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From a Vantage Point in the American Law Institute

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Geoffrey C. Hazard, Jr.*

From a Vantage Point in the American Law Institute

It is a welcome opportunity to join in tribute to Harvey Perlman on the occasion of his having completed a long, substantial and (so far as I am aware) peaceful tenure as Dean of the College of Law of the University of Nebraska. We also celebrate his elevation, or restoration, to the status of Professor.

Being a dean has its rewards. In my observation the principal reward is the opportunity to contribute to the welfare of others—students, alumni, faculty and the rest of the university. People who have not been a dean imagine that the office exercises great authority and hence is a position from which one can be a mover and shaker in the world. The fact is that a dean's authority—like most forms of authority—is primarily moral leadership and the power of negation or veto. Through moral leadership one can exemplify hopes for the behavior of others and through the power of veto one can block behaviors of others that are unproductive or imprudent. The usual mechanism of this power of veto is simply to go limp and do nothing. Most significant social or institutional measures require cooperative effort. Hence, withholding effort ordinarily can do the job of killing a bad idea. In the meantime most people are trying to do their jobs. By substraction these other things continue to go forward reasonably well.

However, in my observation Dean Perlman has had an irrepressible tendency to go further than exercising constructive veto. I have seen him repeatedly giving active and affirmative voice to proposals that he considered productive and prudent. On more than one occasion in the National Conference of Commissioners on Uniform State Laws in which I have been a direct observer of that scene, I have seen him speak forcefully to this effect. In deliberations of the American Law Institute he has been similarly clear and resolute. Some of exchanges in the ALI occurred during his tenure as Co-Reporter for the *Restatement Third of Torts: Unfair Competition*. Others have been during his term as a member of the ALI Council. We shall hear still more now that he has become Co-Reporter for the ALI project to for-

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multate General Principles of Torts. Those of us affiliated with the ALI hope and expect to see him return to the Council when he completes his tour with General Principles project.

Making affirmative contentions is one of the responsibilities of a member of a deliberative body, such as the Conference of Commissioners or the ALI Council. A deliberative body does much of its business by silent acquiescence, and necessarily so because it is a group endeavor. Most of us most of the time hence must be followers rather than leaders. However, acquiescence and cooperative "followership" do their work only in response to leadership. A group can move forward toward a collectively shared viewpoint only if coherent viewpoints are adequately expressed.

In my observation Dean Perlman is exemplary in this parliamentary functions. Moreover, he is not simply articulate but also diplomatic and economical in his contributions. Diplomatic, in that he always recognizes whatever merit there may be in an opposing position, never resorts to ad hominem attacks or other diversions, and allows his own views to be reshaped in light of interchanges with others. Economical, in that he speaks simply, briefly and to the point.

More fundamentally, Dean Perlman evidently thinks along several planes. That is, he is a good politician in the best sense of that term. One plane along which a politician should think is the technical plane, i.e., the literal or legal meaning of a resolution or proposal under consideration. Another is the empirical plane, i.e., the real world consequences likely to ensue from a specific course of action. Another is the policy plane—the social significance of these expected consequences. Still another is what might be called the parliamentary plane—the significance of the proposal in the internal dynamic of the group engaged in the deliberation. Still another is the political plane—the significance of the proposal among external constituencies. And yet another is the personal plane, i.e., the significance of the proposal in the "ego worlds" of various relevant immediate players.

These skills of diplomacy, economy and complex discernment are not necessarily exhibited in settings where they should be, for example faculty deliberations or meetings of members of the bar. Dean Perlman, however, demonstrates these skills in unusual abundance. Because he does so he has been regarded as a model member of the ALI, and I assume is held in similar esteem in the Conference and in the other deliberative bodies of which he has been a member. Certainly I am among his admirers.

The qualities Dean Perlman thus demonstrates have been addressed with particular acuity by two people who know the art, having demonstrated it in their own lives. One of them is Judge Michael Boudin, the other the late Professor Isaiah Berlin. Judge Boudin, a colleague for whom I have respect and affection similar to that in

which I hold Dean Perlman, is on the bench of the United States Court of Appeals for the First Circuit. Judge Boudin was a brilliant college student and law student and brilliant as a lawyer before he became judge. Sir Isaiah Berlin, as many scholars will know, was on the faculty at Oxford and was a prolific scholar and commentator in the fields of political philosophy and intellectual history. I have long admired Sir Isaiah's writings.

