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Justice As Right Relationship: A Philosophical and Theological Reflection on Affirmative Action

Rev. Robert John Araujo, S.J.*

“Justice, and only justice, you shall pursue.”¹

“[C]ease to do evil, learn to do good; seek justice . . .”²

“For justice, we must go to Don Corleone.”³

I. INTRODUCTION

Justice. Lawyers, judges, law students, and many members of the public often use the term. Its meaning is generally understood throughout the legal profession, the bench, and the lay community—or so it seems. Our legal literature is replete with the term *justice*, but it frequently appears and is used without a precise definition or understanding. It is a word that is important to the legal profession, to the institutions of the law, and to the communities of human beings, that both serve. Yet, this word that is used in everyday life has a meaning that is often assumed but rarely understood.

*. Professor of Law, Gonzaga University School of Law, Spokane, WA. The author would like to thank Mr. Mark Farrell, J.D. 2000 for his thoughtful and generous research assistance and Dean John Clute and the Gonzaga Alumni Fund for their support. In addition to new material, this essay reflects an integration of some of the author's earlier works, which may enable readers to recognize that philosophical and theological inquiry can assist in the search for just results in the difficult legal questions facing us in this early Twenty-first Century.

1. *Deuteronomy* 16:20.

2. *Isaiah* 1:16-17.

3. *THE GODFATHER* (Paramount Pictures 1972). This statement was made by Bonasera—the undertaker—who seeks revenge against two young men who “tried to take advantage” of his daughter.

Like Bonasera seeking Don Corleone's assistance in *The Godfather*,⁴ the law, the legal profession, and the laity are concerned with justice. But what exactly is it? Is it simply the personal revenge that Bonasera seeks, or is it something more profound? Is it the corrective conclusion of a dispute between two or more people which is commutative justice? Might it be the institutional punishment exacted of those who transgress against other members of the community? Is it providing for those with the least access to goods and services which they need to survive? Is it seeking retribution against those who have brought harm to innocents?

The purpose of this essay is to come to grips with the term justice and to establish a better understanding of this important expression that penetrates much of legal, political, and human history. Throughout life, most of us participate in the search for justice. It is something to which we believe we are entitled because we are individuals who exist in community with other human beings. Each of us relies on others to do some things, and to refrain from doing others. In order to regulate these relationships, we establish publicly recognized rules identified as laws.⁵ It is through these laws that many seek what they believe is just. But, is there any association between these laws, their application and the expected ends or results we deem to be just? These questions are at the heart of the following investigation that will examine the correlation between the law and justice.⁶ Indeed, it has been suggested by others that the law and what is legal does not necessarily coincide with justice in spite of the inscription over the main portal of the United States Supreme Court—"Equal justice under law."⁷

If the law is a social institution, does that mean that justice must also be understood in a similar light? This question must be answered in the affirmative. While many may consider that they are due or owed something because it is "just," justice—be it social, commutative, or retributive—cannot be properly understood without taking account of individuals in a context that brings each into relationship with others. In essence then, justice is relational. Justice can be understood only when those who claim something because it is "just" are considered in relation to the others who may have concern or involvement with the issue that raises the question

4. *See id.*

5. The significance of people being in relationship to law and social institutions was ironically illustrated in the *Declaration of Consensus* calligraphy by Anita Karl accompanying the essay by Nicholas Lemann, which stated: "We, the relatively unbothered and well off, hold these truths to be self-evident: That Big Government, Big Deficits and Big Tobacco are bad, but that big bathrooms and 4-by-4's are not; that American overseas involvement should be restricted to trade agreements, mutual funds and the visiting of certain beachfront resorts; that markets can take care of themselves as long as they take care of us; that an individual's sex life is nobody's business, though highly entertaining; and *that the only rights that really matter are those which indulge the Self.*" Nicholas Lehman, *The New American Consensus: Government of, and for the Comfortable*, N.Y. TIMES MAG., Nov. 1, 1998, at 37.

6. This article will focus primarily on the law found in American legal institutions.

7. *See, e.g.*, RONALDDWORKIN, *LAW'S EMPIRE* 97 (1986) [hereinafter, DWORKIN, *LAW'S EMPIRE*]; JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS*, Chapter XII (1981) [hereinafter, FINNIS, *NATURAL LAW*]; LON FULLER, *THE MORALITY OF LAW* 157-59 (1964) [hereinafter, FULLER, *MORALITY OF LAW*]; H. L. A. HART, *THE CONCEPT OF LAW* 157-63 (1961) [hereinafter, HART, *CONCEPT OF LAW*].

of whether something is just. In short, this paper shall propose that the foundational concept underlying justice is a relational one. That is, justice cannot be understood without considering it the proper, correct, and fitting relation between individuals whose respective interests over some particular matter are in conflict.

This was the situation in the remand decision of the important affirmative action case of *United Steelworkers of America v. Weber*.⁸ That case involved the application of Title VII of the Civil Rights Act of 1964⁹ to an employer-labor union affirmative action program instituted to increase the number of skilled minority employees at Kaiser Aluminum and Steel's Gramercy, Louisiana plant.¹⁰ The dispute brought together counter-arguments by a variety of individuals from different segments of the same community affected by the conflict. In the *Weber* case, some sought justice for white workers like Brian Weber who had gained sufficient union seniority to advance into a training program that would provide new skills and higher wages. Others sought justice for the African-American members of the community who also should have been promoted to better-paying working positions but were conspicuously absent from the ranks of such employment due to past exclusion based on racial considerations.¹¹

Although *Weber* was decided by the Supreme Court over twenty years ago,¹² the majority decision, its impact, and its correctness are still debated today. The disagreement continues to be aired in legal, political, and academic circles.¹³

8. 443 U.S. 193 (1979).

9. 42 U.S.C. § 2000e (1964).

10. *See Weber*, 443 U.S. at 197-200.

11. *See id.* at 199-200.

12. *See id.* at 193.

13. It is clear that to this day the matter of affirmative action is still a major issue confronting the American legal and political community. *See, e.g.*, Nicholas Lehman, *What Happened To The Case For Affirmative Action*, N.Y. TIMES MAG., June 11, 1995; *see also* David Broder, *A New Front In Ballot Battle*, THE WASHINGTON POST, January 23, 1999, at A-1 (suggesting that the national disagreement about the legality and role of affirmative action and racial preference may be a major issue in the Presidential and national elections in the year 2000). Within the courts, the subject of affirmative action is periodically examined. *See, e.g.*, *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996); *see also* WILLIAM BOWEN AND DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998) and STEPHAN THERNSTROM AND ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE* (1997), for two perspectives on the continuing role of affirmative action. The Bowen-Bok effort is supportive of continuing affirmative action, but the Thernstrom investigation is generally critical.

II. THE *WEBER* CASE

A. Background

The major issue in *Weber* was the legality, within the context of Title VII, of a race-conscious affirmative action plan negotiated between a union, the United Steelworkers of America, and an employer, Kaiser Aluminum and Chemical Corp. to address racial imbalance found in the workplace.¹⁴ Many people involved with the litigation as well as its effect were concerned about the meaning of the law in the context of employment practices which address issues of race, color, national origin, sex, and religion.¹⁵

The facts underlying the development and implementation of this affirmative action program are as follows. In 1974 the United Steelworkers and Kaiser negotiated a multi-plant collective bargaining agreement for fifteen of the employer's plants.¹⁶ This agreement established an affirmative action plan to redress the "conspicuous racial imbalances in Kaiser's then almost exclusively white craftwork forces."¹⁷ Prior to 1974, Kaiser had hired into its craft work force only those workers who had craft experience.¹⁸ Because Blacks had historically been excluded from craft jobs in the Gramercy area, virtually none were able to meet the requirement of previous craft experience.¹⁹

Statistically, less than two percent of the craft workers at the Gramercy plant were black.²⁰ This fact contrasted with the further phenomenon that approximately thirty-nine percent of the labor force in the Gramercy area consisted of blacks.²¹ In principle, there seemed to be nothing that would prevent a black from entering the higher-paid occupations of the skilled craftworkers if they had some experience. As a practical matter, however, very few blacks could enter the more desirable craftworker positions.²²

Whatever the motivating impetus for addressing the racial imbalance in the

14. See *Weber*, 443 U.S. at 197.

15. See *id.* at 197-98.

16. See *id.*

17. *Id.* See 443 U.S. at 198-99 for a discussion about the craft work positions which required more skill than the production jobs and also paid higher wages.

18. See *id.*

19. See *id.*

20. *Id.*

21. *Id.* at 199.

22. See *id.* at 198-99. It is difficult to ascertain if there was something in the case's history suggesting that Kaiser did discriminate against blacks and it was only a matter of time before they would face some kind of legal challenge to their discriminatory practices.

Gramercy workforce,²³ Kaiser and the Union cooperated in developing and implementing a temporary craft training program that would be open to both whites and blacks who aspired to those higher-paying craft occupations which necessitated greater skill.²⁴ This training program was designed to prepare unskilled production workers for the higher paying craft positions through on-the-job training.²⁵ In order to compensate for the disproportionately low number of blacks who were presently in craft occupations, the plan called for a temporary allocation of fifty percent of the openings in the training program to blacks until "the percentage of black craftworkers in the plant [was] commensurate with the percentage of blacks in the local labor force."²⁶

Candidates from the unskilled workforce were to be selected for the training program according to their seniority because the principle of awarding training opportunities in preference of those workers with the most seniority was in accord with long-standing union traditions.²⁷ Thirteen trainees were selected to participate in this program during its first year of operation.²⁸ Of those selected, seven were black and six were white.²⁹ Some white workers, including Brian Weber, who had more seniority than the most senior black trainees but who were not selected for training raised a concern.³⁰

After his second rejection from the training program, Weber commenced a class action law suit alleging that the race-preferential process of selecting the craft trainees discriminated against him and similarly situated white workers in violation of Sections 703(a)³¹ and 703(d)³² of Title VII of the Civil Rights Act of 1964.³³

23. *See id.* at 223 n.2, 246 (Rehnquist, J., dissenting) for insight about whether the "voluntary" affirmative plan was really voluntary. Justice Rehnquist points out that a considerable amount of Kaiser's work was for the Federal Government and was continuously being investigated by the Office of Federal Contract Compliance (OFCC). *See id.* OFCC would periodically examine Kaiser's employment practices to ensure that it was not discriminating against any workers on grounds prohibited by Federal law. *See also Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 218 (5th Cir. 1977), *rev'd*, 443 U.S. 193 (1979).

24. *See Weber*, 443 U.S. at 198-99.

25. *See id.* at 198.

26. *Id.* at 197.

27. *See Weber v. Kaiser Aluminum & Chem. Corp.*, 415 F. Supp. 761, 764 (E.D. La. 1976).

28. *See Weber*, 443 U.S. at 199.

29. *See id.*

30. *See id.* at 199-200.

31. 42 U.S.C. § 2000-2(a) (1994). Section 703(a) of the statute states that:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an

B. The Litigation

While acknowledging that affirmative action programs *may* be an appropriate form of relief in Title VII cases “where necessary to cure the ill effects of past discrimination...,”³⁴ the district court entered judgment for Weber and the plaintiff class and issued a permanent injunction against Kaiser and the Union restraining them from denying the plaintiffs access to the craft-training program on the basis of race.³⁵ The trial court further stated that “the judiciary may establish affirmative action programs as a form of relief in certain Title VII cases without running afoul of sections 703(a), 703(d) or 703(j). . . .”³⁶ However, it also noted that the judiciary cannot override “the clear and unequivocal prohibitions against discrimination by an employer against any individual on the basis of race”³⁷

On appeal, the Fifth Circuit found that, “[i]n the absence of prior discrimination, a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference* prohibited by Title VII”³⁸ The two-judge majority of the Fifth Circuit panel considering this appeal recognized that those preferences which favor victims of past discrimination could be an appropriate remedy if there was a finding of previous racial discrimination.³⁹ However, the majority also pointed out that Title VII prohibits any preference that is based solely on race.⁴⁰ In affirming the district court, the Fifth Circuit majority stated:

We deny appellants relief, not unmindful of the delayed opportunities for advancement this will occasion many minority workers but equally aware of our duty, in enforcing Title VII, to respect the opportunities due to white workers as well. Whatever the merits of racial quotas..., *Congress has forbidden racial preferences in admission to on-the-job training programs*, and under the circumstances of this case we are not

employee, because of such individual’s race, color, religion, sex, or national origin.

Id.

32. 42 U.S.C. § 2000e-2(d) (1994). This subsection provides that: “It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining . . . to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.” *Id.*

33. *See Weber*, 443 U.S. at 199-200.

34. *See Weber v. Kaiser Aluminum & Chem. Corp.*, 415 F. Supp. 761, 768 (E.D. La. 1976).

35. *Id.* at 770.

36. *Id.* at 767.

37. *Id.* at 766.

38. *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 224 (5th Cir. 1977).

39. *See id.*

40. *See id.* The majority went on to say that “unless a preference is enacted to restore employees to their rightful places within a particular employment scheme it is strictly forbidden by Title VII.” *Id.* at 225.

empowered by the equitable doctrine of restorative justice to ignore that proscription.⁴¹

The majority saw inherent dangers if employers gave members of specific racial groups preferential treatment where there is no evidence of past racial discrimination. Under these circumstances, they concluded that affirmative action plans that assign employment opportunities on the basis of racial preference violate Title VII because this remedy is designed to correct past discrimination, but it is not engineered to alter a racial imbalance in the absence of previous discrimination.⁴² The majority concluded that affirmative action plans which address “societal discrimination” rather than past employment discrimination are strictly forbidden by Title VII.⁴³

In his dissent, Judge Wisdom acknowledged that there is a strong case to be made for interpreting Title VII in a color-blind fashion (i.e., a person’s skin color should *not* be relevant to most employment practices), but he also saw that societal discrimination continued to permeate American social and economic institutions.⁴⁴ In accepting that voluntary affirmative action programs may not be wise or just to all employees (especially those from the racial majority), he found that they are legal and fall within the scope of Title VII, particularly when needed to remedy “the pervasive effects of centuries of societal discrimination . . .”⁴⁵

The Union and Kaiser sought review by the Supreme Court which granted certiorari.⁴⁶ In reversing the Fifth Circuit,⁴⁷ the majority⁴⁸ of the Supreme Court emphasized at the outset of its opinion the “narrowness of [its] inquiry” and found that because the voluntary affirmative action program did not involve state action, there were no Constitutional issues involving the Fifth and Fourteenth Amendments.⁴⁹ The majority underscored the fact that the craft training program was adopted voluntarily.⁵⁰ For the members of the majority, this case was less concerned

41. *Id.* (emphasis added).

42. *See id.* at 224.

43. *See id.* at 225.

44. *See id.* at 239 (Wisdom, J., dissenting).

45. *See id.*

46. *See* *United Steelworkers of Am. v. Weber*, 439 U.S. 1045 (1978).

47. *See* *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 200 (1979).

48. Justice Brennan delivered the opinion in which Stewart, White, Marshall, and Blackmun, JJ., joined. *See id.* at 195.

49. *See id.* at 200. Unlike *Weber*, the *Bakke* case included these Constitutional issues because action by the State of California was involved in the special admissions program at the medical school of the University of California at Davis. *See* *Regents of Univ. of Calif. v. Baake*, 438 U.S. 265, 279-80 (1978). For an informative analysis of the impact of the *Bakke* case on affirmative action programs and their future, see SUSAN WELCH & JOHN GRUHL, *AFFIRMATIVE ACTION AND MINORITY ENROLLMENTS IN MEDICAL AND LAW SCHOOLS* (1998).

50. *See Weber*, 443 U.S. at 200. This is a point questioned by Justice Rehnquist in his dissent. *See id.* at 246 (Rehnquist, J., dissenting).

with what Title VII requires or prohibits and more concerned with what the statute permits.⁵¹

In his concurring opinion, Justice Blackmun shared “some of the misgivings” presented in Justice Rehnquist’s dissent.⁵² These “misgivings” concentrated on the extent to which Title VII’s legislative history supported the result reached by the majority.⁵³ In a lengthy examination of the statute’s legislative history, Justice Rehnquist concluded that Title VII prohibits all racial considerations in employment practices—even those remedial preferential programs that attempt to redress past wrongs or contemporary racial imbalances.⁵⁴

C. A Remand Opinion Raises A Profound Question

After the Supreme Court issued its decision, the case was remanded to the Fifth Circuit⁵⁵ where Judge Wisdom, who had previously dissented,⁵⁶ stated that the High Court was “profoundly right.”⁵⁷ Judge Gee who had written the earlier opinion reversed by the Supreme Court noted his “personal conviction that the decision of the Supreme Court in this case is profoundly wrong.”⁵⁸ He based his disagreement on two points. First, Judge Gee addressed statutory construction. He argued that the plain meaning of Title VII as corroborated by its legislative history indicates that hiring practices which rely on racial preferences are prohibited.⁵⁹ His second point of disagreement emerged from the interpretation of the Constitution based on Justice Harlan’s dissent in *Plessy v. Ferguson*⁶⁰ that the “Constitution is color-blind, and

51. *See id.* at 200. As the opinion states: “The only question before us is the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan.” *See id.* (emphasis added).

