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**COMMUNITARIAN ETHICS AND LEGAL
JUSTIFICATION***

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I. INTRODUCTION

In the last decade or so there has been an important revival of interest in Aristotle's *Ethics*.¹ The revival is chiefly associated with Alasdair MacIntyre's work, *After Virtue*,² but it can be traced to Rawls' provocative work, *A Theory of Justice*,³ in which he raised focus anew, and with intense concentration, on the age-old issue of the principles of justice. Of course in a larger historical context, the interest in Aristotlian ethics goes back to Aristotle himself, because the author had important things to say on the subject.

There are many interpretations of Aristotle's address to the problem of ethics, and indeed many interpretations of his formulation of the problem. A properly informed exposition of both the question and the answer would itself be a course in philosophy, and an extraordinary one at that. Yet the question which Aristotle put is one that every reflective citizen should try to answer for himself, and certainly one which any serious lawyer must try to answer for herself. Moreover, undertaking to answer the question has independent significance, whatever the content of the answer. As they say in the club tournaments, it's not whether you win but whether you play. We all have to play.

Most simply stated, the question put by Aristotle, and of course

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1. ARISTOTLE, *NICOMACHEAN ETHICS*(n.d.).

2. A. MACINTYRE, *AFTER VIRTUE* (1981).

3. J. RAWLS, *A THEORY OF JUSTICE* (1971).

by Plato and others before him, is: How do we know what is right to do? Put differently, the question is, What is the intellectual foundation of the norms of civilized life, including legal rules? How are the normative propositions that we use as the basis of justification themselves justified?

There is a rule that one may not drive faster than fifty-five miles per hour on many highways. There is a rule that intentional homicide is both illegal and wrong in some larger sense. There is a rule, of a different kind, that the United States Senate is composed of two senators from each state. There is a norm that one should avoid needlessly inflicting harm on others. We all recognize that these rules operate in our community. More over, the proverbial man from Mars, after a sufficient investigation, could affirm empirically that in some definite sense these rules exist in the United States in 1988. Thus, it is clearly intelligible to say that a given community at a given historical time "has" certain rules. The stranger to Rome not only becomes aware that when in Rome one would be well advised to do as the Romans, but would be able to ascertain what in fact the Romans do.⁴ Yet the question remains: On what basis do the Romans feel impelled to do the way they do? To bring it home, how do you and I discriminate right from wrong?

It is unknown when in the history of our species this question was first put, although it would seem obvious that it originally had to do with behavior that would propitiate the gods. In any case, every parent knows that the question of distinguishing right from wrong arises in each young life at about age two, again at age seven, and worst of all in the teenage years. The answers that parents give to the question continue to be relied on through later life and in the larger community. We are all familiar with the formulae: "Because. . ." "Because I said so." "Because there is a rule." "Because God says so." "Because that's the way others should treat you." "Because you can't fight the system." "I don't know why, just do it." A leading theory of moral development asserts that the moral sensitivity of each individual evolves in terms of a hierarchy of justifications, from the crude and immediate to the abstract and aesthetic.⁵ It seems more likely that the process, rather than being sequential and hierarchical, is disorderly and aggregative. We absorb all the formulae of justification and for-

4. There are ascertainable "rules" of conduct even in a subjugated and brutalized community. The limiting case is surely the community within the Nazi extermination camps. That there were rules in that community is explained by the survivors, for example, in Primo Levi's moving accounts. See, e.g., P. LEVI, *THE DROWNED AND THE SAVED* (1987).

5. Compare L. KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT* (1981), with C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

get none of them. Hence, each of us arrives into adulthood not only with some kind of code of rules but also with a repertoire of justifications, many of which remain infantile. For example, the justification that the Constitution is to be taken as meaning what it says because that's the way it was written.

Such primitive justifications are insufficient for the inquiring mind, let alone the doubting mind. We cannot be content with saying, "We believe what is right because we believe," or even, "Because 'we' have always so believed." The question keeps coming back at us, "But why?"

II. LEGAL JUSTIFICATION AND THE LAWYER'S VOCATION

In this country, the problem of the justification for legal rules has a special vocational significance for lawyers. At least, it does so for many lawyers on some occasions. In the phantasy life of some lawyers, and of more law professors, practitioners of law continuously confront excruciating issues of ultimate Right and Justice. How can one defend a guilty person? How can one invoke an unjust law? How can one find meaning in a law that one does not believe in? In fact, of course, the questions that dominate the daily life of most lawyers and judges are of a quite different order: On what date is the draft of the Jones contract due? Did they amend that section of the revenue code in the last session? Where is the file? These philosophically simple questions dominate everyday life in the practice of law and thereby spare us from confronting larger questions. But from time to time, larger questions present themselves, often when we are unprepared for them.

