

# The Legal Ethics of Belonging

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It is noteworthy that the story of Hagar and Ishmael is the Reading for the First Day of Rosh Hashanah; while the next chapter, the intended Sacrifice of Isaac, is read on the Second Day. The highest manifestation of the Divine is not to be found in the calling into existence of Nature's elemental forces; far higher are God's ways manifest in the hearts and souls of men, in the home life of those who do justice, love mercy, and walk humbly with their God.<sup>1</sup>

## I. THE LEGAL ETHICS OF PARTICIPATION

Socrates went around Athens telling law teachers and law students that their highest concern should be to be good people. And, he said, the next and consequent concern of the profession should be to show the citizens of Athens how to be good people. For Socrates, as for virtually all of classical moral philosophy and much of Jewish and Christian moral theology, ethical discussion is discussion about the good person. When we talk about Aristotle's man of practical wisdom, or when we talk about heroes, saints, role models, paragons, or professional exemplars, it is the good person we are talking about. The ethics that supports such moral talk is founded in disciplined curiosity about the good person. In this way, traditional ethics informed those who taught the young. It showed teachers how to hold up the good person as a coherent object of admiration and a coherent source of moral standards.

There is a difference between the good person, as a source of moral standards, and ethical reflection on right and wrong actions. The difference is of considerable importance to modern professional ethics—to legal ethics, I think. Our little corner of the modern academic enterprise hardly knows what to say about good people. It hardly knows, and so it says nothing about goodness but a lot about freedom and autonomy.

Virtually no one talks about *clients* as good people. The assumptions in legal ethics are that the most lawyers can want for their clients is isolation and independence; that clients want lawyers to do wrong actions; that many lawyers obey their clients and do wrong actions for them; and that what legal ethics is about is whether lawyers should refuse to do the wrong actions clients want them to do.

So much for clients being good people. What about *lawyers* being good people? Most of us who make our living from professional ethics do not study or write about or teach about good lawyers. We write, study, and teach about the *acts* of abstract, depersonalized lawyers: right acts and wrong acts, and whether certain hypothetical

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1. J. HERTZ, *PENTATEUCH & HAFTORAHS* 73n. (2d ed. 1960) (comment on Genesis 21:33). The late Dr. Hertz was Chief Rabbi of the British Empire.

acts are right or wrong. Not people who are described or imagined, but acts of people who are treated as if they do not have personalities. In this way of thinking, an act is considered interesting for ethics because an act is the result of a choice; a choice is interesting because it is the result of a quandary—a dilemma. This kind of ethics pauses over dilemmas. So common is the presentation of the dilemma as a device for discussion in our subject that the phrase “ethical dilemma” is spoken as if it were one word.

Legal ethics presents some remarkably crude manifestations of the exaggeration of acts, choices, and quandaries, but the condition is general in most academic consideration of morals. Consideration of goodness (which is a characteristic of people) is obscured by consideration of rightness (which is a characteristic of acts). An act is right or wrong, and if what you study in ethics is right and wrong, you will study acts, the choices that produce acts, and the quandaries that produce choices. Then, if you are a standard-issue professional-responsibility teacher, you will stop. You will, then, have behaved as if a human being is a *chooser*. It is not interesting to ask what makes a human being what he is, or to seek his particular moral quality. Ethics is defined and confined to choices. Whatever it is that prepares a person for choices will be beyond the stopping place, beyond the ken of legal ethics.

For all practical purposes, an act-based ethic defines the person as the result of choices. Choices are the products of quandaries. Ethics on this model often does not ask where the quandaries come from. And act-based ethics shows less interest than you might expect in the poetic suggestion that human choice is inexplicable, in the mystery of what a human person is, in how a human person comes to be what she is, or in how she might become something else. The concern of classical ethics, theology, and literature for the good person has become more or less irrelevant for legal ethics. What legal ethics is concerned about is the right act.

We who make our living from “professional responsibility” benefit from this fixation. That is probably why there is such a fixation. Teaching act-based ethics is like teaching the law of property: When you finally master the rule against perpetuities, you oppose repealing the rule. You might even write a law review article, as the late Professor Lewis Simes did, entitled “Is The Rule Against Perpetuities Doomed?”<sup>2</sup> Focusing on the act in ethics has familiar comfort for us, and it provides a number of tactical advantages. For example, focusing on acts lets a scholar use people interchangeably—as if they were, for purposes of ethics, all alike. If people are defined as choosers, they are not as interesting as their choices. We teachers then encompass our subject, as the Multistate Professional Responsibility Examination does, with machine-graded, multiple-choice questions.

We pose subjects for classroom discussion in the form of “cases” or “problems” in which people can be represented, as they are in property casebooks, with letters: A, an attorney, represents C, a client, in a personal-injury lawsuit against D, a manufacturer of electric heaters, who is represented by L, a second lawyer, and so on. Our subject, thus brought under control, is marketable. Its principles are

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2. Simes, *Is the Rule Against Perpetuities Doomed? The “Wait and See” Doctrine*, 52 MICH. L. REV. 179 (1953).

reduced to codes. It is written about in generic law review articles in which the subject is not people but public policy. It is examined nationally, in terms that divert the gaze from the quirky little differences we find in those we know. This generality allows us, then, to talk of ethics in terms of principle; we can talk about what lawyers do for and with people as “the administration of justice,” for example. Acts push people into the background, a circumstance that works well for our lesson plans and our test questions.

We do not deny, in our subject, that the person is significant. Even teachers of legal ethics read, see, hear, and tell stories about persons. But one person will do as well as another for law school course work, including legal ethics. We seem to have decided that it is an incoherent question (or might as well be) to ask what a person is. What is coherent is that a person makes choices—and so “person” is coherent only as that which makes choices. (What is a choice? It is what a person makes.) The person who makes choices is then coherent as an example of *naked will*, and each naked will is like all the others.

Notice, please, the irony in what has happened to people in this act-centered way of thinking. They have become fungible, interchangeable with one another, because we have not been interested in who they are. We have confined our interest to what they choose. And then, in order to safeguard their choices as objects of our study, we have separated them from one another—each chooser apart from all other choosers. Otherwise their choices might not be their own. We have insisted on defining the excellence of people in terms of separation. Each of them is a chooser, a self-ruling, free chooser. We have isolated each one. We treat each of them as alone. The person is, for purposes of our ethics, alone but not unique—a choosing machine that runs itself.

What I want to try to do in these lectures is to revive the relevance in legal ethics of the good person. I hope then to be able to consider, in your company, both of us then being in the company of the revived good person, two questions that modern American legal ethics seems almost unable to contemplate. One of these questions is the primacy of human relationships, the fact that we people are connected to one another, and connected radically (at the roots). We belong. It is not that we belong—that we are connected—because of our choices, but that we make the choices we do because we are connected. We belong before we make choices; we make the choices we make because we belong.

I do not mean anything arcane when I say “belong” or “connected.” I mean ordinary, daily, backyard belonging in neighborhood, town, religious congregation, and among friends—associations that we choose far less clearly than we think we do; and family, race, and ethnic group—associations that we do not choose at all. These two kinds of associations illuminate one another; we learn, by comparing them, that neither kind of association is the product of choice, that choices are the products of both kinds of association. I do not mean to deny that we in some way choose our connections; but I mean to say that we belong before we choose to belong. I mean to say that belonging is significant whether we choose it or not. We persons are something more than, deeper than, choosers.