52. *See id.* at 209 (Blackmun, J., concurring).

53. *See id.*

54. *See id.* at 219-20. While authoring his own brief dissenting opinion, Chief Justice Burger joined the Rehnquist dissent. *See id.* at 219 (Burger, J., dissenting). In his own dissent, the Chief Justice argued that the majority rewrote the statute “to do precisely what both its sponsors and its opponents agreed the statute was *not* intended to do.” *Id.* at 216 (Burger, J., dissenting). The Chief Justice also indicated that an interpreter need not consult the legislative history of the statute because the requirements of Title VII are apparent from the face of the text. *See id.* at 217 (Burger, J., dissenting). Still, the Chief Justice agreed that Justice Rehnquist’s use of legislative history demonstrated that both supporters and opponents of Title VII reached an agreement about the *intended effect* of Title VII, viz. that it would foreclose the reading given the statute by the majority. *See id.* (Burger, J., dissenting). Simply put, the Chief Justice believed that the history of Title VII demonstrates Congress’s intent “to make discrimination against any individual illegal . . .” *Id.* at 218 (Burger, J., dissenting).

55. *See Weber v. Kaiser Aluminum & Chem. Corp.*, 611 F.2d 132 (5th Cir. 1980).

56. *See Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 227 (5th Cir. 1977).

57. *See Weber*, 611 F.2d at 133.

58. *Id.*

59. *See id.*

60. 163 U.S. 537 (1896).

neither knows nor tolerates classes among citizens.”⁶¹

In noting that the majority opinion was “gravely mistaken,”⁶² Judge Gee hastened to add that it was neither an immoral nor unjust conclusion because “in some basic sense it may well represent *true justice*.”⁶³ Regardless of whether a person agrees with Judge Gee or the Supreme Court majority and Judge Wisdom, one can acknowledge the significance of Judge Gee’s insight that the law (and what it requires, forbids, and permits) and justice do not always precisely correlate. One need only recall the Supreme Court’s reluctant opinion in *Toyosaburo Korematsu v. United States*⁶⁴ to be reminded of other occasions in this century where the law and justice did not perfectly match or even substantially reflect one another.

It is this correlation between law and justice—or lack thereof—that provides the catalyst for this investigation. While Judge Gee’s statement about the distinction between the meaning of the statute and that of justice is sobering, it does not define justice.

What is justice? Of what is it constitutive? Can it be better or clearly more understood? The next section will examine how legal and philosophical minds have defined, explained, and understood justice over the course of western legal history. Although the contributions of these thinkers have enhanced the understanding of what justice is, any understanding of justice is incomplete unless it takes account of the right relationship between those involved in the controversy or dispute where the lawyers, judges, parties, and society at large seek “justice.”

III. CONCEPTIONS OF JUSTICE—THE PERSPECTIVE OF HISTORY

In a responsible search for the meaning of justice and its “true form,” one could dwell on the understanding of this term’s meaning within the context of contemporary western legal institutions. However, this search would exclude a long legacy of

61. See *Weber*, 611 F.2d at 133 (citing *Plessy*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

62. See *id.* at 133.

63. *Id.* (emphasis added). Judge Gee concluded his opinion with the following reflection:

[T]here are many actions roughly just that our laws do not authorize and our Constitution forbids, actions such as preventing a Nazi Party march through a town where reside former inmates of concentration camps or inflicting summary punishment on one caught red handed in a crime. Subordinate magistrates such as I must either obey the orders of higher authority or yield up their posts to those who will. I obey, since in my view the action required of me by the Court’s mandate is only to follow a *mistaken* course and *not an evil one*.

Id. (emphasis added).

64. 323 U.S. 214 (1944). In this case, an American citizen of Japanese descent was convicted of remaining in a military area in which all persons of Japanese descent had been prohibited under law. See *id.* at 215-16. Despite the fact that there was no inquiry into Korematsu’s loyalty to the United States, the Court upheld his conviction reasoning that the order excluding members of Japanese descent was a valid wartime security measure. See *id.* at 223-24.

the human encounter with, and pursuit for, the meaning of justice and its relation to the community that lives according to the dictates of some law. In starting with Plato, we can see that this inquiry has ancient and venerable roots.

A. *Ancient and Medieval Perspectives*

In his dialogue *The Republic*, Plato often raised the question: what is justice?⁶⁵ Early in Book I, Socrates, Glaucon, and Cephalus are engaged in a conversation in which Socrates presents the central issue: “[c]oncerning justice, what is it?”⁶⁶ Answers were quickly offered: it is the repayment of a debt that is owed; it is giving good to friends and evil to enemies.⁶⁷ Thrasymachus, however, posited that justice is whatever is in the interest of the stronger—might is right.⁶⁸ Is it not, after all, the strongest, the leader, those in charge who decide what is just and what is not? But Socrates countered Thrasymachus with the suggestion that it is not power or might itself that determines justice, but, rather, virtue, wisdom, and friendship that define what is just and what is not.⁶⁹ Moreover, he reinforces his position by pointing out that justice is both individual as well as communal: it is the virtue of the individual as well as the virtue of the state.⁷⁰ Soon, other virtues come into play according to Socrates.

In particular, these virtues that appear on both the individual and corporate levels are wisdom, courage, temperance, and justice.⁷¹ As habits of human conduct, they direct the thought and the action that individuals pursue. Because they exist at the personal and communal level, virtues can habitually direct the actions taken by members of a community as well as the community itself to ascertain what decisions the community should take to resolve the disagreements that surface between its members. In essence, these virtues can promote harmony throughout a society in which tension between its members is held in check and a right relationship is restored.⁷² This harmony is characterized by the *suum cuique*: no one may take what is due to others nor may one be deprived of what is due him.⁷³ It is this notion of the

65. See generally PLATO, *THE REPUBLIC* (Benjamin Jowett trans., Random House 1982).

66. See *id.* Book I, at 8-9.

67. See *id.* at 9-10.

68. See *id.* at 19.

69. See *id.* at 38. We shall see later on that Aristotle, in his *NICHOMACHEAN ETHICS*, also understands that justice, or at least its best form, is understood as true friendship—a friendship that is not based on master and subservient, but on relationship between those few who are prepared to give of their entire selves so that others may benefit. See *infra* note 77.

70. See PLATO, *supra* note 65, Book I, at 40.

71. See PLATO, Book IV, at 139 (discussing wisdom, at 140; courage, at 142; temperance, at 144; justice, at 146).

72. See PLATO, at 149-51.

73. See PLATO, at 148-49.

suum cuique which is at the heart of justice.⁷⁴

Socrates suggests at the end of *Crito* that the *suum cuique*—what is due the individual person—cannot be understood without taking into account others who surround the individual making the claim of justice. As he notes, justice should be foremost in the minds of people:

[i]f you go forth, returning evil for evil, and injury for injury, breaking the covenants and agreements which you have made with us, and wrongdoing those whom you ought least to wrong, . . . we shall be angry with you while you live, and our brethren . . . will receive you as an enemy⁷⁵

But how does an individual cultivate those qualities essential for achieving the *suum cuique*? Like Plato,⁷⁶ Aristotle asserted that we find the meaning of justice through the application of virtues.

Throughout Book II of the *Nicomachean Ethics*, Aristotle examined virtuous human conduct and its relationship to “doing well” and achieving “good.”⁷⁷ Initially, the application of virtuous conduct would lead the good person to the “intermediate between excess and deficiency.”⁷⁸ Those who practice this mean would find themselves spared from those human appetites that promote the extremes of excess or defect. Virtuous conduct is the guide that directs the mediate and arrests those appetites or passions which lead to extremes. Practical wisdom is what leads the person to a life of virtuous conduct that promotes the search for the intermediate or mean between extremes.⁷⁹ Aristotle then raised the prospect that if justice is a desirable goal of human enterprise, it must be the product of virtuous conduct and the search for the intermediate.⁸⁰ What is just is not only lawful but also fair;

74. Joseph Raz has developed an interesting corollary to this. In his essay *Autonomy, Toleration, and the Harm Principle*, he states that “one can harm another by denying him what is due to him.” See Joseph Raz, *Autonomy, Toleration, and the Harm Principle*, in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H. L. A. HART* 313, 329 (Ruth Garrison ed., 1987). In the context of affirmative action and the promotion of preferences for one group that are denied others, Raz argues that “one causes harm if one fails in one’s duty to a person or a class of persons and that person or a member of that class suffers as a result.” *Id.* at 329-30. Coercion is thus justified when it prevents harm: the coercion here would be the imposition of an employment practice that grants preferences to one class of individuals while at the same time denying them to other classes.

75. PLATO, *THE CRITO*, in *GREAT DIALOGUES OF PLATO* 456 (W. Rouse trans., 1956).

76. See PLATO, *supra* note 65, Book IV, at 139.

77. See ARISTOTLE, *NICOMACHEAN ETHICS*, Books II., at 1106^a (David Ross trans., Oxford Univ. Press 1925).

78. See *id.*

79. See *id.* at 1107^a.

80. See *id.* Book II., at 1109^a.

injustice is neither lawful nor fair.⁸¹ This leads Aristotle to conclude that justice might be the greatest, most complete, virtue because it not only directs the individual to seek the balance of the intermediate in one's life, but it also guides individuals in "their relations to their neighbor."⁸² This point is crucial to the notion of justice as a right relationship. Consequently, justice must be a communal rather than an individual state because it is ultimately concerned with relation to one's neighbor.⁸³ Thus, if a person has achieved what is believed to be just, he may create injustice for others.

To Aristotle it is unequivocal that the communal notion of justice becomes manifested in various ways in the society. One is the rectifying element where transactions between people are influenced by the fair and the intermediate.⁸⁴ Another is found in the distributive level of human interaction where the possessions of society useful to human existence are distributed in accordance with virtuous conduct.⁸⁵ An illustration of Aristotle's conception of justice is the judge who determines that a member of the community has been harmed by an attacker. The relationship of the two is equalized by the right kind of penalty which takes away the "gain" of the assailant by acknowledging the harm experienced by the victim.⁸⁶ In essence, the relationship is in some way restored to rightness by the recognition of the wrong and the meting out of the punishment for its commission. What solidifies justice in the community is the understanding that comes from recognizing the relationship between and among people.

This led Aristotle to examine the idea of friendship that bears on the meaning of justice. Yet, friendship can take a variety of forms. There is the friendship which is based on pleasure and is geared to obtaining physical gratification.⁸⁷ There is also the friendship that is based on utility—a relationship that leads those who practice it to derive some good from each other.⁸⁸ Both of these forms of friendship seek a good, but a good that is principally directed toward the self. The truest form of friendship, which is at the foundation of justice, is one that is established on virtue and directs individuals to seek and confer good not on themselves but on others.⁸⁹ Friendship in its truest form is the cornerstone of justice and enables individuals who seek the good to act in ways that take account of the other; that wishes well on the other; and that helps the self grieve and rejoice with the other.⁹⁰ However, Aristotle put a limit on true friendship when he contended that this sort is in limited supply.

81. *See id.* Book V., at 1129^a (This point would raise a problem in the context of repressive regimes such as Nazi Germany where certain conduct may have been lawful but not fair).

82. *See id.* Book V., at 1129^b-1130^a.

83. *See id.*

84. *See id.* Book V., at 1132^a.

85. *See id.*

86. *See id.*

87. *See id.* Book VIII., at 1156^a.

88. *See id.*

89. *See id.* at 1156^b.

90. *See id.* Book IX., at 1166^a.

He suggested that “one cannot have with many people the friendship based on virtue and on the character of our friends themselves and we must be content if we find even a few such.”⁹¹ But does Aristotle unnecessarily limit his important contribution to the search for a widespread justice in the world?

In response, one can turn to another philosopher who built upon Aristotle’s work over a millennium and one half later. Like his ancient predecessor,⁹² Thomas Aquinas acknowledged the significance of practical reason to the search for justice.⁹³ He argues that the first principle of practical reason is based on seeking that which is good and avoiding that which is evil.⁹⁴ As a dictate of practical reason,⁹⁵ law’s “proper effect” is to lead those who are its subjects to seek and practice virtue in their lives.⁹⁶ Because the human person is a rational being, people are inclined, but not forced, to “act according to reason.”⁹⁷ Thus, while the human being has a natural aptitude to reason that is inclined to the virtuous, “the perfection of virtue must be acquired . . . by means of some kind of training.”⁹⁸ Ultimately, the direction in which reason seeks justice is not to the personal but to the communal—that is, individuals who exist in relationship with one another.⁹⁹ Therefore, it follows that the end of law and the justice it seeks is the common rather than the individual good.¹⁰⁰ The soul of justice, then, is to direct individuals in their relation with others.¹⁰¹ Justice is not simply the direction of activity, it also seeks the end that is good and takes account of each member of the community affected. Justice, in essence, “is a habit whereby man renders to each one his due by a constant and perpetual will.”¹⁰² This is the *suum cuique*—to render everyone his or her own.¹⁰³ The justification for this understanding of justice is the realization of what it can and will accomplish: the retention and preservation of civil society and the continuation of communication or

91. *Id.* Book IX.¹⁰, at 1171^a.

92. *See id.* Book II.⁶, at 1107^a.

93. ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA, Q. 90, art. 2 (Fathers of the English Dominican Province trans., Burns Oates & Washbourne Ltd., 2d ed. 1927).

94. *See id.* Q. 94, at art. 2.

95. *See id.* Q. 91, at art. 3.

96. *See id.* Q. 92, at art. 1.

97. *See id.* Q. 94, at art. 4.

98. *See id.* Q. 95, at art. 1.

99. *See id.*

100. *See id.* Q. 96, at art. 1.

101. *See id.* Part II-II Q. 57, at art. 1.

102. *Id.* Q. 58, at art. 1.

103. The maxim of the *suum cuique* is found in other ancient legal precepts. For example, there is *juris praecepta sunt haec—noseste vivere; alterum non laedere; suum cuique tribuere*—these are the precepts of the law: to live honorably; to hurt nobody; to render everyone his due. Another is a traditional definition of justice: *Justitia est constans et perpetua voluntas jus suum cuique tribuendi*—Justice is a steady and unceasing disposition to render everyone his due.

mutual intercourse among people.¹⁰⁴

B. Early Modern Responses

It is this matter of relationship amongst people that fascinated both Thomas Hobbes and John Locke, encouraging them to investigate justice. Hobbes considered that the natural condition of the human race is that of war or conflict in which every person is pitted against every other.¹⁰⁵ However, the law of nature is also guided by the power of human reason, and this power leads individuals to understand that reason leads them away from that which is destructive toward that which preserves human existence.¹⁰⁶ While the individual's natural state is one of liberty, human reason leads each subject to the conclusion that some of this unrestrained liberty must be ceded to an authority (Leviathan) to ensure survival; otherwise, people will remain in the state of nature which is that of war and conflict.¹⁰⁷ It is the commonwealth, or Leviathan, that serves as the guarantor of the agreements or covenants that people make in the reasoning state to eliminate conflict and promote peace when disagreements amongst people arise.¹⁰⁸ Hobbes noted that the existence of either justice or injustice is contingent on the existence or absence of the commonwealth.¹⁰⁹ He also suggested that the *sum cuique* is sponsored by the commonwealth in that it will sponsor justice—"the constant will of giving every man his own."¹¹⁰ This necessarily entails that individuals come together in society governed by the commonwealth to keep in check unrestrained liberty that threatens justice—i.e., people living in right relationship with one another. By abiding by all laws of nature, people will obey their agreements, follow the dictates of the commonwealth, and thus enjoy justice through the giving to each and everyone their due.¹¹¹

While having a stronger sense of hope for people in the state of nature than Hobbes, John Locke followed him by asserting that people live naturally in a state of nature—a state that is characterized by reason obliging "all mankind who will consult it, that being all equal and independent, no one ought to harm another in his life, liberty or possessions . . ."¹¹² Locke's notion of consultation should lead to agreement on the need to establish the commonwealth that is committed to the public good of the society.¹¹³ Locke hastened to add that the laws promulgated by the

104. See AQUINAS, *supra* note 93, Part II-II Q. 57, at art. 1.

105. THOMAS HOBBS, LEVIATHAN at 91 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

106. See *id.*

107. See *id.* at 92.

108. See *id.* at 100-01.

109. See *id.* at 100.

110. *Id.* at 101.