That the basis for determining what is right presents itself in a special way to lawyers in this country results, ultimately, from the now accepted postulate that the law of the Constitution binds the legislature and that, in Chief Justice Marshall's phrase from *Marbury v. Madison*, "it is emphatically the province. . . of the judicial department to say what the law is."⁶ This proposition of federal constitutional law has its counterpart in the jurisprudence of state constitutional law, so that the measure of the law at large is also what the judges say it is.

For American lawyers the significance of this doctrine is that the practice of law is the political mechanism for formulating and resolving questions of law. A lawyer must formulate a case in order for a judge to resolve the issues of law which it presents. A judge can resolve an issue of law only by reference, implicit or explicit, to some-

6. *Marbury v. Madison*, 5 U.S. (1 Cranch) 49, 70 (1803).

thing more than the text of the law itself; if the issue was plain there would be nothing for the judge to decide. The judge's inquiry thus carries somewhere beyond the immediate problem. And the lawyer has to go along the judge's pathway of thought, if possible arriving at the destination before the judge does.

Addressing the problem of justification for rules of law is thus part of the lawyer's professional work. Any given case in the hands of any given lawyer can become the medium by which fundamental questions of right and wrong are publicly addressed and law is yet again given authoritative meaning. Law can be given meaning that it does not already have only by recourse to some normative reservoir beyond the law itself. That reservoir is the corpus of concepts of right and wrong more or less shared in society, or at least those perceived by the judges as more or less shared in society. Napoleon observed that possibilities for achievement in the Revolutionary French Army were such that "[e]very French soldier carries a marshal's baton in his knapsack."⁷ Similarly, the possibilities for creative interpretation in American law are such that every American lawyer carries new law in his pen. Familiar in the lore of law practice is the story of an obscure case that wound its way upward to the Supreme Court where it became a vehicle for making or unmaking the law.⁸

Of course, not every case poses an important issue of fundamental law, nor does every case that does so rise to the Supreme Court, or even to the law and motion calendar. And not every office case presents an opportunity to invent some new device of private ordering. In fact, most court cases and office cases are utterly routine, deserving attention only because clients want them done and practitioners have to make a living. Yet even in a routine case a question can arise not only as to what the law is, but what the law ought to be. Being in law practice in the American constitutional system necessarily entails addressing not only technical questions of what the law is, but also normative questions as to what the law ought to be. In dealing with that normative question, recourse has to be made by hypothesis to sources aside from the law itself. There are occasions, that is, when the law does not itself speak, but must be made to speak.

The difficulties judges face under such conditions of uncertainty were profoundly articulated by Cardozo more than a half century ago.⁹ How much greater are the difficulties that confront the lawyer

7. J. BARTLETT, *FAMILIAR QUOTATIONS*, 505b (14th ed. 1968).

8. *See, e.g.*, A. LEWIS, *GIDEON'S TRUMPET* (1964), an informal history of *Gideon v. Wainwright*, 372 U.S. 335 (1963).

9. *Compare* B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); *with* M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987).

as counselor or strategist. She confronts the law's uncertainties in unfolding transactions and lawsuits in which moves and responses must be improvised with irrevocable consequences that will occur in an unforeseeable future. It is only judges who can pronounce judgment over what has already transpired, on the basis of a record that is deemed to contain the facts. If the law often has no evident or transparent meaning to those at the summit of the legal system, in the jurisdiction's highest court, it surely is less transparent in the lower precincts of everyday law office practice. The problem for the lawyer then is to infuse the law with meaning, in Herbert Hart's metaphor to fill in the places in the law's open texture.¹⁰

III. THE CLASSICAL SOURCES

The quest for normative sources beyond existing norms has been the supreme problem in legal philosophy, as well as one of the supreme problems in moral philosophy. Indeed, it is the supreme problem in legal philosophy *because* it is the supreme problem in moral philosophy. In the Bogart-Bergman film *Casablanca*, in the denouement in which Major Strasser is shot, the ensuing conundrum is resolved with the classic line, "Round up the usual suspects."¹¹ In the realm of possibilities for resolving ultimate questions of right and wrong, too, there is a usual list of what have come to be suspects.

The first source is the Will of God. The Will of God is still a viable normative resource within that part of the community whose members accept one and the same God manifesting one and the same Will. This is the way Western Christendom used to define the moral universe, and is the way in which the moral universe is still defined by some religious communities, non-Christian as well as Christian.

A basic difficulty with the concept, of course, has been that not everyone accepts the existence of God, and that even among those who do so there are deep differences of interpretation as to what His Will may be. Many members of our secularized, auto-loving culture urge return to the Word of God as a foundation of public policy. They may forget that there are profound differences as to what that Word means to different people. Such differences were notorious among Popes and Kings of old, and it is said that Martin Luther had views on the subject that were distinctive in his time. In any case, the Ayatollah has come to help us remember that there are still differences as to how the Word of God is to be interpreted. At the political level, we simply cannot say with confidence based in empirical fact that the traditional

10. H. HART, *THE CONCEPT OF LAW* (1961).

11. *Casablanca* (Metro-Goldwyn-Mayer 1942).

