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**THE LIMITS OF LAW:
PAUL RICOEUR AND A CRITICAL PHRONĒSIS
TO ENGAGE LAW, ETHICS AND RELIGION**

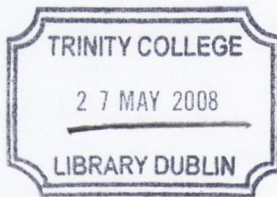
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Thesis submitted in fulfillment of the requirements
for the degree of PhD.

Trinity College Dublin

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October 2007



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SUMMARY

This study explores the relationship of law and ethics from the insight, evident for many who have been engaged in law as a profession, that the practice of law encounters limits which point to a broader context in which it has to be embedded: the level of ethical values and moral obligations operative between persons, citizens, and communities. The level of ethics equally encounters limits, as is reflected in the traditional duality between the deontological and the teleological approaches to it. My interest is in attempts to reconcile the two, and Paul Ricoeur's work in this regard is of particular importance since he also offers bridges to both the theory of law and to religion and biblical faith. This is the task begun in chapter 1.

If it is true that a proliferation of positive law is the response to a diminishing effectiveness of moral and ethical reflection, with increased reliance on law to resolve ethical and moral disputes and/or to provide explicit moral norms, then we must ask what resources the law has for such a task. This study explores in chapter 3 a controversy as to whether legal theory and practice is based on morality and whether moral theory is applicable to them. We will examine a debate between an American Court of Appeals judge, Richard A. Posner, who answers "no", and a panel of commentators, who argue for its inclusion.

Having examined in chapter 2 the limits of law in resolving moral issues and, in particular, the tragic and/or "hard case," we will return to see in chapters 4 and 5 if Paul Ricoeur's theory of critical *phronesis* might move us forward toward bringing to the law the resources it lacks in this regard. The diagnosis of a weakness is confirmed by the view put forward especially in current Continental debates that the state (which empowers the legal system) proceeds from pre-political foundations of value which it does not generate and which it cannot renew. The new currency of this debate which originated in the 1960's has led to a re-examination of the role of the religious voice in the public sphere and a cautious reversal of the silencing of the religious voice in the name of a non-establishment of religion. The Golden Rule and the Ricoeurian concept of a "superabundance" generated by an "Economy of the Gift" have been proposed as a means to draw from originally religious insights a compelling and renewable resource of moral value, by which the limits of the law may be supported in the broader context we began this inquiry to investigate.

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Thank you also to my family who have been so supportive of my work for so long. And to my husband Salvatore Barranca: I can't thank you enough.

Finally, but foremost:

To Him who is able to keep me from falling and to present me before His glorious presence without fault and with great joy – to the only God our Savior be glory, majesty, power and authority, through Jesus Christ our lord, before all ages, now and forevermore! Amen. (Jude 24-25)

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Introduction

How do we go beyond the confines of the law, which can only ask for external legality and foster an internal moral identity, which the law presupposes - but cannot create - in its assumption of imputability? How might this balance between legality and integrity be affected, if we also include in our equation the question of hope and *meaning*, which is posed ineluctably by the religious voice, so often silenced today in questions of both law *and* ethics?

Twenty years of practicing law did not reveal the answer to me from a legal perspective. Ten years of missionary work did not provide a comprehensive answer acceptable outside the community of faith, let alone in the legal or ethical domains.

This paper represents my efforts over the past five years to determine what resources are available in the philosophical and theological ethical domains, which could be brought to bear on this question and how the three domains might operate complementarily, rather than adversarially, or in isolation to one another. More specifically, I have come to focus on the critical *phronēsis* of Paul Ricoeur, a seminal thinker whose work linking debates in several Western traditions (French-, German- and English-speaking) has touched on all three categories here at issue: law, ethics and religion.

I propose a critical *phronēsis* between disciplines, but especially for the determination and inquiry into the tragic or “hard case” situation. The more usual legal, ethical, or religious question or contemplation would not give rise to this heightened inquiry insofar as it could readily be resolved within the terms of the tradition in which it was raised, for example by a careful study, determination of the facts, perhaps, and applying the agreed principles at hand. The hard or tragic case, however, presents a different problem. These are cases where it appears that no solution is possible that does not involve wrongdoing or the imposition of suffering on one or another. Moreover, the tragic case can arise legally, ethically, or religiously. Having presented itself, however, I contend that the case may best be undertaken in counsel and discourse with the other

disciplines. The limit questions will reveal themselves not as marginal, but as foundational ones for the practice of law and ethics, which show up in the extent of premises unquestioned as long as such cases can be avoided. Thus, a continuity will be shown from the “hard” and seemingly exceptional cases to the question of how the motivation for the “will to live together” (H. Arendt) in a democracy can be sustained.

This is not to argue that, henceforth, there should be the equivalent of three courts of differing - yet cooperating - jurisdictions: (1) legal, (2) ethical, and (3) religious. That would be to attempt to translate the entire enterprise to the legal, and reduce the matter to legal rules and procedures, which is part of the existing problem. No, the suggestion here is that we start, much as Paul Ricoeur starts in his account of moral identity in his work *Oneself as Another*, with an ethical orientation to the “good” and the desire to strive to live well, with and for others, in just institutions. Is it possible to apply this same ethical starting point to the three disciplines here at issue? That will be one of our tasks to determine.

Accordingly, in chapter one, I will start with the ethical domain, and the recent debates between teleology and deontology. There is a tension between the ethical teleological aim - human striving towards the ‘good life’ or good “aim”, in Ricoeur’s language - and its deontological limit, the restriction imposed by the obligation to conform one’s actions to what is ‘right’: the moral sense of what one *ought* to do in any given circumstance.

Philosophers continue to grapple with the issue. In effect, any moral philosopher, theologian and jurist who addresses issues bounded by questions of the ‘good’ and - or - the ‘right’ will have to address this duality.

Chapter one will take us to the current state of the debate, approached from the field of ethics as comprising the quest for personal identity and the constitution of the moral, imputable self. We will examine the reflections by the theological ethicist Hille Haker on the categories used and the levels conceived by different deontological and teleological thinkers as Jürgen Habermas, Charles Taylor, and Paul Ricoeur. We will focus on the question of evil as a fault line showing the need for a turn from the teleological to the deontological sense of obligation. Then, we will take a closer look

at tragedy and how that has been seen to sharpen the question of ethical determinations in the work of Martha Nussbaum and Paul Ricoeur. Where Nussbaum fully embraces a Hegelian approach to the tragic, Ricoeur may be seen to chart a different course, because of his critical commitment to a philosophy of limits, to which Hegel's absolute knowledge is in opposition. Whereas Nussbaum appears to welcome the tragic Hegelian option as a solution for the way forward, Ricoeur proceeds more cautiously, aware of the limits of human action under conditions of plurality and contingency. It is in the face of the tragic that Ricoeur will develop his critical *phronēsis*, a relationship of complementarity between teleology and deontology in practical wisdom.

Following Ricoeur, we have started our inquiry at the level of the good and we turn now to the level of obligation, so by analogy, to the law. It is at law that we encounter enforceable obligations and in **chapter two**, I discuss the limits of law in the context of a proliferation of law in the face of a declining adherence to the unenforceable ethical. We will trace Ricoeur's investigation of the resolution of the hard case through the alternate devices of argumentation and interpretation, seeing in his solution another working out of practical wisdom. We will test assertions of human rights and imperfect duties as a possible means of resolving disputed moral issues at law, and their use to attempt to shore up a shrinking ethical domain. In this regard we must acknowledge the limits of law as to how it operates, what it can accomplish, and what requires consent or free will to bring about.

Chapter three presents the opportunity to observe a debate between jurists and philosophers, several of whom have religious orientations. In the Oliver Wendell Holmes, Jr. Lectures at the Harvard Law School, entitled "The Problematics of Moral and Legal Theory,"¹ Judge Richard A. Posner argues for a strict separation of the law from moral theory. The answers from the panel of commentators invited to respond to Judge Posner's presentation without exception take the opposite view, namely that moral theory *is* relevant to the law. Is this polemic debate possibly the result also of what amounts to a cross-cultural encounter (even though all participants are English-speaking, and in the United States) in which there is a failure to understand based on specialized language, customs, goals, motivations and norms? We will investigate the

¹ "The Problematics of Moral and Legal Theory," *Harvard Law Review* 111, no. 7 (1998): 1637-1717.

level of the disagreement between Posner and the commentators, including legal theorist Ronald Dworkin, philosopher Martha C. Nussbaum, and Judges Charles Fried, and John T. Noonan. The positions represented include a Kantian, a neo-Aristotelian, a hermeneutical, and a Natural Law view.

Judge Posner is confident that the law has all the resources it needs to resolve even the hardest case. Ultimately, he argues for an ‘intuitionist’ approach to disputed moral issues properly before a court of law, where it would appear that (1) there is no controlling applicable law or (2) the application of the controlling applicable law is offensive to the judge’s own sense of morality. This seems self-contradictory or at least equivocal on the use of “moral”, although Posner appears to believe he has steered clear of moral theory by not engaging in a systematic review of the issues at hand by consulting established moral categories and schools of thought.

It is just such an impasse, however, that should be amenable to the application of Paul Ricoeur’s critical *phronēsis*, insofar as it seeks a complementary interaction between two apparently opposing orientations, held in a critical tension. Ricoeur’s starting point in *Oneself as Another* is the individual’s desire to “live well”, “aiming at the ‘good life’ with and for others, in just institutions.”² Can we not see also how such an approach might move us forward in the debate between Posner and his commentators? How might we begin to structure an interaction between moral theory and the law that is *complementary* rather than argumentative, or invasive? We will have occasion to note one area of possible common ground in the exchange between Judge Posner and Judge Noonan, with respect to the expansion of the concept of altruism, to include love, or a generosity that goes beyond mere reciprocity between equal partners in justice.

To breach the impasse reached in the debate of Posner with his critics, **chapter four** will look at one way in which this attempt at a complementary interaction might be initiated, namely by what appears to be a presupposition of the law in the matter of a party’s ethical identity and moral conscience. Here, we will examine the issue of the unity or fragmentation of the moral subject. The traditional concept of conscience will be enriched by the philosophical enquiries explored in chapter one as well as additional

² Paul Ricoeur, *Oneself as Another*, trans. Kathleen Blamey (Chicago: University of Chicago Press, 1992), 172.

enquiries by, e.g., Paul Ricoeur and Hannah Arendt, into internal integrity and thinking as an inner dialogue, whereby the self is in conversation with itself, in an enterprise of reflective examination, judgment, and justification. If the law presupposes this moral agency, accountability, and culpability on behalf of the parties before it, its assumptions need to be articulated.

This situation of conflict before the law is where I consider Hannah Arendt's position on the dimension of forgiveness as an internal property of human agency. Paul Ricoeur critiques Arendt's assumption of forgiveness as a natural part of human capabilities. Instead, he shows up the limits of morality in an "eschatological" dimension of forgiveness opened up from elsewhere.³

In chapter 3, the one area of possible agreement that arose in the discussion between Judge Posner and Judge Noonan was the link between religion and love (although the problem remains what this could mean, given Posner's rejection of morality). The question of the role of love arises again in chapter 4 in Paul Ricoeur's comparison between the Golden Rule and what he calls the "Economy of the Gift", opened up in a faith perspective. Here again we encounter a tension or duality of apparently discordant effects: the Golden Rule, which would apply the rule of equivalence, and the Economy of the Gift - arising out of Jesus' commandment to love even one's enemies - which proposes a *non*-equivalence, namely the love of those who hate; the giving to those who take; the blessing to those who curse.

It is in Ricoeur's exploration of the Golden Rule and the Economy of the Gift that he proposes the relationship as being mutually corrective, but out of which a "logic of superabundance" arises, serving to transform and renew our ethical interactions with one another in accordance with the Christian tradition of forgiveness and redemption. If it is true that a shrinking of the ethical domain is being seen in an increase in the effective range of law, as concluded in chapter 2, and that the limits of law prevent the law from acting in such a way as to renew individual moral values and/or identity, as claimed as the result of the reflections in chapters 2 and 4, then we might argue that it is here that the religious voice has an important role to play in ethical and legal life.

³ Paul Ricoeur, *Memory, History, Forgetting* (Chicago: University of Chicago Press, 2004), Epilogue.

Thus, we come to the **fifth and final chapter**, in which we study the questions of the pre-political foundations of the state, including the question of how values are generated, sustained and renewed. Here, we will encounter the thought of the philosopher and sociologist Hans Joas who finds in the American pragmatist William James' views the beginning of an answer to his question of *The Genesis of Values*. Notably, William James avers that it is in religious experience that values are generated. Judge Posner's pragmatism has taken a different turn to the pragmatism of William James, and it is clear from Posner's presuppositions that he is on an entirely different course, even if he does use the terms 'religion' and 'love'.

The current Continental - and mainly German - debate about the "mentalities" presupposed by the democratic project (Habermas) is finally linked to Charles Taylor, who has also drawn upon the thought of William James, and Taylor's conception of the "social imaginary." For Taylor, questions of the religious voice have moved out of an "enchantment" of day-to-day life and into our very relationships, where God may be seen as central to the very identity of individuals as well as people groups. Taylor emphasizes that the Weberian diagnosis of disenchantment actually expresses a shift to a new space.

From this most recent and ongoing cultural debate, we turn to the legal and political question of what the "separation" between church and state entails. What have been the historical considerations underlying this concept and how have they been transformed into constitutional precepts? We will look at the American model, as well as the Irish one, and consider the silencing of the religious voice in the public space which has largely resulted from what started out as a desire to *promote* religious freedom and freedom of conscience. A new stage has been reached in the debates about the role of religion for fleshing out what constitutes "public reason" in civil society. Jürgen Habermas increasingly supports an increased role for religious voices, although he started from a position which would have limited religious input into public discourse. Yet even the discourse ethicist warns that this translation, which has to be attempted from both the secular and the religious side, may not always be accomplished without remainder.

I conclude with what the religious voice might contribute to public debate as well as to the law, where the debate has moved to that forum. Beyond questions of the source of values following Joas, and motivation to continue the dialogue, Ricoeur provides insight as to the hope that is provided in no other way. In hope, then, we might find the motivation to engage in and sustain dialogue on our vision for society and the policies appropriate as means towards this goal. Each of the three disciplines: law, ethics, and religion, has an irreplaceable part to play in working out this vision. Here, we may recall the ethics of responsibility that H. Richard Niebuhr envisioned, in which he positioned an ongoing dialogue as his starting point, responding to all things as if to God, and responding in such a way as to continue the dialogue.⁴

It is in this sense, I contend, that an answer to the position embodied by Judge Posner is needed, a position which denies the limits of law, confident in the self-sufficiency of the legal sphere. It is my hope that this study might provide a starting point.

⁴ H. Richard Niebuhr, *The Responsible Self: An Essay in Christian Moral Philosophy* (San Francisco: HarperSanFrancisco, 1978), 126.

Chapter 1

Recent Debates Between Deontology and Teleology

In the history of ethics, two major approaches can be distinguished. One is the teleology of Aristotle, in which the main focus is on a striving towards the 'good life' as *telos*, meaning end or purpose. The second approach is the deontological basis of Kant, in which the focus is shifted instead to the question of individual obligation - or duty - which can be compelled by the exterior sanction of the law. In this regard, the deontological approach to ethics may be confused with a rule of law, or legalistic orientation. The law itself, however, also has a theoretical - or philosophical - framework, which plays out along similar lines.

In this chapter, we will be looking at these two approaches from an ethical perspective. In subsequent chapters, we will also be looking at the law in this regard, and will be able to see how the law operates deontologically through exterior sanctions, for example, as well as teleologically, insofar as the law presupposes certain values. Ultimately our question involves the *limits* of law, and where it may benefit from a dialectical discourse with ethics and, beyond that, with the religious. It is in the difficult relationship between deontology and teleology that I shall hope to find the answer.

These two approaches have typically been seen as a duality in ethics - either one, or the other - as, for example, in the dispute over ends versus means, or in the question of the supremacy between the 'good' or the 'right'. That view has been put into question by more recent proposals of ethics that mediate between the two, most notably by Paul Ricoeur, who summarizes:

It is usually assumed in moral philosophy that a teleological approach, as exemplified by Aristotle's ethics of virtue, and a deontological approach, as

heralded by Kant's ethics of duty, are incompatible; either the *good* or the *right*, to designate these two major traditions by their emblematic predicates.⁵

The virtues that flow out of the quest for the good life are thus a part of the teleological ethical tradition, also denominated virtue ethics, and have been set over against an opposition of duty. Duty, in turn, is itself set against natural inclinations. Ricoeur questioned that strict duality:

It is presumptuous to aim at a kind of conciliation between Aristotle and Kant, namely between an ethics of virtues linked to the qualitative plurality of the goods themselves, and an ethics of moral obligation which reduces the good to the right and the right to the dutiful because of violence? [sic] But, if this presumption should be given up, how could we avoid becoming schizophrenic with one Aristotelian half-brain and another Kantian half-brain?⁶

After taking stock of the current state of impasse in philosophical ethics, Ricoeur's second quote shows the need for – if not the possibility of – an approach to ethics that is able to relate the two traditions, namely Aristotle's ethics of striving and Kant's morality of obligation, to each other. I shall investigate his survey of the state of the debate in order to be able to delineate more precisely the points of contact – and of conflict – between the disciplines of (1) ethics in these two understandings, and (2) law.

A distinction between the good and the right marks the continuing nature of the debate between these two ethical approaches, yet a further complication is an imprecise (or perhaps simply inconsistent) use of the “emblematic” words and predicates not only in everyday language, but also in academic circles, particularly as between those from differing disciplines. Thus, part of the task ahead is to discern the meaning that the concept of the “right” takes on in different philosophical systems, in the theory and practice of law, and in different approaches to Theological Ethics. The concept of the “good” will differ according to these counterparts as well.

⁵ Paul Ricoeur, “Teleological and Deontological Structures of Action”, in *Contemporary French Philosophy*, ed. A. Phillips Griffiths (Cambridge: Cambridge University Press, 1987) 99-111, 99.

⁶ Ricoeur, “Teleological and Deontological,” 111.

It is along the fault line of this philosophical tension between deontology and teleology, as expressed in the distinction between the right and the good, that we will approach the relationship between law and ethics. I shall start this investigation by looking at the terminology and its respective contexts.

Notions of the “good” proceed from a teleological view of the human being in the cosmos. Teleology has been defined as:

The study of the ends or purposes of things. The idea that there is such a thing as the end or purpose of life is prominent in the Aristotelian view of nature (and ethics), and then in the Christian tradition.⁷

Deontology is seen as:

Ethics based on the notion of a duty, or what is right, or rights, as opposed to ethical systems based on the idea of achieving some good state of affairs (*see* consequentialism) or the qualities of character necessary to live well (*see* virtue ethics).⁸

Interestingly, neither of these definitions is explicitly defined as over against the other. Neither, however, are they defined in such a way as to contemplate their working together as different stages of a single, unified approach, with the possible exception of Paul Ricoeur.⁹ This is further borne out by looking at another term of common usage in this subject area, namely “morality”. The same Oxford Dictionary of Philosophy defines it as follows:

Although the morality of people and their ethics amount to the same thing, there is a usage that restricts morality to systems such as that of Kant, based on notions such as duty, obligation, and principles of conduct, reserving ethics for the more Aristotelian approach to practical reasoning, based on the notion of a virtue, and generally avoiding the separation of ‘moral’ considerations from other practical considerations.¹⁰

⁷ Simon Blackburn, *Oxford Dictionary of Philosophy* (Oxford: Oxford University Press, 1994), 374.

⁸ Blackburn, *Philosophy*, 100.

⁹ See Paul Ricoeur, “Ethics and Human Capability: A Response”, in *Paul Ricoeur and Contemporary Moral Thought*, ed. John Wall, William Schweiker and W. David Hall, (New York: Routledge, 2002) pp. 279-290.

¹⁰ Blackburn, *Philosophy*, 251.

In effect, while Blackburn's report of the general view would concede that morality and ethics "amount to the same thing", he sees the adjective 'moral' practically as having taken up the banner of deontology, whereas the 'ethical' refers to a teleological approach. This allows us to reposition the dispute as between two different levels, i.e., the level of morality versus the level of ethics, instead of as alternatives on a single level, between two approaches and two incompatible aims.

Paul Ricoeur also notes this difficulty in a more recent article in which he examines the alternatives (moral as opposed to ethical) as part of a single specific human capability, whether it is called moral *or* ethical.

[M]ost important is an attempt to redistribute in new ways the several fields related to the competing concepts of ethics and morality. We need two terms. There were always two terms: *ethics and morality*. Why? There is no compelling reason in the etymology, because both terms have to do with the customs, the ethos. What is the need for two concepts? ¹¹

At the same time, Ricoeur sees this dual aspect of ethics and the "appropriate location of the term *ethics*" as both the "real difficulty" and "most difficult problem in this field."¹² His solution is to see morality as bridging in both directions, towards the orientation for a flourishing life (which he does not devalue, as does Kant), but also toward the applied level of "practical wisdom."

Ricoeur now approaches the problem from "the moral level, that of obligation, as a level of reference of the whole investigation related to the use of the terms *ethics* and *morality*."¹³ This is because it is from this level that "two uses of the term *ethics* are required: a backwards, so to say, grounding of ethics on the one hand, and an ethics of practical wisdom on the other hand."¹⁴ It is morality, Ricoeur tells us, that functions to "connect [those] two levels of ethical life, the basic one and the applied one."¹⁵

¹¹ "Response," 285.

¹² "Response," 285-286.

¹³ "Response", 285.

¹⁴ "Response," 285.

¹⁵ "Response," 287.

We will look, then, at the current state of the debate between deontology and teleology – and in particular, recent promising attempts to give effect to both ethical branches – which will provide us with the starting point we will need to be able to approach the relationship between law and ethics. I will show that this relationship is affected by the dialectic between teleology and deontology operative in ethics, but is made more complex by the institutional setting of law, interdisciplinary aspects such as terminology, overall goals and spheres of operation, and the difficulty of establishing interdisciplinary channels of communication. Is law the social institution that takes over when moral imperatives fail, or does it just have the role of a fence, by way of its sanctions? Or, is there another perspective on the interface between values, principles and law in a society whose members are seen as self-directing and solitary citizens?

Turning, then, to the current nature of the debate, let us look first at the Christian ethicist, Hille Haker, who notes three different approaches to ethical and moral life in their significance for personal identity in contemporary ethics. More specifically, she investigates how the relationship between deontology and teleology is worked out by several philosophical authors, namely Jürgen Habermas, Axel Honneth, Hans Krämer, Charles Taylor, and Paul Ricoeur. Those approaches are described by her as extrinsic (1), intrinsic (2), and complementary (3).¹⁶

I. Ethics and Moral Identity

1. The Extrinsic Approach

Jürgen Habermas exemplifies the extrinsic approach, which describes a “strict separation between ‘aiming for the good life’ to use Ricoeur’s phrase, and the normative claims of morality.”¹⁷ Habermas proceeds along deontological lines, following Kant. An extrinsic approach may also be based upon a teleological orientation, however, and Haker gives a second example of extrinsic approach in Hans Krämer’s book *Integrative Ethik* (1992), which focuses primarily on the ‘good life’ in a

¹⁶ Hille Haker, “Narrative Identity in the Work of Paul Ricoeur,” in *Memory, Narrativity, Self and the Challenge to Think God: The Reception within Theology of the Recent Work of Paul Ricoeur*, ed. Maureen Junker-Kenny, Peter Kenny (Münster: LIT Verlag, 2004), 134-52, 143.

¹⁷ Haker, “Narrative Identity,” 143.

teleological orientation.¹⁸ Like Habermas, though, Krämer sees the relationship between the good life of ethics as extrinsic to the question of normative, or deontological thinking.

Habermas incorporates the relationship between the good and the right within his discourse ethics. He notes the possibility that the values underlying the pursuit of the good life *can* be “normative”, but this only if they are unquestioned. As Haker points out, that is because of how Habermas has structured *argument* as the type of ‘reason that counts’ in his Discourse Ethics. Because Habermas defines a successful argument on the basis of a universal *consensus* (“X can count as a moral argument if anybody could – and therefore must – either consent to it or contradict himself as a rational person”)¹⁹, the very act of questioning the validity of the source of a moral claim undermines the status of that moral claim as any sort of normative moral argument recognized by Habermas. As is typical for deontological approaches, he distinguishes sharply between origin and validity.²⁰ The fact that norms, e.g., the idea of Human Rights, may have originated in particular life forms or communities has nothing to do with their validity, which for Habermas, in keeping with Kant, has to be established by way of universalization. He notes that “the moral principle²¹ owes its rigorously universalistic character precisely to the assumption that arguments deserve equal consideration regardless of their origin and, hence, also ‘regardless of who voices them.’ ”²² The strength of this approach is that it allows one to think of, argue for, or critique the validity of norms independently of the power of particular communities.

While agreeing to the need to distinguish between an ethos and the validity of the norms it espouses, Haker identifies problems with Habermas’ approach as follows: 1.) Habermas sees moral identity as “post-metaphysical”²³; 2.) Habermas does not see the

¹⁸ Haker, “Narrative Identity,” 145.

¹⁹ Haker, “Narrative Identity,” 144.

²⁰ Jürgen Habermas, *Justification and Application: Remarks on Discourse Ethics*, trans. Ciaran Cronin, (Cambridge, MA: MIT Press, 1993), 32-33.

²¹ Earlier described as the “obligatory character of justified norms [which involve] the notion that they regulate problems of communal life in the common interest and thus are ‘equally good’ for all affected.” Habermas, *Remarks*, 33.

²² Habermas, *Remarks*, 33.

²³ Haker, “Narrative Identity,” 144. Haker critiques this view of moral identity by stating that it is “an identity which in its normative elements can only be defined by

“justification of self” as a “vertical concept, as is the case, for example, in a theology of justification, but in the horizontal concept of public recognition”²⁴; which leads 3.) to Habermas’ moral theory having to “concentrate on the normative conflicts and the question of just and impartial moral judgments . . . [by which] the universalistic perspective of recognition of and respect for the other becomes a tradition of modernity itself without the trap of particularity.”²⁵ This last point is, for Haker, the “principal problem of his theory of moral identity: while it might be possible to build a normative moral theory without turning to the traditions and experiences of those who will have to follow its claims, this might not be the case with moral identity.”²⁶

Insofar, then, as Habermas equates moral identity with the post-metaphysical, he restricts questions of the normative to what remains after the individual’s break with tradition and custom - or the “postconventional.” At the same time, Habermas turns from a question of a vertical justification of the person - again in keeping with a break with the metaphysical - turning instead to a horizontal picture of justification, in the form of agreement and approval from others. In this way, Habermas takes the so-called “most important” traditions and experiences out of what has gone before, and attempts to bond them with an unquestioned “modernity”. Habermas has since moved away from this demand, implied in making the “postconventional” stage a requirement for universality, and has developed a greater recognition of supporting traditions for the principles of modernity. One can see his reference to a Species Ethic set out in *The Future of Human Nature*²⁷ as such a correction, as well as his new position on the irreplaceable role of religious contributions to dialogue in the public sphere in his *Zwischen Naturalismus und Religion*.²⁸

this break with subjective commitment to a particular tradition or conviction.” Haker, “Narrative Identity,” 144.

²⁴ Haker, “Narrative Identity,” 144 (citing Habermas, “Individuation through Socialization: On G. H. Mead’s Theory of Subjectivity,” in *Postmetaphysical Thinking*, trans. William M. Hohengarten (Cambridge: MIT Press, 1992), 149-204.) Haker, “Narrative Identity,” 144n.8.

²⁵ Haker, “Narrative Identity,” 144.

²⁶ Haker, “Narrative Identity,” 144.

²⁷ Jürgen Habermas, *The Future of Human Nature*, (Cambridge: Polity Press, 2003).

²⁸ Jürgen Habermas, *Zwischen Naturalismus und Religion* (Frankfurt: Suhrkamp, 2005).

In his more recent work, Habermas deals with the specific problem posed by the possibility of new genetic interventions. Interestingly, Habermas retains his extrinsic approach, but asks for morality to be ‘embedded’ in a species ethics. Our anthropological self-understanding as a species plays a role in light of the problems posed by questions of enhancement and cloning.²⁹ He also notes that this type of case demonstrates a motivational weakness – why should we want to be moral? – and that an “assessment of morality as a whole is itself not a moral judgment, but an ethical one, a judgment which is part of the ethics of the species.”³⁰ When he speaks of the “embedding of morality in an ethics of the species”,³¹ he notes the usual priority of the just (i.e. morality) over the good, even as he cautions that such a priority “must not blind us to the fact that the abstract morality of reason proper to subjects of human rights is itself sustained by a prior *ethical self-understanding of the species*, which is shared by all *moral persons*.”³² Ultimately, however, Habermas appears to pin his hopes on the ability demonstrated previously at the turn to a pluralist culture to revert to principles of the ‘right’, independent of a shared common worldview or even just a minimal ethical self-understanding:

When the religious and metaphysical worldviews lost their binding nature and the transition to a tolerated pluralism of worldviews took place, we (or most of us) did not turn out [to] be cool cynics or indifferent relativists, because almost by reflex we held – and *wanted* to hold – to the binary code of moral judgments being right or wrong. We adjusted the practices of the lifeworld and of the political community to the premises of a rational morality and of human rights because they provided the common ground for a human existence irrespective of any differences arising from the variety of worldviews. Perhaps the affective opposition raised today against a dreaded change in the identity of the species can be explained – and justified – by similar motives.³³

²⁹ Habermas, *Future*, 39 (“For ethical political questions. . . , it is ‘so many cultures, so many customs.’ The questions raised, in contrast, by our attitude toward prepersonal human life are of an altogether different calibre.”)

³⁰ Habermas, *Future*, 73. See also Habermas, *Remarks*, 33-35, where Habermas had earlier noted the difficulties attendant on unhooking “*direct* action-regulating force” from ‘justified valid moral judgements’. “A valid moral judgment does indeed *signify* in addition an obligation to act accordingly, and to this extent every normative validity claim has rationally motivating force grounded in reasons.” Habermas, *Remarks*, 33. That ‘obligation’, however, is subject to “weakness of will”. Habermas, *Remarks*, 33.

³¹ Habermas, *Future*, 37-44, 37.

³² Habermas, *Future*, 40 (emphasis in original).

³³ Habermas, *Future*, 73-74 (emphasis in original).

Habermas thus increasingly acknowledges the importance of the teleological, yet remains ultimately faithful to an ascendancy of the deontological. His approach remains extrinsic insofar as he evaluates the particular notions of the good as “resources” but not as ultimate arguments. The work cut out for discourse is still at the deontological universal level, but Habermas increasingly recognizes both the need to “embed” the ‘moral language game’ in a conversation about the nature of the human species³⁴, and to use insights into social pathologies, that especially religions offer, as contributions to a mutual learning experience in democratic opinion and will formation. Maureen Junker-Kenny says it well:

It is striking to see [Habermas] devise an independent category for religion due to its sensitivity for pathologies and its pragmatism-defying utopian outreach towards reconciliation. In his view, what religions have to add is not so much the generosity inspired by faith in the prevenient love of God, but the problem-spotting capacity of their salvation-inspired imagination.³⁵

The question now presented is whether Habermas’ most recent work alters his view of law as the limit of communicative reason.³⁶ How is this view affected if, as he appears to, he takes the notions of the good that come from religion – specifically, but not exclusively – more seriously? Second, how does he chart the relationship between notions of the good and the values that underlie so-called ‘communities of virtue’, whose “world views are needed as a source of ‘mentalities’ the state cannot create by itself, for motivation, integration, meaning, and renewal”?³⁷ Finally, does Habermas do justice to his Kantian foundations with regard to the question of evil? Can evil be identified primarily with a tendency to put our own interest first, so that starting from

³⁴ See generally Habermas, *Future*, 37-40.

³⁵ Maureen Junker-Kenny, “‘Public Reason’ as Gatekeeper to the Public Sphere: What Place for Religious Contributions to Debates in Civil Society?” 15-16, to be published under the title “Between Postsecular Society and the Neutral State: Religion as a Resource for Public Reason”, in *Religious Voices in Public Places*, ed. Nigel Biggar and Linda Hogan (Oxford: Oxford University Press, 2007) (forthcoming).

³⁶ See, e.g., Jürgen Habermas, “The Language Game of Responsible Agency and the Problem of Free Will: How Can Epistemic Dualism be Reconciled with Ontological Monism?” *Philosophical Explorations* 10, Issue 1 (March 2007): 13-50, <http://www.informaworld.com/10.1080/13869790601170128>. (accessed 14 October 2007), in which Habermas uses an analysis of the criminal law of responsibility in order to demonstrate the limits of discourse between free will and determinism.

³⁷ Junker-Kenny, “Public Reason,” 15.

the Kantian position (as Habermas does) of not instrumentalizing the other and of morality existing in order to honor the other's equal claim to respect and the promotion of their own lives despite our inclination to put our own interest first, will effectively deal with the question of evil? Kant speaks of radical evil; Habermas, however, of the strategic use of communicative language.

We will look more closely at these three questions - (i) law as the limit of communicative reason, (ii) how values and questions of the good relate in communities of virtue, and (iii) the adequacy of language to deal with evil, in the next two sections: the intrinsic approach (2), and the complementary approach (3), in order to show the different anthropological and social political presuppositions for the relationship between law and ethics.

2. The Intrinsic Approach

Charles Taylor represents what Haker has called the intrinsic approach, taking issue with the 'separation thesis' of the extrinsic approach, and seeing instead no "strict separation between the ethical and the moral."³⁸ Taylor focuses on the good life as the location of the 'sources of the self' which inevitably shape the individual life and are expressed in the form of "strong" and "weak" evaluations.³⁹ Thus, for Taylor it is out of the self striving for the good life that the self develops these evaluations of relative value ranging from individualistic preference to so-called "strong evaluations", which assert claims of a normative sort for the individual, if not a universalistic normative claim applicable to others. A strong evaluation goes beyond individualistic and completely subjective preferences, to the expression of value judgments that "introduce a vocabulary of 'excellence'"⁴⁰ in the pursuit of a life worth living.

³⁸ Haker, "Narrative Identity," 145-46.

³⁹ See Charles Taylor, *Human Agency and Language: Philosophical Papers* (Cambridge: Cambridge University Press, 1985), 15-44.

⁴⁰ Haker, "Narrative Identity," 146. Taylor puts it thus: "The strong evaluator envisages his alternatives through a richer language. The desirable is not only defined for him by what he desires, or what he desires plus a calculation of consequences; it is also defined by a *qualitative* characterization of desires as higher and lower, noble and base, and so on." Taylor, *Human Agency*, 23 (emphasis supplied).

Notably, Taylor sharply distinguishes utilitarianism from the ‘good life’ he sees underlying the kinds of strong evaluations which not only shape the life being pursued as worth living, but which also shape the identity of the person pursuing it. This is evident in his critique of attempts to shift the focus of the grounds for strong evaluations to alternate grounds where the evaluation can be made on a *quantitative* basis rather than a qualitative one:

The utilitarian strand in our civilization would induce us to abandon the language of qualitative contrast, and this means, of course, abandoning our strong evaluative languages, for their terms are only defined in contrast. And we can be tempted to redefine issues we are reflecting on in this non-qualitative fashion.⁴¹

It is also evident in Taylor’s description of the “strong” versus “weak” (or “simple”) evaluator or “weigher”,⁴² in which Taylor emphasizes the depth and articulacy of the strong evaluator, contrasted with a shallow inarticulacy of the simple weigher.⁴³

Taylor here touches upon the motivation behind evaluations, beyond strict utility, quantity, or desire. He explains that “[t]o characterize one desire or inclination as worthier, or nobler, or more integrated, etc. than others is to speak of it in terms of the kind of quality of life which it expresses and sustains” and “[m]otivations or desires do not only count in virtue of the attraction of the [viewed] consummations but also in virtue of the kind of life and kind of subject that these desires properly belong to.”⁴⁴

In this, Taylor proceeds from the variety of “incommensurable” recognized goods in society, some of which will ultimately be recognized as “higher goods”, to the concept of what he calls “hypergoods”, by which we measure and judge other competing goods. Taylor explains:

⁴¹ Taylor, *Human Agency*, 21.

⁴² See generally, Taylor, *Human Agency*, 23-26, comparing the two, in which Taylor contrasts the “strong evaluator” to the “simple weigher”. The strong evaluator has a “vocabulary of worth” and can “articulate superiority” insofar as he has a “language of contrastive characterization.” *Human Agency*, 24. The simple weigher, however, is inarticulate. “[F]aced with incommensurables . . . the simple weigher’s experiences of the superiority of A over B are inarticulate.” *Human Agency*, 24.

⁴³ “To be a strong evaluator is thus to be capable of a reflection which is more articulate. But it is also in an important sense deeper. A strong evaluator . . . goes deeper, because he characterizes his *motivations* at greater depth.” Taylor, *Human Agency*, 25. (Emphasis supplied).

⁴⁴ Taylor, *Human Agency*, 25.

Even those of us who are not committed in so single-minded a way [seeking, e.g., the “love of God or the search for justice” as the highest good] recognize higher goods. That is, we acknowledge second-order qualitative distinctions which define higher goods, on the basis of which we discriminate among other goods, attribute differential worth or importance to them, or determine when and if to follow them. Let me call higher-order goods of this kind ‘hypergoods’, i.e., goods which not only are incomparably more important than others but provide the standpoint from which these must be weighed, judged, decided about.⁴⁵

Recognizing that hypergoods and the basis by which we discriminate between higher goods are a source of conflict, Taylor describes what we define as morality today as descriptive of the *boundaries* of hypergoods, with different philosophers providing different descriptions of the applicable boundaries.

There has been a common tendency in modern philosophy to define morality by a kind of segregation, though the definition of the boundary has varied. Kant defines the moral in terms of the categorical imperative, and this in turn by universalizability or by our being members of a kingdom of ends. Habermas in our day identifies a set of issues which have to do with universal justice and hence with the universal acceptability of norms, which are the domain of a discourse ethic; and he gives these a superior status to issues concerning the best or most satisfactory life. In both these cases, and in many others, the ‘moral’ encompasses a domain significantly narrower than what ancient philosophers defined as the ‘ethical’.⁴⁶

Taylor readily admits that “there will always be ranking of goods.”⁴⁷ This is typical of a teleological approach, in which the hermeneutics of a culture is worked out in the priorities of their goods, e.g. liberty, or cohesion, or financial security, or risk taking. The intrinsic approach, however, is shown by an “authenticity” of being true to oneself, instead of a moral distinction between good and evil. It is the specific and individual articulation of the authentic good and authentic application to the situation at hand as well as to the actions under consideration which demonstrates Taylor’s intrinsic approach.

⁴⁵ Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge: Cambridge University Press, 1989), 63.

⁴⁶ Taylor, *Sources*, 63-64.

⁴⁷ Taylor, *Sources*, 64.

Being true to myself means being true to my own originality, and that is something only I can articulate and discover. In articulating it, I am also defining myself. . . . This is the background that gives moral force to the culture of authenticity, including its most degraded, absurd, or trivialized forms.⁴⁸

Where there will be conflicts between strong evaluations, Haker notes that, for Taylor, “the concern is with the question of which self-interpretation is appropriate, authentic and in this sense ‘true,’ and which interpretation is based on a distortion of perception, on a self-deception or illusion, the uncovering of which can lead to a crisis of identity.”⁴⁹ In this way, Taylor opposes the “degraded, absurd, or trivialized forms” of any attempt to be true to self, which otherwise slides into subjective relativism, and “gives sense to the idea of ‘doing your own thing’ or ‘finding your own fulfillment.’”⁵⁰

Thus, Taylor offers a perspective that Habermas ignores, namely the hermeneutical internal motivation of the self towards the good. Taylor collapses ‘moral’ and ‘ethical’ when he speaks of moral, since he is more interested in the motivational resources of individuals. Thus, the term ‘moral’ overlaps with what was previously distinguished by Blackburn and Habermas as ‘ethical.’ Taylor, however, is aware that “high standards need strong sources.”⁵¹ Ultimately, Taylor sees theism as the best background for those strong sources insofar as it gives an incomparable affirmation both to the world and to “life and being, expressed in the very first chapter of Genesis in the repeated phrase: ‘and God saw that it was good’.”⁵² We will return to this link to monotheism later, in chapter 5.

Taylor proceeds individually, in his hermeneutics of ethical striving, in a process of ‘self-interpretation’. He thus provides a superior account to the problem of motivation to the good than does Habermas, who has attempted to overcome this recently-admitted problem with an *a priori*, noting a “*prior* ethical self-understanding of the species,

⁴⁸ Charles Taylor, *The Ethics of Authenticity* (Cambridge, MA: Harvard University Press, 1991), 29.

⁴⁹ Haker, “Narrative Identity,” 146.

⁵⁰ Taylor, *Authenticity*, 219.

⁵¹ Taylor, *Sources*, 516.

⁵² Taylor, *Sources*, 218.

which is shared by all moral persons.”⁵³ Yet Taylor does not resolve the question of where the intuitions themselves come from, which are themselves taken to be good.

A weakness of Taylor’s approach, however, is obvious where 1.) the individual refuses to engage in self-interpretation, or 2.) having engaged, she arrives at a result different to the results envisioned by others similarly situated. No process of conflict-resolution between individuals - or between individual and society - is set forth. Taylor himself acknowledges that if reconciliation of the moral conflicts of modern culture is not possible, then the “articulacy” on the part of the individual, which he has prescribed in order to engage in this interior hermeneutics of ethical striving, “will buy us much inner conflict.”⁵⁴ Ironically, Haker notes that “Charles Taylor’s ‘solution’ for this problem of plurality and particularity in [individual] self-interpretation [where our value systems and interpretations are ‘plural’] consists in a hermeneutical process of ascertaining which goals and ideals are workable for a community.”⁵⁵ Thus Taylor sees the self engaging in individual hermeneutical processes and self-evaluations, reverting to *individual* evaluations of what works best for a *community* in the difficult case, but provides no normative criteria or rules where – inevitably – there is a conflict between 1.) individual answers, 2.) what is best for the community, or 3.) what community is at issue. Hille Haker astutely notes that:

The “good life” reveals itself to be that which corresponds to ethical value judgments and convictions. These, however, are plural, contextually mediated and initially have a truth-content which is only valid at an individual level. According to Taylor, the rightness of ethical convictions is established and corrected in a hermeneutical process of consensus building.⁵⁶

In this, Taylor would seem to approach Habermas with respect to ‘consensus’ – but it seems Taylor looks to consensus to establish what Haker calls ‘rightness’⁵⁷, whereas Habermas would look to consensus to establish what counts as a moral argument.

⁵³ Habermas, *Future*, 40 (emphasis supplied).

⁵⁴ Taylor, *Sources*, 106-107.

⁵⁵ Haker, “Narrative Identity,” 146-47.

⁵⁶ Haker, “Narrative Identity,” 151.

⁵⁷ It might be more accurate to refer instead to the ‘good’ here instead of to the ‘right’, with respect to Taylor’s idea of a greater articulacy and understanding of the *good*, as well as (in the case of conflict) to a consensus as to which account gives the *best* account in terms of making sense of our lives. See e.g., Taylor, *Sources*, 58, describing

Haker deals further with this in her comments about the weakness of Taylor's approach. Specifically, she points out that he does not deal adequately with the problem of justification. She states:

The concept of morality . . . is an intrinsic concept allowing the self the norms which claim to be valid for everybody. However, Taylor's intrinsic approach deals with the problem of justification only in passing, and this obviously is not enough in a world of moral pluralism and practical dissent about how to describe respect for a person.⁵⁸

Thus, Haker points out the hidden move from the individual 'strong' evaluation to universal moral "norms which claim to be valid for everybody."⁵⁹ It could be argued that Taylor deals with this issue in arguing for increasing the articulacy of our conversation about the good, thereby engaging in a process requiring not only articulate communication, but also justification. In that articulation of the good and our "deepest moral allegiances", however, Taylor also notes:

The 'must' here doesn't arise from any *external* argument, which I have tried to show can be of no weight here. Rather it has to do with our identity. In fact, our visions of the good are tied up with our understandings of the self [and we] have a sense of who we are through our sense of where we stand to the good.⁶⁰

Certainly there is no precise description of the process. As Haker notes, the "hermeneutical process itself needs normative criteria to be of practical relevance, but these are easily lost in the intrinsic approach which takes the good people aim at to be the right goods."⁶¹ The intrinsic approach as exemplified by Charles Taylor also – necessarily – takes people themselves as 'good' and as eschewing evil or, where evil *does* arise, as dealt with by the embracing of a strongly-based (probably theistic) hypergood, which *ought* to inspire love of the constitutive good in the hermeneutically-striving individual, and which would encourage action-in-accordance, namely action

what Taylor calls the "BA principle" – the *best account* principle – which "is trumps" in the sense of making sense of our lives.

⁵⁸ Haker, "Narrative Identity," 147.

⁵⁹ Haker, "Narrative Identity," 147.

⁶⁰ Taylor, *Sources*, 105 (emphasis supplied).

⁶¹ Haker, "Narrative Identity," 147.

antithetical to evil.⁶² Taylor does not provide a safeguard for the event of that *not* happening, where, e.g., evil is embraced. In this regard, Habermas' insistence on an extrinsic deontological level is superior to what amounts to Taylor's intrinsic optimism.

3. The Complementarity Thesis between Deontology and Teleology

From the weak points of each of the two prior approaches, the contribution of Paul Ricoeur can better be assessed.⁶³ Like Taylor, Ricoeur sees a connection between self-esteem and the evaluations and values which move to action, especially when such evaluations are related to the individual's 'core of identity'. It is the "sense of self-esteem which moves the concern with the good life into the area of ethics."⁶⁴

Ricoeur's notion of the self, however, already recognizes that the 'good life' necessarily involves others as well as institutions. He thereby picks up a tradition of ethics "long forgotten because it is based on emotions and appeared incapable of being rigorously argued for."⁶⁵ Haker puts it as follows:

Goodwill towards others, *sollicitude* [sic], in Ricoeur's term, is a central aspect of our ethical involvement with others. . . . In the language of modernity, solicitude consists in care for another and others, who in this way become a factor in my action. Ricoeur grounds it as a spontaneous impulse in striving for the good life. A good model for this is friendship, in which we experience respecting another person as something we want to do and precisely not as something we ought to do, in the way that morality will demand it.⁶⁶

From solicitude, which involves others in the individual quest for the good life, Ricoeur moves into the institutional realm. Not all of our relationships will be individual and interpersonal, but there will also have to be other structures – institutions in fact – that will allow us to deal with one another. In this regard, Ricoeur inserts another value at the foundational level of pursuit of the good life, namely justice. This appears warranted to ensure that the institutions necessary to direct our non-interpersonal⁶⁷

⁶² See, e.g., Taylor, *Sources*, 95-96.

⁶³ Dealt with by Hille Haker at "Narrative Identity," 147-152.

⁶⁴ Haker, "Narrative Identity," 147.

⁶⁵ Haker, "Narrative Identity," 147-149

⁶⁶ Haker, "Narrative Identity," 148.

⁶⁷ Interpersonal relationships and dealings are, of course, dealt with by solicitude; good will; the Golden Rule; 'respect'.

dealings will be just – if only to deal justly with me and mine. “A sense of justice is therefore the basis of all more than individual relationships and structures.”⁶⁸

Ricoeur formulates this relationship on three levels, as one can see in his definition of the inherent ethical orientation of the self:

Let us define “ethical intention” as *aiming at the “good life” with and for others, in just institutions.*⁶⁹

Having expanded the scope of the ‘good life’ to be striven for by the individual and anchored this orientation at the level of spontaneous striving, Ricoeur turns to an age-old problem which he has dealt with from his very first philosophical writings: that of evil. Notably, neither Habermas nor Taylor deals extensively with this phenomenon. Habermas does not give evil the same counterposition to morality as does Kant, for whom the need for the Categorical Imperative arises from our propensity to instrumentalize the other. Nonetheless, Habermas appears to find the possibility of evil adequately dealt with by his start in the Kantian position that takes morality to exist in order to honor the other’s equal claim to respect, despite our inclination to put our own interest first. Taylor, on the other hand, deals with the question primarily in terms of the appropriate hypergood to be articulated and/or chosen instead. Ricoeur presents it as follows:

Because there is evil, the aim of the “good life” has to be submitted to the test of moral obligation, which might be described in the following terms: “Act solely in accordance with the maxim by which you can wish at the same time that what *ought not to be*, namely evil, will indeed *not exist*.”⁷⁰

Haker takes this general formulation of evil and the maxim by which Ricoeur seeks to overcome it, and formalizes it along the same three fronts into which Ricoeur has expanded the good life, namely individually, with respect to others, and with respect to institutions.⁷¹

⁶⁸ Haker, “Narrative Identity,” 148.

⁶⁹ Paul Ricoeur, *Oneself as Another*, trans. Kathleen Blamey (Chicago: University of Chicago Press, 1992), 172 (hereafter *OA*).

⁷⁰ *OA* at 218.

⁷¹ Haker, “Narrative Identity,” 148-49.

First, individually, she sees evil as:

[D]isregard of moral autonomy in Kant's sense, as Kant used this notion to describe a person's capacity for morality. To deny one's responsibility for one's own life and actions, to remain in a position of dependency and disenfranchisement when there are alternatives, to refuse to be or become a moral subject: this contradicts not merely the conditions of self-esteem on the level of ethical striving; it is much more disregard of one's self. Respect for the self is accordingly morally right as respect for an authority which has to give itself moral laws.⁷²

Second then, with respect to evil in our dealings with others, Haker notes that Ricoeur here translates solicitude into respect for others, thereby affirming a moral footing *compelling* respect even where one has lost "an emotional reason to encounter another person with goodwill."⁷³

Third, with respect to evil and the establishment of structures, Haker asserts that Ricoeur again engages in a 'translation' – this time from a "sense" of justice into a "*principle* of justice which is grounded on a level which transcends the individual. Here, e.g., Rawls's theory of justice can be brought in, and the differentiation carried out by Michael Walzer as well."⁷⁴

Having investigated evil in these three dimensions, Haker restates Ricoeur's maxim on this three-fold basis. Summarized into one maxim, I paraphrase it as follows:

*Act according to the maxim which means that you can at the same time desire that that which should not be, is not, namely: (1) the disregard of your own self; (2) the disregard of another person; (3) the establishment of unjust structures.*⁷⁵

⁷² Haker, "Narrative Identity," 149.

⁷³ Haker, "Narrative Identity," 149.

⁷⁴ Haker, "Narrative Identity," 149 (emphasis added), referring, of course, to Michael Walzer's *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), in which a diversity of goods is sought to be taken into account by means of "spheres of justice." Ricoeur notes that a problem remains of how one is to 'arbitrate' where different spheres come into contact, over and above any question of producing an "exhaustive list of these spheres of justice, nor even to clarify the fate of the idea of equality in each of them." Ricoeur, *OA*, 252.

⁷⁵ See p. 149 where it is stated by Haker in 3 separate maxims – breaking down the more theoretical maxim proposed by Ricoeur himself "that what *ought not to be*,

Even with the more particular breakdown of the maxim from avoidance of the existence of evil to the more specific regard of oneself, the other, and the establishment of just institutions, Haker acknowledges:

This newly formulated moral imperative for the stemming of evil is, however, too formal to be able to be directly useful for the practice of shaping one's life or establishing institutions. In addition, it paints in black and white, whereas in practice it is often the case that only shades of grey and borderline cases are to be found. For this reason it seems sensible to assume a relationship of complementarity between the ethics of the good life and morality, although here Ricoeur assigns the foundational power to the ethics of the good life.⁷⁶

Hille Haker does not present in this article a completely worked-out account of Ricoeur's view of the so-called *ascendancy* of the teleological. It is important to distinguish between what Ricoeur calls the "naïve" ethical aim, at the beginning of the practice of practical wisdom, which is then subjected to the moral norm (because of evil) and then reverts back to the ethical level but now utilizing a *critical phronēsis*, resulting in considered *conviction* and – ultimately – action.

Moreover, Ricoeur's approach - alone of the three we have considered - is committed to harmonizing the objective with more subjective aspects of the person along all the levels of his inquiry:

This correlation between the objective mood of discourse and the reflective one governs the structure of *Oneself as Another*. I can put this correlation under a precept in the form of a slogan: "explaining more in order to understand better." This slogan conveys to the whole enterprise a workable articulation between two sides of each particular problematic: the linguistic and the reflective, the objective and the existential.⁷⁷

Here the level of inquiry shifts for the moment to the level of which emphasis - deontological or teleological - is highlighted, rather than how they are related.

namely evil, will indeed *not exist*" – quoted from *OA* by Haker, "Narrative Identity," p.148.

⁷⁶ Haker, "Narrative Identity," 149.

⁷⁷ Paul Ricoeur, "Ethics and Human Capability: A Response" in *Paul Ricoeur and Contemporary Moral Thought*, ed., John Wall, William Schweiker, and W. David Hall, (New York: Routledge, 2002), 279-90, 281.

Habermas, of course, highlights the deontological and focuses primarily on the objective, only recently making forays into the more reflective subjective in light of escalating violence of terrorists as well as the continuing challenges of bioethics. Taylor highlights the teleological, and focuses on the *subjective* and reflective, trying to incorporate more objective aspects affecting the self by making things like culture, background, history, norms, societal expectations, etc. a necessary part of the individual's identity, if that identity is to have any weight or consequence:

The agent seeking significance in life, trying to define him- or herself meaningfully, has to exist in a horizon of important questions. . . . To shut out demands emanating beyond the self is precisely to suppress the conditions of significance, and hence to court trivialization. [In other words:] I can define my identity only against the background of things that matter.⁷⁸

Looking at all three approaches, Haker concludes:

In summary, my discussion of different modes of the link between personal and moral identity has come to the following conclusions. The notion of moral identity is ambiguous: on the one hand it means striving for the good life, on the other the recognition of normative claims with regard to other people. There are different systematic options for understanding this relationship in the context of moral theory. The extreme positions can either be understood as an extrinsic relationship, i.e., as a clear distinction between the two areas, or as an intrinsic relationship, incorporating the transition from one to the other. In contrast, Ricoeur takes up a middle position which takes complementarity as its starting point and at the same time subordinates morality to ethics.⁷⁹

Haker's understanding of Ricoeur's position as occupying "middle ground" is unfortunate, if not misleading. It may indeed be a "complementary" starting point, but it is a *journey* that Ricoeur describes, starting in teleology, passing through deontology, and returning – where necessary – to teleology, by way of a now *critical phronēsis* resulting in conviction (and action accordingly). What difference does this make? It emphasizes the role of the two poles – the extremes – and travels between them, seemingly as often as necessary, instead of seeking to reduce the field to a manageable size – the "middle position." With respect to the two aims of ethics, Ricoeur stresses

⁷⁸ Taylor, *Authenticity*, 40.