I mean to argue, as Saul Bellow's Augie March did, that first you are and then you choose to be, and that this situation is the human condition. We are not primarily choosers; we are primarily members—and that means *we are not alone*. “All the influences were lined up waiting for me,” Augie said. “I was born, and there they were to form me, which is why I tell you more of them than of myself.”<sup>3</sup> Augie was a poor Jewish boy of my generation; he speaks here of growing up in Chicago. He said:

I know I longed very much, but I didn't understand for what . . . Friends, human pals, men and brethren, there is no brief, digest, or shorthand way to say where it leads. Crusoe, alone with nature, under heaven, had a busy, complicated time of it with the unhuman itself, and I am in a crowd that yields results with much more difficulty and reluctance and am part of it myself.<sup>4</sup>

The second question I hope to be able to consider with you, after trying to revive the good person, is whether our moral choices are like the “cases” in our legal-ethics casebooks. Are our moral choices decisions we make after some neutral mental agency within each of us establishes the facts and states the considerations? The common way of “doing” professional ethics poses sets of facts and arguments that are gathered out of observation and experience and then presented to the will, so that the will can reach a moral choice on them. I want to suggest to you that our moral quality is more pervasive than that and that it functions in what we see and remember and know more radically than it functions in what we choose. If I succeed at opening up this second question, I will persuade you to nod in agreement at something the philosopher and story teller Iris Murdoch said:

Will and reason are not entirely separate faculties in the moral agent. Will continually influences belief, for better or worse, and is ideally able to influence it through a sustained attention to reality . . . As moral agents we have to try to see justly, to . . . curb imagination, to direct reflection. Man is not a combination of an impersonal rational thinker and a personal will. He is a unified being who sees, and who desires in accordance with what he sees [who sees in accordance with what he desires], and who has . . . control over the direction and focus of his vision.<sup>5</sup>

*Seeing* is a moral act, she says. *Seeing* is a moral art.

I am not going to prove any of this. What I am going to try to do is to show you one kind of human relationship and invite you to notice that our connections determine the facts we see, or fail to see; the reasons that occur to us; and the choices we say we are making for ourselves and for our clients. I hope to examine with you what I want to call the legal ethics of belonging. I hope to rely on your concluding that our communities prove that we do not act alone—the human person is not an imperious, autonomous will, a lonely governing self, an isolated individual, choosing his singular moral way. That is my ambition on the first question. My ambition on the second question is to show that, as our communities talk us out of the impression

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3. S. BELLOW, *THE ADVENTURES OF AUGIE MARCH* 89 (1953) (Crest ed. 1965).

4. *Id.*

5. I. MURDOCH, *THE SOVEREIGNTY OF GOOD* 41 (1970) (Ark. ed. 1985).

of isolation, they will also disprove the notion that our facts and our morals are separate.<sup>6</sup>

Anthropology, the study of what people are, is a place to begin to describe the ethics of belonging. And, fortunately for me, a recent and compelling piece of anthropology comes to hand in Carol Greenhouse's study of the Baptists of "Hopewell," Georgia. Her recent book<sup>7</sup> describes the way members of a Baptist congregation in a suburb of Atlanta deal with their disputes. It is a study of justice and of the home life of those who do justice. Greenhouse looks at morals in a community. She begins with the common-sense observation that a person's morals come to light in the way he explains and justifies what he has done. She sees the person not as a chooser but as an explainer.<sup>8</sup>

Greenhouse shows that the critical feature in an explanation of behavior is that the explainer claims to be in a community. He explains himself by saying what he is; when he says what he is, he is saying that he belongs in a community. A person comes up with one explanation rather than another, Greenhouse says, "and thereby identifies with one group over another."<sup>9</sup> This way of looking at morals is not novel, but it is neglected. Greenhouse claims to have found in a modern American community what Alexis de Toqueville described as the American dream—"a society built not on obedience" nor on choice, "but on participation."<sup>10</sup>

Greenhouse distinguishes between rule and explanation. Rule relates to act, choice, and dilemma. Explanation relates to belonging. She talks to one of these Georgia Baptists and asks him, for example, why he did not stand up for himself in a family quarrel. He answers by saying it is because he is a Baptist. His explanation is membership. It comes, Greenhouse says, from a "we-feeling"<sup>11</sup>—the feeling this person gets when he looks to the left and to the right and says to himself, "I am one of these. When I speak of these, I can say we." And that *feels*—if you will pardon the word—*right*. It is not the case that I belong because I am right, but, rather, I am right because I belong.

As Michael Novak explains it, when discussing the ethics of immigrant communities, this saying "we" is not really a choice; it is not so much the conscious joining of a group as it is the recognition, often the emotional recognition, that says I have come home. There has been provoked in me a sense of being at home. First we remember that we are members; then, in some way or other, we choose to be members. Choice is secondary.<sup>12</sup>

6. I have attempted this agenda before in Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987). I aim to develop aspects of a single theme in that essay, these lectures, and my recent article, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988) [hereinafter *Adversary Ethic*].

7. C. GREENHOUSE, *PRAYING FOR JUSTICE—FAITH, ORDER, AND COMMUNITY IN AN AMERICAN TOWN* (1986).

8. *Id.* at 23–37.

9. *Id.* at 25.

10. *Id.* (quoting A. DE TOQUEVILLE, *DEMOCRACY IN AMERICA* (G. Lawrence trans. 1969)).

11. *Id.* (quoting J. HUIZINGA, *AMERICA: A DUTCH HISTORIAN'S VISION FROM AFAR AND NEAR* 277 (H. Rowan trans. 1972)).

12. *Id.* (discussing HUIZINGA, *supra* note 11, at 277). See generally D. CARR, *TIME, NARRATIVE, AND HISTORY* 122–52 (1986); GREENHOUSE, *supra* note 7, at 23–42. The alternative way of accounting for associations—that they are

The we-feeling is an emotion. That does not disqualify it from reality, not even in law school discussion, but it does raise the question of whether the we-feeling is also rational. Is it something that can be thought about among those who feel it, something they and we can discuss? Greenhouse and I answer "Yes." We argue that the we-feeling is an ethical event, as well as a moral event. It accounts for morals by describing them in terms not of acts, choices, and dilemmas, nor of rules chosen to govern choices, but in terms of explanation. The we-feeling accounts for and clarifies morals in terms of explanations for morals. It identifies explanation in terms not of autonomous, self-governing choices, but in terms of where we belong.

The actions that students of applied ethics describe and ponder are being described here by one who claims she can "see society's heart in its mind," who probes "not rules but the ideas that people find compelling and on which they base [or try to base] their conduct as a matter of course."<sup>13</sup> These "ideas" are not rules or laws; they are "normative ideas apart from those backed [by] coercive threats."<sup>14</sup> They are notions, influences that form persons, as Augie March said, and they are prior, in time and in potency, to the rules and principles that are backed by deduction, logic, scripture, or coercive threat. These influences from belonging limit us, but they are not primarily limits on behavior so much as they are limits on interpretation.<sup>15</sup> Belonging explains reality.

How do these interpretations seem to come about in a person's consciousness? They are, Greenhouse says, first "a current of yearning and regret in people's private lives," and then "understandings of . . . personal responsibilities in their social relationships."<sup>16</sup> Greenhouse's work is a study of the way justice works. Her way of describing a person in his community puts meaning and value on disputes and what the person in his community does about disputes. This meaning and this value—which are matters of belonging before they are matters of obeying—are the actor's and the actor's community's *legal* anthropology. Greenhouse's work is focused on dispute resolution. Her insight is that the Baptists of "Hopewell" hold themselves together in a selective memory "that consists of silencing old disputes" and thus accounts in significant ways for "the ethic of harmony that silences new ones."<sup>17</sup> Her anthropological point is that the community's memory<sup>18</sup> combines with its perception of order to provide an explanation to members of the community for what they do

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created by the choices of their members—can succeed only by ignoring most organic communities, that is, by ignoring the neighborhoods, families, and religious congregations that most of the time will show us why we do what we do.

13. GREENHOUSE, *supra* note 7, at 31.

14. *Id.*

15. *Id.* at 33.

16. *Id.*

17. *Id.* at 26–27.

18. By memory I mean the way such a community accounts for its past—its collective history. Greenhouse notices that such a memory is inevitably selective. As much is ignored by the community in its history as is claimed for memory. See M. Ball, *Constitution, Court, and Indian Tribes*, 1987 AM. B. FOUND. RES. J. 3 (showing that the history of legal mistreatment of Indians in North America is the product of our (white) culture's selective inattention to original European injustice). Much of American legal ethics is explained by the fact that our professional forebears said this country was (in Thomas Jefferson's phrase) "God's New Israel," and that it was as well a nation governed by law and not by men. See T. SHAFER, *FAITH AND THE PROFESSIONS* ch. 5 (1987). The point is sometimes encompassed in discussions of "the philosophy of history." See generally D. CARR, *TIME, NARRATIVE, AND HISTORY* (1986).

when they quarrel, or refuse to quarrel, with one another.<sup>19</sup> When a person uses such an explanation he shows himself to be formed by the memory and present order of a community. He recognizes and explicates his membership. The ethical point I take from Greenhouse is that such an anthropology gives access to the morals of the person, access that leads to realities that are descriptions of the person's actions and of the rules he claims or appears to follow.