God of Abraham ordains such things as the equality of women and men, or the goodness of material goods.

Another suspect is Natural Law. Natural law is still a viable concept, at least as a critical device, because there is eternal appeal in the notion that the human condition necessarily implies some minimal norms. But when the concept of natural law is applied to such micro-cosmic real world problems as whether profit is legitimate or differences in income are socially unjust, or whether a particular war is a just war or a particular punishment is just retribution, the utterances of natural law are equivocal, or at least ambiguous.¹² The legal ordinances derived from natural law turn out often to depend on premises in which the conclusions have already been embedded, or upon the person or personage by whom natural law is being interpreted. Arguments based on natural law seem always to turn out to be arguments about the basis of natural law.

Then there is Kant's Categorical Imperative. Precisely what the Categorical Imperative is all about remains a matter of philosophical conversation.¹³ At the level of abstraction at which I find Kant still intelligible, he can be read as saying that each person is entitled on an equal basis to be both the subject and object of all moral discourse. Another analysis is that the Categorical Imperative is a desacralized version of the Golden Rule, i.e., Do Unto Others as Ye Would Have Them Do Unto You.

Kant's proposition, if taken seriously, says something. At least it would seem to have some resolving power for such questions as the justifiability of genocide, saturation bombing of civilian sites, random assassination and terrorism, compulsory racial discrimination, and other horrors that result when it is forgotten that human life is per se morally significant. The Categorical Imperative, like the Golden Rule, speaks meaningfully to such stark moral questions. Nevertheless, it seems to me to have little resolving power when applied to the more mundane problems of ordinary government that emerge as legal questions. For example, recognition of the universal moral worth of every person does not seem to resolve such questions as the justifiability of the death penalty, abortion, lying to Congress in oversight hearings, racial integration through amalgamation of school districts, the minimum wage law, and similarly vexing legal issues of daily political controversy.

12. See, e.g., L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* (1981); H. Kelsen, *GENERAL THEORY OF LAW AND THE STATE* (1934); L. STRAUSS, *NATURAL RIGHT AND HISTORY* (1953); L. WEINREB, *NATURAL LAW AND JUSTICE* (1987).

13. See B. WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985).

The reason that such a universal normative proposition as Kant's imperative has little concrete resolving power in ordinary life is precisely because it is universal. A proposition framed in a nearly ultimate degree of generality does not accommodate the varieties of circumstance that create real-life moral and legal dilemmas in the first place. This seems to me to be the essential difficulty with Rawls' *A Theory of Justice*, which can be regarded as essentially Kantian. Rawls' thesis is that we must retire behind a veil of ignorance to think rightly about what is right. But this requires us to forget who we are in order to think about what we should do. According to Stuart Hampshire, among others, and I agree, that is literally an impossibility.¹⁴

Essentially converse difficulties have come to be recognized as attending utilitarianism, the do-all moral philosophy of secularized democracy. Utilitarianism asks that for any proposed action, a calculation be made as to the consequences, good and bad, for all members of the polity, and that the action be deemed good or bad according to the net balance of the calculation. "Rule utilitarianism" requires a similar type of calculation except that the consequences to be estimated are those of a rule of action rather than a specific action. Utilitarianism thus requires that we step from behind the veil of relative ignorance in which real life enshrouds us, foretell all possible futures, and then select the best.¹⁵ An intellectual cousin of utilitarianism is neoliberal economic analysis, which has become the new lingua franca of business management, public policy, and now law. Economic analysis, if it is to have more than formal resolving power, requires the same kinds of calculation but from a decentralized perspective.

Both utilitarianism and economic analysis have much to contribute to analysis of moral questions, certainly to deliberations on questions of public policy. Elementary decency requires that we inform ourselves in as precise a way as possible what it is we are really doing when we Do Unto Others. This point is beautifully made in Cecil Woodham-Smith's study of the causes and consequences of the terrible famines in Ireland in the first half of the nineteenth century.¹⁶ Speaking of the catastrophic ignorance and ineptitude that attended the efforts of the British government to alleviate the situation, she says:

These misfortunes were not part of a plan to destroy the Irish na-

14. S. HAMPSHIRE, *THOUGHT AND ACTION* (1959).

15. See B. WILLIAMS, *supra* note 13.

16. C. WOODHAM-SMITH, *THE GREAT HUNGER: IRELAND 1845-1849* (1962).

tion; they fell on the people because the government . . . was afflicted with an extraordinary inability to foresee consequences.¹⁷

Where the surrounding circumstances can be more or less fully reconnoitered, and the likely futures can be more or less foretold, and when some kind of comparison of those futures can be made in terms of human costs and benefits, it surely is the essence of irresponsibility to forego such calculations or to ignore their import.