⁷⁹ Haker, "Narrative Identity," 150-151.

the need to retain *both* poles and would reject any suggestion of a synthesis between the two, born out of any dialectic that did away with any conversation partner.

Nonetheless, Hille Haker's treatment of Ricoeur demonstrates the promise that his complementary approach – in a critical *phronēsis* – holds for the impasse in philosophical ethics between the teleological aim and the deontological obligation. This will be further developed in the relation of each to the sphere of law.

One major point remains to be made, however, before we turn to the investigation of the state of this debate within the discipline of law. It is the question of the “hard case” or the so-called ethical dilemma. It is the ethical dilemma that seems to chart the limits of any attempt to reconcile the good and the right insofar as it presents a case in which a “reconciliation” of the two is apparently not possible under *any* approach. Thus, a course of action may be good – but not ‘right’ – or perhaps ‘right’, but in no way good, and no amount of ‘practical wisdom’ appears to yield an answer or, rather “the” answer. Law frequently only exacerbates the situation by lending itself to a confusion between the difference between the legal and the legitimate.

This type of case has been analyzed by way of the *tragic*, which category figures importantly – and productively – in the thought of Paul Ricoeur⁸⁰ as well as that of Martha C. Nussbaum.⁸¹ I will argue that it is in the tragic case that we can best recognize – if not resolve – the limits of any attempted reconciliation between the good and the right, and thereby gain a better appreciation of the values inherent in each, even as we might find it necessary to deny or temporarily dismantle one of several competing values in the particular, tragic, case. Therefore, the possibility of the tragic case should not properly be seen as strengthening the argument that denies the viability of the attempt to work out a complementary relationship between the good and the

⁸⁰ Ricoeur, *OA*, 241-249.

⁸¹ Martha C. Nussbaum, “Ricoeur on Tragedy: Teleology, Deontology, and Phronēsis,” in *Paul Ricoeur and Contemporary Moral Thought*, ed. John Wall, William Schweiker and W. David Hall (New York: Routledge, 2002), 264-76. See also Martha C. Nussbaum, “The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis,” *Journal of Legal Studies* 29 (2000): 1005-36, and her earlier work, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge: Cambridge University Press, 1986).

right, but rather as a case study to assist in approaching the relatively rare tragic case, recognizing that constructing principles from exceptional cases is problematic.

II. Ethics and the “Hard Cases”

One initial question to address at the outset is the basis by which we would equate “hard cases”, ethical dilemmas, and tragedy. A case may be “hard”, for example, because of a perceived difficulty of determining the true facts, which witness to believe, or which law applies. In and of itself, that kind of case is not the kind of “hard case” which approaches the question of tragedy. Thus, by “hard case”, we will mean a case that presents the kind of conflict between the ethical aim and moral obligation that we will see implicated in the tragic. We will look at this in some detail in this section.

Likewise, the “ethical dilemma” does not necessarily rise to the level of the tragic. Instead, it can describe the impasse between two incommensurable goods. At times, that impasse might assume a tragic dimension where there appears to be no morally acceptable choice available. Other cases, however, might entail an impasse that presents a dilemma only because of a subjective reluctance to make the choice that is morally acceptable. Again, we are here concerned with the ethical dilemma that approaches the tragic, where it appears no acceptable choice is available, and yet action is required.

At this stage of our inquiry, we are not looking at questions of actual cases to be determined as in a court of law, or concerned with answers - and the reaching of the “correct” answer - but rather continuing to investigate the kinds of ethical and moral reasoning found to be constitutive of the person in the thought of Paul Ricoeur as well as Charles Taylor. In this regard, then, we will be looking at literary accounts of the tragic. We will see the role of literature functioning also as a cultural narrative by which we may engage in a joint exploration of the tragic question. We start with the relatively rare tragic case, rather than the typical case, because it is in the tragic case that we may see the operation of Ricoeur’s critical *phronēsis*, a level of ethical reasoning which is not implicated in the typical case of day-to-day decisions.

1. The Tragic Case in the Analyses of M. Nussbaum and P. Ricoeur

The neo-Aristotelian philosopher Martha Nussbaum investigates the tragic and its impact on ethics by way of the Indian epic *Mahabharata* as well as Sophocles' *Antigone*, which both Hegel and Ricoeur also drew upon. She uses *Mahabharata* to illustrate what she calls the 'tragic question', why it must be asked, and the obstacles to the effective asking of it. *Antigone* demonstrates for Nussbaum the contribution she sees from Hegel in the category of the tragic for purposes of better understanding the methods of approaching, resolving and ultimately avoiding in future what she calls the hard case.

Here we would have to note an immediate distinction between contingencies that *can* be avoided as opposed to absolute contingencies and the vulnerability of the human condition so that, e.g., we do not overlook the legitimacy of being a victim of illness, accident, or other unavoidable misfortune. There is also a distinction to be drawn between tragedy and mere misfortune, however, no matter how severe the misfortune. As we shall see, the tragic involves being presented only with apparently immoral choices of action or response. Misfortune, although it can certainly lead to a tragic situation, does not present the same dynamic, absent more. Thus, one can suffer injury or illness without thereby being forced into the kind of impossible tragic situation where there is no way forward that is morally acceptable.

Paul Ricoeur looks to the tragic as a means by which to chart the limits of deontology in the critical *phronēsis* journey he maps out in *Oneself as Another*. Specifically, Ricoeur demonstrates that, while it is evil that points out the limits of teleology and mandates the turn to the deontological level of obligation, it is tragedy that points out the limits of deontology and mandates a *return* to the teleological orientation to the 'good', in a *critical phronēsis*.

Whereas for Ricoeur, *phronēsis* does not necessarily have either a clear beginning *or* end, outside of a formal juridical context, Nussbaum seems more focused on the results of the tragic choice and answer to the tragic question, in keeping with her admiration of the Hegelian contribution to the tragic. As we shall see below, Nussbaum appropriates

Hegelian tragic thought in order to springboard into a better future shaped by means of an analysis of the current tragedy and the past which led to it. The question thereby presented, however, is whether her approach ultimately assumes certain “goods” as a given, and whether for her the tragic is merely an avenue by which to engage in a primarily deontological assessment of the relative moral wrongs and/or comparable blameworthiness between individuals, in pursuit of the good assumed to have been agreed upon.

For Ricoeur, the question must be asked how his *phronēsis* can help move us forward in the tragic situation, insofar as he does not sketch out a beginning or an end, outside of an applied ethics situation, for example in a legal judgement.

I will explore the tragic on these 3 fronts: Nussbaum’s tragic question (A), the Hegelian Option (B), and Ricoeur’s enrichment of *phronēsis* through the lens of tragedy (C). Ultimately, this exploration is intended to further flesh out the limits of both law and ethics by means of the classic ethical “hard case”, namely tragedy. In this section we are, however, still looking at those limits from the direction of the ethical. Once we have finished this exploration, however, I shall attempt the same exploration, but from the other side: that of the law.

a. The tragic question

Martha Nussbaum approaches the tragic case by noting that it raises not just the question of ‘what must I do’, which Nussbaum calls the “obvious question”, but also the question: *Are any of the available alternatives morally acceptable?* This, for Nussbaum, is the “tragic question.”⁸²

⁸² Nussbaum, “Tragedy,” 266. Although I agree that Martha Nussbaum’s approach – adding the tragic question to the obvious one – is preferable to deciding only what has to be done (if anything), I am drawn to H. Richard Niebuhr’s work in *The Responsible Self*, in which he sets out the tragic nature of the questions underlying any determination of *what must I do* as, first: *What is the goal?* then: *What is the law?* and finally, in his own version of the tragic question: *What is going on?* H. Richard Niebuhr, *The Responsible Self: An Essay in Christian Moral Philosophy*, (San Francisco: HarperSanFrancisco, 1963). This appears to add a focus more in tune with a critical *phronēsis* taking into account both aims of ethics than does Nussbaum’s “tragic question”, which appears to revert to a deontological determination of whether ‘rightness’ is possible under any scenario.

In *Mahabharata*, the ‘rightful’ heir has been usurped by his cousins, and the tragic hero, Arjuna (brother to the rightful heir), is faced with the prospect of leading his brother’s troops against his own cousins and other relatives, who have usurped the power from his brother. Arjuna is initially overcome by this prospect, and throws down his weapons in sorrow.

Nussbaum perceptibly notes that Arjuna is asking not just one question, but two:

1. What must I do? (the “*obvious question*”), and
2. Are any of the available alternatives morally acceptable? (the “*tragic question*”).⁸³

With respect to the first question – the ‘obvious’ one – Nussbaum acknowledges that, in a tragic situation, it may very well be difficult to answer, as well as difficult to determine the best *method* for reaching an answer to the obvious question of *what must I – or what can I – do*.

What is not difficult, however, is to see that it is a question that has to be answered, since some action must be taken, and even inaction is, in such a situation, a kind of action. In that sense, the question is obvious; it is forced by the situation. Arjuna cannot be both a loyal, dutiful leader of his family and at the same time a preserver of lives of friends and relations on the other side. He has to choose.⁸⁴

The tragic question is different. Nussbaum describes it:

The other question is not so obvious, nor is it forced by the situation. . . . Arjuna feels that this question must be faced, and that when it is faced, its answer is “no.” Krishna, by contrast, either simply fails to see the force of the question altogether, or recommends a policy of deliberately not facing it, in order the better to get on with one’s duty.⁸⁵

⁸³ Nussbaum, “Tragedy,” 266.

⁸⁴ Nussbaum, “Tragedy,” 266.

⁸⁵ Nussbaum, “Tragedy,” 266.

The tragic question does not arise simply because the obvious question is difficult to answer, however. Nussbaum emphasizes that the tragic question arises instead out of the difficulty of finding an answer to the obvious question that is untouched by “moral wrong”.

The tragic question registers not the difficulty of solving the obvious question, but a distinct difficulty: the fact that all the possible answers to the obvious question, including the best one, are bad, involving moral wrongdoing. In that sense, there is no “right answer.”⁸⁶

Thus, Nussbaum points out that tragedy forces Arjuna to face not just a cost/benefit assessment, which he would already have done in determining an answer to the ‘obvious’ question, but that:

he appears to consult an independent (quite deontological) account of ethical value, according to which murdering one’s own kin, especially when they are blameless is a heinous wrong; but deserting one’s family when one is their leader and essential supporter is also morally wrong. Ethical thoughts independent of the “what to do” question, thoughts about respect, kinship, and the right, enter in to inform him that his predicament is not just tough, but also tragic.⁸⁷

The question of the relative blameworthiness in assessing tragic circumstances and addressing the tragic question is a potential problem in Nussbaum’s approach. Beyond the question of whether anyone is truly innocent – and therefore completely ‘blameless’ – the predicament of weighing relative faults, together with questions of applicable standards, acceptable arguments and what counts as persuasive justification would threaten to derail Nussbaum’s view of the tragic before ever it had a chance to operate in the ethical domain.

Moreover, we should also consider here the question whether, for Nussbaum, tragedy leads primarily to a deontological assessment of relative moral ‘wrongs’. As we shall see in c. below, for Ricoeur, the tragic shows the *failure* of the deontological

⁸⁶ Nussbaum, “Tragedy,” 266.

⁸⁷ Nussbaum, “Tragedy,” 267.

assessment of – in the tragic case – *conflicting* moral obligations, leading Ricoeur to return to the teleological.

b. The point of the tragic question – The Hegelian Option

Strict utilitarians, so-called ‘pragmatists’ and other detractors of asking and pursuing the tragic question would argue that it merely distracts one from the main issue, i.e., the obvious question of *what must be done*. This is the position taken in *Mahabharata* by Krishna against Arjuna, as he ponders the tragic question, initially doing nothing.

Nussbaum outlines 4 major points to posing the tragic question:

1. It reminds the one facing the tragic choice that he is choosing an immoral action,
2. Recognizing one’s own ‘dirty hands’ “is not just self-indulgence: it has significance for future actions”,
3. It brings the possibility of reparations to mind, and
4. It is a reminder that these things ought not to be done – or *have* to be done – again in the future.⁸⁸

Nussbaum credits Hegel with this more *political* perspective – i.e., her insistence that we must ask about ‘reparations’ and engage in a process by which we analyze just *how* this situation came to be, and how we might prevent it in the future – rather than retaining a more theoretical ethical perspective. Her focus on the political and the possible is grounded in her reading of Sophocles’ *Antigone* through the lens of Hegel, and his view of tragedy as implicating action well into the future. Specifically, for Nussbaum, Hegel finds both protagonists narrow, thinking only of their own “sphere of value and neglecting the claim of the other.”⁸⁹ She explains further:

Creon thinks only of the health of the city, neglecting the “unwritten laws” of family obligation. Antigone thinks only of the family, failing to recognize the crisis of the city. We may add that for this very reason each has an

⁸⁸ Nussbaum, “Tragedy,” 267.

⁸⁹ Nussbaum, “Tragedy,” 268.

impoverished conception not only of value in general but also of his or her own cherished sphere of value. . . . Because neither sees the tragedy inherent in the situation, because neither so much as poses the tragic question, both are in these two distinct ways impoverished political actors.

And this makes a huge difference for the political future.⁹⁰

In theatrical presentations of this work, those observing the tragedy are free to solidify their own resolve not to put others into such a situation, noting that both the interests of the city as well as the unwritten law of either the family or of religion must not be set at odds with one another except under the most dire of situations. Nussbaum explains:

Just as Americans believe that we can create a public order that builds in spaces for the free exercise of religion, in which individuals are not always tragically torn between civic ordinance and religious command, so ancient Athens had an analogous anti-tragic thought – as a direct result, quite possibly, of watching tragedies such as Sophocles' *Antigone*.⁹¹

It is a short step, then, from audience involvement to political action:

It was here, indeed, that Hegel found, plausibly, the political significance of tragedy. Tragedy reminds us of the deep importance of the spheres of life that are in conflict within the drama, and of the dire results when they are opposed and we have to choose between them. It therefore motivates us to imagine what a world would be like that did not confront people with such choices, a world of “concordant action” between the two spheres of value. In that sense, the end of the drama is written offstage, by citizens who enact these insights in their own constructive political reflection.⁹²

Accordingly, Nussbaum points to Hegel as moving our focal point from the potentially tragic question of the present, to a question of the future, and how to avoid such questions/situations from arising in the future. For Nussbaum, then, having illuminated the need for the often-overlooked tragic question, she turns almost immediately to what she calls the “Hegelian point”, namely what could have been done in the past that may

⁹⁰ Nussbaum, “Tragedy,” 268.

⁹¹ Nussbaum, “Tragedy,” 268-69.

⁹² Nussbaum, “Tragedy,” 269.

have eliminated this conflict in the present, but – more to the point – that *will* eliminate such a conflict in the future.

To that end, Nussbaum effectively critiques the view espoused by Krishna in *Mahabharata* (preserved as the *Bhagavad-Gita*) to the effect that one has control over one's actions, but *not* over the results or the consequences.⁹³ In so doing, Nussbaum appears to be in danger of conflating action with intended result. She seems to assume that, having looked to the past and determined how a certain situation could be avoided, action can be taken that *will* in fact avoid tragic situations in the future.

Contra Nussbaum's confidence in an expected outcome to determined action is Hannah Arendt and her division of possible human activity into labour, work, and action.⁹⁴ Arendt notes an inherent unpredictability in the result of action based not only upon the self acting, but also upon the fact of other selves acting and reacting as we live together. "To act", she tells us, "in its most general sense, means to take an initiative, to begin . . . to set something into motion."⁹⁵

Not only that, but:

It is in the nature of beginning that something new is started which cannot be expected from whatever may have happened before.⁹⁶

This 'unexpectedness' is only one of the "three-fold frustration[s] of action – [namely] the unpredictability of its outcome, the irreversibility of the process, and the anonymity of its authors . . . calamities of action [which] all arise from the human condition of

⁹³ See Nussbaum, "Tragedy," 266n. 3.

⁹⁴ See generally Hannah Arendt, *The Human Condition*, 2d ed. (Chicago: University of Chicago Press, 1958), 79-247.

⁹⁵ Arendt, *Human Condition*, 177.

⁹⁶ Arendt, *Human Condition*, 177-78.

plurality.”⁹⁷ Arendt deftly describes the typical and persistent attempts throughout history to escape these “calamities of action”:

The remarkable monotony of the proposed solutions throughout our recorded history testifies to the elemental simplicity of the matter. Generally speaking, they always amount to seeking shelter from action’s calamities in an activity where one man, isolated from all others, remains master of his doings from beginning to end. This attempt to replace acting with making [which entails at least an object – if not a subject – being ‘made’] is manifest in the whole body of argument against “democracy”. . . .⁹⁸

Nussbaum does note one area of critique against Hegel’s approach to tragedy which can be seen as in keeping with Arendt’s description of action as inherently implicating the unexpected:

Now in one way Hegel’s approach to tragedy is too simple, for it ignores the possibility that some degree of tragedy is a structural feature of human life.⁹⁹

In this regard, however, Nussbaum appears to turn too quickly to general questions of multiculturalism and incommensurate goods and values, all vying for equal and meaningful display, exercise and enjoyment, and periodically clashing in tragic fashion. At the same time, however, she continues largely to ignore the role plurality plays in the indeterminacy of any contemplated action. Still, Nussbaum notes a positive, and I would agree that:

In another way, however, Hegel gives us the best strategy to follow, especially in political life. For we really do not know whether a harmonious fostering of two apparently opposed values can be achieved – until we try to bring that about. Many people in many places have thought that a harmonious accommodation between religion and the state is just impossible. Athens tried to prove them wrong. Modern liberal states – grappling with the even thornier

⁹⁷ Arendt, *Human Condition*, 220.

⁹⁸ Arendt, *Human Condition*, 220.

⁹⁹ Nussbaum, “Tragedy,” 269, noting also at n.7 the question of the lack of relative blamelessness and equating “moral dilemmas [with] a secular analogue of original sin [in that] you can’t live a fully pure life, a life in which you are false to no value.” Nussbaum, “Tragedy,” 269n.7.

problem of the plurality of religions, and of secular views of the good – all in their own ways try to prove them wrong.¹⁰⁰

Nussbaum acknowledges that the ‘Hegelian option’ is not a panacea. “[T]here will be a residuum of tragedy left even in the Hegelian nation.”¹⁰¹ she tells us. Still, asking the tragic question with “Hegel’s idea in view” leaves us in a tenable position, certainly better – in Nussbaum’s view – than the position advocated by those who would ask only the ‘obvious’ question. One, it challenges us to imagine better social arrangements and two, tragedy - and the tragic question - gives us the opportunity *and* the incentive to engage in “better social planning” and “good social reflection.”¹⁰²

Moreover, she does not hold out the desirability of attempting to do away with tragedy altogether, noting that to do so would be to be tempted to attempt to do away with the richness of the values underlying human life, in the attempt to prevent the occasional conflict between them. “Thus, we could always remove tensions between religion and sex equality by doing everything in our power to get rid of religion.”¹⁰³

From this insightful need to ask the tragic question and not merely focus on getting on with determining the answer to the ‘obvious question’ of what to do, Nussbaum nonetheless moves perhaps too quickly with the Hegelian option right back to a now-broadened question of what to do, and to an action theory that shifts the focus away from the present to the past, by which the future is sought to be impacted for the better. Nussbaum’s approach is thereby much more complex and responsive to the tragic situation than is the simple determination of what, amidst no clear-cut “right” answer, ought to be done. Likewise, it avoids the trap of denying the possibility of competing duties as does Kant. Ultimately, however, it fails to provide insight or guidance on the

¹⁰⁰ Nussbaum, “Tragedy,” 269.

¹⁰¹ Nussbaum, “Tragedy,” 269.

¹⁰² Nussbaum, “Tragedy,” 270. Nussbaum states the “Hegelian point” as follows: “Finally, the Hegelian point: the recognition of tragedy leads us to ask how the tragic situation might have been avoided by better social planning: tragedy thus provides a major set of incentives for good social reflection.” Nussbaum, “Tragedy,” 270.

¹⁰³ Martha C. Nussbaum, “The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis,” *Journal of Legal Studies* 29 (2000):1005-36, 1036.

resolution of competing goods and/or duties, or how to reconcile - without collapsing - the questions Nussbaum would have us ask, in pursuit of the Hegelian Option she admires. Instead, Nussbaum would substitute a widening of the field of inquiry, to include the past, questions of causation of the current impasse, reparations, and political activism to prevent such happenings in the future. Moreover, she proceeds in an unsubstantiated confidence that actions undertaken will result in the results intended, insofar as she does not seem to acknowledge a potential dichotomy between result intended and actual result. In this regard, Nussbaum demonstrates her affinity to a Hegelian "absolute knowledge" as to which - as we will investigate in chapter five - Ricoeur's philosophy of limits operates in opposition.

It is at the point of asking the tragic question that Nussbaum investigates the contribution made by Paul Ricoeur in avoiding the turn too quickly to a more pragmatic consideration of what must be done. As we have considered in this section, Nussbaum advocates the widening of the scope of the questions to be considered, to include questions of causation, reparations, and an attempt to prevent the future occurrence of the tragic situation. In the next section, we will investigate how a Ricoeurian *phronēsis* moves the analysis further in the tragic case first, by the tragic having shown the need for a critical *phronēsis*, and then by sharpening the focus of our ethical inquiry to reconsider questions of the good in connection with basic human moral capability (i), the avoidance of evil as an opposition to the good, rather than in an action analysis focusing on issues of power or violence (ii), and the further working out of a complementary interrelationship between deontology and teleology that gives effect to both, in its proper time (iii). This discussion will also set up our investigation in chapter 3, below, into the discourse between the legal and the ethical, in which the argument is made by Judge Richard A. Posner that an intuitive pragmatism is superior to moral and ethical theories with respect to resolving hard cases at *law*, in a juridical setting.

c. Avoiding the pragmatic usurpation of the tragic question – Ricoeurian phronēsis.

Nussbaum notices that, when faced with the tragic, the overwhelming urge is to *do something* to ameliorate the situation. In effect, this sets up the potential of a ‘pragmatic usurpation’ of the tragic question:

Notice that our examples reveal a persistent human tendency to neglect the tragic question in favor of the more straightforward obvious question, a question that can hardly be avoided if action is in the offing.¹⁰⁴

Nussbaum notes that Krishna’s advice to Arjuna (essentially: ‘get on with it – DO something’) is revered in the Bhagavad-Gita, “while Arjuna’s very sensible response to his dilemma [namely, asking the ‘tragic question’] is not revered in this way, or, frequently, even considered part of the same discussion.”¹⁰⁵ This is an excellent example of what I am calling the pragmatic usurpation of the tragic question.

Nussbaum casts further light on the tendency to overlook – or never reach – the tragic question in *Antigone*, instead of which, action and decision strategy take center stage:

. . . Creon and Antigone prefer the simple focus on issues of choice and action to a more complex reflection on the plurality of conflicting values and the need to arrange things so that they conflict less tragically. Focusing on the moment of choice requires only some decision strategy, and one can always choose in an arbitrary way if a sounder decision strategy does not suggest itself. Asking the tragic question requires, first of all, assuming a possible burden of guilt and of reparative effort, something people, and especially leaders, do not always enjoy doing. Asking it in the Hegelian way requires more: a systematic critical scrutiny of habit and tradition, in search of a reasonable *Aufhebung* of the contending values. And this scrutiny requires of us nothing less than a comprehensive account of justice and central human goods.¹⁰⁶

It is at this point, however, that a Ricoeurian *phronēsis* adds the third dimension to the tragic, having moved from posing the tragic question (1), to the *point* of the question (i.e., moving forward, acknowledging the wrong, one’s complicity with it, the inability

¹⁰⁴ Nussbaum, “Tragedy,” 270.

¹⁰⁵ Nussbaum, “Tragedy,” 270.

¹⁰⁶ Nussbaum, “Tragedy,” 270-71.

to extricate oneself from it, and the potential duty of reparations as a result of it, per Nussbaum's reading of the Hegelian Option) (2), and now to the practical reason that would mediate between the good and the right as to the individual, between individuals and between individual and society (3).

We have already looked at Ricoeur's thought on *phronēsis* insofar as it demonstrates the relationship between deontology and teleology. Relevantly to review, Ricoeur proceeds from a teleological starting point, of an individual situated at the level of ethical striving to live a good life with and for others, in just institutions. The existence of evil, however, requires that orientation to be subjected to the level of moral obligation: the deontological. Tragedy demonstrates the limits of deontology and necessitates a return to the teleological in a now *refined* practical reason - or *phronēsis*. Ricoeur emphasizes here that this is not the addition of a "third agency to the ethical perspective . . . corresponding to Hegelian *Sittlichkeit*."¹⁰⁷ Neither is it a disavowal of the moral level of obligation. Instead:

The passage from general maxims of action to moral judgement in situation requires, in our opinion, simply the reawakening of the resources of singularity inherent in the aim of the true life. If moral judgment develops the dialectic that we shall discuss, conviction remains the only available way out, without ever constituting a third agency that would have to be added to what we have called up to now the ethical aim and the moral norm.¹⁰⁸

Moreover, it is the passage through conflict at the ethical level, yet keeping our sense of the moral level of obligation, that Ricoeur sees as keeping us from falling prey to arbitrary situationism. He concludes that there is "no shorter path than this one to reach that point at which moral judgment in situation and the conviction that dwells in it are worthy of the name of *practical wisdom*."¹⁰⁹ It is in 'conviction' - ultimately - that we must move forward, if at all. Ricoeur sees conviction as arising out of tragic catharsis, a "transition [which] consists essentially in a meditation on the inevitable place of

¹⁰⁷ Ricoeur, *OA*, 240.

¹⁰⁸ Ricoeur, *OA*, 240.

¹⁰⁹ Ricoeur, *OA*, 241.

conflict in moral life.”¹¹⁰ This conflict is two-fold, involving a one-sidedness of individual character (1) and of moral principles (2) in the face of a complex situation of life.

Keeping in mind that it is the tragic that Ricoeur sees as giving rise to the need for practical wisdom in the form of a critical *phronēsis*, how does Ricoeurian *phronēsis* add to the resolution of the tragic? Here, too, we must be mindful to avoid Ricoeur’s warning that tragedy is not an instructive “quarry to be mined”, but that instead, “failing to produce a direct and univocal teaching, tragic wisdom carries practical wisdom back to the test of moral judgement in situation alone.”¹¹¹ We will therefore proceed along a three-fold clarification of Ricoeur’s position: (i) the focus on the ‘good, (ii) the avoidance of evil, and (iii) the interconnection in complementarity of the moral norm and the ethical aim.

(i). Focal Point: the ‘good’.

We must go deeper into the foundation Ricoeur lays for *phronēsis* in order fully to understand the nuances of what it adds to resolving the tragic, which we have positioned at the apparent irreconcilability between the teleological and the deontological moments of ethical thought and action. Specifically, we need to look closer at the distinctions Ricoeur draws between the deontological moments and the teleological ones, both in essence as well as in application. This is necessary because only by fully understanding the distinctions - as well as the similarities - can we follow the path of practical wisdom that Ricoeur charts between the good and the right in the case of the tragic, where they conflict.

Nussbaum notes as much, pointing out the complexity of Ricoeur’s thought *vis-à-vis* this relationship:

¹¹⁰ Ricoeur, *OA*, 247.

¹¹¹ Ricoeur, *OA*, 241.

[W]e can only appreciate the role of the tragic in Ricoeur's thought if we understand first the relationship he maps out between the teleological and the deontological. This relationship must not be understood in an oversimple way, as a simple opposition. For Ricoeur in *Oneself as Another*, the central ethical question is a question about the *good*.¹¹²

Nussbaum rightly emphasizes that Ricoeur does not leave the question of the good solely at the level of the individual, however, but like Aristotle, sees the wish for a good life as already including the wish to live with others, and in just institutions:

It is very important for Ricoeur that this is so: justice enters morality on the same level as the wish for a good life for oneself. It is in the first instance an object of teleological wishing. As he says in *Le Juste*, it makes its presence felt as an optative before it is present as an imperative. But for Ricoeur, unlike Aristotle, the teleological perspective proves incomplete.¹¹³

It is at this point, however, that we must reference Ricoeur's subsequent remarks on the presentation he gave in *Oneself As Another*, and further developed in *The Just*, which appears to question - or at least refine - this starting point. In *Ethics and Human Capability: A Response*¹¹⁴, Ricoeur offers a retrospective of his own work in this area, explaining, refining, and critiquing his position in several important regards: (1) critiquing his failure to flesh out his "Little Ethics" into a more comprehensive chapter rather leaving it more an appendix to *Oneself as Another*, (2) noting that he - like so many other thinkers - had on occasion fallen prey to the mistake of making too much of the distinction between deontology and teleology, (3) emphasizing the role of human capability in ethical theory and thought, namely that in common practice, one moves *beyond* the question of the determination of the applicable norms to the question of imputability and to the question of the application of the standard to the person him or herself; (4) reaffirming, nonetheless, the overarching application of the concept of the good to any ethical thought; (5) distinguishing two senses of ethical life: theory and practice, and positioning 'morality' - which he sees here to function deontologically -

¹¹² Nussbaum, "Tragedy," 271.

¹¹³ Nussbaum, "Tragedy," 271.

¹¹⁴ Ricoeur, "Response," 279-290.

to connect those two senses of ethical life; (6) reaffirming the operation on and vital importance of *time* to the whole process, especially with respect both to an ongoing dialogue and determination of properly universalistic norms; (7) reaffirming the importance of his work into the existence and nature of evil (and avoidance thereof) as the major corrective in the practical wisdom to be exercised in - most particularly - tragic situations, where the deontological and the teleological appear to be irreconcilable (forcing a return to the teleological and the striving for the 'good'); and (8) reaffirming the importance of the human self as responsible, *capable* human agent with respect to engaging in this process.

Ricoeur's original position does not change - he still starts with the question of the good firmly in the ascendancy - but within that position, he now accentuates the "capability" side of the individual (desiring to live a good life with and for others, in just institutions) positioned in a '*moral*' mode, which Ricoeur observes to function deontologically, binding the theoretical (i.e., which standard applies?) to the applied ethic (i.e., the subjective aspect of placing oneself under a rule).

It is only recently that I felt allowed to give a name to this overarching problematics. I mean the problem of human capability, capability as the cornerstone of philosophical anthropology, or, to put it in more simple terms belonging to ordinary language, the realm of the theme expressed by the verb *I can*.¹¹⁵

How does Ricoeur's retrospective affect our thinking here, with respect to the relationship between deontology and teleology, and particularly where the two conflict in the tragic? I would note that Ricoeur avoids moving into the intrinsic category of relationship we investigated earlier (as laid out by Hille Haker) insofar as he continues to emphasize the need for the deontological when faced with the primarily teleological, and the teleological, when faced with the primarily deontological. That Ricoeur now emphasizes that a sharp distinction between the two is to be avoided does not mean that he either (1) sees no distinction between the two or (2) advocates an intrinsic connection. Instead, Ricoeur continues to apply the differences complementarily. One

¹¹⁵ Ricoeur, "Response," 280.

cannot - and does not - exist without the other. Each has its moment and its part to play, even if - at times - they operate at the same time.

Turning again to Ricoeur's retrospective, we see that *he* sees his failure to connect the Ninth Study on Practical Wisdom to the rest of his work in *Oneself as Another* as resulting from his need to position imputability at the "ending point of the anthropological phenomenology" and "at the threshold of ethics".¹¹⁶ He says that now:

I see the whole problematic of ethics as an exploration of one specific capability, the moral or ethical capability."¹¹⁷

Imputability, then, would enter the inquiry along with - and at the same time - as human capability, as an element of the "I can", including an "*I can be imputed*, an action can be imputed to me as its true author."¹¹⁸ In that regard, tragic wisdom brings the capable and imputable self to a practical wisdom and, in reflection upon moral conflict, to the point of conviction and action-in-accordance.

Interestingly, in making this journey through practical wisdom as informed by tragic wisdom, Ricoeur moves in the opposite direction through the three zones he has laid in *Oneself as Another*, namely starting instead with just institutions, then moving to the recognition of others, and finally returning to the self, oriented toward the good life.¹¹⁹ His reasoning is that only when we have faced the conflicts raised in the levels of institutions and other persons will we "be able to confront the idea of autonomy that, in the last analysis, remains the cornerstone of Kantian morality; it is here that the most deeply concealed conflicts designate the turning point between morality and a practical wisdom that does not forget its passage through duty."¹²⁰

¹¹⁶ Ricoeur, "Response," 285.

¹¹⁷ Ricoeur, "Response," 285.

¹¹⁸ Ricoeur, "Response," 280.

¹¹⁹ Ricoeur, *OA*, 249-50.

¹²⁰ Ricoeur, *OA*, 250.

We could summarize the developments in this area of Ricoeur's thought as follows: Human capability is seen as an overarching anthropology, in spite of fallibility; morality can be seen as mediating between the normative and the subjective; practical wisdom is a renewed focus; conflict is seen as the agent - the "goad"¹²¹ - by which the capable self is moved through the ethical journey, striving for the good life, with others, in just institutions.

(ii). Refining Focus: avoiding evil.

We know that in *Oneself as Another*, Ricoeur recognizes the existence of evil as the ground for the need to subject the teleological pursuit of the good life to the deontological level of moral obligation. In his retrospective, he notes that the "link between the descriptive and the prescriptive parts of my work" is imputability¹²² and further that it was his method of resolving the problematics of the "I can" that required that he deal with the "problem of bad will and evil" after he had moved from a descriptive phenomenology to the "field of representational acts" much earlier in his career.¹²³ He notes therefore the difference between what may be observed, and what may be ascribed.

As we have seen, for Ricoeur the question of evil - that which should not be - marks the turn from the ethical aim to the level of moral obligation. Having made that turn, however, the tragic case presents us with the need once again to turn to the ethical aim, now in a critical *phronēsis*. This does not signal a retreat from the deontological level of obligation, but instead a refocus onto the good, as we explored in the last section. In this section we focus on continuing to avoid evil at the same time. We will see that Ricoeur includes this focus in his original starting position, which emphasizes the ethical aim while at the same time avoiding evil. By contrast, Martha Nussbaum sees evil through the lens of violence, which leads her to view Ricoeur's starting position slightly differently, which results in a starting position which seems to restrict the possibilities of action, as we shall see.

¹²¹ Ricoeur, *OA*, 249.

¹²² Ricoeur, "Response," 280.

¹²³ Ricoeur, "Response," 281.

Recognizing Ricoeur's commitment to the deontological, Nussbaum acknowledges that "for Ricoeur, unlike Aristotle, the teleological perspective proves incomplete." She ascribes this incompleteness, however, to questions of power, and – ultimately – to violence and force,¹²⁴ thereby avoiding the use of the explicit reasoning given by Ricoeur himself: *evil*. Granted, evil can be expressed through power, violence and force, but evil remains an element in itself, not necessarily implicit in the others. Consider here, for example, the point that Hannah Arendt makes with respect to the violence implicit in every 'making' undertaken by humans, in which - by necessity - the 'making' of one thing involves the violent transformation (or even destruction) of something already in existence.¹²⁵ Consider also the force inherent in the power we have ascribed and entrusted to courts of law.

Nussbaum *does* consider the possibility that individuals and institutions might have occasion to use force legitimately, but she presents it as an after-the-fact situation, requiring careful consideration in advance:

The fact that both individuals and institutions use force requires us to think about what it is in the human being that limits the use of force, and also what might possibility legitimate it in certain circumstances.¹²⁶

For Nussbaum, "violence" and "power" seem synonymous with "evil" at some primal level, or at least as a rebuttable presumption. Yet to equate them is to lose an important distinction, as well as to lose any possibility of the use of power, force, or even violence - *action*, in fact - in any originary 'good' way. Instead, we would have to start with a presumption of violence and force as evil, requiring justification in

¹²⁴ Nussbaum, "Tragedy," 271.

¹²⁵ See Arendt, *Human Condition*, 139-40. We can not, as Arendt notes, create *ex nihilo*, we must "create out of a given substance, [therefore] human productivity was by definition bound to result in a Promethean revolt because it could erect a man-made world only after destroying part of God-created nature." Arendt, *Human Condition*, 139. Further, that: "The experience of this violence is the most elemental experience of human strength and, therefore, the very opposite of the painful, exhausting effort experienced in sheer labor." Arendt, *Human Condition*, 140.

¹²⁶ Nussbaum, "Tragedy," 271.

advance. Per Hannah Arendt's thought on action and making, advance justification along these lines would entail a *significant* infringement on basic human freedom of action, without any corresponding benefit from *starting* at this position of restricted action. It is in keeping with a Kantian starting position, recognizing the tendency to instrumentalize the other. Ricoeur, however, chooses to start with the aim of living justly, and not with the Kantian fact of instrumentalization.

Ricoeur handles the question of power and power over another in a different manner, namely through his analysis of the Golden Rule and its "enunciation of a *norm of reciprocity*":¹²⁷

The most remarkable thing, however, in the formulation of this rule is that the reciprocity demanded stands out against the background of the presupposition of an *initial dissymmetry* between the protagonists of the action. . . .¹²⁸

And in fact, Ricoeur himself points out the need to distinguish between evil uses of power or force:

The occasion of violence, not to mention the turn toward violence, resides in the *power* exerted *over* one will by another will. **It is difficult to imagine situations of interaction in which one individual does not exert a power over another by the very fact of action.** Let us underscore the expression "power-over." Given the extreme ambiguity of the term "power," it is important to distinguish the expression "power-over" from two other uses of the term "power" which we have employed in the earlier studies. We termed *power-to-do*, or power to act, the capacity possessed by an agent to constitute himself or herself as the author of action, with all the related difficulties and aporias. We also termed *power-in-common* the capacity of the members of a historical community to exercise in an indivisible manner their desire to live together, and we have been careful to distinguish this power-in-common from the relation of domination in which political violence resides, the violence of those who govern as well as that of the governed. . . . The power-over, grafted onto the initial dissymmetry between what one does and what is done to another – in other words, what the other suffers – can be held to be the occasion par excellence of the evil of violence.¹²⁹

¹²⁷ Ricoeur, *OA*, 219.

¹²⁸ Ricoeur, *OA*, 219 (emphasis supplied).

¹²⁹ Ricoeur, *OA*, 220 (bold supplied; italics in original).

Ricoeur does not confine his concept of evil to instances of physical violence or power over another, however, insofar as he notes - as evil - the possibility of a bad will or proper self-esteem "perverted by . . . the penchant for evil."¹³⁰ He points out that:

Kant does not linger over the litany of complaints concerning human wickedness but goes straight to the most subtle figure of evil, that in which self-love becomes the motive for an entirely external conformity to the moral law, which is the precise definition of *legality* in opposition to morality.¹³¹

In his retrospective, Ricoeur notes his indebtedness to Kant with respect to Kant's equation of radical evil in our tendency toward evil, but which is related to the "originary goodness of the human being [so that a]s radical as evil may be, it will never be more originary than goodness. . . ."¹³² We will look at the issue of originary goodness in more detail in chapter 5, below, when we consider contributions of the religious voice. For now, let us merely note the difference this idea makes in Ricoeur's starting position, as opposed to the position Nussbaum ascribes for him.

Nussbaum sees Ricoeur as arguing for:

. . . a need for the Kantian idea of *universal law*, and the closely related idea of the *human being as an end*. Taking up the Kantian perspective, the agent uses the notion of *obligation* where formerly she had used the idea of *good*.¹³³

Again, a subtle shift of distinctions is made with respect to the Ricoeurian position, since Nussbaum – for whatever reason – does not take up the question of evil *per se*, which is actually what Ricoeur points to in describing the turn to the level of obligation:

¹³⁰ Ricoeur, *OA*, 215.

¹³¹ Ricoeur, *OA*, 216n.28.

¹³² Ricoeur, "Response," 284.

¹³³ Nussbaum, "Tragedy," 271 (emphasis in original).

From the union of these two ideas [inscrutability of origin of evil as well as penchant for evil] there results the supposition that will henceforth govern the entire series of moments of the deontological conception of morality: does it not follow from evil and from the inscrutable constitution of (free) will that there is, consequently, a *necessity* for ethics to assume the features of morality? Because there is evil, the aim of the “good life” has to be submitted to the test of moral obligation, which might be described in the following terms: “Act solely in accordance with the maxim by which you can wish at the same time that what *ought not to be*, namely evil, will indeed *not exist*.”¹³⁴

When Ricoeur speaks of the “*test of universalization*,” he does so with respect to the problem of inclination and the will, and with the Kantian distrust of inclination which labels desire as “pathological”.¹³⁵ Insofar as Ricoeur disagrees with this aspect of Kant and, *contra* Kant, places *desire* to live the good life firmly in his *starting* position, Ricoeur should not thereby be seen to equate either inclination *or* desire with *evil*, to the effect that his turn to the deontological can be linked either to a need for universal law or the Kantian prohibition of treating a person as a means, rather than as an end in themselves.

Neither is this position changed in his later work. In his retrospective, Ricoeur links the test of universalization with the process of dialogue by which norms are articulated and tested, placing the issue firmly within the *process* of practical wisdom, which of course he has defined as using *both* the level of obligation *and* the good (as in values lived by cultures). In fact, he says:

As to the screening or testing stage of norms, we should not let ourselves be caught in the difficult, but not unsolvable, problem of the test of universalization. Everybody agrees that it is thanks to its dialogical structure in public discourse that the alleged universality of any norm - what I called in my work inchoate universals - should be put to the test. And in that sense we should say that the process of universalization, *the testing of the universal capability of our projects, already belongs to the sphere of applied ethics, the field that I called the field of practical wisdom.*¹³⁶

¹³⁴ Ricoeur, *OA*, 218.

¹³⁵ Ricoeur, *OA*, 208-209.

¹³⁶ Ricoeur, “Response,” 288 (emphasis supplied).

This is not to say that Ricoeur has given up on Kantian ideas of universal law or the maxim of treating another person as an end - and not a means - merely that my reading of Ricoeur does not show his positioning of those Kantian elements as reasons to move from a teleological focus on the good to the deontological level of obligation as test. I submit that it is a different (and much more compelling) situation which Ricoeur presents as leading a moral 'agent' to turn *to* questions of *obligation* to inform questions of the good. Ricoeur posits the need as arising out of the existence of evil, and describes the moral obligation itself as acting in such a way that evil *will not* exist and will not be *desired* to exist. Evil being the polar opposite of the good serves to keep us within a conversation about the 'good' even as it adds the moral obligation to *avoid* evil. Nussbaum's focus instead on permissible versus impermissible uses of force, could operate to jettison the larger framework of the good prematurely, leading to a myopic analysis of conflicting proposed courses of action on the level of the 'right'. The same danger holds true with respect to discourse on universal law and the respect of persons as an end rather than means.

Accordingly, we reaffirm Ricoeur's emphasis on the initial focus on the good - at the same time avoiding evil - while evil also marks the turn to the level of the moral obligation. It is at the level of moral obligation that the tragic refocuses the moral agent onto the ethical aim toward the good.

(iii). Developing Focus: No independence of the deontological from the teleological

As we have already noted, Ricoeur's view of the relationship between deontology and teleology is one of interrelationship - one of *complementarity*. Not: one *or* the other; or: one *instead of* the other; or even: one *and* the other. It is more: one *with* the other, each adding *to* the other, *complementing* the other, yet retaining itself. That has not changed, even with the straightforward remarks Ricoeur issued in his retrospective of his work, in which he lamented the all-too-frequent, all-too-hasty emphasis on "the distinction and even the opposition between the deontological and the teleological."¹³⁷

¹³⁷ Ricoeur, "Response," 287.

At the same time, however, Ricoeur notes the elements of the teleological which have long formed part of even the Kantian deontological project, namely *good will* (arising out of the first proposition in Kant's *The Foundation of the Metaphysics of Morals*) - as well as respect (Kant's sole 'rational motive of action' and arising out of the categorical imperative) - as teleological elements in Kant. Indeed, he concludes that:

A teleological concept governs the whole attempt of a so-called deontological ethics.¹³⁸

Similarly, elements of the deontological have long formed part of even the Aristotelian teleological project, specifically, in the sense that the Aristotelian concept of virtue moves from the general to the specific - and plural - "secured by a normative or prenormative concept, [namely] that of mediation, the mean between the excess and deficiency. . . ."¹³⁹ Here, Ricoeur concludes:

The so-called golden mean of Aristotle is a kind of preimperative in the teleological ethic.¹⁴⁰

Martha Nussbaum notes this unifying aspect of Ricoeur's work as well, tying in the concept of distribution of *goods* to the operation of this ethical working out of deontology and teleology in practical wisdom. She says that "the deontological never attains a complete independence from the level of the good: for justice must be concerned with the distribution of something, and we have to be cognizant of these things as goods."¹⁴¹ Moreover, it is in the 'plurality' and 'incommensurability' of these good things that she sees a source for tragic conflicts, in addition to those whose type we saw in ancient tragedies. The tragic conflicts in *Antigone*, for example, do not appear to arise in any way out of questions of the distribution of goods, but rather a clash of *values*, shaping *conviction*.

¹³⁸ Ricoeur, "Response," 287.

¹³⁹ Ricoeur, "Response," 288.

¹⁴⁰ Ricoeur, "Response," 288.

¹⁴¹ Nussbaum, "Tragedy," 271-72.

Notwithstanding the shared elements between each of the two major ethical systems, Nussbaum sees the superiority to Kant of Ricoeur's approach to the tragic. She points out that the approach by Ricoeur is much more responsive to the complexities of life than is Kant's, who would deny that tragic conflicts between two genuine duties ever exist. The identification of a second (or even third) duty goes far in recognizing and perhaps even explaining the difficulties behind so-called 'moral dilemmas'. It certainly gives an answer to the strict deontology advocate who, like Kant, would never countenance a lie, for example, no matter what:

Ricoeur's approach to the problem of tragic conflict moves well beyond that of Kant, who simply denied that such conflicts ever arise. One or the other apparently conflicting duties will turn out not to be a genuine duty, and our only moral difficulty is to sort things out correctly deciding which duty is the real duty. Kant took this plainly inadequate line, it seems, because he could not bear the idea that the contingent demands of reality should ever put the moral agent in the position of being false to a genuine duty. And it lands him in an untenable position. In the famous example of whether I should lie to a murderer who comes to my door asking for the whereabouts of the person he wants to murder, Kant simply sees one duty only, that of not lying; he simply refuses to recognize another duty exerting its claim, namely that of saving my friend's life. This deontological approach is plainly inadequate to the complexities of life.¹⁴²

Neither, however, does the teleological emphasis succeed, where the deontological emphasis failed. An Aristotelian herself, Nussbaum has little admiration for the dominant consequentialist version of a teleological ethics, certainly in the United States.¹⁴³ Thus, she dismisses utilitarian cost-benefit analyses, deeming them inferior not only to Ricoeur's *phronēsis* approach, but to the Kantian deontological approach as well, in that the utilitarian cost-benefit approach never even *reaches* the question of rights or obligations – let alone 'duties'. Moreover, it never draws a meaningful distinction between the deontological and teleological level at all. In Nussbaum's words:

¹⁴² Nussbaum, "Tragedy," 272.

¹⁴³ See generally Martha C. Nussbaum, "The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis," *Journal of Legal Studies* 29 (2000): 1005-36; Martha C. Nussbaum, "In Defense of Universal Values," *Idaho Law Review* 36 (2000): 379-447, 401-11; Martha C. Nussbaum, "Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics," *University of Chicago Law Review* 64 (1997): 1197-1214.

Equally inadequate is another approach that now determines most of the public policy that gets made in this nation and in many others: that is, the approach characteristic of utilitarian cost-benefit analysis. This approach doesn't even bother denying that there is a conflict of duties; it simply never gets to that question at all, probably because it really doesn't recognize a deontological level distinct from the teleological. For the public practitioner of cost-benefit analysis, then, the only question to be asked in such a situation is what I've called the obvious question: What shall be preferred to what? This question is approached by reckoning up the costs and benefits of each of the alternatives to the parties concerned – usually by some plainly crude stratagem, such as asking people what they are willing to pay to avoid each of the evils in question. This approach, though rarely seriously challenged in our public life, is far more inadequate than the Kantian approach, since it doesn't even get to the point of recognizing the existence of right and obligations.¹⁴⁴

Nussbaum has turned to what she calls a “capabilities approach” to normative ethical questions as a means not only to govern individual ethical determinations, but also to guide political action and - presumably - help resolve conflict, including the tragic.¹⁴⁵ In this regard, Nussbaum puts forward a list of “central capabilities [that] play a role similar to that played by primary goods in Rawls’s more recent account”¹⁴⁶ including such items as “Life”, “Bodily Health”, “Bodily Integrity”, “Senses, Imagination, and Thought”, “Emotions”, “Practical Reason”, “Affiliation”, “Other Species”, “Play”, and “Control Over One’s Environment”.¹⁴⁷

It is perhaps therefore not surprising that Nussbaum ultimately questions Ricoeur’s ‘solution’ – wondering “how far the turning to *phronēsis* should go.”¹⁴⁸ She finds that Ricoeur has not precisely spelled that out - in spite of his superiority to both the Kantian deontological approach as well as the utilitarian version of the teleological approach - and she suggests two important ways in which she believes *phronēsis* should be effectively expanded in our society today. Both suggestions refer back to the Hegelian option, regarding the question of losing claims in conflict situations and the claim for reparations and/or a later re-hearing, and the question of whether Ricoeur’s

¹⁴⁴ Nussbaum, “Tragedy,” 273, citing also her work in “Cost of Tragedy.”

¹⁴⁵ See generally Martha C. Nussbaum, “Capabilities and Human Rights,” *Fordham Law Review* 66 (1997-98): 273-300; Henry S. Richardson, “Some Limitations of Nussbaum’s Capabilities,” *QLR* 19 (2000): 309-32.

¹⁴⁶ Nussbaum, “Capabilities,” 286.

¹⁴⁷ Nussbaum, “Capabilities,” 287-88.

¹⁴⁸ Nussbaum, “Tragedy,” 273.

solution would go so far as to find an *obligation* to carry out the Hegelian enterprise so that “[e]ven in cases in which a state simply cannot eliminate a tragedy any time soon, wise Hegelian thinking, over and above *phronēsis*, may guide the way to a better future.”¹⁴⁹

We will take up this question in greater detail in chapter 3 as we discuss the limits of law. For now, we should note Ricoeur’s insistence on the need for both the teleological and the deontological, and especially in the tragic case. We would observe with Nussbaum the superiority of Ricoeur’s account of the tragic to Kant’s, which denies the possibility of a conflict at the level of duty, and we note the question of the use of Ricoeur’s critical *phronēsis* to implement a prior determination of the content of recognized value, toward the goal of achieving justice.

Summary

We have begun our investigation of the relationship between law and ethics by looking first at the nature of the debate between the deontological and the teleological branches of ethics itself. We reviewed three major approaches to resolving those differences, the extrinsic (1), the intrinsic (2), and the complementary (3).

We continued to explore the differences and relationship between deontology and teleology as charted by Paul Ricoeur in what he calls a “practical wisdom” - or *phronēsis*. We examined the effect of evil on any ethical project as requiring a turn to the deontological - or the level of moral obligation. We observed that it is the *tragic* that demonstrates the limit of the deontological, however, and requires resolution of the tragic conflict outside of the deontological ethic, by a re-turn to the teleological. We briefly considered the role of conflict in this regard as “goad,” leading to reflection and conviction, out of which action arises.

¹⁴⁹ Nussbaum, “Tragedy,” 274.

We have not seen either a proceduralist or positivist account of any “solution” by Ricoeur of the tragic question, indeed, we have seen instead the warning that the tragic is not a quarry to be mined, but rather a place where a gap may be seen between tragic wisdom and practical wisdom. This is “one of the functions of tragedy in relation to ethics”, Ricoeur tells us, continuing:

By refusing to contribute a “solution” to the conflicts made insoluble by fiction, tragedy, after having disoriented the gaze, condemns the person of praxis to reorient action, at his or her own risk, in the sense of a practical wisdom in situation that best *responds* to tragic wisdom. This response, deferred by the festive contemplation of the spectacle, makes conviction the haven beyond catharsis.¹⁵⁰

Neither have we determined at this point whether Ricoeur’s insistence on maintaining the need for two irreconcilable perspectives in a complementary relationship will ultimately succeed, or whether it imposes an endlessly circular process of thought with no resolution.

Having thus begun our investigation of the relationship between law and ethics by starting with the ethical question, we move now from the ethical to the legal, and investigate how a similar struggle manifests itself in determining and enforcing norms as well as ‘goods’ at the juridical level. To that end, we will start with an investigation into the limits of law as demonstrated by the legal “hard case” on three fronts: (1) argumentation versus interpretation of positive law, (2) “rights” talk as attempted trump card at law, and (3) so-called “imperfect duties” where positive law is either silent or impotent in the face of desired - or required - action or *inaction*.

Thereafter, in chapter 3, we will be able to review an interdisciplinary written debate including judges, lawyers and moral philosophers on the role of moral philosophy in the judicial system and see that the same categories that Hille Haker has suggested on the ethical level may be seen as applicable also to describe the discussions between the legal and the ethical. Once more, we will see an extrinsic approach (1), and an intrinsic approach (2). Effectively missing from this particular dialogue, however, is the third approach: specifically, the question of a refining *phronēsis*, which we have investigated

¹⁵⁰ Ricoeur, *OA*, 247.

more thoroughly by way of the tragic and Ricoeur's retrospective, with a view towards seeing in it a possible solution to the impasse demonstrated by our next study.

Chapter 2

The Limits of Law

Overview.

In the previous chapter, we looked at the interaction between the two branches of ethics - deontology and teleology - and investigated this relationship in three different configurations: extrinsic (1), intrinsic (2), and complementary (3). In addition, we noted the existence of *evil* as showing the limits of teleology - mandating a turn to deontology and obligation - and the *tragic* as indicating the limits of deontology, and a corresponding need to turn again to the “good” in a critical *phronēsis*.

As we have also already touched upon, since Kant, at least, it has been assumed that, although we *can* reach a consensus on a common idea of the “right”, we can *not* reach a consensus on a common idea of the “good.” Liberalism attempts the establishment of a common good as *justice*, allowing each individual to reach his or her own idea of what is good for them. Obviously, this implicates the danger of radical individualism and subjectivism, where “any” or “many standards” becomes “no standard”.

The communitarian project, on the other hand, would uphold the importance of a community-based ideal of the ‘good’ – to be lived out in community – and as vital for nourishing a virtue ethic and a common morality at least as within the community. As the vast literature since the 1980’s shows, this calls into question the contours of the community (1), which community and who decides (2), questions of community vs. individual where there is a conflict (3), and questions of community vs. community where communities border each other but do not share common notions of the ‘good’ (4).