Greenhouse was particularly concerned with dispute resolution and therefore with process and the collective explanation of process, as well as individual explanation for conflict and the avoidance of conflict. The individual relates to the collective as the individual claims membership in the collective and by that claim adopts its ways of explaining both collective and individual behavior.

Greenhouse had an interest in order, in government in the broadest sense. Her analysis of culture claims to go behind the usual anthropological description of justice. The usual anthropology describes justice in terms of cases, disputes, and assertions of rights. Justice brought to bear on cases, disputes, and assertions is described in terms of rules and bodies of rules. The ethics of belonging (my term, not Greenhouse's, although I think I am faithful to what she means) claims, even when the agenda is order in the community, that social life is not organized by rules, but that rules are constituted by social groups. Rules come from a primary social order. Rules do not motivate collective behavior—do not motivate even what we lawyers call procedure—because there can be no rules until there are rule-makers, and rule-makers cannot come to their rule-making task with uncolored rationality.

I propose to apply Greenhouse's conclusion to legal ethics. There is current and, as I perceive it, growing effort among legal scholars to make in jurisprudence the argument Greenhouse makes in anthropology. Sanford Levinson's new book, *Constitutional Faith*,<sup>20</sup> seems to rest on a perception of belonging in America—belonging to America, as if America were a community of memory and of explanation, which explanation is stated in a peculiarly central way in the federal Constitution. The anthropology for such a claim involves, I suppose, the demonstration of enduring communal strength in America—the sort of thing Robert Bellah and his associates claim to have accomplished in their recent *Habits of the Heart*.<sup>21</sup>

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19. See generally S. HAUERWAS, *THE PEACEABLE KINGDOM: A PRIMER IN CHRISTIAN ETHICS* (1983); J. YODER, *THE PRIESTLY KINGDOM: SOCIAL ETHICS AS GOSPEL* (1984). A theologian might pause here to notice that Carol Greenhouse was studying a community that claims to be *the* church, the people of God. From a theological point of view, the fact that the Baptists of "Hopewell" deny conflict now and explain themselves with an untruthful memory of the conflicts of the past is dissonant. A theologian would say, I think, that an indication of the church's faithfulness to its mission is its ability to be truthful about its past and its ability to tell the truth about conflict now. Greenhouse is safely within her discipline when she looks at "Hopewell" and says that "no culture is without its contradictions"; a theologian would not deny that, but he could not, in looking at contradictions in the church, ignore the belief of the church that, as Greenhouse describes it, "God's plan is the history and future of all creation, whose evolution is . . . proof of God's supreme intelligence." GREENHOUSE, *supra* note 7, at 38. In other words, in reference to both order and memory, there is a theology that says "Hopewell's" Baptists are *able* to hear the truth. Greenhouse's book, read by a theologian, might become an unintended reproach to "Hopewell's" Baptists.

20. S. LEVINSON, *CONSTITUTIONAL FAITH* (1988).

21. R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWINDLER & S. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985).

My colleague Steven Hobbs has caused me to think of this "republican" perception of America in terms of those who have been excluded from participation. Hobbs is at work on a theory of the Civil Rights Movement which argues that what the lawyer-reformers of that movement sought was not so much rights for black people as participation for them, participation in America.<sup>22</sup> Thus Charles Hamilton Houston, the intellectual and professional dean of those great black lawyers, argued that black law students from Missouri were being denied participation in their professional community.<sup>23</sup> The practice, by the state of Missouri, of sending black students to Nebraska to study law, instead of admitting them to Missouri's state law school, made both of the ingredients essential to Dean Houston's argument, and did so in terms of belonging. What Missouri did recognized membership and denied participation.

Dean Houston said the practice deprived black law students of the dignity of their citizenship because it denied them association with other students who would be *Missouri* lawyers. Houston challenged the professional community Missouri's lawyers had made, in which black lawyers could be of the fraternity but not in it, a professional community which, as he put it, included black lawyers "by tolerance as strangers and outsiders,"<sup>24</sup> rather than as participants. His argument was an argument about belonging.

In his effort to integrate railroad unions and to include black people in the Tennessee Valley Authority, Dean Houston argued that Jeffersonian prosperity in America would never be in any human sense possible if black people were excluded from it. In gathering support for the historic school desegregation cases, he said "the first item on any program for improvement of public schools for Negroes must be convincing the mass of Negroes themselves that they are part of the public . . . ."<sup>25</sup>

In their recent brief for economic justice, the Roman Catholic Bishops of the United States argued from the suffering presence of the poor and the despised toward a community in which the poor and the despised participate. Their argument resembles Dean Houston's. "[S]ocial friendship and civic commitment . . . make human moral and economic life possible,"<sup>26</sup> they said. Friendship makes moral life possible. "Social justice implies that persons have an obligation to be active and productive participants . . . and that society has a duty to enable them to participate in this way."<sup>27</sup> The Bishops said "[t]he ultimate injustice is for a person or group to be actively treated . . . as if they were non-members of the human race."<sup>28</sup>

22. S. HOBBS, FROM THE SHOULDERS OF HOUSTON: A VISION FOR SOCIAL AND ECONOMIC JUSTICE (1988) (unpublished manuscript). This work will consider G.R. McNeil's 1983 biography of Houston, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights*, as well as speeches and essays that Dean Houston gave and wrote during the busiest years of his career as an advocate.

23. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

24. S. HOBBS, FROM THE SHOULDERS OF HOUSTON: A VISION FOR SOCIAL AND ECONOMIC JUSTICE (1988) (draft manuscript) (quoting C. Houston).

25. G. McNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 141 (1983) (quoting C.H. Houston).

26. United States Catholic Conference, *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy* 34 (1986).

27. *Id.* at 36 (emphasis omitted).

28. *Id.* at 39.

When Judge Harry T. Edwards gave the annual Tucker Lecture at Washington & Lee University last year, he took “affirmative action” as his topic, a subject that he has written and taught about for decades. At a faculty colloquium after the lecture, one of my colleagues asked Judge Edwards about his goals for “affirmative action.” The judge said he thought of three goals—equality, involvement by members of racial minority groups in the judgments society makes, and a community in which people love one another. All three goals were, for him, a legal and professional agenda—a jurisprudence and a professional ethic. These goals are also, I think, a religious agenda, a political theology if you like. In any case, these goals have to do with good persons living together; they do not have to do with isolation, and they have less to do with choice than with belonging.

The religious vision here, the vision of the Hebraic tradition (the tradition of Jews and Christians), points ultimately to a human community; it argues that humanity is a family. I thought, when I heard Judge Edwards, of the Talmud and of the Jewish tradition’s interpretation of Genesis 2:7, which says that the Lord formed the first human person “of the dust of the ground.” The Rabbis taught that the dust came from every part of the habitable earth, and so, as Rabbi Meir put it, people of all lands and climes are brothers and sisters. We all belong to one family. But the religious tradition will argue, as Judaism has always done, as Judge Edwards does, and as the Catholic Bishops did in 1986, that first we belong to families and neighborhoods and religious congregations; we belong to larger communities *through* our organic communities, some of which are inevitable in our lives. We cannot not belong to our organic communities, although we can deceive ourselves about belonging. We are able to think about such a messianic abstraction as a worldwide family of all persons only because we know, from remembering that we are members of families and neighborhoods and religious congregations, what such a universal brotherhood would be like.