However, in real life such calculations are usually imprecise and often are hardly more than guesses.¹⁸ When the calculations are mere guesses, utilitarianism and economic analysis have correspondingly diminished capability to indicate what will be the consequences of a course of action. Since in those systems the rightness of consequences determines the rightness of the course of action, the indeterminacy of the former translates into corresponding indeterminacy in the latter.

The same is true of all instrumentalist moral theories, i.e., theories in which the value of a course of action is determined by measuring its consequences. This, of course, does not prevent practitioners of these methods from attempting greater precision than so far has been achieved, which is appropriate and potentially illuminating. However, it also does not prevent them from pretending greater precision than they have actually achieved, which is something else. If the limitations of rational calculation are honestly faced, forecasting consequences of either actions or rules reveals itself as a matter of conjecture. That makes equally conjectural a theory of morals that is based on forecasting.

The classical antipode of utilitarian moral philosophies are deontological moral philosophies. The essential idea in deontological moral philosophy is that, at least because consequences of an action cannot be confidently foretold, the rightness of action has to be determined from the intrinsic character of the action and not from its consequences. What is called "principled decision-making" in the realm of legal philosophy appears to amount to this. There are various versions of the theory of principled decision-making, but they seem to have a common conceptual structure. Unfortunately, they too are suspect.

As articulated by Professor Dworkin, the idea is that an apparent contradiction between two or more legal or moral propositions, or incompleteness in the coverage of such propositions, can be resolved by reference to some more general proposition.¹⁹ The procedure is illus-

17. *Id.* at 410.

18. Compare G. BREWER, *THE FOUNDATIONS OF POLICY ANALYSIS* (1983).

19. See R. DWORKIN, *A MATTER OF PRINCIPLE* (1985).

trated in an example used by Professor Dworkin. The case he puts is that where the beneficiary of a life insurance policy, having murdered the named insured, has the chutzpa to claim the proceeds of the policy. In such a case, the claimant relies on the relatively narrow proposition that the insurance contract requires payment to the named beneficiary. However, this seems to yield an unjust result. Its unjustness is revealed and the problem resolved by use of principled analysis. Another principle, higher and more general, therefore is invoked and it dissolves or undermines the proposition whose application will be unjust. In the case of the insurance claim, this more general principle is that a person should not be allowed to benefit from his own wrong.

Another example of principled analysis is the one suggested by Professor Wechsler. In dealing with racial desegregation, the claim of a right to attend a racially desegregated school may be dissolved by the principle of freedom of choice in association.²⁰

The trouble with "principled analysis," however, is that any claim of right that is sufficiently specific to be intelligible can be superseded by going up one more flight in the golden stairway of increasingly general principles. In the life insurance proceeds case, the principle that a person should not be allowed to benefit from his own wrong could be met by the principle that promises are to be kept. That proposition would seem to be of quite suitable generality and it has a respectable Roman provenance, *Pacta sunt servanda*. That maxim surely has enough generality and antiquity to "trump" the proposition that no one should be allowed to benefit from his own wrong. And, if it does not, then the principle could be invoked that even a wrong doer is entitled to his due.

At this level the generality of the competing principles begins to approximate Kant's Categorical Imperative. There is a corresponding diminution of their intelligibility as specifically applied, and hence of their resolving power in the concrete case. In any event, the system of principled analysis has no principle for selection of the level of generality at which conflict of principle is to be resolved, and no principle for determining which general principle is to govern when more than one is applicable in its own terms.

Professor Dworkin indeed now seems to have abandoned the work of trying to make a go of "principled analysis." His most recent essay, echoing other present voices, suggests that the solution all along

20. H. Wechsler, *Toward Neutral Principles of Constitutional Law*, in *PRINCIPLES, POLITICS AND FUNDAMENTAL LAW* 3 (1961).

lay not in resort to principle as such, but in resort to the process of interpretation.²¹

IV. INTERPRETATION

“Interpretation” is the newest fashion in legal philosophy, though of course it is a long-established mode of moral discourse in the Jewish and Christian traditions, among others. The Jewish fathers have the Torah; many Christian preachers simply start fresh each day with the Bible.

In any event, it is startling to suppose that such a process as such could distinguish right from wrong. The ordinary connotation of the term “interpretation” suggests a process something like translation or elucidation. That is to say, to interpret is to render a meaning to some given proposition or event that is equivalent to, although perhaps more intelligible than, the original.

If this were all that was meant, however, “interpretation” would make no advance toward answering a question. The concluding proposition derived by the process of interpretation would simply be a restatement of the antecedent from which it was derived. As one ponders, it seems evident that the extension of meaning cannot be the result of transposing the original proposition. Rather, it must have been the result of interpolating something into the text during the process of moving from the starting place to the conclusion. “Interpretation” may be a satisfying name for a ceremony in which new normative meaning is infused into old normative premises. But it does not explain how the ceremony accomplishes the transformation.

