about the client identity problem:

The issue of who is their client perplexes government lawyers continually.

If we take as an example a staff lawyer employed by the Ministry of the Attorney General of a province, the possible answers to the question,

63. Forsey, supra note 1 at 1.
65. Fritz Morstein Marx, supra note 43 at 510, 511, 512.
who is my client? include at least the lawyer’s immediate superior, the Deputy Attorney General, the Attorney General, the agencies or other ministries on whose behalf the lawyer appears before courts and tribunals, the government, and the public.

The question is important, and the lack of Canadian authority is surprising. Here we begin to see the various possible clients of the government lawyer: the individual fonctionnaire whom the DoJ litigator is representing; the department in which the civil servant works; the Government of Canada as a whole; the Canadian public; and the Crown. Which master(s) does the DoJ lawyer serve? Perhaps all of them, and thus as a consequence, none of them?

To begin with, it cannot seriously be suggested that the public is the client. DoJ lawyers do not receive their instructions from the public. While Justice lawyers are public servants with public duties, their marching orders are not determined by plebiscite. And yet, despite the practical necessity for the DoJ civil litigator to locate authority in a concrete client or clients, the complexity of the situation is not thereby reduced: if the identity of the client is considered as a function of who benefits from the disposition of the case, it becomes clear how the Canadian public as a whole can be considered the DoJ civil litigator’s client: where a successful defence of an action against the government results in saving the expenditure of money from out of the Consolidated Revenue Fund, the DoJ lawyer saves Canadian taxpayers money. The Canadian public also pays DoJ lawyers, at least indirectly.

As Stager & Arthurs note, “Government lawyers generally see themselves as responsible to the community instead of to an individual client and as taking a wider view of circumstances in giving legal advice to departmental colleagues …” Although this point is perhaps overstated, the general idea which it expresses is important. The traditional, binary model of the lawyer-client relationship is muddied in the public sector context. To begin with, the client is not ultimately the boss, as is the case in the private sector: section 5(d) of the Department of Justice Act states that the Attorney General of Canada “shall have the regulation and conduct

68. Thanks to Matthew Sullivan for this point.
of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada. This means, in effect, that the DoJ can overrule the wishes of a departmental client if push comes to shove. This is not the traditional lawyer-client relationship that exists in the private sector, where the client is boss even if reliant on the lawyer’s advice. Interestingly, we see intimations of the client identity problem in s. 5(d), since the section explicitly recognizes that litigation may involve the Crown or any department. Section 23(1) of the Crown Liability and Proceedings Act also demonstrates the problem.

Where the federal government must take a position in litigation and the interests of government departments diverge, the Attorney General of Canada personifies the unity of the government under s. 5(d), deciding what is in the best interests of the Crown. In practice, conflicts between two or more departmental clients are mediated by senior DoJ lawyers. In especially complex files, “collective” instructions may be given by a working group of Deputy Ministers or Assistant Deputy Ministers. The distinctive institutional structures set up for giving legal advice in these circumstances reflect the “wider view of circumstances” that must be taken, particularly when dealing with the most difficult legal issues faced by the federal government.

One possible solution to the client identity problem is simply to decree the answer, as has been done in Alberta, where the law society has determined that the government lawyer’s client is the government as a whole. In Ontario, for example, rule 2.02(1.1) of the Rules of Professional Conduct, which is not limited to private sector lawyers, states that even when a lawyer receives instructions from an authorized representative of an institutional client, the client remains the “organization” as a whole. This is not much help to Ontario DoJ lawyers, as “organization” is not defined and may mean either a specific client department or the government as a whole. More generally, the client identity problem intersects with Canadian

70. Supra note 26.
71. R.S.C. 1985, c. C-50, s. 23: “Proceedings against the Crown may be taken in the name of the Attorney General of Canada or, in the case of an agency of the Crown against which proceedings are by an Act of Parliament authorized to be taken in the name of the agency, in the name of that agency.”
72. See e.g. the Law Society of Alberta's Code of Professional Conduct, Ch. 12, Rule 1 <http://www.lawsocietyalberta.com/files/Code.pdf>: “A lawyer in corporate or government service must consider the corporation or government to be the lawyer's client.” Or see Hawaii Professional Conduct Code (1996), Comment 7 on Rule 1.13 <http://www.state.hi.us/jud/ctrules/hrpcond.htm>: “...defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole.”
federalism in a way that may be problematic for a federal institution such as the DoJ: given that each provincial law society has the constitutional jurisdiction to regulate the federal lawyers working within the province, and therefore the power to define who the client is, federal DoJ lawyers across the country may find themselves serving different masters—at least on paper.

However, the potential for divergent definitions of who the clients of federal lawyers are may, in the end, prove to be a non-problem. Would defining who the client is really make a practical difference in the daily lives of DoJ lawyers? A black-letter rule enacting that the client is the government as a whole, for example, would not reduce the inherent complexity in DoJ lawyers’ daily professional lives. Similarly, it cannot be that the answer to the client identity problem is as simple as determining the proper government party that must be named in the style of cause, which differs depending on the venue, whether an action or application is being brought, and what the applicable federal statute says. That would be an incongruous result.

Since ethics cannot be divorced from place, analyzing who the client is entails different considerations in the criminal and civil context. In the criminal context, the RCMP may be a client, even though federal prosecutors are the agents of the Attorney General of Canada and Her Majesty the Queen is the proper prosecuting party. In the civil context, practising DoJ lawyers recognize the inherent complexity about who the client is, but would say nonetheless that the client is the department, since that is the entity from which they take instructions and to which they are therefore most directly accountable. Yet, the concept of client accountability must be understood more broadly in the public sector than in the private sector. A “wider view of circumstances” is required once again, since DoJ lawyers are employees, and as such they are not “retained” by their client departments in the manner in which retainer agreements are normally concluded in the private sector. As employees, DoJ lawyers are accountable not only to their departmental clients, but also to their managers within the Justice Department and to the government as a whole through the Public Service Commission of Canada.

The nature of the accountability to departmental clients has undergone a subtle shift in the last few decades, primarily due to financial

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74. See Crown Liability and Proceedings Act, supra note 71 at s. 23; Federal Court Act, R.S.C. 1985, c. F-7, s. 48 and Schedule; Federal Court Rules, s. 303. My thanks to Dale Yurka for these provisions.
considerations. It used to be that the DoJ was funded like any other government department. With the budgetary restrictions of the 1980s and 90s, however, the DoJ began “billing” its departmental clients directly. This change in funding sources, in turn, has brought the DoJ closer to the private sector model of practice, and it may be that departments are now more motivated to seek greater input in the litigation process.\textsuperscript{76} From the most practical, everyday perspective, of course, the client is the contact person within the department who is authorized to represent and embody the department for the purposes of conducting the litigation.

Where a Minister or other Crown servant is sued personally, that individual will also be a client unless the potential for a conflict of interest exists. Section 4(a) of the federal government’s \textit{Policy on the Indemnification of and Legal Assistance for Crown Servants} provides that legal representation will be paid for out of public funds so long as the Minister or other Crown servant “acted honestly and without malice within their scope of duties or employment and met reasonable departmental expectations.”\textsuperscript{77} Appendix B provides for the hiring of outside counsel where “a conflict may arise between the interests of the Crown and those of the servant, or between the interests of two or more servants who are co-defendants.”

