

# Equity and Principles

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## EQUITY AND PRINCIPLES†

By STEPHEN TOULMIN\*

It is an old tradition for universities to have leading painters decorate their walls with symbolic figures representing the major disciplines, and an equally venerated tradition for the faculty to quarrel unmercifully about the results. The bitter arguments over Gustav Klimt's frescos for the University of Vienna are just one modern episode in this long story.<sup>1</sup> Thrown together as they are by the chances of their careers, academics rub along pretty well for so long as they need not put their deepest beliefs on the table. But the fresco painter inadvertently catalyzes an open debate about just those issues of professional commitment and political ideology that are normally and tactfully left shrouded in compromise.

A philosopher addressing an audience of lawyers, therefore, feels some of the apprehension of Gustav Klimt making his pitch to the University of Vienna Senate. How, for instance, should he best display the current relations between the two disciplines? The public image of the law today has more to do with the drama of the television courtroom than with "the embodiment of theological, ethical, cultural and historical values" of which the *'Or 'Emet* endowment speaks; and a preoccupation with adversary manoeuvring does little to convey the "spirit of reconciliation between persons and communities." Nor is moral philosophy much better off. These days, public debates about ethical issues oscillate between a narrow dogmatism that confines itself to unqualified general assertions, dressing these up as "matters of principle," and a shallow relativism that evades all firm stands by suggesting that we choose our "value systems" as freely as we choose our clothes. Given these

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<sup>1</sup> Schorske, *Fin-de-Siècle Vienna* (New York: Random House, 1980) gives an excellent account of this episode.

misleading stereotypes of law and ethics, Gustav Klimt might well depict their current relations as the blind leading the blind.

Even if we do not take the content of these stereotypes seriously, we should, at any rate, be curious about their currency. Why do people tend to see law and ethics in this light? What has clouded public perceptions in this way? In answering these questions, students of law and ethics can afford to pool their thoughts and experience. I shall not suggest that philosophical ethics can be brought in to underpin the law—a very dubious proposal in my view. Nor shall I imply that lawyers can teach moral philosophers their proper business—we may have something to learn from your procedures, but otherwise “we have our own fish to fry.” Instead I shall argue that, in recent years, law, ethics and public administration have undergone similar historical transformations in all large industrialized societies, regardless of their economic systems. As a result, they are exposed to the same kinds of pressures, face many common difficulties, and share in the resulting public distrust. And I shall ask what we can learn about those shared problems if we study the common origins from which all three disciplines have sprung.

## I

All of my central problems have to do with the same central topic: the nature, scope and force of “rules” and “principles” in ethics and in law. Three personal experiences helped to bring these problems into focus for me.

1. For several years in the mid-1970s, I worked with a National Commission established by the United States Congress, whose agenda was the ethics of using human research subjects in medical and psychological experiments. A group of eleven commissioners—five of them scientists, the remaining six lawyers, theologians and other non-scientists—were instructed to make recommendations about publicly-financed human experimentation: in particular, to say on what conditions subjects belonging to certain vulnerable groups, such as young children and prisoners, could participate in such research without moral objection.<sup>2</sup>

Before the Commission began its work, many onlookers assumed that its discussions would degenerate into a Babel of rival opinions. One worldly commentator was quoted in the *New England Journal of Medicine* as remarking, “Now (I suppose) we shall see matters of eternal principle decided by a six to five vote.”<sup>3</sup> But things did not work out that way. In practice, the commissioners were never split along the line between scientists and non-

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<sup>2</sup> The work of the U.S. National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research will be discussed more fully in a paper to be published in Engelhart and Caplan, eds., *Scientific Controversies* (Hastings-on-Hudson, N.Y.: Institute for Society, Ethics and the Life Sciences), due to appear in late 1982 or early 1983.

<sup>3</sup> So, at any rate, ran the verbal reports at the time. Having worked through the files of the *Journal* for 1974-75 without finding any article or editorial on the subject, I am inclined to suspect that this may have been a casual remark by Dr. Franz Ingelfinger, the distinguished editor of the periodical.

scientists; and in almost every case they came close to agreement even about quite detailed recommendations—or did so, at least, for just so long as their discussions proceeded taxonomically, taking one difficult class of cases at a time and comparing it in detail with other clearer and easier classes of cases.

Even when the Commission's recommendations were not unanimous, the discussions in no way resembled Babel: the commissioners were never in any doubt what it was that they were *not quite unanimous about*. Babel set in only afterwards. When the eleven individual commissioners asked themselves what "principles" underlay and supposedly justified their adherence to the consensus, each of them answered in his or her own way: the Catholics appealed to Catholic principles, the Humanists to Humanist principles, and so on. They could agree; they could agree what they were agreeing about; but, apparently, they could not agree why they agreed about it.

This experience prompted me to wonder what this final "appeal to principles" really achieved. Certainly it did not add any weight or certitude to the commissioners' specific ethical recommendations: for example, about the kind of consent procedures required in biomedical research using five-year old children. They were, quite evidently, surer about these shared, particular judgments than they were about the discordant general principles on which, in theory, their practical judgments were based. If anything, the appeal to principles undermined the recommendations by suggesting to on-lookers that there was more disharmony than appeared in the commissioners' actual discussions. By the end of my time with the Commission, I had begun to suspect that the point of "appealing to principles" was something quite else: not to give particular ethical judgments a more solid foundation, but rather to square the collective ethical conclusions of the Commission as a whole with each individual commissioner's other *non*-ethical commitments. It seemed to me that the principles of Catholic ethics tell us more about Catholicism than they do about ethics, the principles of Jewish or Humanist ethics more about Judaism or Humanism than about ethics. Such principles serve less as foundations, adding intellectual strength or force to particular moral opinions, than as corridors or curtain walls linking moral perceptions that are available to the "natural reason" of all reflective human beings with other, more general positions—theological, philosophical, ideological or *Weltanschaulich*.

