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FACTFINDING AS A SPIRITUAL DISCIPLINE

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Over the years, I have from time to time participated in academic discussions of the issue of whether judges' religious convictions play a role in their decisions, particularly their decisions on issues with explicit religious dimensions.[1] I have always been somewhat uncomfortable in these discussions, in part because I do not belong to a faith community that instructs me as a matter of doctrine on the appropriate position to take on our major religious-political disputes and in part because, as a district judge, such disputes rarely, if ever, come before me. If they did, my determination would be essentially meaningless as the ultimate legal issues would be resolved by the opinion of a reviewing court.

But another source of discomfort was even deeper. These discussions usually paid little attention to the place where I believe ethical and/or religious views play the greatest role: in judges' determination of the facts of a controversy. Here, trial court judges have an enormously important role to play: in the facts we make part of the evidentiary record—whether by our evidentiary rulings or by our power to call for and hear evidence the parties might not otherwise present to us—and in the facts we choose to emphasize in our decisions. In these ways, by our substantial power to shape the evidentiary record, and in our largely unreviewable power to decide what evidence should be believed or credited as salient or determinative, our most important values—whether their source is ethical, religious, or political—have a frequently dispositive impact on the outcome. Indeed, as every practicing lawyer knows, the facts the lawyers prove and the facts the judge finds frequently compel the disposition of the case.

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* United States District Court Judge for the Northern District of Illinois. The author would like to thank Richard Rosengarten, who understood these ideas when they were diffuse and inchoate; he provided not only encouragement but indispensable guidance and suggestions for further reading. Without his help and support, this paper would never have seen the light of day. The author is also immensely grateful to her law clerks, Jason Odeshoo and Jess Krannich, for their substantive suggestions, invaluable editorial assistance and unfailing enthusiasm for this project.

1. *See, e.g.*, Joan B. Gottschall, *Response to Judge Wendell Griffen*, 81 MARQ. L. REV. 533 (1998).

The legal literature generally fails to address factfinding as an activity of religious or moral importance, although there is recognition that how judges (particularly appellate judges) view the facts can have a significant impact on the result. Outside the boundaries of writing about the law, however, there is a good deal of discussion of the moral and spiritual importance of our assessment of the facts that confront us.

In this article, I examine the work of two individuals who believed that our vision of what confronts us—our effort to pay attention and our ability to do so—has spiritual and moral significance. The first is Simone Weil, the religious thinker; the second is Iris Murdoch, a philosopher and novelist on whom Weil had a great influence. I discuss their concept of "attention" and show how the facts judges attend to significantly affect the decisions they reach. I also discuss the systemic pressures that prevent judges from attending to facts as well as they perhaps should. It is my hope that in doing so, I will contribute in a small way to shifting the discussion about the significance of judges' religious and moral views. I suggest that this significance has less to do with how judges come down on politically contentious issues and more to do with their efforts to become people of broader and more inclusive vision.

I. SIMONE WEIL'S CONCEPT OF "ATTENTION"

The philosopher who most explicitly linked the work of assessing reality to its religious or spiritual dimension was Simone Weil. Weil was born in France in 1909, lived during Hitler's rise to power, and died in London in 1943. She wrote at length about what she termed "attention." Weil defined attention as a way of looking at something outside oneself by which "[t]he soul empties itself of all its own contents in order to receive into itself the being it is looking at, just as he is, in all his truth."[2] Weil, as contemporary critic Sissela Bok has said, believed in the "primacy of attention."[3]

Attention is outward-looking rather than self-centered, and authentically seeks the truth. True attention consists of a suspension of thought, so that our thought is empty and detached and ready to be penetrated by what is outside of ourselves.[4] Error results when thought seizes upon an idea too hastily and is prematurely blocked, and is not, therefore, open to the truth.[5] According to Weil, we must set our hearts upon determining the truth but not allow ourselves to seek it actively.[6] We must be content to wait, to give our attention to the data of a problem without trying to solve it, or to wait

2. SIMONE WEIL, WAITING FOR GOD 115 (Emma Craufurd trans., Harper & Row 1973) (1951).

3. Sissela Bok, *Simone Weil and Iris Murdoch: The Possibility of Dialogue*, GENDER ISSUES, Fall 2005, at 71, 76.

4. *See* WEIL, *supra* note 2, at 111.

5. *Id.* at 112.