We have looked at signs, however, that this previous duality is being approached as no longer either/or. From the liberal democracy/discourse ethics side, Jürgen Habermas is increasingly acknowledging the need to at least *discuss* common notions of the ‘good’ – if only to attempt to avert the type of violence and destruction unleashed with the September 11 terrorist attacks and other similar acts of violence by one worldview adherent upon another. At the same time, questions of globalization, and the migration and mixing of groups from divergent cultures, religions and backgrounds have sharply challenged the communitarians, at least in the West, with the result that there is a question as to whether a return to ‘traditional community’ is even possible. There will undoubtedly remain those not willing to engage in dialogue - even if they have to live with them in the same society - with others who do not share their community values, way of life, notion of the “good life”, and how to deal with those who are outside their community, as well as those within the community who fail to observe community norms.

We have also discussed the thought and approach of Paul Ricoeur who argues for a resurgence of a *phronēsis*-like interplay between deontology and teleology, calling it ‘reflective judgment’ or ‘practical wisdom’, and ‘conviction,’ which brings together the universal and the particular, i.e., the moral norm and the personal reflection of the moral subject on the background of her values, experience, faith or other commitment. How does this type of integrated, personally- authenticated morality relate to the written law that needs to be applied to singular situations?

Thus, finding ourselves in a position, post-Kant, where duty is no longer either attractive *or* entirely enforceable – at law or by social pressure – it is understandable that efforts would be made to shore up the shrinking ethical domain of shared values, and of the erosion of a culture of defining the subject through their capability for moral self-legislation. These efforts are on a variety of fronts. There are those who call for an increase in *positive* law. Others look to the concept of *human rights* to carry the burden. The communitarians insist that it’s in *authentic community* that shared values and norms are brought into existence and lived out. The liberal democratic project continues an *ethics of dialogue*, in which values and norms are to be the result of a more procedural process – that of a certain formal discourse in which a consensus is to be formed as to the values and norms to be embraced. More and more others inhabit

the borders of the different approaches and insist on a combination of two or more methods.

We shall look at this question - from the point of view of the so-called "hard case" at law - on three fronts: (1) the question of argumentation versus interpretation of positive law, where the "hard case" is presented, (2) "rights" talk as a legal device to overcome unsettled moral questions, and (3) imperfect duties as a means by which so-called "higher" standards of behaviour can be expected - if not imposed - absent the express requirements of positive law.

We start with the hard case, because the more straight-forward typical case at law does not present the kinds of challenges that demonstrate the limitations of law and implicate a requirement to enrich its resources in dialogue with other disciplines, specifically that of ethics and, as I shall propose in chapter 5, theology. The three approaches to the hard case that we will examine correspond to the first three efforts we have outlined as attempts to shore up a shrinking ethical domain and the erosion of a culture in which citizens realize their own identity through moral self-legislation. We will look at the fourth option, the *ethics of dialogue* in a liberal democracy, starting in chapter 3. We will look at these issues in a slightly different order in this chapter, however, as follows: (i) the tension between morality and external legality as evidence of a problem, (ii) imperfect duties as potentially a lower level of intersection between morality and the ethical aim, (iii) argumentation versus interpretation in resolving the "hard case", and (iv) the proper weight to be accorded "rights talk" in resolving the "hard case" at law.

I shall assume the proliferation of positive law as a commonly-observable phenomenon. Ultimately, I aspire to show that none of these approaches is fully successful in resolving the impasse at hand. Starting in chapter 3, I shall put forward the possibility of the same *phronēsis*-like approach which Paul Ricoeur advocates in ethical dilemmas, as also promising to resolve the hard case at law, as well as to help shape the discourse between law and ethics.

I. Evidence of a Problem: Law and Moral Identity

In the mid 60's, the public reaction against the writer of an article condemning the perpetrator of a game show cheating scandal reminded Hannah Arendt of the outcry against her attempts in *Eichmann in Jerusalem: A Report on the Banality of Evil*¹⁵¹ to come to grips with the perpetrators of the unspeakable horrors of Nazi Germany. She wrote:

The first conclusion I think is that no one in his right mind can any longer claim that moral conduct is a matter of course--*das Moralische versteht sich von selbst*, an assumption under which the generation I belong to was still brought up. This assumption included a sharp distinction between legality and morality, and while there existed a vague, inarticulate consensus that by and large the law of the land spells out whatever the moral law may demand, **there was not much doubt that in case of conflict the moral law was the higher law and had to be obeyed first.**¹⁵²

Far from being the assumed "higher law" Hannah Arendt noted as fading 40 years ago - which (prior to then) was to have been obeyed as a matter of course with or *without* the compulsion of positive law - we are increasingly facing situations where it appears the *positive* law is placed in the "higher" position than is the moral, at least insofar as compliance thereto or enforceability thereof is concerned.¹⁵³ This is perhaps typical of a certain understanding of liberalism, where one's motives do not come into issue so long as there is no harm done to others. Kant asks more of his autonomous subjects, of course, namely self-legislation, not merely external compliance.

¹⁵¹ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1994).

¹⁵² Hannah Arendt, *Responsibility and Judgment*, ed. Jerome Kohn, (New York: Schocken Books, 2003), 60-61 (emphasis added).

¹⁵³ In a contempt case involving a reporter's refusal to testify (discussed at greater length below, in f.n. 5), the presiding judge, U.S. District Judge Thomas Hogan, was quoted as follows: "We have to follow the law. . . . If [the defendant] were given a pass today, then the next person could say as a matter of principle, 'I will not obey the law because of the abortion issue,' or the election of a president or whatever. **They could claim the moral high ground, and then we could descend into anarchy.**" CNN report: Terry Frieden, *New York Times reporter jailed* - Friday, October 28, 2005; Posted: 2:16 p.m. EDT (18:16 GMT) (emphasis supplied), <http://www.cnn.com/2005/LAW/07/06/reporters.contempt/index.html> (accessed October 14, 2007).

Even more telling is the fact that the legal/moral situation today is effectively reversed: we largely do not deal in situations like Nazi Germany where positive law purported to *compel* - or at the very least enabled - the systematic extermination of Jews and others, and the theft and looting of their property.¹⁵⁴ Those who disagreed with the positive law on moral grounds did so at the risk of their own life, family, and property. Now, we tend to encounter a reverse variation: morally questionable behaviour is justified on the grounds that the positive law does not expressly *prohibit* it. Thus, conflicts today between the moral law and the law of the land appear to be of the second, lower variety, namely instances of those engaging in *immoral* behaviour justified as not specifically prohibited by positive law, rather than instances of those engaging in *illegal* behaviour argued to be required by a higher, moral law.¹⁵⁵

1. Morality and legality

In 2000 and 2001, Kenneth Lay of Enron Corporation was not constrained by any consideration of the moral law as the higher operative law when he presided over the bankrupting of the corporation, systematically lying and presenting Enron as financially viable and prospering, encouraging his employees to hold on to their stock - and even buy more - while he himself sold over \$100 million of his own stock in the

¹⁵⁴ See, e.g., Mark J. Osiel, *Mass Atrocity, Ordinary Evil, and Hannah Arendt: Criminal Consciousness in Argentina's Dirty War* (New Haven: Yale University Press, 2001), 131, where the author notes that "much of postwar legal philosophy (i.e., since Nuremberg trials) has been influenced by the concern to protect us from the dangers posed by obedience to *wicked* law." (emphasis added).

¹⁵⁵ Granted, we still see the occasional reporter jailed for failing to disclose her sources or notes (e.g. the case involving New York Times reporter Judith Miller who was imprisoned in October 2005 for refusing to testify before a Grand Jury investigating the unlawful leak of the name of a CIA operative), but note that those cases are generally defended on constitutional rather than moral grounds. Thus, the reporter will stand on the Constitutional right of the freedom of the press (argued to be jeopardized by the failure to protect confidential sources), rather than on an allegation of a moral obligation to keep a promise that she would protect the confidentiality of the source. It is perhaps a small - but revealing - distinction. It is likewise interesting to note that a number of individuals jailed for refusal to testify in cases of this sort have increasingly asserted neither the moral obligation of keeping a promise of confidentiality nor the Constitutional guarantee of freedom of the press, but rather have proceeded under the Constitutional right (5th Amendment) not to be compelled to incriminate oneself. Incarceration for refusing to testify is seen as permissible where the government has offered immunity against prosecution but the witness still refuses to testify. This was the situation presented in the Susan McDougal civil contempt incarceration for her refusal to testify in 1996 before the Grand Jury in the Whitewater investigation headed up by special prosecutor Kenneth Starr.

company at a profit. His subsequent criminal trial found him guilty of wire fraud, securities fraud, and for conspiracy to commit wire and securities fraud, but not for lying, cheating, and swindling the stockholders of the value he had duped them into thinking was resident in the corporation into which they were investing, nor of the betrayal of trust to the many employees, whose stock option and retirement plans were rendered worthless by his behaviour. Ken Lay died before he was sentenced, and his convictions were therefore vacated, insofar as he had not been able to exercise his rights of appeal before his death.

There seems to be no question that Lay's actions - resulting in over 100 million dollars of profit to him, but many more millions of dollars of loss to others - were morally suspect. The bigger problem was finding a law they ran afoul of. Ken Lay never denied the vast majority of his actions. Neither, however, did he admit that they were either morally or criminally condemned. Lawmakers, subsequently, have passed various new legislation to ensure they do not have similar problems in the future.¹⁵⁶

Moreover, other moral issues like homosexuality, abortion and euthanasia - which no longer enjoy general agreement as to their moral tenor - increasingly have been the subject of positive law enactments, whether to relax or restrict, if not outright prohibit. In this regard, of course, homosexuality can be seen to differ from, e.g., abortion and euthanasia insofar as laws criminalizing homosexuality have been steadily repealed and proponents thereof now push for positive law or constitutional amendment to widen the scope and application of sexual preference freedom and "rights", including marriage.

By contrast, abortion and euthanasia continue - so far - to be seen as appropriate subjects of legislation, and thereby as continuing to pose moral challenges, properly

¹⁵⁶ E.g. The **Sarbanes-Oxley Act of 2002** (Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. §§ 7201 - 7266), also known as the Public Company Accounting Reform and Investor Protection Act of 2002 and the Corporate and Criminal Fraud Accountability Act of 2002 (title VIII, § 801 *et seq.*, of the Sarbanes-Oxley Act of 2002). *See generally*, Kathryn Steward Lehman, "Executive Compensation Following the Sarbanes-Oxley Act of 2002," *North Carolina Law Review* 81, issue 5 (2003): 2115-35; Ramesh Ponnuro, "Enron's Bastard Children: Oh, what legislation you have spawned!" *National Review*, May 6, 2002, http://findarticles.com/p/articles/mi_m1282/is_8_54/ai_84943300 (accessed October 14, 2007).

addressed and at least regulated - if not restricted - by positive law. In no way, however, do any proponents claim a moral *obligation* to disobey any restrictive or prohibitive positive law in these areas. Instead, they have claimed a basic human right - or freedom - to be free to engage in what was previously held immoral, and a right to *choose*: whether it be to engage in homosexual activity between consenting adults, to abort a fetus, or to end one's own life.

Finally, it should be noted that our society increasingly looks to the law as a protector and even insurer against harm. The question arises, does this strengthen morality by creating conditions or structures of accountability and prevention? Or is this further evidence of a diminishing ethical realm, attempted to be remedied by passing or strengthening applicable laws? Paul Ricoeur raised this issue in his testimony before the Cour de justice de la République about responsibility and guilt concerning the HIV-tainted blood supply in France. We will discuss this issue in more detail in chapter 4, when we consider questions of responsibility both legally as well as morally. For our present purposes, we may note that Ricoeur testified that he saw a "serious drift affecting both private and public law, one that tends to substitute risk for any error . . . [and] the socialization of risk threatens to leave room only for a notion of insurance, which, I will say, is one that threatens to remove all responsibility."¹⁵⁷ Thus, he concludes that this attempt *damages* the sense of individual responsibility, rather than providing for greater accountability and prevention.

This demand that the law protect and/or insure against harm is increasingly prevalent as applied to potential criminal activity, even though common law has traditionally held that there is no duty to protect an individual from a third-party's crimes and that there is no liability for failure to *prevent* a crime. For example, after conviction and serving a prison term, the law requiring registration of sex offenders in the United States and the notification of parents when a registered sex offender moves into a particular school district is an attempt to prevent future crime.¹⁵⁸ "Zero-tolerance" of any sort of 'drug'

¹⁵⁷ Paul Ricoeur, *Reflections on the Just*, trans. David Pellauer (Chicago: University of Chicago Press, 2007), 250-51.

¹⁵⁸ The law popularly known in the United States as Jessica's law, for example, arose out of the 2005 murder of Jessica Lunsford in the state of Florida. Within 3 months, legislation was enacted in Florida - the Jessica Lunsford Act, signed into law on May 2, 2005 - which provided for increased prison sentencing for sexual offenses against

or weapon - no matter how innocuous or innocent - and no-touching rules in schools are attempts to forestall and prevent violence or drug violations in schools.¹⁵⁹ Criminal activity such as the killings at the campus of Virginia Polytechnic Institute in April of 2007 are inevitably followed by recriminations for the failure of the authorities - or the law - to have detected and/or prevented the crime.¹⁶⁰

Conditions of probation or parole routinely include an extended period of significant restrictions on the defendant's freedom to travel, associate, and ingest what he chooses, in the attempt to prevent recidivism and to gain leverage to be able to further imprison a defendant for behaviour that falls short of criminal, but which violates the prophylactic conditions of probation or parole that extends far beyond any permissible prison sentence. Sex offender registries, for example, have no provision for

children, tougher probation laws, and ongoing registration of released sexual offenders, including electronic monitoring. To date, some 30 states have enacted similar legislation, and federal legislation has consistently been proposed - but not yet enacted - which would incorporate the same reporting requirements of sex offenders on a national basis, as well as withholding federal funding to states that do not cooperate in the maintenance and exchange of sex offender registry information. See, e.g., H.R. 2423, 109th Congress (1st Session) H.R. 2423 [109th]: Jacob Wetterling, Megan Nicole Kanka, and Pam Lychner Sex Offender Registration and Notification Act (A Bill To improve the national program to register and monitor individuals who commit crimes against children or sex offenses, introduced in the House of Representatives May 18, 2005); H. R. 252, 110th Congress (1st Session) (A Bill To create a separate DNA database for violent predators against children, and for other purposes, introduced Jan 5, 2007); H. R. 291, 110th Congress (1st Session) (A Bill To establish a National Sex Offender Risk Classification Task Force to create guidelines for the establishment of a risk-based sex offender classification system for use in sex offender registries, introduced in the House of Representatives Jan. 5, 2007); S. 431, 110th Congress (1st Session - A Bill To require convicted sex offenders to register online identifiers, and for other purposes, introduced in the Senate of the United States Jan. 30, 2007); H. R. 719, 110th Congress (1st Session - A Bill To require convicted sex offenders to register online identifiers, and for other purposes, introduced in the House of Representatives Jan. 30, 2007).

¹⁵⁹ Students have been suspended or otherwise disciplined for such things as possessing an aspirin, display of plastic army men figurines, spanking fellow students, and submitting a photo for the school year book that depicted the student in medieval costume with a sword.

¹⁶⁰ In Virginia, for example, Governor Tim Kaine issued an executive order within two weeks of the shooting purporting to close what was being described as a "loophole" of Virginia's gun control law. The executive order provided for the establishment of a database of names of certain mental health patients and the prohibition of the sale of guns to anyone on the list. The potential legal and political challenges to this action are beyond the scope of this work.

expiration. A convicted sex offender, therefore, is subject to these restrictions for the rest of his or her life.

Moreover, where the criminal law has proven less than effective, civil law has been invoked. Some cities, including Los Angeles, Fort Worth, Wichita Falls and San Francisco, have sued gang members in civil court - prior to being able to prove any criminal activity - and obtained injunctions restricting their ability to gather on the street or travel to certain other areas of the city.¹⁶¹ Proponents claim criminal activity is thereby reduced.

Thus, it appears that we are attempting to prevent criminality,¹⁶² and come against questionable morality and ethical dilemmas with law. I contend that some of these types of proliferation of positive law are an indication of the shrinking of the moral and the ethical, an attempt to enforce what previously was held to be the unenforceable (externally, at least), and that it shows the limits of law. The limits are shown in that where law proliferates, what is unsaid becomes 'legal' and gains a sense of legitimacy without reference to internal or formerly jointly-held moral considerations. This demonstrates not only the limits of law, but also the limits of what the state can do, to make people moral. It is an illustration of Justice Ernst-Wolfgang Böckenförde's well-known thesis that the state has to presuppose these kinds of moral resources, as it cannot create them itself. We will look more closely at this issue in chapter 5.

2. Imperfect duties

The Kantian philosopher Onora O'Neill brings several helpful concepts to the discussion of the limits of law *vis-à-vis* the determination and/or enforcement of an ethical code. First, her treatment of the Kantian concept of *imperfect obligations*, by

¹⁶¹ See *People v. Englebrecht*, 88 Cal. App. 4th 1236 (2001 Cal. App.) (upholding San Diego injunction against Posole gang member which prohibits otherwise legal behavior, such as the wearing of certain clothing, the carrying of a baseball bat, for example, and giving certain gang hand-signs).

¹⁶² Whether or not crime is on the rise or not, see generally Yvonne Marie Daly B.C.L., "The Changing Irish Approach to Questions of Criminal Justice: Media Portrayal, Moral Panic and Myopic Politics," *Cork Online Law Review* X (2003): <http://www.ucc.ie/colr/2004x.html> (accessed October 18, 2007); and David Garland, *The Culture of Control* (Oxford University Press, 2001), 263, which argue that the perception of increased criminality is more important to the cultural phenomenon of over-reactive legislation than any actual increase.

which she means “obligations without counterpart rights.”¹⁶³ Second, her distinction between status and contract by way of situating both rights and obligations, including the unenforceable *imperfect* duty. It is in the increasing confusion and shifting of relationships that arise either out of status or of contract¹⁶⁴ that we see a further decline of the notion of the unenforceable, insofar as imperfect duties most frequently are retained in status-based relationships, rather than those arising out of choice, which are increasingly conditional.

Our lives are becoming increasingly “choice”-driven instead of by “status”, i.e., something given, as, for example, by membership in a culture, language, by citizenship in a country, relationship by family tie, or even permanent residence in a cohesive community within a larger country. Many of these givens of people’s existence - including family ties and relationships - are no longer constant. We divorce and divide families, we move away from the country of our birth, we migrate from village to village and may not even know our neighbor, let alone ‘belong’ to any community in the place of our residence.

Looking at the status relationship of parent and child, it is clear that the child should have certain self-evident and universal rights (not to be tortured or killed, for example), as well as special or specific rights in relation to her parents. These would include elements of care such as food, clothing, shelter, etc. The corollary to the child’s rights would be universal and special duties of the parent to the child with respect to fulfilling those rights.

O’Neill properly points out an additional element of duties – both universal *and* special – which however cannot be claimed by the child and are misconstrued if one treats them as a matter of *right*. These are what she terms *imperfect obligations*. The example she gives is to the general understanding that a parent has some degree of

¹⁶³ Onora O’Neill, “The ‘Good Enough’ Parent in the Age of the New Reproductive Technologies” in *The Ethics of Genetics in Human Procreation*, ed. Hille Haker and Deryck Beyleveld (Aldershot, U.K.: Ashgate Publishing, 2000) 33-48, 36. Note that the Kantian notion from which this is drawn does not so much emphasize the duty without the corresponding ‘right’, as much as it emphasizes a duty which it is possible only to ‘over-fulfill’.

¹⁶⁴ I.e., by *choice*.

responsibility or obligation to provide to his child a home and atmosphere that provides some measure of “cheerful dailiness of family life, to some fun and attention, to some affection and understanding”.¹⁶⁵ This is so, even though it can not be said that a child may claim it as a matter of *right*, let alone identify certain *specifics* attendant to the fulfillment of that imperfect duty such as a room, television and Gameboy or X-box of one’s own. . . . perhaps.

This element of imperfect duty becomes important with respect to retaining and nourishing the concept of the ‘unenforceable’ in a society increasingly oriented toward the law and its [enforceable] requirements. The *unenforceable* becomes the stuff of virtue ethics and character-formation ethics in the long line proceeding from Aristotle. It is present also in Kant’s Groundwork of the Metaphysics of Morals in the requirement of a “good will”, or one acting from a good motive, as Ricoeur has pointed out. Specifically, it is one acting out of respect for law in obedience to Kant’s second formulation of the categorical imperative to treat others as an end in themselves, and not as a means. I would argue that Kant does not thereby speak of actions *enforceable* by law in the legal sense, but rather actions undertaken out of respect for a higher, *unenforceable* philosophical law of reason, in conjunction with the universal maxim of his Categorical Imperative.¹⁶⁶ Its guiding idea is that each person is an end in themselves, “ineffable”, inexhaustible, and not at another’s or their own disposal.

As this sense of duty is the one I began this chapter by saying is no longer either attractive *or* entirely enforceable in a culture that appears to be losing the moral resources needed to sustain it, we may readily see the importance of the concept of imperfect duties as some measure of possible substitute. Imperfect duties fall at a crucial point showing the limits of law - in that the imperfect duties are neither legally specifiable nor enforceable - and at the limit of rights, in that imperfect duties may not be demanded as a matter of right, although they may be reasonably expected. Thus, imperfect duties are where motivation, spontaneity, internal resources, and moral emotions are called for, instead of a crippling demand for rights, which operates mainly defensively, limits the “rights” by specifying them, and damages the ability of the parties to - together - pursue a flourishing life.

¹⁶⁵ O’Neill, “‘Good Enough’ Parent,” 37.

¹⁶⁶ See, e.g., Paul Ricoeur, *OA*, 262-73.

Another case may be seen utilizing a different starting point, where the conflict is between a primary and a secondary institution, such as a family over against the legal system. One may readily see the encroachment of the legal system on the family - or lifeworld, to use Habermas' colonization thesis - where a prohibition of slapping, for example, disempowers the primary relationship by transforming it into a legal one.

The alternative to the unenforceable - whether in the original sense of Kantian duty under the Categorical Imperative, or the lesser imperfect duty - is, of course, is to fall back on actions only as required and enforceable at law or else to rely entirely on gratuitous action. Imperfect duties get us only so far, however.

Onora O'Neill traces a potential difficulty besetting imperfect duties in the parental sphere in the second point I mentioned as helpful to our discussion, namely a distinction between status and choice, and the difference it makes to the formation and type of duties and rights. Parenthood – and its concomitant obligations, both perfect and imperfect – is generally seen as a status, and not as a relationship chosen or arising out of contract. In distinguishing between relationships that are “given” as opposed to those that are chosen, obviously the ‘given’ relationships are those we can *not* chose – they just are. My mother is my mother no matter what, but my friends and enemies are subject to change and subject to choice.¹⁶⁷ O'Neill notes that these types of status relationships “matter deeply to people” and she gives the example of adopted children who, no matter how loving their relationship with the adopted parents, still long to know their birth mother and father.¹⁶⁸

¹⁶⁷ Marriage is problematic in this regard. Although based in choice - one chooses whether to marry or not - marriage has become increasingly conditional, as the option of *ending* the marriage has become subject to choice as well.

¹⁶⁸ An interesting - but complicating - development in this area arises out of the increasing incidence of children being born “to” homosexual couples and - by means of adoption - end up with either two mothers (or two fathers), instead of a mother and a father. See, e.g., James C. Dobson, “Two Mommies is One Too Many: Mary Cheney is starting a family. Let’s hope she doesn’t start a trend.” *Time Magazine*, December 18, 2008, 123 and Ellen Goldman, “All Children Should Have the Right to Find their Fathers,” *The Capital Newspaper*, Annapolis, MD, Tuesday, December 26, 2006, A10.

She points out, however, that parenthood is increasingly becoming subject to choice especially by means of new medical procedures. From the point of view of children born by these types of procedures, the questions they subsequently face are different to those faced by other children born and raised 'naturally' by their biological parents.

"Even a child who was rejected by its birth parent(s) was not usually had in order to reject it. Adopted and fostered children have to face facts that they may find harsh, and in searching for their birth parents may find rebuff and disappointment of many sorts. But they do not have to face the fact that either genetic or gestational parents . . . *planned from the start not to have any connection, not to take on any of the emotional and normative demands of parenthood.* . . . and that this rejection was not merely aided and abetted but planned by the parents who brought them up."¹⁶⁹

O'Neill looks at the confusing heritage that can result from the use of new technologies and suggests that we "consider whether chosen relationships tend to become conditional relationships. We are well aware that contractual and other voluntary relationships are conditional: non-performance on either side may be grounds for complaint, for redress and ultimately for ending the relationship."¹⁷⁰ Her conclusion?

"As parental relationships are increasingly chosen relationships, there may be a risk of sliding towards a increasingly conditional view of parenthood."¹⁷¹

A conditional view of parenthood, of course, is one that would be at home in the contractual world of law. Together with rights, obligations and competing claims, the law is well able to make findings of fact and issue rulings of law as to what must be done. There is no room for the unenforceable and all is reduced to a utilitarian, economic and/or contract exchange.

Moreover, the attempt to enforce the terms of such a relationship - including the inchoate imperfect obligations which it is possible only to overfulfil and not exhaustively to define, let alone legislate or mandate - effectively exhausts the voluntary nature of fulfilment of such duties and reduces the relationship to the bare basics that *may* be mandated and enforced. A child who sued her parents to require

¹⁶⁹ O'Neill, "'Good Enough' Parent," 42.

¹⁷⁰ O'Neill, "'Good Enough' Parent," 43.

¹⁷¹ O'Neill, "'Good Enough' Parent," 43.

them to pay her tuition expenses at Harvard University, for example, instead of the State College they had agreed to pay for, would likely not be expecting a continuing warm welcome home, lovingly home-cooked meals of her favorite foods, help assembling her stereo at the dorm, or a hand-knitted muffler to ward off the cold. The attempt to resolve these relational issues *outside* of the relationship by recourse to the legal tends to suppress further relational resolutions in favor of the structured legal one. This is a familiar experience also in choice-based relationships. Consider as an example the fate of a friendship subjected to a suit on an unpaid debt or breach of contract. The debt may be ordered to be repaid, but there is no judicial decision or order that can restore the friendship.

Likewise, this type of enforceable, contractual relationship is not the view that we typically hold of the nature of the parent/child relationship.¹⁷² Will the changes in how we view that relationship - i.e., as a matter of status or choice - also change our notion of the unenforceable 'obligations' a parent has toward his or her child? And will the parent/child relationship become increasingly subject to the 'will' of the parent much as the marital relationship is subject to the 'will' of the individual spouses? A major difference between the two, of course, is that the child has no will or choice to be expressed until he or she first comes into being - a happening that is increasingly being expressed as a matter of the 'will' of individual procreators.

We have looked at the diminishment of individual moral accountability and self-legislation in the form of a corresponding demand for increased positive law. We have seen the limits of law in that it cannot make people moral, it can only enforce a certain minimum standard - and this is a very important and valuable function. Nonetheless, for a flourishing life, we can see the need for what may be called the *unenforceable*, and we have seen that this is something the law cannot provide. We explored what imperfect duties, operating at a lower level than Kant's Categorical Imperative, may add, but found that imperfect duties show signs of erosion as well, (1) by the tendency to attempt to transform them into rights by operation of law, (2) by the encroachment of legal institutions on the relationship that gives rise to the imperfect duties, and (3) by

¹⁷² A critique of the philosophy of Ayn Rand, whose novels work out an extreme contractualism in all relationships, is that her world has no room for children.

the increasing conditional nature of our relationships, which undermines imperfect duties, rendering them conditional, as well.

We will now look at the limits of law in resolving the “hard case” within the terms of the law, using its own resources (a) by argumentation and/or interpretation, and (b) using the concept of “rights.”

II. The “Hard Case”

That ‘hard cases make bad law’ is a well-known maxim at law.¹⁷³ Not only do these hard cases potentially result in an injustice to the parties appearing in court, but judicial attempts to side-step what appears to be the required inequitable result can result in a legal precedent that will operate to work injustice on cases yet to come, or to dismantle the operation of the law on the compromised issue altogether. Thus for the sake of the integrity of the law and the legal process, the hard case may result in what appears to be a miscarriage of justice under the facts presented, but the upholding of the law in the long run. This is a classic conflict between polarities: the universal versus the particular; the so-called greater good versus the individual; the ideal versus the actual; the “right” versus the “good”.

These are the same issues we have dealt with already on the ethical level and, as we have seen, Paul Ricoeur in his “little ethics” urges a form of practical reason – a critical as opposed to naive *phronēsis* – as a way of mediating between Aristotelian ethics (the desire for the good life) and Kantian moral norms and duties. He retains a tension between those two polarities in a dialectical mediation informed and shaped by the interpreting self within a narrative framework, as instructed by the tragic, which could be considered the *ethical* “hard case”. Ricoeur’s ethics have been developed as part of his theory of the self and inform his thoughts on law and justice.

¹⁷³ It appears that Justice Oliver Wendell Holmes was a first - if not *the* first - example of the use of this phrase as follows: “Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.” *Northern Securities Co. v. United States*, 193 U.S. 197, 400-401 (1904).

Is it possible that the same considerations that have shaped our study of the interaction between deontology and teleology can profitably shape our understanding of the relationship between law and ethics? If this is so, we could view law as the *enforceable* aspect growing out of the deontological, and - within the making of the law/coming to a judgment itself - see also the interplay of teleological- and deontological-like perspectives that take place when the letter of the law is applied to individual cases.

1. The Hard Case - Argumentation and/or Interpretation

In Ricoeur's work on the polarity - and yet inter-relatedness - of argumentation and interpretation in juridical discourse, he looks at the starting point of Ronald Dworkin, a noted jurist and legal philosopher, which revolves around the difficulties presented by *hard cases*. His aim is to show the hermeneutical, inductive process of coming to a judgment, in defining what the case *is*. It is at Dworkin's starting point of the hard case, Ricoeur points out, that Dworkin "encounters the question of the relation between law and interpretation."¹⁷⁴

Thus we are dealing with a strategy that takes its starting point in a perplexity arising at the point of the actual practice of a judge and, from there, rises to general considerations concerning the coherence of judicial practice.¹⁷⁵

What IS the hard case, according to Ricoeur?

When none of the legal dispositions drawn from existing laws seems to constitute the norm under which the affair in question might be placed. We could say, in Kantian language, that hard cases constitute a test for reflective judgment.¹⁷⁶

As evil shows the need for deontology and tragedy the need for a return to teleology in a practical wisdom in ethical matters as we explored in chapter 1, so, too, Ricoeur appears to present a similar relationship at law between the polarities of argumentation and interpretation and the adherents of each in the realm of the law. The presence of

¹⁷⁴ Paul Ricoeur, *The Just*, trans. David Pellauer (Chicago: The University of Chicago Press, 2000), 111.

¹⁷⁵ Ricoeur, *The Just*, 111.

¹⁷⁶ Ricoeur, *The Just*, 111.

evil and possibility of violence would argue for strict argumentation under clear rules with no room for interpretation or modification under existing rules of law. At the same time, the “hard case” - like the tragic in the ethical domain - shows the limits of strict argumentation and application of inflexible rules, and cries for the permissibility of interpretation and modification of the law to fit the facts and circumstances at hand, in a more teleological orientation toward the ‘good’.

In attempting to solve the question of argumentation versus interpretation, Ricoeur explores the relationship between normative practical discourse and normative juridical discourse as a subset. This will be important in tracing out the increased role occupied by the law not only as an enforcer of the right, but also as part of the process by which consensus about the right and the good are reached.

Ricoeur observes an apparent polarity between argumentation and interpretation within the law. At the initial stages of his investigation as to how the two might interact, he proposes a narrow view of interpretation – which appears to be to him the sense of mere *application* of “the juridical norm to a case in litigation”. This, he says, is a good enough reason to at least try to oppose to it an ‘opposite’ of argumentation. And this question “is relevant insofar as argument has been characterized. . . . as a verbal battle without violence and, more precisely, as the clash of arguments, by which the well-known agonistic tenor of arguments within the setting of a court of justice is underscored.”¹⁷⁷ We might note here the move from a pre-legal direct violence, to argumentation in a court of law, submitted to the binding decision of the presiding judge. Supreme Court Justice Oliver Wendell Holmes, Jr. said it well:

[I]n societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees.¹⁷⁸

Ricoeur questions, however, whether in fact an oppositional duality is really the best way to view these concepts or whether – as he believes – “we must attempt to elaborate

¹⁷⁷ Ricoeur, *The Just*, 109.

¹⁷⁸ Oliver Wendell Holmes, Jr., “The Path of the Law,” *Harvard Law Review* X, no. 8 (1897): 457-78, 61.

a properly *dialectical* version of this polarity.”¹⁷⁹ The “present state of the discussion” he says, does not appear to be “oriented toward such a dialectal treatment.”¹⁸⁰ Thus, writers and thinkers in the philosophy of law arena appear to be choosing one or the other – *either* interpretation¹⁸¹ *or* juridical argumentation.¹⁸²

Ricoeur sets up the duality as follows:

Dworkin titles the second half of his book “Law as Interpretation”, “apparently without making any place . . . for an eventual confrontation between interpretation and argumentation.”¹⁸³

And:

Alexy and Atienza see juridical argumentation as a subordinate part of practical argumentation generally, “without interpretation ever being recognized as an original component of juridical discourse.”¹⁸⁴

Ricoeur, however, argues that argumentation and interpretation ought to intersect at one point, which he describes as the point where a complex regressive and ascending arc (interpretation) meets a progressive and descending arc (argumentation). He describes this relationship as follows:

The point where interpretation and argumentation overlap is the one where Dworkin’s regressive and ascending way and Alexy and Atienza’s progressive and descending way intersect. The former finds its starting point in the difficult question posed by hard cases and from there rises toward the ethico-political horizon of the “judicial enterprise” considered in terms of its historical unfolding. The latter proceeds from a general theory of argumentation valid for every form of normative practical discussion and encounters juridical argument as a subordinate province. The first way reaches the common crossroads at the moment when the theory of interpretation encounters the question posed by the narrative model of criteria of coherence applying to judgment in juridical

¹⁷⁹ Ricoeur, *The Just*, 109 (emphasis supplied).

¹⁸⁰ Ricoeur, *The Just*, 109-110.

¹⁸¹ Citing, e.g. Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985).

¹⁸² Ricoeur, *The Just*, 110nn2-3 (citing Robert Alexy and Manuel Atienza’s major works. Note that the works cited are from 1985, 1979 and 1989, respectively).

¹⁸³ Ricoeur, *The Just*, 110.

¹⁸⁴ Ricoeur, *The Just*, 110.

matters. The second reaches it when, in order to account for the specificity of juridical argumentation, procedures of interpretation again find their relevance as the *organon* of the juridical syllogism thanks to which a case is placed under a rule.¹⁸⁵

Here, *organon* is the Kantian term which one might translate to mean the framework of methods to be used. A juridical syllogism is typical of a subsumption figure of argumentation, where specificities of the case are overlooked. The problem is how to judge like as like, and how to establish what makes one particular case either like or unlike previous cases.

In arguing against a strict polarity between interpretation and argumentation, Ricoeur refers to Hannah Arendt's unfinished work on judging and suggests that "the Kantian theory of reflective judgment illustrated in the third Critique by the analysis of the judgment of taste and that of the teleological judgment can receive other applications than those proposed by Kant. . . ." ¹⁸⁶ To that end, Ricoeur argues for a different ground – *not* an 'either/or', but a 'both/and' held in a creative tension. This is important in order to do justice both to the singularity of the case (for which narrative criteria apply), and for the cohesion required of the law, which cannot legislate just for exceptions.

This sounds very much like the critical *phronēsis* we have been studying of him. The question then becomes to what extent the law – as thus empowered to act both interpretively *and* by means of recognizing arguments – may (or *will*) act in ethical matters. One important point of convergence is that the point of the legal process is to come to a decision. The end point is a definite act of judgement with consequences. And yet the law also preserves a dialectic - a tension - between the predictability citizens are entitled to expect from the law and the court's sensitivity for special circumstances which must be seen to count, and not be put aside in the legal judgment. The law attempts to safeguard both. One example may be seen in the criminal case where the guilt/innocence phase of the trial is separate from the sentencing phase of the trial. This enables the judge to apply a criminal law predictably with respect to guilt or

¹⁸⁵ Ricoeur, *The Just*, 125-126.

¹⁸⁶ Ricoeur, *The Just*, 126n19.

innocence, and yet consider special circumstances at the time of sentencing. Ricoeur offers us the theory, but does not go into the detail of legal application.¹⁸⁷

In other words, how does this fit in with the thesis of an increase in positive law in the attempt to gain a foothold against a diminishing ethical realm and decline of the unenforceable? It is here that Ricoeur's treatment of Alexy's normative juridical discourse as a subset of normative practical discourse comes into play, where the law may be viewed not only as a means of enforcement of established norms, but perhaps - more importantly - as the means by which consensus is mediated as to the good and the right.

Juridical normative discourse, of course, takes place within a judicial court system of enforceable rules, rendering enforceable decisions, and compelling action. This type of normative discourse is related by Ricoeur to the larger and more general notion of practical normative discourse where, however, there *is* no discourse system, no enforceable rules, and there are no formal decisions (the impossible goal is to reach consensus), let alone action. In short, the juridical discourse (enforceable) is looked to, to *inform* the practical discourse, which is unenforceable. In fact, this appears to be Ricoeur's main point of interest in the judicial system, the extent to which it affects - or reflects - the larger discourse on norms and potentially on values. This is certainly in keeping with Ricoeur's subsequent retrospective, which we discussed in Chapter 1, in which he affirms that the main difficulty today in ethics is the proper location *of* ethics as it looks backwards to the standard to be applied and forwards to the application of the proper standard, connected - as it were - by a deontologically-functioning morality.¹⁸⁸

Does this not assume a foundational interpretative function of the law, however, in attempts to deal with an historical application of existing law and avoiding the "no answer" to the hard case question? Ricoeur characterizes Dworkin's interpretative thesis as integrally based on an opposition to the positivist theory of law. Thus, refuting legal positivism is the major goal in Dworkin's theory and - in relevant part to

¹⁸⁷ See Ricoeur, "Response," 289, where he sketches out possible tests in applied ethics in political, historical, medical and judicial areas.

¹⁸⁸ See Ricoeur, "Response," 285-87.

our discussion - specifically to overcome that portion of legal positivism which would provide for the exercise of a judge's *discretion* in a case where it appeared that applicable law provides no answer. It is in refuting legal positivism that Dworkin will "make a bed for a theory of interpretation."¹⁸⁹

Ricoeur explains this vital point:

If the judge's 'discretion' is the only reply to the silence of the law, then the alternative is fatal for every juridical characterization of a decision. Either it is arbitrary, in the sense of being outside the law, or it enters the law thanks only to the legislative claim with which it cloaks itself. Only the capacity to draw on a precedent preserves the juridical characterization of a decision stemming from any discretionary power.¹⁹⁰

Without a theory of interpretation then - being able to draw on 'precedent' - which is common law theory, in fact, Ricoeur concludes that where a law does not *expressly* resolve a matter, any judicial decision breaks down. It is either (1) arbitrary, or (2) taken out of a judicial role altogether by virtue of having been cloaked with a legislative function in that it only re-enters the law *as* law by judicial legislative pronouncement. The 'decision' is no longer judicial decision relating to existing law, it becomes legislative action, the creation of new law.

Ricoeur cogently summarizes:

The problem as Dworkin sees it: how to justify the idea that there is always a valid response, without falling into the arbitrary or into the judge's claim to make himself a legislator?¹⁹¹

Ultimately, Dworkin avoids almost all contact with any element of the theory of argumentation. This failure to "look on the side of a more refined theory of argumentation" is hardly "due to a lack of subtlety", Ricoeur affirms.¹⁹² The answer lies elsewhere:

¹⁸⁹ Ricoeur, *The Just*, 111-12.

¹⁹⁰ Ricoeur, *The Just*, 112.

¹⁹¹ Ricoeur, *The Just*, 112.

¹⁹² Ricoeur, *The Just*, 114.

Dworkin is much less interested in the formality of arguments than in their substance and . . . in their moral and political substance. The concept of law proposed . . . rests on a hierarchy of the various normative components of the law. It is again the quarrel with Hart's positivism that leads the way. What is denounced here is the complicity between the juridical rigidity attached to the idea of a univocal rule and the decisionism that ends up increasing a judge's discretionary power. Univocity, is it strongly emphasized, is a characteristic of *rules*. It does not fit *principles*, which, in the final analysis, are of an ethico-judicial nature. The established law, as a system of rules, does not exhaust the law as a political enterprise.¹⁹³

For Ricoeur, this distinction between rules and principles "contribute[s] to a hermeneutic theory of judicial judgment . . . in that it is principles rather than rules that work together more readily toward the solution of hard cases. And these principles, unlike rules, are identifiable not by their pedigrees . . . but by their normative force."¹⁹⁴ In working with principles, of course, it is inescapable that there must be an interpretative function:

In each case, they have to be interpreted. And each interpretation can be said to 'count in favor of' this or that solution, 'weigh' more or less, incline without necessitating. . . . The vocabulary of many verdicts in common law – terms such as unreasonable, negligent, unjust, significant – marks the place for interpretation up to the pronouncement of the verdict."¹⁹⁵

This more casuistic standpoint is clearly in opposition to the formalism characteristic of law as argumentation and Ricoeur adroitly notes connections between the text-reception school of literary theory and Dworkin's interpretative theory of law, utilizing principles rather than being bound by strict rules:

[Dworkin] owes to the model of the text a conception of the law freed from what he calls its pedigree. From a model of narration, despite a certain naiveté in the face of the contemporary development of theories bearing on narrativity, he takes up "legal practice" in terms of its historical unfolding, "legal history" being set up as the interpretive framework. Finally from the distinction between principles and rules, he draws a general conception of law inseparable from "a

¹⁹³ Ricoeur, *The Just*, 114.

¹⁹⁴ Ricoeur, *The Just*, 115.

¹⁹⁵ Ricoeur, *The Just*, 115.

substantive political theory.” It is this ultimate and fundamental interest that finally distances him from a formal theory of juridical argumentation.¹⁹⁶

Ricoeur makes a good case for the need for *both* sides of this theoretical dispute, however, and that rather than existing oppositionally - as a dichotomy - they might function instead in a dialectical relationship. This relationship would be analogous to the dialectic of explaining and understanding, which he has established as equal partners in hermeneutics, after Dilthey’s separation of the two distinct modes of the sciences and the humanities. He has explored them in *Oneself as Another* as they relate to Kant’s “reflective judgment.” Most importantly to our study, however, is the distinction between mere internal rules of the legal system and principles from which they stem, and that have to be related back to the political sphere in which there is a mutual recognition of citizens. Ricoeur has clarified for us that rules *qua* rules are no solution to the problem of the shrinking realms of the ethical and of the moral. Instead, he emphasizes the existing sense of principles in the individuals as political citizens, i.e., as persons who want to “live together”, as he quotes Hannah Arendt. Thus, his acclaimed entry point of ethics, namely “to live well with and for each other in just institutions”, makes itself visible in his critique of rules as not free standing. Instead, he sees a referral back to the origin of a complementary relationship of an ethics of the flourishing life that does not forget moral obligation.

Ricoeur points out that:

In the end, recourse to theory and to so-called systematic arguments does not get us away from hermeneutics, but rather in a strange way leads back toward it. . . .¹⁹⁷

Our discussion, so far, has dealt with the limitations of law with respect to the difficulties the competing theories of either argumentation or interpretation of *existing* law present, to a juridical normative discourse involving the specific case. The situation is changed, of course, where there is no consensus as to the proper norm to be applied in a situation where there either *is* no existing law, or where the existing law has come under challenge as not reflective of the community’s norm or where the norm itself is being challenged. Ricoeur provides us with the theory of a complementary

¹⁹⁶ Ricoeur, *The Just*, 115-16.

¹⁹⁷ Ricoeur, *The Just*, 124.

relationship between positive law, and the specificity of the unique case, as well as his assurance that - in the hard case - “established law, as a system of rules, does not exhaust the law as a political enterprise.”¹⁹⁸

We will look now at the question of the assertion of rights at law, in the attempt either to resolve disputed moral issues in a “hard case”(i) or to secure the legal enforcement of an asserted right where it has not been reduced to a positive law nor recognized as forming part of the common law. We will look at this question from the perspective of the lawyer, who emphasizes the difference between legal terms and philosophical or ethical ones; from a Kantian, for whom the assertion of right also requires the acknowledgement of the corresponding obligation; and from an Aristotelian, who sees in the assertion of rights the opportunity to challenge the law to help bring about social justice and the improvement of the lives of its citizens. How may assertions of human rights be heard at law, and under what conditions are they either persuasive, or enforceable? Do human rights overcome the limits of law we have been discussing so far, with respect to law’s inability to make people moral?

2. Assertions of Human Rights

The use of ‘rights’ language is frequently shorthand for an appeal to the law to try to enforce ethical issues or to resolve disputes by appeal to presumed entitlements. Onora O’Neill references so-called “manifesto rights”, noting, however, that “too often . . . their normative force is an illusion because they are neither principles of justice for which arguments are provided nor institutionally anchored normative requirements.”¹⁹⁹ Constitutional rights, of course, may be alleged to be based on certain “self-evident truths”.²⁰⁰ But consider that the establishment of a right *at law* requires enabling legislation to define the nature of those rights and to provide for the enforcement of, protections against infringement, or other redress for alleged infringements. Otherwise, the ‘rights’ remain inchoate at law: unenforceable that is, unless the court is invited to fashion its own remedy and provide its own forum.

¹⁹⁸ Ricoeur, *The Just*, 114.

¹⁹⁹ Onora O’Neill, “Women’s Rights: Whose Obligations?” in *Bounds of Justice* (Cambridge: Cambridge University Press, 2000), 97-114, 100n.3.

²⁰⁰ The United States Declaration of Independence, of course, starts with the words: “We hold these truths to be self-evident. . . .”

Over the past five to ten years, however, there has been an increasing tendency to ground certain moral problems in the language of rights *without* calling for corresponding enabling legislation and/or enforcement procedures and tribunals. So, for example, the Ombudsman for Children in Ireland has called for a constitutional amendment establishing rights of children.²⁰¹ This, in spite of the Irish ratification of the UN Convention on the Rights of the Child, which, however, has not yet resulted in a corresponding change to the Irish Constitution nor to Irish domestic law. The United Nations Committee on the Rights of the Child has acknowledged that the UN Convention must be *implemented* by corresponding national constitutional and positive law enactments.²⁰² Calls continue to be made to change the Irish Constitution, specifically: the amendment of Articles 41 and 42 to include a statement of the constitutional rights of children. To date, this has not yet been done.

Other examples abound. An election campaign promise by the Irish Labour Party was to establish the recognition of “rights” to housing. Amnesty International, in conjunction with publishing accounts of alleged abuses of human rights in the mental health care arena, urges the recognition of the “rights” of the mentally ill to certain levels of care and participation in treatment decisions. And as we shall discuss in more detail below, the European Convention on Human Rights and Biomedicine (adopted by the Parliamentary Assembly on September 26, 1996) is grounded in human rights and neither provides nor envisions the provision of an effective enforcement procedure.

a. May the assertion of rights resolve disputed moral issues?

The Irish legal theorist Neville Cox looks at what he calls “the failure of ‘Rights Talk’ in the Field of Bioethics”, concluding that if the Council of Europe “wishes to deal with matters pertaining to bioethics. . . [it] will have to be prepared to depart from the tried and trusted, yet now inadequate language of rights and use the far more difficult

²⁰¹ Carol Coulter, “Change in Constitution urged to protect rights of children,” *The Irish Times*, Jan. 31, 2005, p. 1.

²⁰² U.N. Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child, Ireland*, Seventeenth Session, U.N. Doc. CRC/C/15/Add.85 (1998), available online <http://www1.umn.edu/humanrts/crc/ireland1998.html> (accessed October 19, 2007).

language of morality.”²⁰³ It is not because of the moral status of the embryo, he says, that rights language is inappropriate in this case, it is because of the legal nature of rights. In particular, he notes that “[t]heir recognition, albeit not their application, should transcend all reasonable moral certainty.”²⁰⁴ What does Cox mean? In effect, he demonstrates the failure – if not impotence – of the Council of Europe to say what is ‘good’²⁰⁵ in respect to how we ought to treat human embryos, which, of course, has implications that reach much further, to questions of basic rights to life, bodily integrity, what constitutes personhood, and so on. This is an area open to considerable debate and disagreement not only in the area of testing and research on human embryos, but also surrounding the question of abortion. Cox traces what he views as the Council of Europe’s attempt to circumvent this dispute by means of the assertion of rights. What follows will be Cox’s *legal* argument, which, as we will see, does not resolve the underlying moral dispute. That is Cox’s point, in fact: that the mere assertion of *right* - within a legal context - does not resolve the moral dispute either.

The issue is presented because the *European Convention on Human Rights and Biomedicine*²⁰⁶ appears to grant human rights to *embryos* in that its regulation of embryonic research is expressly based upon an assertion of human rights, or at least protection of the person. Cox argues that this inference arises because embryos for research are required to be donated by *consenting* parties, as to which no question of human rights arises. Thus, the only other human right or dignity requiring protection by the Convention would be that of the human embryo itself. The granting of human rights to the human embryo obviously goes far beyond either what the European Convention on Human Rights states or the Court of Human Rights has held with

²⁰³ Neville Cox, “The Failure of ‘Rights Talk’ in the Field of Bioethics: The European Convention on Human Rights and Biomedicine”, in *Designing Life? Genetics, Procreation and Ethics*, ed. Maureen Junker-Kenny (England: Ashgate Publishing Ltd., 1999), 37.

²⁰⁴ Cox, “Failure of Rights,” 39.

²⁰⁵ Cox does not abide by any distinction between the teleological and deontological branches of ethics with respect to the use of the terms ‘right’ and ‘good’, or to the other common usage of morality as relating to questions of the right and ethics to questions relating to the good, but tends to use them interchangeably. This tends to cloud his argument with respect to where he would like to focus on the question of ‘the good’ as opposed to ‘the right’ – or at least the permissible – as affected by assertions of human rights.

²⁰⁶ Hereafter referred to as the “Convention”.

respect, for example, to abortion issues. It is in this respect that Cox sees the use of rights-talk as an attempt to trump unresolved ethical issues, at least in this instance as far as embryonic research is concerned. The fact that it is unenforceable at law²⁰⁷ - absent express positive law enactments - amounts to little more than verbal incantations with heavy moral overtones.

Ironically, rights-talk appears to be moving into the arena previously held by the religious, whose God-talk was also accused of being used as a trump card, incapable of being discussed rationally. This is the reason which led to the ultimate exclusion of the religious voice from the public debate of these types of serious questions within the liberal democratic systems of justice and/or ethics as proposed by John Rawls and – at least initially – by Jürgen Habermas.

Cox rightly points out that the use of rights-talk to “conclude and foreclose debates in difficult areas . . . means that ‘real’ rights – of freedom of expression, property and so on – are debased.”²⁰⁸ But it also means that the underlying difficult questions have not been dealt with. That, ultimately, is why rights-talk fails in the Council of Europe’s *European Convention on Human Rights and Biomedicine*. Granted, the Convention may have been rejected on both sides of the question - namely that it didn’t go far enough, as well as for the reason that it went too far. This is Cox’s point. His ultimate diagnosis is that the Convention provides “no certain basis apart from the language of rights upon which to make moral judgments. What is needed, as the Council of Europe moves in new directions such as the direction of bioethics is some effort to determine a moral or ethical code for Europe in this area.”²⁰⁹ The effort may not succeed, but it is a

²⁰⁷ See Cox, “Failure of Rights,” 24-27 for a cogent explanation of the binding authority of this and other international regulations. He notes that it should be remembered that the Convention “being based on international law, it will necessarily be more dependent on consent than on enforcement.” Cox, “Failure of Rights,” 34. Even more tellingly, Cox describes the feeling at the time that “while it was not very good, it was at least better than nothing, and would serve as a yardstick and model for individual member states.” Cox, “Failure of Rights,” 27.

²⁰⁸ Cox, “Failure of Rights,” 27. One wonders where the rights of the person – including a right to life – would fit within Cox’s scheme of ‘real rights’, which seem to assume the existence of the person holding those ‘real rights’.

²⁰⁹ Cox, “Failure of Rights,” 41 (footnote omitted). Again, Cox is imprecise as to whether this is a moral or ethical undertaking that is required. Given the long history

step that must be taken. The bare assertion of “rights” does not address the underlying dispute.

Cox provides a good example of the legal objection to the assertion of rights as “reasons” in moral disputes. For the lawyer, rights are grounded somewhere, whether positive rights established by positive law - which Onora O’Neill terms “claim rights” - or rights of liberty, declarations of certain freedoms, for example, which are not to be infringed by another or the state, but which do not require any other positive action to secure them.²¹⁰ O’Neill emphasizes what Cox does not say explicitly:

In a way the fact that there are no claim rights without obligations is so obvious and well known that it is embarrassing to bring the matter up. Yet I believe that a great deal of discussion of rights, including of women’s rights, continually misstates the ways in which and the extent to which rights and obligations correspond to one another, and hence fails to see how much it matters whether discussion of justice emphasizes rights or obligations.²¹¹

The situation is complicated further when there is no underlying agreement either as to the fact or nature of the right itself, let alone the corresponding obligation and the so-called right itself is being advanced as a “reason.”

b. May the assertion of rights form the basis for legal enforcement of disputed moral issues?

Aristotelian Martha Nussbaum gives another perspective on the use of rights-talk as a means by which to transform disputed - and currently unrealized - values into so-called self-evident rights, which are thereby gradually realized, defined, and protected. Her admiration of the Hegelian Option in tragedy, which we discussed in Chapter 1, is based on an appreciation for the need to consider questions of reparations to the currently losing side, as well as to consider what can be done to prevent similar situations in the future.

Nussbaum offers two examples from India which she would address through the means of the assertion of rights, over and above the question of resolving the disputed moral

of debate concerning the ascendancy of deontology to teleology – or the reverse – some treatment of this question seems necessary.

²¹⁰ O’Neill, “Women’s Rights,” 98-99.

²¹¹ O’Neill, “Women’s Rights,” 98-99.

issues and/or values. One, the question of compulsory education²¹². Two, the issue of a woman's ability to work and support herself.²¹³

In critiquing Ricoeur's *phronēsis*, we noted that Nussbaum found that Ricoeur had not precisely spelled how far it should go, and she suggests two important ways in which she believes *phronēsis* should be effectively expanded in our society today.