111. See *id.* at 185.

112. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 6, at 9 (C.B. Macpherson ed., Hackett Publishing Co., 1980).

113. See *id.* § 135, at 71.

commonwealth must be “bound to dispense justice.”¹¹⁴ Locke did not provide the details for understanding the nature of justice. Yet if there can be some consensus on a core meaning of the concept, what happens if the law is silent about addressing justice? The case of *Riggs v. Palmer*¹¹⁵ provides an important illustration of the difference between the legal versus the just result of a law.

C. How the Law Can Be Bound to Justice—An Illustration

In *Riggs*, sixteen-year old Elmer Palmer killed his grandfather in order to accelerate the testamentary gift the latter had planned to give young Elmer.¹¹⁶ The majority of the New York Court of Appeals sensibly acknowledged that the state legislature, in enacting the revocation of wills statute, most likely intended that donees named in wills should take the property designated as their gift under the terms of the instrument.¹¹⁷ Moreover, it was most likely the goal or the purpose of the statute to enable individuals to plan for the disposal of their property when they die, and, second, to honor these specified wishes after the testator’s death.¹¹⁸ But the court’s majority speculated about what the purpose of the law should be, and what the legislators may have intended if they had considered the facts of a beneficiary, such as Elmer, taking the life of the testator in order to accelerate receiving the gift.¹¹⁹ In other words, should the statute permit the unjust result of enabling a murderer to profit from the act of homicide?

Surely the members of the court were principled people, and it is doubtful that any of them would countenance Elmer’s scheme. Moreover, it was their responsibility in effecting justice to ensure that crime does not pay. However as the dissent pointed out, Elmer was punished with the criminal penalties provided by the law for the commission of homicide rather than the revocation of wills statute.¹²⁰ This statute simply did not apply to the circumstances of Elmer taking his grandfather’s life. The revocation statute was explicit about the grounds for invalidation, and murder was not one of them. This is not to say, as Judge Gray argued in the dissent, that the law would tolerate the scheme of one “who murdered his ancestor that he might speedily come into the possession of his estate.”¹²¹ Perhaps the majority would have been on

114. *Id.* § 136, at 71.

115. 22 N.E. 188 (N.Y. 1889).

116. *See id.* at 189.

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.* at 192-93 (Gray, J., dissenting).

121. *See id.* at 190.

firmer ground in reaching the result if it did so by not referring to the statute, even though Elmer relied on this statute to secure his claim to the bequest. However, the court could not avoid the status of the testamentary provision because Elmer and his aunts (the remainder beneficiaries who would receive the gift intended for Elmer if he should die under age, unmarried, and without surviving children) were in dispute over who was entitled to the estate.¹²² How should the court reach a just result where the principal body of law was silent?¹²³ Ultimately, the majority decided the case in favor of the aunts and denied Elmer the large gift left to him under the will.¹²⁴ Thus, in adding something to the revocation of wills statute that was not in the text, the majority ensured that the law was “bound to justice.”¹²⁵

D. Contemporary Responses

A case such as *Riggs v. Palmer* raises the issue of whether there can be a separation between what the law says—or as it is reasonably interpreted in the absence of plain meaning¹²⁶—and what is right or what is just. H. L. A. Hart investigated the separation thesis presented earlier by Hans Kelsen.¹²⁷ While recognizing that the notion of what “ought to be” has had a significant influence on the law, this influence in Hart’s opinion was not essential.¹²⁸ As he noted, the laws of Nazi Germany, while heinous in many instances, were still the law.¹²⁹ If one were to adopt Socrates’ view that failure to abide by unjust laws creates a greater injustice,¹³⁰ then one would act unjustly by contradicting the even the most egregious laws of Nazi Germany. Hart did not follow the lead of Socrates. Rather, he identified as the essential element of justice the principle “of treating like cases alike.”¹³¹ Yet, he hastened to add that, “This is justice in the administration of the law, not justice of the law.”¹³² Hart elaborated that the notions of justice and

122. See *id.* at 188-89.

123. See BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 41-42 (1921). See also HANS KELSEN, *THE PURE THEORY OF LAW* 67-69 (1970), where the author admits that law and justice are not unrelated.

124. See *Riggs*, 22 N.E. 188, 191.

125. See *id.*

126. See generally, Robert John Araujo, S.J., *Method in Interpretation*, 68 *MISS. L.J.* 225 (1998).

127. See, H. L. A. Hart, *Positivism and the Separation of Law and Morals*, reprinted in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49 (Clarendon, 1983).

128. See *id.* at 69-70.

129. See *id.* at 70.

130. See PLATO, *supra* note 75, at 456.

131. See H. L. A. Hart, *Separation of Law and Morals*, reprinted in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 64, 81 (1983).

132. *Id.* Hart elaborates this point when he stated that, “Natural procedural justice consists therefore of those principles of objectivity and impartiality in the administration of the law which implement just this aspect of law and which are genuinely designed to ensure that rules are applied only to what are cases of the rule or at least to minimize the risks of inequalities in this sense.” *Id.*

injustice can be equated with “fair” and “unfair.”¹³³ The core of Hart’s understanding of justice can be distilled in this point he made in *THE CONCEPT OF LAW*: “. . . justice is traditionally thought of as maintaining or restoring a *balance* or *proportion*, and its leading percept is often formulated as ‘Treat like cases alike’; though we need to add to the latter ‘and treat different cases differently.’”¹³⁴ Hart added that while this principle may be at the center of justice, it is in need of complement.¹³⁵ As he stated, “we must know when . . . cases are to be regarded as alike and what differences are relevant.”¹³⁶ Yet, this approach offers little practical guidance to those concerned about justice in the existential rather than the conceptual sense.

In short, there is need for a supplement to Hart’s basic principle of justice as “treating like cases alike,” and that supplement begins with a recognition that justice must also deal with the essence of the law and not merely its administration.¹³⁷ Hart distinguished between the essence and the administration with the illustration of a law that discriminates against people along racial lines even though it is “justly administered.”¹³⁸ In the context of the affirmative action program investigated at the beginning of this essay, one might ask whether justice is in the Civil Rights Act itself, in its administration, or in both. Hart’s answer might suggest that “justice constitutes one segment of morality primarily concerned not with individual conduct but with the ways in which *classes* of individuals are treated.”¹³⁹ Yet if the law is “bound to justice” for classes of people, is it also “bound to justice” for the individual as well?

It took Lon Fuller’s critique of Hart to understand that there is a “deep affinity” between the law and justice.¹⁴⁰ Fuller claimed that both the law and justice act through “known rules.”¹⁴¹ As he stated, “The internal morality of the law demands that there be rules, that they be made known, and that they be observed in practice by those charged with their administration.”¹⁴² Fuller answered the hypothesis of the separation of law and morals by arguing that “most of the world’s injustices are inflicted, not with the fists, but with the elbows.”¹⁴³ “Fists” appear to be direct, intended transgressions of the law; “elbows” are the indirect, more subtle transgressions that at first suggest a “random pattern for which we are not responsible, even

133. See HART, *THE CONCEPT OF LAW*, *supra* note 7, at 158.

134. *Id.* at 159.

135. See *id.*

136. *Id.*

137. See *id.* at 161.

138. *Id.* at 161-62.

139. *Id.* at 167.

140. See FULLER, *THE MORALITY OF LAW*, *supra* note 7, at 157.

141. See *id.*

142. *Id.*

143. *Id.* at 159.

though our neighbor may be painfully aware that he is being systematically pushed from his seat."¹⁴⁴

Fuller's insight raised a series of related questions about the law itself. Is law directed toward addressing the transgressions caused by "fists", by "elbows", by neither, or by both? These questions were addressed by Eric Voegelin and Hans Kelsen in very different ways. Voegelin admitted the need to examine the essence of the law.¹⁴⁵ His insight about the nature of law turned not on self-sustaining rules as was the case with Kelsen,¹⁴⁶ but on the human effort to establish order in society.¹⁴⁷ Within Voegelin's context, the law is but a means of bringing order to the members of a society, an order that promotes "their continued harmonious existence, and survival on the actions of the component human beings."¹⁴⁸ The relationship between and amongst people is crucial in this regard because "The normative meaning of a rule involves at least two persons face to face in an act of communication."¹⁴⁹ Consequently, for Voegelin there were, "no clear line[s]" of separation between the personal and the social.¹⁵⁰ Society and the legal community that permeates it are engaged in an ongoing conversation and debate about what is just and what is not.¹⁵¹ The public discussion among the members of society leads to its "true order" where the members "can unfold fully the potentialities" of their nature, and their nature is geared not to the individual but to the social.¹⁵²

Where Voegelin brought the individual and the communal together, John Rawls appeared to restrict the relationship between the two by emphasizing the individual.¹⁵³ Indeed Rawls acknowledged the "role of justice in social cooperation."¹⁵⁴ For Rawls, however, justice is ultimately the concept of fairness—a fairness directed toward the individual,¹⁵⁵ for "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override."¹⁵⁶ Still, Rawls conceded that even though the individuals of the society have "disparate aims and purposes,"¹⁵⁷ the "bonds of civic friendship" cultivate a "general desire for justice [that] limits the pursuit of other ends."¹⁵⁸ Thus, for Voegelin, justice *is* the

144. *Id.*

145. *See generally* ERIC VOEGELIN, *THE NATURE OF LAW AND RELATED WRITINGS* 9-10 (1991).

146. *See* KELSEN, *supra* note 123, at 3-23, where the author searches for the basic norm of law.

147. *See* VOEGELIN, *supra* note 145, at 42-43.

148. *Id.* at 43.

149. *Id.* at 45

150. *Id.* at 49

151. *See id.*

152. *See id.*

153. *See generally* JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter *RAWLS, THEORY*].

154. *Id.* at 3.

155. Brian Barry has noted that Rawls' theory of justice-as-fairness is the best example of his own theory of justice-as-impartiality. *See generally* BARRY, *JUSTICE AS IMPARTIALITY: A TREATISE ON SOCIAL JUSTICE—VOL. II* (1995) [hereinafter *BARRY, JUSTICE AS IMPARTIALITY*].

156. *RAWLS, THEORY, supra* note 153, at 3.

157. *Id.* at 5.

158. *Id.*

ordered society; but for Rawls, justice is that which *regulates* the “well-ordered society.”¹⁵⁹ The manner in which Rawls understands these principles is by understanding justice as fairness.¹⁶⁰

Interestingly, Ronald Dworkin presented a different attitude on this. While noting that fairness is important to many political systems, he asserted that justice is not fairness as much as it is the “right” political outcome.¹⁶¹ Nonetheless, Rawls argued that rational people would make choices in the exercise of their “equal liberty”¹⁶² leading to the just society. In large part, Rawls’ theory was premised on the “original position” in which the “veil of ignorance” blends together human rationality and the need to protect each member of the community when they are deprived of the knowledge about their own circumstances and positions in life.¹⁶³ Thus, Rawls explained that:

Some measure of agreement in conceptions of justice is, however, not the only prerequisite for a viable human community. There are other fundamental social problems, in particular those of coordination, efficiency, and stability. Thus the plans of individuals need to be fitted together so that their activities are compatible with one another and they can all be carried through without anyone’s legitimate expectations being severely disappointed.¹⁶⁴ Moreover, the execution of these plans should lead to the achievement of social ends in ways that are efficient and consistent with justice. And finally, the scheme of social cooperation must be stable: it must be more or less regularly complied with and its basic rules willingly acted upon; and when infractions occur, stabilizing forces should exist that prevent further violations and tend to restore the arrangement. Now it is evident that these three problems are connected with that of justice.¹⁶⁵

Dworkin’s view of justice developed along similar but not the same lines. In one emphasis on social justice, he contended that a community’s practices “must be reformed to serve more coherently and comprehensively” the vision of social justice that it pursues—yet “it does not declare which officer has which office in that grand

159. *See id.* at 8.

160. *See id.* at 11.

161. *See* DWORKIN, *LAW’S EMPIRE*, *supra* note 7, at 404-405. As he further notes, “We bow to justice, among the political virtues, by creating for it a special form of integrity. But the honor is not arbitrary. The concrete consequences of fairness and procedural due process are much more contingent than those of justice, and they are often matters of regret.” *Id.* at 406.

162. *See* RAWLS, *THEORY*, *supra* note 153, at 12.

163. *See id.*

164. Justice, in essence, may then be a truth—the truth that defines the proper, the right relationship between people, amongst individuals. It is not simply seeking for whatever it is that is proper to an individual who is separated from others.

165. RAWLS, *THEORY*, *supra* note 153, at 6.

project.”¹⁶⁶ While Dworkin was reluctant to specify the particulars of how justice is to be implemented and preserved, he did adopt a notion that brings together in community the individuals who are essential to making and keeping justice. The law and the justice it seeks are based on a “fraternal attitude” in which individuals are “united in community though divided in project, interest, and conviction.”¹⁶⁷ Thus, Dworkin recognized the need to bring each individual together in community when he concluded Law’s Empire with his aspiration that the law is that which helps make us “the people we want to be and the community we aim to have.”¹⁶⁸

Insofar as justice contributes to the construction of ethical theories, Rawls advanced the position that the two main concepts that underlie ethical theory are the right and the good.¹⁶⁹ He asserted, “The structure of an ethical theory is, then largely determined by how it defines and connects these two basic norms.”¹⁷⁰ Indeed, any separation between the right (the principles for determining the course) and the good (the goal or goals expected at the conclusion of the course) would be artificial, inconsistent, and counter-intuitive. However, Rawls still contended that the priority of the right over the good is essential to his conception of justice.¹⁷¹ Yet is the distinction between the right and the good, in reality, a matter of degree rather than kind?¹⁷²

166. DWORKIN, LAW’S EMPIRE, *supra* note 7, at 407.

167. *See id.* at 413.

168. *Id.* In some ways, Dworkin, in his LAW’S EMPIRE, overcomes some of the criticism Michael Sandel made of Dworkin in the former’s LIBERALISM AND THE LIMITS OF JUSTICE. *See* MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 135-46 (1982). Sandel properly points out that each individual, as a unique entity, belong to a multitude of communities; therefore, it would be wrong to conclude as he suggests Dworkin did in his (Dworkin’s) earlier works that the issue of discrimination and affirmative action is the concern of “the” society. *See id.* at 146. As Sandel states, “the society as a whole” is an abstraction. *See id.* If this is true, the resolution of acts of discrimination must take account of real and specific contexts and the people who are situated in them—in other words, the people who are living in relationship that is troubled by discrimination of some form.

169. *See* RAWLS, THEORY, *supra* note 153, at 24-25.

170. *Id.* at 24.

171. *See id.* at 31-32.

172. Brian Barry takes a different tack. While he generally agrees with Rawls on the latter’s notion of justice as fairness, Barry insists that the notion of justice as a principle [the right] is independent from the achievement of the good. *See* BARRY, JUSTICE AS IMPARTIALITY, *supra* note 155 at 76. Although he does not establish a conventional right-over-good theory, Barry is most concerned with deontology rather than teleology—his subject is the right, and his concentration is on rules of justice that are needed by any society to avoid or rectify conflict. *See id.* at 72. His rules of justice suggest that while people may disagree on the goal or good, they must concede that people have the right to pursue their interests—and this is justice as impartiality. *See id.* at 79. As he states, “there are conflicting conceptions of the good and the object of justice as impartiality is to find some way of adjudicating between the that can be generally accepted as fair.” *Id.* at 82. It would seem that the right for him provides the rules by which people arrive at a fair resolution of their conflicts over what goals they should be pursuing. *See id.* While individuals may dislike the outcome of a rule, they will accept the outcome if the rule constitutes a fair means for resolving the disagreement. *See id.* at 111.