6. *Id.* at 113.

for the right word to come of itself, rejecting all words that are inadequate.[7] Something in us, Weil argued, has a violent repugnance for true attention; but when we really concentrate our attention, and suspend our thought (our self-centered thought) as true attention requires, we destroy the evil within ourselves.[8]

Weil did not believe that paying attention comes easily. Rather, learning to pay attention is a type of discipline—something we have to practice and work at. She emphasized, however, that many different kinds of activity provide opportunities to develop the power of attention. In her words, "[E]very time that a human being succeeds in making an effort of attention with the sole idea of increasing his grasp of truth, he acquires a greater aptitude for grasping it, even if his effort produces no visible fruit."[9] For example, Weil saw study—in which one focuses on trying to understand something or to solve a problem—as a form of practice in attention. For Weil, aptitude is not necessary in order for study to develop one's capacity for attention. Instead, however, two other qualities are necessary: first, a sincere effort to understand; and second, humility—a willingness to look at our failures honestly.[10] "If these two conditions are perfectly carried out," she said, "there is no doubt that school studies are quite as good a road to sanctity as any other."[11]

Ultimately, if we master attention, we can engage in the unselfish love of our neighbor and in prayer. Weil viewed prayer as the ultimate example of attention: the orientation of all the attention of which the soul is capable toward God.[12] The love of God, Weil said, has attention for its substance; the love of one's neighbor is the same love and is made of the same substance.[13] "The Gospel," she emphasized, "makes no distinction between the love of our neighbor and justice."[14] What is most needed by someone who is unhappy is someone capable of giving him this attention, but most people who believe they have the capacity to give their attention to another do not in fact possess it. "The capacity to give one's attention to a sufferer is a very rare and difficult thing; it is almost a miracle; it *is* a miracle."[15] Attention has nothing to do, Weil noted, with emotional enthusiasms like "[w]armth of heart, impulsiveness [or] pity."[16] Rather, it is a suspension of

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7. *Id.*

8. *Id.* at 111.

9. SIMONE WEIL, *Reflections on the Right Use of School Studies with a View to the Love of God*, *in* THE SIMONE WEIL READER 44, 46 (George A. Panichas ed., 1977).

10. *Id.* at 46–47.

11. *Id.* at 47.

12. WEIL, *supra* note 2, at 105.

13. *Id.* at 114.

14. *Id.* at 139.

15. *Id.* at 114.

16. *Id.*

thought and feeling about ourselves so that we can attend to the condition of another.

Weil also spoke about justice, and her idea of justice is closely related to her idea of attention. "Justice in punishment," she wrote, "can be defined in the same way as justice in almsgiving."[17] It means giving our attention to any victim of affliction (another idea she wrote about at length) as a being and not as a thing.[18] She maintained that we must never look at another being with contempt, because contempt is the opposite of attention.[19] We must not look at this other being as an "unfortunate," for to do so would be to fail to see the other as a being just like ourselves.[20] Justice, for Weil, "consists of behaving exactly as though there were equality when one is the stronger in an unequal relationship."[21]

In illustrating these aspects of her conception of attention, Weil invoked the legend of the Holy Grail.[22] In the legend of the Grail, as she recounted it, the Grail belongs to the first person who asks the guardian of the vessel, a king paralyzed by a painful wound, "What are you going through?"[23] Similarly, the love of our neighbor simply means being able to say to him, "What are you going through?"[24]

The parable of the Good Samaritan—to which Weil on a number of occasions referred—additionally exemplifies the importance of attention from a spiritual point of view, as well as its relevance to our daily lives. In the parable, Jesus' interlocutor was a lawyer, a detail which perhaps should not be ignored:

> And behold, a lawyer stood up to put him to the test, saying, "Teacher, what shall I do to inherit eternal life?" He said to him, "What is written in the law? How do you read?" And he answered, "You shall love the Lord your God with all your heart, and with all your soul, and with all your strength, and with all your mind; and your neighbor as yourself." And he said to him, "You have answered right; do this, and you will live."
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> But he, desiring to justify himself, said to Jesus, "And who is my neighbor?" Jesus replied, "A man was going down from Jerusalem to Jericho, and he fell among robbers, who stripped him and beat him, and departed, leaving him half dead. Now by chance a priest was going down that road; and when he saw him he passed by on the other side. So likewise a Levite, when he came to the place and saw him, passed by on the other side. But a Samaritan,

17. *Id.* at 153.
18. *Id.*
19. *Id.*
20. *See id.* at 115.
21. *Id.* at 143.
22. *Id.* at 115.
23. *Id.*
24. *Id.*

> as he journeyed, came to where he was; and when he saw him, he had compassion, and went to him and bound up his wounds, pouring on oil and wine; then he set him on his own beast and brought him to an inn, and took care of him. And the next day he took out two denarii and gave them to the innkeeper, saying, 'Take care of him; and whatever more you spend, I will repay you when I come back.' Which of these three, do you think, proved neighbor to the man who fell among the robbers?" He said, "The one who showed mercy on him." And Jesus said to him, "Go and do likewise."[25]

We all know that this story is about mercy to our neighbor, but it is also about who we regard as our neighbor. Many accounts of the parable remind us that as Jesus' contemporaries heard this story, they understood that the injured man was probably a Jew, and that Jews and Samaritans looked down upon one another and certainly were unlikely to think of one another as neighbors. Thus, it is significant that the priest and the Levite passed the injured man by; but the Samaritan, whom Jesus' audiences would never have thought of as the injured man's neighbor, responded to him as a neighbor should.