## II. THE LEGAL ETHICS OF COMMUNITY

*Chi lascia la via vecchia per la nuova, sa quel che perde e non sa quel che trova.*<sup>29</sup>

In section I, I argued for two propositions. First, that professional ethics—legal ethics—should turn from its obsession with autonomy and the rights of interchangeable individuals, with acts, choices, and quandaries. Legal ethics should attempt instead to describe and to teach to lawyers the classical ethics of the good person. And second, that a neglected way for doing this would be to turn to each person’s emotional (pre-rational) sense of belonging somewhere, among a particular group of people. I invoked to support the second point the anthropological and theological perception that we explain what we do in terms of the communities we belong to. Both of these propositions depart from the way legal ethics is “done” in university law schools; both involve turning from one familiar fact to another familiar fact, from

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29. Gambino, *Italian Americans Today*, in *A DOCUMENTARY HISTORY OF THE ITALIAN AMERICANS* 428, 428 (W. Moquin & C. Van Doren ed. 1974) (“Whoever forsakes the old way for the new knows what he is losing, but not what he will find.”).

talking in school about “ethical dilemmas,” to exploring the fact that each of us is in a crowd that he is a member of.

I propose in this section to illustrate the arguments with one instance of such familiar territory—the community and communities formed in this country within the last century by Italian-American immigrants. I propose to try to describe that community as a center of ethical explanation, to consider the fact that it has produced lawyers who influence clients, professional ethics, and national policy, and, finally, to wonder with you whether it makes a difference that these lawyers are Italian-Americans.

I propose to consider what seems to me a quizzical outsider’s look at one Italian-American lawyer, a case where the Italian-American lawyer was, on a conventional ethical assessment, a moral failure. I mean Mario Fabbri, of Louis Auchincloss’s short story *The Fabbri Tape*.<sup>30</sup> Notice, before we take that look, that the observer here, Louis Auchincloss, is a practicing lawyer and the principal inside storyteller of the world of big-firm, modern, New York City lawyers. He is that and also a giant in American letters—often referred to as the intellectual successor to Henry James. Auchincloss is a W.A.S.P., very much a descendant of the two cultures that support Wall Street law practice: the Puritan world that gave us American legal ethics and the Wall Street law firm titans Auchincloss writes about, and the world of old New York, which governs the business prosperity the law firms feed on. Auchincloss views his Italian-American character from outside. And I am commenting—theorizing—from outside. We are both students of Italian-American culture. Neither of us is a member.<sup>31</sup>

Mario Fabbri was the eldest of eight children in an Italian immigrant family. His parents came to New York from Genoa in the 1880s, settled in New York, and opened a family restaurant.<sup>32</sup> The Fabbri sons were destined, if they were typical, to work in the family business or to take jobs as laborers under immigrant Irish work bosses. The Fabbri daughters were destined to remain at home until they met other Italian immigrants, in a proper and supervised way, and then were allowed to marry.

Mario Fabbri grew up in this way but he also grew into the Wall Street world. The latter development was unusual. It happened because Mario’s father was atypically ambitious for his oldest son. Signor Fabbri became friendly with a middle-aged bachelor who was also a Wall Street lawyer of solid Puritan credentials and prosperity, and whose only fault was that he liked Italian food. The Wall Street lawyer, Thomas Findlay, was the managing partner of his firm. He agreed, as a favor to Signor Fabbri, to hire young Mario to be an office boy. Mario impressed Mr. Findlay, and Mr. Findlay sent Mario to college, and then to law school, and made him a clerk in the firm.<sup>33</sup> “Once I had a hand on the bottom rung of that ladder,”

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30. L. Auchincloss, *The Fabbri Tape*, in *NARCISSA AND OTHER FABLES* 149 (1983), and in T. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* 599 (1985) [hereinafter *Fabbri Tape*].

31. I am grateful, of course, for advice from Italian and Italian-American students, colleagues, and friends, and the advice of my remarkable daughter, Mary, who is a student of Italian culture and has spent most of the past three years living and working in Italy. She is a graduate student at Johns Hopkins University.

32. *Fabbri Tape*, *supra* note 30, at 150–51.

33. *Id.* at 151.

Mario said later, "I never loosened my hold."<sup>34</sup> He became an associate, then a partner, and, in 1930, he succeeded Mr. Findlay as managing partner of the firm.<sup>35</sup> He was, for a little while, on the top of the heap.

This was an unusual ascent for an Italian boy. Few Italian boys left home in any final way at all; few went to school long enough to qualify for college. They grew up in an immigrant culture that was valiantly insular and distrustful of American institutions. The culture Mario Fabbri came from did not believe in the American dream. Contrary to the fond W.A.S.P. myth and to our rhetoric on the Fourth of July, the Italians, and the other late immigrants, did not come here to escape oppression or to take on a new, liberated way of life. They came, first, to survive and then, perhaps, to find enough money to support their way of life. They were not leaving their culture; they were trying to preserve it.<sup>36</sup> They were taught from Old World memory, particularly from Sicily and Southern Italy, that the way a community of people survives is to take care of its own, to adhere to *la via vecchia*, the Old Way.<sup>37</sup> The highest social value in that immigrant culture is the order of the family, the protection of the family (*l'ordine della famiglia*). The principal tenet in the Old Way is respect for your father—such deep respect that it would be an insult to him to achieve more than he achieved, to rise higher in the world, even by the standards of the strange, materialistic world of America.

Jewish immigrants of the period from 1890 to 1920 provide an illustrative contrast in terms of interest in vertical mobility for children. Jews have advanced into the professions more rapidly than any other late immigrant group. In 1970, seventy percent of American Jewish males were in "professional, technical, managerial, and administrative careers."<sup>38</sup> The comparable figure for Italian-Americans was about twenty-six percent.<sup>39</sup> Italian-American income figures are relatively closer; Italians have not had the best-paying jobs, but they have held their own on income, which suggests that their relatively slower ascent to eminence has not been an aversion to hard work, but rather a fear of cultural corruption, of assimilation.

In any case, Italians adhered to a way of life that turned less on status in the larger American community than on acceptance and trust within their own immigrant community.<sup>40</sup> The Jewish tradition has, like the Italian, emphasized the honor due parents, but it teaches parents to work for the material advancement of their children;

34. *Id.*

35. *Id.*

36. An Italian friend said they left Italy because they were starving to death; they left to escape that nightmare. The nightmare was not their culture but their poverty.

37. Letter from Mary Shaffer, Feb. 11, 1988 [hereinafter Letter]:

You emphasize *la via vecchia*. I would say that it includes *tradition*, not adhering consciously to a path which you (the Italian) can visualize and follow, but rather doing things the way you've always traditionally done them. Because it's the only way you know. Everyone here follows "the way" because it's the way they've always done things. Deep down, I think, this gives Italians, whose country has always been in a precarious position, a sense of security that they cling to. They need this built-in (internal) system of "security by routine," because they don't have much external security. Your daily habits are something you can always control, even when you can't control the outside world. Italians are, for example, extremely formal, following a code of manners which I think gives them structure and security, tells them how to behave.

38. R. PATAI, *THE JEWISH MIND* 497 (1977).

39. H. NELLI, *FROM IMMIGRANTS TO ETHNICS: THE ITALIAN AMERICANS* 185 (1983).

40. See generally *id.* at 173-93.

it has not preserved the notion that a child who does well shames his father—a Jewish father should seek a less burdensome life for his child than he seeks for himself, so that the child will have time and energy to study the Torah. “Parental concern for the well-being, development, studies, marriages, and careers of their children is, unquestionably, more general and more intense among Jews than among any other ethnic group,” a fact that is due to the preservation of “the Jewish home environment and . . . age-old traditional Jewish values.”<sup>41</sup>

Nor do Italians have the Anglo-American, utilitarian ethic that says it is a good thing to get ahead. That ideal has been clearly expressed in American legal ethics from early in the 19th century, in American culture from such popular sources as Benjamin Franklin and Horatio Alger, and in English culture from the beginning of the mercantile era. But the Italians did not and do not have it. Italians place value on time spent well, on beauty, and on enjoying themselves—all the while observing a decorous formality in dealing with one another. Those who came here eighty years ago found that Americans mocked order; the language and bearing and manners of Americans were unrefined. One immigrant, reflecting on how America looked to him at first, said, “[d]ignity had no place in life.”<sup>42</sup> The Italian immigrants found turn-of-the-century American pragmatism crude and revolting. The immigrants’ diaries and letters home said of Americans that they were “colorless, unsalted . . . without culture,”<sup>43</sup> cold and unemotional. “[J]oy,” one Italian said, “is a fruit that the Americans eat green.”<sup>44</sup>