1. The Right Versus the Good

Traditionally the distinction between the right and the good has been viewed as the distinction between deontological and teleological ethical and moral systems.¹⁷³ The right is concerned with principles or rules, whereas the good is concerned with goals.¹⁷⁴ Rawls developed this contrast by considering the good as emerging from utilitarian concerns whereas the right does not.¹⁷⁵ To test the validity of his contention, a series of questions should be addressed. Is this distinction simply between the separate entities of the right on the one hand and the good on the other? Or is it a difference between utilitarian and non-utilitarian considerations? It is important for those concerned about the best meaning of justice to understand that there can be overlap and complement as well as distinctions between the right and the good that are often ignored. The elements of these questions will now be considered in the following discussion.

Rawls' contribution presents a useful departure for examining the distinction between the right and the good and how both relate to the search for "true justice." A major argument Rawls raised is that the individuals consigned to the Original Position (the fiction Rawls used to define justice-as-fairness) would eschew utilitarian considerations and would opt for the two principles of justice that are geared more to the right than to the good.¹⁷⁶ The keystone of Rawls' construct of justice-as-fairness is that it, unlike utilitarianism, avoids any movement toward the teleological.¹⁷⁷ Rawls observed that the utilitarian principle of achieving the maximum good runs counter to the principle of justice because it makes no effort to improve the conditions of the least well-off member of the community. Because of this, Rawls concluded that "... in justice as fairness the concept of the right is prior

173. See e.g., Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778, 779 n.86 (2000) (book review) (citing RICHARD B. BRANDT, *ETHICAL THEORY: THE PROBLEMS OF NORMATIVE AND CRITICAL ETHICS* 354, 391-405 (1959) (differentiating theological from deontological or "formalist" ethics); WILLIAM K. IRANKARA, *ETHICS* 19, 25-27, 30-33, 113 (2d. Ed. 1973)).

174. W. D. ROSS, *THE RIGHT AND THE GOOD*, and *FOUNDATIONS OF ETHICS* supplies a detailed discussion of the traditional view of the right and the good. See W.D. ROSS, *THE RIGHT AND THE GOOD* (1930); W.D. ROSS, *FOUNDATIONS OF ETHICS* (1939). His *FOUNDATIONS OF ETHICS* was an effort to update, confirm, and revise the earlier views on moral theory which first appeared in *THE RIGHT AND THE GOOD*. See *id.* Ross reached the conclusion that, while moral goodness and rightness are independent in some ways, a morally good action can be the right action in some circumstances. See *id.* As will be seen with Rawls and Kymlicka, Ross earlier saw a connection between the right and the good in some, but not all, situations. See ROSS, *FOUNDATIONS OF ETHICS*, *supra* at 309.

175. RAWLS, *THEORY*, *supra* note 153, at 449.

176. See *id.* at 31.

177. See *id.* at 30.

to that of the good.”¹⁷⁸

To reinforce his point, Rawls proposed several contrasts between the right and the good. His first distinction was that considerations about rational choice and deliberative rationality focus on how each person pursues personal interests and goals once the two principles of justice (i.e., access to equal rights to basic liberty, and fair addressing of social and economic inequalities) are in place.¹⁷⁹ There is no need for principles about rational choice because each person will be entitled to plan his life in accordance with the two justice principles. Rational choice succeeds rather than precedes the justice principles. Thus, the goods and the goals must be a function of justice, not *vice versa*.¹⁸⁰

Rawls second contrast was that the right (i.e., the principles of justice) is uniform whereas conceptions of the good can take on a variety of manifestations.¹⁸¹ The good for one person may very well be substantively different from that for another person because variety characterizes rational choice.¹⁸² However, the right for each person is conditioned by justice principles that are not expressed by variety.¹⁸³

Rawls third contrast centered on the point that the exercise of rational choice and the pursuit of the good require access to the facts and conditions of a person’s position in life whereas the exercise of the right is restricted by the “veil of ignorance.”¹⁸⁴ He elaborated on this third contrast by developing some distinctions. Once the right is “discovered” but before individuals pursue personal goods, the construction of constitutions and basic political/social arrangements needs more information than is available under the veil of ignorance but less than is required by individuals when pursuing the goods for their lives. A second distinction is that rational choice and pursuit of the good are evolving or dynamic (organic)¹⁸⁵ whereas exercise of the right is static.¹⁸⁶ Finally, the exercise of rational choice and the pursuit of goods is comparative in nature while the exercise of the right is much more uniform. It is antithetical for the right to rely on comparisons. The rules or principles of justice consist of an integrity that is opposed to variety.¹⁸⁷

The degree to which these distinctions can be pursued presents several major challenges to Rawls’ initial views about the right being prior to the good. Will Kymlicka sifted through the questions posed by these distinctions and provided a framework for answering them—a framework which establishes why the good is vital

178. *Id.* at 31.

179. *See id.* at 449.

180. *See id.* at 446-47.

181. *See id.* at 447

182. *See id.*

183. *See id.* at 447-48.

184. *See id.* at 448-49 (defining Veil of Ignorance).

185. I use the term *organic* in a sense similar to that used by Robert Nozick. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 209 (1974).

186. *See* RAWLS, THEORY, *supra* note 153, at 447-48.

187. *See id.* at 557, 559.

to developing an understanding of justice and to the system of justice with which lawyers and lay people are inextricably involved.¹⁸⁸ Kymlicka hastened to question whether there is any real issue regarding the priority of one over the other.¹⁸⁹ Elements of this criticism were eventually addressed by Rawls himself when he recognized and examined several connections between the right and the good not previously made in Theory.¹⁹⁰

Kymlicka maintained that the contrasts proposed by Rawls in Theory confuse, rather than clarify, the issues of the right and the good.¹⁹¹ It is beneficial to use Kymlicka's critique as a means of sharpening, rather than denying, the points initially made by Rawls in 1971 concerning the distinctions between the right and the good.

Kymlicka directed his first criticism at Rawl's belief that utilitarians ignore the full moral significance of the distinctness of persons because they do not account for the distinctness of persons.¹⁹² According to Kymlicka, Rawls improperly conflated theology and utilitarianism. What is at issue is not the distinction between people and their individual claims, but the equality given to each individual's claims in formulating principles of justice.¹⁹³ Moreover, Kymlicka further argued that utilitarianism can be a deontological theory, which Rawls denied.¹⁹⁴ Achieving a fundamental level of equal consideration for each person concerned Rawl's and this, argued Kymlicka, is consistent with the political morality of utilitarianism as a deontological theory of equal consideration.¹⁹⁵

Kymlicka directed his second criticism at Rawl's view about a fair distribution of the good which is at the heart of justice-as-fairness.¹⁹⁶ Ultimately, Kymlicka advocated that the real distinction depends, not on distribution but on proper definition of the good.¹⁹⁷ Because Rawls avoided imposing a particular view of the good on people, his theory leads to variety (the "thin theory of the good") in the goods people choose.¹⁹⁸ This accords with Rawl's non-perfectionist theory of society where he saw that essential human interests will be less limited and more protected by non-perfectionism.¹⁹⁹ Rawls believed that perfectionist theories are geared to

188. See generally WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989).

189. See *id.* at 21.

190. See John Rawls, *Priority of Right and Ideas of the Good*, in *POLITICAL LIBERALISM* 173, 173-211 (1993).

191. See KYMLICKA, *supra* note 188, at 21.

192. See *id.* at 31-32.

193. See *id.* at 32.

194. See *id.* at 32-33.

195. See *id.* at 32.

196. See *id.* at 33.

197. See *id.*

198. See *id.*

199. See *id.*

goods (teleology), rather than principles (the right).²⁰⁰ Yet this concern obscures an important, as well as accurate, understanding of the nature and relationship of the right and the good.²⁰¹ Kymlicka referred to Rawls's questionable position that perfectionists are primarily concerned with maximizing "their preferred good."²⁰² Kymlicka demonstrated how perfectionists and non-perfectionists do not simply adhere to one basic view apiece.²⁰³ Just as there is variety among the views of non-perfectionists, so there is variety of views among perfectionists.²⁰⁴ This being the case, it is possible for both teleologists and deontologists to pursue a variety of goods.²⁰⁵

However, Kymlicka's critique must be reconsidered in light of Rawls's subsequent work. Like Kymlicka,²⁰⁶ Rawls discovered that the right and the good may be more complementary than was originally suggested in *Theory*.²⁰⁷ While still remaining prior in Rawls's estimation, the right is not divorced from the good.²⁰⁸ Connections between them can be observed on two levels: the first is through the principles of justice, which influence the exercise of rational choice and the goods pursued by individuals; the second is through the constraints imposed by social and political institutions on the exercise of rational choice.²⁰⁹ Rawls conceded that, for the principles of justice to enhance liberty, the limits placed on the exercise of rational choice cannot be too restrictive.²¹⁰

Although Rawls earlier made more of the distinction than the relationship between the right and the good, he subsequently acknowledged a link between an individual's exercise of rational choice and pursuit of the good, and the constraints imposed on these choices by the political and social institutions generated by the principles of justice.²¹¹ However in making this connection, Rawls implicitly and paradoxically recognized some further distinctions between the right and the good—an acknowledgment that is vital to this inquiry.²¹² While Rawls attempted to show how "admissible ideas of the good" respect the priority of the right and the political conception of justice,²¹³ he identified several distinctions which demonstrate dependence and relationship between the two—a dependence which makes an important point about understanding what "true justice" is.²¹⁴

200. *See id.* at 35.

201. *See id.*

202. *See id.*

203. *See id.*

204. *See id.*

205. *See id.* at 35-36.

206. *See id.* at 21.

207. *See* Rawls, *supra* note 190, at 173.

208. *See id.*

209. *See id.* at 176-78, 201-04.

210. *See id.* at 174

211. *See id.* at 207-08.

212. *See id.* at 176-204.

213. *See id.* at 176.

214. *See id.* at 176.

The first distinction focused on goodness as rationality.²¹⁵ In targeting their respective goals in life, individuals generally exercise rationality.²¹⁶ But, some exercises of rationality can restrict the specific aims identified by each person.²¹⁷ While an individual may reasonably desire a particular goal, rationality ultimately cautions against some goals because they conflict with the principles of justice or they may be prohibited by social and political structures erected by the principles.²¹⁸ This distinction emerges more sharply when the difference emerges between plain rational choice and rational choice subject to institutions conditioned by the right.²¹⁹ Plain rational choice can lead an individual to elect a particular good. Rational choice exercised in accordance with the right, however, may identify the selection as a good not worth pursuing or incapable of being pursued because it conflicts with the principles of justice and political and social institutions.²²⁰

The second distinction extends from the first and emanates from the manner in which individuals select primary goods as contrasted with the method used by citizens.²²¹ Rawls distinguished between *individuals* (persons who manifest little interest in their culture and society) and *citizens* (persons who are very concerned about those with whom they share in a community).²²² Both individuals and citizens exercise rational choice in the identification and selection of primary goods.²²³ But, individuals choose primary goods independent of any external factors including relationships with those other persons with whom they share a community.²²⁴ Citizens, on the other hand, choose them in accordance with the rights and duties imposed by social and political institutions founded in accordance with the justice principles.²²⁵ The person *qua* individual and the person *qua* citizen do not operate under the same rational scheme for identifying primary goods.²²⁶ The citizen's selection of primary goods will necessarily be influenced by those primary goods "advantageous for all" whereas the individual would select primary goods without this influence.²²⁷ The rational choice that assists the citizen in selecting primary goods consequently bears the hallmark of mutuality: what is good for one agent can

215. *See id.* at 176-78.

216. *See id.* at 177.

217. *See id.*

218. *See id.*

219. *See id.* at 176-78.

220. *See id.*

221. *See id.* at 178.

222. *See id.* at 178-79.

223. *See id.*

224. *See id.*

225. *See id.*

226. *See id.*

227. *See id.*

be good for other agents.²²⁸ This is relevant to the conception of justice as right relationship. Rawls may have conceded that the citizen may well be concerned about the *suum cuique*.²²⁹ This concern is absent in the exercise of rational choice by the individual. Thus, the selection of primary goods by the citizen bears a social and relational component; that of the individual does not.²³⁰ Brian Barry seems to have conceded something along this line when he stated that even though justice as impartiality does not tell individuals what they must seek, it does indicate “how are we to live together, given that we have different ideas about how to live.”²³¹

The distinction between the individual and the citizen provides the foundation for a further contrast between the good and the right. The citizen is a member of social and political institutions. Citizens who exercise rational choice in the selection of goods do so in accordance with political virtues—“virtues of fair social cooperation such as the virtues of civility and tolerance, of reasonableness and the sense of fairness.”²³² A citizen is guided by a sense of public virtue which permeates one’s exercise of rational choice with freedom, equality, and social cooperation; the individual, on the other hand, does not rely on these virtues.²³³

A critic of this interpretation might argue that these distinctions lead to a perfectionist state to which Rawls is opposed.²³⁴ This objection can be countered by the recognition of a further distinction which follows from the previous three.²³⁵ While citizens and individuals share an interest in seeking goods, the concept of the good for the citizen implies the good for all.²³⁶ The nexus between the good for one member and the good for other members of the society raises the concept of the good of the political society which is intertwined with the good of the citizen.²³⁷ Again, evidence in support of justice as relationship [or the *suum cuique*] surfaces. This is where Rawls’ final distinction concerning the idea of the “good of [a well-ordered] political society” comes into play.²³⁸ These interrelated concepts do not necessitate the ideal political community. They do, however, show that citizens who exercise

228. See *id.* at 180.

229. See *id.* at 184-85.

230. See *id.* at 178-90.

231. See BARRY, JUSTICE AS IMPARTIALITY, *supra* note 155, at 77. Barry illustrates this point with the story of Robinson Crusoe who had no need for justice as impartiality until he encountered Man Friday. See *id.*

232. See Rawls, *supra* note 190, at 194.

233. See *id.* at 190-95.

234. See STEPHEN MULHALL & ADAM SWIFT, LIBERALISM AND COMMUNITARIANS 32 (1992). These authors take this point further. They argue that liberals like Rawls, who oppose perfectionism, present a view of social and political institutions which unite rather than separate people’s good with the right. See *id.* As Mulhall and Swift state, “talk about the priority of the right over the good only serves to conceal this crucial point.” See *id.*

235. See Rawls, *supra* note 190, at 201-06.

236. See *id.* at 202.

237. See *id.*

238. See *id.* at 201.

their rational choice do so for themselves *and* for the well-ordered society.²³⁹ The point here is that citizens—but not individuals—seek goods both for themselves and others.²⁴⁰

As Rawls experienced an evolution in his belief about the priority of the right over the good, he adopted a view acknowledging some connection and compatibility between the two.²⁴¹ While the right and the good overlap in some areas, they may be distinguishable in others.²⁴² In the final analysis, the distinctions are better understood if seen as those of emphasis rather than separation. The distinctions between the right and the good are of degree rather than kind. As Kymlicka accurately pointed out, there is no real issue “about which of the right and the good is prior.”²⁴³ When the distinctions between the two are analyzed, it becomes conspicuous that the connections and interrelationships between the good and the right outweigh the differences. The right and the good are different, but also interdependent and complementary. The contrasts between the two are of degree, not substance; they reveal as much about unity as they do about separation. Those searching for “true justice” may appreciate not only the distinction between the right and the good, but also of their interdependence as well.

2. Is There A Connection Between Justice And Morality?

This last point raises a question about the role of morality in the process leading up to making a just decision in difficult cases where justice seems elusive.²⁴⁴ Here, a new set of questions surfaces. Is it important to consider the role that moral considerations play in the search for justice? Must moral considerations play a role in the reasoning process of seeking justice? These questions take on further significance as one ponders the point made by Robert George: “Laws cannot make men moral. Only men can do that; and they can do it only by freely choosing to do the morally right thing for the right reason.”²⁴⁵

If George is correct, it would seem logical to argue that the members of a community dealing with law and the search for just solutions to difficult cases must incorporate moral considerations when they seek the goal (the good) of justice. It would also appear that the person concerned about “true justice” is a moral reasoner

239. *See id.* at 180, 202-04.

240. *See id.*

241. *See id.* at 174.

242. *See supra* text accompanying notes 169-241.

243. *See KYMLICKA, supra* note 188, at 21.

244. By the “moral” and “morality,” I mean the use of ethical wisdom in confronting the issues of public life. Individuals and groups are moral if they act virtuously in their conduct toward one another. The moral choice is right or good. The immoral choice is wrong or evil.