Issues involving departments, and not only individual public servants, can become more complex. In tort suits against the government, for example, it may be difficult to determine who the alleged wrongdoer is. In other cases, it may be difficult to find the client within the vast machinery of government who has the appropriate knowledge of the matter at issue in the litigation, or there may be multiple possible clients each one of which, individually, is reticent to take over responsibility for the conduct of the litigation.\textsuperscript{78}

As already stated above, indeterminacy is compatible with decision-making. An intuitively appealing approach to working out the client identity problem, which may help to sharpen ethical issues, is to emphasize lines of authority between various actors and institutions in the civil litigation process. The client is the person or institution to whom the lawyer is most directly accountable, who gives instructions to the lawyer, and who must ultimately take responsibility for the lawyer’s actions. Accountability in the public sector must be understood from a wider perspective, and to

\textsuperscript{76} My thanks to Dale Yurka for this insight.
\textsuperscript{77} Online: Treasury Board of Canada Secretariat <http://tbs-sct.gc.ca/chro-dprh/pol/pilacs-pifes;01-eng.asp>.
\textsuperscript{78} I owe my thanks to Dale Yurka for these examples.
force a simple answer to the client identity problem in this context is to risk sacrificing accuracy for the sake of determinacy.

c. The public interest problem
The public interest problem has a long pedigree; it presents a quandary that, realistically speaking, is not really solvable. Miller expresses the point well:

Despite its surface plausibility, the notion that government attorneys represent some transcendental “public interest” is, I believe, incoherent. It is commonplace that there are as many ideas of the “public interest” as there are people who think about the subject.79

Miller is a professor and former DoJ advisor in the U.S., where the Federal Bar Association has declared the government agency itself to be the government lawyer’s client.80 This position strongly influences Miller’s treatment of the public interest problem, which focuses on agency-centric advocacy and loyalty that defines the public interest at the interstice of the constitutional fault lines of the various actors in government and society. On this approach, the public interest is the product of the proper workings of the system, which is composed of individual institutions and persons each of whom is represented zealously by counsel. This is a view of the public interest borne from the more Whig, classically liberal, and egalitarian tradition in the U.S., with its focus on the separation of powers. The approach to the public interest problem that I propose may be viewed as a more Tory and conservative approach (in the British and European sense), more deferential and respectful of authority, with its focus on the concentration of power.81 As will emerge in greater detail below, my approach to the public interest problem is based on the democratic authority of Parliament to legislate on behalf of the people. As mentioned previously, the client identity and public interest problems are themselves difficult to tease apart. Rosenthal explains why: “... there are differing interests that can be advocated and goals achieved in fulfilling the legislative mandate,

79. Miller, supra note 44 at 1294-95. The point was made even more starkly by the Supreme Court of Canada in R. v. Morales, [1992] 3 S.C.R. 711, in which the court held that the criterion of the “public interest” as a basis for pre-trial detention of criminal accused under the former s. 515(10)(b) of the Criminal Code violates s. 11(e) of the Charter because it authorizes detention on terms which are unconstitutionally vague and imprecise. Criminal Code, R.S.C. 1985, c. c-46. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, supra note 23.
81. See Lipset, supra note 50 at 2.
depending upon who is deemed to be the client." This foreshadows a basic difficulty with my suggested approach, to which I return below.

In his recent article, which has "In the Public Interest" in its title, Professor Hutchinson describes and attempts to resolve the public interest problem. To do justice to what I take to be his basic point, I quote him at length:

It can be insisted, therefore, without too much serious resistance, that government lawyers are differently situated than private lawyers in that their work takes place more directly in the immediate field of the public interest. However, because there are so many competing notions of what comprises the public interest and how it should apply in particular situations, it is a notoriously difficult and contested task to designate what ends are in the public interest and what means—which must also be consistent with the public interest—are best pursued to realize those ends. There is no certainty as to what those values are and even less on what they demand in particular situations: democracy is premised on the belief that such determinations are inherently political and are best made by the people themselves. However, in seeking to fix and frame the ethical obligations and professional responsibilities of government lawyers, there is no compelling need to enter into that sprawling debate in any definitive or exhaustive way. The more modest and pertinent question concerns the role and responsibilities that government lawyers do and should have in explicating or contributing to the government's duty to act in the public interest. Fortunately, reference back to a democratic appreciation of the public interest can point to possible answers to that central quandary.

By off-loading the public interest problem into the democratic arena, this approach risks not giving sufficiently concrete ethical direction to government lawyers in their day-to-day practices. DoJ lawyers cannot make strategic and substantive litigation decisions through the public opinion poll method. Not only would that be impractical—it would simply take too long and be too costly—it would also be patently unethical—requiring lawyers to divulge confidential information to masses of people. Although this is absolutely not what Professor Hutchinson proposes, it is nonetheless unclear how his approach can provide concrete direction in the lived experience of DoJ lawyers.

82. Rosenthal, supra note 66 at 15. To the same effect, see Stager & Arthurs, supra note 69 at 283:
"In the case of professional responsibility, a government lawyer (other than a crown attorney) may face some ambiguity about who is the client to be represented. In attempting to represent 'the public interest' one encounters some difficulty in sorting through conflicting and changing interests among various sectors of the general public."

83. Hutchinson, supra note 3 at 115-16.
The approach I adopt contains three basic components, all of which are premised on the value of democracy. First, the DoJ lawyer's role begins with a commitment to service. Service, as Professor Hutchinson demonstrates, involves explicating or contributing to the government's duty to act in the public interest. To invoke the Forseyan analogy once again, the DoJ lawyer helps steer the nation as part of the government. As Professor Hutchinson notes, “government lawyers have a significant contribution to make in debates within government about how to determine what the public interest demands.” Lawyers at the DoJ know that the more important is the file on which they are the lead, the more eyes will be required to vet the factum before it is submitted to court.

Second, the value of democracy suggests that it is helpful to draw a distinction between the public interest simpliciter and a public interest function. Federal Ethical Consideration 5-1 of Canon 5 of the American Bar Association's 1973 Code of Professional Responsibility states: “The immediate professional responsibility of the federal lawyer is to the department or agency in which he is employed, to be performed in light of the particular public interest function of the department or agency...” Inherent in the ideal of democracy is that no single person or institution has a monopoly on defining the public interest. Rather, what is in the public interest is always a matter of debate; disagreement is a healthy and necessary part of communal life as such. The liberalization of the doctrine of public interest standing being signalled by the Supreme Court of Canada—even the fact of the doctrine’s existence itself—seems to suggest that there are numerous public interest functions. The various types of Crown lawyers, as “repositor[ies] of the public conscience,” just happen to exercise important ones among many. Even amongst DoJ lawyers themselves, “[t]here is no one public interest model that applies to all government counsel.”