2. The years of the National Commission's work were also years during which the morality of abortion became a matter of public controversy. Following a public dispute about research on the human fetus, the United States Congress established the Commission in the backwash from the Supreme Court's ruling on the legality of abortion.<sup>4</sup> Before long the public debate about abortion acquired some of the same puzzling features as the proceedings of the Commission itself. On the one hand, there were those who could discuss the morality of abortion quite temperately and with discrimination: acknowledging that here, as in other agonizing human situations, conflicting

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<sup>4</sup> *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973).

considerations are involved and a just, if sometimes painful, balance has to be struck between different rights and claims, interests and responsibilities.<sup>5</sup> That temperate approach underlay traditional common law doctrines about abortion before the first statutory restrictions were enacted in the years around 1825.<sup>6</sup> It was also the approach adopted by the United States Supreme Court in the classic case, *Roe v. Wade*;<sup>7</sup> and, most important, it was the approach quite clearly spelled out by Aquinas, whose position on the topic was quite close to that of the common law and the Supreme Court. He acknowledged that the balance of moral considerations necessarily tilts in different directions at different stages in a woman's pregnancy, with crucial changes beginning around the time of "quickening."<sup>8</sup> On the other hand, much of the public rhetoric of the abortion controversy increasingly came to turn on "matters of principle." Consequently, the debate became less temperate, less discriminating, and above all less resolvable. Too often, in subsequent years, the issue has boiled down to pure head-butting: an embryo's unqualified "right to life" being pitted against a woman's equally unqualified "right to choose." Those who have insisted on dealing with the issue on the level of high theory thus guarantee that, on the practical level, the only possible outcome is deadlock.

3. My perplexities about the force and value of "rules" and "principles" were further sharpened as the result of watching a television news magazine program. A handicapped young woman had difficulties with the local Social Security office. Her Social Security payments were not sufficient to cover her rent and food, so she started up an answering service which she operated through the telephone at her bedside, and the income from this service, though itself less than a living wage, made all the difference to her situation. When the local Social Security office heard about this extra income, however, they reduced her benefits accordingly. In addition, they ordered her to repay some of the money she had been receiving in the meanwhile. They apparently regarded her as a case of "welfare fraud." In conclusion, the television reporter added two final statements. Since the report had been filmed, he told us, the young woman, in despair, had taken her own life; and to this he added his own personal comment, that "there should be a *rule* to prevent this kind of thing from happening."

Notice that the reporter did not say, "The local office should be given discretion to waive, or at least bend the existing rules in hard cases." What he said was, "There should be an *additional* rule to prevent such iniquities in

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<sup>5</sup> Callahan, *Abortion: Law, Choice and Morality* (New York: Macmillan, 1970); Noonan, ed., *The Morality of Abortion: Legal and Historical Perspectives* (Cambridge: Harvard U. Press, 1970).

<sup>6</sup> Abortions after quickening were made a felony in Britain in 1803 by 43 George III c. 58, and the example was followed by many U.S. states during the succeeding decades. For details, see Louisell and Noonan, "Constitutional Balance," in Noonan, *id.* esp. at 223-26.

<sup>7</sup> *Supra* note 4.

<sup>8</sup> Aquinas, *Commentarium Libro Tertio Sententiarum*, D.3, Q.5, A.2, Solutio.

the future." Justice, he evidently believed, can be insured only by establishing an adequate system of rules; and injustice can be prevented only by adding more rules. Hence, the questions to which this lecture is addressed:

1. What force and function do rules or principles truly possess, either in law or in ethics, in the first place?

2. What social and historical circumstances make it most natural and appropriate to discuss legal and ethical issues in the language of "rules" and "principles"?

3. Why are our own contemporary legal and ethical discussions so pre-occupied with rules and principles?

4. How much would we do better to look for justice and morality in other directions?

Far from "rules" playing an indispensable part in either law or ethics, I shall argue, they have only a limited and conditional role. The current vogue for rules and principles is the outcome of certain powerful but not uniquely important factors in recent social history. Looked at in a longer historical perspective, they have always had to be balanced against counterweights. Justice has always required both law and equity, while morality has always demanded both fairness and discrimination. When this essential duality is ignored, the insistence on discussing fundamental issues on the level of unchallengeable principles can generate, or become the instrument of, its own subtle kind of tyranny.

## II

My reading soon led me back to Stein's book, *Regulae Juris*, which traces the development of the concept of a "rule" in the Roman law tradition from its early days to the modern era.<sup>9</sup> Professor Stein's account of the earliest phases of Roman law was the most striking part. For the first three hundred years of Roman history, the system of law made no explicit use of this concept. The College of Pontiffs acted as the city's judges, and individual pontiffs gave their adjudications on the cases submitted to them. They were not required to cite any general rules as justifications for their decisions. Indeed, they were not required to give "reasons" for their adjudications at all. Their task was not to argue, rather it was to pontificate.