245. *See* ROBERT GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY I (1993).

who focuses on the good rather than simply the rule/right. John Finnis once suggested that legal reasoning, in large part, is technical rather than moral reasoning.²⁴⁶ This assertion raises an issue about the separation between law and morals. Is the separation real and necessary, or is it a fiction? Those searching for justice must find answers to these questions. They may well be acquainted with Ronald Dworkin's lawyer-judge Hercules who is gifted with "superhuman skill, learning, patience, and acumen."²⁴⁷ Unlike Hercules, most people concerned about the true form of justice can make no claim to being something other than human. Of greater influence to such individuals is the model constructed by Judge Cardozo who argued that a conscientious judge is like the "wise pharmacist" who must balance and combine a variety of ingredients including logic, history, custom, and a sense of right in order to arrive at a just decision.²⁴⁸ When confronted with Finnis's statement, one may be perplexed. Realizing that Finnis's concept of practical reasonableness underlies legal reasoning by raising the fundamental moral issue about what *ought* to be done,²⁴⁹ a person should conclude that there is more to Finnis' statement.

A conscientious individual might agree that difficult cases and the search for justice defy easy solutions. Those concerned with obtaining true justice often apply a corpus of relevant judicial precedent, and other legal authority to the case under decision. Some of this work is technical, perhaps even mechanical in the application of relevant precedent and other authorities to each factual context. But, this does not preclude probing the moral issues within difficult cases. Unlike Dworkin's Judge Hercules who searches for one right answer,²⁵⁰ the person seeking true justice acknowledges that there may well be several potential solutions for difficult cases. It is precisely in the hard cases such as *Weber* where moral reasoning is often necessary to reach justice.

Finnis correctly acknowledged that moral investigation is a component of the legal and judicial processes. It is the "backbone" of legal reasoning, and it helps

246. See JOHN FINNIS, NATURAL LAW AND LEGAL REASONING, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 142 (Robert P. George, ed. 1992) [hereinafter FINNIS, NATURAL LAW THEORY]; see generally also RICHARD S. MARKOVITS, MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION (1998) (discussing the role of moral reasoning in legal interpretation).

247. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105-06 (1977).

248. See CARDOZO, *supra* note 123, at 162.

249. See FINNIS, NATURAL LAW, *supra* note 7, at 12.

250. See DWORKIN, LAW'S EMPIRE, *supra* note 7, at 257-58; see also DWORKIN, A MATTER OF PRINCIPLE (1995) (elaborating on his "one right answer" thesis). Dworkin introduces Hercules in his TAKING RIGHTS SERIOUSLY (1977), where he describes his mythical judge as,

[A] lawyer of superhuman skill, learning, patience and acumen... [who] is a judge of some representative American jurisdiction... [Hercules] accepts the main uncontroversial constitutive and regulative rules of the law in his jurisdiction. He accepts... that statutes have the general power to create and extinguish legal rights, and that judges have the general duty to follow earlier decisions of their court or higher courts whose rationale, as lawyers say, extends to the case at bar.

DWORKIN, TAKING RIGHTS SERIOUSLY 105-06 (1977).

shape the enterprise.²⁵¹ The search for objective moral truth is vital to deciding hard cases because this investigation is constitutive of ascertaining “the most basic human rights.”²⁵² In the final analysis, Finnis recognized a nexus between addressing moral issues and legal reasoning.²⁵³ This connection becomes evident when a person discovers that identification of the moral—making the right decision to resolve a difficult case—is rationally determined.

What furthers justice and human flourishing cannot be determined by exclusive reliance on technical reasoning. Justice and human flourishing must ultimately incorporate “a principle of fairness” based not on a separation but a synthesis of legal and moral reasoning.²⁵⁴ Reason deprived of moral consideration will never, in itself, determine what is just, what is the “greater good and lesser evil.”²⁵⁵ The ability to use moral reasoning to reach the just solution should be more apparent the longer one contemplates and pursues the true nature of justice.

However, Jeremy Waldron presented an interesting investigation by raising questions about the relevance of moral realism to legal decision-making.²⁵⁶ Ultimately, he saw that any link between the moral and the legal is specious, and he concluded that moral decision-making by lawyers and judges is inappropriate.²⁵⁷ The gist of Waldron’s thesis is that lawyers and judges who claim to arrive at moral decisions often arrive at different decisions that conflict with the claims of others who also believe that their conclusions are moral.²⁵⁸ It is not the lawyer’s or judge’s moral subjectivity that Waldron sees as being fatal to moral claims. Rather, it is the disagreement among the variety of conflicting moral claims that lawyers make, and, which in his view, can lead to different results.²⁵⁹ The ongoing debate about affirmative action—what is right and what is not right with it—illustrates his point. Yet, it is worthwhile to recall that H. L. A. Hart—a staunch adherent to the separation thesis—implied some “point of necessary intersection between law and morals” when he critiqued the Utilitarians’ “emphatic insistence” on the separation

251. See FINNIS, *NATURAL LAW THEORY*, *supra* note 246, at 148.

252. *See id.*

253. *See id.*

254. As Finnis argues, “moral absolutes give legal reasoning its backbone” and “moral absolutes are rationally determined.” *Id.*

255. *See id.* at 151-53.

256. See JEREMY WALDRON, *THE IRRELEVANCE OF MORAL OBJECTIVITY IN NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 163 (Robert George ed., 1992).

257. *See id.*

258. *See id.* at 183-84.

259. *See id.* at 184.

of law and morals in legal reasoning.²⁶⁰

One could turn to the evaluation of the moral component of legal reasoning made by Neil MacCormick to resolve this question.²⁶¹ MacCormick retreated from his earlier attraction to "the separation of law and morals" thesis.²⁶² MacCormick spanned the gap between the moral and the legal in his identification of a "necessary connection" between law and morality that avoided his previous detection.²⁶³ This nexus is manifested in those legal systems which aspire to just decisions. The reasoning leading to just decisions tends to rely on compromise between, and tolerance of, the respective positions of the parties to the legal dispute. This connection between law and morals, while weak, is still significant for MacCormick.²⁶⁴ It is also practical because law and morality share concerns about how individuals must ultimately live together in society.²⁶⁵ This living-in-togetherness is a problem that justice as right relationship seeks to address. MacCormick saw the promising link between morality and law in their mutual, practical interests to resolve conflict and to establish a just result.²⁶⁶ The quest for a just result suggests the existence and necessity of a legal order in the human community called the Rule of Law.²⁶⁷ What bolsters the Rule of Law for MacCormick and many others is found in the consensus that the Rule must be practically oriented toward an efficiency that is fair, determinate, good, and just.²⁶⁸ If the Rule of Law is not geared to this efficiency, individuals in conflict may turn to alternative methods of resolving their disputes, and avoid the elements of practical reasoning shared by law and morals.

But the skeptic may raise another objection to the contention that there is a nexus between legal and moral reasoning. If a portion of the law is independent of moral reasoning, may this segment be expanded to demonstrate that most legal cases involving disputes between people can be decided without any need for moral reasoning? Many thoughtful individuals would answer this question in the negative. The technical considerations that insulate some aspects of legal reasoning from moral evaluation cannot be applied to the substantive issues of human conflict which emerge in the disputes that are at the core of legal cases. Otherwise, this would lead to a mechanical jurisprudence which is ill-suited for resolving these difficult issues,

260. See Hart, *supra* note 127, at 64. But see Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) (discussing Professor Fuller's response which develops an inextricable relationship between law and morality).

261. See Neil MACCORMICK, *NATURAL LAW AND THE SEPARATION OF LAW AND MORALS*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 113 (Robert P. George, ed. 1992).

262. See *id.*

263. See *id.*

264. See *id.* at 118.

265. See *id.*

266. See *id.* at 120. In his earlier work, MacCormick noted that moral reasoning is not a "poor relation of legal reasoning," rather, he insisted that "legal reasoning is a special, highly institutionalized and formalized type of moral reasoning." See *id.* at 272-74. For MacCormick, the legal and the moral necessarily share parts of the same social setting. See *id.*

267. See *id.*

268. See FINNIS, *NATURAL LAW THEORY*, *supra* note 246, at 121-25.

where moral reasoning is essential. In these cases, the facts, the equity of the parties' positions, and other relevant considerations would be overshadowed and perhaps even eliminated by this mechanical approach to legal reasoning. Like the Cardozian jurist,²⁶⁹ many searching for the true form of justice are rational and reasonable people. If this assumption is correct, then the conflict about the meaning of the law in each case is usually not a disagreement between illogical or irrational persons but, rather, is between rational and logical ones. Notwithstanding their rationality, it is clear that the litigants and their lawyers often disagree over the meaning of the law as it applies to their dispute. Many will see that the law itself does not contain an internal mechanism that automatically resolves the disagreement between these rational agents. But, the law has been established by people as the body of general rules to guide and regulate how they live together. Consequently, must the reasoning needed to find the meaning of the law in difficult cases be expanded? Can reliance on background moral considerations essential to how these people can restore the ability to live in a right relationship with one another be necessary for just resolution of interpersonal disputes?

Ultimately, legal reasoning that searches for true justice, and moral reasoning are not separate enterprises. That some legal reasoning is not based on moral reasoning does not automatically lead to the conclusion "that legal reasoning is impervious to moral reasons."²⁷⁰ While moral reasoning need not permeate the entire process of legal reasoning (particularly when the questions focus on technical matters such as general procedure), it is not required to be completely omitted from the process. A strict separation of law and morals is a doctrine that has little bearing on the legal process. Especially in those difficult cases where reasonable people credibly and persuasively espouse conflicting understandings about the meaning of the law; one searching for true justice might conclude that what is needed to clarify the meaning of the law in such a context is the law's moral justification.²⁷¹ While reasonable people may dispute the particular moral justification reinforcing the meaning of the law, there is considerably less disagreement that it is a moral justification which underlies our understanding of the law and the legal reasoning which supplies that understanding in hard cases. But when we get to the hardest of cases and the moral seeker of true justice seems to be boxed in by what the law demands, is this person free to disobey the law?

269. See CARDOZO, *supra* note 123 and accompanying text.

270. See Joseph Raz, *On The Autonomy Of Legal Reasoning*, 6 *RATIO JURIS* 2, 14 (1993).

271. This point stands in contrast to Dworkin's Judge Hercules' "best political justification." See DWORKIN, *LAW'S EMPIRE*, *supra* note 7, at 380.

3. May The Moral Person Disobey The Law?

Judge Gee, in his remand opinion raised the prospect of whether he should adhere to the Supreme Court's decision when he stated that he had the opportunity to make an election. As he said,

[F]or the above reasons I think [the Supreme Court's decision] gravely mistaken, I do not say that the Court's decision is immoral or unjust. Indeed, in some basic sense it may well represent true justice. But there are many actions roughly just that our laws do not authorize and our Constitution forbids, actions such as preventing a Nazi Party march through a town where reside former inmates of concentration camps or inflicting summary punishment on one caught red-handed in a crime. Subordinate magistrates such as I must either obey the orders of higher authority or yield up their posts to those who will. I obey, since in my view the action required of me by the Court's mandate is only to follow a mistaken course and not an evil one.²⁷²

There has been much discussion about whether there is an obligation to obey the law or not.²⁷³ The question presented here presumes that there is some obligation on the part of the seeker of true justice to obey. Related to this question is the issue regarding the extent to which this obligation is voluntary. Assuming that some aspects of obedience to the law are mandatory and others are voluntary, how does any obligation to obey the law affect the positions and actions taken by this searcher? Philip Soper claimed that there is a weak obligation to obey the law in that there is "some moral reason to do what the law requires."²⁷⁴ The obligation to obey, for Soper, is neither absolute nor irrefutable but *prima facie*.²⁷⁵ There can be substantive reasons for not obeying an unjust law, or not obeying a just law in particular circumstances where obedience would constitute injustice.²⁷⁶ Nonetheless, two points reinforce Soper's claim that there is a moral reason to obey the law. The first is that law is part of a "supremely effective coercive system" that offers its subjects

272. *Weber v. Kaiser Aluminum & Chem. Corp.*, 611 F.2d 132, 133 (5th Cir. 1980) (Gee, J., on remand).

273. Another commentator has investigated and developed the relationship between the responsibility of citizenship and obligation due the law. See T.R.S. Allan, *Citizenship and Obligation: Civil Disobedience and Civil Dissent*, 55 CAMBRIDGE L. J. 89 (1996) (arguing that legal obligations must be understood in the context of moral judgment). For Professor Allan, whether a person obeys the law or not is based on a premise that the citizen (presumably this would include the lawyer) will obey the law upon his judgment concerning the law's "purposes and effects." See *id.* at 119. Thus, the relationship between obedience and disobedience is contingent on the moral basis of the law that appeals to reason rather than the threat of the exercise of force. See *id.*

274. See Philip Soper, *The Obligation to Obey the Law*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 127, 132 (Ruth Gavison ed., 1987).

275. See *id.*

276. Aquinas argues in *Summa Theologiae* that not all human law binds people "in conscience" when such law contravenes God's law, especially where the human law "inflicts unjust hurt on its subjects." See AQUINAS, *supra* note 93, Q. 96, at art. 4.

both security and an attractive alternative to the chaos of anarchy. Second, the law is defended by its subjects who are the frequent beneficiaries of its ability to coordinate social life and by those whose duty it is to enforce the law.²⁷⁷ But is the obligation to obey the law always voluntary? Does the concept of voluntariness imply that the action pursued by an individual is done freely and intentionally and not mandated by some coercive authority?²⁷⁸ It is important to answer these questions in order to assess what position the seeker of true justice must take in hard cases where the law is either immoral or, if it is not, would dictate a result which is immoral or unjust.

In order to address these issues, it will be helpful to determine what is meant by legal obligation within the context of law and obedience to law. An examination of the positions taken by several major contributors to this discussion will frame the investigation. One of the first definitions about legal obligation was offered by Socrates in the *Crito* dialogue.²⁷⁹ Socrates had been condemned to die because of his violation of Athenian law.²⁸⁰ Yet, questions arise as to whether Socrates had been justly accused and justly convicted.²⁸¹ Crito offered Socrates a tempting alternative to death; tempting because contained within the plan for escape was the argument that disobedience to the law would be morally justified in this case.²⁸² Socrates demonstrated in the *Apology* that the allegations he faced were unsubstantiated, and that the application of the law was unjust.²⁸³ Crito informed Socrates that his escape could be arranged by payment of a small sum of money.²⁸⁴ However, Socrates responded that even though he may be wrongly convicted, it would be a far greater wrong to take the law into his own hands by escaping from lawfully imposed punishment.²⁸⁵ For Socrates, the injustice done to him paled in contrast to the violence he would commit against the state by escaping punishment for the unjustifiable conviction.²⁸⁶ But those seeking true justice may not be satisfied by Socrates' example and counsel.

Richard Wasserstrom redefined the question faced by Socrates in his investigation of "the obligation" to obey the law.²⁸⁷ He reconstructed the question which

277. See Soper, *supra* note 274, at 153.

278. See Joseph Raz, *Promises and Obligations*, in *LAW, MORALITY & SOCIETY* 218, 223 (P.M.S. Hacker et. al. eds., 1997).

279. See PLATO, *supra* note 75.

280. See *id.*

281. See *id.*

282. See *id.*

283. See PLATO, *APOLOGY*, in *THE DIALOGUES OF PLATO* (R.E. Allen trans., 1984).

284. See CRITO, *supra* note 279.

285. See *id.*

286. See *id.*

287. See Richard Wasserstrom, *The Obligation to Obey the Law*, 10 *UCLA L. REV.* 780 (1963).

Socrates faced by testing the claim that “because one does have an obligation to obey the law, one ought not ever disobey the law.”²⁸⁸ Wasserstrom identified the falsehood of assuming that a person has an absolute obligation to obey the law because he demonstrated that there are circumstances which can justify disobedience (such as is the case involving the false charges against Socrates).²⁸⁹ Wasserstrom challenged Socrates’s view by claiming that even if one begins with a *prima facie* obligation to obey, disobedience can be morally justified when strict adherence to the law constitutes greater violence to justice than obedience.²⁹⁰ His point reflects Rawls’ view that, while there is a moral obligation (derived from the principle of fairness) to obey the law, such obligation can be overcome by other obligations.²⁹¹ The nucleus of Wasserstrom’s position is his concern “with *moral obligations* and *morally justified* actions.”²⁹² Writing at the time of widespread civil rights demonstrations protesting the evil of segregation, Wasserstrom argued that it was not “inconsistent to assert both that indiscriminate disobedience is indefensible and that discriminate disobedience is morally right and proper conduct.”²⁹³ Given the context in which he was writing, the author did not advocate unbridled disobedience.²⁹⁴ He did argue, however, that disobedience to oppressive laws directly or indirectly disfavoring some citizens over others could be morally justified.²⁹⁵ Yet Wasserstrom did not address the question whether the obligation to obey the law is voluntary when he stated that he was “not at all concerned with the question of why, in fact, so many people do obey the law.”²⁹⁶ Insight about the voluntary nature of obedience to the law must be sought elsewhere.