84. Ibid. at 120-21.
85. Cited in Rosenthal, supra note 66 at 21. It is noteworthy that MacNair invokes the “public interest role” in the work of DoJ lawyers: “In the Service of the Crown”, supra note 3 at 528 [emphasis added].
89. See Edwards, ibid., The Attorney General, c. 6 (“Leading Role but no Monopoly as Guardian of the Public Interest”), especially at 138-39.
90. MacNair, “In the Service of the Crown,” supra note 3 at 509.
Third, and most importantly for my purposes, democracy as a value demands respect for the legislative process, a respect which informs what I will call a "rule of law approach" to the public interest problem. As advocates in civil litigation matters, government lawyers are usually acting as the defendant’s counsel. More often than not, a DoJ lawyer’s first instinct, when faced with litigation against the federal government, is to go to the enabling statute and dig up the regulations. From this reflex towards enabling statutes and regulations, an important intuition arises: in the minds of DoJ lawyers, their public interest function is defined by Parliament. When Parliament speaks, it expresses the democratic will of the people in the closest possible approximation of the public interest we have. Ritchie J. stated in Colet v. R. that in the criminal context, “[a]ll sections of the Criminal Code are presumably enacted ‘in the public interest’...” Going even further, I would suggest that all legislation passed by Parliament articulates the public interest. A public official does not serve the nation unless he acts within the confines of his statutory authority.

What I have called a rule of law approach to the public interest problem has been the subject of critique, expressed, for example, in Rosenthal’s concern that legislation is susceptible of many different interpretations by judges and technocratic manipulations by lawyers. Another way in which Rosenthal expresses this criticism, at least indirectly, has already been cited above, namely, that the answer to the client identity problem will often determine the interests that are advocated for and the goals sought to be achieved in fulfilling the legislative mandate. A combination of Miller’s agency-centric approach together with a skeptical take on the inherent instability of the meaning of statutes seems to allow DoJ lawyers, when representing a specific department, to co-opt the “public” interest for other purposes entirely.

I do not offer the statute as the holy grail of the public interest, but only as a helpful guide towards its discovery. The rules, at least, help us to determine what we should be arguing about. As MacIntyre notes, rules are an index of our conflicts and therefore also tell us about ourselves.

91. Ibid. at 517.
92. The government’s public interest function when acting as a plaintiff in litigation is a much more difficult matter, requiring a separate treatment which I do not attempt to undertake here. A rule of law approach to this issue would likely be insufficient on its own.
95. See e.g. Rosenthal, supra note 66 at 18-20.
96. Thanks to Professor Macdonald for this point.
97. MacIntyre, supra note 11 at 254.
In this case we can say that statutory rules tell us about what we value as a Canadian society, and about our living government as well. As MacNair notes, "[t]he skill of the interpretation of statutes and regulations is important because of the organizational structure of government." To the extent that statutes and regulations give contours to our public institutions, which in turn speak to what we value as a country, they are a proxy for the public interest.

Legislation, it is true, is susceptible of many interpretations. If statutes were self-applying lawyers and judges would not have much to do. To move, however, from the position that interpretation is a delicate semantic business to the position that interpretation is a chaotic free-for-all is to forget all of the shared understandings, practices, common-sense conventions and pragmatism that inform lawyers' hermeneutic universe. DoJ litigators are meant to advocate for Canada's best interests, and like all litigation lawyers they do so in an adversarial process. The client identity and public interest problems do not make a DoJ lawyer any less of an advocate than any other lawyer.

The foregoing discussion has, in various ways, demonstrated the importance of rules in DoJ lawyers' lived experience. While rules constitute the game and are therefore necessary for there to be a game in the first place, they say little about how the game should be played. For that, the right character or disposition is required, a certain kind of virtue.

III. Virtue ethics and service to the nation

To begin this section, and to tie it back into the preceding section, I return briefly to a discussion of the Crown, this time from another perspective. The aspect of service in service to the nation carries within it, as already discussed, a requirement of knowing just what and/or who one is serving (the client identity problem). The Crown is one very important possibility. And yet, the Crown has another dimension, which was not discussed above. The Crown and its representatives are "living symbols of our collective freedoms and institutions." They are "living signs of our traditions and our permanent ideals" and are "an enduring part of our living history." In its emphasis on living embodiments of abstract values and the personification of the state and its institutions, the tradition of the Crown intersects with the perspective of virtue ethics. As Queen Elizabeth declared in Quebec City on 10 October 1964, "the role of a

98. MacNair, "From Polyester to Silk," supra note 3 at 145.
99. MacLeod, supra note 37 at 11.
100. Monet, supra note 52 at 82.
101. MacLeod, supra note 37 at 60.
constitutional monarchy is to personify the democratic state."¹⁰² The principles of constitutional-monarchical democracy are, in a very direct way, the instantiation of a virtue ethical outlook on the world, which views the human subject, not rules, as the focal point of ethical deliberation. While it is more an idea than a person, the Canadian Crown manifests itself in persons.¹⁰³ Similarly, virtue is an idea that is manifested in persons. Governors General, for example, are moral exemplars in themselves. They are appointed because of their excellence, because of their dedication to public service, appreciation of many cultures, and concern for the rights of others, all of which they "prove in their very persons."¹⁰⁴

Who some other virtuous exemplars may be, and what the practical consequences of virtue ethics might be for practice in the DoJ, will be discussed in the following sections. Having described in preceding sections what the nation is, and what service to it might entail, I now wish to propose service to the nation, more formally, as the ultimate end of the DoJ lawyer’s ethical and professional life. To do so, I will first set the scene by giving some general background on virtue ethics and the "teleological" approach that it entails.

Virtue theory has its roots in the writings of Aristotle in The Nicomachean Ethics.¹⁰⁵ It is not my purpose to describe Aristotle’s work in detail. Only the broad outlines of his theory will be set out, and always with the instrumental purpose of attempting to draw lessons from virtue ethics that are helpful to the day-to-day practice of public sector lawyers. A bird’s eye view of virtue ethics looks something like this:

(1) to be a good x one must exhibit the excellence (arête) of x;

(2) the excellence of x lies in performing x’s characteristic function (end, purpose or telos) well—hence the “teleological” approach;

(3) performing x’s characteristic function well entails developing the virtues, traits of character and capacities associated with a well-functioning x;

(4) the virtues, traits of character and capacities associated with a well-functioning x can be developed through habituation, training, practice and modelling;

¹⁰². Monet, supra note 52 at 17.
¹⁰³. Ibid. at 34.
¹⁰⁴. Ibid. at 81-82.
(5) the fundamental virtue that makes possible the possession and exercise of all the others is practical wisdom (prudence, judgment, deliberation or phronésis).  

For my purposes here Alasdair MacIntyre’s “partial and tentative” definition of virtue is instructive: “[a] virtue is an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods.” What, then, are “practices” and the “goods” which are “internal” to them? For MacIntyre,

[a] practice involves standards of excellence and obedience to rules as well as the achievement of goods. To enter into a practice is to accept the authority of those standards and the inadequacy of my own performance as judged by them. It is to subject my own attitudes, choices, preferences and tastes to the standards which currently and partially define the practice.

“Goods” which are “internal” to this notion of a practice can only be specified in terms of the practice itself, and can only be identified and recognized by the experience of participating in the practice in question. MacIntyre continues:

We are now in a position to notice an important difference between what I have called internal and what I have called external goods. It is characteristic of what I have called external goods that when achieved they are always some individual’s property and possession. Moreover characteristically they are such that the more someone has of them, the less there is for other people. This is sometimes necessarily the case, as with power and fame, and sometimes the case by reason of contingent circumstance as with money. External goods are therefore characteristically objects of competition in which there must be losers as well as winners. Internal goods are indeed the outcome of competition to excel, but it is characteristic of them that their achievement is a good for the whole community who participate in the practice. So when Turner transformed the seascape in painting or W.G. Grace advanced the art of batting in cricket in a quite new way their achievement enriched the whole relevant community.  