Thomas Findlay, who was Mario Fabbri’s Puritan patron and even surrogate father in the law, did nothing but work. Mario said, of Findlay:

He was the most impersonal man I have ever known, a close-mouthed, hard-hitting, utterly industrious Yankee. He lived, so far as I could make out, for the love of the law alone. He never spent much money on himself, and he bequeathed the substantial fortune that he made to a hospital in which he had shown only a perfunctory interest in his lifetime.<sup>45</sup>

Mario, on the other hand, hardly realized how Italian he was when he admitted to himself that he “craved pleasure as much as work. [He] loved music and art and food and wine and women.”<sup>46</sup>

Mario and Mr. Findlay were nonetheless typical of the young and old lawyers in Auchincloss’s Wall Street fiction. Their relationship was defined by work. They depended on one another—Findlay needed Mario’s labor, and Mario was willing to work hard, as Italians in this country have always been. And in that way, within the limits of such industry, perhaps Mario and Findlay loved one another. I suspect Mario would not have advanced so well if they had not loved one another.<sup>47</sup>

41. PATAI, *supra* note 38, at 496–97.

42. M. LASORTE, *LA MERICA: IMAGES OF ITALIAN GREENHORN EXPERIENCE* 147 (1985) (quoting C. PANUNZIO, *THE SOUL OF AN IMMIGRANT* 129 (1921)).

43. *Id.* (quoting P. DIDONATO, *THREE CIRCLES OF LIGHT* 32 (1960)).

44. *Id.* (discussing E. CARNEVALI, *AUTOBIOGRAPHY OF EMANUEL CARNEVALI* 160–70 (1967)).

45. *Fabbri Tape*, *supra* note 30, at 151.

46. *Id.*

47. For development of this theme, see L. AUCHINCLOSS, *THE GREAT WORLD AND TIMOTHY COLT* (1956), and T. SHAFFER, *AMERICAN LEGAL ETHICS* ch. 4 & 5 (1985).

Even if the Fabbri family restaurant had made money, it was not likely that Signor Fabbri would have sent his sons to law school. In any event, if the Fabbri were typical of Italian immigrants before 1920, they did not make much money. They found employment conditions almost as bad as they had been in Italy. They found a steady and burdensome prejudice against Italians, and they found few opportunities. Even those who came with skills, as Mario's father apparently did, could find no openings for their skills. Those who had professional and technical training took jobs as day laborers or, as the Fabbri eventually did, opened their own businesses. Thousands of them, unlike the Fabbri, returned to Italy (some with savings, some with none).

Both the economics of being in a large immigrant family in the 1890s and the culture that Italians preserved in their tight immigrant community in America argued against Mario Fabbri's being a lawyer. It was unlikely that his father could or would have paid for a legal education for him; Mr. Findlay did that. But Wall Street was even more unlikely than the Bar for a young man such as Fabbri. How did he get to the top of the heap on Wall Street? Partly, of course, because Mr. Findlay liked him. But, as Mario himself explained it, it was also because he did the thing that it was least likely that the son of Italian immigrants would do—he repudiated his heritage.

If a young Italian-American lawyer wanted, as he put it,

to join the Union Club or the Piping Rock, if he wanted to send his sons to Groton or Andover, if he hoped to be president of the American Bar Association or achieve high federal office, it was going to be a lot easier for him if he became an Episcopalian and treated his homeland as an exotic memory rather than a present-day inspiration.<sup>48</sup>

Fabbri became an Episcopalian. He sent his children—a respectable, Protestant two children—to the best schools. He joined the right clubs and assembled an enviable art collection; he lived in a big house in Manhattan and gave opulent parties; he had what he called “an agreeable and luxurious existence,”<sup>49</sup> and all it cost him was his Italian heritage.

Let me pause to underline how unlikely this was. But for the patronage of the most powerful partner in the firm, Mario would never even have been hired as a law clerk. Such firms in those days did not take associates who had not gone to the right private boarding schools, and thence to Ivy League colleges and law schools. They did not take Jews or Italians or even, for the most part, people with Irish surnames.

And it was not likely that the son of Italian immigrants would be at the Bar to be considered for such a firm in the first place. Think, for example, of how long Italians have been in this country in large numbers—about the same amount of time as Eastern European Jews, the Irish, the Slavs, and many of the Germans. Then consider how recent were the days when we first heard Italian names mentioned as among those who held high office in government or business, or even in the Roman Catholic Church. You did not hear names such as Iacocca mentioned among the

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48. *Fabbri Tape*, *supra* note 30, at 153.

49. *Id.* at 155, 159.

Fortune 500 corporations until Mr. Iacocca began to be noticed. Antonin Scalia is the first Italian-American to sit on the Supreme Court.

John Pastore in 1946 became the first Italian-American elected governor of a state—Rhode Island. In 1950 he became the first Italian-American elected to the United States Senate. In 1962, President Kennedy appointed Anthony J. Celebrezze . . . the first Italian-American to hold cabinet rank in the federal government . . . John A. Volpe, a former governor of Massachusetts, was appointed Secretary of Transportation by President Nixon. In 1973, Volpe, the son of immigrants from Abruzzi, became the first Italian-American ambassador to Italy.<sup>50</sup>

This slow progress to eminence—there are still few Italians in positions of power anywhere in America, even in the Catholic church—was not due entirely to prejudice. Other late immigrant groups, notably the Eastern European Jews, the Irish, and the Germans in and after World War I, have been subject to prejudice in America. But the Italians did not trust American law and politics as much as the Jews and Germans did, and they did not trust machine politics as much as the Irish did.<sup>51</sup> They trusted the Old Way; they feared the loss of their family order in the melting pot; they had little faith in democratic pluralism; they held on to the Old Way, as many Italian-Americans still do. In Mario Fabbri's day, they did not have the money to send their children to law school but, even if they had had the money, they would not have sent them. They knew that law school would turn their children into W.A.S.P.s, as Mario Fabbri was turned into a W.A.S.P. They preferred to stay close to their Little Italys and to preserve there the Old Way for their children, and their children for the Old Way.<sup>52</sup>

Mario Fabbri's story is a first-person narrative, given in widowed old age by speaking into a tape recorder. He is provoked into the narrative by an investigative reporter who has accused him of hubris. Mario's encounter with the investigative reporter, and his making of the tape, are in 1975. Forty years prior to that, one Gridley Forrest, a judge of the United States Court of Appeals in New York, was tried and convicted of taking bribes.<sup>53</sup> Mario Fabbri was exposed by the bar association as implicated in Judge Forrest's crime, and resigned from the Bar to avoid disbarment. In 1975, the reporter came upon the fact that Fabbri was still living, and tracked him down and talked to him about the Forrest case.

The reporter discovered to his unlikely amazement that Mario was not repentant

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50. R. GAMBINO, *BLOOD OF MY BLOOD: THE DILEMMA OF THE ITALIAN-AMERICANS* 293 (1974).

51. See generally NELLI, *supra* note 39, at 173–93. A third factor is involved, in addition to prejudice and insularity. That factor is the Italian preference for using close to home the money they eventually accumulated, using it for houses and businesses they would own and not rent and for the needs of their extended families in this country and in Italy. A significant number of second-generation Italian-Americans were brought into American higher education after World War II by the G.I. Bill, which made it possible for veterans both to own a house or business and have a college education.

52. I do not mean to imply that other late-immigrant groups did not preserve their culture, but that the Italians had their own way of doing it. The Eastern European Jews, again, are a contrast. The culture and career of the entertainment lawyer Fanny Holtzmann is an example. T. BERKMAN, *THE LADY AND THE LAW: THE REMARKABLE LIFE OF FANNY HOLTZMANN* (1976); Harriman, "Miss Fixit," *The New Yorker*, Jan. 30, 1937, at 21, and Feb. 6, 1937, at 22, in T. SHAFER, *AMERICAN LEGAL ETHICS* 624 (1985).