M.B.E. Smith advanced the bold view that not only is there no obvious obligation to obey the law, there is no *prima facie* obligation to obey any laws of one’s government.²⁹⁷ Smith defined a *prima facie* obligation as one in which a person has a moral reason to obey the law.²⁹⁸ Absent some other moral reason which would take precedence over the first to obey the law, a failure to obey the law would be wrong.²⁹⁹ In Smith’s view (which is in sharp contrast with Soper’s)³⁰⁰, debts of gratitude to one’s government for supplying basic services and security are insufficient to impose a *prima facie* obligation to obey.³⁰¹ Any argument from fair

288. See *id.* at 790-91.

289. See *id.* at 801-02.

290. See *id.*

291. See RAWLS, THEORY, *supra* note 153, at 333-34, 352.

292. See Wasserstrom, *supra* note 287, at 785.

293. See *id.* at 793.

294. See *id.* at 805-07.

295. See *id.*

296. See *id.* at 785.

297. See M. B. E. Smith, *Is There a Prima Facie Obligation to Obey the Law*, 82 YALE L.J. 950, 950 (1973).

298. See *id.* at 951.

299. See *id.* at 952.

300. See Soper, *supra* note 274.

301. See Smith, *supra* note 297, at 953.

play (which both Hart and Rawls support³⁰²) is not directed toward the obligation to obey as much as it is directed toward guiding one's relationships with fellow citizens.³⁰³ In addition, offering one's consent to the presence and operation of a government is not a *prima facie* obligation to obey the law.³⁰⁴ Smith pointed out that virtually every legal system contains either pointless or harmful laws to which citizen's obedience would be either meaningless or detrimental. Therefore, avoidance of, and possibly disobedience to such laws, in some circumstances, would be the morally correct thing to do.³⁰⁵

While there may be many harmful or pointless laws, there are many others which are either beneficial or neutral in their outcome.³⁰⁶ Smith appeared to agree with Aquinas³⁰⁷ in stating that some types of disobedience (e.g., against immoral laws) can be morally justified.³⁰⁸ However, it would be mistaken to conclude that it would always be morally justifiable to ignore or disobey the law, particularly when the law's enforcement is based on moral grounds or when the law generates substantive benefits for all humanity.³⁰⁹ Moreover, many laws are crucial to coordinating the events of daily life (e.g., most traffic regulations), and obeying them would not be unjust—particularly in an urban setting during rush-hour traffic.³¹⁰

Anthony Honoré has supplemented the discussion by addressing the question of why individuals should obey the law.³¹¹ His answer advanced a political argument why there is an obligation to obey: obedience to law is "healthy" because it makes members of a society more mindful that they are conditionally dependent on one another.³¹² While Honoré did not dismiss the existence of circumstances that can morally justify disobedience, his position agreed with Soper's that there is a general *prima facie* obligation to obey.³¹³ The *prima facie* obligation is premised on the existence of myriad complexities found in contemporary life. Honoré argued that

302. See H. L. A. Hart, *Are There Any Natural Rights*, in *POLITICAL PHILOSOPHY* (1967); RAWLS, *THEORY*, *supra* note 153, § 53, at 350; see also *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 9, 9-10 (1964).

303. See Smith, *supra* note 297, at 956-57.

304. See *id.* at 953-54.

305. See *id.* at 956.

306. See *id.* at 958.

307. See AQUINAS, *supra* note 93.

308. See Smith, *supra* note 297, at 958.

309. See *id.* at 959-60.

310. My example of the urban setting could take on a different hue if one were to consider whether a motorist ought to obey all traffic regulations in the dead of night when no other motorists are observed using the streets.

311. See Tony Honoré, *Must We Obey? Necessity as a Ground of Obligation*, 67 VA. L. REV. 39 (1981).

312. See *id.* at 44.

313. See *id.*

because of these complexities, like those in the *Weber* case, sensible individuals must depend on the existence, implementation, and enforcement of the laws which help people meet these complexities. Putting aside the acknowledgment that the law serves many practical human needs, he did not reach the second component of the question,—is the obligation voluntary?³¹⁴ Honoré implied that the obligation is not voluntary, and he concluded that the obligation to obey is of necessity rather than choice because people are dependent on one another.³¹⁵ In his view, people obey the law out of practical necessity.³¹⁶

What if there are other reasons for obeying the law besides the most fundamental of practical reasons, for example, survival? Joseph Raz has assisted in finding a solution. Raz initially held a position similar to Smith's that not only is there no obligation to obey the law, there is not even a *prima facie* obligation to obey it.³¹⁷ But in doing so, Raz made two concessions: (1) some people may have moral reasons for obedience, and (2) most people have good, prudential reasons for obedience most of the time.³¹⁸ Raz's two concessions imply two conclusions. The first is that some people have individual reasons based on moral or prudential judgment for obeying the law. The second conclusion which follows is that such compliance is voluntary rather than mandatory insofar as the individual is willing to accept the consequences of disobedience. Raz subsequently cautioned that his denial (that there is no obligation to obey the law) does not mean that people should disobey the law, nor does it imply that it is immaterial whether individuals obey or disobey.³¹⁹ In order to make his position more clear, Raz examined the concept of consent as the relationship between an individual and the authority which enacts a law. Within the context of contemporary political institutions having infinite rules that regulate people's lives, Raz's notion of consent is a sensible manner of investigating if obedience is voluntary or otherwise.

First, Raz regarded "consent" as a cognitive agreement that acknowledges a change in the normative situation of a person. Second, consent eventually imposes the performance of action that demonstrates the normative change. Third, consent has a public element in which the individual who offers the consent holds out to others (usually members of the same political society) the first two conditions.³²⁰ Yet, Raz's notion of consent is not an inviolable rule that always binds people to obey. If the society seeks what is just, and a person tends to identify with this society, then "it is morally permissible for [that] person to adopt an attitude of conscientious watchfulness" in which obedience is not performance of an obligation

314. *See id.*

315. *See id.* at 61.

316. *See id.* at 45-46.

317. *See* JOSEPH RAZ, *THE AUTHORITY OF LAW* 233 (1979).

318. *See id.* at 237, 242.

319. *See* Joseph Raz, *Authority and Consent*, 67 VA. L. REV. 103, 104 (1981).

320. *See id.* at 119-20.

but exercise of a person's moral judgment that this is what ought to be done.³²¹

Guiding Raz's investigation of the relationship between individuals and the law is the issue of whether the law is itself morally justified. According to Raz, the question of whether there is any obligation to obey cannot be answered until it is established that the law itself is morally grounded. Only then can one assess a person's moral obligation to obey the law.³²² It would seem that the stronger the moral justification for a law, the more a moral person is obligated to obey it. In turn, the weaker the moral justification, the less one is obliged to honor it. Because individuals are moral agents who often have different, personal decisions to make, the extent of any obligation to obey will vary from person to person.³²³

Reasons for following or not following the law, according to Raz, tend to be individual, based on the moral justifications of the law, and the circumstances (including moral ones) of each individual in relation to each law. Some individuals may also be more affected by some laws and less affected by others. This leads Raz to identify "an attitude of respect" for the law that is founded not on an obligation to obey the rules established and enforced by the authority, but on the premises that the law is one's law because it is either (1) the law which one has respect for or consents to through "voluntary or semi-voluntary obligations,"³²⁴ or (2) the law of the community to which one belongs and identifies.³²⁵

Rather than having an obligation to obey, one has a relationship to the community, the source of all law, that grows as one's identification with it grows. This is akin to the relationship between a person and the community.³²⁶ What emerges is an obligation to obey not so much the law as one's attitude toward the community to which a person belongs.³²⁷ As Raz states, "if there is a general obligation to obey the law, it exists because it was voluntarily undertaken" as a result of a person joining and remaining with the community.³²⁸ Surely, a person living in a totalitarian state may follow the law because of the harsh consequences of not doing so. But even here, there is a sense of voluntariness when a person's prudent judgment and realization about the practical considerations associated with obedience and disobedience influence his or her decision.

However, when looking at democratic states and the societies in which they

321. See *id.* at 130-31.

322. See Joseph Raz, *The Obligation to Obey: Revision and Tradition*, 1 NOTRE DAME J. L. ETHICS & PUB. POL'Y 139, 140 (1984).

323. See *id.* at 146.

324. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 99 (1986) [hereinafter RAZ, *FREEDOM*].

325. See Raz, *supra* note 322, at 154.

326. See RAZ, *FREEDOM*, *supra*, note 324, at 104.

327. See Raz, *supra* note 322, at 154.

328. See *id.* at 155.

exist, the story is somewhat different in that the voluntary nature of citizen obedience is more characteristic of the political institutions. The stronger the bond with the community (and its law), the stronger the voluntary obligation to be obedient to its rules. The less one identifies one's self with the community, the weaker that voluntary obligation.

It is not simply a *free spirit* which autonomously decides whether to obey a particular law or to obey any law in a particular context. Rather, it is the moral reasoner who seeks the good and looks at the law through the lens of justice. As mentioned earlier in the discussion on whether legal reasoning is moral reasoning, the law consists of those rules simultaneously used by each person along with the community at large to direct how people live in peaceful, beneficial, and flourishing coexistence with one another—how they live justly in relation to one another. When the law is not used to achieve this goal of ensuring that the members of the society live in right relation with one another, the duty or obligation to obey these rules may be questioned since the law's existence and application that are directed toward achieving the good simultaneously for each person is in doubt.

It is at this point that John Finnis makes an extraordinary contribution to the discussion about the nature of justice and its essential core of right relationship between individuals. He suggested that justice requires each person to seek what is important to human life not only for the self and "his own sake but also in common, in community."³²⁹ In order to accomplish this, Finnis identified three elements of justice.³³⁰ The first is called "other directedness."³³¹ Essentially, this means that justice is interpersonal or inter-subjective and concerns each person's relations and dealings with other individuals.³³² The second component of justice deals with duty—the rights individuals have as understood by what is owed or due to them by others.³³³ The final element is equality, an equality not based on identicalness, but on proportionality, equilibrium, or balance.³³⁴ Finnis concluded his preliminary analysis of justice by arguing that arbitrary self-preference is substituted for the pursuit of the common good of the community.³³⁵ It is important to note that the common good for Finnis is "the good of individuals"—the "object of all justice and which all reasonable life in community must respect and favour."³³⁶ While equality is an important part of justice and, in particular, distributive justice, the "objective of justice is not equality but the common good, the flourishing of all members of the

329. See FINNIS, NATURAL LAW, *supra* note 7, at 161.

330. See *id.*

331. See *id.*

332. See *id.*

333. See *id.* at 162.

334. See *id.* at 162-63.

335. See *id.* at 164.

336. *Id.* at 168.

community”³³⁷ It is at this stage where the relation and role of the common good in achieving justice must be examined.

E. Practical Reason and the Common Good

In the *Prima Secundae* of his *Summa Theologiae*, Aquinas presented his general theory of law. He defined law as rules or measures of acts whereby individuals are induced to act or restrained from acting.³³⁸ His concept of the law helped establish the ground from which the present investigation will develop and take shape.

337. See *id.* at 174. Finnis makes the wry observation

If redistribution means no more than that more beer is going to be consumed morosely before television sets by the relatively many, and less fine wine consumed by the relatively few at salon concerts by select musicians, then it can scarcely be said to be a demand of justice. But if redistribution means that, at the expense of the wine, etc., more people can be preserved from (non-self-inflicted) illness, educated to the point where genuine self-direction becomes possible for them, defended against the enemies of justice, etc., then such redistribution is a requirement of justice.

Id. at 174. Eric Rakowski, in *EQUAL JUSTICE*, has focused on the issue of distributive justice and concluded that justice is equality—“equality of fortune.” See ERIC RAKOWSKI, *EQUAL JUSTICE* 1 (1991). In recognizing that individuals have different strengths and weaknesses that account for what they have or do not have, each person’s due is “a right to compensation at the expense of those who fared better, to the extent that the unlucky did not willingly assume the risk of whatever disadvantaged them, and assuming that specific culprits cannot be found to make reparations.” See *id.* at 2. There are some views of distributive justice in which the entitlements of individuals are considered solely on the basis of looking at individuals and not individuals who live in community or relationship with others. See *id.* An illustration is found in the work of Robert Nozick who addresses the insertion of principles of distributive justice into the law and the legal structure of society. See *id.* He suggests that these principles

give each citizen an enforceable claim to some portion of the total product; that is, to some portion of the sum total of the individually and jointly made products.... It is on this batch of individual activities that patterned distributional principles give each individual an enforceable claim. Each person has a claim to the activities and the products of other persons, independently of whether the other persons enter into particular relationships that give rise to these claims, and independently of whether they voluntarily take these claims upon themselves, in charity or in exchange for something.

NOZICK, *supra* note 185, at 171-72 (1974). It is unclear from Nozick’s approach what happens to those who are present in the community but are not citizens of it. See *id.* Second, it does not seem important that the claim a person makes to the products of one’s labor or of another’s labor is ever considered in the context of the claims of other individuals who also have needs. See *id.* In other words, Nozick’s understanding of distributive justice is independent of considering an individual’s claims in relation to the claims of others who must be involved with the same distribution of products. See *id.* Consequently, his principles of distribution would seem to concentrate on the claims of specific individuals rather than on the competing claims of the individuals in the community in which these principles apply. See *id.*

338. See AQUINAS, *supra* note 93, Q. 90, at art. 1.

Aquinas acknowledged that law is generally directed toward the common good of mankind.³³⁹ This basic point established a goal or the teleological dimension of the law which, is an important element in defining true justice. Aquinas further identified the several kinds of law as eternal, divine, natural, and human.³⁴⁰ The eternal law³⁴¹ is teleological and concerns God's plan of "divine wisdom directing all things to the attainment of their end."³⁴² The divine law is related to the eternal law in that it directs the last end of people and orders what they ought to do or avoid, judges interior human movements, and punishes those evil deeds which human law cannot or does not punish.³⁴³ Human law is the derivative of practical reason which directs the human race to known or ascertainable principles applicable to matters of human conduct.³⁴⁴ But these descriptions and definitions of the law do not provide much insight into substantive knowledge about the particulars of the law. Rather, they provide the inquirer with the ability to reflect upon what the law ought to be in a broad way.

Dean Anthony Kronman has acknowledged an important contemporary role for practical reasoning or wisdom central to Aquinas's definition of human law. While acknowledging the strong skepticism against practical wisdom in both legal education and the profession, Dean Kronman asserts that "practicing lawyers still need the intellectual and affective powers whose combination constitutes the virtue of practical wisdom."³⁴⁵ As he further noted, practical wisdom is a character trait of what the "lawyer-statesman" needs as guidance in difficult deliberations essential to doing the good of serving both the client and society.³⁴⁶ This notion of doing good emerges elsewhere in the efforts to determine what is true justice. Again Thomistic thought comes to the rescue.

Drawing from Aquinas' First Principle, Etienne Gilson suggested that the first and foremost principle of legal prescriptions is that humans are to do good and avoid evil.³⁴⁷ Gilson's understanding reflected Aquinas' point that law provides an important vehicle through that human reason can discern what is good and what is evil.³⁴⁸ The frequently cited passage of the First Principle makes this point as follows: "the first precept of law, that good is to be done and ensued, and evil is to be avoided. All other precepts of the natural law are based upon this . . ."³⁴⁹

339. *See id.* Q. 90, A. 2, at art. 2.

340. *See id.* Q. 91.

341. *See id.*

342. *See* F. C. COPLESTON, S.J., *AQUINAS: AN INTRODUCTION TO THE LIFE AND WORK OF THE GREAT MEDIEVAL THINKER* 220 (1995).

343. *See* AQUINAS, *supra* note 93, Q. 91, at art. 4.

344. *See id.* Q. 91, at art. 3.

345. ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 269 (1993) [hereinafter, KRONMAN, *THE LOST LAWYER*].

346. *See id.* at 41-44.