Perhaps we should understand this parable as reminding us that we do not get to choose our neighbor. Rather, our neighbor is the person whose need we notice if we pay attention. And when we pay attention, the moral action that should follow is quite clear. If we fail to pay attention to the injured man, if we view him as merely an obstacle in the road, we cross the street like the priest and the Levite. We fail to see an injured neighbor before us and fail to ask what he is going through. Weil said that those who pass by this "thing" scarcely notice it. Minutes later, they don't even remember that they saw it.[26] But the Samaritan who stops and looks and gives his attention to the "anonymous flesh lying inert by the roadside" is giving *creative* attention, seeing humanity where, without this attention, there was none.[27]

When we as judges are given the responsibility of listening to disputants, who are often locked in a moral crisis with each other, and trying to determine where truth and justice lie in a dispute, we are called on, to the best of our ability, to pay attention. Paying attention, as Weil made clear, is more than simply trying not to be distracted. It is trying to ascertain the truth, unobstructed by our own biases, prejudices, self-interest and resentments, as well as by the blinding limitations of our own experience. I suggest that to the extent that the work of judging has a spiritual dimension, it inheres in this: that we are charged with paying close attention to our fellow human beings and trying, by listening to them, to find the truth. Listening to

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25. *Luke* 10:25–37 (Rev. Standard).
26. WEIL, *supra* note 2, at 146.
27. *Id.* at 149.

others, hearing them, and reaching a fair assessment where both sides have been heard and feel that they have been heard, is what justice in its full significance is about.

II. Iris Murdoch and the Moral Significance of Attention

Iris Murdoch, the novelist and philosopher, was born in England approximately a decade after Weil's birth and wrote at length about Weil and her concept of attention. Murdoch's philosophical project was to demonstrate the error in the then-dominant philosophical view that ethics or morality inhered only in observable acts of will, not in internal, subjective thoughts. Weil's idea of attention suggests that something other than action is of critical importance, and that is what so attracted Murdoch. For Murdoch, as for Weil, the starting point is some rudimentary awareness of the other—that is, the ability to pay attention to the situation of others outside oneself. Without this, in the words of Sissela Bok, it is impossible "to reason coherently about moral choice."[28] Where Weil believed that paying attention was a religious imperative, essential to a real love of one's neighbor and of God, Murdoch tried to put Weil's ideas on a moral rather than a religious foundation—as essential to our proper relation to one another and to excellence in morality.[29]

Murdoch's famous example of this follows: M, a mother-in-law, perceives her daughter-in-law, D, as good-hearted but unpolished, juvenile, and lacking in dignity and refinement.[30] M does not like D. She dislikes her pertness, her familiarity, her accent, and the way she dresses. She regrets that her son has bound her to D. M, however, treats D beautifully and does

28. Bok, *supra* note 3, at 74.

29. Murdoch used Weil's thinking about our relationship with God to get to her idea of our moral obligations to other people even if God is assumed to be absent or non-existent; an idea of "Good" without "God." The problems with this enterprise have been discussed by numerous theologians. For an excellent collection of essays discussing this point, see Iris Murdoch and the Search for Human Goodness (Maria Antonaccio & William Schweiker eds., 1996), particularly Franklin I. Gamwell, *On the Loss of Theism*, *in* Iris Murdoch and the Search for Human Goodness, *id.*, at 171; Stanley Hauerwas, *Murdochian Muddles: Can We Get Through Them If God Does Not Exist?*, *in* Iris Murdoch and the Search for Human Goodness, *id.*, at 190; and William Schweiker, *The Sovereignty of God's Goodness*, *in* Iris Murdoch and the Search for Human Goodness, *id.*, at 209. I will not attempt to deal with the question of the boundary between theology and morality, but find Weil's view, that *wherever* there is Good there is God, helpful in setting it aside for present purposes:

> Even the most narrow-minded of Catholics would not dare to affirm that compassion, gratitude, love of the beauty of the world, love of religious practices, and friendship belonged exclusively to those centuries and countries that recognized the Church. These forms of love are rarely found in their purity, but it would even be difficult to say that they were met with more frequently in those centuries and countries than in the others. To think that love in any of these forms can exist anywhere where Christ is absent is to belittle him so grievously that it amounts to an outrage. It is impious and almost sacrilegious.

Weil, *supra* note 2, at 208.

30. Iris Murdoch, The Sovereignty of Good 16–18 (Routledge & Kegan 1970).

not let her feelings show. In Murdoch's hypothetical case, D dies or emigrates—the absence of D as an active agent being an essential condition of our certainty that what transpires thereafter is due entirely to M's internal activity and not to any action by D.

What happens in D's absence is that M considers D. She focuses her attention. She attends to D. She embarks on a journey of self-criticism in which she considers her attitudes as she attends to D. Gradually, M's vision of D alters. D comes to be regarded by M not as vulgar but as refreshingly simple, not undignified but spontaneous, not noisy but cheerful, not juvenile but youthful. M's outward behavior is not altered, but her inward vision and her judgment are altered dramatically. They are altered not because of anything that has happened in the world of objective action, but because of the work M has done within herself, the attention she has paid to D, and the internal struggle M has compelled herself to undergo. M may be deluding herself, but she is trying to see D justly and lovingly.