How was this possible? How can any system of law operate in the absence of rules, reasons, and all the associated apparatus of binding force and precedent? Indeed, in such a situation can we really say a true system of law exists at all? Answering those questions requires us to consider the historical and anthropological circumstances of early Rome. Initially, Rome was a small and relatively homogeneous community, whose members shared a correspondingly homogeneous tradition of ideas about justice and fairness, property and propriety: a tradition having more in common with Maine's ideas

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<sup>9</sup> Stein, *Regulae Juris* (Edinburgh: Edinburgh U. Press, 1966) at 4-10.

about "customary law" than with Austin's "positive law."<sup>10</sup> In any such community the functions of adjudication tend to be more arbitral than regulatory: like labour arbitrators today, the judges will not be as sharply bound by precedent as contemporary high court judges. The disputes that the pontiffs adjudicated were typically ones about which the traditional consensus was ambiguous, and in which the balance of rights and obligations between the parties required the judgment call of a trusted and disinterested arbitrator. In these marginal cases all that the arbitrator may be able to say is, "Having taken all the circumstances into account, I find that on this particular occasion it would, all in all, be more reasonable to tilt the scale to A rather than to B." This ruling will rest, not on the application of general legal rules, but rather on the exercise of judicial discrimination in assessing the balance of particulars. Thus initially, "pontificating" did not mean laying down the law in a dogmatic and ungrounded manner. Rather, it meant resolving marginal disputes by an equitable arbitration, and the pontiffs had the trust of their fellow citizens in doing so.

This state of affairs did not last. Long before the first Imperial codification, Roman law began to develop the full apparatus of "rules" with which we are ourselves familiar. Under what circumstances did this happen? Stein picks out five sets of factors as contributing to this new reliance on *regulae*.<sup>11</sup> First, as the city grew, the caseload increased beyond what the pontiffs themselves could deal with. Other junior judges were brought in to resolve disputes. They did not possess the same implicit trust as the pontiffs, so the consistency of their rulings had to be "regularized." Second, with the rise of lawyering as a profession, law schools were set up and *regulae* were articulated for the purpose of teaching the law. Discretion, which had rested earlier on the personal characters of the pontiffs themselves and was not so easy to teach, began to be displaced by formal rules and more teachable argumentative skills. Third, Rome acquired an empire, and foreign peoples came under the city's authority. Their systems of customary law had to be harmonized with the Roman system, and this could be done only by establishing concordance between the "rules" of different systems. Fourth, the Empire itself developed a bureaucracy, which could not operate except on the basis of rules. Finally, the intellectual discussion of law was pursued in the context of Greek philosophy. Although Cicero, for example, was a practising attorney, he was also a philosopher with a professional interest in the Stoic doctrine of the *logos*, or "universal reason."

What followed the resulting proliferation of rules and laws is common knowledge. First, a functional differentiation grew between two different kinds of issues. On the one hand, there were issues that could be decided by applying *general* rules or laws, on the basis of the maxim that like cases should be treated alike. On the other hand, there were issues that called for discretion, with an eye to the *particular* features of each case, in accor-

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<sup>10</sup> Fallers, *Law without Precedent* (Chicago: U. of Chicago Press, 1969); see also the classical discussion by Sir Henry Maine in *Lecture on the Early History of Institutions* (7th ed. Port Washington: Kennikat, 1966).

<sup>11</sup> Stein, *supra* note 9, at 26, 80-82, 124-27.

dance with the maxim that significantly different cases should be treated differently. This functional differentiation became the ancestor of our own distinction between legal and equitable jurisdiction. Secondly, the Emperor Constantine decided as a matter of Imperial policy to bring equitable jurisdiction under his personal control by reserving the equitable function to his own personal Court and Chancellor. Out in the public arena, judges were given the dogwork of applying the general rules with only the minimum of discretion. Once legal proceedings were exhausted, the aggrieved citizen could then appeal to the Emperor as *parens patriae*, or "father of the fatherland," for the benevolent exercise of clemency or equity. Politically, this division of labour certainly did the Emperor no harm; but it also sowed the first seeds of public suspicion that the Law is one thing, Justice another.<sup>12</sup>

From the College of Pontiffs to the Emperor Constantine was, thus, a significant reversal. When Rome was a small town, the pontiffs were both priests of the national cult and impartial arbitrators, and in the latter capacity their activities were primarily "arbitral" or "equitable" rather than "legal." Once Rome had become an Empire with a fully developed court system and a bureaucratic state machine, the activities of the judges were primarily legal rather than arbitral, and equitable jurisdiction was taken away from them. Equity now became the preserve of the Emperor, who was not just *parens patriae* but also *pontifex maximus*, or "supreme pontiff." Carried over into the modern English-speaking world, the resulting division between courts of law and courts of equity is familiar to readers of Dickens. Even though during the twentieth century most Anglo-American jurisdictions have merged legal and equitable functions in the same courts,<sup>13</sup> it is still widely the case that equitable remedies can be sought only in cases where legal remedies are unavailable or unworkable. In this respect, the dead hand of Constantine still rules us from the grave.