First, she looks at the question of what happens to the value or obligation choice that 'lost out' after turning to *phronēsis* and ultimately making a decision. Does it continue to exert a claim, she asks? And what about reparations where there is suffering imposed by the decision made? Second, she turns again to Hegel, and asks whether we are, "in Hegelian fashion, even more deeply obligated to ponder the genesis of the tragedy, asking how a different arrangement of social institutions might eliminate such conflicts for citizens in the future?"²¹⁴

Nussbaum illustrates this point with "the case of compulsory education in India."²¹⁵ The conflicting values are the relative 'good' of having educated citizens, the cost to the government to provide such an education and the cost to parents of children having to forego the wages their children could otherwise earn. She then critiques *phronēsis* as incapable - alone - of addressing this problem and urges the creation of a new fundamental right, by constitutional amendment.

²¹² Martha Nussbaum, "Tragedy," 273-274.

²¹³ Martha Nussbaum, "Valuing Values: A Case for Reasoned Commitment," *Yale Journal of Law & Humanities* 6 (1994): 197-217, 202 (Nussbaum argues that we do not need universal agreement on moral issues – or on values – before such matters can be determined. She also rejects any need of a transcendent in order to supply authority for values that can not be agreed upon. In this, however, she seems to confuse values with 'human rights'. Her example is of the Indian woman of high caste who is not allowed (by custom, expressing the particular values of a community) to work outside the home, who is in danger of starving if she does not work, and in danger of being killed by her family if she *does*. Nussbaum would "solve" the problem apparently by *asserting* a "right" to work, "right" to live, to personhood, etc. This is a completely different approach than that of any commitment to "values". Certainly it differs substantially from the notion of values as proposed by Hans Joas, in his work, *The Genesis of Values*, trans. Gregory Moore (Cambridge: Polity Press, 2000). Consider too his thesis that it is the *negative* experience of self-formation and/or transcendence that leads to assertions of human rights.

²¹⁴ Nussbaum, "Tragedy," 273.

²¹⁵ Nussbaum, "Tragedy," 274.

Nussbaum thereby urges the use of the law – constitutional law – to *mandate* the ‘good’. Specifically, she urges the adoption of a “currently unrealizable constitutional goal” in order to provide a basis by which the law can be utilized to enforce what has not - so far - been achievable by the motivations of commonly-held values and ethical convictions. She states, quoting her at length:

All this [her report of the uneven results of attempts to require ‘compulsory education] suggests that there is some point to going beyond the best *phronēsis* that we can exercise, and adopting a currently unrealizable constitutional goal that specifies a basic education right for all citizens. This is in fact what India is now doing: a proposal to amend the constitution’s list of fundamental rights to include a fundamental right of primary and secondary education has been introduced, and has broad support. **Obviously enough, amending the constitution does not all by itself change the conditions I have described.** But it does give education a new moral and legal emphasis: it is now a fundamental entitlement of all citizens, the deprivation of which constitutes a tragic cost. **It will also be possible to litigate against states or other public actors that deprive children of this fundamental right** through deficient planning. If political actors had *simply* turned to *phronēsis*, not pressing into the future the demands of the losing claim, we would have missed a profound element in political justice. Tragic dilemmas may have a natural element, but they usually also have an element of human greed or neglect or lack of imagination. We should not treat the greed as a given; we should exercise imagination in a free Hegelian spirit, asking what steps might be taken to produce a world that is free of some life-crushing contradictions.²¹⁶

Nussbaum thereby urges that India legislate a decision *now* for what should happen in the future, in spite of the current social *rejection* of the result she urges. In effect, Nussbaum establishes her own transcendent notion of the ‘good’ in the face of disagreement on the matter. She fails to take into account what other competing values might be asserted over against such now-constitutionally-mandated value of compulsory education. This solution purports to eliminate any conflict in the future, by strengthening the claim of the currently ‘losing’ value.²¹⁷ Unfortunately, it appears merely to have shifted the battle ground from public debate in a public forum to a legal question fought in the courts. In this regard, Nussbaum may also be seen to have ignored the financial cost, perhaps in reaction against the ‘cost-benefit analysis’

²¹⁶ Nussbaum, “Tragedy,” 274 (bold supplied, italics in original).

²¹⁷ Interestingly, Nussbaum appears to ignore the possibility that there are *reasons* - perhaps valid ones - a ‘losing’ claim has lost. This approach would make it impossible to say ‘no’ to an asserted “value”. With Nussbaum, it would be rendered “not yet”.

position she opposes so vigorously, as we shall see in chapter 3. In fact, she provides the potential of costs even greater than the originally-unconsidered costs of securing new rights to the people by declaration, as claimants are invited to litigate over the nature of their new rights, the question of how to secure them, specific demands for rights and alleged denials thereof.

The question here is not the underlying merit of education to the people, and this is perhaps what make the argument difficult to focus upon in our Western culture which so highly values education. Neither do I wish to be heard here to be making a culturalist-relativist argument, blindly supporting the cultural decisions and values of a hosting culture, no matter what. At the same time, it is not necessary for our current argument to determine when another culture's contrary value must be opposed and by what means. Our question is whether the assertion of rights may form the basis for the *enforcement* of disputed legal issues. Nussbaum would say 'yes', having utilized an assertion of rights to transform those matters into constitutional guarantees which may then be clarified, established and institutionalized in legal courts.²¹⁸ The lawyer Cox would say 'no', insofar as the law is not the proper device by which to resolve disputes underlying which law is to be made. Kantian Onora O'Neill adds a third perspective, by reminding us that there is no positive claim of right without an attendant obligation. Moreover, she notes that the "rhetoric of rights supposedly appeals to fundamental moral principles, and aspires to justify or to condemn the claims of the grand declarations and charters, and so cannot coherently presuppose them."²¹⁹

c. The assertion of rights includes a burden of obligation

In "Women's Rights: Whose Obligations?" Onora O'Neill sketches the relationship between rights and obligations. She notes our tendency to prefer to talk about the more attractive rights, rather than dwell upon the less appealing question of obligation and yet she also points out that, without the obligation of *providing* access or recourse or the ability to *realize* certain "rights", the talk of rights is meaningless:

²¹⁸ See also Nussbaum, "Cost of Tragedy," 1036, in which Nussbaum urges the application of 'capabilities' or the "(closely allied) human rights approach" to situations of tragic conflict.

²¹⁹ O'Neill, "Rights," 100.

Of course, claims [of rights] are not likely to be effective unless somebody ought to meet those claims, and often they will be ineffective unless the claims are not merely allocated to some agent or agency, but accepted and enforceable. But the actual claiming can go on loudly and confidently, with panache and bravado, without establishing who should deliver whatever is claimed.²²⁰

There can be a political benefit on focusing on the positive claim of rights as well, O'Neill notes, insofar as she notes that rights as entitlements are objected to only by the "curmudgeonly." Obligations present a different side however, requiring us to:

specify not only what is to be accorded, but which obligation-bearers are going to have to do what for whom and at what cost. This is a much less charming topic. Unsurprisingly, the rhetoric of obligations and duties has an unsavoury reputation, and those on whom burdens may fall often object.²²¹

Nonetheless, O'Neill sees the need at least to include the attendant obligations in discussions of rights, because otherwise our moral thinking becomes confused. When we focus on rights rather than on obligations, "it obscures what is really at stake."²²²

To put the matter starkly, if we think about justice primarily in terms of rights, we are more or less bound to find not only that we do not or cannot live up to it, but that we cannot work out what we are trying to live up to. The rhetoric of rights is not only deceptively easy to promulgate, but deeply evasive.²²³

We come up again against a question of "duty", which we have started out by acknowledging is a shrinking moral domain, of diminishing attractiveness and difficulty of enforcement. We now find that the level of obligation also affects assertions of human rights. In attempting to determine "what is really at stake", it is necessary to include the turn to the level of obligation to determine what *are* the obligations attendant on the assertion of specific rights, and who will bear the burden of that obligation. For example, O'Neill reports:

It is even possible to claim what nobody can deliver as a right: I was once publicly admonished for asking who holds the obligations that correspond to an

²²⁰ O'Neill, "Rights," 100.

²²¹ O'Neill, "Rights," 100.

²²² O'Neill, "Rights," 99.

²²³ O'Neill, "Rights," 97.

alleged right to health (not merely to a right to health care!) on the grounds that health is too important to human beings not to be the object of a right.²²⁴

Nussbaum, for example, proposes a list of certain human “capabilities” as human rights which assert just such kind of “rights” with no mention of the attendant obligation-bearer, listing such rights as “Life . . . Bodily Health . . . Bodily Integrity . . . Senses, Imagination and Thought . . . Emotions . . . Practical Reason . . . Affiliation . . . Other Species . . . Play . . . Control Over One’s Environment.”²²⁵ She recognizes that there may be difficulties in securing all these capabilities to all citizens, and circumstances in which they may be delayed. Most tellingly, she also admits that “the precise threshold level for many of them remains to be hammered out in public debate”²²⁶ even if she does not explicitly acknowledge that it is the attendant burden of obligation that will need to be hammered-out, as a society attempts to grapple with the appropriate “threshold level”, for example, to be accorded to a human capability of “bodily health” or “play.”

May we see in this a similarity to the dialectic we examined in chapter 1, in which the ethical aim and the moral obligation are to be held in creative tension? Accordingly, we might also consider that human rights - like ethical aims - must also be subject to the level of moral obligation especially where the assertion of a human right requires the attendant obligation to fall on another person.

Summary - Law: Cart or Horse?

Is law the codification of our culture’s norms and values, or is law a means by which to shape our culture’s norms and values? Which comes first, in other words?

We can perhaps enrich our proposed answer if we look at an analogous situation in ancient law. Was ancient law in response to the culture it regulated, or did it develop independently and thereby shape the culture? We have the luxury of being able to

²²⁴ O’Neill, “Rights,” 100.

²²⁵ Martha C. Nussbaum, “Capabilities and Human Rights,” *Fordham Law Review* 66 (1997-98): 273-300, 287-88.

²²⁶ Nussbaum, “Capabilities,” 300.

study both the law and the culture from a distance, in retrospect, and this might help add a further dimension to the issues we have considered here, with respect to the limits of law. In particular, consider the arguments that the Hebrew Bible specialist Anne Fitzpatrick raises in her chapter on “The Independence of Legal Development” to show that ancient law was *not* a “rational response to socio-economic circumstances.”²²⁷ Interestingly, the situation we face today is different in a very important aspect. In one way, it is almost the reverse of what Fitzpatrick presented.

Fitzpatrick dealt with the question of whether positive law arises out of the accepted values and practices of a society - whether the codification of that law is borrowed from elsewhere or not - or whether it is largely independent. Her conclusion, based *inter alia* on the characteristics of written law as text, including inertia, problems of erasure, and the phenomenon of legal “transplants” - laws “borrowed” from another jurisdiction - was that positive law does *not* arise out of its culture, as a codification of the norms of that culture.²²⁸ In fact, she showed law as lagging well *behind* the culture, and its accepted values, norms and common practices.

The question today is: what *are* the accepted values, norms, and common practices? It may very well be that these questions are unanswerable.

I contend that we attempt to use law to go *ahead* of engaging in discourse to *determine* the existing values, norms and practices in society and thereby establish, influence and/or change those values, norms and practices in advance, into the ones prescribed by law (or at least not prosecuted), deemed thereby to be ‘good’. We do this in several ways, including: (1) increasing the reach of criminal law (which tends to legitimize behaviour not explicitly criminal), (2) the extension of criminal law-like powers and control over non-criminal behaviour by means of positive law enactments enlarging parole and probation powers and establishing various ‘registries’ of past offenders, (3) engaging in the declaration of rights independent of obligations, and (4) the use of the

²²⁷ Anne Fitzpatrick, “The Transformation of Torah from Scribal Advice to Law” (PhD. diss., Trinity College, Dublin, October 1993), 59. Granted, there are significant differences between questions of Torah and modern law, but this example is to illustrate and challenge our thinking, moving forward, not an attempt to draw straight-line conclusions from the Torah to apply to modern law, today.

²²⁸ Fitzpatrick, “Transformation of Torah,” 59-95.

courts as forum in which to contest disputed values, norms and common practices which, because of the role of precedent in the law, operates (5) as a means to settle disputes not yet resolved in the public debate.

On the other side, we have reviewed efforts *outside* of positive law to shore up what we have been calling the unenforceable - specifically the imperfect duties Onora O'Neill investigates - but have seen that imperfect obligations are (1) primarily based on so-called 'status' relationships in a world filled increasingly with relationships of 'choice'²²⁹ and (2) inchoate in their extent, namely it is possible only to over-fulfil them; they are not subject to precise enumeration or description, and (3) we have observed that attempts to utilize the law to enforce or define certain duties arising out of relationship tends to undermine the relationship insofar as it cuts off the free fulfilment of commitment once the law has become involved.

Returning to where we started:

[N]o one in his right mind can any longer claim that moral conduct is a matter of course. . . .²³⁰

We have investigated the limits of law on three fronts: (1) so-called "imperfect duties" as sources for the enlargement of the ethical realm of the otherwise unenforceable; (2) argumentation versus interpretation of positive law, and (3) the question of what effect is to be accorded at law to an assertion of rights, absent a corresponding acknowledgement of obligation, especially where the underlying assertion of right is disputed on moral grounds.

I should like now to turn to question the role of moral theory in the judicial system. I shall do this by reviewing an interdisciplinary debate between several judges, lawyers and moral philosophers as to the proper role moral theory plays in judicial determinations. We will study the exchanges, moves between disciplines, the possible misunderstandings, as well as the points of agreement between the two respective branches. Specifically, how do members of one branch or profession communicate

²²⁹ Marriage appears to be in a category all its own, as described earlier.

²³⁰ Arendt, *Responsibility and Judgment*, 61.

with members of the other and how readily do legal concerns translate into the ethical, and ethical concerns into the legal? The debate itself concerns the role of moral theory in the judicial system. In it, we will see that the same categories that Hille Haker has suggested on the ethical level may be seen as applicable also to describe the discussions between the legal and the ethical, namely the extrinsic approach (1), and the intrinsic approach (2). The Ricoeurian complementary approach, however, is sadly lacking, which will be immediately apparent in the at-times uncivil exchanges. We will look at these exchanges in some depth, in an attempt to determine - if we can - just how these otherwise highly respected, professional, intelligent and erudite scholars can so completely misunderstand one another and talk past each other. We will need to attempt to understand the nature of this misunderstanding if we are to attempt to sketch out a better model for an ethico-legal discourse.

Chapter 3

The Role of Moral Theory in the Judicial System: A Debate between Legal Theorists and Philosophers

Turning once again to Hannah Arendt to sum up the initial problematic, this time of the relationship between law and ethics, she sets out an opposition:

It is, I think, well-known that there exists hardly a walk of life in which you'll find people as wary and suspicious of moral standards, even of the standard of justice, as in the legal professions.²³¹

At the same time, she briskly sets out the strength - and vital role - of the juridical in a moral society:

Legal and moral issues are by no means the same, but they have in common that they deal with persons, and not with systems or organizations. It is the undeniable greatness of the judiciary that it must focus its attention on the individual person The almost automatic shifting of responsibility that habitually takes place in modern society comes to a sudden halt the moment you enter a courtroom.²³²

Our task in this chapter will be to investigate the relationship between law and ethics, and to determine the location of intersections and overlaps, as well as areas of opposition. This relationship will be important not only on the level of moral theory, but also on the level of lived values insofar as both areas are affected by legal proceedings or legal discourse. We may see the intersection between law and ethics as a subset of the relationship between teleology and deontology, keeping in mind that one of the limits of law that we explored was the inability to enforce the higher level of Kantian morality, namely the respect of oneself and another as end in oneself.

²³¹ Hannah Arendt "Some Questions of Moral Philosophy" in *Responsibility and Judgment*, ed. Jerome Kohn (New York: Schocken Books, 2003) 49-146, 57.

²³² Arendt, "Some Questions," 57.

We will explore this relationship along the same fault line we have employed in the previous chapters, namely the tragic, and/or the hard case. Moreover, we will be retaining the same categories we have already charted in the ethical: the relationship of the deontological and the teleological and how that is worked out, either extrinsically, intrinsically, or complementarily.

From our investigation of the limits of law, we retain also our heightened awareness of an increasing reliance on the law to establish and/or enforce 'right' behavior (1), the competing legal theories of argumentation versus interpretation and the legal philosophies implicated (2), and the problems surrounding the proliferation of 'rights-talk' with no corresponding duties attached (3). The uncertainty introduced by the shift from status-based to contractual relationships of choice and its effect on other sources of unenforceable duty, which we investigated in the 'imperfect obligations' described by Onora O'Neil, will come into play as we look at other possible sources of motivation toward the 'good' - or ethical behavior.

In addition to these categories from moral theory, we will be using those of American pragmatism under the William James school of thought, contrasted with the more utilitarian pragmatism - also American - proliferating in what is known as the Chicago School, and currently being expressed in economic utilitarianism along economic cost-benefit lines.²³³

Our theme will be a close analysis of the 1997 Oliver Wendell Holmes Lectures²³⁴ by Chief Judge Richard A. Posner of the U.S. Court of Appeals, 7th Circuit²³⁵ as well as responses thereto by (among others) Philosopher Martha C. Nussbaum²³⁶, an

²³³ See e.g. Richard A. Posner, *Law, Pragmatism, and Democracy* (Cambridge, MA: Harvard University Press, 2003); "Pragmatism Versus Purposivism in First Amendment Analysis," *Stanford Law Review* 54 (2001-02): 737-52; "The Problematics of Moral and Legal Theory," *Harvard Law Review* 111, no. 7 (1998): 1637-1717. For a critique of same, see Nussbaum, "Costs of Tragedy," and Martha C. Nussbaum, "Flawed Foundations: The Philosophical Critique of (A Particular Type of) Economics," *University of Chicago Law Review* 64, no. 4 (1997): 1197-1214.

²³⁴ Richard Posner, "The Problematics of Moral and Legal Theory," *Harvard Law Review* 111, no. 7 (1998): 1637-1717.

²³⁵ Chief Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School.

²³⁶ Martha C. Nussbaum, "Still Worthy of Praise," *Harvard Law Review* 111, no. 7 (1998): 1776-95.

Aristotelian, Judge Charles Fried²³⁷, a Kantian, Legal Theorist Ronald Dworkin,²³⁸ who provides an interpretationist critique of legal positivism, and Judge John T. Noonan, Jr.²³⁹, who adheres to the Natural Law school of thought.

Judge Posner is one of the most influential jurists in America today. His judicial appointment to the Federal Court of Appeals is only one step below the Supreme Court. He is one of the most prolific writers certainly on the bench, if not ever. Through the first half of 2007, he has written over 2,300 legal opinions.²⁴⁰ Besides this vast array of opinions, he has published some 49 books through 2007 and hundreds of articles, book reviews and blogs.²⁴¹ His writing style is sharp, memorable, and often entertaining, as a result of which his opinions are increasingly admired, cited, and studied.²⁴² Even those who disagree with Judge Posner's opinions and writing style attest that it is memorable, increasingly influential, and more and more cited by legal practitioners. A fellow appellate judge in the 7th Circuit, who often dissents from Judge Posner's opinions, notes that Posner's "judicial work is the most widely cited and quoted of any judge in the United States."²⁴³ Ronald Dworkin, one of the commentators of Posner's Holmes Lecture begins a book review of two of Posner's books (both published in 1999) by noting:

Richard Posner is the wonder of the legal world. He is Chief Judge of the Seventh Circuit of Appeals - Ronald Reagan appointed him to that court in

²³⁷ Charles Fried, "Philosophy Matters," *Harvard Law Review* 111, no. 7 (1998): 1739-50.

²³⁸ Ronald Dworkin, "Darwin's New Bulldog," *Harvard Law Review* 111, no. 7 (1998): 1718-38.

²³⁹ John T. Noonan, Jr., "Posner's Problematics," *Harvard Law Review* 111, no. 7 (1998): 1768-75.

²⁴⁰ One may search his opinions on a website devoted entirely to that purpose as part of Columbia Law School's Program on Law and Technology. "Project Posner," <http://www.projectposner.org/> (accessed October 5, 2007).

²⁴¹ A list of his publications is available online at <http://www.law.uchicago.edu/faculty/posner-r/ppw.html#books> (accessed October 5, 2007). His personal site also contains information about current projects, data, and other work in progress. <http://home.uchicago.edu/~rposner/> (accessed October 5, 2007).

²⁴² See generally John Guiffo, "Judging Richard," *Columbia Journalism Review*, Issue 6 (Nov/Dec 2005), <http://cjrarchives.org/issues/2006/6/Guiffo.asp> (accessed October 5, 2007).

²⁴³ Richard D. Cudahy, "Posner Through Dissenting Eyes," *Journal of Contemporary Health Law & Policy* 17 (2000-2001): xxxiii-lxxii, xli.

1981 - and he is therefore one of the busiest and most important federal judges of the nation.²⁴⁴

Dworkin's exchanges with Judge Posner have become increasingly acrimonious²⁴⁵, but this particular assessment of Judge Posner does not appear to be offered facetiously.²⁴⁶

Posner's initial Lecture itself is comprised of two parts: "The Limits of Moral Theorizing"²⁴⁷ (I) and "The Limits of Moral Reasoning in Law"²⁴⁸ (II). Following the critiques cited above, Posner responded in "Reply to Critics of the Problematics of Moral and Legal Theory".²⁴⁹ I shall be following the sequence of his responses, since they elucidate his position between the opposite approaches of his critics, which are: Neo-Aristotelian, Kantian, Hermeneutical and Natural Law. Posner himself takes an extreme extrinsic approach to the relationship between law and ethics, denying any legitimate connection and insisting that at law, only legal considerations are needed. He claims to be a pragmatist.

²⁴⁴ Ronald Dworkin, "Philosophy & Monica Lewinsky," *The New York Review of Books* 47, no. 4 (March 9, 2000) (Book Review of Richard A. Posner, *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton*, (Cambridge, MA: Harvard University Press, 1999) and Posner, *The Problematics of Moral and Legal Theory*, (Cambridge, MA: Harvard University Press, 1999)), <http://www.nybooks.com/articles/187> (accessed October 14, 2007).

²⁴⁵ See, e.g., Richard Posner, Reply by Ronald Dworkin, "'An Affair of State': an Exchange," *The New York Review of Books* 47, no. 7, (April 27, 2000) <http://www.nybooks.com/articles/135> (accessed October 14, 2007); Richard Posner, "Dworkin, Polemics, and the Clinton Impeachment Controversy," *Northwestern University Law Review* 94 (1999-2000): 1023-47.

²⁴⁶ Where Posner is concerned, Dworkin does not tend to engage in tactful critique. At the end of the double book review, "Philosophy & Monica Lewinsky," for example, Dworkin suggests that Posner ought to "concentrate his academic work on empirical issues that are better suited to his tastes. When he is not driven by his anti-intellectual furies, he is a shrewd commentator on legal and social phenomena, a useful debunker of cant on both left and right, and a prolific and entertaining spokesman for the legal culture. If he finds philosophy useless, he should try to do without it. But he should stop writing demeaning books hectoring others to give it up too. He can leave philosophy alone and still have legal world enough to bustle in."

²⁴⁷ Posner, "Problematics," 1638-93.

²⁴⁸ Posner, "Problematics," 1693-1709.

²⁴⁹ Richard A. Posner, "Reply to Critics of the Problematics of Moral and Legal Theory," *Harvard Law Review* 111, no. 7 (1998): 1796-1823.

I. Posner's Limits of Moral Theory and Moral Reasoning

At the very start of his lectures – in the first paragraph – Chief Judge Richard A. Posner asserts his thesis:

I shall argue that moral theory does not provide a solid basis for moral judgments, let alone for legal ones.²⁵⁰

He goes on to state:

I shall indicate how in legal as well as private life we can get along without doing or even thinking about moral theory.²⁵¹

Accordingly, it appears that Judge Posner represents the extreme position that, not only does the law not require any assistance from “moral” reasoning²⁵², but neither do human beings generally. According to him, the law is sufficient on its own. He is less clear about how individuals fare. Still, as I shall show, Judge Posner exemplifies the position that leads to the proliferation of law as governor or guide to conduct instead of the ethical, reducing our interaction with others and institutions to contractual relations, enforceable at law.

Posner defines “morality” as the “set of duties to others . . . that are designed to check our merely self-interested, emotional or sentimental reactions to serious questions of human conduct”²⁵³ - which sounds vaguely Kantian until you realize that his view of norms are little more than sociocultural rules. This would appear to place Posner

²⁵⁰ Posner, “Problematics,” 1638.

²⁵¹ Posner, “Problematics,” 1638. It is less certain whether Judge Posner actually succeeds in doing so. With the potential exception of John T. Noonan, Jr. all his other reviewers would undoubtedly argue that he has not. Noonan himself purports to praise Posner for making clear that “[t]here is no law without a lawgiver. . . . no judge without a law. . . . no judgment without a judge.” Noonan, “Posner’s Problematics,” 1768. Further, he expresses hope in Posner’s supposed “openness” to development, presumably to developing an appreciation for the application of moral principles. This is certainly an optimistic view, little borne out in the actual text of Posner’s Oliver Wendell Holmes Lectures.

²⁵² We will discuss, below, the question of terminology, and how Judge Posner defines and utilizes these words, “moral” and “ethical”, not to mention “practical reason.”

²⁵³ Posner, “Problematics,” 1639.

firmly outside a Kantian view since he denies any degree of universality to moral norms. Norms, instead, Posner sees as “rudimentary principles of social cooperation that . . . are too abstract to serve as standards for moral judgment.”²⁵⁴ This also signals a discrepancy between his use of the word “duty” and the duty contemplated by Kant’s formulations of the Categorical Imperative. For Posner, “duty” means “legal duty”, which is co-extensive to what the law may compel. Thus, he notes that “[l]ying is not a tort or a crime . . . charity is not a legal duty [and t]he law is indifferent to most promise-breaking.”²⁵⁵ One wonders whether Posner recognizes that there is another level to duty at all.

In fact, one of the most difficult tasks we will face in seeking to understand this conversation on moral theory and the law is trying to find Posner’s starting point. Dworkin calls it “Darwinian pragmatism.”²⁵⁶ Noonan provides no label, but notes Posner’s “worship” of the scientific method, evolution, and “Purity of Law” - a complete separation of law from morals.²⁵⁷ Fried likewise provides no label at least at first, noting Posner’s attempt effectively to argue against *all* moral theory without entering into the specifics of the underlying argument itself. Ultimately, however, Fried concludes that Posner, the supposed skeptic, is really a “disappointed absolutist” whose “mistake is that he asks too much of moral argument”, namely that it provide clear, concrete, correct and unchallengeable answers.²⁵⁸ Nussbaum also struggles to “pin down” Posner’s view, questioning his self-description as a moral relativist. She finds that he embraces much of moral subjectivism (which he claims not to), and concludes that, although the “theoretical statement of his position is . . . underdeveloped. . . if it is interpreted in the most plausible light, he is an ancient skeptic”.²⁵⁹ Posner himself seems unwilling to commit to any one theory, completely:

So, in sum, I embrace a version of moral relativism, reject moral particularism, and accept diluted versions of moral subjectivism, moral skepticism, and

²⁵⁴ Posner, “Problematics,” 1640-41.

²⁵⁵ Posner, “Problematics,” 1694.

²⁵⁶ Dworkin, “Darwin’s Bulldog,” 1736.

²⁵⁷ Noonan, “Posner’s Problematics,” 1770.

²⁵⁸ Fried, “Philosophy Matters,” 1750.

²⁵⁹ Nussbaum, “Worthy of Praise,” 1784-89.

emotivism. I have not exhausted the “isms” that indicate my general stance. It might be called “pragmatic moral skepticism.”²⁶⁰

A legitimate question immediately presents itself: why engage in the study of this work at all, since the main writer’s position is itself unclear? The answer is two-fold.

First, as I have already indicated, Posner represents the extreme view that would, unchallenged, lead to the enthronement of law - alone - as the supreme arbiter of human action. Although Posner presents a moving target with respect to his position vis à vis his own moral theory²⁶¹, he presents the very clear thesis that law and moral theory have little or no connection. This unequivocal segregation of the law requires response and continued counter-argument, even though Posner’s arguments do not themselves conform to the traditional categories set out within the debate.

Second, Judge Posner is an increasingly influential jurist, whose prolific, often engaging (and certainly confident), declarative writing style makes up in tone and quote-ability what it might lack in substantive support, at least where academic moral theory is concerned. Accordingly, his judicial opinions are received by law students with considerable glee and enjoyment for their sheer exuberance and outspokenness, if only as a welcome contrast to the usual, dense fare of more standard judicial opinions. His extra-judicial treatises on such matters as sexuality, plagiarism, security and terrorism, election law and economic utilitarianism are received into the public sphere as authoritative treatments of moral matters, but lack a reasoned moral basis. Judge Noonan aptly summarizes Judge Posner’s effect:

With what sharp strokes Posner dispatches them! How accurately he analyzes the local character of moral codes, how unsparingly he unmasks the pretensions to universality of the classics, how conventional and self-contradictory he shows the modern oracles to be. His summary of their predictable positions is so coolly judicious that it stops just short of satire; but, as he knows, the truth needs no embellishment to be comical and damning. What more can one say of a writer so candid, so courageous, whose indictment has such comprehensiveness and clarity?²⁶²

²⁶⁰ Posner, “Problematics,” 1645.

²⁶¹ Posner does not deny moral theories exist, merely their usefulness.

²⁶² Noonan, “Posner’s Problematics,” 1768.

We must not abandon the field of discourse proposed between ethics and the law, upon coming up so quickly against this notable, influential and memorable juridical practitioner who conclusively states that such discourse is “worthless.” Otherwise, the enterprise is effectively abandoned before beginning. Nonetheless, it is not an easy discourse. It is marked by differences in perspective, terminology, motivation and desired outcome. As our examination of this particular exchange will show, it is also marked by an apparent lack of mutual understanding and, I suspect, a lack of respect.

I shall not attempt an exhaustive review of Posner’s position. His writing is fluid, his reasoning adaptive and functionalist, and his categories unconventional. Instead, with the help of the categories introduced in chapters 1 and 2, I will seek to identify areas where Posner makes assumptions and attempt to show where those assumptions are unwarranted or even mistaken, leading to the breakdown of the attempted discourse. Thereafter, I will analyze the responses made from opposite stances by the panel of commentators.

1. Posner’s Problematic Terminology: Morality, Ethics, and Practical Reason

Posner seems to assume that morality is akin to the law insofar as it is a series of local rules, and that the goal of “academic moralists” or “moral theorists” is “imposing a uniform morality on society.”²⁶³ This contrasts with the view of morality we examined in chapter 1, in which we investigated morality in relation to the ethical, and noted the difference in the ethical aim as deontological or teleological. Posner does not reason in those terms at all, although he *does* utilize the concepts. Thus, Posner deems the moral avoided, where one engages in discussions of means, rather than ends:

[T]he expert, the scholar, does not choose the goal, but confines himself to studying the paths to the goal, thus avoiding moral issues.²⁶⁴

And:

Moral dilemmas involve disputes about ends; fruitful deliberation, the sort of reasoning that moves the ball down the field is deliberation over means.²⁶⁵

²⁶³ Posner, “Problematics,” 1642.

²⁶⁴ Posner, “Problematics,” 1669.

²⁶⁵ Posner, “Problematics,” 1680.

Turning to the framework we have laid out, where the law is concerned, Posner would appear to deny the operation of an ethical aim altogether, whether deontological or teleological, as he would avoid choosing any ‘end’ or goal at all. He appears to believe that avoiding choosing a goal - or disputes over which to choose - means that he has thereby avoided moral issues. His illustration - that of advancing the ball down the field in the game of American football - assumes an agreed goal of trying to score points, however, within the rules of the game being played.

Note that Posner assumes that ‘academic moralists’ are interested in changing people’s behavior, and faults them for *failing* to persuade others to adopt the moral code being urged upon them. This position appears to be based upon the legal structure of argumentation, with *persuasion* as the goal. Posner assumes that the question presented to and by the moral theorists is *how* to persuade people to live up to the argued-for code. It does not seem to occur to him that a larger framework is in view, one that goes beyond the ideological content and powers of advocacy. Posner appears to be operating within the framework and limitations of the law, for which advocacy or argumentation would be an appropriate category, but which does not apply in the same sense to the ethical. To that end, Posner could be seen to be engaged in a different game altogether, which would help explain the lack of understanding between Posner and his commentators. If Posner has not stepped out of the legal framework of case, argument and judgment, under legal rules of standing, jurisdiction, evidence, procedure, and case law, would this explain Posner’s apparent blindness to ethical and moral issues on a philosophical level?

Consider that Posner appears not to recognize the inherent divide between questions of teleology and deontology – let alone any question of how those polarities might hope to be reconciled – proceeding instead under a relentless extrinsic *legal* approach. In that regard, one might consider that Posner assumes the law as ultimate end or goal. With respect to other types of ‘ends’ contemplated in the teleological aim to ethics, he notes in his *Reply to Critics* that arguing over ends is pointless, but in *Problematics* itself, he seems to assume that the ends are already – or *should have been* – determined.²⁶⁶ This

²⁶⁶ See Posner, “Problematics,” 1669.

makes sense if one considers that Posner has limited the “ends” to what is properly before him as judge, namely the assumption of an end of “justice” through established legal procedure. May we see further evidence of this presupposition in his use of other ethical concepts and terminology?

Posner’s use of the words “ethics” and “practical reason” seems to signal that he associates the term “ethics” to the tradition before Kant which understood “practical reason” not as identical with morality, but as the *rationality* inherent in striving for a flourishing life:

Ethics and practical reason are not interchangeable with moral theory, unless the term is to be used unhelpfully to denote all normative reasoning on social questions.²⁶⁷

In his actual argumentation, however, Posner utilizes “ethics” in the sense of professional legal guidelines, and reserves the notion of “practical reason” to questions of utility, cost-benefit, and political action, which, in the terms of the Frankfurt School, is a reduction to *instrumental* reason. Thus, we would question whether his understanding of practical reason is associated with the tradition before Kant at all. Certainly he gives no hint of a practical reason that would be similar to the operation entrusted by Ricoeur to critical *phronēsis*. Posner’s use of the term likely refers to a pragmatic *legal* reasoning, designed to reach a workable answer. Again, we see evidence of Posner’s practical legal framework, even as he attempts to reach outside that framework to consider the role of moral and legal *theory*.

How did the commentators respond to Posner, with respect to what we are investigating as his view of moral theory through what appears to be the lens of legal practice? We will look first at Ronald Dworkin’s critique²⁶⁸, because Posner himself noted that he would be paying particular attention to Dworkin’s view in presenting the *Problematics* to begin with, “[b]ecause Dworkin stands squarely at the intersection of the two bodies of literature that I discuss, academic moral theory and moralistic legal

²⁶⁷ Posner, “Problematics,” 1697.

²⁶⁸ Ronald Dworkin, “Darwin’s Bulldog,” 1718-1738.

theory.”²⁶⁹ Whereas Posner seeks to define “moral theory” as narrowly as possible so as to avoid its operation, Dworkin answers with a salvo seeking to extend the moral scope into sociology, anthropology and psychology²⁷⁰ - as well as science, as a field of application. Dworkin scolds Posner that “for better or worse, judges face moral issues, and railing at moral theory can’t change those issues into mathematical or scientific ones.”²⁷¹ Dworkin also asserts a moral element inherent in the assumption of not only what constitutes a valid government but also in how political systems ought to operate, which he rightly points out Posner overlooks.

Dworkin also points out that Posner distinguishes between questions *of* morality as opposed to questions *about* morality, which turns, respectively, upon questions of the *content* of a moral code - as opposed to questions of how the code operates - on both the micro and macro levels and all levels in between. To that end, much is made of just what kind of a ‘moralist’ Posner is. Posner’s categories²⁷² are analyzed and critiqued, as is his own self-description as a ‘pragmatic moral skeptic’.²⁷³ In short, Dworkin does not accept either Posner’s categories or his self-descriptive label. He holds out another label as a better fit for Posner, that of “Darwinian pragmatism.”²⁷⁴ By “Darwinian,” Dworkin means what he sees as Posner’s adherence to the “natural” - and to natural (and local) evolution and development - which he generally is unwilling to interfere with unless it interferes with his pragmatic bent.

Ultimately, Dworkin pronounces the failure of Posner to make his point as follows:

²⁶⁹ Posner, “Problematics,” 1640. He also devotes the most time to Dworkin in his “Reply to Critics,” 1796-1806.

²⁷⁰ Dworkin, “Darwin’s Bulldog,” 1719.

²⁷¹ Dworkin, “Darwin’s Bulldog,” 1732.

²⁷² Moral relativism, moral subjectivism, moral scepticism, emotivism, moral particularism - and various combinations of the same, see Posner, “Problematics,” 1642-49.

²⁷³ “[I]n sum, I embrace a version of moral relativism, reject moral particularism, and accept diluted versions of moral subjectivism, moral scepticism, and emotivism. I have not exhausted the “isms” that have attracted moral theorists, but I hope that I have said enough to indicate my general stance. It might be called ‘pragmatic moral scepticism.’” Posner, “Problematics,” 1645.

²⁷⁴ Dworkin, “Darwin’s Bulldog,” 1736. “The assumption that Darwinian pragmatism is Posner’s intuitive but hidden conviction dissolves all the mysteries I have been describing.” Dworkin, “Darwin’s Bulldog,” 1736.

[Posner] calls for the death of moral theory, but, like all of philosophy's would-be undertakers, he only means the triumph of his own theory. For his arguments show the opposite of what he intended: they show that moral theory cannot be eliminated, and that the moral perspective is indispensable, even to moral skepticism or relativism. Posner is himself ruled by an inarticulate, subterranean, unattractive but relentless moral faith.²⁷⁵

Judge Charles Fried²⁷⁶ takes on only two of what he perceives as Posner's points, namely (1) that moral – and political – philosophy fails as argument and (2) even if it *did not* fail as argument, it has “no influence on culture, politics, or law.”²⁷⁷ Relevant to our moral and ethical inquiry in this section is Fried's critique in point two. Fried looks at the moral theories rejected by Posner: John Finnis²⁷⁸, Onora O'Neill²⁷⁹, Rawls²⁸⁰, and Dworkin²⁸¹, and essentially concludes that one can either “join in . . . and vanquish[] one's foe from within, or . . . simply decline[] to engage in this kind of argument at all. Posner does the latter.”²⁸² Fried disagrees: “[R]efutation and support can come only from within.”²⁸³ Fried has identified what we have suspected: Posner and the moral theorists with whom this dialogue is being attempted are not engaged in the same enterprise.

²⁷⁵ Dworkin, “Darwin's Bulldog,” 1737-38.

²⁷⁶ Associate Justice, Supreme Judicial Court of Massachusetts, and Carter Professor of General Jurisprudence, Emeritus, and Distinguished Lecturer, Harvard Law School.

²⁷⁷ Fried, “Philosophy Matters,” 1741.

²⁷⁸ Fried, “Philosophy Matters,” 1746-47.

²⁷⁹ Fried, “Philosophy Matters,” 1746-47.

²⁸⁰ Fried, “Philosophy Matters,” 1747-48.

²⁸¹ Who equates legal argument with moral argument, see Fried, “Philosophy Matters,” 1748.

²⁸² Fried, “Philosophy Matters,” 1749.

²⁸³ Fried, “Philosophy Matters,” 1749. This is a point well made in C.S. Lewis' *The Abolition of Man*. Lewis talks about what he calls the *Tao*, and “which others may call Natural Law or Traditional Morality or the First Principles of Practical Reason or the First Platitudes”. C.S. Lewis, *The Abolition of Man*, (London: Fount Paperbacks, 1999), 27. He notes that “the *Tao* admits development from within. . . . The outsider knows nothing about the matter. His attempts at alteration . . . contradict themselves . . . he merely snatches at some one precept, on which the accidents of time and place happen to have riveted his attention, and then rides it to death - for no reason that he can give. From within the *Tao* itself comes the only authority to modify the *Tao*. This is what Confucius meant when he said ‘With those who follow a different Way it is useless to take counsel.’ This is why Aristotle said that only those who have been well brought up can usefully study ethics: to the corrupted man, the man who stands outside the *Tao*, the very starting point of this science is invisible. He may be hostile, but he cannot be critical: he does not know what is being discussed. This is why it was also said ‘This people that knoweth not the Law is accursed.’ ” Lewis, *Abolition*, 28, 29-30.

Moreover, having failed to enter into the system either to refute *or* support it, Fried dispels any suggestion “that what we have here is at least a draw.”²⁸⁴ Why? Because Posner offers no alternative to the system he will not enter into for purposes of critique, but instead merely dismisses. Ultimately, Fried concludes that Posner expects not too little from moral theory or argument, but too much. It is not capable of giving “unambiguous, inescapable answers embedded in a complete theoretical structure right away, every time. . . . [so] the skeptic here is a disappointed absolutist, taking his revenge on the world for depriving him of all the right answers all at once.”²⁸⁵

Recalling Fried’s Kantian perspective helps to see the basis of Fried’s astute observation. To anyone but the Kantian, Posner’s complete rejection of the efficacy of moral reasoning and the affirmation instead of a local and relative morality would probably signal that Posner is anything *but* an absolutist. Accepting Posner’s legalistic bent, however, together with the absolute rejection of moral arguments as in any way helpful to resolve hard cases, Fried has made a telling observation, applicable also to our next category, universality and justification of the normative.

2. Universal, Local, or Legal? The Question of Justification

“Adjudication is a normative activity”, Posner tells us, but the “problem of getting from ‘is’ to ‘ought’” does not necessarily ‘plunge’ the judge into “the domain of moral theory.”²⁸⁶ Morality for Posner is “local”. Alleged universals are “uninteresting” (whatever that means), and too abstract to provide meaningful guidance for moral judgment.²⁸⁷

Assertions of universality of norms arouse resistance from Posner. Although he would not be able adequately to explain just why child torture would probably never be morally acceptable, he is reluctant to entertain the possibility of any universal norm. In fact, he explains the major antagonism between the theories of Ronald Dworkin and H.L.A. Hart as “largely an artifact of their insistence upon framing their respective

²⁸⁴ Fried, “Philosophy Matters,” 1749.

²⁸⁵ Fried, “Philosophy Matters,” 1750.

²⁸⁶ Posner, “Problematics,” 1697.

²⁸⁷ Posner, “Problematics,” 1640.

theories in universalistic terms, when what each is really doing is offering a stylized description of the legal system of his own country.”²⁸⁸ Jürgen Habermas is much the same, Posner tells us: he “fancies himself to propounding a universal jurisprudence; actually he’s just talking about Germany.”²⁸⁹

It would appear that the assertion of universal application is anathema to Posner, at least from the perspective of the moral. It is perhaps his background with the law, as amended, interpreted and applied, that inclines him not to take anything as an unchangeable fact, let alone a norm. Posner does not address how norms are established or justified.

Martha Nussbaum critiques Posner’s lack of a reasoned approach in this regard. She points out that his view of norms is unclear and the question of justification is not resolved. She provides an overview of the state, so far, of the debate on these issues, breaking down the varying positions into 3 major camps: (1) the reflective-naturalist (following Hume – current examples being Simon Blackburn and Phillippa Foot)²⁹⁰, (2) the reflective-eudaimonist (Aristotelian – current examples being Henry Richardson, John McDowell, David Wiggins, herself, and – although also related to the neo-Kantian view – John Rawls)²⁹¹ and (3), the neo-Kantian view²⁹² (current examples being Christine Korsgaard, Barbara Herman, Onora O’Neill and the late Jean Hampton). Following a comprehensive review, Nussbaum notes in conclusion:

All three of these views, and others, are live options for answers to Posner’s normativity question; none involves his implausible rejection of all justification.²⁹³

Posner’s failure to resolve the question of normativity and justification may well turn on a point made by Dworkin that for Posner, “disagreement proves that moral theory has failed.”²⁹⁴ Moreover, his view of moral rules as local would certainly also shape a

²⁸⁸ Posner, “Problematics,” 1653.

²⁸⁹ Posner, “Problematics,” 1653.

²⁹⁰ Nussbaum, “Worthy of Praise,” 1789-90.

²⁹¹ Nussbaum, “Worthy of Praise,” 1790-91.

²⁹² Nussbaum, “Worthy of Praise,” 1791.

²⁹³ Nussbaum, “Worthy of Praise,” 1791.

²⁹⁴ Dworkin, “Darwin’s Bulldog,” 1723 (citing Posner, “Problematics,” 1656-57).

reluctance to advance a theory of any justification beyond an empirical determination of the local custom. Finally, we may consider that what Posner is actually arguing is that he finds that the application of positive law within a legal context is generally sufficient to resolve questions of normativity, certainly in the typical case. In this regard, we would have to view Posner as prepared merely to *apply* laws embodying norms rather than concerning himself with which are the appropriate norms and/or how might those norms affect actual laws, in a conflict situation. Again, we turn to the hard case, to see the limits of law and thereby the limits of Posner's optimism in the law alone.

3. The Hard Case at Law: Posner's Legal Perspective

Posner accepts that there are hard cases, and even moral 'dilemmas'. Insofar as he purports to approach all cases from a strictly legal point of view, the questions of evil and tragedy do not arise for him in the way we have been investigating.

For Posner, the 'hard case' in the sense of morality typically involves the moral dilemmas, and he reviews several cases involving abortion, euthanasia, and segregation. There is no indication of a look to ideas of the "good" to help shape the debate, nor of looking to questions of obligation to oneself, others, or institutions by way of turning from evil and striving for (in Ricoeur's formulation) a just life, with and for others, in just institutions. Instead, Posner appears to focus on the empirical, the observable, the measurable, and the countable, insofar as local opinion counts. He relies on what he would call "logical" argumentation based on legal rules and reasoning, and appears confident that this will suffice. We should note here what appears to be a difference between "legal" logic and philosophical logic in the classical sense. Stanford Law professor Thomas C. Grey notes that the American law tradition has been heavily influenced by Oliver Wendell Holmes, Jr.'s "campaign" against what he called "logic" in the legal sense, insofar as he saw the need also to incorporate experience (descriptive) and instrumental reason (prescriptive) into the process.²⁹⁵ This view of "legal" logic has since been taken up by legal practitioners, many of whom are unaware of the discrepancy between what they are calling logic, and what the more

²⁹⁵ Thomas C. Grey, "Holmes on the Logic of the Law," in *The Path of Law and its Influence: The Legacy of Oliver Wendell Holmes, Jr.*, ed. Steven J. Burton (Cambridge: Cambridge University Press, 2000), 133-57.

philosophically-literate practitioner would call logic. Posner would appear to follow Holmes' view of a legal logic that is not confined to a rigid and consistent application of deductive utilizing precise legal principles. It marks Posner's pragmatism, even if it is not entirely clear how it operates. Consider Posner's description of the hard case:

[J]udges routinely confront issues that cannot be resolved by the application of an algorithm – that require instead the application of “practical reason,” which (in the sense in which I am using the term) is the ensemble of methods, including gut reaction, that people use to make decisions when scientific or mathematical or logical exactness is unattainable. This means that judicial opinions will often fail to achieve the certitude of a logical, mathematical, or scientific demonstration. . . . Judges get into moral quandaries only when the law points to a result that violates their deeply held moral beliefs. That is not a routine predicament in this country, and moral philosophy will not help judges out of it.²⁹⁶

Thus, Posner admits that occasionally a case arises that would not be resolvable on purely legal terms. The alternatives Posner suggests are (1) the court should refuse to intervene and rely on political resolution of the disputed subject, or (2) the court acts on the case, and the judge gives effect to her *own* moral emotions. Surprisingly, it is the second option that Posner favors. “It leaves a place for conscience,” he says.²⁹⁷

This is a disturbing position for one who has rejected what moral philosophers would offer the judge in the position of hearing and resolving the hard or tragic case. Posner appears in this regard to embody the weakness which Dworkin critiques of legal positivism, in that he would apparently allow potentially arbitrary rulings based on the *judge's* ‘moral emotions’. Interestingly, Posner makes no mention of the moral emotions of the parties to the case at bar, let alone the effect of the moral conflict on them. Neither does he consider the effect of the precedent being set, which would be in keeping with a view of legal logic not necessarily bound to a rigid formalism and consistency. At law, the “distinguishable case” is a well-known phenomenon to overcome the alleged precedent of common law.

²⁹⁶ Posner, “Reply to Critics,” 1811, n. Note that this is in response to Anthony Kronman, “The Value of Moral Philosophy,” *Harvard Law Review* 111, no. 7 (1998): 1751-67.

²⁹⁷ Posner, “Problematics,” 1708.

We have viewed the likely content of a morality acceptable to Posner, which (as to the person) would emphasize the local character of norms, and preference rather than the inviolable dignity of persons as the starting point of law. We will see below that, with respect to the person, and personal identity, his emphasis is on a logical or intellectual consistency over a behavioral consistency, and he accepts a fragmented sense of identity rather than expecting the enterprise of constructing an integrated one. His worldview would be empirical, scientific, measurable and consistent with economic standards and current legal concerns.

It is here that the critique by Nussbaum urging the application of the lessons learned through the tragic would have been helpful, namely that we must not just ask the obvious question (“What must we do?”), but that we must face the tragic question (“Are any of the alternatives morally acceptable?”). Martha Nussbaum did not make this point in her response, however. Given Posner’s disinclination to attend to moral and ethical theory, it is perhaps understandable that she did not take on this daunting task. Nonetheless, we should note that it is here that Posner’s approach is weakest, from the perspective of our interest in seeing where the legal and the ethical might converse. A corrective would involve setting out the material we covered in Chapter one, namely the relationship between the deontological and teleological (including Ricoeur’s more recent thought about morality as a connector between finding the right and then its application), moral identity generally, and the role of the tragic to chart the limits of obligation and mark the turn again to questions of the good in a critical *phronēsis*.

Even in the hard case, Posner continues to attempt to distinguish:

between moral reasoning and legal reasoning, both of which are subsets of normative reasoning. . . . The question whether contracts of surrogate motherhood are wrong is a specifically *moral* normative question, but the question whether they should be unlawful is a *legal* normative question. I argue . . . that legal questions can and should be answered without first being translated into moral questions, and without the aid of moral theory²⁹⁸

²⁹⁸ Posner, “Problematics,” 1649.

While Posner notes at least a rhetorical overlap of law and morality, interestingly, he continues to exclude morality from any effect. He explains the use in the law of “moral terminology . . . such . . . as ‘fair’ and ‘unjust’ and ‘inequitable’ and ‘unconscionable,’ [as] a borrowing that reflects in part the ecclesiastical origins of the equity jurisdiction, and that has misled Dworkin into believing that law is suffused with moral theory.”²⁹⁹ At the same time, he points to our need for “a really powerful vocabulary of condemnation”³⁰⁰ as a possible explanation for the resilience of moral terminology in the law. He admits that there appear to be universals in the “terminology of condemnation” – pointing specifically to Nazi totalitarianism – but denies that that in any way signals that there are universal standards or moral values.³⁰¹

Moreover, according to Posner, there are mostly adequate means by which any self-respecting judge may always sidestep a so-called “moral” question at law – and he gives examples.³⁰² Thus, “[m]oral issues can be elided, or recast as issues of interpretation, institutional competence, practical politics, the separation of powers, or *stare decisis* – or treated as a compelling reason for judicial abstention.”³⁰³ Then also, if a particularly hard case is presented where the judge seemingly has no recourse *but* to resort to a moral basis insofar as public opinion is divided on the matter, Posner notes that the judge could always refuse to intervene, leaving resolution to the political process. His preferred course, however, is to leave open the prospect of the judge

²⁹⁹ Posner, “Problematics,” 1695.

³⁰⁰ Posner, “Problematics,” 1962.

³⁰¹ Posner, “Problematics,” 1692.

³⁰² See Posner, “Problematics,” 1698-1708, generally. At one point, he also makes a rather slippery argument in which he argues for a distinction between moral *principles* and moral *issues*. The moral *principles* would appear to be the *settled* morality of a particular people in a particular time and place, whereas a moral *issue* is the *particular* issue at dispute, arising out of “shared morality that forms the backdrop to a case”. Posner, “Problematics,” 1704. To the *particular*, Posner objects to any application of moral theory, which he terms as “of the casuistic variety”. Posner, “Problematics,” 1704. Of the so-called ‘shared’ morality, he gives no clue as to how to determine it or where it ends, and the ‘particular’ - which is in dispute - begins. Or perhaps it is the *fact* of dispute that would render it a moral issue instead of a moral principle? Like the issue of consensus in determining ‘public reason,’ conflict serves to take what must be resolved out of the forum in which it *could* be resolved.

³⁰³ Posner, “Problematics,” 1698.

resolving the matter according to his or her own “moral emotions”, which – surprisingly – Posner equates to leaving a “place for conscience.”³⁰⁴

4. Moral Sentiments at Law

Posner deals with questions of altruism, feelings of guilt and indignation as “moral sentiments.”³⁰⁵ Interestingly to our study, he notes:

There may be *more* moral sentiment in the average gang member than in the average law-abiding citizen. Law, a substitute for moral sentiment, is unavailable to gang members. They are forced back on the oldest system for enforcing human cooperation.³⁰⁶

In keeping with his evolutionary focus, law has been transformed into the higher force for human ‘good’ and the old system of morality, conscience, and guilt are largely dismissed as no longer needed in a society of rules. Yet Posner does not argue for the superiority of this approach. He does not comment upon the theory of law which would accomplish this transformation of the law which, having been instituted as the *minimum* standard acceptable (violation of which was punishable), is now apparently to take the place of morality.

Elsewhere, Posner argues that he sees no evidence that the criminal is any less ‘moral’ than the non-criminal, insofar as acting or failing to act on moral impulses. The difference is in the legal sanctions, as Posner sees it. The criminal was not dissuaded by the threat of prosecution; the non-criminal was.

The reviewers do not comment on Posner’s elevation of the law in this regard. This is unfortunate, because in Ricoeur we would appear to have an excellent point of departure to Posner’s acknowledgment of moral sentiments, and yet his reluctance to admit of any influence of a morality at law. Ricoeur analyzes the question of moral sentiments in terms of a “stitching together” of norms and moral obligations with

³⁰⁴ Posner, “Problematics,” 1708. Of course, Posner anticipates that such action would arise only rarely, and seems to find it justified based upon the ‘careful selection’ of judges, such that their occasional moral indignation could safely be indulged. Notably, earlier he firmly resists any picture of judges as “philosopher kings”. Posner, “Problematics,” 1696.

³⁰⁵ Posner, “Problematics,” 1662-64.

³⁰⁶ Posner, “Problematics,” 1663.

desire. This, he ties to the Aristotelian concept of *phrohaireisis*, which Ricoeur designates as the “capacity to determine ‘this is worth more than that’ and to act according to this preference.”³⁰⁷ May we not see in Ricoeur’s description of the function of moral sentiment the beginnings of an argument that, in fact, moral sentiment is a presupposition to the law, and the acknowledgment that law is not an effective substitute for it?