The vision achieved by M, Murdoch says, is the result of moral effort and moral imagination.[31] At any point, one's actions are frequently determined—or at least influenced—by what one sees.[32] To notice only the moment of action or choice is to see only the outward moment, but what has preceded that choice is the work of attention. Murdoch says, "[I]f we consider what the work of attention is like, how continuously it goes on, and how imperceptibly it builds up structures of value round about us, we shall not be surprised that at crucial moments of choice most of the business of choosing is already over."[33] Indeed, "[t]he ideal situation . . . is . . . to be represented as a kind of 'necessity.' This is something of which saints speak and which any artist will readily understand. The idea of a patient, loving regard, directed upon a person, a thing, a situation, presents the will not as unimpeded movement but as something very much more like 'obedience.'"[34] This is no mystery to judges. As stated above, the facts found routinely compel the decision reached. Once a judge determines the facts, resolution of the case feels very much like "obedience."

What is the discipline required of us to move toward more perfection in our vision of what confronts us? As for Weil, the process is not an easy one. Indeed, in Murdoch's words, it is "an endless task."[35] Our imperfection is inevitable. Concepts alter. Courage means something different at forty from what it means at twenty. A deepening, altering or complicating pro-

31. *Id.* at 37.
32. *Id.*
33. *Id.* at 36.
34. *Id.* at 39.
35. *Id.* at 23, 28.

cess takes place.[36] "Where virtue is concerned we often apprehend more than we clearly understand and *grow by looking*."[37]

Murdoch's writing does not address the work of judges, but the issues she discusses, like those that confront judges every day, pose dilemmas in which every resolution serves and disserves important values. Murdoch writes:

> Should a retarded child be kept at home or sent to an institution? Should an elderly relation who is a trouble-maker be cared for or asked to go away? Should an unhappy marriage be continued for the sake of the children? Should I leave my family in order to do political work? Should I neglect them in order to practise my art? The love which brings the right answer is an exercise of justice and realism and really *looking*. The difficulty is to keep the attention fixed upon the real situation and to prevent it from returning surreptitiously to the self with consolations of self-pity, resentment, fantasy and despair.[38]

No matter how we set aside our self-centered rationalizations and fantasies, no matter how good and real our vision, there is no perfect answer to these questions. This is a moral reality. It is certainly a religious reality because from a religious point of view, omniscience is not available to us. And it is certainly a judicial reality. The search for perfect answers to the dilemmas that confront us is not possible. Our responsibility is to hear and understand as best we can.

III. JUDICIAL FACTFINDING: ATTENTION AND JUDGING

The discipline of attention—viewed as a religious imperative by Weil and a moral imperative by Murdoch—has special relevance to the work of a public factfinder such as a trial judge. Few individuals are given the public power to have their vision of the facts translate into state-sanctioned power over other human beings. The discipline of attention is the work of all of us, but in a very special way it is the work of a judge.

In legal literature that has focused on factfinding, a much-discussed example is Justice Brennan's description[39] of how the Supreme Court came to decide the case of *Goldberg v. Kelly*,[40] one of the most significant decisions of the Warren Court era. The issue in *Goldberg* was whether New York's procedure of providing welfare recipients with an opportunity to contest a proposed termination of benefits in writing *before* termination with an evidentiary hearing *after* benefits were terminated, was sufficient to

36. *Id.* at 29.
37. *Id.* at 30.
38. *Id.* at 89.
39. William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 1 (1988).
40. Goldberg v. Kelly, 397 U.S. 254 (1970).

satisfy due process.[41] The Court held that it was not, and that due process required a pre-termination hearing.[42]

Justice Brennan described his decision-making process as an emotional or intuitive response to a given set of facts or arguments which he called "passion."[43] *Goldberg*, he said, can be seen as the expression of the importance of passion in governmental conduct, with passion defined as "attention to the concrete human realities at stake."[44] The New York system, he maintained, while a model of rationality in requiring pre-termination notice and a chance to submit a written opposition, failed to account for "the drastic consequences of terminating a recipient's only means of subsistence,"[45] the erroneous termination of which would create complete desperation. Written submissions are an inadequate means of demonstrating error because the population affected by these rules lacks the education necessary to write effectively and the means to obtain professional assistance.[46] New York's rule, he said, "was blind to the brute fact of dependence."[47] "A government insensitive to such a reality cannot be said to treat individuals with the respect that due process demands—not because its officials do not reason, but because they cannot understand."[48]

Justice Brennan's analysis of what motivated the decision in *Goldberg* as an emotional or intuitive response to the facts appears to neglect what was at least as significant—not his response to the facts, but the facts themselves: the nature of welfare dependence, the real-world consequences of an erroneous termination of benefits and the realistic impact on the welfare-dependent population of a rule requiring written submissions. Justice Brennan and the rest of the majority *responded* to the facts, surely enough, but what critically got them to the point of response were the facts themselves. By looking closely at the plaintiffs' actual situation—by paying attention to it—the Court quite easily concluded that due process required other procedures.