“Interpretation” seems to come around to being a concealed reference to resources within the person or personage providing the interpretation. Questions of right and wrong indeed can be resolved by presenting them to a person whose Thing is interpretation. The identity of this person sometimes is not specified. Yet it seems clearly contemplated that the interpretationist is a person or group that is steeped in the mores of the society where the question has arisen.

In days of old the procedure entailed referral to the wise men or village elders. In our culture it often involves referral to the courthouse. Such a procedure is fine as far as it goes. But it says nothing as to how the wisemen or judges are supposed to do their Thing when a matter is referred to them, or how the citizenry is to comprehend when there is a real issue to put in their hands.

The theory of “interpretation” is not assisted, it seems to me, by

21. See R. DWORKIN, *LAW'S EMPIRE* (1986).

recourse to Deconstruction Theory, an even newer fashion in legal philosophy.²² Deconstruction theory tells us, apparently, that every term and proposition in discourse implies an opposite term, or an opposite correlative, or a shadow of similar contour but opposite effect. There is a way in which this is unavoidably true. To say Something is by necessary implication to have not said Something Else. Everyone knows — at least every lawyer knows — that what has not been said is often as significant as what has been said. But that still leaves the question of what was meant in either the first place or the second place. If interpretation as such is an inexplicable process when applied to something that has been said, it can not be more explicable when applied to something that has not been said. One is reminded of some of the classic dialogues between Groucho and Chico Marx.

There is another notion associated with “interpretation” that also seems unhelpful. This is the relativist idea that unresolved normative issues do not have any defensible resolution because, in the vernacular phrase, “it all depends on how you look at it.” If this means that the resolution of all questions of right and wrong is in some sense contextual, it is undoubtedly correct. For example, it may be that the context in which the nineteenth century judiciary passed on the validity of labor legislation made it inevitable that the judges of that time could not see the virtue of such legislation and therefore were predisposed to hold it invalid. Again, the context in which some contemporary judges address anti-abortion legislation may be such that they cannot see its virtue, and therefore hold it invalid. So also we can understand why Muslim countries have trouble with the idea of Women’s Lib.

These kinds of statements are intelligible. But it should be noted that they are intelligible only because they describe the decision-making process from an external observer’s view point. They say nothing as to what the deliberations themselves are about. To say that a decision about right and wrong depends on “how you look at it” provides no basis for understanding how an open question of right and wrong can be answered by someone seeking to answer it. If in any given social context the outcome of a question of right and wrong has been preempted by the context’s coercive effect, then the question is not really an open one for those addressing it. And if the question is not really open, the process of its resolution does not entail problematic moral deliberation, which is the matter that has baffled moral philoso-

22. For a lucid if somewhat credulous exposition of Deconstruction Theory, see Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987). As Balkin notes, according to deconstruction theory no authoritative statement of that theory is possible, which in these days is no doubt one of its attractions.

phy all these years. One is reminded of the limitations of Holmes' observation that "law" is a prophecy of what judges do in fact.²³ That may be correct as an observation about judging by someone who is not a judge, but it is either circular or empty as a proposition about the process of judicial deliberation itself.

V. INTERPRETATION AND COMMUNITY

Theories of interpretation have an interesting kinship with neo-Aristotlian communitarian ethical theory, an approach that is enjoying an important contemporary revival. Indeed, it would seem that interpretationist theories *are* neo-Aristotlian if analyzed in operational terms. The key is that both concepts rely on community mores as the source of guidance in resolving questions of right and wrong.

The central concept in neo-Aristotlian ethics is that the resolution of matters of right and wrong results from reference to "practice."²⁴ "Practice" writ large is "experience." As we have seen, "interpretation," when dissected, is a deliberative process in which the wisdom of experience is brought to bear. That is what the wisemen, or the judges or other decision-makers, do when doing their interpretation Thing. What they have seen and done in their lives yields an intellectual residue and decisional potential upon which they draw in the interpretive process. That collective experience occurred, not on the moon or in some imaginary world, but in the lifetimes of the specific wisemen as members of a specific community.

In Aristotlian ethics of a community, this self-same experience, "practice" is the source of virtue. Thus, MacIntyre defines the relation between practice and virtue as follows:

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.²⁵

"Virtue"—that which is good or right—is "internal to practice," i.e., embedded and manifested in practice. The practice in which virtue is embedded and manifested is something "acquired" and which is the subject of "exercise." Clearly a practice, with its attendant virtue,

23. O. W. HOLMES, *THE PATH OF THE LAW* (1897).

24. A. MACINTYRE, *supra* note 2, is most explicit in this regard. Rawls' theory seems to operate in the same way but does so through the medium realm of the "original Position." See B. WILLIAMS, *supra* note 13. That is, the "original position" consists of the viewpoint of a moral evaluator who had adopted the right "practice" in taking on the "position" of a moral evaluator.