### III

Much of this analysis still rings true today. Life in late twentieth century industrial societies clearly has more in common with life in Imperial Rome than it has with either the Rome of Horatius at the Bridge or with Gaskell's *Cranford*. Our cities are vast, our populations are mixed and fragmented, our public administration is bureaucratic, and our jurisdictions (both domestic and foreign) are many and varied. As a result, the moral consensus and civic trust on which the pontificate of early Rome depended for its general respect and efficacy often appear to be no more than a beguiling dream. The way we live now, people have come to value uniformity above responsiveness, to focus on law at the expense of equity, and to confuse "the rule

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<sup>12</sup> For the subsequent influence of this division on the Anglo-American legal tradition, see, e.g., Baker, *An Introduction to English Legal History* (Toronto: Butterworths, 1979).

<sup>13</sup> Politically speaking, of course, the decline of monarchical sovereignty made the formal division of Law from Equity less functional. It is no surprise, therefore, that the nineteenth century saw its abolition both in the constitutional monarchy of England and also in the republican United States.



of law" with a law of rules. Yet the balance between law and equity still needs to be struck, even in new ways that answer to our new needs. From this point on, I shall work my way toward answering the question, "How, in our actual situation, can that balance best be redressed?"

In law, in ethics and in public administration alike, there is nowadays a similar preoccupation with general principles and a similar distrust of individual discretion. In the administration of social services, the demand for equality of treatment makes us unwilling to permit administrators to "temper the wind to the shorn lamb"—which strikes us as unfair.<sup>14</sup> The equation of justice with fairness is, thus, a two-edged sword. In the professions, too, there is a widespread fear of professionals taking unfair advantage of their fiduciary positions, which has contributed to the recent wave of malpractice suits. In the courts, judges are given less and less room to exercise discretion, and many lawyers view juries as no more trustworthy than judges; the more they are both kept in line by clear rules (it seems) the better.<sup>15</sup> As for public discussions of ethics, the recognition of genuine moral complexities, conflicts and tragedies, which can be dealt with only on an individual case-by-case basis, is simply unfashionable. Victory in public argument goes, rather, to the person with the more imposing principle. Above all, many people involved in the current debate seem actually to have forgotten what the term "equity" means, and assume that it is just a literary synonym for "equality."<sup>16</sup> A demand for the uniform application of public policies leads to a submerging of the discretionary by the rigorous, the equitable by the equal. Faced with judicial injustices, we react like the television reporter: declaring, "There ought to be a law against it," even where it would be more appropriate to say, "In this particular case, the law is making an ass of itself." The same applies, also, to the operation of our bureaucracies, and to the emphasis on principles in moral judgments.

In all three fields, we need to be reminded that equity requires not the imposition of uniformity or equality on all relevant cases, but rather reasonableness or responsiveness (*epieikeia*) in the application of general rules to individual cases.<sup>17</sup> Equity means doing justice with discretion: around, in the

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<sup>14</sup> Rawls, *A Theory of Justice* (Cambridge: Harvard U. Press, 1971) is only the most recent systematic exposition of this position, which has become something of a philosophical commonplace, since Kant raised the issue of "universalizability" in the late eighteenth century.

<sup>15</sup> See, e.g., Davis, *Discretionary Justice* (Baton Rouge: La. State U. Press, 1969); Newman, *Equity and Law* (New York: Oceana, 1961); and particularly Newman, ed., *Equity in the World's Legal Systems* (Brussels: Bruylant, 1973).

<sup>16</sup> This even seems to be true of so perceptive an author as Kaufman, in his ingenious tract, *Red Tape: its Origins, Uses and Abuses* (Washington: Brookings Institution, 1977) at 76-77: "Quite apart from protective attitudes toward specific programs, general concern for uniform application of policy militates against wholesale devolution. Not that uniformity automatically assures equity or equality of treatment. . . ."

<sup>17</sup> The *locus classicus* for the discussion of the notion of *epieikeia*, or "equity" is Aristotle's *Nicomachean Ethics*, especially paras. 1136b30-1137b32. See also Hamburger's useful discussion in *Morals and Law: the Growth of Aristotle's Legal Theory* (New Haven: Yale U. Press, 1951).

interstices of, and in the areas of conflict between our laws, rules, principles and other general formulae. It means being responsive to the limits of all such formulae, to the special circumstances in which one can properly make exceptions, and to the trade-offs required where different formulae conflict. The degree to which such marginal judgments can be regularized remains limited today, just as it was in early Rome. Faced with the task of balancing the equities of different parties, a judge today may well be guided by previous precedents; these precedents, however, only illuminate broad maxims, they do not announce formal rules.<sup>18</sup> Likewise, professional practice may be spoken of in cut and dried terms, as a matter of "routine and accepted" procedures, only in the artificial context of a malpractice suit. In the actual exercise of his profession, a surgeon, for instance, may have to use his best judgment in deciding how he can conscientiously proceed. Finally, in ethics, moral wisdom is shown not by those who stick by a single principle absolutely and without exception, but by those who understand that, in the long run, no principle, however absolute, can avoid running up against another equally absolute principle, and who have the experience and discrimination needed to balance conflicting considerations in the most humanly acceptable way.<sup>19</sup>