53. *United States v. Manton*, 107 F.2d 834 (2d Cir. 1938), perhaps suggested a plot to Auchincloss. See J. NOONAN, *BIBES* 567–72 (1984).

for what he had done: "Fabbri, hale and hearty at eighty-four, sole survivor of a scandal that four decades ago shook our bar from coast to coast," the reporter wrote, "cheerfully persists in his ancient error. 'Believing what I then believed to be the facts,' he told a reporter recently, 'I'd do the same thing again.'"<sup>54</sup>

"It's perfectly true. I would," Fabbri says into the tape recorder. "But it behooves me, I suppose, in an era of general review of moral values, to make some effort to set down my reasons for the benefit of any posterity that cares to hear them."<sup>55</sup> The Fabbri tape is a moral explanation—the sort of thing that Carol Greenhouse put into her tape recorder in Georgia when she talked to Baptists about dispute resolution. I want to argue that the Fabbri tape is also a case of the sort Greenhouse describes in which explanation is a claim of belonging, and in which belonging is where morals come from. Fabbri's explanation reveals that he belongs to the community he thought he had renounced; it is an Italian-American's explanation. And this even though he thinks his explanation comes from the community he thought he chose when he renounced the Old Way. In other words, I want to say that Fabbri was not as able to choose the community he belonged to as he thought he was. He belonged to the community he thought he had left. He did not belong to the community he thought he had chosen.<sup>56</sup>

Mario explains, as he talks into the tape recorder, that he became managing partner of the law firm in 1930; by 1935 he had reached the social and economic pinnacle, symbolized by his election to the Greenvale Country Club in 1934 and by his growing friendship with Judge Forrest. Judge Forrest was arrogant and ambitious, industrious and clever; he was the sort of man Wall Street expected to be on the federal Supreme Court eventually; and, as he assessed his own abilities, he thought he would have been there but for the fact that President Franklin D. Roosevelt would not nominate such a person for that court.

Mario was prosperous and at least apparently confident and able—or so he thought—to meet the judge on equal ground. The equal ground was the country club.

[E]lection to this club was the social triumph of my life. . . . I enjoyed it just as much as, during my two years on the waiting list, I had thought I should. I loved the big white shiny clubhouse, always so freshly painted, with its porticos overlooking the great green stretch of the golf course . . . ; the huge sapphire swimming pool; the grass courts; the smart women in tennis clothes . . . . My son, Tom, said that I liked it because it looked like a Packard advertisement.<sup>57</sup>

Mario and the judge met at this place on Saturdays, played golf there, and then had lunch together in the big white shiny clubhouse. They talked of inside matters in the judge's court and of inside matters among Mario's business clients. The judge

54. *Fabbri Tape*, *supra* note 30, at 149.

55. *Id.*

56. I mean to quarrel here with Greenhouse's tendency to imply that a person *chooses* his explanation and thereby *chooses* his community, as he might choose a brand of beer or a used car. There is, in my view, much less choice, and much less of a quandary behind the choice, than Greenhouse and the anthropologists she relies on suppose; there is much less choice, too, than existentialist philosophy, in its attempt to account for relationship and community, implies. See D. CARR, *TIME, NARRATIVE, AND HISTORY* 100–52 (1986).

57. *Fabbri Tape*, *supra* note 30, at 158–59.

learned facts he could use in his investments; the lawyer learned useful facts about the federal judiciary. "I was perfectly aware that I was being pumped, but I had no objection. Was I not, in my own way, pumping him?"<sup>58</sup>

Mario tells his tape recorder that the judge discovered Mario's moral vulnerability. "Gridley Forrest, I sometimes think, was put on this earth to destroy me, the one being equipped by a malign creator with the apparatus fatal to my defenses, as the mongoose is to the cobra or the desert wasp to the tarantula."<sup>59</sup> The judge discovered Mario's vulnerability during the lunches at the country club. What happened at lunch was a familiar thing in immigrant groups—the making of a deal, a trade or "the game," as an Italian-American friend put it. One characteristic description of the immigrant groups, with their community life, their ward politics, their gradual claim on political power in American cities, was that they made deals. This was characteristic of the Italians, as it was of the Irish; think of *The Last Hurrah*, George V. Higgins's political novels, or the stories about the late Mayor Richard Daley. Deals had a somewhat different object in the Italian community. They were essential to that community's integrity, and particularly to a negotiated peaceful coexistence within the larger society. (Think of O'Connor's Mayor Skeffington in the Columbus Day Parade in Boston, or helping to bless a statue of Mother Cabrini.)

The immigrant groups did not understand this deal-making to be morally questionable; they did not glamorize political power with moral rhetoric; and they understood that government is a matter of compromise.<sup>60</sup> An immigrant lawyer would enter into deal-making as into any other professional activity; if Mario Fabbri had been an entirely self-conscious Italian-American, trading business information for judicial information would not have been morally troublesome to him. In this he was an Italian-American, even when he was not conscious of being one. (What Italian-American in 1935 would, after all, have been sitting in the dining room of a private club that it took two years of waiting for a Wall Street lawyer to get into?)

But—my theory continues—Judge Forrest thought this information swapping to be morally questionable. He had a W.A.S.P.'s conscience about it. The fact that Mario appeared not to have qualms made the judge contemptuous of him, as people of the judge's class were contemptuous of the way Italians dressed, washed, ate, and raised their children. My guess is that the judge began to discover Mario's vulnerability at these Saturday lunches. The "apparatus fatal to my defenses"<sup>61</sup> that Mario later talked about was that Judge Forrest noticed that Fabbri really was an Italian. Mario did not see that—at least not then. The judge saw it, and he stored the discovery away for future use. When the time came for him to put that information to use, as he might have used information on securities that he got from Mario at lunch, he took it out, and he made his play.

The judge's play was this. One Saturday at lunch at the club he told Mario that he had taken a bribe in a patent case. There were three judges on the court hearing

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58. *Id.* at 159.

59. *Id.* at 157.

60. M. NOVAK, IN PRAISE OF CYNICISM (OR) WHEN THE SAINTS GO MARCHING OUT (1977).

61. *Fabbri Tape*, *supra* note 30, at 157.

the patent appeal. One of them was adamant to reverse the district court's judgment; Judge Forrest had taken the bribe to affirm it. That left the third appellate judge and Forrest needed to get that judge's vote. If he failed to get it, he said, the person paying the bribe would expose Judge Forrest. He needed Mario's help in writing a draft opinion that would persuade this third, unbribed judge. He turned to Mario because Mario was vulnerable and was also a good lawyer, especially persuasive in patent cases. "Will you help me?" the judge said. "If not for my sake, for the reputation of the bench?"<sup>62</sup> Mario said to his tape recorder, forty years later, "I gazed at him in surprise. Then I nodded. 'For *your* sake, Gridley.'"<sup>63</sup>

Mario did help him. The bribery came to light; it turned out, in fact, that the judge was taking bribes in other cases. Mario was implicated in the patent-case bribery and resigned from the Bar. His wife left him for a while, then returned, and then died. Mario made a little money in the real estate business and otherwise lived off the proceeds of the sale of his art collection. Forty years later the reporter tracked him down and found out that he was not repentant—Mario said he would do it again. The tape was taking down Mario's reasons.

His reasons, he said, were patriotic.

I . . . felt some still unsettled debt to the great nation that had rescued my family from the sad poverty of its origin. I had believed in the American system, in hard work, in getting ahead, in a society that at least tried to be fair to the individual if that individual had some respect for it. I had prospered . . . and now there was something I could do to show my gratitude.<sup>64</sup>

Wasn't this a cover-up? Yes, he told the tape recorder. But "[w]ho knows how many of the heroes and inspiring events of our history do not owe some of their luster to cover-ups?"<sup>65</sup> Even Watergate, he said, "[s]upposing . . . it had been possible to cover up the Watergate break-in and spare the world a knowledge that has disillusioned millions . . . . Would you not have done so?"<sup>66</sup>

That is a W.A.S.P.'s explanation for behavior. On Carol Greenhouse's account it is a claim by Mario Fabbri to belong to the dominant American society. It is the claim of an American republican lawyer.<sup>67</sup> To claim that ethic is to claim the community of American gentlemen-lawyers, the moral titans who depend on integrity and honor to assure probity in what they do for their clients and for their country. It was the sort of moral identification the late immigrants distrusted. But it was an altogether admirable moral tradition. We have all been taught to admire it. Atticus Finch, of Harper Lee's remarkably popular story, *To Kill a Mockingbird*, is such a

62. *Id.* at 162.