The importance of the facts found and emphasized in decision-making is the subject of Martha Nussbaum's essay, *Poets as Judges*, in her book, *Poetic Justice: The Literary Imagination and Public Life*.[49] Nussbaum discusses a number of cases that she believes demonstrate, or fail to demonstrate, what she terms "the literary judge."[50] She defines a literary judge as:

41. *Id.* at 255.
42. *Id.* at 266.
43. Brennan, *supra* note 39, at 9.
44. *Id.* at 20.
45. *Id.*
46. *Id.* at 21 (citing *Goldberg*, 397 U.S. at 269).
47. *Id.* at 22.
48. *Id.*
49. MARTHA C. NUSSBAUM, *Poets as Judges*, *in* POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 79 (1995).
50. *Id.* at 82.

one who is able to "imagine vividly, and then to assess judicially, another person's pain, to participate in it and then to ask about its significance" as "a . . . way of learning what the human facts are."[51] A decision she cites as an example of "literary judging" is Judge Richard Posner's opinion in *Carr v. Allison Gas Turbine Division*.[52]

Carr involved a complaint of sexual harassment in the workplace. The facts themselves were largely undisputed, although the legal significance of the facts when taken in context was contested. One question was whether the verbal and nonverbal conduct to which the plaintiff was exposed was sufficiently hostile, intimidating and degrading to affect adversely the conditions of the plaintiff's employment.[53] Another question was whether the defendant employer's response, or lack thereof, to its employees' behavior toward the plaintiff was negligent.[54] These are questions of fact, which a judge is required to answer under Title VII of the Civil Rights Act.[55] The district judge concluded that the workplace conduct to which the plaintiff was exposed was sexual banter of a kind common in the workplace, not serious enough to affect the conditions of the plaintiff's employment, and that the employer was not negligent because it was powerless to stop such banter.[56]

Judge Posner, who was empowered to revisit the findings of fact of the district judge only if convinced they were clearly erroneous, concluded that the plaintiff had proven actionable sexual harassment.[57] Judge Posner narrated the facts in considerable detail—more detail, Nussbaum noted, than was strictly necessary.[58] This is, of course, the way a judge attends to, and forces the reader to attend to, the facts he views as salient. Judge Posner, by carefully reciting the facts he viewed as important, was attempting to demonstrate why the conduct to which the plaintiff was subjected was not merely vulgar and obnoxious, but was instead deeply offensive and sexually harassing.

Nussbaum describes Judge Posner's recitation of the facts as demonstrating a "sympathetic attention to the special plight of people who are socially unequal and to a certain extent, therefore, helpless."[59] But, as in *Goldberg*, the foundation of the decision was not Judge Posner's emotional or intuitive *response* to the facts, but his *attention* to the facts. Judge Posner, as Nussbaum notes, is judicious and calm,[60] not "wringing his hands or

51. *Id.* at 91.
52. 32 F.3d 1007 (7th Cir. 1994).
53. *Id.* at 1009.
54. *Id.*
55. 42 U.S.C. §§ 2000e–2000e-4 (2000).
56. *Carr*, 32 F.3d at 1010.
57. *Id.* at 1010–11.
58. NUSSBAUM, *supra* note 49, at 107.
59. *Id.* at 111.
60. *Id.* at 109.

emoting in the manner of one personally caught up in the situation."[61] Both Nussbaum and Justice Brennan are clearly worried about whether it is appropriate for judges to act out of sympathy or passion. But they need not be so worried. Sympathy or passion is not the driving force behind these opinions. What is driving them is the judge's willingness to look closely at the facts, imagine what those facts mean as they affect the people involved and then, and only then, respond to the facts by applying a relevant rule of law.

In addition to her concern that attention to the facts is closely linked to sympathy, Nussbaum suggests that attention to the facts biases us toward the socially unequal and powerless. It is true that Justice Brennan's opinion in *Goldberg*, like many Supreme Court opinions of the Warren Court era, ruled in favor of the socially unequal or powerless. Judge Posner did the same, in ruling on behalf of the plaintiff in *Carr*. This, if true, could be a substantial objection to the kind of attention to the facts which I have suggested is a spiritual and moral imperative: that it leads to a bias in favor of the weaker party.