It is looking at the effects of changing social conditions on our ethical perceptions that we can best discover the clues that will permit us to unravel this whole tangle of problems. A century ago in *Anna Karenina*, Tolstoy expressed a view which, though exaggerated, is nonetheless illuminating. During his lifetime Tolstoy lived to see the abolition of serfdom, the introduction of railways, the movement of the populace from the country to the cities, and the consequent emergence of modern city life; and he continued to have deep reservations about the very possibility of living a truly moral life in a modern city. As he saw matters, genuinely "moral" relations can exist only between people who live, work and associate together; inside a family, between intimates and associates, within a neighborhood. The natural limit to any person's moral universe, as Tolstoy depicts it, is the distance he or she can walk, or at most ride. By taking the train, you left the sphere of truly moral actions for a world of strangers, toward whom you had few real obligations and with whom your dealings could be only casual or commercial. Whenever the moral pressures and demands become too strong to bear, Tolstoy has Anna go down to the railway station and take a train somewhere, anywhere; and the final irony of Tolstoy's own painful life was that he finally broke away from his own home and family, only to die in the local station-master's office.<sup>20</sup> Matters of state policy and the like, in Tolstoy's eyes, lay

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<sup>18</sup> McClintock, *Handbook of the Principles of Equity* (2d ed. St. Paul: West, 1948) at 52-54; Pomeroy, *A Treatise on Equity Jurisprudence* (San Francisco: Bancroft Whitney, 1907) §§ 360-63.

<sup>19</sup> Hence Aristotle's emphasis on the need for a person of sound ethical judgment to be an *anthropos megalopsychos*; see Part VI *infra*.

<sup>20</sup> This image of the steam locomotive had a powerful hold on Tolstoy's imagination. It recurs, for example, in *War and Peace*, where he compares the ineluctable processes of history to the movements of the pistons and cranks of a railway engine, as a way of discrediting the assumption that "world historical figures" like Napoleon can exercise any effective freedom of action in the political realm.

quite outside the realm of ethics. Through the figure of Constantin Levin, he made clear his own skepticism about all attempts either to turn ethics into a matter of theory or to make political reform an instrument of virtue.<sup>21</sup>

What Tolstoy rightly emphasized is the sharp differences that exist between our moral relations with our families, intimates, and immediate neighbors or associates, and our moral relations with complete strangers. In dealing with our children, friends and immediate colleagues, we both expect to, and are expected to, make allowances for their individual personalities and tastes, and we do our best to tailor our actions according to our perception of their current moods and plans. In dealing with the bus driver, the sales clerk in a department store, the hotel barber and other such casual contacts, there may be no basis for making these allowances, and hence no chance of doing so. In these transient encounters, our moral obligations are limited and chiefly negative, *viz.* to avoid acting offensively or violently. In the ethics of strangers, respect for rules is all, and the opportunities for discretion are few; in the ethics of intimacy, discretion is all, and the relevance of strict rules is minimal.<sup>22</sup> For Tolstoy, of course, only the ethics of intimacy was properly called "ethics" at all and that is why I described his view as exaggerated. But in this respect the ethics of Rawls is equally exaggerated, even though in the opposite direction. In our relations with casual acquaintances and unidentified fellow citizens, absolute impartiality may be a prime moral demand. But among intimates a certain discreet partiality is, surely, only equitable, and certainly not unethical. A system of ethics that rests its principles on "the veil of ignorance" may well be "fair," but it will also be—essentially—an ethics for relations between strangers.<sup>23</sup> That is what makes the doctrine of justice as fairness double-edged.

#### IV

Seeing how Tolstoy felt about his own time, what would he have thought about the life we lead today? The effects of the railways, in blurring the boundary between the moral world of the immediate community and the neutral world beyond, have been only multiplied by the private car, which breaks that boundary down almost completely. Living in a multi-storey apartment block, taking the car from its underground garage to the supermarket and back, the modern city dweller may sometimes wonder whether he has any "neighbours" at all. For many of us, indeed, the sphere of intimacy has shrunk to the nuclear family, and placed immense strain on family relations in the process. Living in a world of comparative strangers, we find ourselves short on civic trust and increasingly estranged from our professional ad-

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<sup>21</sup> This is the central theme of *Anna Karenina*, in which Tolstoy documents his own disillusion with social and political ethics through the character of Constantin Levin.

<sup>22</sup> Notice how Aristotle treats the notion of *philia* as complementary to that of "equity." The nature of the moral claims that arise within any situation depend on how closely the parties are related. Indeed, it might be better to translate *philia* by some such term as "relationship" instead of the customary translation, "friendship," since his argument is intended to be analytical rather than edifying.

<sup>23</sup> Rawls, *supra* note 14.

visors; less inclined to give judges and bureaucrats room to use their discretion, and more determined to obtain equal, if not always equitable, treatment. In a world of complete strangers, after all, equality will be about the only virtue left.

Do not misunderstand my position. This lecture is not intended as a nostalgia trip back to the "Good Old Days." The world of neighbourliness and forced intimacy, of both geographical and social immobility, had its vices as well as its virtues. Austen's caricature of Lady Catherine de Burgh in *Pride and Prejudice* reminds us that purchasing equity by submitting to gross condescension can make its price too dear: "God bless the Squire and his relations, and keep us in our proper stations." Any biography of Tolstoy reminds us that his world, too, had a darker side; and those who are seduced by his admiration for the moral wisdom of the newly emancipated peasantry will find an antidote in Douglass's memoirs of slave life on the Maryland shore.<sup>24</sup> Nor am I interested in deploring apartment blocks and private cars. People usually have reasons for living as they do, and attacking modernity in the name of the morality of an earlier time is an act of desperation, like building the Berlin Wall. My question is only, "If we accept the modern world as it is—apartment blocks, private cars and all—how can we strike the central balances between the ethics of intimates and the ethics of strangers, between uniformity of treatment and administrative discretion, and between equity and law, in ways that answer to our contemporary needs?"