25. A. MACINTYRE, *supra* note 2, at 178.

is acquired and exercised in some specific place in the lifetime of specific persons, i.e., in a community.

The interpretationist and communitarian concepts thus converge. The communitarian concept has serious difficulties, as I shall try to indicate in a moment. But at least it frankly indicates that the community is the wellspring of virtue, an acknowledgment that the interpretationist does not make.

VI. COMMUNITARIAN ETHICS

The Aristotlian asserts that the resource for determining questions of right and wrong is the community's ethos or Way of Life. This concept is philosophically problematic, but as a technique it should not be mysterious to a lawyer. Indeed, the technique is often used in judicial decisions and hence in legal argument. Any judicial decision that adverts to a tradition in effect employs this procedure. Consider the reference in a judicial decision to "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."²⁶ Or the proposition that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of . . . freedom of speech."²⁷ Or "the right of courts to conduct their business in an untrammelled way."²⁸

These references are not to rules or precedents but to ways of life out of which a rule can be extracted and a precedent established. Judges and lawyers use this method all the time. The same method, with special emphasis on community, is also salient in much contemporary social philosophy and in the legal discourse associated with Critical Legal Studies.²⁹ The method has its attractions — common interest as a basis for deciding what norms shall prevail, participation as the medium of decision, recognition of the wholeness and historicity of normative choices. However, these attractive features of communitarian ethics operate only in cases in which there is little disagreement on the merits. That is, they apply where the community as a whole holds a common view of the matter at issue. I shall now try to show why the concept of communitarian ethics is of little avail in what we call "hard cases."

26. *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (quoting *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926)).

27. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

28. *Wood v. Georgia*, 370 U.S. 375, 383 (1962).

29. See Singer, *The Players and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1 (1981).

A. *The Communitarian Concept*

MacIntyre's statement of the communitarian thesis can be presented very simply. First, he says:

What I am . . . is in key part what I inherit, a specific past that is present to some degree in my present. I find myself a part of a history and . . . one of the bearers of a tradition.³⁰

Second, the specific tradition into which any individual is born, and of which he is a part, entails roles and role-expectations. These expectations in turn define what is good or right within the particular tradition:

A virtue is a quality the manifestation of which enables someone to do exactly what their well-defined social role requires. The primary role [in Homer] is that of warrior king and . . . the key virtues therefore must be those which enable a man to excel in combat. . . The concept of *what anyone filling such-and-such a role ought to do* is prior to the concept of a virtue. . .³¹

Third, virtues when more or less consistently manifested in conformity with the specific tradition, are "practices."

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. . .³²

Much of what is said in these propositions, as well as much else that MacIntyre says in his book, is appealing and important. His first proposition, that "I am a part of a history and a bearer of a tradition" is, among other things, a direct attack on Kant and Rawls. Indeed, it is an attack on all ethical theories that purport to be unqualifiedly universal. This attack seems to me unanswerable, at least at the level of abstraction that Kant and Rawls have pitched their own arguments.

At some level of analysis, the proposition that each of us is defined by time and circumstance is as irrefutable as the fact of death. Elliott Richardson once said, concerning the position an official takes on public policy questions, that "Where you stand depends upon where you sit." That is solid practical wisdom although perhaps a little crude as a philosophical proposition. Nevertheless, anyone who does not appreciate that personal circumstance necessarily makes for some relativity in ethics does not understand such human weaknesses as fear, unworthy self-preference, and sheer absentmindedness. Weaknesses such as these disable us from being consistently heroic and also

30. A. MACINTYRE, *supra* note 2, at 206.

31. *Id.* at 171-172.

32. *Id.* at 177.

make ethical discourse interesting and challenging in the first place. If doing what was right notwithstanding circumstance were easy, all of us would be virtuous and few of us would have many moral dilemmas.

B. Context, Role, and Rule

More generally, all but the starkest moral dilemmas arise not only *in a context* determined by a specific past but as a *result of* a specific past. Events of the past generate roles in the present, and roles in the present entail expectations and rules that codify those expectations.

For example, I have children and am a parent. That present condition is the result of past events. If I did not have children, I would not face the moral dilemmas involved in the role of being a parent. For another example, Billy Budd's superior officer Lieutenant Vere had been appointed to his office of responsibility some time in the past. That prior appointment meant that in the present Vere was not simply Billy's fellow crewman but was his superior officer. It was the fact that Vere was Billy's superior officer that entailed the responsibilities of office which caused him anguish. Similarly, if I were not a lawyer, I would not confront the ethical problems that arise in practicing law.