106. For greater detail than this point-form, summary outline of virtue ethics provides, see Milde’s helpful primer on Aristotle and legal ethics: supra note 12 at 55-60. For the point made in (5), see MacIntyre, supra note 11 at 183.

107. MacIntyre, ibid. at 191 [emphasis on entire quotation omitted].

108. Ibid. at 190.

109. Ibid. at 188-89.

110. Ibid. at 190-91.
In classical economic terms, then, a virtue is a particular species of public good, being non-rivalrous (positive sum when consumed) and non-excludable (impossible to exclude others from). To summarize, a virtue is an acquired human quality that is a necessary condition for achieving intangible goods that enrich, are the product of, and are defined by a community that commonly subscribes to authoritative standards of excellence. In its pithiest formulation, a virtue is a “qualit[y] which enable[s] an individual to do what his or her role requires.”

Having defined what a virtue is, I now move on to an explanation of phronēsis. Simply put, a person who possesses practical wisdom is someone who knows how to exercise judgment in particular cases, a virtue which makes possible the exercise of all the other virtues (see (5) in the bird’s eye view of virtue ethics above). Put differently, the ability to exercise judgment requires knowing one’s place—the dynamics and intricacies of the specific situation in which one finds oneself. Someone may be courageous or compassionate or honest or generous, but unless one can properly size up the situation and exercise judgment one is bound to go wrong in exercising these other virtues. To borrow an example from Kant, who was resoundingly not a virtue ethicist, sound judgment would entail that the virtue of honesty be exercised in a particular way if the Grim Reaper were to appear at your door asking for your brother.

Perhaps the most famous application of Aristotle’s virtue theory to legal ethics is Anthony T. Kronman’s book, The Lost Lawyer: Failing Ideals of the Legal Profession. In it he attempts to revive the “embarrassed virtue” of the “lawyer-statesman ideal,” which he argues is intimately bound up with practical wisdom. At the heart of the lawyer-statesman ideal is the idea that deliberation and character are fundamentally interconnected. To be practically wise involves being a certain kind of person, with certain intellectual and affective dispositions and traits. The lawyer-statesman is the embodiment of a commitment to public service, combining an ability to feel, think, and act—a capacity for deliberative imagination and the ability to simultaneously be sympathetic and detached. The lawyer-statesman also exhibits excellence in deliberating about human and professional ends—which cannot be fully separated—and in how to reconcile the

111. Ibid. at 128.
112. Ibid. at 154.
incommensurability of ends in daily life and legal practice.\textsuperscript{114} In short, the lawyer-statesman is a living, breathing paragon of personhood and professionalism.

Like most important works, Kronman’s book has received the compliment of criticism from numerous directions and sources. Two of the most prominent criticisms of Kronman’s book are, first, that it fails to tie ideals—lawyer-statesmanship and practical wisdom—to legal practice on the ground and, second, that it conflates personal and professional deliberation.\textsuperscript{115} These two criticisms would seem to parallel the two dimensions that Kronman attributes to practical wisdom—its \textit{procedural} aspect, which involves method in deliberating about how to act in a given circumstance, and its \textit{substantive} aspect, which involves method in deliberating about one’s life-choices so as to allow a person to harmoniously integrate all that she is and does.\textsuperscript{116} In what follows I take up each of these criticisms of Kronman, which parallel the two aspects he attributes to practical wisdom, and attempt to learn from and apply them in the context of public sector lawyering. I have already taken up the former problem in setting out the distinction between values (enduring beliefs which influence action) and ethics (the instantiation and reconciliation of values in concrete circumstances).

In this essay so far, I have focused for the most part on a fairly large sub-category of lawyers, namely, government lawyers who work at the DoJ. I have also proposed \textit{service to the nation} as the characteristic function of DoJ lawyers—that is, the end towards which DoJ lawyers must strive (see (2) in the bird’s eye view of virtue ethics above). Excellence in DoJ lawyering resides in serving the nation (see (1) in the bird’s eye view of virtue ethics above). But this in itself, as I hope I have already made clear, says very little. It neither prescribes nor describes adequately, in that it fails to tie the ideal of service to the nation to the practice of actual

\textsuperscript{114} The above description has been pieced together from the following pages of Kronman’s book: 3, 15, 27, 109, 161-62, 326-27, 363. For an account of the life of an \textit{economist}-statesman who needed “a cause, a vision of the good life, to which he could hitch his worldly activities”, see Robert Skidelsky, \textit{John Maynard Keynes, 1883-1946: Economist, Philosopher, Statesman} (New York: Penguin Books, 2005) at 373.

\textsuperscript{115} See David B. Wilkins, “Practical Wisdom for Practicing [sic] Lawyers: Separating Ideals from Ideology in Legal Ethics” (1995) 108 Harv. L. Rev. 458. A more recent application of virtue theory to legal ethics, which offers \textit{justice} as the ultimate end of the legal profession, seems to suffer from a similar failure to tie values to ethics: see Justin Oakley & Dean Cocking, \textit{Virtue Ethics and Professional Roles} (New York: Cambridge University Press, 2001) at 121, noting that “virtue ethics would hold that a lawyer ought not to fulfill the requirements of their role in cases where fulfilling those requirements would involve gross violations of justice.”

\textsuperscript{116} See e.g. Kronman, \textit{The Lost Lawyer}, supra note 113 at 86-87.
DoJ lawyers, proclaiming a value without adequately describing how that value is meant to guide ethical decision-making in lived circumstances.

My argument so far has not properly accounted for the significant heterogeneity that exists within the class of DoJ lawyers itself. My $x$ is not sufficiently specific to give an account of the lived experience of all the DoJ lawyers out there. For certain other purposes, however, I believe my approach so far has helped to justify what is perhaps the basic claim of this paper—that the aspiration to serve the nation, as an abstract value, is common to all DoJ lawyers. On a higher order of generality, this is what unites DoJ lawyers, no matter what their more specific tasks, roles, titles and functions may be. I am essentially defining a generalized “characteristic function” for all DoJ lawyers (a centripetal force), one that is meant to give direction for outlining further, idiosyncratic functions and ethical dilemmas that specific types of DoJ lawyers have (a centrifugal force). Unless one is prepared to take the extreme view that DoJ lawyers have no shared, functional characteristics whatsoever, some common basis must be found. That common ground, I am proposing, is service to the nation. It is what allows for a living legal value for Justice lawyers in Canada.

Precisely because it is a living value, service to the nation will have numerous, organic instantiations in a number of different environments. Living legal ethics that sprout up in various locales grow from the fertility of the living legal value of service to the nation. I therefore have to make my $x$ sufficiently specific in order to allow for an account of the lived experience of at least some of the DoJ lawyers out there, and the more refined $x$ that I have chosen is civil litigators. At the same time, however, given that each of the ethical sprouts emanates from the same normative seed, some commonality will always exist. In keeping with the virtue ethics methodology that I have adopted, the site of both divergence (based on centrifugal forces) and commonality (based on centripetal forces) in the normative lives of DoJ lawyers will be the virtues themselves (see (3) and (4) in the bird’s eye view of virtue ethics above). These virtues will be further developed in Section V.