In the practice of law, current public stereotypes focus on the shortcomings of the adversary process, and those within the profession who feel that its virtues can be bought at too high a price are beginning to search for alternative procedures. What first needs to be explained, however, is just where the adversary system has gone astray, and in what fields of law we should be most concerned to replace it. That should not be hard to do. Given that we handle our moral relations with intimates and associates differently from our moral relations with strangers, may not a similar differentiation be appropriate between the ways in which we handle our legal relations with strangers, on the one hand, and with intimates, associates and close family members on the other?

Even in the United States, the homeland of the adversary system, at least two types of disputes are dealt with using procedures of arbitration or conciliation rather than confrontation: labour-management disputes and the renegotiation of commercial contracts.<sup>25</sup> That is no accident. In a criminal prosecution or a routine civil damage suit arising out of a car collision, the parties are normally complete strangers before the proceedings, and have no

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<sup>24</sup> Quarles, ed., *Narrative of the life of Frederick Douglass, an American Slave, written by himself* (Cambridge: Belknap Press, 1960).

<sup>25</sup> In United States labour law practice, arbitrators are guided by the published decisions of previous arbitrations, but not bound by them, since their own decisions normally turn on an estimate of the exact personal and group relations between the workers and managers involved in the particular dispute. In Switzerland, the results of labour arbitrations are not even published, on the ground that they are a "purely private matter" as between the immediate parties.

stake in one another's future; so no harm is done if they walk out of the court vowing never to set eyes on each other again. By contrast, the parties to a labour grievance will normally wish to continue working together after the adjudication, while the disputants in a commercial arbitration may well retain or resume business dealings with one another despite their present disagreement. In cases of these kinds, the psychological stresses of the adversary system can be quite destructive. By the time an enthusiastic attorney has done his bit, further labour relations or commercial dealings may be psychologically impossible. In appraising different kinds of court proceedings, we need to consider how particular types of judicial episodes fit into the larger life histories of the individuals who are parties to them and what difference the actual form of proceedings adopted can make to their impact on those life histories.

A lawsuit that pits the full power of the State against a criminal defendant is one thing: in that context Freedman may be right to underline the merits of the adversary mode, and the positive obligation of zealous defense advocacy.<sup>26</sup> A civil suit that pits colleagues, next-door neighbours or family members against each other is another thing: in that context, resort to adversary proceedings may only make a bad situation worse. Reasonably enough, the main locus of dissatisfaction with the adversary system embraces those areas of human life in which its psychological outcomes are most damaging, such as family law. By the time that the father, mother and children involved in a custody dispute have all been zealously represented in court, the bad feelings from which the suit originally sprang may well have become irremediable. It is just such areas as family law that some other jurisdictions, for instance, West Germany, have chosen to handle by arbitration rather than litigation, in a context that leaves much more room for discretion.

I am suggesting, then, that a system of law that consists wholly of rules would treat all the parties coming before it in the ways appropriate to strangers. By contrast, in handling those legal issues that arise between parties who wish to continue as close associates on an intimate or familiar level, the demands of equality and rule conformity lose their central place. There, above all, the differences between the needs, personalities, hopes, capacities and ambitions of the parties to a dispute most need to be taken into account. Only an adjudicator with authority to interpret existing rules, precedents and maxims in the light of, and in response to, those differences will be in a position to respect all the equities of the parties involved.

## V

In public administration, especially in the field of social services, the crucial historical changes were more recent, yet they appear, if anything,

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<sup>26</sup> Freedman, *Lawyer's Ethics in an Adversary System* (Indianapolis: Bobbs Merrill, 1975). In this connection, current Chinese attempts to turn criminal proceedings into a species of "chummy" conciliation between the defendant and his fellow citizens can too easily serve to conceal tyranny behind a mask of paternalistic good will.

much harder to reverse. Two centuries ago most of what we now call the social services—then known collectively as “charity”—were still dispensed through the churches. Local ministers of religion were generally trusted to perform this duty equitably and conscientiously; and in deciding to give more to Mrs. Smith rather than to Mrs. Jones, they were not strictly answerable to any supervisor, still less bound by a book of rules. Of course, this arrangement had its own abuses: as Austen makes clear, the Rev. Mr. Collins could be as overbearing in his own way as Lady Catherine de Burgh. Even a hundred years ago many such charitable functions were still carried on by private organizations, like those in Britain charmingly known as “friendly societies.” But by this time things were beginning to change. A friendly clergyman is one thing, but a friendly *society* is more of an anomaly. In due course irregularities in the administration of those organizations, like those in some trade union pension funds today, provoked government supervision, and a Registrar of Friendly Societies was appointed to keep an eye on them.

From that point on, the delivery of social services has become ever more regularized, centralized and subject to bureaucratic routine. It should not take horror stories, like that of the handicapped young woman’s answering service, to make us think again about the whole project of delivering human services through a bureaucracy: one only has to read Weber.<sup>27</sup> The imperatives of bureaucratic administration require determinate procedures and full accountability; while a helping hand, whether known by the name of “charity” or “social services,” can be truly equitable only if it is exercised with discretion on the basis of substantive and informed judgments about need rather than formal rules of entitlement.