Instead, the primary thrust of the commentators appears to be to discuss Posner’s reluctance to take on moral theory as an *aid* to the law, especially in the resolution of the hard case. There is no critique of the confidence he places in the law - with or without the aid of moral theory - and his ignoring the need for a viable operation of the ethical realm outside the enforceable venue of the courts. While Posner’s position would allegedly exclude morality and moral theory from the law almost altogether, his point against attempts to use the law to resolve moral issues and conflicts has merit. This is not to say that the law cannot - or perhaps should not - resolve cases involving moral questions. It is, however, to say that the law is not well used to force upon or enforce allegedly moral behavior onto an unwilling or dissenting moral agent. Accordingly, the law should not be used to compel charitable donations, for example, or require volunteer duty to teach remedial reading, perhaps, or donate blood. Posner says the former; I would emphasize the latter. I do so, for moral reasons relating to autonomy and respect for the person as well as out of my understanding of the law.

5. Posner’s View of the Person: Moral Identity

Having so roundly condemned moral theory, Posner nonetheless stresses the value of *diversity* in morals³⁰⁸ while he also claims that exposure to moral philosophy can result in less moral behavior as the student learns the better to justify his actions.

It is interesting that Judge Posner nonetheless seems to accept without question that morality *ought* to make us better – a moral argument urging an ethical and moral aim – in his indictment against academic moralism for *failing* to do so. He states

³⁰⁷ Paul Ricoeur, “From the Moral to the Ethical,” in *Reflections on The Just*, trans. David Pellauer (Chicago: University of Chicago Press, 2007) 45-57, 49.

³⁰⁸ In this, Judge Posner points to ‘moral entrepreneurs’ and the need for those who come to challenge ‘immoral’ behaviour that has become an accepted moral principle. Posner, “Problematics,” 1666-67.

unequivocally that “the ambition of the academic moralist is to change people’s moral beliefs and thus change their behavior.”³⁰⁹ This is another example of the level of misunderstanding between Posner’s legal orientation and the moral philosophical orientation assumed by the topic as well as by the other participants in the debate. Posner assumes the goal of persuasion, seemingly within the framework of a trial. The answer, for example, that Kant would insist that each moral agent was to pursue their own moral excellence and that we can only *help* others in their virtue, but not replace their own responsibility, would be nonsensical in light of his presuppositions.

Posner argues that moral argument neither serves to change anyone’s moral view nor, even if successful, does it motivate action in accordance with that view. He does not, however, provide an alternative for effective motivation of action. His only positive example of moral agents in motivating roles are those he calls “moral entrepreneurs” who – rather than using arguments, use instead “arational persuasion”, which includes the example of their own lives.³¹⁰ Jesus and Jeremy Bentham are given as examples of moral entrepreneurs who sought to expand the boundaries of altruism; Hitler was the example of the moral entrepreneur who sought to “narrow” them.³¹¹

Posner does make a valid point regarding the question of beliefs and behavior. In claiming that the goal of “academic moralism” is to change both beliefs *and* behavior, he says:

It is not a realistic ambition. To begin with, it is not clear that a change in moral beliefs will in fact lead to a change in behavior.³¹²

He is right. The problem of motivation is certainly a challenge to moral philosophy in the line of Kant. Posner deals with the issue pessimistically, concluding that neither the desire to be moral or moral pride is sufficient. From a strict cost-benefit position, the *cost* of being moral is frequently prohibitive. Posner does not seem to be able to

³⁰⁹ Posner, “Problematics,” 1664.

³¹⁰ Posner, “Problematics,” 1667.

³¹¹ And it is on the “boundaries of altruism” where Posner tells us moral entrepreneurs typically take aim, either to expand or contract them. Posner, “Problematics,” 1667.

Noonan’s corrective would add love here as vital moral element, as we shall see.

³¹² Posner, “Problematics,” 1664.

account for a moral theory which would willingly embrace suffering in order to improve ourselves, let alone “be good.”

We are reluctant to pay *any* price to be good. We can avoid having to pay any price, without suffering any pangs of conscience - we can have our cake and eat it - by denying that morality requires us to change our behavior.³¹³

Posner points out that, in his experience, belief and behavior is not necessarily as strongly linked as the academic moralists might think. In fact, he argues that “behavioral consistency is a much weaker ordering principle than is logical consistency.”³¹⁴ In this, Posner appears to dismiss any principle of integration or unity within the self, and accepts a fragmented self, of contradictory beliefs and behavior, as - if not the norm - at least acceptable.

Thus, logical - mental - consistency is what is to striven for (in line with the experiential and instrumental additions we have already discussed as added to logic under the pragmatic legal thought from the Holmes tradition), rather than integrity of values, beliefs and action. Moreover, Posner dismantles any sense of unity of the person over time, claiming that “[o]ne of the questionable assumptions in *A Theory of Justice* [Rawls] is that a rational person is a single self, with consistent preferences, over his adult lifetime.”³¹⁵ Here, Posner’s thought would benefit from the insightful treatment of Charles Taylor of the effect on an individual who treats choices as *preferences* of taste, rather than strong evaluations to be articulated, felt, and determined. The nuances of Paul Ricoeur’s work with *ipse* and *idem* identity, as well as the effects of moral choices on identity would also enrich Posner’s view of the person, beyond that of choosing consumer, based on physical circumstances rather than questions of interior identity or integrity. Finally, Posner apparently has no appreciation for any starting position of any self in his or her life enterprise, beyond that of consumer choosing.

Finally, how do Posner’s anthropological premises and legal pragmatism influence his views of science and religious convictions of faith?

³¹³ Posner, “Problematics,” 1666.

³¹⁴ Posner, “Problematics,” 1674.

³¹⁵ Posner, “Problematics,” 1675.

6. Faith, Science and Pragmatism

Posner applies the concept of 'faith' to *scientific* theory - the empirical and testable - but notes that:

There is no corresponding faith in moral theory. We don't say things like, Kantians taught us how to be *X* (the moral equivalent of being able to fly or generate heat from nuclear fuel cells or cure syphilis), so we'll accept their current teaching that *Y* (for example, that animals shouldn't be eaten).³¹⁶

Again, Posner demonstrates his legal orientation. The example, if it demonstrates anything, would demonstrate perhaps the weight to be accorded a reliable witness, whom we have reason to know has testified truthfully in the past. It certainly does not demonstrate logical reasoning, but perhaps that is Posner's point. It shows his apparent inability to think of a useful moral teaching, insofar as he is reduced to inviting his reader to imagine the moral equivalent of flying or scientific advance.

Posner does not seem to notice his own reliance on empiricist scientific theory as perhaps similar to those who rely on religious 'theory', or teachings. Thus for Posner, religiously-based arguments are out-of-bounds, as are moral theories based on "controversial metaphysical commitments such as those of a believing Christian."³¹⁷

Even in questions of moral claims, Posner purports to be impotent to analyze the claim apart from the presence of empirical 'proofs' that are reducible to legal argument - again, apparently what he means when he refers to "logic". Otherwise, the "critical voice is stilled", Posner tells us. "Or rather, it becomes a voice expressing disgust - which is largely a reaction to difference - rather than a voice uttering reasoned criticisms."³¹⁸

Apart from an absolute faith in the scientific or empirical, Posner flattens legal inquiry to one of personal preference, guided only by cost-benefit analyses and legal prohibitions.

³¹⁶ Posner, "Problematics," 1680.

³¹⁷ Posner, "Problematics," 1648.

³¹⁸ Posner, "Problematics," 1652.

Dworkin makes several telling observations in this regard. His analysis of Posner's view of truth – which Dworkin dubs “postmodern” – shows that Posner equates consensus with truth – and the lack of consensus as showing a lack of truth.³¹⁹ Another revealing approach to Posner's view of truth, might be to look at how it follows William James's view of a developing *revelation* of truth, as presented in his *Pragmatics*.³²⁰ Continuing with Jamesian thought, we would also see a difference in Posner's thought with respect to risk of error. William James' article “The Will to Believe”,³²¹ describes his defence of choosing to risk error in the quest for determining truth, rather than the reverse, which is so often urged by those who embrace scientific empiricism or otherwise claim to be skeptics – as has Posner, himself. “Skepticism, then, is not avoidance of option; it is option of a certain particular kind of risk. *Better risk loss of truth than chance of error* – that is your faith vetoer's exact position.”³²² He goes on: “dupery for dupery, what proof is there that dupery through hope [of finding truth] is so much worse than dupery through fear [of falling into error]?”³²³ James describes the two separate laws we have to live by: (1) know truth and (2) avoid error.³²⁴ This would appear particularly relevant for Posner insofar as he considers himself a pragmatist as well as a skeptic.

Indeed, the original pragmatic view has been much criticized for many of the same reasons postmodernism has drawn fire, primarily for its radical relativism and subjectivism, but the thought pattern appears to retain its viability in ever-new incarnations that are perhaps not so easily dispensed with as by simply leveling against

³¹⁹ Another area where Posner is apparently in lock-step with postmodern thinking is in his rejection of ‘canonical’ philosophical treatises and thinkers, as attempting to present an ‘overarching’ concept by which all moral determinations could easily be determined. Although they may be valuable, he says, “they do not contain answers to, or methods for answering, contemporary moral questions.” Posner, “Problematics,” 1671-72. See also Nussbaum, “Worthy of Praise,” who also submits a critique of Posner's Holmes Lectures. She points out that Posner's “critique of moral theory parallels well-known (and discredited) strategies used by ancient Greek sceptics and contemporary postmodernists.” Nussbaum, “Worthy of Praise,” 1776-77.

³²⁰ William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (New York: Barnes & Noble Publishing, 2000), 26-29 and 86-104 (Lecture VI – *Pragmatism's Conception of Truth*) (first published 1907).

³²¹ William James, *The Will to Believe and Other Essays in Popular Philosophy* (New York: Barnes and Noble Books, 2005) 3-26, 15-23, (originally published in 1897).

³²² James, “Will to Believe,” 22.

³²³ James, “Will to Believe,” 23.

³²⁴ James, “Will to Believe,” 15-16.

it the presumed knock-out “postmodern” epithet. Consider also how it relates to the Rawlsian and Habermasian projects, both of which importantly feature consensus, although there are significant differences between Rawls’ overlapping consensus and Habermas’ morally-based one.³²⁵

Posner has rejected two very important aspects of William James’ thought, however, and it renders his view of truth as well as his brand of pragmatism considerably different from the pragmatism spelled out by James. Specifically, Posner would reject James’ pursuit and hope of truth in moral questions in preference over the ‘duty to avoid error’ of the skeptic’s scientific method.³²⁶ Second, he appears not to accept James’ view of the person and their identity with respect to James’ work in *The Varieties of Religious Experience*,³²⁷ in which questions of self-transcendence are seen as integral to individual identity, and as the source for moral conviction and behavior. The closest Posner comes to this point is in his acknowledgment of certain - few - moral ‘entrepreneurs’, but Posner does not examine the cause or effect of their attractive and active morality.

Judge John T. Noonan addresses the issue of altruism from this religious perspective, offering the rule of love as an important corrective to approaching the question of altruism at law. Like Posner, Noonan is a judge in the U.S. Court of Appeals, but for the 9th Circuit (California, Arizona, Nevada, Idaho, Montana, Washington, Oregon, Alaska, Hawaii, Guam, and the Northern Mariana Islands) instead of the 7th Circuit (Illinois, Indiana and Wisconsin), on which Posner sits. Noonan is the least caustic of

³²⁵ Granted, Posner himself would likely not be charmed by the comparison, in that he has little positive to say about the work of either Rawls or Habermas. In his book, *Law, Pragmatism, and Democracy*, (Cambridge, MA: Harvard University Press, 2003), 14, Posner identifies Rawls and Habermas as “Concept 1 theorists” who pursue what Posner sees as a deliberative model of democracy, as opposed to the representative model he advocates, following Joseph Schumpeter. Posner, *Law, Pragmatism*, 130. He critiques the approach of the Concept 1 theorists on much the same grounds as he critiques the ‘academic moralists’ - and especially Ronald Dworkin - in his “Reply to Critics,” that they expect entirely too much from the American people, who are not inclined to work so hard to be involved in deliberative debates and reflective judgement. Compare Posner, “Reply to Critics,” 1801-02, with Posner, *Law, Pragmatism*, 132-43.

³²⁶ William James, “Will to Believe”, 16-19.

³²⁷ William James, *The Varieties of Religious Experience: A Study in Human Nature* (New York: Simon & Schuster, 1997) (Originally published in 1902).

Posner's critics, proceeding from a point of supposed agreement with Posner. Noonan's argument begins by outlining the "predicament of most of the academic moralists who are Judge Posner's targets", which Noonan ties to a failure to acknowledge either an ultimate lawgiver or judge:

Their vulnerability is patent. Their attempts to pronounce moral judgments are doomed to failure.³²⁸

Notably, Noonan excepts Biblical ethics from those otherwise doomed, insofar as Biblical ethics acknowledges a lawgiver.³²⁹ Noonan, of course, proceeds from the Christian tradition of Natural Law ethics.

Noonan's critique: Posner has his own idols, specifically, Science and Evolution, and – on a deeper level – the idols of Neutrality in moral judgments and Purity of Law.³³⁰ Like Fried, indirectly Noonan recognizes that Posner is not engaged in the same enterprise as the moral theorist, but for Noonan, this "idolatry" does not undermine Posner's indictment against many academic moralists. What it does, Noonan tells us, is to remove the alternatives Posner is said to be offering. Specifically, Noonan discusses Posner's "difficulties" with Neutrality as well as Purity of Law, ultimately concluding that Posner is "genuinely puzzled as to where moral guidance could be found."³³¹ He notes Posner's struggle with arguments over so-called 'ends', arguing that a strict distinction between ends and means is not workable, as – at some point – ends can become means, and means, ends. With respect to changes in morality – using the question of slavery as an example – Noonan describes the shift as one that takes place over time, not discounting the role of violence in bringing it about.³³² Noonan also shows the Christian roots of its abolition, connecting the free-exercise of religion guaranteed in the First Amendment of the U.S. Constitution with the gradual change of

³²⁸ Noonan, "Posner's Problematics," 1768.

³²⁹ See Noonan, "Posner's Problematics," 1768n. 2. Noonan also traces in that footnote the concept of God as lawgiver through ancient philosophical thought, in Plato, Aristotle and the Stoics, presumably setting up a basis for validly continuing the extension of Christian ethics in the reception of philosophical thought, e.g., through Thomas Aquinas.

³³⁰ Noonan, "Posner's Problematics," 1768-70.

³³¹ Noonan, "Posner's Problematics," 1772.

³³² Noonan, "Posner's Problematics," 1773. See also John T. Noonan, Jr., "The Letter of Religious Liberty and Its Spirit," (lecture, Trinity College, Dublin, April 12, 2006).

moral values.³³³ In this regard, Noonan injects the important element not only of the ‘good’, but also of time in bringing it about, within the context of a Lawgiver.

Noonan ends on what he must view as a positive note, noting “at least three major areas [in which Posner] reveals an openness to development.”³³⁴ Those areas of ‘openness’ are: (1) That Posner’s overall position is not fixed and rigid; (2) that he has not committed himself on the question of the existence of a deity, thereby still being – theoretically, at least – open to the question of God; and (3) that he appears open at least to the possibility of moving from viewing love as an emotion only, to equating it with altruism, seeing love as a “movement of rational will toward the good” – and into a more Biblical vision of “love’s central role in moral life”.³³⁵

Interestingly, Posner had noted - uncommented upon - that he is puzzled “at the persistence of academic moralism” because of the renewed role of theistic religion in America since “theism is a substitute for philosophical moralism.”³³⁶ What is all the more puzzling to him is his observation that:

[M]orality is losing its grip on the American people, who are increasingly constrained in their behavior (to the extent that they are constrained at all) by law rather than by norms. . . .³³⁷

The philosopher would seemingly attempt to make the ethical and moral applicable to the legal, in *legal* proceedings. They do not address the question of why the resolution of moral matters seems increasingly governed not by the ethical or even the theistic but by power of law. This is an important question.

II. The Legal and the Moral Dialogue as Cross-Cultural Encounter: The Reception of Cross-Arguments

We have seen evidence of misunderstandings between Posner and his commentators based upon the differing expectations each brings to the encounter. We have noted that

³³³ Noonan, “Letter.”

³³⁴ Noonan, “Posner’s Problematics,” 1774.

³³⁵ Noonan, “Posner’s Problematics,” 1774-75.

³³⁶ Posner, “Problematics,” 1690.

³³⁷ Posner, “Problematics,” 1690.

Posner continues to operate within a legal context and framework in spite of the fact that he's discussing the application of moral theory to the law, while the moral theorists proceed from a philosophical context, attempting to engage Posner on theoretical questions and disputes in an academic exchange and debate. We have considered difficulties with language in Posner's use of terminology and categories that appear to be the same being used and discussed by the commentators, but which lead to completely different conclusions, leading one to suspect that the two sides are not understanding one another. This misunderstanding appears to take place on the level of language (i), with differing understandings as to certain key terms based largely upon a different expectation as to the desired result (ii), which leads to a significant difference in praxis of the two disciplines (iii). I shall generalize, in an attempt to demonstrate the difficulties of encounter between the lawyer and the philosopher.

The legal proceed from an adversarial, argumentative perspective, seeking to prevail. They tend to attempt to reduce the complex to the more simple and understandable in order to understand the facts, determine the law, apply the law to facts, and render an opinion and judgment. Therefore, they will tend to reduce arguments rather than multiply them. Moreover, they will rely on established burdens of proof to help reach a decision in a questionable case.

Here we might consider Martha Nussbaum's taking issue with Judge Posner for not considering and/or choosing one of the several views of normativity she proffers as dealing with the subject.³³⁸ Posner's legal mind might easily be annoyed with the apparently indiscriminate proliferation of theories, coupled with the perceived failure of Nussbaum to meet her burden of proof on any of them.³³⁹ Interestingly, Posner faults Nussbaum for attempting to place on him "a crushing burden of proof" when she complains that he has not adequately provided a "sustained critique" and "scrutiny of major cases" to support his arguments.³⁴⁰ "Judicial economy", for example mandates

³³⁸ Nussbaum, "Worthy of Praise," 1789-91.

³³⁹ "All three of these views, and others, are live options for answers to Posner's normativity question; none involves his implausible rejection of all justification." Nussbaum, "Worthy of Praise," 1791.

³⁴⁰ Posner, "Reply to Critics," 1822 (quoting Nussbaum, "Worthy of Praise," 1777).

the consolidation of multiple issues to a single proceeding.³⁴¹ Judges routinely decide only what is strictly necessary to decide in order to resolve the case, another exercise of judicial economy, but also to avoid *dicta* - or nonbinding opinions - as well as advisory opinions, which are generally prohibited.³⁴²

On the other side, the philosopher is likely to multiply possible options, (1) in order better to understand, and (2) as a matter of fairness that all options have been presented. The tone of discourse is much more ‘reasoned’, less argumentative, and generally not polemic. It is respectful, anticipating comment, critique and corrective. An ‘answer’ is not [necessarily] what is sought. Instead, it seeks a better understanding, a more coherent plotting of the course of thought. Interestingly, Dworkin comments to this effect in a book review of Posner’s *The Problematics of Moral and Legal Theory*, characterizing the ongoing philosophical arguments as potentially adversarial presentations in order to help the judge “take sides:”

It is a basic assumption of the Anglo-American adversarial system of legal argument, after all, that disagreement can be instructive.³⁴³

Dworkin says that a judge must ultimately “take sides”, but he does not appear to take seriously the effect of taking sides on disputed moral issues. In fact, Posner’s opinions are replete with the express refusal to “take sides” on certain issues under dispute, having found, for example, another way to resolve the case.³⁴⁴ Moreover, Dworkin has dealt specifically with Judge Posner’s “practical” judicial pragmatism in the past,

³⁴¹ *Chicago Board of Education v. Substance, Inc. and George N. Schmidt*, 54 F.3d 624, 626 (7th Cir. 2003) (Posner, J.) (“judicial economy is served by the consolidation of as many issues in a litigation as possible in a single appeal.”) In this case, Posner also says that “[t]o simplify the opinion, we’ll ignore the corporation.”

³⁴² *Charles Chathas, et al., v. Local 134 IBEW, Unified Social Club*, 233 F.3d 508, 512 (7th Cir. 2000) (Posner, J.) (upholding trial court’s refusal to render *dicta* in its judgment and noting that an “advisory opinion [has] no tangible, demonstrable consequence, and is prohibited.”).

³⁴³ Dworkin, “Philosophy and Monica Lewinsky,” 11.

³⁴⁴ *Sharon Gernetzke v. Kenosha Unified School District No. 1*, 274 F.3d 464, 468 (7th Cir. 2001) (Posner, J.) (“We need not take sides in this case”); *Commonwealth Edison Co. v. Sarah D. Vega*, 174 F.3d 870, 874 (7th Cir. 1999) (Posner, J.) (“We need not take sides”); *U.S. v. Edward R. Deal*, 147 F.3d 562, 563 (7th Cir. 1998) (Posner, J.) (“We need not take sides in this dispute”); *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assoc., Inc.*, 86 F.3d 656, 660 (7th Cir. 1996) (Posner, J.) (“We need not take sides”).

which he has specifically contrasted with what he calls a “theory-embedded” approach, by which “[l]egal reasoning means bringing to bear on particular discrete legal problems . . . a vast network of principles of legal derivation or of political morality.”³⁴⁵

In short, this is effectively a cross-cultural encounter, in which we have conflicting norms and criteria. The violation of these norms carries differing messages to each ‘culture’: thus the adversarial starting point of most lawyers translates to the philosopher as potentially narrow-minded, and rude. The collegial tone of the academic, by contrast, can translate into improper appeasement to the lawyer. The lawyer’s ‘cut to the chase’ tactics and attempt to simplify the issues translates to the philosopher as a naïve over-simplification, possibly signalling a lack of familiarity with the true nature of the many issues, or even a lack of education. The philosopher’s contrary insistence on maintaining a multitude of open and relevant issues may easily strike the lawyer as obfuscating, a failure to be able to determine the truly relevant or important, and as simply unnecessary and unnecessarily confusing and complex.³⁴⁶ To engage in dialogue, the parties will have to be aware of these types of areas of conflict and misunderstanding, and seek to meet first on areas of common ground.

This is not, however, how the debate was conducted. The articles responding to Judge Posner’s *Problematics* were – almost without exception – unflinchingly harsh. They accused him of, *inter alia*, making bad and “spectacularly unsuccessful” arguments³⁴⁷, making no argument at all,³⁴⁸ being “ruled by an inarticulate, subterranean, unattractive but relentless moral faith”³⁴⁹, worshipping his own false idols³⁵⁰, having a

³⁴⁵ Ronald Dworkin, “In Praise of Theory,” *Arizona State Law Journal* 29 (1997) 353-76, 354.

³⁴⁶ See, for example, *Albertine Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039 (7th Cir. 1999) (Posner, J.) in which Plaintiff’s complaint for wrongful death was dismissed on a motion for summary judgment which the Plaintiff did not defend. Posner stated: “Our system of justice is adversarial, and our judges are busy people. If they are given plausible reasons for dismissing a complaint, they are not going to do the plaintiff’s research and try to discover whether there might be something to say against the defendants’ reasoning.” 168 F.3d 1039, 1041.

³⁴⁷ Dworkin, “Darwin’s Bulldog,” 1718.

³⁴⁸ Dworkin, “Darwin’s Bulldog,” 1732.

³⁴⁹ Dworkin, “Darwin’s Bulldog,” 1738.

“tendency to focus on weak pieces of work that are genuinely silly”³⁵¹, engaging in “sound-bite style of criticism”³⁵²; “careless”, “casual” and “inaccurate”³⁵³; childish³⁵⁴, making “gross and unnuanced” arguments³⁵⁵; hardly making sense³⁵⁶; advancing empirical claims that are “spectacularly wrong”³⁵⁷; “witty. . . learned. . . dryly irreverent, but despairing”³⁵⁸; “depressing”³⁵⁹; getting things backwards³⁶⁰; sadly mocking³⁶¹.

There were few good points recognized by the panel of critics. Noonan credited him with pointing out the difficulty of establishing a law without the lawgiver, as we have just discussed, and Nussbaum concedes two valid points to Posner: (1) academic moral philosophers should broaden their life-experience to avoid danger of narrowness³⁶², and (2) a lifeless, insular writing style prevails in academic moral theory, which is a “good style for persuading no human being”.³⁶³

Posner himself is certainly not guilty of either lifeless *or* insular writing. Whether he is more effective at persuading than are the academic moral theorists is perhaps a function of perspective and the ability to enter into the debate. In a debate that is, however, not geared towards persuasion, but toward correctness along recognized academic lines, Posner will have failed according to the philosophers. Notably, Posner continually emphasized that moral theory is too flaccid to persuade and has denied that he needs it

³⁵⁰ Noonan, “Posner’s Problematics,” 1768 (the scientific method), 1769 (Evolution), 1770 (“Purity of Law”).

³⁵¹ Nussbaum, “Worthy of Praise,” 1777.

³⁵² Nussbaum, “Worthy of Praise,” 1778.

³⁵³ Nussbaum, “Worthy of Praise,” 1782, see also Fried, “Philosophy Matters,” 1742-43, complaining of Posner’s “casual” denial of the influence of philosophers on the American Revolution.

³⁵⁴ Nussbaum, “Worthy of Praise,” 1794.

³⁵⁵ Fried, “Philosophy Matters,” 1739.

³⁵⁶ Fried, “Philosophy Matters,” 1741.

³⁵⁷ Fried, “Philosophy Matters,” 1741.

³⁵⁸ Kronman, “Value of Moral,” 1753.

³⁵⁹ Kronman, “Value of Moral,” 1755.

³⁶⁰ Kronman, “Value of Moral,” 1764.

³⁶¹ Kronman, “Value of Moral,” 1767.

³⁶² Nussbaum dismisses Posner’s suggestion that “philosophers are improved by persecution” and rejects as “childish”, Posner’s “romantic view of tyranny”.

Nussbaum, “Worthy of Praise,” 1794.

³⁶³ Nussbaum, “Worthy of Praise,” 1795.

either for legal reasoning or in private life. In a debate on Posner's terms that is geared towards subjective persuasion, it would appear the philosophers have no hope of success.

Having examined the major issues raised both by Posner and the commentators, we will examine Posner's "Reply to Critics" to attempt to gain a deeper insight into the nature of the misunderstanding between this jurist and these moral theorists. In addition to the disputed issues, we will note the tone and content of Judge Posner's reply, attempt to identify misunderstandings based on the differing disciplines and note the amenability of the parties to the discourse to continue in it.

1. Exchange with Dworkin: A Confusion of Moral Content with Moral Theory

In his *Reply*, Judge Posner refocuses the field of discussion. He claims to feel reassured in his position that moral theory is useless based on the alleged failure of his critics "to demonstrate how moral reasoning can actually convince doubters or aid judges."³⁶⁴ It would appear that Judge Posner's only interest in "moral reasoning"³⁶⁵ is the extent to which it serves as a tool of argumentation. Posner concludes that moral reasoning produces arguments that "are too flaccid to induce a sensible person to change his beliefs or behavior."³⁶⁶ Thus, he sees it as *just* a tool of argumentation, and an ineffective one at that, rather than the compass or moral identity with which we approach a moral issue, or a case with a moral question. Moral theory plays no role, according to Posner, in resolving issues where there is "no consensus on ends, and so the issues have to be resolved by force, elections, compromise, legislation, judges' values, public opinion, default, exhaustion, distraction by other issues, changes in religious beliefs (not themselves induced by moral theory) or in demographics or in technology, considerations of feasibility, or emotional appeals".³⁶⁷

³⁶⁴ Posner, "Reply to Critics," 1796.

³⁶⁵ One is left to speculate how closely related that would be to the moral theory he so roundly despises, whether it is a synonym or whether he intends to distinguish between the two, possibly based upon the use to which each is to be put: the term 'moral reasoning' to be used in order to discuss the tools of argumentation.

³⁶⁶ Posner, "Reply to Critics," 1801.

³⁶⁷ Posner, "Reply to Critics," 1803.

Dworkin's idea, to the contrary, is that people *have* a moral code and/or theory, the question is to find out what type it is, and then to see whether their actions are consistent with it. If not – to argue (based on the *other's* moral code, initially, anyway) that their own code condemns them.³⁶⁸ We may see this, for example, in Dworkin's exhaustive attempts to determine Posner's moral theory. Posner, however, seems to think that academic moralism is about taking your own pet moral theory – for example “asking the courts to enact [a] left-liberal policy agenda”³⁶⁹ – and using *it* as a bludgeon to try and change people and/or convince judges. As such, it appears Posner confuses moral theory with the content of a moral opinion. As such, Posner is right. One's own moral opinions - absent more - *are* “too flaccid to induce a sensible person to change [his own moral theory or] his beliefs or behavior”³⁷⁰ if the goal is subjective persuasion. But is this very goal not to misconstrue an essential element of, e.g., Kantian moral theory which emphasizes that morality is *not* about changing others, but about complying *oneself* to the moral law? It is in furtherance of that project that the conversation and the articulation of moral conviction and values helps ground a moral society.

Posner casts ridicule on Dworkin's idea that there are many people who spend much time thinking about their own moral position, its soundness or the integrity of their actions in accordance – in connection with determining moral responsibility. That is too “high-flown” for most people, he asserts, and further charges that it excludes children as well as the non-“high-flown” people. “I define a morally responsible person as a person who behaves morally.”³⁷¹ Posner says. Nowhere, however, does he discuss what that means, where one is to find the moral content that supposedly drives the behavior, and the means by which one might justify and/or judge the behavior in relation to the applicable moral content.

Posner complains:

³⁶⁸ One can see in Dworkin's position a parallel to Romans 2:1, “Therefore you have no excuse, O man, every one of you who judges. For in passing judgment on another you condemn yourself, because you, the judge, practice the very same things.” (ESV)

³⁶⁹ Posner, “Reply to Critics,” 1799.

³⁷⁰ Posner, “Reply to Critics,” 1801.

³⁷¹ Posner, “Reply to Critics,” 1802.

Every move in normative moral argument can be checked by a countermove. The discourse of moral theory is interminable because indeterminate.³⁷²

That may be so, but it would not appear to justify the cessation of all conversation nor to excuse willful misunderstanding of what conversation *is* offered. A basic constitutional and legal principle is that the cure for offensive speech is not *less* speech, but more.³⁷³

Thus, Posner's response, at times uncivil, engages in the manipulation of definitions, the revision of stated objectives, and complains of the futility of further conversation in the face of studied opposition.

2. Reply to Fried: A Study in Legal Obfuscation

Posner's *Reply*, insofar as it refers to Judge Fried, does not appear to deal with the main points raised by Fried at all. Posner concedes that Fried makes "one good point" against him, which he shortly discounts by saying that that's not what he meant.³⁷⁴ He then clarifies what he actually means by the "social function of moral duties" by equating them to a leash on a dog such that one can be constrained by that leash "without having to reason."³⁷⁵

Posner claims that what he really wants from academic moralists is that they demonstrate how moral 'argument fragments' – a term he lifts from Fried's concluding paragraph pronouncing final judgment against Posner – can be assembled into a

³⁷² Posner, "Reply to Critics," 1802.

³⁷³ Like offensive speech, I would submit that interminable dispute should be first subjected to ongoing dialogue in an attempt to clarify – and then hopefully resolve – the dispute, rather than shutting down the conversation altogether rather than risk interminability.

³⁷⁴ "Justice Fried makes a good point against me – that in defining morality as the set of duties to others that are designed to check our merely self-interested, emotional, or sentimental reactions to serious questions of conduct, I was implying that moral judgments cannot be reduced to raw emotion and therefore acknowledging a role for moral reasoning in those judgments. That may indeed be an implication of what I said. But it is not what I meant, as should have been clear from the Lectures as a whole." Posner, Posner, "Reply to Critics," 1806.

³⁷⁵ Posner, "Reply to Critics," 1806.

convincing moral argument.³⁷⁶ He goes on, however, to misrepresent Fried's actual argument. For one, he ignores the fact that Fried actually used the idea of argument fragments as constitutive of *most* arguments – including scientific and mathematical ones – and not just moral ones. Instead, he implies that Fried has somehow conceded that moral arguments are actually only argument *fragments* and, as noted, pleads for a demonstration of the proper assembly of those fragments such as to enable him to see how moral argument might possibly be effective. This is a legal argument from beginning to end, demanding a strict offer of proof upon threat of dismissal otherwise of the argument.

Posner certainly also misses the point that Fried makes concerning what he calls Posner's sneering repetition of isolated phrases³⁷⁷ of certain thinkers in an attempt to hold that thinker up to scorn rather than critiquing the actual work or ideas of the thinker and advancing academic reasons. That doesn't work, Fried had said, and compares the attempt to singling out "one or two steps from Gödel's proof and repeat[ing] them in a sneering tone intended to show the vacuity of that enterprise."³⁷⁸ Further on, Fried compared Onora O'Neill's ethical scholarship to "mathematicians pursuing Fermat's last proof" insofar as she is "one in a long line of exegetes and amenders of Kant's remarkable argument."³⁷⁹ It is not enough there, either, to merely pick out one or two fragments of her argument and restate them, sneeringly, Fried reiterated, and thereby expect to have vanquished her work as moral theorist.

Here is how Posner reacts to this point:

I take Fried to be meeting me halfway when he describes the arguments that academic moralists make as "argument fragments." What I would like to see now is a demonstration of how those fragments can be assembled into a convincing argument. Fried says they can be, and remarks intimidatingly that Rawls and O'Neill are the peers of Gödel

³⁷⁶ Posner, "Reply to Critics," Amazingly, Posner claims that he thereby takes Fried to be "meeting him half-way".

³⁷⁷ Argument fragments, indeed.

³⁷⁸ Fried, "Philosophy Matters," 1747.

³⁷⁹ Fried, "Philosophy Matters," 1747.

and Fermat³⁸⁰, but he gives no examples of convincing moral argument except to cite his own book on contracts³⁸¹, and so I will content myself with a countercitation.³⁸²

Again, Posner operates in less than admirable legal fashion by refocusing the issue to engage in critiques of Fried's supporting citations rather than with the actual issue raised. Posner compounds his abuse of Fried's argument by making free use of quotations contained in works of Fried written over a decade earlier. Beyond the innocuous use of the past tense ("[Fried] has written"³⁸³) and the bare citation in footnotes, Posner gives little signal that the quotations are so old, out of context, and are not actually contained anywhere in Fried's instant critique of Posner's *Problematics*.

Posner quibbles over the cases cited by Fried as indicative of showing that Fried himself - also a judge, as we have already noted - is influenced by his review of moral philosophy and that two other judges are perhaps also influenced thereby. Posner

³⁸⁰ Posner cites accurately, here, to the page on which Fried treats Gödel and Fermat, Fried, "Philosophy Matters," 1747, but nowhere is the point made - intimidatingly or not - that they, Rawls, and O'Neill are peers.

³⁸¹ Again, Posner cites accurately to a place where Fried cited his own book on contracts, namely Fried, "Philosophy Matters," 1740n12 and 1745n45, but fails to note that the first cite is introductory, and indicative generally of the academic moral philosophy of the targets of Posner's disdain (of whom Fried is only one, but who also cites representative work for a long list of others); and the second citation of only three pages of which, which relates to Fried's own personal experience wrestling with a particular moral issue related to the Rawlsian principle of difference. The idea that his own book from 1981 is the *only* citation Fried supplies of supposed persuasive moral argument is ludicrous. The article itself is 12 pages long, and contains 59 comprehensive footnotes. Tellingly, Posner next launches into three law cases which he says Fried cited as "show[ing] that judges do moral philosophy after all." Fried has cited them, however, to show that his own "reading, thinking, and writing about moral political and legal philosophy makes a difference to my work." Fried, "Philosophy Matters," 1743, and n32, and questioning whether what they know about two other judges and their attitude towards moral and political philosophy does not also show that it influences *their* judicial decisions. See Fried, "Philosophy Matters," 1743-44.

³⁸² Posner, *Reply*, at p.1807 and notes 44, 45 and 46. Posner's "countercitation" is to Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 Mich. L. Rev. 489, 490, 517-23 (1989), offering no other clue as to the grounds for the countercitation. Craswell discusses Fried's theory of promising in connection with Craswell's desire to establish in contract law a default rule upon which to rely in all cases, concluding that Fried's approach does not result in a definitive rule and thereby "does little to advance our understanding of contract law." *Id.* at p. 523.

³⁸³ Posner, "Reply to Critics," 1807.

claims not to find anything “remotely resembling a moral issue in the case”³⁸⁴ – in *any* of the three cases cited. One would have thought Posner would have reacted enthusiastically to the prospect of engaging in a legal analysis, but he does not treat the cases any further than that. The difficult burden at law of proving a negative is well-settled and it would appear that Posner has attempted to avoid the issue by merely stating his conclusion that he found none. A review of the cases however, shows that moral issues in the cases do not appear to be in short supply, although the same can not be said, perhaps, of an *obvious* use of moral theory, reasoning, or argumentation in the actual written opinions.³⁸⁵

Posner is also cursory in his refutation of any claim of real influence by Marx,³⁸⁶ Locke, Kant, and Hegel, claiming with respect to the last three that he has “doubts that even those three great philosophers influenced the real world, doubts not stilled by the references in Fried’s footnote twenty-eight.”³⁸⁷ The footnote in question cites six different writers, covering works from 1955 to 1992, who have treated the influence (or lack thereof) of Locke upon America. It is hard to imagine a more unhelpful stance to take, either judicially or academically, than the summary dismissal of a wide citation of authority with no discussion whatsoever. In this particular instance, Posner appears to have been operating from the position of judge insofar as he seems to have applied a burden of proof standard which he claims Fried did not meet. If in fact this had been a

³⁸⁴ Posner, “Reply to Critics,” 1808.

³⁸⁵ 44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc., v. Rhode Island and Rhode Island Liquor Stores Assoc., 517 U.S. 484; 116 S. Ct. 1495; 134 L. Ed. 2d 711, for example, deals with questions of the permissibility of free speech/advertising concerning the sale of intoxicating liquor. In NLRB v. Transportation Management Corp., 674 F.2d 130, 132 (1st Cir. 1982) (Breyer, J., concurring), *rev’d*, 462 U.S. 393 (1983), the issue dealt with the question of employer motivation – specifically, whether it was impermissibly anti-union – and the burden of proof where evidence is adduced to show *dual* motivation, good and ‘bad’. Doe v. Attny Gen., 426 Mass 136, 686 (Mass. 1997) deals with the permissibility of requiring automatic registration and public disclosure as a sex-offender, ostensibly for the protection of children, of a man whose homosexual activity involved an adult, an undercover police officer. One could wish that Fried had been a bit more forthcoming in describing how the judges may have been influenced by moral theory in reaching their decision, as the written opinions themselves are better examples of Posner’s recommended technique of dodging the moral issue and tackling the question supposedly on other grounds.

³⁸⁶ Whom Posner claims has been refuted factually, although interestingly, he does not deny that Marx has been influential. Posner, “Reply to Critics,” 1809.

³⁸⁷ Posner, “Reply to Critics,” 1809.

legal argument in which Fried and Posner were the disputants, however, this exchange would have been won by Fried insofar as Posner produced no evidence or argument to contest Fried's account.

Here as well, Posner is uncivil, mischaracterizes and even misstates some of Fried's arguments, refuses to reply to others - merely restating his own opinion - again implicating the futility of response, or a failure to respond.

3. Response to Nussbaum: Evidence of Bias against Academic Theory

Posner is particularly scathing in the portion of his response that deals with Martha Nussbaum's comments. He seemed to expect 'better' from her, since he notes her general opposition to the professionalization of philosophy, and explains her taking up arms against him – a supposed fellow opponent to professional philosophy – as follows:

But, faced with a challenge by an outsider, she closes ranks with the academicized and professionalized moral philosophers and endeavors to catalogue their successes in the world of action.³⁸⁸

He takes umbrage at what he considers willful misunderstandings of his position,³⁸⁹ makes fun of examples that she cites,³⁹⁰ picks apart at length a study cited by Nussbaum in a footnote,³⁹¹ and otherwise clarifies what he calls "inaccuracies in Nussbaum's Response."³⁹² He refuses to engage, however, on the question squarely presented in Nussbaum's Response, namely just how we justify moral claims or the source of normativity of ethical norms – including any of the three approaches

³⁸⁸ Posner, "Reply to Critics," 1815-16.

³⁸⁹ E.g. Posner, "Reply to Critics," 1817("I never said it was"), 1819 ("misunderstands my point" and "ascribes to me radical positions that I made clear I do not hold.").

³⁹⁰ Pointing out that all her 'model philosophers' of influence are dead, for example, see Posner, "Reply to Critics," 1817, and that the most recent example she gives of an ethical theorist as influential politician is Marcus Aurelius. Posner, "Reply to Critics," 1816. "It's odd to call a Roman emperor an "influential politician." Posner, "Reply to Critics," 1816n94.

³⁹¹ Posner, "Reply to Critics," 1817-1819, responding to Nussbaum's footnote 33 at p. 1783 of "Worthy of Praise."

³⁹² Posner, "Reply to Critics," 1819.

described by Nussbaum as possible options for considering these questions.³⁹³ He rejects them in a single sentence:

I argue that academic moralism is useless, and I regard Nussbaum's parsing of the differences between neo-Humeans, neo-Aristotelians, and neo-Kantians as just so much sand in the eyes.³⁹⁴

He then faults Nussbaum for only 'presuming' that moral theorists have influence, instead of actually *showing* how they have influence. One begins to suspect, however, that any attempt so to show would be met by further dismissal, insofar as Posner introduces a new element into the equation: moral theorists *qua* moral theorists, and not otherwise masquerading as education, economic, or animal rights theorists.³⁹⁵ For Posner, it appears that the moment so-called academic moralists begin to discuss any *tangible* subjects such as education, economic, or medical issues, academic moralists are immediately out of their league. In effect, they are no longer operating as academic moralists, and thus we are no longer dealing with moral argument at all, effective or otherwise. One begins to wonder that Posner argues merely that moral argument is "useless". He might otherwise argue that it is non-existent, since the moment one begins to speak about an actual subject or instance, it is transformed out of morality into the subject matter under which the moral question arose.

At the same time, however, Posner seems quite comfortable making his own moral claims, never seeming to recognize that a "legal" approach to questions does not otherwise do away with any accompanying questions of morality. Thus, in reviewing arguments relating to abortion, Posner blithely rejects any suggestion that the law "should not impose a general duty to rescue strangers when the rescue can be effected without mortal peril to the rescuer" for example, claiming that "objections to imposing [such laws] are of a practical character unrelated to any moral right not to be a good Samaritan."³⁹⁶

³⁹³ See discussion above, at p. 103 and nn60-63.

³⁹⁴ Posner, "Reply to Critics," 1820.

³⁹⁵ See Posner, "Reply to Critics," 1820. See also Nussbaum, "Worthy of Praise," 1780-1782, in which Nussbaum cites historical and then more recent examples where philosophers could be said to have influenced people and society.

³⁹⁶ Posner, "Reply to Critics," 1821.

Moreover, he resolves in a single sentence the complex moral questions Nussbaum brought up in evaluating Posner's own review of an actual potential philosophical argument, namely his point that there is a difference between merely 'pulling the plug' and 'chopping up' a fetus. Nussbaum wonders whether the "significant moral distinction is between active killing and allowing to die", noting also the Catholic doctrine of double effect.³⁹⁷ It is important to anticipate an opponent's position, Nussbaum had asserted, and to respond to what one can reasonably imagine would be their answer, placed in its most favorable light. Posner translates this Nussbaum critique into a request for "amplification" of what he says he thought he had already proved was a "thoroughly bad argument."³⁹⁸ He launches into a legal analysis which seems to take the accompanying moral judgments as already resolved. He certainly appears unaware of *making* any moral judgments when he makes statements like:

Whatever the method and whatever the stage of the pregnancy, the doctor is employing force for the purpose and with the effect of killing the fetus.³⁹⁹

and:

What is important for the present discussion is that abortion is killing rather than letting die.⁴⁰⁰

Thus, Posner ignores Nussbaum's attempt to work out just where Posner stands with respect to the moral issue underlying the abortion argument and instead takes her to task for first, trying to 'win' her point by placing on him a "crushing burden of proof" and second, by unfairly insisting that he meet her on her own "turf", thereby "engaging with the normative moral philosophers on their terms."⁴⁰¹

[M]y principal argument is that those are the wrong terms for judges and others seeking guidance on how to act. In this respect her tactic resembles Dworkin's rhetorical stratagem of insisting that the only permissible, indeed the only possible, criticism of moral theory is itself a moral argument.⁴⁰²

³⁹⁷ Nussbaum, "Worthy of Praise," 1779.

³⁹⁸ Posner, "Reply to Critics," 1820.

³⁹⁹ Posner, "Reply to Critics," 1821.

⁴⁰⁰ Posner, "Reply to Critics," 1821-22.

⁴⁰¹ Posner, "Reply to Critics," 1822.

⁴⁰² Posner, "Reply to Critics," 1822.

It is hard to imagine how he hopes to persuade those with whom he disagrees when he refuses to speak with them on their own terms, ignores their efforts to speak with him on his, offers no alternative, and instead merely continues to repeat his condemnation of all moral theory as “useless”. This is particularly confusing, as Judge Posner’s topic *was* moral theory, after all. As with the other responses, Posner’s tone is sharp and he engages in shifting definitions. We may see here the express acknowledgment that Posner has not attempted to meet the philosophers on “their terms” and his belief the terms of moral theory are not the right terms to be used at law.

Notably, Nussbaum has engaged with Posner on the issue of conflicting philosophical and legal levels in the past, as for example noting that Judge Posner’s approach to the question of “free will” (with respect to a legal finding of voluntariness of a confession to a crime) ignores philosophical considerations concerning basic capacity to make a rational choice.⁴⁰³ She has also critiqued his conflation of “rationality” with basic issues of cost-benefit analysis, never seeming to consider the question of incommensurability of the values at issue.⁴⁰⁴ Inexplicably, in her critique of his “Problematics,” she does not bring up this basic tendency of Posner to stay on the legal level, although she does find fault with his arguments, but analyzes on a philosophical one.

4. Response to Noonan: Sign of Hope in Argument of Love?

Posner responds favorably to Judge Noonan’s positive beginning and states his agreement with Noonan’s “central theses: that one needs a lawgiver if there are to be moral universals, apart from the tautological and the vacuous; that no human lawgiver could lay down universal moral duties; and that, in short, the only tenable ground for believing in a universal moral law is religious. And naturally I agree with his criticisms of academic moralism.”⁴⁰⁵

Interestingly, Posner ignores the ‘idols’ Noonan points out, and instead quibbles over questions about supposed moral “progress” and the examples Noonan used: slavery

⁴⁰³ Martha Nussbaum, “The Use and Abuse of Philosophy in Legal Education” *Stanford Law Review* 45 (1992-93): 1628-45, 1630-33.

⁴⁰⁴ Nussbaum, “Use and Abuse,” 1637-38.

⁴⁰⁵ Posner, “Reply to Critics,” 1813.

and bribery. He concludes that he can no longer “doubt . . . that one can speak intelligibly about moral progress.”⁴⁰⁶ Yet he points out that there was a time when one apparently could and *did* disagree over conflicting moral view points which – now resolved, as in slavery – we view *as* progress.

With respect to the three areas of ‘openness’ Noonan sees as a favorable aspect in Posner’s approach, Posner speaks briefly about the first – the importance of ‘seeing’ – emphasizing that such sight or recognition still does not resolve the underlying moral dilemma of abortion, for example. “There is no process of reasoning that will tell us which sight should move us more.”⁴⁰⁷ He moves then to Noonan’s remark about love (the third area of ‘openness’, above), again emphasizing his concern that any such insight could “power moral reasoning.”⁴⁰⁸

Posner’s response to Noonan is the only response that does not include sharp remarks or personal attacks, even though Posner questions some of Noonan’s examples with respect to the question of moral reasoning as underlying changes in society regarding slavery and bribery. Posner appears to discuss the examples relevantly, although he does not agree with Noonan’s conclusion:

[D]oes Noonan believe that the North won the war because slavery is immoral, as Lincoln hinted in his second inaugural address? Most scholars think the North won because it was wealthier, more populous, more industrialized, and more centralized and had an abler president.⁴⁰⁹

Notably, Posner revises one of the points of his original Lectures, apparently in the face of Noonan’s interaction on the point:

I no longer doubt - and here I am qualifying a point in my Lectures - that one can speak intelligibly of moral progress.⁴¹⁰

Finally, Posner takes up Noonan’s final remarks, relating to his optimism concerning Posner’s openness to development. The three areas were that (1) Posner’s position is

⁴⁰⁶ Posner, “Reply to Critics,” 1815.

⁴⁰⁷ Posner, “Reply to Critics,” 1815.

⁴⁰⁸ Posner, “Reply to Critics,” 1815.

⁴⁰⁹ Posner, “Reply to Critics,” 1814.

⁴¹⁰ Posner, “Reply to Critics,” 1815.

not inflexibly fixed, (2) that he remains open to the possibility of the existence of God and (3) that he may yet come to see the religious 'commandment' to love as an essential element of morality, completing the otherwise puzzling category of altruism.

Is it a measure of respect that Posner exhibits in responding to these final remarks?

Posner calls them "striking observations about empathy, divinity, and love."⁴¹¹

Following the accusation and brutal condemnation of attempts of academic moralists to set their own moral agenda by means of legal implementation of their favored policies, it is surprising to see Posner's gentleness with respect to substantive faith claims underlying Noonan's position. Is this due, perhaps in part, to the ongoing debate about the role of the religious voice in the public sphere (ironically undertaken by just the same sort of academic moralists Posner derides) that has begun to overcome the effective silencing of the religious voice along the same grounds Posner urges for silencing the voice of moral reasoning?

SUMMARY

We have taken a close look at relevant portions of a debate between the legal and the moral in the *1997 Oliver Wendell Holmes Lectures* at Harvard Law School, on moral and legal theory. We have seen the extreme extrinsic approach to relating law and ethics - demonstrated in Judge Posner - denying that there is any connection between the two, and focusing on the legal orientation. Here, the main critique is the failure to recognize that one cannot operate in a moral vacuum. Statements of value and judgment are inherently required in making judicial determinations, and they do not always boil down to matters of empirical proof or measurement, nor may they otherwise be reduced to subjective preference. Neither can one choose just one or the other. We have discussed the weaknesses of envisioning law without ethics. Likewise, ethics without law loses the important corrective of the enforceable, generally, as well as the potential removal of the outlaw.

An intrinsic relationship of law and ethics was demonstrated by the positions of the majority of the commentators to Posner's Lectures, but most notably by Ronald

⁴¹¹ Posner, "Reply to Critics," 1815.

Dworkin. Dworkin sees little or no obstacle in combining law and ethics in an *intrinsic* relationship, moving seamlessly (or so he would imply) between law and ethics in any given case. The major drawback in this formulation of the relationship between the two is the ongoing difficulty of resolving disputed norms, especially in instances where the moral norm is sought to be enforced, legally. Thus, an intrinsic depiction of this relationship runs the risk of losing its teleological focus, insofar as legal proceedings tend to be deontological in focus, since the goal is normative pronouncement and enforcement. As was critiqued as against Charles Taylor (who exemplified the intrinsic model in the moral identity field), there is also the danger here of taking the goods aimed at to be the *right* goods. The issue of enforceability of what would otherwise be unenforceable at the moral level remains problematic, as recognized by Kant, the law may not be called upon to attempt to control the interior moral inclinations. As then, the force of law remains a poor substitute for properly reasoned moral determinations.

With the exception of the remarks by John Noonan and the subsequent exchange between Noonan and Posner, we did not observe any interaction between the legal and the ethical that resembled the practical wisdom - or *phronēsis* - per the work of Paul Ricoeur. Neither was Ricoeur cited by any of the participants in this debate, despite his discussions both with Nussbaum and Dworkin.

Looking at the Noonan position - in relation and dialogue with Posner - we can perhaps see (or maybe just imagine) the beginnings of a complementary relationship between law and ethics. From the ethical, in a religiously-oriented conception of norms as law from a Lawgiver, the legal may test or complement its idea of the normative. The religious voice would also provide issues of creation as originary good, together with language and the categories to describe the not-good, or the 'fallen' or 'sinful'. As we saw in Ricoeur's thought, it was this - or evil - that led to the initial need to turn to the deontological level of obligation, here exemplified by the deontological//*legal* level of *enforceable* obligation.

We have seen limitations on both sides of this more complementary discourse relationship. In observing the relevant discourse that embodied it, however, we see the only example of (1) a civil conversation where (2) each participant was open to being

influenced by the other. In the other exchanges, we saw evidence of what amounts to a cross-cultural attempt at communication between these two disciplines, one in which apparently neither side made the attempt to establish common ground, define terms, and clarify meaning. Judge Posner represents the view that the relationship between law and ethics should be extrinsic - and remain strictly separate.

We turn now back to the ethical to see where it might offer a valuable corrective to the legal, or at least engage in complementary discourse in contrast to the polemical stance we have just examined. In this regard, looking at the well-received final comments of Judge Noonan, we will concentrate on questions of "love" as a viable moral element of resolution in the hard - or tragic - case at law. This returns us to Paul Ricoeur's work of *phronēsis* - specifically, to the question of the rule of reciprocity, which he posits not only as the foundational moral principle embodied in the Golden Rule, but also as effective solution to the asymmetry he observes in all human action and interaction. We will explore the self-constitutive aspects of thinking and conscience, as well as the value determinations necessary under the Golden Rule. Finally, we will face the challenge of the transcendent foundation upon which the commandment to love is based, and determine the possible field of interaction there, with the legal, with a view toward improving and expanding effective discourse. This does not mean that we will end in consensus, but the alternative stances will become clearer.

Chapter 4

Ethical Identity and Moral Conscience as Presuppositions of Law

From the foregoing chapter, we are left with the observation that the extreme legal perspective we identified in the position advanced by Judge Posner - seeking to operate independently of so-called "moral philosophy" - advances several reasons to justify a divorce between law and moral theory. First - and possibly foremost - is the difficulty in fixing the moral *content*. This difficulty is fleshed out in the debate over morality as local rules as opposed to questions of universality.

Second, we noted the complaint of the interminability of the conflicts that arise at the moral level. Here, we might also place the question of the alleged lack of a power to persuade as inherent to moral arguments or principles, from the legal perspective, within a legal framework. The moral perspective would focus on conviction reached internally through moral reflection. As Ricoeur points out, it is the need for a decision that marks the difference between the practice of law and moral argumentation.