Having addressed the first criticism of Kronman’s book, I now move on to the second. To recall, the criticism is that The Lost Lawyer conflates the personal and professional lives of lawyers. The criticism seems to parallel the substantive aspect of practical wisdom defined by Kronman, namely, method in deliberating about one’s life-choices so as to allow a
person to harmoniously integrate all that she is and does.  

If I agree to some extent with the first criticism levelled at Kronman, I fundamentally disagree with the second. Or, more properly, I disagree that it is a problem at all. It is a basic premise of this paper that personal and professional lives cannot be fully separated. The consequence is that a "philosophy of work" requires some conception of a "philosophy of life," as well as the reverse. One's role is, in fact, what gives meaning to one's life as an individual. As Kronman states, "a lawyer's profession is part of his identity and can't be put on or off like a suit of clothes." We are, to a very great extent, what we do. Our projects make our lives meaningful; our jobs come to define who we are. What we do, in turn, does us—it remakes and molds us. What we do "for a living" is, as the expression itself makes clear, inseparable from our lives. Vocation and avocation are not so distinct. The blurring between the personal and professional is particularly acute for government lawyers who, unlike private lawyers, must think carefully about, say, taking a leadership role in community organizing, criticizing politicians, engaging in outside employment, publishing articles, and accepting certain kinds of gifts.

What makes a DoJ lawyer's personal and professional life meaningful is the kind of person that she is challenged to become—which in practice is intimately bound up with service to the nation—through her work in the federal government. She submits herself to what MacIntyre calls a practice which, as already discussed, involves a kind of surrender to the authority of standards of excellence determined externally from her as an agent. She must accept the attitudes, choices, and preferences that partially define the practice. She must see herself as practising within, and being measured by, an institution with 140 years of history serving the nation.

Service to the nation, in its various instantiations of federal lawyers' roles, presents unique challenges and ethical dilemmas, and therefore demands the development of particular traits and personal characteristics. One cannot acquire the traits of character and dispositional attitudes of

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117. For a deeper development by Kronman of this aspect of practical wisdom, see "Living in the Law" (1987) 54 U. Chi. L. Rev. 835 [Kronman, "Living in the Law"].
118. Glenn, supra note 18 at 432.
120. I owe this important point to Matthew Sullivan. See e.g. the brochure "Political Activities and You," online: Public Service Commission of Canada <http://www.psc-cfp.gc.ca/plac-acpl/brochure-depliant/brochure-eng.pdf>. DoJ employees engaging in political activities are governed by Part 7 of the Public Service Employment Act, supra note 21, the purpose of which is to reconcile political activities with the principle of political impartiality in the public service (s. 112).
a lawyer without also experiencing a change of identity. Virtue theory mandates that becoming an ethical DoJ lawyer means finding the right role models, and looking to them for guidance. Who we choose as our role models—our biographical guidance—is an important ethical decision in itself, but it is not only our decision. Put differently, we have some latitude in what we choose to do, but what we choose to do in turn points us toward certain role models who influence us and thereby change who we are. We are free to choose our practice (in MacIntyre’s sense) but, having done so, the practice to a very great extent chooses us, in the sense that it chooses our role models for us and those role models in turn affect our character and identity.

IV. A complementary approach to virtues and rules
In this section I begin by drawing on important empirical work carried out in Ontario by Wilkinson and colleagues, which has resulted in data giving rise to numerous articles. The authors found that the majority of lawyers practising in Ontario did not find the Professional Conduct Handbook a useful tool. The real question, of course, is why these lawyers found this to be the case. Why was the code of conduct in question not felt to be useful? The possible responses to this question suggest that Canadian legal ethics scholarship is in need of a more nuanced understanding of the complementarity in daily law practice of the virtues of people and the rules in codes.

One response is simply that we need better codes of conduct. Professor Wilkins argues, for example, that legal ethics must develop “middle-level” principles specific to different social and institutional contexts of lawyerly practice (that is, different places). Another possible response is that virtue theory is of practical importance in the daily lives of lawyers. That lawyers talk first to their role models when they have ethical dilemmas

125. David B. Wilkins, “Legal Realism for Lawyers” (1990-1991) 104 Harv. L. Rev. 469. This is also the approach favoured by Professor Hutchinson, who bemoans the failure of professional codes of conduct to differentiate between government lawyers and private sector lawyers. See Hutchinson, supra note 3.
seems to hold empirically, and not just as a matter of virtue ethics theory.\textsuperscript{126} The practice of looking to other people for guidance, as opposed to simply written rules, may suggest that codes of conduct are not only inadequate, but that they have inherent limitations as guides to ethical behaviour. Living, breathing role models are needed in addition to rules for the simple reason that no code of conduct could ever be exhaustive. Virtue ethics is premised on the uncodifiability of ethical judgment,\textsuperscript{127} and virtue ethicists attribute this uncodifiability to the tyranny of circumstance.\textsuperscript{128} The complex problems that arise in the minutiae of human affairs cannot be regulated away. Good judgment cannot be codified. More controversially, it might even be said that one does not really have an ethical dilemma if the situation in which one finds oneself falls squarely and neatly within the letter of a code of conduct manual. When written rules do not provide adequate guidance, however, one must look to biographical guidance: it is people with experience and judgment who can best help others resolve ethical dilemmas. And yet, codes of conduct will nevertheless be helpful in resolving such problems. A more nuanced understanding is needed of the interaction between rules and roles, between law and ethics.\textsuperscript{129}

Wilkinson and colleagues interviewed 180 lawyers from firms of various sizes across Ontario. One lawyer said that he consulted senior lawyers in his firm because it was “valuable to obtain the views of more senior people” before making ethical decisions.\textsuperscript{130} Another lawyer said that when faced with an ethical problem, he decided first about his beliefs about right and wrong, and then “you talk to anybody whose judgment you trust to tell you whether or not they think your internal compass is on point.”\textsuperscript{131} An immigration lawyer in a small town said, “[g]enerally with refugee problems, if I have an ethical dilemma I talk to somebody inside and I generally talk to one of the two or three sort of ‘Deans of the profession’ in the town.”\textsuperscript{132} Invoking an age-old Aristotelian idea, one lawyer remarked, “The Code of Professional Conduct, in some cases I think, is inadequate

\textsuperscript{128} Ibid. at 909.
\textsuperscript{129} In this regard I have been inspired by the following articles: David Braybrooke, “No Rules without Virtues: No Virtues without Rules” (1991) 17 Social Theory and Practice 139; and Feldman, \textit{ibid}. The latter author defines the characteristic function of lawyers, at 927, as follows: “While acting in a representative capacity, a lawyer enables cooperation and manages competition, specifically in situations involving diverse, not necessarily congruent interests.”
\textsuperscript{130} Wilkinson, Walker & Mercer, “Codes”, \textit{supra} note 122 at 657.
\textsuperscript{131} \textit{Ibid}. at 669.
\textsuperscript{132} \textit{Ibid}. at 670.
but that is the function of not being able to provide in any code for all situations which can arise in the course of human conduct. ... And in fact I think the Law Society itself has in a way inferred and agreed with the inadequacy of the Code by having a Practice Advisory Committee and you can call up a practitioner and ask for advice or guidance in ethical dilemmas." A partner in a firm resolved a conflict of interest problem by talking it over with other partners in the firm. When faced with a strategic issue concerning whether to convert a motion into a summary judgment motion, one lawyer discussed the issue with some colleagues even before beginning any research. Finally, in a separate study based on the same data, Margaret Ann Wilkinson’s results suggest that lawyers’ information-seeking practices strongly favour informal sources such as colleagues and role models over formal sources such as rule- and code-based research.