347. *See* ÉTIENNE GILSON, *THE PHILOSOPHY OF ST. THOMAS AQUINAS* 327 (Edward Bullough trans., Rev. G. A. Elrington ed., 1929).

348. *See* AQUINAS, *supra* note 93, II-I, Q. 91, at art. 2.

349. *See id.* II-I Q. 94, at art. 2.

As mentioned earlier, there is a *telos* or goal associated with Aquinas' method for living a moral life in which good is sought and evil is avoided. Within the context of the *Summa Theologiae*, the *telos* is identified with justice, the object of which directs "man in his relations with others . . ." ³⁵⁰ At the heart of the interpersonal relationship, and therefore at the heart of justice, is "a kind of equality" because the name of *justice* implies equality for "things are adjusted [such as a person is in right relationship with another person] when they are made equal, for equality is in reference of one thing to some other." ³⁵¹ As social beings, people have a variety of relationships with other persons. For these relations to be right, they must be rectified "in relation to the person to whom they are directed [and] . . . about such dealings there is a special virtue, and this is justice." ³⁵² For Aquinas, justice has another identity which is "truth" and truth is achieved "when the rectitude of the reason which is called truth is imprinted on the will on account of its nighness to the reason . . ." ³⁵³ What is this "rectitude of reason" which is essential for justice? The answer to this question appeared in Aquinas' examination of the virtue of prudence.

If the goal of human existence is to live in right relation with one another in accordance with the First Principle and if this goal is to be attained through the virtue of justice, how do people—members of a wide variety of communities—come to discover what it is that will constitute the good in relations with their neighbors? It is through prudence. Aquinas exhorted, "Prudence is a virtue most necessary for human life. For a good life consists in good deeds." ³⁵⁴ Here, Aquinas made the connection with justice through the notion of "rectitude of choice." ³⁵⁵ He argued as follows:

350. *See id.* II-I Q. 57, at art. 1.

351. *See id.* A. P. d'Entrèves has concluded that the concept of equality of people is fundamentally related to the theme of natural law. *See* A. P. D'ENTRÈVES, *NATURAL LAW: AN HISTORICAL SURVEY* 21-22 (Harper Torchbook 1965). Lloyd Weinreb has made a helpful contribution to the understanding of equality that emerges from natural law systems. *See* LLOYD WEINREB, *NATURAL LAW AND JUSTICE* 161 (1987). Weinreb argues that, "equality has value as the complement of liberty; it is only in connection with liberty that equality can be understood as a human value at all." *See id.* I agree with Weinreb that liberty (freedom) must somehow serve as a complement to equality. After all, one can look at a group of slaves and argue that they, as members of a community, have and share equality. The point is that equality must be tied in with human goods like liberty, opportunity, wealth, and self-respect identified by John Rawls' "thin theory of the good." *See* KYMLICKA, *supra* note 188, at 33 (1989). John Finnis identifies life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion as the relevant goods pursued by humans. *See* FINNIS, *NATURAL LAW*, *supra* note 7, at 85-90. Elsewhere, Weinreb has pointed out that the conflict and tension which arise between equality and liberty reveal that understanding one means that we must understand the other—" [t]heir reconciliation takes us beyond either considered by itself." *See* WEINREB, *supra*, at 183.

352. *See* AQUINAS, *supra* note 93, II-II, Q. 58, at art. 2.

353. *See id.* at art. 4.

354. *See id.* II-I, Q. 57, at art. 5.

355. *See id.*

[I]n order to do good deeds, it matters not only what a man does, but also how he does it; to wit, that he do it from right choice and not merely from impulse or passion. And, since choice is about things in reference to the end, rectitude of choice requires two things; namely, the due end, and something suitably ordained to that due end. . . . And to that which is suitably ordained to the due end man needs to be rightly disposed by a habit in his reason, because counsel and choice, which are about things ordained to the end, are acts of the reason. Consequently an intellectual virtue is needed in the reason, to perfect the reason, and make it suitably affected towards things ordained to the end; and this virtue is prudence. Consequently *prudence is a virtue necessary to lead a good life.*³⁵⁶

Aquinas elaborated on the significance of prudence to justice and doing good by arguing that moral virtues cannot exist without intellectual virtues such as prudence.³⁵⁷ Prudence offers and directs people to “the right reason about things to be done,” and gives people the understanding necessary to decide both practical and speculative matters.³⁵⁸ Knowing and understanding what is moral, what is “the good” of the First Principle, cannot be accomplished without reliance on the intellectual virtue of prudence.³⁵⁹

Prudence is also a cardinal virtue—one of those virtues on which all others hinge—according to Aquinas, and, as such, has an inextricable relation to justice as a second cardinal virtue.³⁶⁰ Prudence exists in the human act of reasoning which is directed in its operation into justice.³⁶¹ As a cognitive faculty, prudence gives a person concerned about understanding justice the perception or vision which becomes the foundation of human knowledge.³⁶² In turn, human knowledge makes an individual know through reason what is good, so that this individual’s work will be good.³⁶³

Exactly what is the good which is sought? Is it the antithesis of evil, or is it something else? In the context of moral virtue, it is human good that is sought.³⁶⁴ As an end or *telos* of the moral virtues, human good must “of necessity pre-exist in the reason.”³⁶⁵ Prudence does not appoint the end, but serves as the means or direction by which people are guided toward this end.³⁶⁶ The relevance of this goal of the human good is vital to the American legal system.

If there is some question that the human good is geared toward the individual in

356. *Id.* (emphasis added).

357. *See id.* II-I, Q. 58, at art. 4.

358. *See id.*

359. *See id.*

360. *See id.* II-I, Q. 61, at art. 2.

361. *See id.*

362. *See id.* II-II, Q. 47, at art. 1.

363. *See id.* at art. 2-3.

364. *See id.* II-II, Q. 47, at art. 6.

365. *Id.*

366. *Id.*

isolation, rather than the individual in relationship with other people, then Aquinas provided an answer to this question.³⁶⁷ He formulated a solution that “[p]rudence is right reason applied to action.”³⁶⁸ This method of right reason follows the path of first, making the inquiry; second, judging what has been discovered through inquiry; and, third, taking action toward that which has been inquired about and judged.³⁶⁹ Once this process is pursued and right reason is implemented, it becomes evident that the common good is better than the individual good according to right reason.³⁷⁰ While the common good has the upper hand over the individual good,³⁷¹ the two are nonetheless intertwined because the concern for the common good can only become manifest if the sum total of the individual goods are viewed as being equal to one another.³⁷²

Understanding the issue of how these perspectives of the good are to be achieved and how justice is to be done—within the context of prudence—is a vital component in the process of defining true justice. The virtue of prudence “perfects reason” and is essential to the development of the moral virtues, especially justice which is concerned with the external and inter-relational operations of human affairs.³⁷³ The question of affirmative action deals with these aspects of human affairs. Law can be understood as a body of rules and regulations intended to direct human conduct with a public effect. For example, laws impact individuals who are struggling with their relationships with one another. As a body of rules, the law is in need of interpretation and understanding so that lawyers and the rest of society can deal directly with human interrelationships and their regulation as covered by the law. It is precisely the responsibility of those concerned with seeking justice to engage in this interpretation and understanding to ensure that the goal of justice—of right relationship with the neighbor—is obtained. Legal regulation exists not for the sake of regulation itself, but, rather, for the sake of peaceful reconciliation of differences and disputes.³⁷⁴ Aquinas addressed the connection between justice for

367. *See id.* II-II, Q. 47, at art. 8.

368. *See id.*

369. *See id.*

370. *See id.* II-II, Q. 47, at art. 10.

371. *See id.* II-II, Q. 58, at art. 5.

372. *See id.* II-II, Q. 57, at art. 1.

373. *See* JAMES F. KEENAN, S.J., GOODNESS AND RIGHTNESS IN THOMAS AQUINAS’S SUMMA THEOLOGIAE 92 (1992) [hereinafter KEENAN, GOODNESS AND RIGHTNESS].

374. *See* AQUINAS, *supra* note 93, II-II, Q. 58, at art. 8 (“[S]ince justice is directed to others, it is not about the entire matter of moral virtue, but only about external actions and things, under a certain special aspect of the object, in so far as one man is related to another through them.”); *see also* art. 10 (“[T]he matter of justice is external operation, in so far as an operation or the thing used in that operation is duly proportionate to another person, wherefore the mean of justice consists in a certain proportion of equality between the external thing and the external person.”).

the one and justice for all when he stated that “[i]t is proper to justice, as compared with the other virtues, to direct man in his relations with others”³⁷⁵ In developing this relationship, it is important that the parties involved acknowledge the existence and the needs of others. As John Lucas stated, “[n]ot to hear [the other] . . . is implicitly to deny his status as a person, his human worth.”³⁷⁶ Thus, justice cannot be rendered until each person hears the other: *audi alteram partem*—hear the other side, hear both sides, no one should be judged unheard.³⁷⁷ By doing this, justice seekers may begin to see that justice is a concept that relies on each person in relationship with the other.

IV. THE NOTION OF RELATIONSHIP AND THE LAW

There are two relevant points about relationship which come from Biblical traditions. The first is the question which God posed to Cain who killed his brother Abel: “Then the Lord said to Cain, ‘Where is your brother Abel? He said, ‘I do not know; am I my brother’s keeper?’”³⁷⁸ The second comes from the exhortation of St. Paul: “For the whole law is summed up in a single commandment, ‘You shall love your neighbor as yourself.’”³⁷⁹ Both of these scripture passages demonstrate ancient principles regarding living in right relationship with others, be they siblings, neighbors, or strangers. In the late twentieth century, many democratic states still grapple with issues surrounding relations between people of different races—a matter with which *Weber* is concerned.³⁸⁰ While many individuals may hold the view that racial discrimination is a thing of the past, recent events such as discriminatory practices engaged in by a multi-national employer illustrate that racial discrimination is not a relic of history but is still, unfortunately, an extant and pressing issue.³⁸¹ Nonetheless, the focus of this paper remains on the question of affirmative action and justice in the context of the United States and the fashion in which *Weber* presents these questions.³⁸²

At this point, it would be helpful to examine a school of jurisprudential thought, Critical Race Theory, which has raised pertinent concerns about race, justice, and the role of affirmative action. While Critical Race Theory has contributed to the understanding of the problems posed by *Weber*, the conception of justice which

375. See *id.* II-II, Q. 57, at art. 1.

376. J. R. LUCAS, ON JUSTICE 87 (1980).

377. See *id.* at 93-94.

378. *Genesis* 4:9 (New Revised Standard).

379. *Galatians* 5:14.

380. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

381. See Kurt Eichenwald, *Texaco Executives, On Tape, Discussed Impeding a Bias Suit*, N. Y. TIMES, November 4, 1996, at A1 (concerning the alleged efforts by several Texaco managers to destroy evidence relevant to pending discrimination claims made by minority employees, and the racial epithets used by these managers to derogate these employees); see also Taunya Lovell Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, 6 BERKELEY WOMEN'S L.J. 46, 49-51 (1990) (relating the “elevator story” an incident about racial differences, attitudes, perceptions, and discrimination).

382. See *supra* notes 7-56 and accompanying text.

emerges is incomplete in that it does not take account of the interrelationship of all who are concerned with and affected by the search for justice in cases involving race.

A. *The Oppositionist Voice*

It is the face of contemporary racism that minority legal scholars who share the designation Critical Race Theorists continue to elevate consciousness of their fellow citizens.³⁸³ Some Critical Race Theorists question whether racial minorities of the United States are able to live in a right relationship with their neighbors. In particular, the Critical Race Theorists examine contemporary legal theory and doctrine to examine, identify, and critique what Cornel West termed “the construction and maintenance of social domination and subordination” which adversely affect racial minorities.³⁸⁴ Although West views Critical Race Theory as a vital response to revealing and relieving the “social misery” of racial discrimination, he conceded that there is hope “for human freedom and equality” supplanting the “flagrant shortcomings” of the past and present of racial subjugation.³⁸⁵

Any contemporary examination of race relations and the legal developments directed to combat discrimination in the U.S. would be incomplete if it did not take into consideration the work of the Critical Race Theorists. This school of legal theory and practice focuses on the perspective of racial minority cultures about social, political, and economic issues. In a variety of ways, this school makes the point that legal developments—including those geared to addressing and resolving discrimination—have frequently ignored the perspectives of racial minorities. The contentions of the Critical Race Theorists raise important problems about the state of race relations and the need for affirmative programs that take account of the views and experiences of racial minorities to address the law and underlying social policies of anti-discrimination. Many Critical Race Theorists conclude that new models reflecting the specific views of racial minorities are needed in legal discourse and

383. See Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 461 (1993) (including a detailed bibliography of Critical Race Theory scholarship which examines the “complex interplay among race, racism, and American law”). One need not be restricted to Critical Race Theory scholarship to be reminded of the discrimination which people of color have suffered in the United States. For example, in Mark Twain’s *Huckleberry Finn*, there is a conversation in which Tom tells Aunt Sally of a boiler explosion on a riverboat. See MARK TWAIN, *HUCKLEBERRY FINN* 244 (1985). Aunt Sally asks if anyone was hurt, and Tom responds, “No’m. Killed a nigger.” See *id.* The objectification of this black person is complete when Aunt Sally retorts, “Well, it’s lucky; because sometimes people do get hurt.” See *id.*

384. See Cornel West, *Foreword*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xi (1995) [hereinafter *KEY WRITINGS*].

385. See *id.* at xi-xii.

development, especially the development which addresses the law of race relations and anti-discrimination enforcement. To many Critical Race Theorists, the traditional models of anti-discrimination largely reflect a majoritarian perspective which ignores or excludes the perspectives of racial minorities.

As with many schools of legal philosophy, it is difficult to present a simple, coherent statement of the central tenets of Critical Race Theory without doing any misdeed to the variety of perspectives of this movement's major contributors. Nevertheless, the introduction of a recent anthology of Critical Race Theory writings presents a good synthesis of the principal tenets of this school of jurisprudence.³⁸⁶ At the outset, the principal editors of this work, Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, concede that, "there is no canonical set of doctrines or methodologies" to which the members of the Critical Race Theory movement all subscribe.³⁸⁷ However, a consensus among Critical Race Theory's members demonstrate that two themes are central to this movement. The first is the investigation of "how a regime of white supremacy and its subordination of people of color have been created and maintained in America"; the second is a determination not simply to comprehend "the vexed bond between law and racial power but to *change it*."³⁸⁸

The common goal of Critical Race Theory concentrates on the creation of "new, oppositionist accounts of race" in the United States.³⁸⁹ One may conclude that terms like "oppositionist," appear unorthodox. Some of the leaders of Critical Race Theory state from the outset that their work is a form of antithesis or "adversarial scholarship."³⁹⁰ This designation issues from the fact that the members of Critical Race Theory see this movement as a counterpoint to "the prevailing orthodoxy that scholarship should be or could be 'neutral' and 'objective.'"³⁹¹ In essence, the goal of Critical Race Theory scholarship is to "create new, oppositionist accounts of race" within an American context.³⁹²

In substantial part, Critical Race Theory is opposed to any cultivation of American law or legal institutions that propose the role of "color blindness" to the progress of social, political, and legal development implemented to combat racial discrimination.³⁹³ While Critical Race Theory and traditionally liberal views of race

386. *See id.* at xiii-xxxii.

387. *See id.* at xiii.

388. *Id.*

389. *See id.*

390. *See id.* at xi-xii.

391. *See id.*

392. *See id.*

393. *See id.* at xv; *see also* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan J., dissenting). In his dissent, Justice Harlan may have minted the phrase "color-blind" when he commented that "in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *See id.*; *see also* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (critiquing the color-blindness theory).

relations in the United States appear to hold much in common, Critical Race Theory tends to critique many traditional liberal views regarding merit, color-blindness, and even some applications of affirmative action.³⁹⁴ As some of its principal advocates declare, “the reigning discourse seem[s], at least to [them], ideologically impoverished and technocratic.”³⁹⁵

A major presupposition of Critical Race Theory is that “racial politics,” rather than formal “legal doctrine” (such as the invention of “color blindness”) is crucial in developing laws dealing with racial discrimination.³⁹⁶ In lieu of a coherent legal theory, Critical Race Theory is focused on a particular or deconstructionist approach to the law that relies on the unifying force of racial distinction. This force is used to analyze contemporary legal institutions and legal norms without necessarily proposing its own body of normative principles. At the core of Critical Race Theory is a permeating racial consciousness and identification that is essential to the critical methodology its adherents employ.³⁹⁷ The identification of Critical Race Theory, which largely but not exclusively focuses on the experience of Black America, excludes the possibility that it could have much in common with white or majoritarian views. Paradoxically, the *telos* of Critical Race Theory is a tense synthesis of an “institutionalization of difference” and a quest for equality.