What might be done, then, to counter the rigours of bureaucracy in this field? Or should late twentieth century societies look for other ways of lending a collective hand to those in need? In an exemplary apologia for bureaucracy, Kaufman of the Brookings Institution has put his finger on many of the key points.<sup>28</sup> He argues that, if we find public administration today complex, unresponsive and procedure-bound, this is almost entirely our fault. For these defects are direct consequences of the demands that we ourselves have placed on our public servants in a situation increasingly marked by diversity, populist envy, and distrust of officialdom. Because we are unwilling to grant discretion to civil servants for fear that it will be abused, we leave ourselves with no measure for judging administrator’s performance other than *equality*. As Kaufman remarks: “If people in one region discover that they are treated differently from people in other regions under the same program, they are apt to be resentful and uncooperative.”<sup>29</sup>

Hence arises a “general concern for uniform application of policy,”

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<sup>27</sup> Weber, *The Theory of Social and Economic Organization* trans. Henderson and Parsons (London: Oxford U. Press, 1947) Chapter III sec. ii, especially 329 *et seq.*: from *Wirtschaft und Gesellschaft*, part I.

<sup>28</sup> Kaufman, *supra* note 16.

<sup>29</sup> *Id.* at 77.

which can be guaranteed only by making the rulebook even more inflexible. Is our demand for equality and uniformity really so unqualified that we are determined to purchase it at any price? If it were entirely clear to us that it is our own insistence on absolute fairness which makes the social services dehumanizing and dehumanized, might we not consider opting for other, more *equitable* procedures even though their outcomes might be less certainly equal?

Alternatively, should we perhaps reconsider the wholesale nationalization of charity that began in the early twentieth century? Plenty of honest private pension funds still operate alongside government retirement and old-age pension schemes, and a few communally based systems of welfare and charity still exist which remain trusted just because their accountability is to a particular community rather than to the national government. Among the Ismailis, the world-wide branch of Islam of which the Aga Khan is the head, tithing is still the rule, and no promising high school graduate misses the chance of going to college merely because he comes from a poor family—which is no longer true of the government programs available in the United States of America. Perhaps we let ourselves be too skeptical too soon about the friendliness of “friendly societies,” and should take more seriously the possibility of reviving social instruments with stronger roots in the locality or the community, which do not need to insist on rigid rule-governed procedures. I say, we should *perhaps* take this possibility more seriously, but that is of course a large “perhaps.” The social changes that led to the nationalization of charity are powerful and longstanding, and thus far they have shown little sign of weakening. It may be that, given a choice, people will prefer to continue putting up with bureaucratic forms and procedures that they can grumble at with impunity if in this way they can avoid putting themselves back at the mercy of social or communal relationships of kinds that may be onerous in more substantive ways.

## VI

In the field of ethics, all these difficulties are magnified. There I have one firm intellectual conviction, and on the social level one somewhat frailer hope. In a 1932 poem Robert Frost wrote:

Don't join too many gangs. Join few if any.  
Join the United States, and join the family.  
But not much in between, unless a college.<sup>30</sup>

In Frost's own curmudgeonly way his lines capture that hostility toward communal ties and restraints which, since Tolstoy's day, has continued to undermine our “intermediate institutions” or “mediating structures.” Toward the nuclear family and the nation, people do indeed still feel some natural loyalty, “but not much in between, unless a college.” During the last thirty years, even the nation state has lost much of its mystique, leaving the family

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<sup>30</sup> Frost, “Build Soil—a Political Pastoral,” in *Complete Poems of Robert Frost* (New York: Holt, Rinehart & Winston, 1949) 421-32, at 430.

exposed to stresses that it can hardly support. It is my frail social hope that we may find some new ways of shaping other intermediate institutions toward which we can develop a fuller loyalty and commitment: associations which are larger than the nuclear family, but not so large that they defeat in advance the initial presumption that our fellow members are trustworthy. For it is only in that context that the ethics of discretion and intimacy can regain the ground it has lost to the ethics of rules and strangers.

Where might we look for the beginnings of such associations? Traditionally, their *loci* were determined by religious and ethnic ties, and these are still sometimes used constructively to extend the range of people's moral sympathies beyond the immediate household. But we scarcely need to look as far as Ulster or Lebanon to see the other side of that particular coin. Membership in schools and colleges has some of the same power, as Frost grudgingly admits, though it is a power that tends to operate exclusively rather than generously. The great ethical hope of the Marxists was that "working class solidarity" would, in effect, create a vast and cohesive extended family within which the dispossessed would find release from psychological as well as from political and economic oppression. By now it seems to be the evidence of history that awareness of shared injuries sets different groups against one another quite as often as it unites them. For some of us, the bonds of professional association are as powerful as any. Certainly, despite all other reservations about my fellow academics, I do still have a certain implicit trust in their professional responsibility and integrity. Each year I vote colleagues whom I have never even met onto the boards that manage my pension funds without any serious anxiety. If it were proved that those elected representatives had, nevertheless, been "milking" the premiums and "salting" them away in a Swiss bank, that revelation would shake up my moral universe more radically than any dishonesty of public figures on the national level.