That the Values and Ethics Code for the Public Service provides for ethical mentorship, therefore, is both a positive thing and potentially unnecessary: “When faced with an ethical dilemma, public servants are encouraged to use the opportunities and mechanisms established by their Deputy Head to raise, discuss and resolve issues of concern related to this Code.” Deputy Heads have, under the Code, the obligation to designate a senior official who can assist public servants to resolve issues pertaining to the Code. These provisions in the Code are positive to the extent that they facilitate the human inclination to seek out informal, person-to-person ethical guidance. These types of human interactions should be facilitated by the DoJ—even assuming they would happen informally in any event—with measures as simple as a formal mentorship programme for new recruits.

As of June 2009, 554 employees at the DoJ were registered in the National Mentoring Program, launched in September 2008, which pairs associates with mentors across the DoJ so they can share knowledge and experience and learn from one another. It is worth noting, in addition, that various law societies and other professional organizations across Canada

133. Ibid. at 673-74.
134. Ibid. at 676.
135. Ibid. at 677.
136. See Wilkinson, supra note 126.
138. Ibid. at 15, sub-section (c).
have, or are planning, mentorship programs. How these programs operate in practice, who uses them, and how and why they are used present interesting questions for future empirical research. The efficacy and value of mentorship in helping to inform and develop ethical judgment stems, in part, from the nature of mentorship itself, which is a relationship that transcends the distinction between the personal and the professional and thereby recognizes the lived reality that personal and professional lives cannot be fully separated.

Collectively, the empirical work of Wilkinson and colleagues surveyed above demonstrates that in the day-to-day practice of lawyers rules of conduct are less important than roles of conduct in working out ethical problems. This is not to say, however, that codes of conduct should be abandoned. In many ways, such codes are extremely valuable tools for practising lawyers. They are symbols of what it means to be a professional, and also an important public statement of right and wrong. In what follows I turn to a more formal discussion of lawyers' codes of conduct, and then attempt to better understand how rules and roles can complement one another—in a way that goes beyond merely valuing experience in interpreting and following rules.

Law societies' rules fall within the meaning of “law” for the purposes of s. 1 of the Charter of Rights and Freedoms. While codes set out minimum, formal, proscriptive rules (prohibitive “don’ts”), I begin from the premise that ethical conduct is better facilitated through role-driven, informal, aspirational ideals (prescriptive “do’s”). As the empirical work on codes of professional conduct already discussed demonstrates, “[c]odes of ethics can be expected to play only a limited role in influencing


142. Interestingly, the American Bar Association’s 1969 Model Code, which adopts a hybrid approach that integrates mandatory minimum standards with hortatory, supererogatory prescriptions, was partly inspired by a famous distinction drawn by the co-chair of the committee who helped draft it: Lon Fuller put the difference between the morality of duty and the morality of aspiration into action. See David Luban, “Rediscovering Fuller’s Legal Ethics” in Willem J. Witteveen & Wibren van der Burg, eds., Rediscovering Fuller: Essays on Implicit Law and Institutional Design (Amsterdam: Amsterdam University Press, 1999) 193 at 199.
lawyers’ attitudes and behaviour...” The more critical positions on such codes range from the view that they are as worthless as a Valentine’s card to a surgeon in an operating room, to as counter-productive to ethics as saltwater is to thirst. For the purposes of analyzing ethical decision-making in the actual practice of law, codes of conduct are viewed by some commentators as a distraction from the real issue, namely, the types of clients for whom lawyers act and the related incentives for ethical conduct.

And yet, nowhere is the reflex to regulate through chirographic, propositional rules stronger than in the legal domain. Lawyers trade in rules, and as such lawyers’ solutions to problems are more often than not legislative in nature. The predictable impulse to propositionalize and decree is no different in the domain of legal ethics. On this view, legal ethics is about promulgating “lawyers’ rules,” an ongoing project which the Canadian Bar Association began in 1920. Canada’s legal professions promulgate codes of ethics, of course, the better to be ethical! It may also be that the promulgation of codes of ethics—and of rules generally—is premised upon a healthy distrust of discretion and uncertainty, as well as the institutional necessity for licensing bodies to have sanction and enforcement mechanisms at their disposal.

An overly heavy emphasis on codes, however, risks turning ethical decision-making into a rote search for rules—into a matter of technique,

145. Loder, supra note 48.
as opposed to deliberation. If there is no rule against something, the inclination might be, then the action can be taken. The problem this creates is that it off-loads ethical agency on to a professional conduct manual: we don’t decide; the rules do. That position does not properly describe ethical life as such. At all times, it is people who make decisions: it is the living agency of humans more so than rules that is the locus of ethical lived experience. According to the Tait Report, people do not make values the true well-spring of conduct by looking to the rules; they do so by looking first to people:

Whether as children or as adult professionals we do not absorb or learn to have values primarily through rules: we do so through people, through rewards for obedience and discipline for disobedience, and through example. The rules come afterward. They codify and summarize what we already know or believe. They serve as a handy checklist. But they do not motivate in and of themselves, or they do so only at second hand, because we are already internally disposed to respect them.

We learn to hold and to live values because we see others do so: either exemplary role models such as parents, teachers, or outstanding colleagues; or simply the routine goodness exemplified by many people in our various communities. We learn about the good not from abstractions but from encountering it in real life, embodied in real persons.149

With its intense focus on rules, Canadian legal ethics scholarship has lamentably overlooked the importance of character. Rules can usefully channel how law is practised, but not as significantly as is often presumed. Amidst this deontological fervour, not enough attention has been paid to the plain fact that law is practised by people. Perhaps this has gone unnoticed simply because it is so maddeningly obvious, but one of its fundamental consequences is less obvious: law and ethics cannot be completely separate and distinct from one another,150 since lawyers personify their intersection. Daily life blurs the conceptual lines between different normative regimes. For precisely the same reason, written rules and living paragons of virtue intersect, interact and inform one another.

Professor Glenn offers another way of reflecting upon the complementary nature of rules and roles:

149. Tait Report, supra note 4 at 51.
Standards address the question of how one acts and assume the existence of an articulated role the standard is meant to implement. In contrast, rules tell one what to do, in a particular case, and their implementation appears to require no concept of a professional role or professional standards. To the extent that a profession seeks rules in order to know what to do, it is clear that it lacks a clear sense of role informing it as to how it should act.\textsuperscript{151}

To put this fascinating insight differently, it might be said that rules tell us what to do, while roles show us how to be. The rules of tennis, for example, cannot tell Roger Federer how to react when Andy Roddick hits him a particularly challenging serve.\textsuperscript{152} No rule-book can impart the kind of knowledge gained by experience: that kind of knowledge is not knowledge of or knowledge that; it is know-how. One develops that kind of skill only through learning by doing. Becoming a lawyer, then, is not simply a matter of being subject to a special regulatory regime, nor will more rules help in this process unless the rules are somehow tied to living exemplars of what it is to be a lawyer.