But I do not think Nussbaum is entirely correct on the issue of whether attention to the facts biases us toward the powerless, if bias is understood as suggesting prejudice or partiality. Paying attention to the facts may at times prevent the decision-maker from acquiescing in a normal bias in favor of the establishment, the class of which the decision-maker is almost certainly a member. And Title VII harassment cases, like *Carr*, *require* us to look at the inequality of position between the alleged harasser and the alleged harassee.[62] Harassment is largely about whether conduct of supervisors toward their employees is permissible—the conduct, in other words, to which people with power in the workplace can subject less powerful people. Without considering inequality of condition, we would be unable to assess the challenged conduct as the law requires. Similarly, Justice Brennan's opinion in *Goldberg* was about the effect of a certain procedure on a certain class of people, and whether that effect on those people was constitutionally adequate. Rather than resulting from some improper bias, these opinions pay attention precisely to what they should: rather than exemplifying a bias in favor of the powerless, they are seeing reality as it is. Insofar as an accurate assessment of reality causes a decision-maker to decide in favor of the less powerful person, the decision-maker is simply doing what the oath of

61. *Id.*

62. *See, e.g.*, Crandell v. N.Y. Coll. of Osteopathic Med., 87 F. Supp. 2d 304, 319 (S.D.N.Y. 2000) (unequal power relationship between plaintiff and the hospital resident charged with evaluating her performance supported finding of a hostile environment). Many courts have relied upon Catharine MacKinnon's definition of sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power." CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979). *See, e.g.*, Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1011 (5th Cir. 1996); Turley v. Union Carbide Corp., 618 F. Supp. 1438, 1441 (S.D. W. Va. 1985); Moire v. Temple Univ. Sch. of Med., 613 F. Supp. 1360, 1366 (E.D. Pa. 1985).

federal judges requires: to "do equal right to the poor and to the rich."[63] In short, we do not see accurately if we fail to notice—or notice but do not absorb—the fact that a man is lying injured in the street. We do not see accurately if we assume that a woman in the workplace called obscene names and subjected to conduct that cripples her ability to work effectively is subjected to only insignificant banter. If we pay close attention to the powerless, we may notice that they are truly being hurt.

It is true that in our professional role, we owe fidelity to more than the man lying injured in the street. We owe fidelity to those who pass him by, if required to pass judgment on *their* conduct, and must pay attention to *their* circumstances as well. We also owe fidelity to any rules of law relevant to the situation. If, for instance, everyone was driving by the injured man in automobiles and the rules of the road, plus ordinary common sense, made stopping extremely dangerous to oneself and others, we would have to pay attention to those rules in assessing the conduct of those involved. In cases such as *Carr*, we would fail as judges if we neglected to attend to the needs of the employer as well as to the sufferings of the plaintiff. Moreover, we owe fidelity not only to the parties before us, but to others who will be affected by our decisions. In a case like *Goldberg*, a responsible decision would pay attention not only to the situation of the plaintiffs, but to the impact of additional procedural requirements on the defendant and on other affected people.

IV. SYSTEMIC PRESSURES ON JUDGES *NOT* TO PAY ATTENTION

A compelling treatment of the subject of the importance of attention in deciding cases does not even mention Weil or Murdoch. It is Anthony Kronman's *The Lost Lawyer: Failing Ideals of the Legal Profession*,[64] and its subject is the decline of the ideal of the lawyer-statesman in all aspects of our legal culture. The lawyer-statesman, as described by Kronman, possesses not only intellectual ability and professional knowledge, but qualities of character which give him or her an unusual excellence in judgment or deliberation: being, among other things, "more calm or cautious than most people and better able to sympathize with a wide range of conflicting points of view."[65] Indeed, excellence in judgment requires "two opposite-seeming

63. 28 U.S.C. § 453 (2004). In its entirety, the statute provides:

> Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, _____ _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God."

Id.

64. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

65. *Id.* at 15.

dispositions, that of compassion, on the one hand, and that of detachment, on the other."[66] A person faced with a difficult decision must make an effort to see all the claims at issue in their best light and feel the power and appeal of each. At the same time, he or she must remain sufficiently detached to survey the alternatives from a perspective different from the point of view internal to each.[67] Excellence in deliberation or judgment requires combination of the dispositions of compassion and detachment, even as they pull in opposite directions.[68] Kronman calls this ability to entertain these opposing dispositions "bifocality."[69] One of them, which he variously refers to as "sympathy" or "compassion," requires focused attention on each of the competing claims.[70] The other, which Kronman calls "detachment," requires that one refrain from embracing any of the competing claims too easily or quickly, despite the possible ease and comfort of doing so.[71]

The good lawyer exhibits this kind of good character, and it is a kind of character which legal education is designed to inculcate. The case method of legal education requires an unwillingness to take the soundness of any judicial opinion for granted and a commitment to placing the conflicting positions presented by the lawsuit in their most attractive light, regardless of how they are treated in the opinion.[72] Law students' training in the case method involves the study of concrete disputes in which the students are required to see things from different points of view and entertain the claims associated with each, while defending or criticizing these points of view from the judge's detached perspective.[73] "The case method thus works simultaneously to strengthen both the student's powers of sympathetic understanding and his ability to suppress all sympathies in favor of a judge's scrupulous neutrality."[74] Further, and most important, "it increases his tolerance for the disorientation that movement back and forth between these different attitudes occasions."[75] The case method thus "serves as a forcing ground for the moral imagination by cultivating that peculiar bifocality [which is] its most essential property."[76] The lawyer-statesman thus conceived possesses practical wisdom in deliberating about ends: an excellence which depends upon an appreciation of the diversity of human goods, based upon a strong and vivid moral imagination; and a habit of civic-mind-

66. *Id.* at 72.
67. *Id.*
68. *Id.*
69. *Id.* at 72, 113.
70. *Id.* at 72.
71. *Id.*
72. *Id.* at 113.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*

edness, reinforced through disciplined insistence on the priority of the judicial or neutral point of view.