True, these are frail hopes and provide only slender foundations to build on. Yet, in the realm of ethics, frail hopes and slender foundations may be what we should learn to live with and accept as much better than nothing. That brings me, in conclusion, to the intellectual point about which I am much more confident. Let us reconsider the demand for rigorous and absolute moral principles which underlines the dogmatism in contemporary public debates about ethical issues, and which by failing us generates also as its natural opposite, an equally dogmatic cultural relativism. If this cult of absolute principles is so attractive today, then it is in part a sign that we still find it impossible to break with the "quest for certainty" that Dewey tried so hard to discredit.<sup>31</sup> It is not that we needed Dewey to point out the shortcomings of such absolutism. After all, Aristotle had insisted that there are no "essences" in the realm of ethics, and so no basis for any rigorous "theory" of ethics. Practical reasoning in ethics, as elsewhere, is a matter of judgment, of weighing different considerations against one another, never a matter of formal theoretical deduction from strict or self-evident axioms. It is a task

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<sup>31</sup> Dewey, *The Quest for Certainty* (New York: Putnam, 1929).



less for the clever arguer than for the *phrominos*, the "sensible practical person," or the *anthropos megalopsychos*, the "large spirited human being."<sup>32</sup>

It was not for nothing, then, that the members of the National Commission on human experimentation were able to agree about the ethical issues presented to them for just so long as they discussed those issues taxonomically. For in doing so they were reviving the older, Aristotelian procedures of the casuists and Rabbinical scholars, who understood all along that in ethics, as in law, the best we can achieve in practice is for good-hearted, clear-headed people to navigate their way across the complex terrain of moral life and problems. Starting from the paradigmatic cases that we do understand—what in the simplest situations is harm, and fairness, cruelty, generosity and so on—we must simply work our way, one step at a time, to the more complex and perplexing cases in which extremely delicate balances may have to be struck, and decide, for example, under just what conditions, if any, it would be acceptable to inject a sample group of five-year old children with an experimental vaccine from which countless other children could benefit even though the risks fall on those few individuals alone. Ethical argumentation, thus, makes most effective progress if we think of the "common morality" in the same way as we do about the common law:<sup>33</sup> if, for instance, we develop our perception of moral issues by the same kind of progressive navigation that has extended common law doctrines of tort into the areas, first of negligence, and later of strict liability.<sup>34</sup>

In the meanwhile, however, we must remain on our guard against the moral enthusiasts. In their determination to nail their principles to the mast, they only succeed in blinding themselves to the equities embodied in real life situations and problems. Their willingness to legislate morality, by reintroducing, for example, uncompromising legal restraints to enjoin all procedures of abortion, threatens to transform the most painful and intimate moral quandaries into adversarial confrontations between strangers: pitting, for instance, a woman against her own newly-implanted zygote in some ghastly parody of a landlord-tenant dispute. This harsh inflexibility sets the present day moral enthusiasts in sharp contrast to Aristotle's *anthropoi megalopsychoi*, and recalls Tolstoy's portrait of Alexei Karenin's associate, the Countess Ivanovna, who was a supporter of all fashionable good causes in theory but was in practice ready to act harshly and unforgivingly.

When Pascal attacked the Jesuit casuists for being too ready to make allowances in favour of penitents who were rich or high-born he no doubt

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<sup>32</sup> Aristotle's "large spirited person," commonly but wrongly translated as a "great souled man," ignoring the care with which the Greeks differentiated between *anthropoi* (human beings) and *andres* (men), is the final hero of the *Nicomachean Ethics*. The key feature of such a person was the ability to act on behalf of a friend from an understanding of that friend's own needs, wishes and interests.

<sup>33</sup> We are indebted to Donagan for reintroducing the idea of the common morality into philosophical ethics, in his book, *The Theory of Morality* (Chicago: U. of Chicago Press, 1977).

<sup>34</sup> Levi, *Introduction to Legal Reasoning* (Chicago: U. of Chicago Press, 1948).

had a point.<sup>35</sup> When he used this point as a reason for completely rejecting the case method in ethics, he set the bad example that is so often followed today: that is, when discretion is abused, we must withdraw it entirely and impose rigid rules in its place, instead of inquiring how we could adjust matters in such a way that the necessary discretion would continue to be exercised in future in an equitable and discriminating manner. In closing, then, I vote without hesitation against Pascal and for the Jesuits and the Talmudic scholars. We do not need to go as far as Tolstoy and claim that an ethics modeled on law rather than on equity is no ethics at all. We do need to recognize, however, that a morality based on general rules and principles alone is a tyrannical, disproportioned thing, and that only those who know how to “make equitable allowances” for subtle individual differences have a proper feel for the deeper demands of ethics. The casuists may have had their faults, but at any rate those faults were faults on the right side.

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<sup>35</sup> Pascal's *Lettres Provinciales* were originally published in 1656-57, during the trial of his friend Antoine Arnauld, whose Jansenist associations made him a target for the Jesuits. Pascal's journalistic success with these letters did a great deal, by itself, to bring the tradition of “case reasoning” in ethics into discredit: so much so that the art of casuistics has subsequently been known by the name of casuistry—a word which the *Oxford English Dictionary* first records as having been used by Pope in 1725, and whose very form, as the dictionary makes clear, is dyslogistic. It belongs to the same family of English words as “popery,” “wizardry,” and “sophistry,” all of which refer to the *disreputable* employment of the arts in question.