In 1983 Judge Boudin published a short article in the *Harvard Law Bulletin*, entitled *Common Sense in Law Practice*.¹ His theme was that common sense or good judgment was the essential skill of a good lawyer, but that:

This takes us . . . to the question of what is good judgment . . . how it compares with characteristics such as intelligence and style; can it be tested; can it be taught . . . and, most tantalizing, what is its relation to political values?

Judge Boudin considered that a key element was a "sense of proportion," a "sense of 'fit'". Another element was "an ability to think about multiple factors at the same time" and to weigh and order these multiple factors; yet also to "consider remote consequences"; and "a creative gift for devising alternative solutions." Judge Boudin recognized that these specifications might only reiterate the idea of "sense of proportion" among "multiple factors." As he observed, "The list could be extended, and each of the qualities could be dissected endlessly." However, as he observed, other factors of good judgment could be analyzed in terms, not of situations in which good judgment may be exhibited, but in terms of the personality of the actor:

an ability to gauge . . . the reactions of others . . . a sense of calm or self-discipline . . . a willingness to make decisions . . . on incomplete evidence . . . perhaps an instinct for order or pattern . . . [the ability] to form a workable plan for dealing with a problem in the real world.

Sounds like Harvey Perlman, does it not?

Many of the innumerable and various writings of Sir Isaiah converge on the same subject. Sir Isaiah was unusually sensitive to differences in culture, both political (the large scale social order) and domestic (a household's social order). He had been born in the ghetto in Latvia under Imperial Russia before World War I but had come, in his life and professional career, to exemplify the English intellectual aristocracy. Having done his early philosophical work in epistemology and related subjects, he was acutely aware of the significance in a person's "consciousness" of real world facts and circumstances, as distinct from theories or ideologies about how facts and circumstances are understood. He had spent time in intensely practical service of his coun-

1. Michael Boudin, *Common Sense in Law Practice*, HARV. L. BULL., Spring 1983, at 22. It is interesting to reflect on significance of the fact that an article of this character was not published in the *Harvard Law Review*

try, having been posted to Washington in the early years of World War II where his commission was to help persuade the Americans to give direly needed aid to Britain. His principal scholarly work had focussed on development of political mentality in Europe, particularly the contrast in this regard between Russia and the West.

One distillate of these studies and reflections is in an article entitled *Political Judgment*.² The essay addresses high politics, personalities such as George Washington, Bismarck and Franklin Roosevelt, as distinct from the "local" politics of law practice addressed by Judge Boudin. Nevertheless, there are interesting parallels in the two analyses. Sir Isaiah put the essential question in much the same terms as had Judge Boudin: "What is it to have good judgment in politics?" In another parallel, Sir Isaiah asks, "Can statesmen be taught something called political science . . . ?"

In responding to his formulation of the question, Sir Isaiah first presented a conclusory synthesis: "What matters is to understand a particular situation in its full implications, the particular [people] and events and dangers, the particular hopes and fears which are actively at work." By way of explication, Berlin says:

The gift we mean entails, above all, a capacity for integrating a vast amalgam of constantly changing, multicoloured, evanescent, perpetually overlapping data . . . as elements in a single pattern.

Sounds like Harvey Perlman to me.

There seems to me little difference between Judge Boudin's inquiry and explication and that of Sir Isaiah, except that Berlin's focus is on high level political leadership—heads of state or prime ministers—whereas Mike Boudin's is on lawyers' workaday life. Perhaps there is a difference also in that Berlin gives greater emphasis to the dynamic elements of a political problem—the "evanescent"—while Judge Boudin poses the micro-political problems of law practice in static terms. However, this is merely a difference in focus. All serious problems in government or in law practice, or in life in general for that matter, have a dynamic element. The dynamic element is that serious problems arise from real world uncertainty—"incomplete evidence" as Judge Boudin puts it. At the same time, no serious real world problem can be resolved, i.e., met with a plan of action, until it is viewed in static terms, i.e., a pattern.

Thus, the key elements of "common sense" or "political judgment" are the gift of being able to assess multiple factors operating dynamically in a real world setting, to discern or impose a pattern having an eye to future consequences, and to make and carry out decisions. And,

2. Isaiah Berlin, *Political Judgment*, in *THE SENSE OF REALITY: STUDIES IN IDEAS AND THEIR HISTORY*, 40-53 (Henry Hardy ed., 1996)

over the course of a life in doing so, to earn the appreciation and respect of those grateful for being beneficiaries of the gift.

That *is* Harvey Perlman.