Third, we considered the legal/moral dialogue as exhibiting signs of an attempt at cross-cultural communication, but one in which the fact of two cultures was not acknowledged, the difference in language appeared to be overlooked, and the motivation for and the anticipated goal of the respective disciplines was likewise seen to differ substantially.

Finally, we saw the hint of two much larger problems underlying the whole enterprise, namely (1) the question of whether the foundation of any ethics is metaphysical, and whether it is religious and theistic, or whether it is limited to being based on human reason and perception alone. The second problem (2) is that of the resources of a democracy that the state cannot create itself. If law is in communication with the basis of principles held and values lived in the community it serves, the question moves to how these resources can be replenished.

The first question was touched upon only briefly in the comments exchanged between Judges Posner and Noonan concerning the problems of validity of a law without any 'law-giver,' beyond the moral subjects themselves. The second is the subject of a long-standing debate since the 1960's in German legal theory, political philosophy, and theology, which has recently been taken up again between Jürgen Habermas and the then Cardinal Ratzinger. It may turn out that the law is not as self-sufficient as Posner seems to think, but instead depends on motivations, internal sources and convictions, the vitality of which it has to presuppose in its practice. The "wish to live together" (Hannah Arendt) and the motivation to abide by moral principles cannot be taken for granted in a society where citizens with different backgrounds and aspirations co-exist.

From the panel of those invited to comment upon Judge Posner's Lectures - lawyers, judges, and 'academic moralists' - we examined attempts to bring the ethical and moral to bear in response to Posner's plea for legal independence. Those attempts primarily focused on working out the details of Judge Posner's moral approach (1), questions of universality of norms (and validity thereof) (2), the complaint that a critique of particular moral systems of thought is not possible without first entering the thought system/s and arguing from within, implicating interminability of conflicts (3), and finally, the question of a theistic foundation for the moral law or - failing that - for at least a turning to the commandment to love as an important corrective to enable a full understanding of equitable judgment (4), and of the non-political presuppositions of the state.

In the chapter that follows, we will investigate three additional areas in which moral theory is able to engage with the legal, complementarily, rather than polemically. We will proceed under the headings of (1) conscience, (2) the golden rule, and (3) the 'economy of the gift'. These areas focus less upon a content of the 'moral' than they do upon the moral subject, the identity of the person seeking to act 'morally', in relation to themselves, others, society, and - ultimately - a transcendent. As is thus apparent, our argument first assumes a relationship of critical *phronēsis* - a refined practical reason following Paul Ricoeur's thought - between the teleological aims of

ethics and the deontological sieve of norms.⁴¹² We will be building upon the concept of ethical identity which we explored in Chapter 1, and which we noted in Chapter 3 was not brought into the ethico-legal discourse by the academic moralists to answer Posner's declaration of independence from the moral.⁴¹³ I shall attempt to show in what follows, that the effort to disengage the operation of law from moral reasoning is equivalent to severing the consideration of the properly-human in questions of the person, and - specifically - the person at law. As we shall see, this is of importance not only with respect to the person, but also to the state, insofar as questions of the moral subject are linked to the question of the pre-political foundation of the state, and of the law it upholds.

I. Conscience - Unity or Fragmentation of the Moral Subject

To come to grips with conscience - how it has been defined; how it operates - we may find in the thought of Hannah Arendt a starting point at the question of the necessary proof of moral propositions that fuel conscience. She lays out an alternative:

Moral propositions, like all propositions claiming to be true, must be either self-evident or sustained by proofs or demonstrations.⁴¹⁴

Thereafter, of course, one must also deal with the difficulty of proof, the question of 'right reason' and criteria for determining it as well as consequences if the moral proposition is nonetheless flaunted - i.e., the punishment aspect. This is a different case, however, from the operation of the conscience. In fact, Arendt asserts that one's conscience has "no obligatory character." It says " 'This I *can't* do,' rather than, 'This I *ought* not to do.' "⁴¹⁵

The positive side of this "I can't" is that it corresponds to the self-evidence of the moral proposition; it means: I can't murder innocent people just as I can't say, "two and two equal five." You can always counter the "thou shalt" or the

⁴¹² Ricoeur, *OA*, 170.

⁴¹³ Ronald Dworkin does discuss his observation of 'typical moral reasoning' in people - and the role of theory therein - generally, but does not equate the process with its impact on the self. Instead, he focuses on questions of 'truth', the consistency of the reasoning being employed, and questions a distinction between individual reasoning and more general theory. See Dworkin, "Darwin's Bulldog," 1722-24.

⁴¹⁴ Hannah Arendt, "Some Questions of Moral Philosophy" in *Responsibility and Judgment*, ed. Jerome Kohn (New York: Schocken Books, 2003), 49-146, 77.

⁴¹⁵ Arendt, "Some Questions," 78.

“you ought” by talking back: I will not or I cannot for whatever reasons. Morally the only reliable people when the chips are down are those who say “I can’t.” The disadvantage of this complete adequacy of the alleged self-evidence or moral truth is that it must remain entirely negative. It has nothing whatsoever to do with action, it says no more than “I’d rather suffer than do.”⁴¹⁶

Paul Ricoeur takes a similar stance with respect to conscience, seeing that, like the Golden Rule, it operates more negatively than positively - what must *not* be done, rather than a command that a certain thing *be* done. Ricoeur, however, sees this as arising out of the nature of evil, and that in each case, the answer to evil is “No.” For the positive, Ricoeur looks to the ethical level, where:

[S]olicitude, as the mutual exchange of self-esteems, is affirmative through and through. This affirmation, which can well be termed original, is the hidden soul of the prohibition.⁴¹⁷

A simple view of the conscience as operating only prohibitively, then, is perhaps not a complete grasp of the concept. How does one explain those whose ‘I can’t’s - per Arendt - turn into ‘I must’s or ‘I will’s? Dietrich Bonhoeffer, for example? Or others who took action and actively subverted the [then, immoral] law and hid or smuggled Jews in Nazi Germany? In this regard, the “I ought not” turns - outside of any compulsion of moral law - into the “I can not” and a personally authentic conviction carried into action, or inaction.

Interestingly, Bonhoeffer himself would agree with Arendt’s characterization of conscience as operating negatively:

[T]he call of conscience is always a prohibition. “Thou shalt not.” “You ought not to have.” Conscience is satisfied when the prohibition is not disobeyed. Whatever is not forbidden is permitted. For conscience life falls into two parts: what is permitted and what is forbidden. There is no positive commandment.⁴¹⁸

I believe that a more complete answer lies in Arendt’s conception of conscience as arising out of thought and - specifically - the dialogue with oneself, unencumbered by the contemplation of intentional wrong or wrongdoing. Interestingly, she starts from a

⁴¹⁶ Arendt, “Some Questions,” 78-79.

⁴¹⁷ Ricoeur, *OA*, 221.

⁴¹⁸ Dietrich Bonhoeffer, *Ethics*, ed. Eberhard Bethge (New York: Simon & Schuster, 1995) 28.

position in agreement with Judge Posner's argument that moral principles are not persuasive. We may see Arendt's thought through her study of Plato's Socratic dialogue with Gorgias, a dialogue between the Socrates, the philosopher, and the master of rhetoric, Gorgias. The analogy is apt to the debate we have been examining between Judge Posner and the panel of theorists and philosophers.

The example Arendt gives is Socrates' failed attempts in the *Gorgias* to convince his conversation partners of "three highly paradoxical statements: (1) It is better to suffer wrong than to do wrong; (2) It is better for the doer to be punished than to go unpunished; and (3) The tyrant who can do with impunity whatever he pleases is an unhappy man."⁴¹⁹ For our purposes, the important starting point is Socrates' inability to convince, but also his "unshaken conviction . . . that he is right even though he admits that the whole world stand against him".⁴²⁰

Certainly this is 'common ground' by which to approach discourse with Judge Posner and to take his argument (that moral theory convinces nobody) a step further. Instead, it seems as if those commenting on Posner's Lectures were caught up in trying to "prove" that yes indeed, it *does* convince. Arendt acknowledges that from antiquity, however, moral argument has been understood *not* to convince - let alone be persuasive - at least not to everybody. In acknowledging this principle, we do not abandon moral argument. Instead, we recognize that we must first look at who it does - or does not - convince, and then attempt to determine *why*. We should note that Socrates himself was *unshakenly* convicted that he was right. How do we explain the difference between Socrates and his conversation partner?

Plato provides for Arendt the ancient acknowledgement not only of interminable arguments where moral laws are concerned, but also the Platonic solution of translating moral ideas into written laws:

Persuasion, [Plato] says, will not be possible, because these things seem hard to understand, "not to mention that it would require a dismal amount of time." He therefore proposes that the "laws be written down" because then they will be "always at rest." The laws, of course, will again be man-made and not

⁴¹⁹ Arendt, "Some Questions," 82.

⁴²⁰ Arendt, "Some Questions," 84.

“natural,” but they will conform to what Plato called Ideas; and while wise men will know that the laws are not “natural” and everlasting--only a human imitation--the multitude will end by believing that they are, because they are “at rest” and do not change. These laws are not the truth, but they are not mere conventions either. Conventions are arrived at by consent, the consensus of the people . . . true democrats, we may say, against whom Socrates describes himself as the lover of philosophy, which does not say one thing today and another tomorrow, but always the same thing.⁴²¹

Again, we see common ground by which to engage Judge Posner’s objection to the interminability of moral arguments, as well as the solution proposed as early as Plato that written laws be established as unchanging ‘truth’, whereas mere moral conventions may be reached by consent of the people. In fact, the response to Judge Posner becomes one of pointing out that our laws are *not* unchanging. In fact, they change all the time. Accordingly, it could be argued to show a further limit of law in that, as we have failed to establish laws that are “always at rest”, we have undermined the very motivation for attempting to establish a morality *based* on written law. The people know full well that laws are man-made and *not* ever-lasting, hence laws lose their ability to convince or influence morally, and retain only the threat of punishment. Accordingly, more than the law is ultimately needed.

Arendt sums up just such a situation from Plato’s *Republic*:

If you think these matters through, you will easily arrive at the Platonic solution: those few whose nature, the nature of their souls, lets them see the truth, don’t need any obligation, and “Thou Shalt--or else,” because what matters is self-evident. And since those who don’t see the truth can’t be convinced by arguments, some means has to be found to make them behave, to force them to act, without being convinced--as though they, too, had “seen.”⁴²²

The first ethico-moral correctives, therefore, would appear to be the recognition that moral disputes are interminable (i), moral ‘self-evidence’ is not apparent to all (ii), and written law loses efficacy as substitute for unwritten ‘self-evident’ law when the written law is changeable (iii). We are left, however, with the question of the difference between those who see moral law as self-evident and those who do not, noting that Kant would not agree to Plato’s elitism, whereby philosophers are seen as

⁴²¹ Arendt, “Some Questions,” 85.

⁴²² Arendt, “Some Questions,” 88.

more insightful than ordinary people. For him, the experience of obligation is a fundamental human trait which cannot be proved (as freedom cannot be demonstrated) but which has to be assumed as the reason for the way we act, and as condition of the *possibility* of action. Ricoeur makes the same assumption at an earlier level, namely at the *entry* level of his ethics, which is in the wish to live well with and for others, in just institutions. We also have the lingering issue as to how to motivate 'good' action, if conscience operates only negatively to prohibit the bad. Conscience could be that part of moral identity that *excludes* certain ways of action, leaving the question of the *positive* motivation to action to another level.

Arendt questions whether conscience is a workable concept in today's courts, in spite of the fact that the courts continue to use it:

The fact that all our legal institutions, insofar as they are concerned with criminal acts, still rely on such an organ [i.e. conscience] to inform every man of right and wrong, even though he may not be conversant with books of law, is no argument for its existence. Institutions frequently long survive the basic principles on which they are founded.⁴²³

She investigates instead questions of inner dialogue and integrity, which would place conscience in a position similar to the formation of moral identity we have examined in Charles Taylor and Paul Ricoeur. Thus, it would be in moral reflection, judgment and action in conviction that moral identity is forged. If this is true, then we can see that in upholding a strict separation between the law and moral theory, Posner is at the same time undercutting the very basis by which citizens could be expected to act in accordance with "conscience."⁴²⁴

1. Internal Integrity

Returning to the *Gorgias*, Arendt studies Socrates' reaction to Callicles, one of Socrates' discourse partners who was not convinced of the argument that it was better to suffer wrong than to do wrong:

⁴²³ Arendt, "Some Questions," 89.

⁴²⁴ In fact, in *U.S. v. Carlton E. Wilson*, 159 F.3d 280 (7th Cir. 1998) (Posner, J. dissenting) Judge Posner dissents from the conviction of a defendant for an act he could not reasonably have known was criminal - absent a new federal statute - acknowledging the existence of certain "strict liability crimes" but noting that "we rely on conscience to provide all the notice that is required." 159 F.3d 280, 295. In this case, Posner dissented from the conviction of defendant of the crime of owning a gun, while being subject to a protective order which made no reference to firearms otherwise legally possessed.

[Socrates] makes the following reply: he first says that Callicles will “not be in agreement with himself but that throughout his life he will contradict himself.” And then he adds that as far as he himself is concerned he believes that “it would be better for me that my lyre or a chorus I direct were out of tune and loud with discord, and that most men should not agree with me and contradict me, rather than that I, being one, should be out of tune with myself and contradict myself”.⁴²⁵

“The key notion in this sentence”, Arendt tells us, “is ‘*I who am one*,’ which is unfortunately left out in many English translations.”⁴²⁶

Arendt shows that this sentence implicates the self as “one”, but not “*simply one*”:

I have a self and I am related to this self as my own self. This self is by no means an illusion; it makes itself heard by talking to me--I talk to myself, I am not only aware of myself--and in this sense, though I am one, I am two-in-one and there can be harmony or disharmony with the self.⁴²⁷

There are implications to disharmony with the self, however, and Arendt makes the case that it is more important to be in harmony with myself than with others. For one, I cannot walk away from myself like I can other people I disagree with, pointing to an inalienable need for moral identity. This also raises the main reason Arendt believes Socrates asserts that it is better to suffer wrong than to do it, namely:

[I]f I do wrong I am condemned to live together with a wrongdoer in an unbearable intimacy; I can never get rid of him.⁴²⁸

In fact, this is the only reason Socrates ever gives for his conviction, Arendt tells us. This is not an external standard, however, for which something like a conscience is required. It is internal, a matter of *singular* harmony. In short, to live at odds - not in agreement - with yourself is effectively to invite an enemy to take up residence with you. To do wrong, moreover, is to take up residence with a wrongdoer, be it a murderer, thief or liar. Arendt astutely notes that even though “many prefer to do wrong for their own benefit rather than suffer wrong, no one will prefer to live together

⁴²⁵ Arendt, “Some Questions,” 89-90.

⁴²⁶ Arendt, “Some Questions,” 90.

⁴²⁷ Arendt, “Some Questions,” 90.

⁴²⁸ Arendt, “Some Questions,” 90.

with a thief or a murderer or a liar.”⁴²⁹ Placing the primacy on internal harmony - a consistency in self-identification - leaves open the possibility of external disharmony. Socrates’ trial and sentence of death, of course, exemplifies the potential cost.

We have briefly signaled that the concept of internal agreement or integrity is also important in the thought of both Paul Ricoeur and Charles Taylor. The latter in particular takes up morality in the form of moral identity seen as formed in the process of considering, articulating and choosing courses of action based upon the individual’s strong evaluations as to what is important in the pursuit of a good life. It is at odds with the approach of Judge Posner, who sees identity as fragmented, if not changeable. This would appear to be another area of important discourse between the legal and the ethical and offering a corrective: a new seeing of the role of conscience and internal unity as vital to the making of the person - for good or ill.

2. Thinking as Inner Dialogue

Arendt turns to another Socratic account for his description of thought as a dialogue with himself, in which thinking a matter through is equated to a silent, inner dialogue. Socrates explains in *Theateteus*:

It looks to me as though this is nothing else but *dialegethai*, talking something through, only that the mind asks itself questions and answers them, saying yes or no to itself. Then it arrives at the limit where things must be decided, when the two say the same and are no longer uncertain, which we then set down as the mind’s opinion. Making up one’s mind and forming an opinion I thus call discourse, and the opinion itself I call a spoken statement, pronounced not to someone else and aloud but silently to oneself.⁴³⁰

Arendt makes the point that a “wrongdoer will not be a very good partner for this silent dialogue”.⁴³¹

Before we move on to consider the implications of thinking today, we must first note that, for Socrates, thinking was not about information acquisition or even as knowledge. Socrates described a *process*, and for our purposes, the point of interest is that of the person thinking, in unity with him- or herself. This faculty of speech, in

⁴²⁹ Arendt, “Some Questions,” 91.

⁴³⁰ Arendt, “Some Questions,” 91-92 (quoting Socrates’ account in the *Theaetetus*).

⁴³¹ Arendt, “Some Questions,” 92.

fact, was what constituted the “specifically human quality” which Greek thought saw as distinguishing humanity from the animal.⁴³² Arendt tells us that she is convinced that Socrates thought the importance of remaining on “speaking terms with themselves” would surely cause the people to “understand how important it was for them to do nothing that could spoil it.”⁴³³

We may briefly note that Plato’s view on thinking differs. He contemplated that only the elite - the philosophers - would actually engage in the process. As sympathetic as Arendt clearly is to the importance of the interior unity Socrates describes, she also agrees with Plato’s proposition, making little comment except to note that “thinking does not belong among the most frequent and most common occupations of men” Nonetheless, she says, “we, who no longer believe in thinking as a common human habit, still uphold that even the most common men should be aware of what is right and what is wrong, and should agree with Socrates that it is better to suffer than to do wrong.”⁴³⁴

Thus, we again note an initial ground of agreement with Judge Posner, who took Ronald Dworkin to task for “imagin[ing] that there are many people who, though not philosophers or even intellectuals, have ‘a yearning for ethical and moral integrity’ or ‘want a vision of how to live.’”⁴³⁵ Posner clearly does not believe that the average man, woman or child wastes much time in this pursuit. Unfortunately, Posner also does not stop to consider the likely consequences of this belief, which Arendt has presented rather persuasively. In other words, how is it that we acknowledge the general failure of people to *think*, and yet we expect them to know the difference between right and wrong and effectively attribute to them a *conscience*? How is it, also, that we are to deal with those who will *not* think, if in fact they will not?

More troubling is Judge Posner’s distinction between “being moral and being reflective” insofar as he defines morality by behavior, rather than by internal reflection.⁴³⁶ In fact, Posner expresses concern that this type of thinking might actually

⁴³² Arendt, “Some Questions,” 92.

⁴³³ Arendt, “Some Questions,” 92.

⁴³⁴ Arendt, “Some Questions,” 93.

⁴³⁵ Posner, “Reply to Critics,” 1801 (citing Dworkin, “Darwin’s Bulldog,” 1726).

⁴³⁶ Posner, “Reply to Critics,” 1802.

be counter-productive, leading to an increased ability of rationalization, rather than better - or moral - behavior.⁴³⁷ Clearly, he is thereby proceeding from the position that internal *disunity* is the norm. This would appear to show that he does not recognize any value to staying on speaking terms with oneself; certainly he does not suspect that internal dialogue would lead either to moral behavior or to personal integrity. Here we should recall that Judge Posner elevates a “logical” unity over personal unity.⁴³⁸ Here, too, we may identify an important area for an ethical corrective, stressing the integrity of the person over the content of his or her knowledge or the coherence of his or her speech.

The integrity of the moral subject, as carried out in conscience and internal dialogue, leads us next to considerations of a forgetting or willful failure to remember in cases of intentional wrongdoing. We will investigate this issue in the form of a question of evil.

3. Evil - Remembering or Forgetting

Following Ricoeur, who sees in the existence of evil the need to turn to the deontological corrective in ethical questions, we add the fact of evil to our consideration of thinking. In situations of wrongdoing, the question arises: how does dialogue with the self deal with evil and wrongdoing? Ricoeur notes “I have to confess that forgiving may be impossible, and yet, *there is* forgiveness.”⁴³⁹ In that regard, Ricoeur sees forgiveness as a “memory work”:

I would suggest that the work of forgiving consists in connecting together memory work and mourning work. Mourning, at the core of memory, would mean that we must deal with the idea of loss, loss of the claim to construct a story of our life without lack or gaps.⁴⁴⁰

Hannah Arendt speaks of the *not* forgetting what one has done as part of repentance in the Jewish tradition, which “first of all consists in not forgetting what one did, [but] in

⁴³⁷ Posner, “Problematics,” 1641-42, 1684-85.

⁴³⁸ Posner, “Problematics,” 1674. Remembering that, for Posner, there appears to be a difference between ‘legal logic, and classical categories of logic.

⁴³⁹ Paul Ricoeur, “The Difficulty to Forgive,” in *Memory, Narrativity, Self and the Challenge to Think God: The Reception within Theology of the Recent Work of Paul Ricoeur*, ed. Maureen Junker-Kenny and Peter Kenny, (Münster: Lit Verlag, 2004) 6-16.

⁴⁴⁰ Ricoeur, “Difficulty to Forgive,” 15. See also Paul Ricoeur, *Evil: A Challenge to Philosophy and Theology*, trans. John Bowden, intr. Graham Ward (London: Continuum, 2007) in which a similar work of mourning is implicated by the emotional response to evil. Ricoeur, *Evil*, 68.

‘returning to it’”⁴⁴¹ Thus, a form of *not* remembering takes place when I refuse to think my wrongdoing through with myself.

This not-remembering is especially significant with respect to increasing my potential for evil:

If I refuse to remember, I am actually ready to do anything--just as my courage would be absolutely reckless if pain, for instance, were an experience immediately forgotten.⁴⁴²

And finally:

I am certain that the greatest evils we know of are not due to him who has to face himself again and whose curse is that he cannot forget. *The greatest evildoers are those who don't remember* because they have never given thought to the matter, and, without remembrance, nothing can hold them back.⁴⁴³

Is this not a picture of some of the gang violence and ‘unthinking’ outrages committed in our streets today? Examples are legion. The cases often do not appear to be motivated by any specific malice, but by an unthinking decision - or perhaps “impulse” would be a better term - to take a man’s car, or kill a woman, or drive a car at speed through a crowd. It is here that Ricoeur recognizes the concept also of forgiveness at law, “sever[ing] justice from revenge,” as well as the difficulty of severing guilt from self, absent a sense of reversal he addresses in the context of the Hebrew *teschuva*, Greek *metanoia*, and Latin *conversio*.⁴⁴⁴ Otherwise, guilt is linked to debt, even though they are not synonymous, as Ricoeur tells us. We will examine the overcoming of debt in our upcoming section on the economy of the gift. For now, we would note Maureen Junker-Kenny’s observation that “[t]he gift status of forgiveness cannot be totally transposed into conceptual language which is why [Ricoeur’s] lecture and the book have quotations from Scripture on the last page.”⁴⁴⁵

⁴⁴¹ Arendt, “Some Questions,” 94.

⁴⁴² Arendt, “Some Questions,” 94.

⁴⁴³ Arendt, “Some Questions,” 95 (emphasis supplied).

⁴⁴⁴ Ricoeur, “Difficulty to Forgive,” 12-13.

⁴⁴⁵ Maureen Junker-Kenny, “Memory and Forgiveness - Two Itineraries,” in *Memory, Narrativity, Self and the Challenge to Think God: The Reception within Theology of the Recent Work of Paul Ricoeur*, ed. Maureen Junker-Kenny and Peter Kenny, (Münster: Lit Verlag, 2004) 19-41.

The thoughtlessness of not-remembering, however, is rarely addressed in the context of moral identity or capability although it does play a role at law with respect to degree of culpability. A common sentencing variable, of course, is the presence or lack of ‘remorse’. The major difficulty for the judge is often to determine the cause of remorse, and whether it is due to remembering (and deploring) the evil act, or only regretting having been caught. One of Judge Posner’s cases serves as illustration. In *U.S. v. James Wells*,⁴⁴⁶ the defendant pled guilty to robbery of almost \$700,000. His sentence was effectively enhanced, because he did not return or otherwise account for the whereabouts of the money stolen - although he did admit responsibility for the robbery - and the inference remained that he had retained the money for himself, indicating lack of remorse. Posner notes that “[t]alk is cheap” and agrees that “acceptance of responsibility is to be inferred from deeds, not from weepy *mea culpas* at sentencing.”⁴⁴⁷ Thus, Posner does find that forgiveness is not possible certainly where certain benefits of the crime are retained. As such, remorse in the form of deeds *beyond* words is required, deeds consistent with an expression of the conviction of remorse and a turning away from the evil.

We turn now from considerations of the difficulty of forgiving to questions of a ground of moral principle that transcends law and threat of punishment, to consider the contribution that religion may make in this area. We will examine first the Golden Rule as the supreme moral maxim, by which love is also given normative application, and then the “Economy of the Gift,” by which the commandment to love even one’s enemies is positioned in tension with the Golden Rule, namely the confrontation of the symmetry under the Golden Rule, faced with the dissymmetry of the Economy of the Gift.

II. Ethical Identity Beyond Strict Legality

At law, we have seen that the question of the person, at least under Judge Posner, relates more to questions of what he calls “logical” consistency, with little or no regard for moral identity, accounting for past actions - including past wrongful actions - that are not the subject of a legal determination, or a coherent sense of morality or ethical

⁴⁴⁶ *U.S. v. James Wells*, 154 F.3d 412 (7th Cir. 1998) (Posner, J.)

⁴⁴⁷ *U.S. v. James Wells*, 154 F.3d 412, 414.

aim. Granted, Posner's is the extreme separatist approach, but we have also seen indications that his brand of legal 'pragmatism' and strict economic utility analysis are gaining ground in America. The consequences are significant. With a diminishing sense of an unenforceable moral arena, and the undermining of what still exists of conscience, an ethical corrective to a strictly legal approach to the person is imperative. We continue to proceed on the basis of Ricoeur's starting position, that of desiring to live well together, with and for others, in just institutions. To that, however, we also add what has been implicated from our study of the debate between Posner and the philosophers - and specifically, from Judge Noonan, who has recommended the issue of love. As noted, we will study this question from two perspectives, from the Golden Rule as a rule of equivalence - presupposing an initial dissymmetry - and the Economy of the Gift, which restores a supraethical *dissymmetry*, but one that is incomprehensible apart from grace and unmerited favor. It is this element which we will address in chapter 5 under the heading of hope.

1. The Golden Rule as Supreme Moral Maxim

Ricoeur starts with existing values, moving then to the internal ground of morality:

[T]he task of moral philosophy is not to construct morality but rather to start from norms and rules recognized or adopted by most people, or at least by those taken to be thoughtful and wise, and then to return reflectively to the supreme maxim or principle, reserving for a subsequent task any inquiry into the ground (*Grund*) of this maxim or principle.⁴⁴⁸

This is not a novel position, Ricoeur tells us. He sees it as the position taken by both Aristotle *and* Kant.⁴⁴⁹ It is, of course, not the position taken by the legal separatists who, like Posner, would attempt to exclude consideration of the moral by virtue of requiring that it first be newly constructed and/or proven out as universal before it could even be entertained, let alone considered authoritative.⁴⁵⁰

⁴⁴⁸ Paul Ricoeur, "Ethical and Theological Considerations on the Golden Rule," in *Figuring the Sacred: Religion, Narrative, and Imagination*, ed. Mark I. Wallace, trans. David Pellauer (Minneapolis: Fortress Press, 1995), 293-302, 293-94.

⁴⁴⁹ Ricoeur, "Golden Rule," 294.

⁴⁵⁰ See, e.g. Posner, "Problematics," 1649-50. Posner sums up: "There could be; but there doesn't appear to be a universal moral law that is neither a tautology (such as "don't murder") nor an abstraction (such as "don't lie all the time") too lofty ever to touch ground and resolve a moral *issue*, that is, a moral question on which there is disagreement. The moral *emotions* are universal; but, as we shall see, they have no moral content." Posner, "Problematics," 1650.

Ricoeur proposes that the Golden Rule has been regarded as that supreme maxim or principle.⁴⁵¹ Hille Haker sees the Golden Rule as giving solicitude its normative content:

The Christian word for solicitude is love, particularly understood in the charitable sense; the ethical principle which gives it its normative content is the Golden Rule, which also has an outstanding status in Christian Ethics.⁴⁵²

We are struck immediately with a negative and a positive formulation of the rule. Hillel's *negative* formulation of it: "Do not do to your neighbor what you would hate to have done to you" as well as Jesus' *positive* formulation: "In everything do to others as you would have them do to you" [Matt. 7:12] and in Luke 6:31 "Do to others as you would have them do to you". Ricoeur indicates a general impression of equivalence, in that "to forbid an action of a certain kind, and to command one of its contradictory kind, are equivalent."⁴⁵³ Ultimately, we would question whether Ricoeur goes with that view, especially in regard of the weakness that, positively, one is judging according to one's own preferences. Negatively, there could be more agreement imagined, in that it is perhaps less subjective to determine what we do *not* want done to us.

For the moment, we shall reserve judgment on whether the negative is the equivalent of the positive formulation. My impression is that it is not, but we shall need to cover some additional material before making a final determination. For now, I would note that I do *not* see the equivalence of the prohibition of one action and the commanding of its 'contradictory'.

Comparing the Golden Rule to Kant's Categorical Imperative, Ricoeur notes a preference for the Golden Rule because: (1) The Golden Rule *starts* from a position of interaction - 'do' or 'don't do' to *others* - which Kant does not reach until the second formulation of his Imperative, not utilizing others as means. (2) The Golden Rule acknowledges asymmetry from the beginning: not only that of action versus being acted upon, but also implicitly between the various people themselves. Ricoeur

⁴⁵¹ Ricoeur, "Golden Rule," 294 (acknowledging the thought of Alan Donagan as influential).

⁴⁵² Haker, "Narrative Identity," 148.

⁴⁵³ Ricoeur, "Golden Rule," 294, also quoting Alan Donagan, *The Theory of Morality* (Chicago: Univ. of Chicago Press, 1977) at 57-58.

applauds this by way of having noted that the “golden rule sets the relation between persons in the first rank, whereas Kant subordinates this relation to the principle of autonomy . . . So it looks as though [Kant’s] criterion does not thematically imply a plurality of subjects.”⁴⁵⁴ Indeed, Ricoeur points out that even Kant’s “second formulation of the imperative is addressed to the humanity that is identical in each person, not to persons as in fact multiple and different. . . .”⁴⁵⁵ (3) The Golden Rule’s formalism nonetheless incorporates substance. It is not ‘empty’ - a charge often leveled against the Categorical Imperative. So, like the Categorical Imperative, it “does not define actions in terms of what must or must not be done”⁴⁵⁶ and yet it provides by its very terms the categories of thought by which those determinations are to be made.

Relevant to our discussion will be the issues of violence vis à vis the acknowledgment of initial asymmetry and the respective roles of violence and desire in determining what is to be ‘hated’ and what ‘desired.’ Ricoeur emphasizes the initial asymmetry in any human interaction as being:

between what someone *does* and what *is done* to another. In this sense, it does not bring one agent face-to-face with another agent but rather brings together an agent and a “patient” of the action, a patient being someone to whom something is done. To dramatize this initial asymmetry, I will say that the other is potentially the victim of my action as much as its adversary. Owing to this, the golden rule recalls to us that the moral problem is contemporary with the problem of violence. There are morals because there is violence. . . . But here, the potential aggressor to whom the golden rule is addressed is me.”⁴⁵⁷

This functions as an important corrective to the legal/ethical polemic, insofar as Ricoeur focuses our attention on ourselves as potential aggressor. We are invited to see the interaction between individuals *not* as a snapshot of conflict of one against another, but as successive action/acted-upon, in which at any point I might be either the aggressor or the victim. This is considerably different than the perspective taken in a court of law, in which relationship is frozen (generally as of the time of the court intervention), the score is tallied as to acts and acts suffered, and judgment is

⁴⁵⁴ Ricoeur, “Golden Rule,” 294.

⁴⁵⁵ Ricoeur, “Golden Rule,” 294. This is his major critique of a contradiction between “rule” and “singularity” in the Categorical Imperative. See Ricoeur, *OA*, 262.

⁴⁵⁶ Ricoeur, “Golden Rule,” 295.

⁴⁵⁷ Ricoeur, “Golden Rule,” 294-95.

pronounced, announcing which of the parties is the aggressor and which the victim. The role of the court, then, in pronouncing judgment or sentence is often to reverse those roles, whereby the former aggressor effectively becomes the “victim” of the court, compelled to recompense the adjudged victim. Ricoeur points out, however, that this court action is at a different level to that of revenge insofar as the judge is in a mediating role, and “an end must be put to anger, the corrupted sources of retaliation and revenge.”⁴⁵⁸

The Golden Rule, however, does not function to ‘stop the action,’ as it were, to balance the equities between the parties. Instead, it is the principle by which the successive aggressor/victims address the imbalance or inequities themselves, as they continue the process of life with and amongst others. Accordingly, it functions side-by-side with (and informs) an ongoing life process. This is a major benefit over the law in terms of returning opposing litigants to life-as-usual after legal intervention. The law does not easily provide for an ongoing process of review, intervention, and adjustment.⁴⁵⁹ At some point, the parties will have to begin - or resume - that process themselves. The law is not able, perhaps, to mandate the implementation of the Golden Rule, but the Golden Rule *can* inform the court of the more ‘practical’ view to take in allegations of current victimhood. By ‘practical’, I mean that view that would support a ruling enabling a return to a life unmonitored by judicial review and adjustment. I would imagine that this might be a perspective that would be welcome to Judge Posner, if only from the cost-benefit rationale of reducing the cost of litigation.

The corrective application of the Golden Rule to the strictly legal would prevent the application of law from automatically reducing relationship to a current score between the parties and declaring a ‘winner’. One must go beyond the Golden Rule, as Ricoeur does, since the Golden Rule is limited to reciprocity and exchange. In the appropriate case - most notably of criminal acts, for example - the application of the law to halt a more one-sided aggressor/victim ‘relationship’ is clearly warranted. On the other hand, the attempted application of the law to enforce a broken promise of dinner at a restaurant as between husband and wife is clearly not, no matter how artfully pleaded

⁴⁵⁸ Ricoeur, “Difficulty to Forgive,” 12.

⁴⁵⁹ Consider in this regard the difficulties of ongoing injunctive relief whereby, for example, the courts have attempted an ongoing monitoring of school desegregation, prison population, or the exercise of free speech in certain political demonstrations, etc.

as a breach of contract. Somewhere in between the two extremes is the proper balance. That balance will more properly be struck, however, if the law is informed by the moral, and the moral, by the law. Again, issues of evil inform the relevant turning point in one direction; as we shall see, desire informs the turning point in the other.

Turning to the question of the degree of formalism of any moral rule alleged to be universal, Ricoeur notes that a difference between the Categorical Imperative and the Golden Rule is evident with respect to the Golden Rule's incorporation of elements of hate and desire whereas Kant has rigorously excluded any "empirical content from the sphere of the moral a priori, due to the tie between such contents and the sphere of desire and pleasure, which threatened to corrupt the principle of autonomy through a return to heteronomy."⁴⁶⁰

The Golden Rule is not 'empty', however, even though it does not specifically identify what is to be prohibited and what commanded:

In one sense, the golden rule is just as formal as the Kantian categorical imperative. It does not define actions in terms of what must or must not be done. However, unlike the Kantian formulation, it is formal without being empty, a charge that has often been leveled against Kant, particularly by Hegel. It will have been noted that Hillel's and Jesus' formulations of the golden rule refer to what might be "hated" or wished." This reference to fear and desire, in the very formulation of the golden rule, invites moral philosophy to undertake fundamental reflection on what Donagan, Gewirth, and also John Rawls in his *A Theory of Justice* call "basic human goods," that is, goods that are not posited arbitrarily, but rather implied by the very exercise of the action of a rational and responsible agent.⁴⁶¹

It is in this invitation to reflect upon, articulate and ultimately evaluate 'basic human goods' that the Golden Rule provides another important corrective to the legal perspective. This builds upon our earlier discussion of thinking and reflection as constitutive of the self - albeit not of its existence - especially with respect to Charles Taylor's strong evaluations as increasing articulacy and commitment to those values. Although elsewhere we may consider that an increased need for moral reflection indicates either a person or society in turmoil - together with the possibility of

⁴⁶⁰ Ricoeur, "Golden Rule," 295.

⁴⁶¹ Ricoeur, "Golden Rule," 295.

blameworthiness for having reached that condition - here, the ongoing moral reflection instead sensitizes the individual to the considerations and legitimate claims of the other. This is because the reflection upon basic human goods in the context of what I would desire and what I would hate in my ongoing relationship with others keeps those matters firmly to the forefront. In this instance, then, the ongoing touchstone of the Golden Rule operates to forestall dispute, rather than signaling the breakdown of relationship and the need for outside intervention.

It is in this respect that Ricoeur's observation that the Golden Rule "set[s] violence in the very same place that Kant put desire"⁴⁶² becomes so very apt. Ricoeur states that this is the "major difference between Kant and the gold rule":

By setting violence in the very same place that Kant put desire, the golden rule incorporates a fundamental aspect of human action, the *power* exercised *on* or *over* another, and thereby refuses to draw a line between the a priori and the empirical. The golden rule takes into account the whole of action and interaction, of acting and suffering.⁴⁶³

The Golden Rule thus invites approach to what we would desire - which Kant, of course, treats with such suspicion - balanced by the avoidance of what we should hate done to ourselves. Ricoeur posits the 'what we should hate' as evil. Yet we avoid the merely subjective in the balancing. Part of that balancing, I would argue, lies in the positive as well as negative formulation of the Golden Rule. I must not only *not do* what I would hate being done to me, but I must *do* what I would desire be done to me.

This fleshes out the formalism of the Golden Rule into action, continuing to take into account that we are both actors and acted upon. In the norm of reciprocity, then, Ricoeur notes also the presupposition of the initial *dissymmetry*.⁴⁶⁴

The Golden Rule and the imperative of the respect owed to persons do not simply have the same field of exercise, they also have the same aim: to establish reciprocity wherever there is a lack of reciprocity. And in the background of the Golden Rule there reappears the intuition, inherent in solicitude, of genuine otherness at the root of the plurality of persons. At this price, the unifying and unitary idea of humanity ceases to appear as a copy of the universality at work

⁴⁶² Ricoeur, "Golden Rule," 296.

⁴⁶³ Ricoeur, "Golden Rule," 296.

⁴⁶⁴ Ricoeur, *OA*, 219.

in the principle of autonomy, and the second formulation of the categorical imperative assumes once more its entirely original character.⁴⁶⁵

It is in relation to Kant's separation of respect of persons from autonomy at the ontological level that Ricoeur positions his formalization of the Golden Rule, which he sees also as "allowing the voice of solicitude to be heard, behind the Golden Rule, . . . [whereby] the plurality of persons and their otherness [would] not be obliterated by the globalizing idea of humanity".⁴⁶⁶ Here, we turn to the other aspect of the religious contribution to the moral level, from Golden Rule, to Ricoeur's formulation of the "Economy of the Gift."

2. The "Economy of the Gift" as Supraethical Corrective

Ricoeur introduces what he calls the "economy of the gift" by reference to the Kantian rational foundation, informed by what he calls a "religious perspective."⁴⁶⁷

A more complicated foundation is ultimately implicated to address the "question of the practical *possibility* of freedom."⁴⁶⁸ Kant's pure practical reason starts, then, with the practical possibility of freedom, including questions of what enables and how a will exercises autonomy:

The much-debated theory of the postulates of pure practical reason has to be understood starting from this problematic of the practical possibility of freedom. How can a will *exist* freely? How can it become *capable* of exercising its freedom? This is the existential question at the center of Kant's philosophy of religion.⁴⁶⁹

It is Kant's "meditation on radical evil that inaugurates this philosophy of religion."

Ricoeur tells us:

For what is evil, if not the incapacity of the will? To restore to concrete freedom its fundamental power, what Kant calls regeneration, is the object par excellence of religion. And that this restoration should actually be possible is what it is reasonable to hope. Concrete, effective freedom thus becomes an object of hope.⁴⁷⁰

⁴⁶⁵ Ricoeur, *OA*, 225

⁴⁶⁶ Ricoeur, *OA*, 227. See also Ricoeur, *OA*, 226.

⁴⁶⁷ Ricoeur, "Golden Rule," 296-97.

⁴⁶⁸ Ricoeur, "Golden Rule," 296.

⁴⁶⁹ Ricoeur, "Golden Rule," 296.

⁴⁷⁰ Ricoeur, "Golden Rule," 296-97.

It is the question of whether reason alone can support the hope of this freedom that leads to a divergence in the paths between Kant, who says yes, and those who would require a “transcendent source” for this power.⁴⁷¹ There is a distinction to be made here with respect to the *origin* of religious symbols and their reception. For Ricoeur, Kant may have questioned a rational or human *origin* of religious symbols - and specifically the symbol of Christ as reconciling man to God - yet his view of our *reception* of that symbol is squarely within his view of the operation of practical reason. Thus, even though the origin of the religious symbol is “from heaven”, Kant would find that our use of it to our own good is up to us. Ricoeur does not agree:

But what about the origin of these symbols, or their structure of meaningfulness, or their entry into the human heart. . . ? Indeed, this difficulty is not the only one to invite us to a radical change of perspective, to a theocentric and no longer an anthropological one.⁴⁷²

Ricoeur supplies a “second motive” as well:

Kant submitted to the critique of reason only one part of the symbolism of the Jewish and Christian Scriptures, the symbolism relative to sin and the forgiveness of sin, as confirmed by his taking up the religious problematic only through the question of radical evil. It is the part overshadowed by this symbolism that brings to the fore what I am going to call the economy of the gift, an economy that fundamentally *decenters* the origin of religious symbolism in its entirety.⁴⁷³

Thus, Kant does not submit the Christian symbol of salvation through Jesus Christ to the critique of reason and it is the salvation symbol that gives rise to the ‘decentering’ economy of the gift. The salvation symbol, however, is dependent upon the earlier symbol of “an original and always ongoing creation.”⁴⁷⁴ Out of that symbol we may see creation and the created as ‘good.’ Ricoeur points out that “the predicate “good” is assigned to the state of the creature as such, and not yet to some act of the human will or to some human disposition.”⁴⁷⁵ And so we see man as *created* “good” - as a creature - and not as what he has done or is inclined to do. The economy of the gift,

⁴⁷¹ Ricoeur, “Golden Rule,” 297.

⁴⁷² Ricoeur, “Golden Rule,” 297.

⁴⁷³ Ricoeur, “Golden Rule,” 297.

⁴⁷⁴ Ricoeur, “Golden Rule,” 297.

⁴⁷⁵ Ricoeur, “Golden Rule,” 298.

therefore, arises in its first instance out of an originary good creation by an all-powerful and benevolent God.

We cannot retain just this single symbol of God, however, insofar as the Judeo/Christian tradition also embraces the symbolism of God as legislator and judge. Arising out of the fact of human sin, we find the God of hope, and the Christian symbol of Christ, by whom God makes man right again with him. Ultimately, there is also the eschatological symbol of God “that gives rise to the representation of God as the source of *unknown* possibilities.”⁴⁷⁶

Ricoeur describes a cycle of repetition of these symbols, finding the “God of hope” in the “God of beginnings”, and therefore that the “goodness of creation becomes the sense of direction”, an ultimately good direction, in spite of evil.⁴⁷⁷ In Kant, he shows that religion effects this transformation and recuperation of the initial sources of the good.

The foundation of the economy of the gift which Ricoeur has laid out for us obviously differs radically from the non-believer’s view of religion. It differs even more radically from a secular legal approach - especially one like Judge Posner’s which would not consider either the ethical *or* the religious, whether the religious was transcendently-grounded, or not. Consider these fundamental differences at each major point of the intersection of the economy of the gift under a secular legal view point, which I submit is consistent with Judge Posner’s:

1. Creation is not a gift - it is merely what *is*, namely evolution and ongoing process of nature.
2. No transcendent law/scripture - only human law, changeable and subject to revision, rescission, and interpretation.
3. No free pardon. *Responsibility* (or restitution; or retribution).
4. No rational basis for hope outside the human capability.

⁴⁷⁶ Ricoeur, “Golden Rule,” 299.

⁴⁷⁷ Ricoeur, “Golden Rule,” 299.

We find in this last section a high hurdle to overcome before we may hope to propose the economics of the free gift as a corrective to the dialogue with the legal. Beyond his careful analysis of its foundation - and its vital role to ground a hope of actual and practical freedom - Ricoeur gives no argument for its applicability either at law or to the non-religious. He shows how much it is a foundation of Kant's thinking, and he argues for the priority of the criminal's singularity over the rule, as well as the need for forgiveness that comes from "elsewhere." Yet, to a secular discourse partner these arguments - absent more - will likely carry little weight although we should note that Habermas finds them more convincing now than he did at first.

In addition, the analysis of the economics of the free gift's application by means of the commandment to love, is confined to a study of its effect on the Golden Rule and a questioning of how the two relate. Ricoeur appears to assume a religious incentive to aspire to the highest ethical expression available. That aspiration and motivation will likely not be present in ethical determinations at law or under non-religious auspices. Thus, our initial question will have to be: Why would - or should - an ethical principle based upon the Judeo-Christian symbol summed in Ricoeur's 'economy of the gift' be applied by the secular or non-religious? And should it ever be incorporated into legal reasoning?

A possible answer to that question I believe lies in the equation by Ricoeur of the economy of the gift to the commandment to love. As we saw in the exchange between Judges Posner and Noonan, love remained a viable candidate for ethical concerns, if only to explain altruism. The fact of altruism - although far from a universal response - is not well-explained by any other means. It is particularly inexplicable when extended to enemies. Posner attempts several "scientific" approaches to explain altruism, arguing primarily along evolutionary lines, while also admitting that the connection is uncertain.⁴⁷⁸ At one point, he explains it as based on our being "social animals."⁴⁷⁹ Elsewhere, he looks at studies of those who helped rescue Jews in Nazi Germany in an attempt to argue that predisposition to rescue was not based on moral or religious

⁴⁷⁸ Posner, "Problematics," 1659-63.

⁴⁷⁹ Posner, "Problematics," 1661.

considerations, but on political, communal, and pragmatic ones.⁴⁸⁰ He does not address love of enemies.

Noonan points out the bankruptcy of an altruism minus love.⁴⁸¹ Posner replies:

I did not intend to draw a sharp line between altruism and love. There is selfish altruism ("reciprocal altruism," for example) and selfish love; there is also selfless altruism, which is a form of selfless love, as Noonan suggests. My doubts concern the possibility of using this insight to power moral reasoning.⁴⁸²

This admission would appear to give us some basis at least to attempt to show how the commandment to love might "power moral reasoning", per Posner's qualification. Accordingly, we turn again to Ricoeur for his study of the interaction between the economy of the gift and the Golden Rule.

To test this application, Ricoeur sets the commandment to love even one's enemies (which he calls the rule of superabundance) next to the Golden Rule (the rule of reciprocity - or "logic of equivalence" as he calls it here):

It is [the] commandment [to love one's enemies], not the golden rule, that seems to constitute the expression closest, on the ethical plane, to what I have called the economy of the gift. This expression approximating the economy of the gift can be placed under the title of a logic of superabundance, which is opposed as an opposite pole to the logic of equivalence that governs everyday morality.⁴⁸³

Ricoeur brings up the radical possibility that the commandment to love actually "surpassed, if not abolished" the Golden Rule. In fact, the Golden Rule could be seen as still within the 'eye for eye; tooth for tooth' mentality, per its "demand for reciprocity". Ricoeur has another explanation, though:

Is there an incompatibility between the golden rule and the commandment to love? No, if we see in the commandment to love a corrective to rather than a replacement for the golden rule. The commandment to love, according to this interpretation, brings about a *conversion* of the golden rule from its penchant

⁴⁸⁰ Posner, "Problematics," 1682-83.

⁴⁸¹ Noonan, "Posner's Problematics," 1774-75.

⁴⁸² Posner, "Reply to Critics," 1815.

⁴⁸³ Ricoeur, "Golden Rule," 300.

toward a self-interest to a welcoming attitude toward the other. It substitutes for the “in order that” of the *do ut des* [I give so that you give] the *because* of the economy of the gift: “Because it has been given to you, you give in turn.”⁴⁸⁴

Ricoeur looks to the extreme application of the commandment to love to demonstrate the need for the Golden Rule as corrective. In short, the commandment to love without limit *suspends* the ethical, Ricoeur tells us, and may turn to perversion. Moreover, even a more modest attempt to command love of one’s enemies is difficult to apply:

In fact, what penal law and in general what rule of justice could apply directly *without the detour of the golden rule*, the bare commandment to love one’s enemies?

...

Detached from the golden rule, the commandment to love one’s enemies is not ethical but supraethical, as is the whole economy of the gift to which it belongs. If it is not to swerve over to the nonmoral, or even to the immoral, the commandment to love must reinterpret the golden rule and, in so doing, be itself reinterpreted by this rule. This, in my opinion, is the fundamental reason why the new commandment does not and cannot eliminate the golden rule or substitute for it. What is called “Christian ethics,” or, as I would prefer to say, “communal ethics in a religious perspective,” consists, I believe, in the tension between unilateral love and bilateral justice, and in the interpretation of each of these in terms of the other.⁴⁸⁵

Another drawback to the hope of offering the commandment to love as a corrective influence to the legal is the acknowledgement by Ricoeur that its application would be “difficult and interminable”, albeit a reasonable task:

I will even say that the tenacious incorporation, step by step, of a supplementary degree of compassion and generosity into all our codes - penal codes and social justice codes - constitutes a perfectly reasonable task, however difficult and interminable it may be. The golden rule is set in this way, in a *concrete* fashion, at the heart of an incessant conflict between self-interest and self-sacrifice. The same rule may tip toward either direction, depending on the practical interpretation it is given.⁴⁸⁶

Self-interest, the law is likely to understand. Self-sacrifice is another matter altogether. Posner, for one, would appear to have few resources for dealing with the concept. Altruism was difficult for him, reduced as he was to notions of self-interest, social

⁴⁸⁴ Ricoeur, “Golden Rule,” 300.

⁴⁸⁵ Ricoeur, “Golden Rule,” 301.

⁴⁸⁶ Ricoeur, “Golden Rule,” 301.

feeling, or inchoate evolutionary urgings. Moreover, the legal cannot reasonably be expected to embrace a concept *promising* “incessant conflict.”

Accordingly we have a weak claim that the law of superabundance should be received by the legal - and secular - as a potentially corrective influence in ethical matters and conflicts. The premise is counter-intuitive and perhaps unlikely to be embraced except by faith practitioners - if at all - as an exercise of faith. Nonetheless, we should note that whether or not it will be embraced is not to say anything about its validity. Ethics is not about probable success; it is about which principles should be guiding. The strength of Ricoeur’s argumentation appears to lie in two things: (1) reminding non-believers that only an economy of the gift can finally motivate to go beyond one’s own self-interest and (2) reminding believers that “love” and “justice” go together and correct each other. An example would be the battered wife refusing to play the part of the victim any longer, and - through the force of the law - helping her spouse change his behavior.

Having argued that the Golden Rule embodies the primary ethical rule, putting forward the rule of superabundance - the commandment to love - as a corrective appears to weaken the case for acceptance of the Golden Rule to begin with. Interminability and difficulty of application would argue heavily against it as well. In his essay “Love and Justice”, Ricoeur considers that:

Talking about love may be too easy, or rather too difficult. How can we avoid simply praising it or falling into sentimental platitudes? One way of finding a way between these two extremes may be to take as our guide an attempt to think about the dialectic between love and justice.⁴⁸⁷

Moreover, the relationship becomes almost impossible if we consider the Golden Rule in terms of retribution, rather than justice. Ricoeur questions whether we must “remain with this assertion of incompatibility” between the Golden Rule and the “commandment to love.”⁴⁸⁸ He proposes another interpretation, in which:

⁴⁸⁷ Ricoeur, “Love and Justice,” 315.

⁴⁸⁸ Paul Ricoeur, “Love and Justice,” in *Figuring the Sacred: Religion, Narrative, and Imagination*, ed. Mark I. Wallace, trans. David Pellauer (Minneapolis: Fortress Press, 1995), 315-29, 327.

[T]he commandment of love does not abolish the golden rule but instead reinterprets it in terms of generosity, and thereby makes not just possible but necessary an application of the commandment whereby, owing to its hyperethical status, it does not accede to the ethical sphere except at the price of paradoxical and extreme forms of behavior.⁴⁸⁹

For Ricoeur, then, the ‘hypermoral’ commandment to love must be kept from turning to either the nonmoral or even *immoral* by a constantly corrective moral principle which he has summed up in the Golden Rule, and which he sees as formalized by the rule of justice.⁴⁹⁰ Otherwise, we remain in a *do ut des* situation of equivalence (I give *so that* you will give) rather than moving to the economy of the gift which replaces the *do ut des* with the rule to give *because it has been given* to you - which is the generosity principle Ricoeur addresses as corrective. This forms an aspect of Ricoeur’s critique of Rawls, and especially to his second principle - the “maximin” principle of maximizing the smallest portion. Ricoeur sees that Rawl’s view of justice is in danger of reducing our interaction to the *do ut des* level, and needs the ongoing impulse of love - or generosity - to keep it from that decline.

It is perhaps in the tragic case that we would have the best initial chance to argue for the application of the economy of the gift or the commandment to love even one’s enemies. In tragedy, we saw that moral conflicts could lead the individual to an impasse, where there was no choice available that was wholly free of ethical blame. We also saw tragic agents who acted out of conviction nonetheless, suffering harm in the process. The relatively rare - truly tragic - case is the closest we appear to be able to come to produce an example understandable to the secular or legal community. In it, we see either a tragic hero who acts in conviction - suffering harm - or we see a tragic victim unable to escape. It is, however, a place where we may attempt to find an overlap between the self-sacrifice contemplated by the economy of the gift, and the sacrifice in conviction of the tragic hero, or potentially the altruistic sacrifice in a developing tragic situation. In the area of overlap where suffering has occurred, the economy of the gift might give a better account of what is actually happening - or perhaps describe the best that could happen - than a strictly factual account could, which seeks as its highest good the avoidance of suffering. Nonetheless, I am

⁴⁸⁹ Ricoeur, “Love and Justice,” 327.

⁴⁹⁰ Ricoeur, “Love and Justice,” 328.

unwilling to concede restricting operation of the economy of the gift to the tragic, as that is to underestimate its everyday importance.