Of course, a lawyers’ code of conduct is itself an important symbol of what it means to be a lawyer. Codes are an important public, formal statement of obligation, and for the busy practitioner they are a ready and useful reference point.\textsuperscript{153} A code, just like a role model, is most beneficial when it raises ethical issues without definitively answering them.\textsuperscript{154} This approach only minimally reduces certainty and predictability—since much of what can be found in codes is often fairly intuitive—and should also help to stimulate ethical deliberation. To use Professor Glenn’s technical term, a code of conduct should not set out rules, but standards. A code must point towards the exercise of discretion and deliberation, rather than away from it. Such a document would be less like a code and more like a constitution.\textsuperscript{155} As in the case of a role model, it is a constitution which guides us: we find guidance in character, in people.

If it is primarily people who can help us deliberate over ethical questions, there will inevitably be different kinds of people in different places. It is to one such place, the civil litigation environment, which I now turn.
V. Civil litigation at the DoJ: towards an ethics of place

Two dimensions of knowing one's place that are mentioned in the Introduction remain to be discussed: the individual's personal characteristics and temperament (see point (3) in the bird's eye view of virtue ethics above), and the specific government agency, department or office in which a lawyer works. I will discuss these issues side by side in this section.

As advocates, DoJ civil litigators may, for example, oppose motions for strategic reasons, seek to strike out pleadings, argue over proper venue, or seek summary judgments. As public servants, by contrast, one of their chief goals is to promote access to justice by simplifying the procedural path of each litigant, especially for self-represented litigants or other parties at a disadvantage. Practical wisdom is required to remain faithful to the greater public service values at stake in the litigation process, even while employing every procedural tool at the Crown's disposal in order to ensure that clients' legal interests are vigorously defended. Precisely what this role requires, in moving from values to ethics and navigating the often conflicting demands of advocacy and public service, is not always that clear.

The litigation environment in the federal government is a distinctive place. Although we can speak generally of a “DoJ” culture, it must be recognized that the DoJ subsumes multiple cultures, many places, and myriad ways of serving the nation. For my purposes here, I adopt Kronman’s definition of culture, namely, “the attitudes and interests that the members of a group share and that define, for them, the point or purpose of their participation in it.” The measure of ethical conduct is not determined by any type of formal regulation, but instead by the personal characteristics of individual lawyers, the professional circumstances of their practice (“culture”), and the social, political, economic and cultural forces inside and outside the profession which mark off what is ethically deviant and therefore what should be sanctioned. Consequently, the sub-culture of DoJ civil litigation will to a large extent determine for itself what the principle of service to the nation means in practice. The sub-culture, in turn, is formed by relations within a community composed of people. Culture is an artifact: it is a product of people and their interactions. The

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156. Thanks to Matthew Sullivan for bringing this tension into full relief for me.
157. Kronman, The Lost Lawyer, supra note 113 at 291. The burden of this paper has been to show that service to the nation is an attitude and interest that all DoJ lawyers share and that defines, for them, the point or purpose of their lives in the DoJ.
(sub-)culture of the DoJ (civil litigators), therefore, is constructed from its people and their interactions, and therefore who the people are is crucial. That is the first reason why personal characteristics and office environment should be discussed side by side.

But the reverse also holds. The discussion of virtue ethics above has demonstrated, I hope, that DoJ culture writ large and the civil litigation sub-culture within it are formative of the personal character of its lawyers. That is the second reason why personal characteristics and office environment should be discussed side by side. To choose to be a DoJ civil litigator is to submit oneself to the standards of a particular discipline in a particular place, and to recognize that one must look for guidance to the authoritative models of excellence that that particular place proclaims as its exemplars of role, of professionals, of virtuous servants of the nation.

Recall that I have already attempted to develop some virtues that are generally applicable to the class of DoJ lawyers as a whole—which are centripetal forces in the lived experiences of DoJ lawyers—namely, a philosophical bent that helps in thinking through the indeterminacies inherent in public practice; the ability and judgment to cut through philosophical problems and take reasoned, phronetic decisions that fit the context, even in the face of uncertainties; a qualified notion of Canadian patriotism; the belief in the spirit of service to the nation, and the aspiration to put it into practice in day-to-day professional life. The model DoJ lawyer, I conclude, should embody the contemplative character of a “clear-headed philosopher of democratic governance”159 and the decisiveness, pragmatism, practicality and perceptiveness of an action-taker—not only a democratic “lover of wisdom” (philo-sophia), but also a real-world doer. These excellences of character are applicable to all DoJ lawyers, whether they are Crown prosecutors, legislative drafters, legal advisors, policy lawyers, or civil litigators. In F.R. Scott was “exemplified that best product of the professional, the scholarly humanist who is also a man of action.”160 As an academic and advocate, a law professor and lawyer, “[h]e was not interested in abstractions for their own sake but in principles, their operations and effects in specific law cases.”161 In this combination of the contemplative and the practical, Scott embodies the ideal of deliberative judgment that Aristotle called phronēsis.

159. Fritz Morstein Marx, supra note 43 at 513.
Civil litigators are one constellation among many within the universe of DoJ lawyering. I turn now to a first try at fleshing out a virtue peculiar to DoJ civil litigation lawyers. It is perhaps, more properly, a general theme that arises in the DoJ litigation context. Litigation is where the public policy rubber hits the road. It is a process in which two ethical “frames” collide with one another: the bureaucratic rationality of state programs serves as the toile de fond to an alleged injustice done to a particular, identifiable individual. In civil litigation, macro values run up against micro values. Of necessity, the DoJ civil litigator must be concerned with, and must advocate for, the macro frame over the micro. As Professor Roach reminds us,

The Attorney General [of Canada] is the quintessential repeat player in litigation, and will be concerned about the systemic implications of particular claims of Charter or aboriginal rights. Even though it may not be a disaster to lose a particular case, the government may find that an adverse Charter ruling significantly limits its policy options in the future. The Attorney General has to worry not only about the particular case, but about its effects on many cases down the line.163

The lived experience of DoJ civil litigators is fraught with two distinct concerns about distributive justice—one about the ability of the state to implement its programs and policies, and the other about the precedential effects of judicial pronouncements. Both concerns, however, demand that the DoJ civil litigator exhibit and embody a particular excellence of character: it is the ability to advocate for the “realization of collective goals of fundamental importance” and to have the wisdom to know how best to reconcile the broader collective interests of the state with those of its individual citizens.

This is invariably a difficult task, both professionally and personally. It strains the role morality of those who aspire to it. To argue for the integrity of the system, in the abstract, in the face of a concrete, identifiable victim of the system, who may even be sitting in the courtroom, is a difficult persuasive and emotional burden. John Rawls famously argued in A Theory of Justice that the classical theory of utilitarianism violates commonsense notions of fairness, since on the margin it requires individuals to suffer for the benefit of the greater good. Those individuals will invariably want to know, of course, “Why us and not others?” There are different kinds

162. Some more obvious, generally applicable, civil litigation virtues such as the ability to undertake cost-benefit analysis, strategy, and sang-froid will not be canvassed.
of justice, macro and micro, and in the adversarial process the DoJ civil litigator will be required, in most circumstances, to advocate for the large-scale dimension of justice.\textsuperscript{166}

The virtue that I propose, then, which is peculiar to the DoJ civil litigator, is the persuasive ability of an advocate to maximize the force of larger, communal or institutional arguments. It must be asked, however, whether this proposed virtue represents the triumph of detachment over sympathy. What of the central place of feeling in the process of ethical deliberation? For the DoJ civil litigator, having sympathy for the little guy may be a strategic advocacy advantage, since it will help her to frame the most persuasive arguments in favour of broader communal concerns even while minimizing any David versus Goliath effect which may exist. For reasons equally instrumental but more positive, the virtuous character of DoJ civil litigators will be exemplified in how they make hard decisions: exercising a public trust means that the greater the consequences of the decision, the greater must be the engagement with the concerns of the other side.\textsuperscript{167}