63. *Id.* (emphasis in original).

64. *Id.* at 164–65.

65. *Id.* at 165.

66. *Id.*

67. See *Adversary Ethic*, *supra* note 6. The republican-lawyer tradition in America is probably still our dominant professional ethic. It was stated in the Fifty Resolutions on Professional Department, in 1836, by the Baltimore lawyer and law professor, David Hoffman, and restated in the next generation by George Sharswood, founding dean of the University of Pennsylvania Law School and chief justice of Pennsylvania. It found its way into the first codes of legal ethics in the 1880s, even though it was, in the codes, substantially colored by a new adversary ethic that Wall Street lawyers had invented to defend their involvement with the robber barons.

gentleman-lawyer. So is Gavin Stevens, of Faulkner's Snopes stories. So are the Boston lawyers who occasionally appear in the novels of William Dean Howells, and, more to the present point, the Yankee partners that populate Auchincloss's Wall Street lawyer stories.

The republican gentleman-lawyer decides what is best for himself, for his clients, and for his country. He does not make a fetish of moral rules. Shirley Letwin says of him that he will lie to protect his friend, but he will not pretend that he has not lied.<sup>68</sup> He will surely lie to protect his country, too. And he does think of it as *his* country—partly, I suppose, because his fraternity has always controlled it. The explanation that claims membership in this gentleman-lawyer's community also claims power. That, I think, was the moral defense that Mario Fabbri thought he was speaking into his tape recorder—a gentleman-lawyer might well decide that a cover-up would be best. Mario was claiming to be in the community other Wall Street lawyers came from, and to be surprisingly unrepentant. It was the sort of claim he expected to make after he became an Episcopalian and decided to regard his Italian heritage as an exotic memory.

Was Mario's appropriation of that republican mantle the vulnerability that Judge Forrest sensed in him? I wonder if the judge supposed that the way he could get Mario to help him in his bribery scheme was to appeal to his American patriotism—if you do not help me, Mario, the federal judiciary will be brought into disrepute, and that will be bad for the administration of justice. If that were the judge's play, why did he choose Mario? Why didn't he go to a graduate of the private schools, the Ivy League colleges, the better law schools? Why didn't he seek out the Puritan pedigree that most of Auchincloss's lawyers have, and make his pitch there?

The answer, I think, is that American patriotism would not have persuaded a republican gentleman-lawyer<sup>69</sup> and was not the judge's sense of how he could get to Mario Fabbri. I think Forrest depended on the fact that Fabbri was Italian. The way to get to him was to appeal to him as an Italian. And that meant appealing to him as a friend—not as a patriot, a defender of the administration of American justice, a gentleman-lawyer, but as a *friend*. That is why he put the choice of moral reasons to Mario—do it for my sake, or for the sake of the reputation of the bench. And Mario said, as the judge knew he would: “For *your* sake, Gridley.”<sup>70</sup>

Mario, looking back after forty years, thinks he chose to defend the honor of the bench; it appears, on Carol Greenhouse's account, that he thus *chooses* the explanation that shows him to be a gentleman and a republican lawyer. But in fact,

68. S. LETWIN, *THE GENTLEMAN IN TROLLOPE: INDIVIDUALITY AND MORAL CONDUCT* (1982).

69. See NOVAK, *supra* note 60, at 7:

Thus in 1973 Elliott Richardson and Archibald Cox were indispensable to the plan to give Richard Nixon a clean bill of health. Their firing fulfilled the myths of the high civil religion: they were proven “incorruptible.” All of Elliott Richardson's earlier pragmatic compromises in every office in which he served under Richard Nixon might have exhausted the moral capital of a member of any other civil religion and destroyed him politically. They were long tolerated in Richardson, and his single refusal to obey Nixon won him not only total forgiveness but future power. “You won't believe this,” Mr. Richardson later told a reporter, “but it was the easiest decision of my life.” (I believe it.)

See also Novak, *Catholics and Power*, Notre Dame Mag., Feb. 1980, at 12. Both are excerpted in T. SHAFFER, *AMERICAN LEGAL ETHICS* 584, 586, 594 (1985).

70. *Fabbri Tape*, *supra* note 30, at 162 (emphasis in original).

and despite a lifetime of alienation, Mario's tape-recorded explanation shows him to be, still, and even so, in his Italian-American community, the community that takes care of its own, that learned over centuries of coping with powerful outsiders to keep its children close to its breast, to follow the order of the family, and to adhere to the Old Way in the new world.

Mario says, at the end of the tape, that the disgrace of the late 1930s caused his son (whose name is Tomaso) to renounce him. Tom even changed his last name, maybe to something like "Forrest." "He detested my crime and deplored my intransigence; he saw no alternative but to cut himself off from me forever . . . God bless him,"<sup>71</sup> Mario says. But Mario's daughter, Alma, stayed with her father. "Alma accepted me and my crime . . . Her children are almost cozy with me; they think I was a 'victim of my time,'" <sup>72</sup> he says. "Alma has a comfortable theory that I was confused between an Italian Catholic upbringing and something she calls 'the Protestant ethic' . . . I am considered virtually without blame, a dear old wop grandpa who is not to be taken quite seriously."<sup>73</sup> And so, in the end, Mario is an Italian whether he likes it or not. My guess is that he was an Italian all along.

There is an ethical irony in the story that might interest you, even if my analysis of Judge Forrest's hold on Mario does not. And that is that the official ethics of the Bar gave Mario a way to avoid "unethical" behavior in this case, a way that Mario must have known about but did not take.

The legal ethics of the Wall Street firms in the days of Mario Fabbri's glory were, as they are now, remarkably ambivalent. On the one hand they proclaimed the traditions of the 19th century, some of which came through the official histories of their law firms. These are republican traditions—the gentleman-lawyer decides what is best; he is faithful to his client, but he does what is best for his country; he gives moral leadership to his business clients. On the other hand, the law firms had to come to terms with the fact that their prosperity had been dependent on representation of the robber barons, who bribed, stole, and even murdered their way to power in the last third of the 19th century.<sup>74</sup>

The ambivalence is expressed in the codes. The codes are republican in their claims for the profession, but they also enshrine the adversary ethic that says a lawyer is dispensed from the conventional morals of complicity—a lawyer is not responsible for what his client does. The firms support both republican professional rhetoric and the convenient regulatory rules that do not require a lawyer to answer for the consequences of what he does for clients.

The code that was used, in this ambivalent way, to govern lawyer behavior in New York in the 1930s gave Mario Fabbri a way to help Judge Forrest without getting into trouble. Entry into the lawyer's "ethical" enclave required two familiar steps. The first is confidentiality. If the judge had been Mario's client, rather than his fellow

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71. *Id.* at 169.

72. *Id.*

73. *Id.*

74. See *Adversary Ethic*, *supra* note 6. The history of the adversary ethic in the New York City law firms of the 1870s is probably like the history of dispute resolution among the Baptists Greenhouse describes. The Baptists say their ancestors lived in harmony, as the Wall Street lawyers say their ancestors followed the traditional ethic of the adversary.

lawyer, there would have been no duty to report what he knew about what the judge had done. The bribe was paid; the issue the judge presented at lunch was avoiding disclosure of the bribe. The conventional legal ethics of confidentiality would have protected Mario from blame for not disclosing the bribe his client took; the rules of the Bar would have imposed on him a duty not to disclose it. It would have been unethical for Mario to report the judge if the judge had been his client.