SUMMARY

In an attempt to expand the complementary interaction of the ethical with the legal, we have looked at three potential areas of interaction with the legal: (1) Conscience, (2) the Golden Rule, and (3) the Economy of the Gift. We have seen the interaction between thinking as interior dialogue and conscience, and discussed the consequences of those who will not think or, attempting to think, will not remember. We have looked at the Golden Rule as invitation to make the types of strong evaluations Charles Taylor contemplates, and, along with Paul Ricoeur, sees as self-constitutive. We have discussed the limits of evil in turning the self away from the what-must-not-be-done and, at the other extreme, desire: turning the self away from prohibitions and toward the what-must-be-done, or at least attempted. We have pushed the foundation of practical reason as far as it might go and, with Paul Ricoeur, noted Kant's stopping short of a transcendent source of obligation. We have gone with Ricoeur toward the transcendent source, however, and investigated the underlying religious symbols of ordinary (created) good (i), God as judge and legislator (ii), God as reconciler (iii) and God as ultimate (and eschatological) hope (iv).

We have seen areas of common ground between the legal and the ethical in the first two areas, namely Conscience and the Golden Rule, and we have considered several areas where moral theory might provide insight or amplification to the legal with respect to those issues.

We noted the greater difficulty of the third issue - the economy of the gift - insofar as it is premised on (a) a transcendent and religious foundation and (b) self-sacrifice. Nonetheless, we charted the tragic as an area of potential common ground, where the economy of the gift might explain a current situation, as well as provide an expanded vocabulary toward envisioning a "good" outcome in spite of the sacrifice already undergone.

Finally, I return to a consideration at the beginning of this chapter, namely how the effort to separate the operation of law from turning to the moral experience of principles is depriving the law of the sources of citizen's motivation to follow it, and equivalent to severing a legal determination or recognition of the properly-human. By failing to 'think' - as it were - or to consider any of the deeper desires and aspirations, e.g. to live the good life with and for others in just institutions, purporting thereby to limit action effectively to voluntary or involuntary movement based upon matters of preference, the court discounts the self-constitutive evaluations of moral identity and actions taken in accordance with those strong convictions. In the guise of not interfering with an individual's deepest values and aspirations, the court denies their existence. In refusing to consider the relationship between actions taken and underlying values, strong evaluations, and conviction, the court reduces the acting agent to the sum of her actions, insofar as they can be either observed or measured. In refusing to consider the state of inner integrity in the dialogue between self and myself, the court establishes a preference for the apparent exterior, leading to the subtle evil Ricoeur sees Kant describing as inherent when we focus on mere legalities of the external, namely the place where "self-love becomes the motive for an entirely external conformity to the moral law, which is the precise definition of *legality* in opposition to morality."⁴⁹¹

By contrast, Ricoeur speaks of the commandment of loving one's enemies as coming closest to what he calls the economy of the gift and leading to a logic of superabundance:

This expression approximating the economy of the gift can be placed under the title of a logic of superabundance, which is opposed as an opposite pole to the logic of equivalence that governs everyday morality.⁴⁹²

Indeed: "Superabundance becomes the truth hidden in equivalence"⁴⁹³ insofar as the Golden Rule may be seen - through the commandment to love one's enemies - to stand at the junction between sacrifice and self-interest. Ricoeur points to the lack of measure in the giving *because* it has been given unto you, as the Biblical "good

⁴⁹¹ Ricoeur, *OA*, 216n28.

⁴⁹² Ricoeur, "Golden Rule," 300.

⁴⁹³ Ricoeur, "Golden Rule," 302.

measure” (Luke 6:38), which - by repetition - transforms the *do ut des* into superabundance.⁴⁹⁴

Areas in which these three aspects of moral theory - the application of notions of thinking (as person-constitutive), conscience, golden rule & law of superabundance (which, as we have just discussed, arises out of the economy of the gift) - might help in the judicial process could be to:

1. give a better account of the cases before it;
2. equip the court with greater-nuanced categories by which to understand cases at bar, namely the narrative side of the case for which interpretation is needed, per Ricoeur;
3. enable the court to see that, although the legal is limited to the enforceable - thus not aspiring to enforce thinking, conscience, the golden rule, or the rule to love - still, a society whose members lose the aspiration to do just those things becomes a society subject to proliferating laws to try and enforce those categories as well as surveillance to ensure compliance; and
4. put the court in the position of being able to forecast and encourage the greater that *is* available, beyond the scope of legal application, judgment, and order.

Next, however, we turn to the area where we are least likely to find common ground between the legal and the ethical, namely the area of the overlap of the religious and the ethical. Specifically, we will be looking at the Retrospective of Paul Ricoeur in which he reverses an earlier tendency to keep the religious and the ethical separate, in separate discourses. We shall investigate his thought in this regard with a view toward determining what role the religious might play not only in shaping the deontological/teleological *phronēsis*, but also in a complementary discourse between the ethical and the legal.

⁴⁹⁴ Ricoeur, “Golden Rule,” 301-02.

To that end, we will also investigate - briefly - the history of religious dialogue with the state and with the law, as well as the nature of the pre-political foundations of that state which it assumes, but which it neither generates nor renews.

Chapter 5

What good is Religion in Ethical and Legal Discourse?

Overview

We have been examining a possible reconciliation of the dualism between the deontological and teleological understandings of ethics, not only as it is worked out by ethical judgments in situation, but also in how it impacts on the juridical, and the resolution of cases presenting ethical problems. Thus, we have investigated the application of Ricoeurian *phronēsis* - itself a combination of Aristotle and Kant's concept of *Urteilkraft* (judgment) - in ethical judgment situations, followed the question of its applicability in legal situations, and explored its use in inter-disciplinary dialogue. I have argued - with Ricoeur⁴⁹⁵ and Taylor - that an individual's identity is formed by his or her ethical judgments in situation, and emphasized the need for an ongoing application of practical judgment, especially in the "hard" or tragic case, whether it arises at law, outside of positive law in the ethical domain, or a combination of the two.

We have attempted to find common ground between the legal and the ethical insofar as we have noted differences between the enforceable and the unenforceable in terms of both the good *and* the right. We have seen the incomprehensibility at law of the concept of self-sacrifice and the economy of the gift, and we suggested that it is perhaps in tragedy that we might find the opportunity to turn to the religious in order fully to understand the breadth of possible - or potential - human response, even at law. We also noted that it was at the intersection of the religious with the legal that the sole potentially constructive exchange took place between jurist Posner and the so-called 'academic moralists' who commented upon his Holmes Lectures: the *Problematics of Moral and Legal Theory*.

⁴⁹⁵ Ricoeur distinguishes between *idem* and *ipse* in his theory of self and thus introduces a level of analysis that goes beyond a merely narrative constitution of continuity. He also insists on the need for a deontological approach much more clearly than Taylor, who uses "moral" when, in our analysis, we have distinguished between moral and ethical.

In the last chapter, we began to look at limit questions that might invite a religious perspective if they are not to remain aporetic. Specifically, we asked whether forgiveness may form part of our ethical understanding apart from a religious perspective and whether or not the religious traditions of, for example, the Golden Rule, the Economy of the Gift, and forgiveness might continue to be of assistance in shaping norms and making ethical judgments in a non-religious state, as well as at law. With Ricoeur, I conclude that these traditionally religious categories are required for the fullest ethical and moral interaction of individuals with one another, in just institutions. Nonetheless, it was only at the end of his career that Ricoeur went on to explicate the connections between the moral, the legal, and the religious much more openly.

In order to take the next step to investigate how such a discourse might take place, we will first examine the basis upon which the democratic state is founded, which I will contend has major religious roots which continue to sustain our liberal democracy, whether they are recognized or not. This conclusion is reached following the debate between Jürgen Habermas and the then-Cardinal Ratzinger over the nature of the pre-political foundation of the state. I also draw on Charles Taylor's *Modern Social Imaginaries*.

We will briefly review different notions of the "separation between church and state", exploring how religious freedom can be preserved by a *neutral* state, without, however, effectively silencing the religious voice in the public space. To that end, we will investigate the arguments for and against allowing religious voices to participate in public debate. This is in order to provide a background awareness of the issues which have tended to silence religious contributions, as well as to bring to the forefront some of the considerations which would argue for the reception of religious convictions and the need perhaps to engage in a translation between the religious and the secular. This awareness will assist us to consider the potential of religious contributions in discourse with the ethical and/or the legal.

If, as I shall contend, the religious voice is a proper party to participate in public debate, on what grounds might it be heard? How might it provide a uniquely helpful perspective in resolving issues in dispute as to how best to live, both individually and in

society? Specifically, is Habermas' recent receptivity towards religion because he sees it as supplying the "mentalities" needed to support the state similar to the earlier reasoning of Hans Joas in *The Genesis of Values*? We might also mention here Habermas' recognition of its sensitivity for pathologies, because of its eschatological orientation. Still, clearly Habermas does not embrace a pragmatist approach, which Joas treats so generously in its American incarnation as exemplified by William James and which Joas sees as taken up and developed by Charles Taylor. Now, however, Habermas' conclusion might be reconcilable to Joas' conclusion that it is in the process of self-formation and self-transcendence (so closely related to the religious) that values - and value commitments - are generated, if we see those values and value commitments as equivalent to the 'mentalities' Habermas discusses as being necessary to sustain the state, but which the state is not able to generate on its own.

Joas had earlier tested his theory which "integrates the theory of the genesis of values with a universalistic conception of morality . . . in critical dialogue with . . . the universalistic moral theory"⁴⁹⁶, which is how he describes what Habermas sought to achieve in his Discourse Ethics. In 2000, Joas concluded that Habermas' distinctions "between the ethical and the moral, the good and the right, values and norms, [are] in particular, deeply problematic."⁴⁹⁷ Can we see in the development of Habermas' thought since 2001 a coming closer to Joas' view of the values as necessary to sustain a liberal democracy? And, in particular, to the next step, "that values and value commitments arise in experiences of self-formation and self-transcendence"⁴⁹⁸ which can be traced further back to religious experience, following the thought of William James in *The Varieties of Religious Experience*?

Accordingly, we will investigate what efforts have already been attempted with regard to the inclusion of the religious voice in ethical considerations to be taken up by the courts. In this regard, we will have occasion to note the almost complete failure by jurists in the United States to consider the thought of Paul Ricoeur.⁴⁹⁹

⁴⁹⁶ Hans Joas, *The Genesis of Values*, Gregory Moore, Trans. (Cambridge: Polity, 2000), 165-66.

⁴⁹⁷ Joas, *Genesis of Values*, 182.

⁴⁹⁸ Joas, *Genesis of Values*, 12.

⁴⁹⁹ There is a similar lack of attention to Hannah Arendt, as well as Habermas' *Between Facts and Norms* apart from the Cardoso Law School Conferences. But see Timothy Stanley, "From Habermas to Barth and Back Again," *Journal of Church and State* 48 (2006): 101-26; and Catherine Kemp, "Habermas

Finally, we will turn to the contribution religion can make in ethical and legal discourse, specifically as to (a) a source of values, (b) the motivation to continue the dialogue, and (c) helping to provide hope and meaning.

I. Pre-political Foundations of the State

For our purposes, we will focus on the question of the pre-political foundations of the state in two aspects: (a) which values underlie the state and are presupposed by it, and (b) where are those values manifest.

1. A Question of Which Values

In his essay “Faith and Knowledge,” delivered as a speech on his reception of the Peace Prize of the German Book Trade shortly after the events of September 11, 2001, Jürgen Habermas warned us in advance of the dangerous grounds between philosophy and religion, especially if we seek to proceed without acknowledging the rational basis upon which we set out.

The borders of philosophy and religion . . . are mined grounds. Reason which disclaims itself is easily tempted to merely borrow the authority, and the air, of a sacred that has been deprived of its core and becomes anonymous.⁵⁰⁰

In his 2004 debate with then-Cardinal Joseph Ratzinger, Habermas also refers to Ernst-Wolfgang Böckenförde’s well-known words in “Die Entstehung des Staats als Vorgang der Säkularisation” that “the liberal, secularized state lives from foundations which it in itself cannot guarantee.”⁵⁰¹

Among the Americans: Some Reflections on the Common Law” *Denver University Law School* 76 (1998-99): 961-75. We might also note that Ricoeur’s *The Just* was not available in English translation until 1995, while *Reflections on The Just* was not available until 2007.

⁵⁰⁰ Habermas, *Future*, 113.

⁵⁰¹ In *Staat, Gesellschaft, Freiheit. Studien zur Staatstheorie und zum Verfassungsstaat*, (Frankfurt: Suhrkamp, 1976) 42-64, 60. Reprinted in *Kirche und christlicher Glaube in den Herausforderungen der Zeit. Beiträge zur politisch-theologischen Verfassungsgeschichte* (Münster: LIT-Verlag, 2004) 213-230, 229. Quoted by Maureen Junker-Kenny in “The Pre-Political Foundations of the State” in *Concilium. The New Pontificate: A Time for Change?* ed. Erik Borgman, Maureen Junker-Kenny and Janet Martin Soskice (London: SCM Press, 2006) 106-17, 106n2, noting that this was also: “Quoted by J. Habermas as the opening of his contribution to the Munich debate: ‘Vorpolitische Grundlagen des demokratischen Rechtsstaats?’ in *Zwischen Naturalismus und Religion*, Frankfurt, Suhrkamp, 2005, pp. 106-118, 106.” I shall quote from this article since Habermas’ new book has not yet appeared in English.

Maureen Junker-Kenny quotes the view that the Ratzinger/Habermas debate “showed agreement in the main points, [and] the open questions indicated by this topic could be regarded as resolved.”⁵⁰² Nonetheless, she still notes potential areas of misunderstanding between the two, most specifically with respect to the use of terminology. The words potentially at issue are: ‘reason’, ‘faith’, ‘universalism’, ‘law’, and ‘truth’.⁵⁰³

It may well be true that the political philosopher and the theologian agree in the main that ‘the liberal secularized state lives from foundations which it in itself cannot guarantee’, but Junker-Kenny continues to question the effect that belief has on the two thinkers. Specifically, she notes that:

If this correction appears as a gain for communities of value such as churches, then only for those who have themselves accepted religious freedom and who regard the ideological neutrality of the state not as a loss but as an achievement which corresponds with the freedom of faith. The Roman Catholic Church however only made this step at the Second Vatican Council, after a long and turbulent history of internal and external struggles. Both sides, philosophy and ecclesiology, are required to correct their self-understanding⁵⁰⁴.

With respect to the Church, Junker-Kenny posits two questions they must answer if they hope to step forward to help supply the lacking mentalities: 1. the relationship of any “fundamental truth of faith . . . [with] multicultural forms” and 2. the Church’s “suitability as a partner in processes of learning.”⁵⁰⁵

Habermas has made the connection between religion and communicative reason, in keeping with his agreement with Böckenförde’s statement regarding the state’s dependence on outside sources for the ‘mentalities’ it relies upon, but can not generate itself. Yet Junker-Kenny emphasizes that Habermas does not argue for a religious foundation of the state.

On the other hand, Habermas disagrees with, in particular, John Rawls’ conception of “public reason” and, as Junker-Kenny points out, his disagreement:

⁵⁰² Junker-Kenny, “Foundations,” 106.

⁵⁰³ Junker-Kenny, “Foundations,” 106.

⁵⁰⁴ Junker-Kenny, “Foundations,” 106.

⁵⁰⁵ Junker-Kenny, “Foundations,” 107.

“can be found in all five points of his argument. Habermas’s corrections to this secularist model of the normative state under the rule of law by no means mean that the balance is tipped from a reason-based to a religious foundation of the state. Even with regard to resources for the motivation for an active cooperation of citizens which is oriented towards the common good rather than the interest of individuals Habermas remains unmoved.”⁵⁰⁶

Thus, although Habermas acknowledges that the *state itself* is unable to generate the mentalities needed to sustain a government and society that will flourish, Habermas would not go so far as to explicitly assign that role to religion. He would merely advocate the careful dealings with individual citizens who are believers who *may* help supply those very mentalities. For Junker-Kenny, “both sides [secular and believing citizens] are required to learn”, especially since “the will to listen and to learn cannot be imposed by law, [and therefore] the state has to rely on something which has to happen of its own accord and cannot be legally enforced.”⁵⁰⁷

Habermas may thus be seen as arguing on the same side as the Churches, especially in recognizing the question of the need for legally unenforceable motivations to stand up for the ‘good’ for not only oneself, but also for others, and the refusal to reduce moral standards or in any way settle for a *modus vivendi*. He strictly insists on the importance of the distinction he draws between Rawls’ overlapping consensus - which, as Junker-Kenny summarizes - “allows for doubts as to how pure its motivation is with regard to the common good”⁵⁰⁸ - and the consensus Habermas himself urges, which is based on common moral insights. In fact, “Habermas stresses that ‘the ongoing existence of religion’ must be taken seriously ‘not as a mere social fact’ but for reason of its *content*.”⁵⁰⁹ Junker-Kenny points out that for Habermas, religion’s “‘sensitivity . . . for social pathologies’ takes it into a category different from that of the good of the individual.”⁵¹⁰

In spite of the acknowledgment of the importance of the content that religions believe in as well as their sensitivity to ‘social pathologies’, Habermas does not imply that the

⁵⁰⁶ Junker-Kenny, “Foundations,” 108.

⁵⁰⁷ Junker-Kenny, “Foundations,” 108.

⁵⁰⁸ Junker-Kenny, “Foundations,” 108.

⁵⁰⁹ Junker-Kenny, “Foundations,” 109 (emphasis added).

⁵¹⁰ Junker-Kenny, “Foundations,” 109.

religious will resolve all disputes. Far from it. In fact, Junker-Kenny points out that Habermas “demands that citizens should ‘reasonably’ take into account ‘the continuation of the disagreement’”⁵¹¹ in this regard. He goes against the Rawlsian conception of arguments that count as ‘reasonable’ and finds that the rejection of “the rationality of religious convictions a priori” is *unreasonable*:

‘Comprehensive doctrines’ must therefore not be kept silent, their articulation is also in the interest of the constitutional state. Rawls’ proviso, the condition that for every case secular reasons must be found for religious insights, is rejected as ‘a tall order’ (unzumutbar).⁵¹²

On the other hand (after the defense of religion against Rawls), Habermas and Ratzinger disagree on the relationship between democracy and human rights in the pre-political foundations of the state, as well as the conception of ‘truth’ and the use of that term. Ratzinger conceives of truth and democracy in potential tension with one another. He notes that “a basic stock of truth, namely of moral truth, is indispensable especially for democracy.”⁵¹³ Yet the current cultural position is that insistence on truth is incompatible with pluralism:

The attempt to impose on everyone what to some citizens appears to be the truth is therefore regarded as an oppression of conscience: the concept of truth has moved into the sphere of intolerance and of the anti-democratic.⁵¹⁴

Habermas sees it somewhat differently, and would question any so-called democracy that had given up on the concept of a knowable truth:

The democratic constitutional state which relies on a deliberative form of politics represents an epistemically demanding, so-to-speak truth-sensitive form of government. A ‘post-truth-democracy’ as the New York Times saw it emerging during the last presidential election campaign, would no longer be a democracy.⁵¹⁵

⁵¹¹ Junker-Kenny, “Foundations,” 109.

⁵¹² Habermas, *Zwischen Naturalismus und Religion* (Frankfurt: Suhrkamp, 2005), 135f. (trans. Junker-Kenny, “Foundations,” 109).

⁵¹³ Ratzinger, *Werte in Zeiten de Umbruchs*, (Freiburg:Herder, 2005), 50 (trans. Junker-Kenny, “Foundations,” 110).

⁵¹⁴ Ratzinger, *Werte*, 50 (trans. Junker-Kenny, “Foundations,” 109).

⁵¹⁵ Habermas, *Zwischen Naturalismus und Religion*, 150 (trans. Junker-Kenny, “Foundations,” 110).

Junker-Kenny notes the difference in approach as arising out of distinguishing between a majority rule that takes no notice of the truth, and the conviction that truth is not to be determined by majority, “but is prior to it and illuminates it: truth is not created by praxis, but truth enables right praxis.”⁵¹⁶ Habermas may have a consensus concept of truth, but he acknowledges that not every consensus is a true consensus, which is a critical difference to Rawls, for whom an overlapping consensus is enough. For Habermas, we have the possibility of knowing in hindsight.

As we consider a basis for “truth”, however, apart from a religious content and tradition, we re-encounter Habermas’ warning of the mined borderlands between philosophy and religion. To avoid the clash of religious dispute, it is indeed tempting to “merely borrow the authority, and the air, of a sacred that has been deprived of its core and becomes anonymous.”⁵¹⁷

2. Social Imaginaries - A Change of View Regarding the Pre-Political Foundation of the State?

Charles Taylor presents another view of the pre-political foundations of the state, by means of a newly emerging view of the pre-political and its presuppositions. In his *Modern Social Imaginaries*⁵¹⁸ Taylor seems to take secularization as a given, but he wishes us to re-examine it to discover that religion is not *gone*, it has merely moved to a different level.⁵¹⁹

In this regard, he sees that secularization describes a process whereby everyday life loses its ‘enchantment’ and instead, God’s immanence moves to an “identity form” - and may be perceived in relationship with individuals and people groups, in which the presence of God is “central to the[ir] personal identities.”⁵²⁰

This is a profound shift. Taylor implies that we can no longer see a religious founding - or sustaining - of the *physical* reality. Our “social imaginary”⁵²¹ - Taylor’s term -

⁵¹⁶ Ratzinger, *Werte*, 52 (trans. Junker-Kenny, “Foundations,”110).

⁵¹⁷ Habermas, *Future*, 113.

⁵¹⁸ Charles Taylor, *Modern Social Imaginaries* (Durham and London: Duke University Press, 2004)

⁵¹⁹ Taylor, *Social Imaginaries*, 185-194.

⁵²⁰ Taylor, *Social Imaginaries*, 193.

⁵²¹ For a more in-depth look at what a social imaginary is - and isn’t - see Taylor’s chapter 2 “What is a Social Imaginary?” *Social Imaginaries*, 23-30. For our purposes, it is the way in which individuals

“constitutes a horizon we are virtually incapable of thinking beyond.”⁵²² We may have lost the religious foundation of that social imaginary - according to Taylor - but although it may seem that the current social imaginary has “remove[d] God from public space . . . this is not quite true.”⁵²³

Taylor points out that “we mustn’t lose from sight that this opens a new space for religion in public life.”⁵²⁴ That “new space,” Taylor relates to a foundational role of the “common will.” Here, it would be well to note the commitment Taylor points out is necessary to the societal group to prevent a disappointed or disenfranchised portion of that group from withdrawing from the so-called “common will”.

More, if I am to accept as authoritative a decision that goes against me, I have to see myself as part of the people whose decision this is. I have to feel a bond with those who make up this people, such that I can say: Wrong as this decision is in its content, I have to go along with it as an expression of the will, or interest, of this people to whom I belong. What can bond a people in this sense? Some strong common purpose or value. This is what I call their “political identity.”⁵²⁵

In this regard, Taylor approaches the same issue we investigated with Habermas and Ratzinger regarding mentalities supporting democracy, but from another perspective: that of “common will” and “political identity”. Taylor’s reasoning appears to assume a commitment to communitarian values however and, through the living out of those values, a commitment to those *people* shaping the ‘common will’, insofar as it does not agree with one’s own. Taylor takes up the criticism that this might not be a realistic vision:

[I]t is clear that this [political] identity must involve freedom, and that must include the freedom of the dissenting minority. But can a decision that goes against me serve my freedom? Here we meet a long-standing skepticism, which is particularly strong among those who hold to an atomist political philosophy

‘imagine’ - or think about - their interaction with one another, including the rights, wrongs, obligations and customs of how they interact. He says he uses the term ‘imaginary’, because the reality pictured is not solely the stuff of theory, but is also embodied in “images, stories and legends.” [23] Moreover, it also differs from theory in that “the social imaginary is that common understanding that makes possible common practices and a widely shared sense of legitimacy.” [23] Theory, on the other hand Taylor notes “is often the possession of [only] a small minority”. [23]

⁵²² Taylor, *Social Imaginaries*, 185.

⁵²³ Taylor, *Social Imaginaries*, 186.

⁵²⁴ Taylor, *Social Imaginaries*, 188.

⁵²⁵ Taylor, *Social Imaginaries*, 188-89.

and who are suspicious of all appeals to a common good beyond individual choice. They see these appeals as just so much humbug to get contrary voters to accept voluntary servitude.⁵²⁶

Taylor's view of commitment to the common will, even if unrealistic or naïve, provides an important perspective on the problem of motivation to continue to participate in a democratic state that (1) construes truth differently than does the particular individual and (2) acts out of a 'common will' to which the individual objects. In this regard, it is an important reminder of the concept we have already encountered in Martha Nussbaum's treatment of the Hegelian option in tragedy, whereby a currently losing point of view is not necessarily foreclosed forever.⁵²⁷ We re-encounter this idea of commitment by - and to - the cause supported only by a minority group as we discuss the reasoning behind allowing space for the religious voice in the public space.

Taylor goes on to emphasize the importance of this conception of political identity - again, thoroughly communitarian in origin - as a pre-political condition precedent to any government that might ever fail to please all its citizens:

The crucial point here is that, whoever is ultimately right philosophically, it is only insofar as people accept some such answer that the legitimacy principle of popular sovereignty can work to secure their consent. The principle is effective only via this appeal to a strong collective agency. If the identification with this is rejected, the rule of this government seems illegitimate in the eyes of the rejecters, as we see in countless cases with disaffected national minorities: rule by the people all right; but we can't accept rule by this lot, because we aren't part of their people. This is the inner link between democracy and strong common agency. It follows the logic of the legitimacy principle that underlies democratic regimes. **They fail to generate this identity at their peril.**⁵²⁸

It is not clear that Taylor thinks that the government *itself* generates this identity, certainly neither Böchenförde nor Habermas would think it possible.

Taylor also argues that we have changed our focus from living 'hierarchically' in complementarily-dependent relationships in which we cooperated with one another to ensure our very survival, to a society that focuses instead on the *individual*, which lives together with other individuals in a society that is based on mutual benefit, to be sure,

⁵²⁶ Taylor, *Social Imaginaries*, 189.

⁵²⁷ I discussed this in chapter 1.

⁵²⁸ Taylor, *Social Imaginaries*, 190 (bold supplied).

but not necessarily on the same level as the very survival. There is a danger, he says, for us to think – first - that this has always been how we have lived, or - second - that the way we live was somehow *inevitable*:

[W]e are tempted by a “subtraction” account of the rise of modernity. We just needed to liberate ourselves from the old horizons, and then the mutual service conception of order was the obvious alternative left. It needed no inventive insight or constructive effort. Individualism and mutual benefit are the evident residual ideas that remain after you have sloughed off the older religions and metaphysics.⁵²⁹

In this regard, it is important to see our current “pre-political foundations” and note - with Taylor - our commitment to people *as* individuals, essentially responsible to and for themselves, living with each other on the basis of mutual benefit - and not as a matter of necessity or survival, but instead a mutual recognition which goes beyond survival. This would help us to see and trace the beginnings of an increasing reluctance to be obligated, e.g., to pay or care for those in circumstances worse off than we are, or even those whose ‘innate’ abilities fit them for much less than another individual. How can we find a motive for altruism when the basic societal model is founded on individualism in society for *mutual* benefit, when we do not see a corresponding individual benefit to the self? In fact, this would appear to be the situation as resolved by Judge Posner’s ‘Darwinian Pragmatism’, which has such difficulty relating to a case that is not explainable on economic cost-benefit grounds. Again, we see the difficulty of finding a basis for altruism in the case of pre-political foundations that have no reference to the religious.

We turn now to a companion issue accompanying the arguably religiously-oriented (if not religiously-based) pre-political foundations of the state, and that is the question of how the church and state interact, once the state is in existence. Our inquiry considers the value of Liberalism’s strategic argument with historical aspects of religiously motivated persecution and violence, including the responses thereto in the form of new societies and constitutions, and how the attempt to provide a haven for free religious adherence has developed into more of a religious silence in public life, especially in the United States.

⁵²⁹ Taylor, *Social Imaginaries*, 18.

II. Current Argumentation for the Separation between Church and State

It is important for us to speak here of separating Church and State because, on the one hand, religious experience and communities of faith are needed to generate the values necessary for living together as well as for providing the motivation for moral conduct, and living by the unenforceable standards that moral conduct would impose but that no law could require. On the other hand, however, there is the question of religion attempting to impose its views on those who do not share that religious faith. We must not overlook the valuable role that the separation of church and state was meant to achieve: that of *protecting* religious expression. Liberal democracy, however - having apparently successfully relegated the religious to the private sphere - has not succeeded in being able to provide the renewal of values necessary to sustain itself, and increasingly we see a failure of our society to live well in ethical judgments and actions that go beyond the merely-legal state. It is in this vein that we confront Habermas' concern with the violence of religious fundamentalists and his question whether that violence stems at least in part out of having been silenced as a religious voice in the public space.

We will consider the question of the separation between church and state first historically, arising out of religious persecution and the desire instead to provide religious freedom and end the violence of religious intolerance. We will then look at two different constitutions - the United States and Ireland - to see how the separation between church and state was provided for in each.

1. Historical Considerations - Religious Tolerance and Persecution

The working out of a balance between church and state, like any other balance point between two entities, has yielded different solutions at different times in our history. In the more distant past, it appears that religion – or the church – was in the ascendancy, the question being *which* religion; *which* church. The violence of the religious wars in Europe took a terrible toll. At the same time, Nicholas Wolterstorff points out that:

The emergence in the seventeenth and eighteenth centuries, in Western Europe and the American colonies, of the ideal of a state that did not prohibit the free exercise of religion, nor even establish any religion, was a remarkable development.⁵³⁰

The colonies in the ‘new world’ of America were part of these new struggles, this “remarkable development”. On the one hand, many of the early colonists were religious dissenters. On the other hand, many of those religious groups fleeing persecution in Europe turned around and set up religious governments equal to what they had just fled – the only difference being that their own religion was now the one in the ascendancy.⁵³¹ Many other colonies, however, remembering their own misery as a religious minority prohibited from practicing their own religion or actively persecuted for the nature of their religious beliefs, pursued a society that would tolerate diverse religious beliefs and faiths.⁵³²

An interesting historical anomaly took place in Maryland, where it was a minority Catholic government pursuant to the charter given by the English crown to Lord Baltimore - a Catholic - that passed the *Act Concerning Religion* in 1649, legislation which granted freedom of religion and religious conscience to all Christian religions and which, ironically, was the necessary condition precedent for Maryland having Catholics in government. Notably, once the religion of the ruling power coincided with the religion of the enabling power – as happened only five years later in 1654 with Cromwell firmly in control in England and Lord Baltimore divested in Maryland, the protestants in Maryland repealed the *Act Concerning Religion*, and the Anglican

⁵³⁰ Nicholas Wolterstorff, “A Religious Argument for the Civil Right to Freedom of Religious Exercise, Drawn from American History,” *Wake Forest Law Review* 36 (2001): 535-56, 536.

⁵³¹ For an overview of this phenomenon, see Wolterstorff, “Religious Argument,” 536-36. See also Nathaniel Hawthorne’s classic story *The Scarlet Letter* (New York: Hyperion, 1995) (orig. published 1850).

⁵³² See Wolterstorff, “Religious Argument,” 538. Wolterstorff quotes from an early (1579) document so arguing: “I ask those who do not want to admit the two religions in this country how they now intend to abolish one of them. . . . If we intend to ruin the Protestants we will ruin ourselves, as the French did. The conclusion to be drawn from this is that it would be better to live in peace with them, rather than ruin ourselves by internal discord and carry on a hazardous, disastrous, long and difficult war or rather a perpetual and impossible one.” *Ibid.* 538, quoting from *Discour sur La Permission de Liberte de Religion, Dicte Religions-Vrede au Pais-Bais* (1579), reprinted in *Texts Concerning the Revolt of the Netherlands*, E.H. Kossman & A. F. Mellink, eds., Cambridge: Cambridge University Press, 1974), 163.

religion was established as the state religion in Maryland, a status it enjoyed until the drafting of the Maryland Constitution of 1780, Declaration of Rights art. 33.

2. One Solution: The United States Constitution

Ultimately, of course, the United States of America endorsed a Constitution that effectively separated church and state. What has come to be called the “separation of church and state” is a two-fold constitutional provision, one prohibiting the abridgement of the free exercise of an individual’s religion, the other prohibiting the establishment of a state religion.⁵³³ Many, if not most, individual State constitutions provide for similar freedom of religion, and the requirement that the State not infringe upon such freedom.⁵³⁴ In addition, the U.S. Federal Constitution’s Fourteenth Amendment - providing for “due process” and “equal protection” of law effectively incorporated Federal Constitutional provisions as against the multiple States. The political philosopher Wolterstorff points out that historically - where there is a conflict between the two provisions (non-establishment and free exercise) - the United States Supreme Court has tended to favor the non-establishment clause.⁵³⁵

This history may be well-known, but it is interesting to note that disagreement has arisen between those who now say that America was founded essentially as a *secular* state, and those who say that America has a religious foundation *and* roots, being founded by Christians, certainly *for* Christians, but also as a place where “the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination”⁵³⁶ would also be welcome; would be tolerated, in any event, in an age

⁵³³ These two constitutional provisions are known as the “Free Exercise” and “Nonestablishment” clauses, respectfully, of the Bill of Rights, by which name the first 10 Amendments of the Constitution, ratified at the same time as the United States Constitution, are known. Specifically, both these clauses are found in the First Amendment, which also houses the very important right to freedom of speech as well as freedom of assembly.

⁵³⁴ For an excellent review of the history and provisions of the earliest State Constitutions in this regard, see Wolterstorff, “Religious Argument,” 539-43. See also John T. Noonan, Jr. “The Letter of Religious Liberty and its Spirit,” (Lecture, Trinity College, Dublin, April 12, 2006). For a general overview, see “Developments in the Law: Religion and the State,” *Harvard Law Review* 100 (1987): 1606-1781.

⁵³⁵ Wolterstorff, “Religious Argument,” 536. For an excellent summation of the Supreme Court’s non-establishment clause decisions over the past 50 years, see *Mitchell v. Helms*, 120 S. Ct. 2530, 2572 (2000) (Souter, J., dissenting).

⁵³⁶ “The bill for establishing religious freedom, the principles of which had, to a certain degree, been enacted before, I had drawn in all the latitude of reason & right. It still met with opposition; but, with some mutilations in the preamble, it was finally passed; and a singular proposition proved that its protection of opinion was meant to be universal. Where the preamble declares that coercion is a

when ‘tolerance’ meant not embracing the others’ beliefs, but refraining from harming them because of those beliefs.⁵³⁷ It was also before the catch-phrase ‘or people of *no* faith’ came into its own. It would appear that most of the early citizens of the United States had some sort of a religious faith. In fact, Wolterstorff’s close reading of the earliest State Constitutions all contemplate the freedom to worship God, with a divergence between whether the word used was *right*, *duty*, or *privilege* to so worship.⁵³⁸ Maryland State’s earlier *Act Concerning Religion* (1649) granted freedom only to those who professed faith in Jesus Christ:

[N]oe person or persons whatsoever within this Province, or the Islands, Ports, Harbors, Creekes, or havens thereunto belonging professing to beleive in Jesus Christ, shall from henceforth bee any waies troubled, Molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof within this Province or the Islands thereunto. belonging nor any way compelled to the beleife or exercise of any other Religion against his or her consent.⁵³⁹

In fact, this so-called “Toleration Act” provides the death penalty for anyone who blasphemes or curses God, denies Jesus or any other member of the Trinity, or “shall use or utter any reproachfull Speeches, words or language concerning the said Holy Trinity, or any of the said three persons thereof.”⁵⁴⁰ It would appear that ‘toleration’ did not extend nearly as far as today’s secularists might think, at least at first. Instead, early attempts to give effect to a freedom of religion did not include a freedom of *no* religion. It appears to have been assumed that all would have some sort of religion, the question at first was which.

departure from the plan of the holy author of our religion, an amendment was proposed, by inserting the word "Jesus Christ," so that it should read "a departure from the plan of Jesus Christ, the holy author of our religion." The insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination." Thomas Jefferson, *Autobiography* (in reference to the Virginia Act for Religious Freedom) <http://libertyonline.hypermall.com/Jefferson/Autobiography.html#virginia> (accessed Oct. 3, 2007).

⁵³⁷ Jürgen Habermas provides an analysis of the early history not only of religious tolerance, but the distinction between ‘tolerance’ and ‘toleration’ in his article “Religious Tolerance: The Pacemaker for Cultural Rights,” in *Philosophy: The Journal of the Royal Institute of Philosophy*, vol. 79, no. 307 (Cambridge University Press, Jan. 2004): 5-18, 5-10.

⁵³⁸ Wolterstorff, “Religious Argument,” 539-41.

⁵³⁹ Maryland, An Act Concerning Religion (1649),

http://www.yale.edu/lawweb/avalon/amerdoc/maryland_toleration.htm (accessed October 3, 2007)).

⁵⁴⁰ *Ibid.*

Does the motivation behind the U.S. Constitution as either religious or nonreligious matter at this point? Yes: historically, it is important to note that the Free Exercise and Non-establishment clauses were meant to protect religious freedoms, *not* to do away with religion altogether, or to establish a new secular state, which would effectively violate the non-establishment clause notwithstanding the fact that the religion to be established is *no* religion. John Adams, a founding father and the second President of the United States is reported to have said: “Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”⁵⁴¹

Without the understanding of the role of Christianity in the formation of the United States of America, we begin to lose the horizon on which certain of our bearings were predicated. Yes, religious freedom has, so far, been flexible enough to allow for the freedom to have *no* religion, but freedom of religion may not *mandate* no religion, just as it may not mandate religion itself. In contemplating democratic freedom, Jürgen Habermas pointedly notes that “If the democratic state does not wish to give itself up, then it must resort to intolerance toward the enemy of the constitution.”⁵⁴² We might argue the same with respect to the enemy of freedom of religion.

Another aspect of an accurate understanding of the religious versus nonreligious motivations underlying the foundation of the United States relates to the question of the values – unstated – which were understood to be incorporated into the fabric of the emerging nation. I will not insist that they are exclusively “Christian values”, as if only Christians could embrace values of love, peace, hope, charity, truthfulness, honesty and so on. Still, talking about “Christian values” gives a much more specific understanding to the otherwise unstated values underlying the emerging nation. Specifically, the nature of the governance of the United States is based upon the living together of people with essentially ‘Christian’ values which may certainly be summed up as aspiring to abide by the Golden Rule, and at a minimum, in keeping with the 10 Commandments. With Ricoeur, I would note that it is not the province of the moral

⁵⁴¹ Oct. 11, 1798 Address to the military, quoted in John R. Howe, Jr., *The Changing Political Thought of John Adams* (Princeton: Princeton University Press, 1966) 185. George Washington’s Farewell Address (1796) contains this sentence: “Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.” Text available online at Yale Law School, The Avalon Project, <http://www.yale.edu/lawweb/avalon/washing.htm> (accessed October 3, 2007).

⁵⁴² Habermas, “Religious Tolerance,” 8.

status quo to *justify* that status quo, but merely to start with it.⁵⁴³ It is when that understanding is *not* shared, that more and more laws are called for and seen to be necessary.

3. The Irish Constitution - A Difference in Foundation and Effect

There is a difference between the United States Constitution and the Irish Constitution with respect to their respective foundations. Constitutional law expert and Barrister Prof. Gerry Whyte notes the Irish Constitution's protection of certain so-called "natural" rights which transcend positive law, "antecedent and superior" to it.⁵⁴⁴ In a sense, the Irish Constitution had been seen to protect a prior *natural law*, which, in spite of its religious understanding "has not, however, resulted in the judicial endorsement of any specifically Roman Catholic teaching."⁵⁴⁵ One could understand the difference between natural and positive law as similar to the difference between human rights and positive law. Positive law is *written* law - generally statutory law - as opposed to common law, which is based upon the precedent of prior cases, which is preserved in case opinions.

More recently, the understanding of the relationship between the Constitution and natural law has shifted and the Supreme Court has said that the Irish courts "at no stage recognized the provisions of natural law as superior to the Constitution."⁵⁴⁶ Whyte wonders whether that comment "can be explained on the ground that on no previous occasion was an Irish court ever asked to address this issue."⁵⁴⁷ Clearly, it was so understood prior to this opinion.⁵⁴⁸

In fact, the Irish Constitution was explicitly seen as severing a connection with a positivist common law:

⁵⁴³ See *OA*, 205n2.

⁵⁴⁴ Gerard Whyte, "Natural Law and the Constitution", *Doctrine & Life* (Sept. 1995): 481-82.

⁵⁴⁵ Whyte, "Natural Law," 482.

⁵⁴⁶ Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill (1995), [1995] 1 IR 1; [1995] 2 ILRM 81.

⁵⁴⁷ Whyte, "Natural Law," 487.

⁵⁴⁸ See also Brian Doolan, *Principles of Irish Law*, 6th ed., (Dublin: Gill & Macmillan, 2003), 66, to the effect that the "traditional view [was] that the natural law was the fundamental law of the State and as such antecedent and superior to all positive law, including the Constitution".

Its Preamble makes clear that the Constitution and the laws which owe their force to the Constitution derive, under God, from the people and are directed to the promotion of the common good. If a judicial decision rejects the divine law or has not as its object the common good, it has not the character of law.⁵⁴⁹

There is also a difference between Irish and U.S. Constitutional provisions regarding religion. Article 44.2.1 of the Irish Constitution provides for the free exercise of religion, but there is no provision corresponding to the U.S. Non-Establishment clause. Whyte notes that because of this lack of a “direct equivalent . . . consequently there is not quite the same barrier to State involvement with religion.”⁵⁵⁰ Nonetheless, he points out that Articles 44.2.2 and 44.2.3, the non-endowment clause and the non-discrimination clause, respectively, “may be taken as Ireland’s approximate equivalent of the establishment clause in the United States.”⁵⁵¹ Also unlike the United States, Whyte notes that where there is a conflict between the equivalent articles guaranteeing free exercise and the non-establishment clause (namely Ireland’s non-endowment and non-discrimination clause), Irish courts tend to favor the provision for free exercise whereas U.S. courts have tended to favor the non-establishment clause. Ironically, there are signs that these two opposite tendencies in American and Irish courts may be undergoing a change, effectively exchanging positions.⁵⁵² Thus, it appears that where the American courts may now be changing direction to favor the free exercise clause over the non-establishment clause, Ireland appears to be considering a change of direction to favor - instead - its non-endowment and non-discrimination clause.

4. Conclusions from the Historical Investigations and Comparisons

Understanding the nature of motivations and values that underlie the legal system of nations might help us to maintain an ethical and moral course in the face of legal or political windshear in times of turmoil or dispute about basic human values. St. Paul sums it up well when he says that there is no law against things like love, joy, peace, patience, kindness, goodness, faithfulness, gentleness or self-control.⁵⁵³ Neither,

⁵⁴⁹ Seamus Henchy, “Precedent in the Irish Supreme Court,” *Modern Law Review* 25 (1962): 544-58, 549-50.

⁵⁵⁰ Gerard Whyte, “Religion and the Irish Constitution,” *John Marshall Law Review* 30 (1997): 725-46, 731.

⁵⁵¹ Whyte, “Irish Constitution,” 731.

⁵⁵² Compare Whyte, “Irish Constitution,” 736 with Wolterstorff, “Religious Argument,” 536.

⁵⁵³ Galatians 5:22-23.

however, is there any law *for* such things; nor should - or could - there be. Specifically, however, this means that the Christian nature of the values underlying much of western civilization should not be forgotten or erased. There is a difference to be discerned in between questions of origin and validity with respect to these values and certainly with respect to the underlying religious beliefs out of which they arose. Additionally, we would not be required to adhere to the same religious beliefs as did, e.g., America's Founders, some of whom were Deists and Enlightenment Rationalists, as well as Christians.

In the aftermath of 20th century pluralism, the so-called "God-is-dead" period, and Post-Modernity, we have learned to be circumspect with our God-talk. In the name of not offending those who don't share those beliefs, many have stopped talking about them, and sought to purge the legal and criminal systems from all motivations and contributions arising out of religion. There is a good reason for this, insofar as we wish to avoid religious wars, persecutions, and the loss of individual freedoms. But we thereby also lose the 'higher' moral ground of the unenforceable, and the highly attractive and desirable values that transcend mere legality. This is so, even in the face of the most recent example of state-religious regimes in the Middle East, which embrace Islam and forcibly impose Sharia law. The problem is not so much the values being espoused, as it is the attempted *forcible* imposition of religious values by law. A value of female modesty, for example, does not necessarily translate into a law prohibiting a woman from speaking with an unrelated man, driving a car, or appearing in public without being appropriately veiled. A value is individually expressed; a law is externally imposed and enforced.⁵⁵⁴

We turn now to the issue of whether the religious neutrality of the state as the other side of the coin of religious freedom may end up in silencing the religious voice in the public space and consider the reasons advanced to justify that effect, the means used, and the possible consequences.

⁵⁵⁴ Consider the telling point made in Azar Nafisi's book *Reading Lolita in Tehran: A Memoir in Books*, (New York: Random House, 2003) in which one woman who, before it was made the law in Iran, had voluntarily worn the veil as a matter of expressing her own modesty, who felt robbed of the force and purity of her religious expression when the wearing of the veil was made mandatory of all women, as a matter of law.

III. Silencing the Religious Voice in the Public Space through the State's Religious Neutrality?

I shall investigate how one writer has had a major influence towards silencing the voice of the religious in liberal democracies today, namely John Rawls.⁵⁵⁵ His work has focused on the concept of justice as fairness, in which public reason is defined as excluding comprehensive doctrines in potential areas of dispute. Accordingly, religious matters - notoriously difficult of agreement or resolution in areas of dispute - are defined as not properly part of public discourse, or the "public reason".

Habermas had also initially effectively excluded religious thought and the religious voice from public space by how he defined the rules of public engagement and argumentation, even if he has more recently modified his stance against religious matters in the public sphere. Nonetheless, the effect of these two influential thinkers has been profound, and those who oppose – or promote – legislation on religious grounds run the risk of being seen as unreasonable and even dangerously 'fundamentalist'.

1. Translations between the Religious and the Secular

Those who attempt to discuss social matters and have reasons for their position that sound in the comprehensive doctrine of religion must learn to translate those religious reasons into 'secular' terms, if they wish to gain a hearing. After the religious terrorist attacks of September 11, 2001, Habermas addressed this translation requirement by the religious, and can be heard to argue that the non-religious ought also to be capable of translation, or at least to recognize the feat of the religious:

⁵⁵⁵ Rawls' proviso demands that "in due course proper political reasons - and not reasons solely given by comprehensive doctrines - are presented that are sufficient to support whatever the comprehensive doctrines introduced are said to support." John Rawls, "The Idea of Public Reason Revisited," *University of Chicago Law Review* 64 (1997): 765-807, 784. This is a correction of the more restrictive position in his *Political Liberalism* (New York: Columbia University Press, 1993), 212-54. In his earlier work, he had required that "in discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious and philosophical doctrines - to what we as individuals or members of associations see as the whole truth. . . ." *Political Liberalism*, 224-25.

To date, only citizens committed to religious beliefs are required to split up their identities, as it were, into their public and private elements. They are the ones who have to translate their religious beliefs into a secular language before their arguments have any chance of gaining majority support.⁵⁵⁶

Moreover, Habermas notes the profound effect that the elimination of religion from the public space has left. The attempted translation of religious thought, reasoning, motives and concepts to a secular language is a *reduction* of the religious, leaving a void - a remainder - which marks its absence. Habermas appears to have given up on the idea that a proper translation will ever completely remedy the lack:

Secular languages which only eliminate the substance once intended leave irritations. When sin was converted to culpability, and the breaking of divine commands to an offense against human laws, something was lost. The wish for forgiveness is still bound up with the unsentimental wish to undo the harm inflicted on others. What is even more disconcerting is the irreversibility of *past* sufferings - the injustice inflicted on innocent people who were abused, debased, and murdered, reaching far beyond any extent of reparation within human power. The lost hope for resurrection is keenly felt as a void.⁵⁵⁷

In fact, it would appear that it is the translation itself that is a large part of the problem. In effect, the attempt to reduce religious symbols and concepts - especially such important ones like sin, repentance, forgiveness, reconciliation and hope - to secular concepts continues to fail. The secular version is, in effect, a sterile clone, at best.

In this regard, Habermas tells us that Hegel's attempted solution involved replacing "delimiting reason" with "a reason which embraces."⁵⁵⁸

Thus, religious contents are saved in terms of philosophical concepts. But Hegel sacrifices together with sacred history [*Heilsgeschichte*] the promise of a salvaging future in exchange for a world process revolving *in itself*. Teleology is finally bent back into a circle.⁵⁵⁹

Nonetheless, we must speak, and Habermas warns about the temptation to trivialize real difference. Although he is aware of the untranslatable remainder from the attempted translation from the religious to the secular, Habermas is also aware of the

⁵⁵⁶ Habermas, *Future*, 109.

⁵⁵⁷ Habermas, *Future*, 110-111.

⁵⁵⁸ Habermas, *Future*, 112.

⁵⁵⁹ Habermas, *Future*, 112.

need to continue discourse in the face of significant difference. Ultimately he will call for translation efforts on both sides or - failing that - at least the acknowledgement of the translation enterprise undertaken by the religious. The importance of the project extends past existing liberal democracies to influence cultures only now considering questions of secularization or other separation principles between church and state as, e.g., in the Middle East. Habermas implies that otherwise the language of the market and/or the military will fill any void left by the exclusion or failure adequately to convey the religious aspects of our moral feelings:

Democratic common sense must fear the media-induced indifference and the mindless conversational trivialization of all differences that make a difference. Those moral feelings which only religious language has as yet been able to give a sufficiently differentiated expression may find universal resonance once a salvaging formulation turns up for something almost forgotten, but implicitly missed. The mode for nondestructive secularization is translation. This is what the Western world, as the worldwide secularizing force, may learn from its own history. If it presents this complex image of itself to other cultures in a credible way, intercultural relations may find a language other than that of the military and the market alone.⁵⁶⁰

Posner's considerably less academically-articulate acknowledgement that moral language is needed in order to adequately *condemn* certain horrific things (like the Holocaust, for example)⁵⁶¹, is a more crude variation on this theme. Would Posner perhaps recognize that the element missing from his language lexicon is not merely a question of language or vocabulary, but is religiously-based? It would be in this argument by Habermas that we would find our starting place to so argue, also noting, with Ricoeur, that "to translate is to conclude an operation of interpretation."⁵⁶²

Ricoeur discusses the fact of translation within a "practical dialectic of fidelity versus betrayal."⁵⁶³ Looking primarily at different physical languages rather than a difference in subject matter or realm of influence, as we do when considering difference between the secular and the sacred, nonetheless Ricoeur notes the importance of a *desire* to

⁵⁶⁰ Habermas, *Future*, 114.

⁵⁶¹ We discussed this in chapter 3, 1.(c) The Hard Case at Law - Posner's Legal Perspective.

⁵⁶² Ricoeur, "Ethics and Human Capability: A Response" in *Paul Ricoeur and Contemporary Moral Thought*, ed., John Wall, William Schweiker, and W. David Hall, (New York: Routledge, 2002), 279-90, 284.

⁵⁶³ Paul Ricoeur, "The Paradigm of Translation," in *Reflections on the Just*, trans. David Pellauer (Chicago: University of Chicago Press, 2007), 106-120, 109.

translate as well as the difficulties of confirming adequate or inadequate translation. “[A] good translation can only aim at a presumed *equivalence*, not one founded on a demonstrable *identity* of meaning. An equivalence without identity.”⁵⁶⁴ An equivalence that can not be proven but only striven for, or opposed by other, supposedly superior accounts.

Ricoeur takes up the question of the religious as a form of foreign language with respect to what he calls “linguistic hospitality”. He sees the need to learn the communicative forms of the religion before translation is possible, raising the ethical problem of serving “two masters” insofar as to translate is to purport to serve both the reader and the writer. That learning might also be implicated in Ricoeur’s noticing that “*it is always possible to say the same thing in a different way.*”⁵⁶⁵ This is very close to the ‘explaining in order to understand’ concept that is present in *Oneself as Another*, as well his work in the *The Just*. The effort to continue to explain or restate until understanding is reached by another can also be seen as ongoing discourse, with arguments exchanged, modified, and restated - and queries exchanged - until understanding is reached. In this regard, Ricoeur gives us a model of translation perhaps as discourse. At the same time, we must note that in the case of the religious/secular translation, it can be that (1) there is no desire to communicate, (2) no desire to translate, or (3) no recognition that different languages are being used.

It is in the realm of the untranslatable - the secret, the silent, the closed, the incomprehensible - that we find Ricoeur’s most compelling thought. Here, Ricoeur again brings up the dialectic between fidelity and betrayal, noting that the fidelity is to self, but also “to the capacity of language to preserve the secret in the encounter with its propensity to betray it.”⁵⁶⁶ It is in this secrecy that Ricoeur sees the potential for our deepest relationships:

[I]f we had never drawn near to the country of the unsayable, would we ever understand the meaning of the secret, of the untranslatable secret? And do not our best exchanges, in love and friendship, preserve this quality of discretion - of secrecy and discretion - that preserves distance in proximity?⁵⁶⁷

⁵⁶⁴ Ricoeur, “Paradigm of Translation,” 114.

⁵⁶⁵ Ricoeur, “Paradigm of Translation,” 116.

⁵⁶⁶ Ricoeur, “Paradigm of Translation,” 119.

⁵⁶⁷ Ricoeur, “Paradigm of Translation,” 120.

Indeed, no, and yes. Ricoeur makes an important point with respect to our viewing the secret untranslatable as a mystery that draws to further discourse and leads to greater and deeper friendship. The question of an untranslatable remainder which we have discussed in Habermas may well be translated by this thought in Ricoeur to a deeper understanding between peoples, without the need for words. At the same time, we would want to retain fidelity to self, noting the risk of betrayal, while remembering that it is only those who are “drawn near to the country of the unsayable” who would enter into this silent and untranslatable exchange. Just as one does not search for something she does not think is lost, so we will not seek to understand unless we realize the extent of what we don’t see.

To that end, Habermas is right to emphasize the work of the religious in translating, if only to make the non-religious aware of what they have not seen or understood, without it first having been translated. Where the religious voice has been silent, there is the danger that the non-religious will not realize the extent of the difference between the two voices as languages and not only will the public space be deprived of the value of the religious perspective in public debate, but will also fail to realize the secret mystery which beckons one forward into greater and deeper investigation and relationship.