VI. Choosing role models

The Aristotelian wisdom still holds true today: we should take those who deliberate best as our role models. All law societies have a "good character" requirement.\textsuperscript{168} The Law Society of Upper Canada, however, appears to have a particularly minimalist conception of just what constitutes "good

\textsuperscript{166} Of course, the plaintiff suing the government will not always make micro-type arguments. In class actions, for example, which are a growing source of litigation against the federal government, the plaintiff(s) will invariably make macro-type arguments. The number of class action proceedings against the Crown increased from thirty-five in 2000 to 171 in 2008. (See Letter from the Honourable Rob Nicholson to the Honourable Shawn Murphy, online: Government Response to the fourth report of the Standing Committee on Public Accounts, 40th Parl., 2nd Sess. <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=40&Ses=2&DocId=4012061&File=0> at Recommendation 3.

\textsuperscript{167} My thanks to the anonymous reviewer for this point.

\textsuperscript{168} See e.g. s. 27(2) of Ontario's Law Society Act, R.S.O. 1990, C. L.8: "It is a requirement for the issuance of every licence under this Act that the applicant be of good character." For an important pan-Canadian analysis and critique of this requirement, rooted in virtue ethics, which stresses being virtuous (character), and also rooted in social psychology, which stresses the ethics of places (circumstances), see Woolley, supra note 12.
character.” So far, the point that our choice of practice (in MacIntyre’s sense) chooses our role models for us may have been over-emphasized. Choosing our role models is itself an important ethical decision, and role models need not necessarily derive from any particular field of activity. We may learn as much in choosing our role models as we do when we seek their counsel. (They need not be lawyer-statesmen.) We have many role models for many purposes and dimensions of human activity. Not only must we deliberate about our ends; we must also deliberate about our aspirations in the flesh.

A lawyer may have other lawyers as role models. The former Attorney General of Israel, for example, Elyakim Rubinstein, advocated for Aristotle’s golden mean rule, which says that virtue and judgment are a matter of balancing extremes. But a lawyer’s role model need not be a real person. There is much to be learned from the fictional life, for example, of Atticus Finch. To take another example, teachers are the very definition of role models, for they are “a medium for the transmission of values” and it is their job to facilitate the fullest possible development of the human person. Teachers prove certain excellences in their very persons, and through the “out-pulling of knowledge” that is the proper function of a teacher (at least according to some), they inspire

169. According to Question 1 of the licensing process application for articling students, the applicant is of “good character” unless:
(a) under the Young Offenders Act or Youth Criminal Justice Act, you were found guilty of an offence and the disposition was an absolute discharge and it has been one year since you were found guilty;
(b) under the Young Offenders Act or Youth Criminal Justice Act, you were found guilty of an offence and the disposition was a conditional discharge and it has been three years since you were found guilty;
(c) under the Young Offenders Act or Youth Criminal Justice Act, you were found guilty of a summary conviction offence and it has been three years since all dispositions in respect of the offence were made or completed, whichever is applicable; or
(d) under the Young Offenders Act or Youth Criminal Justice Act, you were found guilty of an indictable conviction offence and it has been five years since all dispositions in respect of the offence were made or completed, whichever is applicable. Online: Law Society of Upper Canada <http://rc.lsuc.on.ca/pdf/licensingprocesslawyer/general/lp21memOnlineAppProcess.pdf>.


173. Djwa, supra note 6 at 230.
their pupils to be better persons themselves. In the most general terms, lawyers should seek out role models who have a keen moral-perceptual sense—those who perceive when they are facing an ethical dilemma—and who have the judgment to react accordingly. Put differently, much of lived ethics involves a “smell test,” a certain kind of attunement to the situation, which is a precondition for acting morally in the first place.

Role models are the solution to the uninspired reception by some commentators of Lon Fuller’s “morality of aspiration.” That the morality of aspiration may sometimes fly too high, or seem too distant from human conduct parterre, and thereby fail to influence human agency, may explain the sometimes critical view of aspiration as reducing ethics to inspiration. The downfall of aspiration occurs when what we aspire to is so far away that we cannot even aim at it. The phrase “aspiration in the flesh,” which I have used to indicate role models, points to the solution to the problem of the lack of “aspirational pull” in what we strive for. An aspiration is only too far away when it is not lived. People are not infallible; they are after all human. Sandra Djwa’s biography of F.R. Scott is a charitable portrayal that opts, at times, for tip-toeing over telling all. When we see our aspirations embodied in real people—who prove the values at which we aim “in their very persons”—we are provided with concrete ethical guidance. We see that real life necessarily involves imperfection, idiosyncrasy, chance and subtlety. We learn the most when see in our very aspirations the minutiae


175. See e.g. F.C. DeCoste, “Towards a Comprehensive Theory of Professional Responsibility” (2001) 50 U.N.B.L.J. 109, especially at 113, n. 13 (decrying, amongst others, the Canadian Judicial Council’s Ethical Principles for Judges (Ottawa: Canadian Judicial Council, 1998), a document cast almost entirely in the morality of aspiration). Ironically, the author presents, at 119-120, a discussion of “character” that is strongly albeit implicitly rooted in virtue ethics.

of life. It is perhaps the central insight of virtue ethics that the biographical and the ethical live together.

**Conclusion**

As a public service value, service to the nation both unites and differentiates lawyers working at the DoJ. Serving the nation is, or at the very least should be, a common, enduring belief amongst all DoJ lawyers. That is what unites them. And yet, serving the nation means different things to, and entails different ethical issues for, the various types of DoJ lawyers. That is what differentiates them.

Because it is really only the sum of ourselves, government grows and changes as we do. Put differently, the ethics of people and the ethics of places are intertwined. Another way of re-framing the interaction between people, places and ethics—or perhaps a different dimension of their encounter—is to view people as internal to the process of judgment, instead of external to it. Legal ethics needs to focus more energy on the daily lives of practising lawyers, their choices, and the institutions within which they work.

The modern abhorrence of discretion as the basis of ethical error points in precisely the wrong direction: the suspicion of discretion leads to an instinct towards rule-following that creates moral myopia; to a misapprehension of what the task of judging truly requires; to a race to the ethical bottom that praises regulation over aspiration; and to a denial of the person’s choice and therefore also of the person himself. Discretion does not only mean a free reign of options; discretion also means prudence (judgment or practical wisdom). Discretion in this latter sense calls upon and challenges the subject to decide, to rise to her ethical best. Instead of viewing the person as simply a vehicle for applying the correct rule, it places the person at the centre of ethical deliberation and choice. In a perfect world, rules would be unnecessary for those who are virtuous.

The project of seeking virtue requires the DoJ lawyer to look to others for ethical direction, mentorship, insight and support. As much as they must look to the revised statutes of Canada in fulfilling their roles as advocates, DoJ lawyers must also look to the exemplary people around them for guidance. If they look to the right people, DoJ lawyers will see the spirit of service to the nation thriving in the practices of those who breathe life into our living government.

177. Forsey, *supra* note 1 at 49.