While changes in the legal academy and the practice of law over approximately the last twenty-five years have made these areas of professional life increasingly less hospitable to the ideal of the lawyer-statesman, one might think that the ideal at least retains its appeal among judges in the adjudicative branch of law. Inasmuch as law students learn from judicial opinions and practicing lawyers must advise their clients and practice their advocacy in their expectation of how judges will respond, one would hope that in the adjudicative branch the ideal of bifocality would be alive and well. Judging, Kronman observes,

> [A]lways starts from and returns to the specific facts of a concrete controversy, requires a combination of sympathy and detachment, and often presents the person engaged in it with conflicts between incommensurable goods, while nevertheless requiring him or her to pursue what I have termed the good of political fraternity.[77]

It is "a paradigm of deliberation, and so here if anywhere in the legal profession practical wisdom ought to be a well-understood and valued trait."[78]

Unfortunately, Kronman argues, the professional culture in which judges work has undergone a reorientation comparable to that which has occurred in teaching and practice, and which increasingly depreciates the lawyer-statesman ideal. This change in the culture of judging would be a cause for concern if considered in isolation, but its impact is potentially far more significant when the impact of judging on teaching and practice is considered. The pressure of the caseload is, for Kronman, the primary cause of these changes because it has forced the judicial system to adapt in ways that distance judges from direct involvement with the parties' conflicting claims and, as a result, weakens the judge's deliberative imagination.[79]

The two primary adaptations the judicial system has developed to deal with an increasingly overwhelming number of cases are as follows: first, "managerial judging," in which judges become deeply involved in the pretrial management of cases including settlement and other ways of maneuvering cases in their pretrial stages (usually *not* involving any formal, public statement of reasons) to try to bring cases to closure without the need for a trial; and second, the "bureaucratization of the judiciary," the huge expansion in the number and importance of judges' support staff, including such assistive personnel as elbow law clerks, staff attorneys, special masters, and magistrate judges.[80] In the case of managerial judging, the danger is the pressure on judges to form opinions about cases at an ever-earlier

77. *Id.* at 319.

78. *Id.* at 319–20.

79. *Id.* at 320, 325.

80. *Id.* at 322–24. For other treatments of the same issue, see RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM (1999) and Arthur R. Miller, *The Pretrial Rush to*

stage, before a full adversarial presentation of the parties' claims.[81] For reasons that Kronman describes, based on the work of Judith Resnick, "managerial judging . . . tends to encourage decisions that are more precipitous and prone to personal bias and so to compromise the work of judging at its core."[82] In the case of the bureaucratization of the judiciary, the danger to the quality of adjudication is perhaps even greater because the initial assessment of cases is increasingly delegated to some judicial assistant, "depriving the judge of those 'critical educational experiences' that a more intimate relation to the case might furnish."[83] The task of judging is often divided among the judge and the judge's assistants, diminishing both the sense of personal responsibility judges feel for their decisions and the sense that a judicial decision has been made by an individual with some recognizable identity rather than an impersonal institution.[84]

The idea of the "vanishing trial" is the subject of much discussion in judges' conferences and academic symposia,[85] and the percentage of cases that end in some kind of settlement or plea is very large. When disputes are not tried, but are resolved in some other way, they are more often presented not in their most vital and authentic form—from the mouths of human beings who describe what they are going through—but secondhand, in lawyers' summaries or in a proposed resolution of the dispute in a law clerk's draft, or magistrate judge's or special master's proposed opinion.[86] This means that to an ever-increasing extent, the stimulus to a judge's imagination which comes from his or her direct involvement with competing claims is disappearing and, with it, Kronman argues, a source of strength for the quality of deliberation. He says:

> The more directly [the judge] confronts a plurality of claims, the more strongly [he] is likely to feel the need to empathically engage each on its own terms while making a commitment to none. When claims compete directly in this way, they produce a kind of friction that arouses the imagination and makes the need for it quite clear. But when a judge encounters the disputes that come before him from the point of view of an earlier decision that has already arranged and ranked the claims of those involved, this

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Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. REV. 982, 1004–07 (2003).

81. KRONMAN, *supra* note 64, at 324.

82. *Id.*

83. *Id.* at 325 (footnote omitted).