MacIntyre is surely right in stating that a specific position in a specific society carries with it a specific role, with corresponding expectations. We are not reborn every day, nor is the world in which we live reinvented every day. We therefore live each day in established roles — social standardizations of specific societal functions, whether that of parent, superior officer, neighbor, and so on. Moreover, MacIntyre seems clearly correct in saying that fulfilling a role the right way is better than doing so the wrong way. Once the appropriate role has been specified, fulfilling it well is better in the same uncomplicated sense that it is better to play center field like Willie Mays than like other people.

This is to say that social context establishes roles, that roles project expectations, and that expectations can be fulfilled for better or for worse. This says something, but in the end it does hardly more than relocate the problem. For the question remains as to which role, and which set of corresponding expectations, ought to determine the question of what is right to do.

The question of appropriate role can be indicated by an example from the experience of the ancient Greeks, one suggested by MacIntyre's comparison of Homer and Aristotle. MacIntyre points out that Homer projected the role of warrior as the ideal social role, whereas Aristotle projected the role of public citizen and statesman as the ideal. However, not all warriors are good statesmen and not all

good statesmen are good warriors. The question therefore can arise as to which role is appropriate in given circumstances. At the moment right after Helen was abducted to Troy, whoever was in charge faced an open question whether to go to war or to rely on diplomacy. That choice in turn implicated whether to bring on the warriors or to bring on the statesmen. Of course, if warriors were brought on, it would be hoped that their warrior practice was of high quality. So also if statesmen were brought on. But that does not resolve whether the situation called for practitioners of war or practitioners of diplomacy.

To pose a homey hypothetical from the domain of law, if one is a judge in criminal court, and if judges in criminal court are supposed to apply the law without discrimination among persons, then a judge who is resolutely "objective" is a good judge. But a judge who is resolutely objective is not a good judge if proper judging in criminal cases is supposed to take sympathetic account of the character of the offender as well as the character of the offense. Moreover, acting as a proper judge, whether being resolutely objective or taking sympathetic account of the character of the offender, is not right if it is inappropriate even to be acting as judge in the particular circumstances, for example, if the person to be judged is the judge's child.³³

So also in our everyday life it is not clear, when a dispute arises, whether the better course is to be warrior or diplomat. How, for example, should I deal with a neighbor who is obnoxious?

C. Role and Community

The point can be stated more generally. No real person has a single role. A "role" is simply an abstract description of a person's relationship with someone else in some context. In real life, even in very simple societies, an individual stands in multiple relationships in multiple contexts, moving among them in continuous transition. One moment I am a lecturer, the next moment a houseguest, the next moment airline passenger, with interspersed moments as faceless member of the crowd, and all the time being spouse, parent, and employee of Yale University. Each of these roles may be given an excellent performance or inept performance, so that I am more or less "good" at any one of them. But it remains an open question at any given time which role-specific behavior is appropriate in any particular relationship. We all know, for example, that assuming the stance of a lecturer is usually dysfunctional in conversation with one's spouse.

The same difficulty is revealed if we shift the focus of our atten-

33. This, of course, was the situation in SOPHOCLES ANTIGONE (n.d.).

tion from the actor to the context in which an actor may find himself. Just as it is problematic in any situation what role the individual ought to play—what idealized relationship he should use as the model of his conduct—so also it may be problematic as to how he should define what play he is in.

There are polar extremes of interpretation that an actor can make of the play. On one end of the spectrum, the actor may consider himself utterly alone in his moral contemplation. If anyone else exists at all, that other person is essentially a Thing that should stay out of the way. This is the orientation of a psychopath, and indeed specifies why he is a psychopath. Some of what passes for social philosophy involves a scarcely less solipsistic interpretation of self.³⁴ At the other end of the spectrum, the actor considers the relevant others to include not only people of all nations and conditions but also animals, trees, and even inanimate objects such as the environment and pet rocks. In this interpretation of life's play, the whole scene is inviolate. This is the orientation of those in a catatonic state and some others who are simply in a state of unrelenting moral rage.

Describing the outer boundary of the moral universe in these ways may seem a caricature, and we could exclude these extremes at the borders of insanity. Even if that is done, the possibly relevant moral universe for any given person at any given time has no a priori definition. Does the relevant moral context of one's action include every interest of every other person whose interests may be affected? After all, the poet has said that No Man is an Island.³⁵

In the real world of imperfect practice, any one person's relevant moral universe is less than the whole imaginable moral universe. But how are the boundaries to be drawn? Specifying boundaries of context in effect specifies the boundaries of responsibility.