2. Re-examining the Role of the Religious Voice in the Public Space

Another branch of the debate as to the role of the religious voice in the public space appeared almost twenty years ago, and was initiated by Kent Greenawalt in *Religious Convictions and Political Choice*.⁵⁶⁸ Greenawalt argued that restrictions should be placed on the use of religious arguments in political and legal discourse, at least by government officials and by “quasi-public” citizens.⁵⁶⁹ Habermas would agree to that “institutional threshold.” Two voices on opposing sides of the question whether the religious voice should be heard today in the public sphere are Robert Audi⁵⁷⁰ and

⁵⁶⁸ Kent Greenawalt, *Religious Convictions and Political Choice* (Oxford: Oxford University Press, 1988).

⁵⁶⁹ Greenawalt, *Religious Convictions*, 50-51. An historical treatment of this branch of the debate and its development is to be found in Kathleen A. Brady’s “Reflections on the Light: Judge Noonan’s Contributions to the Debate on Religion in the Public Square,” *University of St. Thomas Law Journal* 1 (2003-04): 480-503, 482-88.

⁵⁷⁰ Robert Audi, “Moral Foundations of Liberal Democracy, Secular Reasons, and Liberal Neutrality Toward the Good,” *Notre Dame Journal of Law, Ethics, and Public Policy* 19 (2005): 197-218; Robert Audi, “The Place of Religious Argument in a Free and Democratic Society,” *San Diego Law Review* 30

Nicholas Wolterstorff.⁵⁷¹ Arguing that the religious voice ought to be silent in the public space, Audi proceeds on a straight-line secular/non-secular (i.e., religious) basis, generally in line with what he sees as a U.S. Constitutional separation of the two, accomplished by means of the constitutional law doctrine of separation between church and state.⁵⁷² In determining just what is religious, however, he appears primarily concerned with theistic religions.⁵⁷³ This is a significant difference from the comprehensive doctrines that would be excluded by Rawls, insofar as Rawls does not distinguish between religious and secular “comprehensive doctrines”. Philosopher Phillip L. Quinn looks into the basis of liberalism’s exclusion of the religious voice and points out:

Because Rawls excludes secular comprehensive doctrines from public reason while Audi does not insist upon a parallel exclusion of secular reasons, there is one way in which Audi’s view is more permissive than that of Rawls. But since they do not benefit from this permissiveness, religious believers are apt to see it as an instance of secularist bias.⁵⁷⁴

Audi’s proposal by which the religious voice would be silenced involves two principles, the stronger being the principle of secular motivation, the weaker being the principle of secular rationale. Both have to do with the bases upon which one advocates “any law or public policy that restricts human conduct.”⁵⁷⁵ According to Audi, one should at *least* have (and be willing to offer) an “adequate secular reason” for any such support – the ‘principle of secular rationale’. Better still, one should – in

(1993): 677-702; Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Lanham, MD: Rowman and Littlefield, 1997); Robert Audi, “Religious Values, Political Action, and Civic Discourse,” *Indiana Law Journal* 75 (2000): 273-94; “The Separation of Church and State and the Obligations of Citizenship,” *Philosophy & Public Affairs* 18 (1989): 259.

⁵⁷¹ Nicholas Wolterstorff, “Why We Should Reject What Liberalism Tells Us about Speaking and Acting in Public for Religious Reasons”, in *Religion and Contemporary Liberalism*, ed. Paul J. Weithman, (University of Notre Dame Press, 1997), 162-81; Audi and Wolterstorff, *Religion in the Public Square*.

⁵⁷² Audi, “Place of Religious Argument,” 680.

⁵⁷³ See generally Audi, “Place of Religious Argument,” 679-85, where he investigates questions of what is religious, from content, epistemic, motivational and historical perspectives.

⁵⁷⁴ Phillip L. Quinn, “Political Liberalisms and Their Exclusions of the Religious”, in *Religion and Contemporary Liberalism*, Paul J. Weithman, ed., University of Notre Dame Press (1997), 138-161, 147 n. 34.

⁵⁷⁵ Audi, “Separation of Church,” 279 and “Place of Religious Argument,” 691-92.

addition to *having* an “adequate secular reason” – be actually *motivated* by that “adequate secular reason”, the stronger principle of secular motivation.⁵⁷⁶

For Audi, “a secular reason is, roughly, one whose normative force, that is, its status as a *prima facie* justificatory element, does not depend on the existence of God or on theological considerations, or on the pronouncements of a person or institution qua religious authority.”⁵⁷⁷ The *adequacy* of the secular reason is then further identified by Audi as a “proposition whose truth is sufficient to justify it.”⁵⁷⁸

The exclusion of the religious voice in the public sphere, however, has been based upon an historic fear of violence resulting from our inability to agree as to the *truth* of various religious truth claims. Not being able to agree on the truth of religious claims, Audi would seemingly have us exclude those reasons, and instead rely only upon *secular* reasons, whose adequacy is based upon their *truth*. But what if we have a disagreement about the truth of propositions underlying secular reasons? Based on Audi’s requirement of an ‘adequate’ secular reason and his definition of adequacy as including propositional “truth . . . sufficient to justify it”, it would appear that disagreement about secular truth claims would also exclude the disputed claims as *adequate* secular reasons upon which to advocate a law or public policy that would restrict conduct. This time it would be excluded not because it is ‘religious’, but because (by definition) a reason is not ‘sufficient’ if the truth of the underlying proposition cannot be agreed. It would appear that this leaves us with public conversations only between those who share the same secular worldview and who basically agree on the matter being debated. Beyond the secular/religious divide, disagreement would essentially mean the matter could not be debated. Moreover, even agreed matters could not be discussed if one of the agreeing parties agrees on, or is

⁵⁷⁶ Audi, “Separation of Church,” 284. Note that in the later article, “The Place of Religious Argument,” Audi phrases the secular motivation principle slightly differently insofar as he implies a duty to *refrain* from acting in advocacy or support of such laws *unless* “one is sufficiently *motivated* by adequate secular reason.” “Place of Religious Argument,” 692.

⁵⁷⁷ Audi, “Separation of Church,” 278.

⁵⁷⁸ Audi, “Separation of Church,” 278.

motivated by, religious grounds. Audi himself acknowledges that the “[a]pplication of the principle of secular motivation can be complicated”.⁵⁷⁹

Continuing to affirm his principles of secular rationale and motivation,⁵⁸⁰ Audi is effectively expanding the scope of restrictions on the religious voice. In 2001, for example, he proposed:

A counterpart of the principle of secular rationale, one that is natural to call *the principle of religious rationale*. It is intended to apply to religious citizens whose religions have (as do Christianity, Judaism, and Islam) an ethic that extends to large segments of sociopolitical conduct. The principle says: In a liberal democracy, such religious citizens have a prima facie obligation not to advocate or support any law or public policy that restricts human conduct, unless they have, and are willing to offer, adequate *religiously* acceptable reason [sic] for this advocacy or support.⁵⁸¹

Insofar as Audi had been investigating the nature of a “Divine Command Ethics”⁵⁸² it appears that this additional requirement for “religious citizens” signals a profound distrust of the religious and perhaps a desire to further minimize the intersection of the religious into the political arena and public sphere. Kathleen Brady points out that “[s]ome advocates of restraint have demanded a secular rationale for all coercive laws because they distrust revelation where it is not confirmed by reason.”⁵⁸³ Audi would appear to aspire to imposing some degree of reason also on *religious* rationale, or at least provide for a degree of religious consensus as a precondition for restrictive legislation. He continues to impose no burden on the ‘secular’ citizen, and continues to deny that this unequal burden is in any way unfair or even burdensome.

It is too easily assumed . . . that as long as we have a right, at least a moral right, to do something, we cannot be criticized or deficient because we do it. This is surely a mistake. I can live within my rights and do essentially nothing for others

⁵⁷⁹ Audi, “Place of Religious Argument,” 693.

⁵⁸⁰ See, e.g. Robert Audi, “Religiously Grounded Morality and the Integration of Religious and Political Conduct,” *Wake Forest Law Review* 36 (2001): 251-77, 268-69; Audi, “Moral Foundations of Liberal Democracy, Secular Reasons, and Liberal Neutrality Toward the Good,” *Notre Dame Journal of Law, Ethics & Public Policy* 19 (2005): 197-218, 216-17.

⁵⁸¹ Audi, “Religiously Grounded Morality,” 269.

⁵⁸² Audi, “Religiously Grounded Morality,” 256-67.

⁵⁸³ Brady, “Reflections on the Light,” 502.

[yet n]o plausible moral theory, particularly if it is consonant with some of the world's great religions, takes such conduct to be fully acceptable. . . .⁵⁸⁴

Audio would silence those very same religions, however, using the higher religious ideals of unenforceable respect and love. Thus, he grounds his principles of secular rationale and motivation in *virtue*, further refined as "civic virtue."⁵⁸⁵

Part of civic virtue consists in having and using an appropriate *civic voice* in one's life as a citizen . . . a civic voice is not fully achieved if one is proposing religious reasons as grounds for public policy decisions.⁵⁸⁶

Notwithstanding that he acknowledges that there can be no question of *forcing* the religious citizen to adhere to 'civic virtue' and use his "civic voice' and that in fact Constitutional principles of the right of freedom of speech and of free exercise of religion would permit such speech, Audi advocates such restraint not only in the public space, but also in the private sphere.⁵⁸⁷ He goes so far as to commend his 'civic virtue' to private and intimate conversations in private homes. "Liberal democracies are unlikely to survive unless patterns established in the home support civic virtue in public."⁵⁸⁸

Moreover, according to Audi, religious institutions such as churches, hospitals, and universities ought also to engage in restraint and avoid using religious language in so-called "external questions, such as what the church should do to relieve famine abroad."⁵⁸⁹ Audi is aware of the significant benefits provided a secular world and individuals by such religious institutions and he does not appear to object to any religious motivations they may have had in providing those benefits. He does,

⁵⁸⁴ Audi, "Religiously Grounded Morality," 276.

⁵⁸⁵ Audi, "Religious Values," 274.

⁵⁸⁶ Audi, "Religious Values," 285 and n27.

⁵⁸⁷ Audi, "Religious Values," 291-92.

⁵⁸⁸ Audi, "Religious Values," 292. This argument would appear to run afoul of Hannah Arendt's critique of the confusion a liberal democracy has made between the political, social, and private spheres. Hannah Arendt, "Reflections on Little Rock" in *Responsibility and Judgment*, ed. Jerome Kohn, (New York: Schocken Books, 2003), 193-213, 204-13.

⁵⁸⁹ Audi, "Religious Values," 292.

however, object to *communicating* those religious motivations or goals to the beneficiaries.

Finally, Audi urges that the religious think twice before attempting evangelistic efforts. Interestingly, he resorts to a “religious” teaching - if not argument - albeit one that is barely recognizable as coherent, in theological terms:

If, as Jesus taught, to look at another lustfully is already to sin in one’s own heart, perhaps we can also do wrong in our hearts by harboring certain kinds of dispositions toward conversion of others, such as a tendency toward a kind of manipulative conversion that we would not like someone else to use on us.⁵⁹⁰

Audi remains firmly convinced that his project “place[s] no unreasonable restrictions on the conduct of religious people”⁵⁹¹ and denies that “my principles of secular rational and motivation severely constrain one’s use of religious language in public.”⁵⁹² Beyond a generalized fear of potentially violent polarization along religious lines, Audi does not justify this unequal burden on the religious citizen. He does, however, verbalize the attractiveness of persuasion instead of compulsion which does not quite escape being undermined as one remembers that Audi’s project is to *persuade* the religious to give up their religious voice and motives in public. From an ethical perspective, Audi’s liberal proposal almost appears to be based on a type of virtue ethics (from the point of view of motivation) which, however, is tied to a negative conception of the ‘good’, namely the fear of religious polarization and violence. He thus undermines any inherent motivation to an attractive good, which would be necessary to support the unenforceable *virtue* he proposes. Insofar as this ‘virtue’ is immediately seen to be unequal and potentially unfair in application, one wonders at its rational force at all. Audi must resort to turning the religious voice in upon itself.

Nicholas Wolterstorff takes the opposite view to Audi, namely that the religious voice *should* be welcome in the public space in spite of liberalism’s general fear of religious

⁵⁹⁰ Audi, “Religious Values,” 292.

⁵⁹¹ Audi, “Place of Religious Argument,” 670.

⁵⁹² Audi, “Religious Values,” 289.

wars and violence.⁵⁹³ He does not proceed upon a guaranteed right of speech, although he does note that the requirement that religious citizens compartmentalize the religious and the secular in their lives and thought in itself violates the free exercise of religion:

Should someone try to stop me from voting, and acting politically, on the basis of my religious convictions, that would violate the free exercise of my religion. . . . Let it be added that I am not unique in my refusal on religious grounds to divide my life into secular and religious components.⁵⁹⁴

Wolterstorff's objections to the proposal that religious citizens should refrain from speaking religiously or with religious motives is based on (1) his view that neither Rawls or Locke (or Audi either, for that matter) provide an adequate defense of liberalism's independent basis principle, (2) an inherent unfairness to the religious, and (3) the adverse effects of first, asking our religious citizens to "split their public and private selves"⁵⁹⁵ but also the void that results in the public debate when religious considerations are removed. Specifically, with regard to number (3), Wolterstorff points out:

What has rushed in to fill the void is not noble discussions about principles of justice which have been extracted in Rawlsian fashion from the consensus populi. For nobody *cares about* principles of justice thus obtained. What has rushed in to fill the void is mainly considerations of economic self-interest, of privatism, and of nationalism.⁵⁹⁶

This has led to the debasing of the public discourse, as Wolterstorff sees it. He notes the 'flatness' of purely secular issues, with no transcendence whatsoever, and concludes that:

[A]part from religion, what people in contemporary society care most deeply about is their pocketbooks, their privacy, and their nation. If the reigning ethos says that it is wrong to introduce religion into the public space, then it is these other concerns that people will appeal to. What else? In all the great religions

⁵⁹³ Wolterstorff, "Why We Should Reject," 163.

⁵⁹⁴ Wolterstorff, "Why We Should Reject," 176.

⁵⁹⁵ Wolterstorff, "Why We Should Reject," 177.

⁵⁹⁶ Wolterstorff, "Why We Should Reject," 177.

of the world there are strands of conviction which tell us that pocketbook, privacy, and nation are not of first importance. In all of them there are strands of conviction which tell that, in the name of God, we must honor the other - even when that other is not only other than ourselves but other than a member of our nation. *Silence religion, and the debasement represented by private and group egotism will follow.*⁵⁹⁷

We might also note that Wolterstorff's initial example of a religious conviction that Biblical accounts of care for the poor, widowed and orphans means that "avoidable poverty is a violation of *rights*."⁵⁹⁸ Wolterstorff purports to have transformed the main issue of poverty into the secular terminology of "rights" rather than remaining with religious charity. Yet the basis for this argument is not readily translatable to secular terms without missing the very important religious aspects of God's creation and maintenance of creation, and our role in that creation as stewards as well as our responsibilities toward one another. Whatever secular reasons might be found for feeding the poor would not address the foundational religious reason Wolterstorff sees in it that it is part of our very purpose in life, as assigned by God, himself.

Wolterstorff's conviction of the need to integrate the religious with the secular - certainly for the religious citizen (he would not force any such so-called integration on a nonreligious citizen) - is based ultimately on several different approaches: Divine Command, Natural Law, and basic human rights, as also embodied in the United Constitution. Thus, Wolterstorff proceeds with the ideal of freedom, in an ethical orientation which can be aligned with that laid out by Paul Ricoeur, of the striving for a good life, with and for others, in just institutions. Respect - in the form of solicitude - would influence the ethical life at a level higher than those of the mere "moral rights" which Audi is so insistent we should rise above. The major difference here, of course, is that the rising above for Wolterstorff includes the continued living out of a life of committed religious faith and conviction, whereas for Audi, it appears to be the hiding or silencing of any connection of our actions or thoughts to the religious.

⁵⁹⁷ Wolterstorff, "Why We Should Reject," 178.

⁵⁹⁸ Wolterstorff, "Why We Should Reject," 162.

3. The Value of Multi-Opinioned Dialogue Including the Religious

Beyond Wolterstorff's objections to silencing the religious voice in the public space, which we have just reviewed, he also provides an account of the value of the free exchange of all reasons in public discourse, providing only that they be offered with civility, and that each listens to the other.⁵⁹⁹ We touched upon this in the prior section, noting his view that silencing the religious voice often invites economic, selfish or nationalistic motivations to "fill the void." Wolterstorff points to a debasing of the public debate where the religious is excluded. Moreover he sees no good reason to deprive the public debate of religious reasons, considerations and insight, where it is done with civility and with the opportunity for others to be heard as well:

[W]hy not invite and urge all of them [religious and non-religious] to listen to each other, genuinely to listen, changing their minds as they feel the force of the testimony and argumentation of others, in this way slowly coming to so much agreement as is necessary for the task at hand? . . . Why not let people say what they want, but insist that they say it with civility?⁶⁰⁰

Quinn looks not so much at the content of the religious voice as he does at the Constitutional and political implications of allowing a moderate presence of the religious voice in the public space. The benefits he focuses on are those of strengthening American liberalism by adopting an "inclusivist ideal" that would allow a limited role to the religious voice, which would thereby diminish the current polarization between the secular liberal and the religious conservative, by demonstrating that a viable middle ground exists.⁶⁰¹

Law Professor Steven Smith provides an excellent account of some realistic benefits of considering a religious perspective at law, in the legal example he provides of the

⁵⁹⁹ Wolterstorff, "Why We Should Reject," 180.

⁶⁰⁰ Wolterstorff, "Why We Should Reject," 180.

⁶⁰¹ Quinn, "Exclusions of the Religious," 159-60. Law professor Kathleen Brady identifies the 'value' of religious contributions to the public space primarily, however, with a religious argument, which may or may not be persuasive to the non-religious citizen: [S]cholars who would exclude or restrict religion in politics make the terrible mistake of cutting off the political community from its divine origin and foundation." Brady, "Reflections on the Light," 449.

difficulties attendant upon assessing money damages in cases of personal injury.⁶⁰² Smith astutely notes that “along with the loss there is also a benefit.”⁶⁰³ He goes on to describe cases of personal injury where, although initially there did not seem to be any benefit, ultimately the one injured will come to see a profound benefit in a refocus on the important values in their life, for example, or an enforced change in career or other path that had seemed set and certain.

That is why our reaction to injury is so complex. What we think of as personal injuries usually denote a setback in the horizontal dimension of life; this is what it typically means to describe something as an injury. However, that sort of injury may also have complicated effects for our welfare in the vertical dimension, which is precisely why we sometimes conclude that what we initially regarded as a personal tragedy was in fact an unexpected, unsought blessing. The tragedy may even have saved our soul; in losing our life, or at least a part of it, we may find it.⁶⁰⁴

Noting that the law takes no notice of this aspect of injury at all, instead purporting to make an injured person “whole” by means of money damages alone, is an impotent attempt to quantify that which is not quantifiable. The law is able to ignore this perspective, however, by ignoring what Smith has called the “vertical dimension” of human existence. His conclusion of the result of the law’s not recognizing the vertical dimension is compelling:

As a consequence, personal injury appears not as one of the necessary challenges and mysteries in human existence, rich with tragedy, opportunity and promise. Instead, personal injury basically presents us with an accounting problem.⁶⁰⁵

Continuing to ignore this “religious” aspect of life “deprives legal discourse of the counsel of our deepest convictions and reflections, and thereby renders our discussions

⁶⁰² Steven D. Smith, “Legal Discourse and the *De Facto* Disestablishment,” *Marquette Law Review* 81 (1997-98): 203-27.

⁶⁰³ Smith, “*De Facto* Disestablishment,” 219.

⁶⁰⁴ Smith, “*De Facto* Disestablishment,” 221.

⁶⁰⁵ Smith, “*De Facto* Disestablishment,” 223.

superficial and obtuse.”⁶⁰⁶ If the law is truly about cost benefit analysis, Smith argues that “this is a cost, or a benefit, that ought to be counted.”⁶⁰⁷

We have thus looked at the value of including the religious voice in public discourse. We have focused on the idea of an enriching contribution, providing for an inclusivist perspective, and an openness to mutual dialogue and problem solving. We have considered how the religious voice also enables us to overcome the horizontal injuries of daily life by not discounting a vertical benefit from those injuries and disappointments in the form of greater insight, fulfillment and connection to one another.

We turn now to a more specific consideration of what Religion might contribute to the public discourse which we analyze under three categories: (a) Religion as a source and renewal of values, (b) Religion as providing motivation to continue the dialogue, and (c) Religion providing hope and meaning.

III. What does Religion Contribute to the Public Discourse?

In the last chapter, chapter 4, we looked at the contribution to be made by mentalities presupposed to underlie the pre-political state by way of religious insights from the Golden Rule and the Ricoeurian concept of a superabundance generated by an Economy of the Gift. We will consider three additional elements here, (a) religion as source of values, (b) religion as motivation to continue the dialogue, and (c) religion as adding elements of hope and meaning to public discourse.

1. Religion as Source of Values

Hans Joas’ study of the *Genesis of Values*⁶⁰⁸ is predicated on the problematic relationship between norms and values, along a divide of attractiveness and obligation. We have already seen the importance of the attraction and motivation of values as ‘mentalities’ necessary to sustain a liberal democracy, which, however, the state is not

⁶⁰⁶ Smith, “*De Facto* Disestablishment,” 227.

⁶⁰⁷ Smith, “*De Facto* Disestablishment,” 227.

⁶⁰⁸ Hans Joas, *The Genesis of Values*, trans. Gregory Moore (Cambridge: Polity, 2000).

able to produce itself. Joas sums up the importance of determining the genesis of values and what leads to our commitment to them:

Although . . . an increasing number of people take seriously and support a politics of values, the answer to the question as to how a stronger commitment to (old or new) values is actually supposed to come about, indeed, how value commitment arises at all, is still wholly lacking in the public debate. Wide-ranging agreement has only been reached in a negative respect: that values cannot be produced rationally or disseminated through indoctrination.⁶⁰⁹

Joas takes us through Nietzsche's initial posing of the question of the genesis of values (and morality) and his answer (Judeo-Christian values originate in *ressentiment*)⁶¹⁰ to a contrary answer proposed by William James that it is in religious experience and prayer that the sense of self-formation and transcendence leads to the formation of values in the individual.⁶¹¹ Interestingly, Joas refers to a serious divide between European and American philosophy at that time, noting that few in Europe expected any significant philosophical insights from America. American pragmatism was almost universally ridiculed as "crass commercialism and ruthless utilitarianism [and o]n the basis of such premises, pragmatism could not accommodate a philosophy of value, an ethics or a philosophy of religion at all."⁶¹² Indeed, Joas tells us that "Georg Simmel is credited with the presumptuous and misleading remark that pragmatism is 'what the Americans have understood of Nietzsche.'"⁶¹³

Joas treats this question of values in the work of a number of other philosophers - Émile Durkheim, Georg Simmel, Max Scheler, and John Dewey, but for our purposes, it is primarily in William James that Joas finds the basis for his conclusion that: "values originate in experiences of self-formation and self-transcendence."⁶¹⁴

Taylor of course does benefit from the work already carried out by the thinkers Joas has investigated:

⁶⁰⁹ Joas, *Genesis of Values*, 5.

⁶¹⁰ Joas, *Genesis of Values*, 24-25.

⁶¹¹ Joas, *Genesis of Values*, 35-53.

⁶¹² Joas, *Genesis of Values*, 36.

⁶¹³ Joas, *Genesis of Values*, 36.

⁶¹⁴ Joas, *Genesis of Values*, 164.

Half a century later and without allusion to any of these predecessors, we again find similar thoughts in the work of Charles Taylor. He makes the connection between the philosophy of value and the theory of self-formation more deliberately than Dewey. To support his argumentation, he enlists, like Scheler, a phenomenology of moral feelings which, however, he never properly carries out. Intersubjective thinking links him with Dewey (and Mead). Taylor deals with the relation of experience and interpretation more sophisticatedly than all the other thinkers under discussion. He refers us to a hermeneutic circle between these dimensions which prevents their being reduced to one pole: interpretation and experience are neither independent of one another, nor are they reducible to one another.⁶¹⁵

What is of particular value for us in this work is the movement of the question of universalization away from the perspective of the actor contemplating action. Universalization, for Joas, could arise in the context of values - as well as in the norm - and here, Joas sees pragmatism as distinguishing between the obligatory 'ought' and the attractive 'value'. Both - for him - contain a universalizable element. We may trace this element back to William James, as Joas describes:

In the work of William James, . . . in which Kant is almost completely ignored, we encountered an abrupt separation of 'religion' and 'morality', in which morality appears exclusively as imperative and restrictive and religion, on the other hand, as attractive, creating possibilities for, and motivating, action."⁶¹⁶

Joas notes Habermas' assumption that the "distinction between norms and values would be invalidated if universal validity is claimed for the highest values or goods" - although this would be "untenable under postmetaphysical conditions" - but he clarifies that his own argument "asserts that the distinction between the restrictive-obligatory and the attractive-motivating is not invalidated under any conceivable conditions."⁶¹⁷

This distinction, the "restrictive-obligatory" and the "attractive-motivating" summarizes what we could say about the contribution that religion can make to the public discourse. It is in religion that we find the possibility of self-formation and self-

⁶¹⁵ Joas, *Genesis of Values*, 163.

⁶¹⁶ Joas, *Genesis of Values*, 166.

⁶¹⁷ Joas, *Genesis of Values*, 184. See also Jürgen Habermas, *Between Facts and Norms*, 257. ("For this reason, postmetaphysical theories of value take into consideration the particularity of values, the flexibility of value hierarchies, and the local character of value configurations.")

transcendence that leads to the formation of - and commitment to - values. Values are the attractive-motivating “mentalities” that underlie and support the state - but which it cannot produce itself - and which enable human flourishing in society.

Neither, however, do we encounter the problematic of a necessary universalization of values in order to apply them generally, although for Joas, this is not so much of a problem.⁶¹⁸ Habermas, as we have noted, has reservations in this regard. He sees particularity of individual values as potentially implicating mere subjective preference, although he notes that we might refer to the matter as “existential decisions about metapreferences”.⁶¹⁹ Here, the religious perspective - and Joas’ thesis on its role in value formation and commitment, rather than choice - would assist to overcome questions of the contingency of values. Maureen Junker-Kenny notes Paul Ricoeur’s approach as “[a]nticipating Joas’s insight that the value systems which support universal moral principles are always particular [as] Ricoeur gives religious convictions an equal standing to positions coming from other backgrounds of thought.”⁶²⁰ In that regard, however, she stresses that any universalism remains inchoate for Ricoeur, continually “validated anew in public debate on the principles and contexts at stake.”⁶²¹

On the one hand, religious values have to undergo the test of their universalizability. On the other hand, their particular origin in a specific religion or experience of self-transcendence cannot be taken from them. Joas points out that our language concepts depend on such experiences, and vice versa, that such experiences are only possible when a cultural stock of existing interpretations is available. Here, we recall Wolterstorff’s warning that nationalistic military and personal economic prosperity concerns will take over once the religious vocabulary has been marginalized.

Most importantly, however, is the *fact* of values and, under the influence of religious experience and tradition, the engendering and renewal of values like love, respect, perseverance, peace, truth, mercy, forgiveness and generosity. Again, against such things, there is no law. Neither, however, can we compel such things *by law*.

⁶¹⁸ Joas, *Genesis of Values*, 183.

⁶¹⁹ Jürgen Habermas, *Between Facts and Norms*, 257.

⁶²⁰ Maureen Junker-Kenny, “Capabilities, Convictions and Public Theology” in *Memory, Narrativity, Self and the Challenge to Think God*, ed. Maureen Junker-Kenny, Peter Kenny (Münster: Lit Verlag, 2004), 153-201, 185.

⁶²¹ Junker-Kenny, “Capabilities,” 185.

2. Religion as Motivation to Continue the Dialogue

The question of motivation to the good is a difficult one in philosophy and ethics. Here, we are concerned with the question of a full participation in public discourse and a striving for the good life - both in the sense of *eudaimonia* as well as in the moral sense - as a citizen in a liberal democracy. What specifically would the religious voice have to offer with respect to motivation to engage and continue in dialogue?

Judge Noonan provides us with a vision of a Creator God in communication with his creation and us, as his creatures.⁶²² This, whether or not we are aware of his communication or whether or not we chose to respond. Theologian H. Richard Niebuhr provides an additional step, however, in his classic work *The Responsible Self*,⁶²³ by which he proceeds first with our response (in either trust or distrust) to the fact that we exist; that we live, and the facts, specifics, and circumstances of our existence.⁶²⁴ Niebuhr characterizes this response to our very existence as inherently religious, the question being whether we respond in trust, distrust, or actual hostility to the idea of a Creator God. From that idea, Niebuhr's prescription for an ethical life in an ongoing dialogue is summed up as "God is acting in all actions upon you. So respond to all actions upon you as to respond to his action."⁶²⁵

For those who respond in trust, momentary set-backs, disagreements and even apparent disasters are all well within the scope of God's possible plan, under his authority, and capable of redemption and the working out for good. The religious voice thereby contains an element of inherent perseverance, as it looks outside itself and its own capabilities and expectations, waiting on and expecting God's continued interventions in the form of responses and actions of others. We have already looked in some detail at ethical judgments in situation, noting what the religious would add in the form of the Golden Rule and the Economy of the Gift. There, too, we noted that it is in the

⁶²² John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* (Berkeley: University of California Press, 1998), 1-2. See generally Brady, "Reflections on the Light," 497-99. See also Paul Ricoeur, "The Summoned Subject in the School of Narratives of the Prophetic Vocation," in *Figuring the Sacred: Religion, Narrative, and Imagination*, trans. David Pellauer, ed. Mark I. Wallace, (Minneapolis: Fortress Press, 1995), 262-75.

⁶²³ H. Richard Niebuhr, *The Responsible Self: An Essay in Christian Moral Philosophy* (San Francisco: HarperSanFrancisco, 1978).

⁶²⁴ See generally Niebuhr, *Responsible Self*, 110-26.

⁶²⁵ Niebuhr, *Responsible Self*, 126.

religious that we find a motivation to continue to engage in the difficult discourse, for example. This motivation would be on two levels, (1) arising out of love for the other and (2) arising out of the desire to respond in trust as to God, in all circumstances, as we observed in the thought of H. Richard Niebuhr. It is not a panacea:

It will not do to say that the analysis of all our moral life in general and of Biblical ethics in particular by means of the idea of responsibility offers us an absolutely new way of understanding man's ethical life or of constructing a system of Christian ethics. Actuality always extends beyond the patterns of ideas into which we want to force it. But the approach to our moral existence as selves, and to our existence as Christians in particular, with the aid of this idea makes some aspects of our life as agents intelligible in a way that the teleology and deontology of traditional thought cannot do.⁶²⁶

Nonetheless, while we are still alive and attempting to live well with one another, it does provide the motivation to continue to engage in discourse, and to attempt thereby to effect redemption and reconciliation of damaged relationships. Niebuhr labels as "the body of death, this network of interactions ruled by fear of God the enemy."⁶²⁷ As Ricoeur and Taylor look to our moral judgments and narrativity as forming our identity and constituting our very selves, so Niebuhr appears to equate our responses to circumstances and others with a similar sense of narrativity, but with respect to our very souls.⁶²⁸ This adds a transcendent element to our interpretive enterprise, involving us on a personal level as witness testifying to the goodness and trustworthiness of God. Niebuhr says it well:

For salvation now appears to us as deliverance from that deep distrust of the One in all the many that causes us to interpret everything that happens to us as issuing ultimately from animosity or as happening in the realm of destruction.

. . . The ethics of death is replaced by the ethics of life, of the open future, of the open society. How this transition from God the enemy to God the friend is made in individual life and in the story of our human race is not the task of Christian ethics as ethics to set forth. For us who are Christians the possibility of making this new interpretation of the total action upon us by the One who embraces and is present in the many is inseparably connected with an action in our past that was the response of trust by a man who was sent into life and sent into death and to whom answer was made in his resurrection from the dead.⁶²⁹

⁶²⁶ Niebuhr, *Responsible Self*, 66-67.

⁶²⁷ Niebuhr, *Responsible Self*, 142.

⁶²⁸ Niebuhr, *Responsible Self*, 142-45.

⁶²⁹ Niebuhr, *Responsible Self*, 142, 143.

Out of the response in religious trust, then, we find not only perseverance and motivation to continue to strive towards what we may best understand as good in relationship with one another, we also find an element of hope and meaning. We take this up next: another element uniquely added by the religious voice to the public discourse, noting also that the addition of hope and meaning being brought to and thereafter arising out of the public discourse in turn - itself - helps supply further elements of motivation to be engaged in the discourse at all.

3. Religion as Adding Hope and Meaning to Public Discourse

It is in Paul Ricoeur's thought that we find the most nuanced development of how the religious voice might add elements of hope and meaning to the public discourse, separate from a corresponding requirement of faith in a specific religious object of hope as, for example, in the resurrection hope of Christianity. Ricoeur's thinking in this regard is Kantian, to the extent that it requires a philosophy of *limits*, and rejects Hegelian absolute knowledge. The development is complex, and will require that we look at this issue in considerable detail.

I start by noting the general acknowledgment that Ricoeur - throughout his career - tended to segregate religious discourse from philosophical discourse, and has continued to emphasize his role not as a theologian, but as a "hearer of the Word."⁶³⁰ In a roundtable discussion in Dublin in 1999, Ricoeur discussed this aspect of his career in terms of the pressures and limitations imposed upon him by his position as a lecturer of philosophy in France:

I am ready to put aside the strategy of merely being a university professor. For when I was still teaching, it was a permanent requirement to be recognized as a philosopher because I was under the pressure of the atheistic trend of French philosophy. I had permanently to justify my existence saying that I was not a "crypto-theologian." But the problem is whether I am not a "crypto-philosopher" in theology; this is the other side of the coin. I put that aside because I am no longer part of the Establishment. I am beyond that. I do not have to justify myself, in order to remain in that position.

⁶³⁰ Paul Ricoeur, "Freedom in the Light of Hope" in *Essays on Biblical Interpretation*, ed. Lewis S. Mudge (Philadelphia: Fortress Press, 1980), 155-80, 157.

In spite of the idea that religious theological discourse should be kept separate from philosophical discourse, and the consensus that that is in fact what Ricoeur had done throughout much of his career until the end, Ricoeur had discussed the relationship of philosophy and theology as early as 1970, in “Hope and the Structure of Philosophical Systems”.⁶³¹

This is a “classical problem,” Ricoeur tells us, and:

Usually this problem is conceived as that of the relation between reason and faith. This relation between reason and faith is itself conceived as a confrontation between the object of reason and the object of faith or, that is, between the God of the philosophers and the God of Jesus Christ; and this confrontation between objects leads to another confrontation between the method of reason and the method of faith or, let us say, between proving and believing.⁶³²

Ricoeur starts his inquiry at the level of hope in order to move the location of the *usual* confrontation (i.e., as quoted above). He proposes the question whether we might see in the concept of hope an “intelligibility of hope” or *intellectus spei*, rather than requiring a determination of hope’s *object* and then debating the hope-worthiness of the proposed object.⁶³³

Ricoeur is proposing a “structural change”, he says, which “could concern what we might call the act of *closing this discourse*”:

In the same way as there is the problem of the starting point in philosophy, as was emphasized by Descartes and Husserl, there is also the problem of the closing point, or better, of the horizon of philosophical discourse.⁶³⁴

This fits within Ricoeur’s view - with Kant - of a philosophy of *limits* and Ricoeur positions hope at this horizon. In this regard, Ricoeur makes clear that he is not proposing an “empty concept” to “oppose to the Hegelian concept of absolute

⁶³¹ From Paul Ricoeur, “Hope and the Structure of Philosophical Systems” in *Figuring the Sacred: Religion, Narrative, and Imagination*, trans. David Pellauer, ed. Mark I. Wallace (Minneapolis: Fortress Press, 1995), 203-16.

⁶³² Ricoeur, “Hope,” 203.

⁶³³ Ricoeur, “Hope,” 203.

⁶³⁴ Ricoeur, “Hope,” 203.

knowledge”.⁶³⁵ Ricoeur finds that a philosophy of hope may be set alongside Kant’s “transcendental illusion” of the *Critique of Pure Reason*, “which occupies the place of the Hegelian concept of absolute knowledge.”⁶³⁶

The “first step of a philosophy of hope”, then, is the placing of a limit as to what can be known. Ricoeur extends this limit also to atheism in an interesting turn:

[T]hrough this interpretation [of limits, and against absolute knowledge], atheism may be cured from another illusion, from its own illusion, the illusion that puts humankind at the center and transforms it into a new absolute. The thought of the unconditioned prevents us from this last illusion, which we could call the anthropological illusion.⁶³⁷

Still, Ricoeur denies that a philosophy of limits *closes* philosophical discourse. Instead, it “breaks the claim of objective knowledge to close it at the level of spatio-temporal objects. The limit is an act which opens, because it is an act which breaks the closure.”⁶³⁸

Ricoeur traces a similar break with respect to the will, in his next step through Kant’s *Critique of Practical Reason*, and the nature of highest good. Here, Ricoeur emphasizes the nature of the relationship between virtue and fulfillment of the will, recognizing that “[t]he will requires a kind of unconditioned totality that is not fulfilled by the concept of duty or of moral law but only by the synthesis of virtue and happiness”.⁶³⁹ This relationship, Ricoeur describes as a *Zusammenhang*, which “must remain a transcendent synthesis between the work of humankind and the fulfillment of the desire that constitutes human existence.”⁶⁴⁰

Only now does Ricoeur come to Kant’s last work, *Religion within the Limits of Reason Alone*. He emphasizes the need, first, to have focused on the limits found through the question of transcendental illusion and that of the antinomy between virtue and

⁶³⁵ Ricoeur, “Hope,” 215.

⁶³⁶ Ricoeur, “Hope,” 212.

⁶³⁷ Ricoeur, “Hope,” 213.

⁶³⁸ Ricoeur, “Hope,” 213.

⁶³⁹ Ricoeur, “Hope,” 213.

⁶⁴⁰ Ricoeur, “Hope,” 214.

happiness (or fulfillment) and the transcendental *Zusammenhang* he sees being worked out during the course of the human enterprise:

If we had omitted the preparatory stages - the critique of transcendental illusion, the paradoxes and antinomies of practical reason - we should have been tempted to oppose to the Hegelian concept of absolute knowledge an empty concept of belief or of hope. Indeed the last book of Kant has too often been viewed apart from the whole structure of a philosophy of the limits. It is only against the background of the whole system that the main doctrine of this book can be understood.⁶⁴¹

Accordingly, it appears that, for Ricoeur, it was necessary to move through a philosophy of hope before the Hegelian concept of absolute knowledge could be opposed by anything more than “an empty concept of belief or of hope.”⁶⁴² Having situated the limits of the horizon of possible philosophical discourse in (1) as to what we might know and (2) similarly, as to what we can will, Ricoeur looks to these limits not as the place where discourse is *closed*, but rather where we might see an opening of the space, having broken any further attempt to fix and determine all that might be seen or willed. The question remains from Kant’s *Religion Within the Limits of Reason Alone*, namely “What can I hope for?” which Ricoeur sees at the center of this moral inquiry, in search of meaning.⁶⁴³

In light of Ricoeur’s comments about the need to consider Kant’s philosophical and religious work together and his position on a philosophy of limits, it seems ironic that Ricoeur decided not to publish his own more theologically oriented lectures⁶⁴⁴ that formed part of his 1986 Gifford Lectures in *Oneself as Another* - which featured the rest of the Gifford Lectures. At the time, he explained in his introduction, “the Question of Selfhood”:

The primary reason for excluding them, which may be debatable and even perhaps regrettable, has to do with my concern to pursue, to the very last line,

⁶⁴¹ Ricoeur, “Hope,” 215.

⁶⁴² Ricoeur, “Hope,” 215.

⁶⁴³ Ricoeur, “Freedom in the Light of Hope,” in *Essays on Biblical Interpretation*, ed. Lewis S. Mudge (Philadelphia: Fortress Press, 1980), 155-81, 177.

⁶⁴⁴ Entitled “The Self in the Mirror of the Scriptures” and “The Mandated Self.” Subsequently, “the Mandated Self” appeared as “The Summoned subject in the School of the Narratives of the Prophetic Vocation” in Paul Ricoeur, *Figuring the Sacred: Religion, Narrative, and Imagination*, trans. David Pellauer, ed. Mark I. Wallace (Minneapolis: Fortress Press, 1995), 262-314.

an autonomous, philosophical discourse. The ten studies that make up this work assume the bracketing, conscious and resolute, of the convictions that bind me to biblical faith.⁶⁴⁵

There is a difference between the “bracketing” of biblical faith convictions and the effective appropriation of biblical and theological themes. One wonders how Ricoeur’s thought would have been enriched had he earlier reversed this course. Christian Ethicist John Wall, in his article “Moral Meaning: Beyond the Good and the Right,” emphasizes the importance of the theological to Ricoeur’s work but sees difficulties in how the theological has, so far, been applied by Ricoeur:

My own view is that theological considerations play an important role in Ricoeur’s ethics, but that their role is not a *mediating* but rather a *limiting* one. As I have argued elsewhere, and as other essays in this volume suggest, Ricoeur’s theological ethics functions as a *radicalization* of ordinary, philosophical ethics on all three levels of the good, the right, and their mediation with one another. Hope is not the only theological ethical category, but is part of what Ricoeur calls an “economy of the gift”. . . .⁶⁴⁶

One thereby suspects that for Wall, hope remains in Ricoeur in part an “empty” category. In fact, Wall calls the inquiry a *theology* of hope while pointing out the result of what he sees as Ricoeur’s failure systematically to address what arises out of the dialectical tension between the good and right:

This has led to a common misperception of what Ricoeur’s ethics is really all about, namely the view that he is finally a Kantian after all who mediates the good and the right, happiness and duty, in a *theology of hope*. By acting according to duty, Kant argued, I can hope, as a philosophical postulate, for the reward of happiness from God in the afterlife.⁶⁴⁷

We have examined Ricoeur’s arguments against the very position Wall describes as a “common misperception”, and we should also note that Kant’s hope was not about “reward . . . in the afterlife”, but about meaning. Moreover, Ricoeur is attempting to work out a *philosophy* of hope, which takes him through Kant’s 1st and 2nd Critiques,

⁶⁴⁵ Ricoeur, *OA*, 23-24.

⁶⁴⁶ John Wall, “Moral Meaning: Beyond the Good and the Right,” in *Paul Ricoeur and Contemporary Moral Thought*, ed. John Wall, William Schweiker, and W. David Hall (New York: Routledge, 2002) 47-63, 55 (citing John Wall, “The Economy of the Gift: Paul Ricoeur’s Significance for Theological Ethics,” *Journal of Religious Ethics* 29, no. 3 [sic] [no. 2] (summer 2001): 235-60).

⁶⁴⁷ John Wall, “Moral Meaning,” 55.

before coming to Kant's *Religion Within the Limits of Reason Alone*. Ricoeur emphasizes that it was necessary to take this journey and not just go directly to Kant's last work because:

[B]y this way of jumping directly to the end we should miss the target, which is not to locate somewhere the theme of hope, as an ultimate theme, but to understand how it belongs to the structure of the system. Hope is not a theme that comes after other themes, an idea that closes the system, but an impulse that opens the system, that breaks the closure of the system; it is a way of reopening what was unduly closed.⁶⁴⁸

Hope remains for Ricoeur a fertile ground both theologically and philosophically. Once again, it is the fact of evil that Ricoeur sees as presenting a turning point:

[E]vil requires a nonethical and nonpolitical transformation of our will, which Kant calls regeneration; it is the task of "religion within the limits of reason alone" to elaborate the condition of possibility of this regeneration, without alienating freedom either to a magical conception of grace and salvation or to an authoritarian organization of the religious community.⁶⁴⁹

Ricoeur continues to differentiate between the potential zones of the operation and interaction of hope, namely both philosophically and theologically. For Ricoeur:

The problem of hope, as compared to that of faith, is less the problem of a specific object than that of the finality of philosophical and theological discourse. Philosophy and theology are concerned with hope in the way in which both are related to their respective closing point or horizon.⁶⁵⁰

Thus, theology's task is to "understand" and present "hope as the anticipation through history of the resurrection of all from among the dead" - both an irrational understanding, to the extent that hope calls for life *in spite of* death and rational, to the extent that we may thereby argue that hope asserts a "new law, the law of superabundance, the superabundance of sense over nonsense."⁶⁵¹

Hope's *philosophical* enterprise is seen by Ricoeur as equivalent to the dialectic of freedom and actualization, a conclusive dialectic for Hegel, but a nonconclusive one for

⁶⁴⁸ Ricoeur, *Hope*, 211.

⁶⁴⁹ Ricoeur, *Hope*, 215.

⁶⁵⁰ Ricoeur, *Hope*, 215.

⁶⁵¹ Ricoeur, *Hope*, 215-16.

Kant. Ricoeur finds the Kantian nonconclusive dialectic to have “more affinity with a theology of hope, that is, with an interpretation of Christianity for which hope cannot be overcome by absolute knowledge, by gnosis, and for which therefore hope opens up what knowledge claims to close.”⁶⁵² Accordingly:

Between a philosophy of hope and this kind of nonconclusive dialectic, there is not only a relation of correspondence, which still remains a static relation, but a dynamic relation, which I call a relation of approximation [by which] I mean the effort of thought to come closer and closer to the eschatological event that constitutes the center of a *theology* of hope.⁶⁵³

Ricoeur does not anticipate that these two - the theology of hope and the philosophy of hope - should become co-extensive, therefore. It would appear to be in the tension of the dialectic that the category of hope is ever renewed. Indeed, for Ricoeur: “The theme of hope has precisely a *fissuring* power with regard to closed systems and a power of *reorganizing* meaning. . . .”⁶⁵⁴ It is in the hope of regeneration that the religious voice may contribute to public discourse, a renewing effect presently, redemptively as to the past, and hope into the future, in an eschatological orientation.

SUMMARY

We began this chapter by examining the pre-political foundation of the state, noting that the state neither generates nor renews the values it depends upon, and we examined which values are implicated as well as explored how they are generated, through the thought of Hans Joas. There, we discovered the connection between religious and self-transcendent experience as generating and renewing values.

Following our review of the separation between church and state - the reasons for and the methods of - we concluded that a religiously neutral state does not have to mean a secular state, and the non-establishment of religion does not have to mean the silencing of the religious voice. We have examined Jürgen Habermas’ openness to an increased role of religious citizens in public debate, and taken note of some barriers imposed by questions of translation. It has been the religious that has had to be translated to the

⁶⁵² Ricoeur, *Hope*, 216.

⁶⁵³ Ricoeur, *Hope*, 216 (emphasis supplied).

⁶⁵⁴ Ricour, *Freedom in the Light of Hope*, 167.

secular in order to participate in the public sphere, but more recently calls have been made for both sides to engage in a translation effort.

We turned to what the religious voice will add to the public debate and, along with the generation and renewal of values to sustain the state, we explored the question of motivation to continue the dialogue following the thought of H. Richard Niebuhr and his response ethics in *Responsible Self*. Finally, we returned to Ricoeur, to investigate the category of hope, and how the religious voice adds hope and meaning to public debate.

We will conclude here with the unique perspective that the Christian God who creates everything brand new brings to bear on a society struggling - and so often failing - to identify and live the "good" life, as well as trying to do the "right" thing. It is in this renewal - this promise of an ability to start again - that the unique province of the Christian message is heard. We trace this new start and repeated renewal invitation to Ricoeur's interpretation, oriented by Kant and Hannah Arendt, of creation as *originary* good, and people as created good in the sense of natality as an ever-new beginning and creation.

It is left, then, for us to conclude how the religious might contribute to ethical and legal discourse, a discourse which inevitably arises out of the disappointed or defaced originary good, and includes questions of evil, wrongdoing, forgiveness and reconciliation. Insofar as these are traditional categories within the Christian faith, one would think it would be hard to frame an argument justifying the silencing of centuries of study, prayer and the very lives of faith that have sought to work out these very problems, along with the voices of those who embody and inhabit that faith tradition today. And yet, the religious voice is so often silenced or simply silent in a liberal democracy that has confused 'neutral' with 'secular' and persists in consigning the deepest-held convictions to the 'private' and 'personal'.

CONCLUSION

We have completed our study, which started with the problematic of the limits of law understood in Kantian terms as a justified framework for the interaction of citizens, but limited to external legality. Its exercise presupposes, on the one hand, agents capable of imputability and, on the other, a striving to live in just institutions. Both dimensions are brought together in a culture of values and convictions which concretize and guide our practical judgments on how to treat others as ends in themselves, in specific cases. Rephrased by Ricoeur, the making and application of just laws presupposes respect for the singularity also in the hard case of the delinquent, and hope in the possibility of forgiveness. The quest for hope and meaning turned out to be an ineradicable dimension for renewing the will to live together and, as Habermas emphasizes, to learn from each others convictions.

It remains to conclude by summarizing our findings and suggesting the next step or steps to be taken.

We have seen that liberal democracy depends on values to sustain it, values which it does not - and can not - produce *or* renew. The values necessary to sustain a democratic state are produced in experiences of self-formation and transcendence, often within a religious context. The silencing of the religious voice in the public space undermines the continued generation and renewal of the very values necessary to sustain the democratic state, in that we have not realized the expectation of a transmission of privately-generated values to the public realm outside of religious language and analogy. We may see, as I have tried to show, the breakdown of value transmission and value renewal in the proliferation of laws and assertions of rights in an attempt to control, pre-determine, and mandate the 'good' and 'right' behavior in ourselves and fellow citizens in the alleged absence both of our ability to exercise autonomous self-legislation, and of trusting citizens with the ability to seek sources of renewal for their motivations.

Although a "separation" between church and state may have been borne out of the legitimate desire to protect an individual's freedom of religious conscience, a

religiously-neutral state does not have to mean a secular state, and the ‘non-establishment’ of religion does not have to mean the silencing, marginalizing, or banishment of religion from every public space. Accordingly, we may continue to call for the inclusion of the religious voice in public debate, and gently to insist on continuing to speak in a religious framework while facilitating efforts to ensure greater mutual understanding between believer and nonbeliever.

The solution proposed by Paul Ricoeur to reconcile the deontological turn of ethics with its teleological aim - in a two-step theory ending in a critical *phronēsis* - is also promising as a means by which to resolve the aims of law and ethics where they may diverge, especially in the “hard” or tragic case. In both instances, recourse to the religious by means of enriching the ethical and legal discourse will prove helpful, especially the religious insight of the Golden Rule, Ricoeur’s concept of superabundance generated by the economy of the gift, and images of redemptive suffering, forgiveness and reconciliation. We may thereby hope not only to re-establish connection with the values necessary to sustain our liberal democracy and its rule of law, but also towards re-vitalizing our conception of the narratives that sustain self-formation and transcendence.

The alternative, especially in the United States, would appear increasingly to be a utilitarian approach, devolving to an economic cost/benefit formula. Such an analysis, however, undermines the very foundation of liberal democracy of a government by the people, *for* the people, and would attempt to substitute market and financial forces for the incommensurable uniqueness of the human person, in all her autonomy. It is the religious that uniquely focuses the attention once again onto an originary good and provides a framework by which to work out self-formation and transcendence in the context of striving for the good life with and for others, and in just institutions, as well as options for rehabilitation and restoration in failed, strained, or momentarily fragmented life narratives.

In the past, we have seen that Ricoeur segregated religion from discourse on the philosophical level, on the grounds that a philosophical stance should be articulable apart from the religious. Insofar as the philosophical would be seen in his view to inform the ethical, moral, legal, and political levels, we may see that this effectively

silenced the religious voice in general conversations outside of religious auspices. At the end of his career, however, Ricoeur invited (or at least recognized the need) for renewal on all these levels, by means of recommitment to values in the form of renewed conviction, or perhaps it is by a forgiveness that breaks in from the outside, following Lévinas.

Where, then, does our study leave us? I see it as having reconnected a hermeneutical circle from the level of striving (with and for others, in just institutions) to the good, as restricted by passage through the moral 'ought' (as required by evil expressed as the threat of violence), and as further refined by the tragic, in which incommensurable values present the case where apparently there is *no* one 'good' - or 'right' - answer. It is here that Ricoeur has presented a practical wisdom leading to conviction, the critical *phronēsis* we have investigated. This approach also implicates principles of *value*, arising out of religious and self-transcendent experience, and as constitutive *of* the self, as one experiences this process.

What seems quite helpful here as well is Hans Joas' reminder that the law - and morality - should function only as a 'safety net'. In this regard, how could moral theory and the law effectively cooperate to minimize their application to the proper sphere? Perhaps it is in dialogue - and even adversarial dialogue - that this task may be undertaken, in which the jurists and the moral theorists continue to wrestle with questions of proper level and scope of intervention. The role of the religious voice would here be appropriate as a reminder of the possibility of forgiveness, reconciliation, and redemption in the "logic of superabundance" Ricoeur describes arising out of the tension and mutual reference between the Golden Rule and the commandment to love.

Joas implicates the need perhaps for a new word for what Ricoeur is making of 'practical reason'. Since *phronēsis* is borrowed from Aristotle's thought, it might retain too much of the teleological emphasis for our purposes. In any event, as we have seen, Joas emphasizes that 'practical reason' takes on the attributes of the philosophical orientation employing it. Ricoeur uses "practical wisdom" or a "critical *phronēsis*" to describe this process in his own thought, but I suggest that a more exclusive defining

term may be needed, in order adequately to signal the unique and comprehensive approach Ricoeur has formulated.

Our study thus began with the suspicion of the limitation of law in the matter of ethical values and moral obligations which ought to underlie it, but which increasingly have been seen to arise out of the law. Having reached the end of this study, I conclude that the law is limited in this respect: like the state that empowers it, it appears that the law is dependent upon presupposed mentalities which it neither generates nor renews. Observing what appears to be a diminishment in the effectiveness of moral and ethical reflection on the part of the moral subject, we may also conclude that the need to address this integral relationship is becoming more urgent.

It will, however, remain for another undertaking to study the practical application of a Ricoeur's critical *phronēsis* as between law and ethics. Ricoeur himself had called for an increased study in applied ethics, noting that "the sole means of giving visibility and readability to the primordial ground of ethics is to project it onto the postmoral plane of applied ethics."⁶⁵⁵ In our study here, I would call also for the reminder that applied ethics in a particular field - here, the law - also implicates the praxis of that field. This may address one of the apparent suspicions of Judge Posner, namely that the moral theorists seek to supplant the law altogether - effectively an illegal enterprise. To that end, we must give the proper scope also for the practice of law *qua* law. If the proper moment for and operation of each is retained, law, ethics, *and* the renewing elements of religious insight, then we may have taken the next step towards realizing the complex human project Paul Ricoeur laid out so well.

⁶⁵⁵ Paul Ricoeur, "From the Moral to the Ethical," in *Reflections on The Just*, trans. David Pellauer (Chicago: University of Chicago Press, 2007), 45-57, 52.

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