All that would have been necessary, for this first step, would have been for Mario to say, early in the conversation at the country club: "You're my client—right?" The public—and, I suppose, the immigrant communities—do not understand that principle of confidentiality, particularly in compelling cases such as this one, or the Lake Placid buried-bodies case; but the Bar is resolute in upholding it. Confidentiality is a matter of professional honor; it is our seal of the confessional.<sup>75</sup>

The second step is Mario's drafting the opinion in the patent case. I suppose many who work in legal ethics would disagree with me (my students often do), but I think that, too, could have been worked out under the lawyer's code. There is no "ethical" rule against ghost-writing judicial opinions. Nor is there a rule against using one's learning and craftsmanship for a cause one does not believe in; that is, after all, the essence of the adversary ethic. Mario wrote an opinion that Judge Forrest thought was sound. It was the result the judge thought should have been reached; he said so, to Mario, before he admitted he was bribed to reach that result. But, Mario says, "I did not even try to persuade myself that it made any difference that the brief I was writing might have been submitted with perfect propriety by counsel for the litigant for whom I was indirectly working,"<sup>76</sup> or that it could, without "ethical" difficulty, have been written for Judge Forrest.

Although Mario Fabbri told himself that what he was doing was "only elementary decency . . . morally right,"<sup>77</sup> he refused to take advantage of routine American-lawyer casuistry, under the provisions of an adversary ethic his forebears on Wall Street had invented and had learned to defend. And that, I think, is an irony. It is as if Mario preferred to stake out his republican moral claim when he did not have to do so, when he might have taken refuge in the canons of his craft. Perhaps, if he had been candid with himself, had admitted to himself that what he was doing was helping a friend, he might have been more willing to defend himself with the weapons that were at hand.<sup>78</sup> Perhaps he would not, as if he were a good Puritan, have so quickly admitted his guilt, and then refused, as a good Italian, to feel guilty about it. Perhaps it was Mario's confusion about his own morals—his inability to spell out his

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75. Letter, *supra* note 37:

I don't think Italians would ever expect to be covered, insured, or saved by a confidentiality rule. It's such an American idea. Even if it existed here, no one would place any faith in it, and therefore take risks, thinking that this principle would protect them. Italians place their faith in what they can see and actually put their hands on. Possession is ten-tenths of the law here.

76. *Fabbri Tape*, *supra* note 30, at 164.

77. *Id.*

78. Jerry Kennedy, George V. Higgins's Boston-Irish street-crimes defense lawyer, would have helped his friend and used the code, as he would put it, to protect his "ticket." See G. HIGGINS, *KENNEDY FOR THE DEFENSE* (1980) (Kennedy protects Cadillac Teddy Franklin, a car thief); G. HIGGINS, *PENANCE FOR JERRY KENNEDY* (1985) (Kennedy protects Lou Schwartz, accountant for the Mafia). See also T. SHAFFER, *FAITH AND THE PROFESSIONS* ch. 5 (1987).

ethic, to see his community—that got him into trouble. If he had been able either to be an Italian-American lawyer who took his morals from the Old Way, or a republican gentleman-lawyer, he would have worked his way through the Forrest case with less disaster.

### III. CONCLUSION

If you are like my students, when they reach this point in the part of the course that has to do with the late-immigrant lawyers, you are annoyed because it is not clear what I am getting at. My students expect too much. Maybe you do, too.

If I have been entirely successful here, I will leave you with a quizzical curiosity about the effects our communities have on our morals as lawyers. That is all I have aimed to do—to suggest a more or less logical (or at least, I hope, rational) argument, in ethics, for turning to explanations as a way to understand moral behavior, and from there to the fact that, in making explanations, a person identifies his community. I have tried to illustrate these suggestions with a look at an American community that has a relatively clear heritage, one that is, thus far, relatively well preserved and also neglected in academic ethics. The most I can hope for, by way of reaction from you who have put up with this, is that you are left wondering if there might be something to it.

To the extent that there is something to it, the profession's reliance on abstract moral quandaries, and on a philosophy that makes persons interchangeable, is weakened; and the possibility that those who "do" ethics in our profession might turn to the ethics of the good person is made more likely. That would be enough for me.

The narrower agenda—the study of discrete moral cultures as a way to suggest an American legal ethic of the good person—is something I hope to do more work on and something I invite other lawyers to work on and think about. I can say a couple of things about what I think such a project will show.

First, it will not support liberal notions of democratic pluralism. I do not aspire to support either the philosophy of the melting pot or the political project of those who want to synthesize ethnic heritages in America. Both of these liberal agendas are suggested in the scholarship and bright prose of Michael Novak, who provoked my own study and teaching in this area. It is his hope that *all* of our moral heritages will affect *each* American for the better; he hopes, he says, for a moral, civic, and religious synthesis—each of us will get a little Italian dignity, a little Teutonic stoicism, a bit of Latin American warmth, and some Puritan guilt to hold us together. Down deep, I think, that philosophy of our history hopes that ethnic, cultural, and religious differences will fade away, that we will all become alike, and that the thing we will be when we are all alike will be a mixture of Benjamin Franklin and Abraham Lincoln. There will be nothing Italian or Irish or African or Mexican left. We will all have learned to eat our fruit green.

Second, it will not be an ethic that exalts autonomy, the philosophy that regards each person as his own tyrant. The implication I find in Greenhouse's helpful scholarship, and in the liberal ethical theory one finds among the followers of H.R.

Niebuhr, involves too much emphasis on choosing. As I perceive the force of moral culture in my life, the lives of my students and other friends, and the lives I read about in good American stories, moral culture precedes the choice of moral culture. It is certainly the case that choice is involved in our morals. We are able to be responsible. We are accountable for what we do. But usually, as Augie March implied, we choose what we already are. Sound choice is not ordinarily so much a matter of a new direction as it is a matter of coming home.

It is the case that a person is *able* to remove herself from the culture she was born into—but the voyage is unlikely, difficult, and perilous.<sup>79</sup> If she were a friend of mine, I would think of Mario Fabbri and advise her not to try. More to the point I have been trying to make here, I would suggest to her that she will probably be in her old moral world when she thinks she has moved to a new moral world. What this means for me as a teacher of legal ethics is that I suggest to my students that the morals they disclose in practicing our profession have their roots at home—not in the profession, not in conventional American patriotism, certainly not in the law, but in where they came from. My teaching will then be an invitation to “spell out engagements”<sup>80</sup> (as Herbert Fingarette puts it) with clear sight, with courage, and finally with pride.<sup>81</sup>

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79. Letter, *supra* note 37: “She arrives and remains always a bit unsure of herself, lacking the solid base which develops before one can consciously choose it, and which supplies her ‘gut’ feelings when the time comes to make a choice or decision.”

80. See generally H. FINGARETTE, *SELF-DECEPTION* (1969).

81. The contemporary American writer who says this best is Anne Tyler. She has not yet written about lawyers; I hope she will. Her stories are stories of people who get together—who both are and become families—because they find a way to come home, or not to leave. In *The Tin Can Tree* (1965), Tyler’s symbol is a narrow two-story building a mile from Larksville, North Carolina. The person who built the building expected Larksville to grow and surround the building, but Larksville did not grow. The building sits all by itself on a dusty road about a mile from town.

The building is divided into three dwellings, “its three chimneys jumbled tightly together with the smoke intermingling in wintertime.” *Id.* at 8. The people who live in the dwellings are involved with one another even as each group of them tries in feeble ways to be independent of the other two. In the story they are involved in grieving over the sudden, accidental death of a child.

When Joan, the heroine of the story and the child’s cousin, leaves, carrying her suitcases to the bus station in town, she walks “with that sudden light, lost feeling that came from walking in a straight line away from people she loved.” *Id.* at 220. Joan returns on a night when all the other neighbors are gathered in the apartment on the left end. The lights are turned on there because the neighbors are having a party—a party that marks the end of their communal grieving for the dead child. “[I]t looked as if someone had tipped the house endwise so that everyone had slid down to James’s parlor.” *Id.* at 261. And, of course, everyone had. In Tyler’s stories, people come home in that way. Joan joins the party and ends up being the one who takes a picture of the residents as they sit on and around a couch in James’s parlor:

In the finder of the camera Joan could see them moving, each person making his own set of motions. But the glass of the finder seemed to hold them there, like figures in a snowflurry paperweight who would still be in their set positions when the snow settled down again. She thought whole years could pass, they could be born and die, they could leave and return, they could marry or live out their separate lives alone, and nothing in this finder would change. They were going to stay this way, she and all the rest of them, not because of anyone else but because it was what they would keep a strong tight hold of.

*Id.* at 269–70.