In this regard I am moved to criticize a recent statement by a thoughtful and humane scholar for whom I have greatest respect, Professor Philip Selznick. In a piece he wrote which has contributed to my thinking about these problems, Professor Selznick has said:

In sociological jurisprudence we are uneasy with the separation of law and politics, law and economics, law and morality. . . . Every practice and every institution is seen as 'in society,' fatefully conditioned by larger contexts and social organization.³⁶

So far so good. Note the analytic resemblance to MacIntyre, to

34. This is the way I interpret Robert Nozick. See R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

35. J. DONNE, *DEVOTIONS UPON EMERGENT OCCASIONS, MEDITATION XVII* (1624).

36. Selznick, *The Idea of a Communitarian Morality*, 75 CALIF. L. REV. 445, 449 (1987).

whose work Selznick indeed explicitly refers. MacIntyre speaks in terms of the individual who is in a specific context with a specific past, while Selznick describes the problem in terms of the context itself. Professor Selznick then goes on to say what he means by the larger context, which he refers to as "the concept of community itself." He describes "community" as follows:

A community is not a special purpose organization. It is a comprehensive *framework* for social life . . . [A]lthough in a genuine community there must be a minimum of integration, including shared symbolic experience, we also expect to find relatively self-regulating activities, groups, and institutions. . . . The individual is bound into a community by way of participation in more limited, more person-centered groups.³⁷

This statement gives no clue as to the definition of the relevant community for purposes of moral discourse on any specific subject. Moreover, the statement recognizes that a "community" is really a set of several different communities. Each of us lives not only in a country, a state and a city, but in a neighborhood. Moreover, "more limited, more person-centered groups" are constituted along lines other than those of geography.³⁸ We intelligibly refer to such groups as the "community of scholars" and the "business community," and to groups defined in terms of age, ethnicity, occupation, avocation, political affiliation, and so on.

The term "community" thus can refer to any one of several sub-communities of which the actor is a member. Each such sub-community entails a set of roles and a corresponding set of role expectations. If the relevant community is the Greek warparty on the shores opposite Troy, then the relevant practices are those of Homer's warriors, the bloodier the better. If the relevant community is the civilization of the Greeks that included both the Athenians and the Trojans, then the relevant practice within that community is not civil war but statesmanship. The same point holds in modern context. For example, if the relevant community is that of women facing the burdens of childbearing and childrearing, then abortion is one thing; if the relevant community is defined so as to include unborn souls, then abortion is something else.

Specification of the relevant community implicates the relevant

37. *Id.*

38. I interpret Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983), to suggest that universal continuous participation is a necessary characteristic of a "democratic" society. Contemplation of such a society brings to mind the remark, I believe by Oscar Wilde, that socialism takes too many evenings.

normative guidelines. Specifying the relevant community therefore is simply the counterpart of specifying the appropriate role that an actor should adopt. MacIntyre's approach specifies in advance which role is relevant for the actor; Selznick specifies in advance the part of the community in which the actor finds himself. It seems to me they both thereby derive from the concepts of role and of context, respectively, what they have put into them.

The question remains: Which community is the relevant one in deciding what is right to do? Questions of this sort are familiar in the law, if not by this name. Indeed, they are the stuff of law. Consider, for example, a classic problem of tort law. This is whether a child straying on a railroad right of way is to be regarded as a business visitor, protected by the duty of due care on the part of the railroad, or a trespasser, protected only by the landowner's duty to avoid intentional harm.³⁹ To what "community" do the railroad and the child belong? Do they belong to a community in which the railroad has something like a parental responsibility toward other people's children, because the railroad management and workforce are folks who have to share with their neighbors the burden of nurturing the young? Or do they belong to two distinct communities, with distance between them, one being an industrial zone curtained off to make rapid transportation possible, and the other an adjacent residential area where children are supposed to be confined? Or is it a single community, but one in which the parents of children are responsible for teaching their children to stay off the railroad track?

Consider, for another example, the constitutional law problem of probable cause to make an arrest of a person who is behaving suspiciously. Is such a person to be regarded as a member of a law-abiding community who has a right to be left alone until he actually does something illegal? Or should he be regarded as a member of a community whose citizens are mostly law-abiding but physically vulnerable, and which is pervaded by punks and thugs who should be apprehended if they cannot give honest account of themselves?⁴⁰ It would seem that any of the myriad problems which the law must address could be analyzed in a similar way.

VII. CARRYING ON

The concept of communitarian ethics nevertheless reminds us that serious questions of right and wrong cannot coherently be considered apart from community, defined somehow. It also reminds us of

39. See *Railroad Co. v. Stout*, 84 U.S. (17 Wall.) 657 (1873).

40. See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968).

the many and various connections we have with our fellow human beings. We are each members of many communities, have many roles, and face many and inconsistent expectations as to what our "practices" should be.

One of life's paradoxes is that there are things that work in practice even though they do not work in theory. One thing that works more or less in practice is the process of resolving fundamental issues of right and wrong on a day-to-day basis without a satisfactory theoretical basis for doing so. The courts perform this task, often being troubled and confused, but they get the job done somehow. So do lawyers in everyday practice. For that matter, so does everyone in everyday life. The law is peculiar only in that its decisions generally have to be accompanied by justifying explanations. However, the mystery of legal justification remains to be unraveled.