84. *Id.*

85. *See, e.g.*, Symposium, *The Civil Trial: Adaptation and Alternatives*, 57 STAN. L. REV. 1251 (2005); Symposium, *Justice in Mediation*, 5 CARDOZO J. CONFLICT RESOL. 59 (2004); Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); John Lande, *"The Vanishing Trial" Report*, 10 DISP. RESOL. MAG. 19 (2004).

86. KRONMAN, *supra* note 64, at 326.

> friction is weaker and less likely to provoke his imaginative powers.[87]

It would require the length of a book, not an article, to describe thoroughly the ways in which trial judges (the people on whom our system depends to pay attention to the facts) are distancing themselves from factfinding in the name of efficiency—or are being forced to do so. Congress seems well aware that allowing judges to engage with the facts may, as in the parable of the Good Samaritan and in the analysis of Weil and Murdoch, cause them to *respond* to the facts. In the area of habeas corpus, for instance, Congress has severely limited the power of federal district courts to look at the facts and has restricted the legal rules the district court can apply.[88] In the *U.S. Sentencing Guidelines*[89]—the status of which has been thrown into some doubt by the Supreme Court's opinion in *United States v. Booker*[90]—Congress prohibited trial judges from relying on a range of factors that would normally be considered highly relevant to the crafting of an appropriate sentence.[91] From within the courts themselves has come an enormous increase in the use of summary judgment, a procedure which authorizes the resolution of large numbers of civil cases based on written evidence predominantly sculpted by lawyers and factual presumptions developed by appellate courts,[92] sometimes applied in factually inappropriate circumstances. In these cases, the parties themselves are never given the opportunity to present to the judge their accounts of what hap-

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87. *Id.* at 327.

88. *See* Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104–132 (1996) (codified at 28 U.S.C. §§ 2241–55 (1996)).

89. U.S. SENTENCING GUIDELINES MANUAL (2006).

90. 543 U.S. 220 (2005).

91. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(d)(1) (2006) (forbidding courts from departing from the applicable guideline range based on "[a]ny circumstance specifically prohibited as a ground for departure in §§ 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third and last sentences of 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), the last sentence of 5K2.12 (Coercion and Duress), and 5K2.19 (Post-Sentencing Rehabilitative Efforts).").

92. Many of these presumptions can be found in employment discrimination cases, which make up a huge proportion of every federal district judge's workload. Consider, for example, the so-called "same actor inference," which arises when a single actor is responsible for both the hiring and the firing of a plaintiff alleging discrimination. In such cases, courts in many circuits hold that the plaintiff must overcome a "strong inference" that he or she was not the victim of discrimination, thus making it difficult for the discrimination plaintiff to survive summary judgment. *See, e.g.*, Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996) (adopting the same actor inference and upholding trial court's grant of summary judgment in favor of defendant); Hartsel v. Keys, 87 F.3d 795, 804 n.9 (6th Cir. 1996) (noting the Sixth Circuit's recent endorsement of the same actor inference); Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173, 174–75 (8th Cir. 1992) (affirming trial court's grant of directed verdict for the defendant on the basis of the same actor inference); Proud v. Stone, 945 F.2d 796, 797–98 (4th Cir. 1991) ("[I]n cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.").

pened, and the judge never has an opportunity to pay attention to their accounts.

V. CONCLUSION

While the origins of our system of justice are, as far as we know, secular, it cannot be doubted that the judicial system has developed in ways that give structural protection to the spiritual and moral imperatives that concerned Weil and Murdoch. Trials, factfinding and opinion-writing compel judges to hear, understand, and come to terms with the competing claims of the human beings whose disputes they are required to resolve. The trial court is an institution which, at least in theory, allows individuals to tell their stories directly to the person or persons charged with resolving their disputes. It requires, at least in theory, that judges and juries pay attention to the people and facts involved. It requires, in Kronman's words, "the imaginative probing of specific cases."[93]

In Justice Brennan's account of the Supreme Court's decision in *Goldberg*, and in Martha Nussbaum's discussion of the enhanced quality of decision-making of which her ideal "literary judge" is capable, it is possible to see and critique what "attention to facts" means in the judicial context. It is possible to see that judges can pay a great deal of attention to the reality which confronts them. It is possible to see that the quality of their attention bears directly on the quality of their adjudication. It is possible to see that attention to facts translates into results in the judicial arena just as directly as it did on the road from Jerusalem to Jericho in the parable of the Good Samaritan. It is possible to see that who a judge is, as a spiritual and moral being, has a direct impact on that judge's decisions in ways that have little to do with doctrinal similarities and differences.

As judges and as human beings, we face many pressures to pay attention badly—pressures of time, pressures of economy, and most important, the sheer difficulty of putting ourselves out of the picture and paying real attention to the other. As Kronman has warned, our institutions are evolving in ways which are likely to place less value on paying attention and make it increasingly difficult to do so. Nevertheless, it is the spiritual and moral core of what we do, and it is worth our disciplined effort to do it as well as we can.

93. KRONMAN, *supra* note 64, at 362.