A principal target of Critical Race Theory is “racialism”; that is, those “theoretical accounts of racial power that explain legal and political decisions which are adverse to people of color as mere reflections of underlying white interest.”³⁹⁸ From a Critical Race Theory perspective, *racialism* tends to be one of the principal justifications for “color-blind,” “objective,” or “meritocratic” approaches to the law.³⁹⁹ For Critical Race Theory, the role of racial “community-building” is essential.⁴⁰⁰ In such a community race and racial identification are ultimately what counts. Ironically, this constitutes both the strength and the weakness of Critical Race Theorists. Its strength is derived from the ability to raise consciousness about the inequality that exists because of racial discrimination. To eradicate racial discrimination, one must take account of how racial distinction has been at the root of this evil. The virtue of Critical Race Theory is its ability to awaken the conscience to the horrors that have resulted from racial distinction and to serve as a reminder of “how deeply issues of racial ideology and power continue to matter in American

394. See KEY WRITINGS, *supra* note 384, at xv.

395. See *id.* at xvii.

396. See *id.* at xx.

397. See *id.* at xxi.

398. *Id.* at xxiv.

399. See *id.*

400. See *id.* at xxvii.

life.”⁴⁰¹ The weakness of Critical Race Theory is that its primary focus on racial distinction eclipses the possibility and the need to see that people, regardless of racial difference, hold much in common. Its fundamental flaw is that the emphasis on racial difference precludes the need to search for and identify the sameness of people—a sameness that promotes harmony, rather than dysfunctional and counterproductive separation—notwithstanding their racial differences and the experiences which follow from these differences.

In order to understand the principal message of Critical Race Theory and the solutions it offers to address racial injustice, it would help to understand how it departs from previous legal scholarship. Like other Critical Race Theorists, Richard Delgado argued that the legal academy has historically been comprised of individuals who are for the most part white and male.⁴⁰² For Delgado, this physical characteristic is responsible for shaping and directing traditional civil rights scholarship to be devoid of the minority scholar’s unique perspective.⁴⁰³ As Delgado stated, many of white majority scholars, who have investigated racial discrimination and civil rights, remain “unaware of basic facts about the situation in which minority persons live or ways in which they see the world.”⁴⁰⁴ This commentary reflects a perspective found throughout Critical Race Theory; scholars who come from the white majoritarian background, even though their sympathy with minorities is very strong and sincere, cannot fully comprehend or explain the suffering that racial discrimination has caused members of the minority populations.⁴⁰⁵

Critical Race Theory maintains that minority scholars must be given a forum for their unique and essential voice. This forum will ensure that their distinctiveness is not blended into “dominant political discourse” which would eliminate the African-American community’s ability to survive politically and economically.⁴⁰⁶ If this

401. See *id.* at xxxii.

402. See Richard Delgado, *The Imperial Scholar: Reflections On A Review Of Civil Rights Literature*, 132 U. PA. L. REV. 561, 561 (1984). The racial and sexual composition of the legal academy today has changed dramatically. See *id.* Indeed, there is evidence strongly suggesting that the “oppositionist” voice is now very much a part of the mainstream academy. See Fred Shapiro, *The Most-Cited Law Review Articles, Revisited*, 71 CHI.-KENT L. REV. 751, 758-59 (1996).

403. See generally Delgado, *supra* note 402. However, there seems to be a transition underway in which “minority” scholars are joining the ranks of “majority” scholars in the legal academy. See Shapiro, *supra* note 402, at 758-59; see also Frances Olsen, *Affirmative Action: Necessary But Not Sufficient*, 71 CHI.-KENT L. REV. 937, 937 (1996). In both the Shapiro and Olsen articles, the authors cautiously suggest that women and minority legal scholars who have traditionally been the “outsiders” of the academy may now be the new “insiders.” See generally Shapiro, *supra* note 402; see also Olsen, *supra*.

404. See Delgado, *supra* note 402, at 567-68.

405. See *id.* Mari Matsuda echoed this sentiment. She argued that, because it is the members of racial minorities who have suffered racial discrimination, only they can “speak with a special voice” about the shortcomings of the law and how it might better address discrimination in order to achieve greater justice for racial minorities within society. See Mari J. Matsuda, *Looking at the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

406. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1387 (1988).

distinctiveness is not preserved, the complaints about late twentieth century discrimination will not be effectively disclosed.⁴⁰⁷

A critic of the Critical Race Theorists might respond by arguing as follows: if Americans were able to engineer a society of color-blindness, then the strongest form of equality would prevail and people would be treated according to their intrinsic merits and contributions, not their racial classification. The Critical Race Theorists counterclaim that color-blindness is not so much a solution as it is part of the problem of racial discrimination. To Critical Race Theorists, color-blindness is really a camouflage that conceals or disguises the views and values of a white majoritarian culture—one that may be well-intentioned but is still majority and white. But, this analyst of Critical Race Theory might turn to John Rawls' veil of ignorance⁴⁰⁸ in which the principles of a just society are developed when its members do not know who they are in terms of racial background, economic and social status, etc.⁴⁰⁹ In response, Critical Race Theorists argue that the simultaneously essential and exclusive perspective of racial justice which American culture desperately needs will never be achieved if the differentiating characteristics attributable to racial groups are eliminated from the quest to develop a more just, more equal society. As Gerald Torres and Kathryn Milun argued, the recognition of racial and cultural identity are essential in order to understand more fully the concerns of groups who have not received a fair share of the goods and privileges that society has to offer.⁴¹⁰ Assimilation of one group into another is not protective of the first group's ability either to safeguard its "self-expression" or to raise its claim for social justice when this group or any of its members become the victim of racial discrimination.⁴¹¹

Lani Guinier focused on the point made by Torres and Milun in the context of drawing the boundaries of legislative districts.⁴¹² For her, the conventional, liberal notion of "one person, one vote" fails as a theory of meaningful participation in a democracy.⁴¹³ Guinier defended the need to protect the representation of distinctive racial groups; however, she also saw that geographic redistricting which takes account of population concentrations of racial minorities, while imperfect as a solution, is still needed.⁴¹⁴ Underlying Guinier's assertion is the premise that racial

407. It should be noted that Critical Race Theory speaks from the perspective of the United States, rather than from a more global one.

408. See RAWLS, THEORY, *supra* note 153, at 136-38.

409. See *id.* at 137.

410. See Gerald Torres & Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L. J. 625, 658 (1990).

411. See *id.* at 659.

412. See Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1596 (1993).

413. See *id.*

414. See *id.* at 1594.

minorities “experience a common ‘group identity’” which must be protected and advanced in the electoral and other political processes.⁴¹⁵ She contended that the idea that political fairness can be guaranteed by the fiction of electoral fairness through the practice of “one person, one vote” is false.⁴¹⁶ Her justification for this is that the best form of political representation takes account of three vital factors.⁴¹⁷ First, legislators “should” represent unanimous rather than divided constituencies; second, every voter’s ballot “should count toward the election of a representative”; and, third, “the unit of representation should be psychological, cultural, and/or political, rather than territorial.”⁴¹⁸ While she acknowledged that racial groups are not monolithic, Guinier also recognized that racial identification is important to electing the best representatives who can advocate important remedial positions for groups who experience racial discrimination. Yet, Guinier did not take account of the fact that blindness to racial and ethnic characteristics can enable a racially diverse electorate to search for common interests as they select their representatives.

Neil Gotanda has been outspoken in his criticism that “color-blindness,” especially from a Constitutional perspective, is not a solution but a part of the problem of racial discrimination.⁴¹⁹ He contended that the claim that the U. S. Constitution is color-blind ultimately “fosters white racial domination.”⁴²⁰ The underlying justification of this point is that the concerns of racial minorities are not protected if the minority community is precluded from injecting racial considerations into Constitutional discourse.⁴²¹ Derrick Bell extended this notion when he suggested that racial minorities will continue to suffer discrimination if the racial majority is able to block out racial considerations which are a source of their “fears.”⁴²² It would appear that any quest for conciliation and integration, which does not also take account of racial distinctness, will never provide racial equality. The racial majority will always substitute its views of equality for those of the racial minority who experience the discrimination.

John Calmore echoed Bell by advocating racial equality from an “opponentist” perspective.⁴²³ While acknowledging that distinctively cultural divisions based on racial classification are not necessarily inevitable, these divisions are not “necessarily a bad thing.”⁴²⁴ As part of the “opponentist” message, Calmore argued that the

415. *See id.* at 1617.

416. *See id.* at 1620-21.

417. *See id.* at 1621.

418. *See id.* at 1621-22. These would be difficult to achieve because any block of voters, including those identified along racial lines, will have a wide variety of perspectives.

419. *See Gotanda, supra* note 393, at 2.

420. *See id.*

421. *See id.* at 16, 55-62.

422. *See Derrick Bell, Racial Realism*, 24 CONN. L. REV. 363, 370 (1992).

423. *See generally* John Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992).

424. *See id.* at 2131.

“universality of white experience” as political and social presuppositions is false.⁴²⁵ These presuppositions perpetuate mistaken universality that sustains domination of the white majority over racial minorities.

While acknowledging that “individuals do not belong merely to one discrete community,”⁴²⁶ members of Critical Race Theory see the need for “social transformation and self-respect” which take account of and promote racial and cultural distinctiveness.⁴²⁷ The necessity for this distinctiveness is reinforced by the stratification in society that follows racial classifications which enable the white majority to dominate the black minority.⁴²⁸ At the root of Calmore’s message is the mandate to save future generations “so that they will have their chance to save the nation[.]”⁴²⁹

Charles Lawrence reiterated this point by suggesting that in order to avoid the dehumanization of racial discrimination, the continuing ability for people of color to present and validate their “common experience” in public forums is essential to the cause of civil rights.⁴³⁰ To Lawrence, sustaining this voice is crucial for combating the stereotypes about black people which have been long held by members of the white majority.⁴³¹ Without this voice, racial domination and repression will continue, but the presence of this political perspective will have a therapeutic effect on the social and political standing of those who have been oppressed.

While Critical Race Theory has increased understanding about the extent of the problem of racial discrimination, there is another side of Critical Race Theory which propagates the problem of injustice fueled by racial distinction and discrimination. In essence, the oppositionist view perpetuates in a new fashion the separate-but-equal doctrine of *Plessy v. Ferguson*.⁴³²

Elements of Critical Race Theory suggest that there can never be any deep, substantive reconciliation between the current white majority and the colored minority. Critical Race Theorists often use the currently popular vehicle of narrative to present the context of why reconciliation is not possible. Derrick Bell’s narrative from his early career as a civil rights attorney in Mississippi offers an illustration.⁴³³ He recalls a conversation with an organizer of the desegregation of Mississippi Delta schools who had been terrorized physically and psychologically by proponents of

425. See *id.* at 2160-61.

426. *Id.* at 2186.

427. See *id.* at 2171.

428. See *id.* at 2181.

429. See *id.* at 2230.

430. See Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2238 (1992).

431. See *id.*

432. 163 U.S. 537 (1896).

433. See Bell, *supra* note 422, at 378.

segregation.⁴³⁴ When he asked her why she persisted in her crusade, she replied, “I am an old woman. I lives to harass white folks.”⁴³⁵ Without doubt, the speaker had experienced much hardship and harassment in her life due to racial oppression. But her statement was not directed at those responsible for or who harbored hatred for African-Americans. Rather, her campaign was targeted at a class of people identified not by racist beliefs and actions but by their skin color. Professor Bell probably had good reason to admire this woman for the determination and courage she had displayed in the face of long standing racial discrimination and persecution. Yet, he did not question the implication of this statement: “I lives [sic] to harass white folks.” What if this statement had been uttered by some other individual who had been oppressed for years by the members of another racial group, but the circumstances were slightly changed so that the speaker was a Jew speaking of Gentiles, or a Palestinian speaking of Jews, or a Hutu speaking of a Tutsi, or a Bosnian speaking of a Serb, or a Kurd speaking of an Iraqi? Would the reaction be any different? Should it?

This freedom to castigate individuals from other groups was displayed in the events surrounding the resignation of Professor Anita Hill from the law faculty of the University of Oklahoma.⁴³⁶ Upon notice of her resignation, one of her colleagues in lamenting her departure commented that Professor Hill “has no argument with the rest of the faculty. . . . The angry white men are quiet, grumpy and non-confrontational.”⁴³⁷

These attitudes reveal the presence of an imprudent and unnecessary wedge of separation being forced into distinctions of race and widening the gap between racial groups within the United States. These phenomena, which cultivate little or no relationship, are at the core of injustice. The idea of “distinctly separate cultures”⁴³⁸ is at the root of racial discrimination. The absence of relationship sponsored by segregationist views is sustained by the oppositionist view. While he talks about forging bonds between and amongst people of color to form communities of ““multicultural synergy,”” John Calmore implied that those who search for common ground, be they racial majority or minority, propose a false and unworkable assimilationist thesis that is doomed to fail.⁴³⁹ He also advocated the following:

[the need to] contend with a growing segment of colored intellectuals who have joined that camp [of dominant society]. These colored intellectuals are prone to suffer a race-image anxiety, rely on a Eurocentric cultural frame of reference, and adopt a model of resolving racial conflict that emphasizes assimilation- integration goals and value

434. *See id.*

435. *See id.*

436. *See* Jo Thomas, *Anita Hill Plans to Leave Teaching Post in Oklahoma*, N. Y. TIMES, Nov. 13, 1996, at B5.

437. *See id.*

438. *See* Calmore, *supra* note 423, at 2131.

439. *See id.* at 2225-26.

orientations."⁴⁴⁰

From Calmore's statement, one could follow up with the question: is there any possibility of reconciliation between different groups of people if the differences between groups must always be paramount over their similarities? If this question were to be answered in the affirmative, there would be little hope for racial and other reconciliation to take root. This becomes particularly true if one considers the possibility of today's majority becoming tomorrow's minority, while at the same time today's minority becomes tomorrow's majority. What, then, is one to make of the emphasis of distinction and difference—a set of issues which has been at the core of discrimination and the response of affirmative action? There would be little room for hope that racial differences can be minimized, that tension between racial groups can be decreased, and that harmony and understanding between different racial groups can be promoted if such attitudes were to continue and dominate.

B. An Alternative to Oppositionist Voice

There is an alternative to this predicament of separation between groups where one justifies the ability to badger members of the other group simply because they are members of the other racial category. While echoing some of the consciousness-raising sentiments of Critical Race Theory scholars discussed earlier, Anthony Cook presented a reflection not found with the other oppositionist voices.⁴⁴¹ Although many Critical Race Theory scholars desire to transform existing dominant racial structures that oppress people of color, Cook additionally argued the need to transcend existing racial tensions and to do so from a theological perspective.⁴⁴² In presenting this alternative, he turned to the "reconstructive theorizing" of Dr. Martin Luther King, Jr.—no stranger to the quest for civil rights for every person.⁴⁴³ Cook relied on the experience of Dr. King and his theology and belief in God as the basis of constructively addressing the racial conundrum in the United States.⁴⁴⁴ Cook's approach focused not on the deconstructive critique shared by Critical Race Theory, but on the reconstructive role of theology and religious perspective in promoting

440. *Id.* at 2227.

441. *See generally* Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990).

442. *See id.* at 986.

443. *See id.* at 987-88.

444. *See id.* at 1023-1041; *see also* Robert J. Araujo, *Political Theory and Liberation Theology: The Intersection of Unger and Gutiérrez*, 11 J. LAW & RELIGION 63 (1994-95) (discussing law, public life, and religious belief).

reconciliation and justice in a world and a country hungering for both.⁴⁴⁵ In relying on the circumstances of the black slaves in the New World, Cook called attention to the transformative reliance in the Word—in the teaching of Jesus Christ who proclaimed at the beginning of his public ministry the need to work with the downtrodden, the imprisoned, the poor, and the sick.⁴⁴⁶ Although Jesus drew strong reaction (some positive, some negative) from his listeners,⁴⁴⁷ he raised consciousness about the social responsibility of every person even the marginalized of the community. Jesus' central message was to adopt and practice the Great Commandment of loving God and your neighbor in everyday life.⁴⁴⁸ It is the constant practice of the Great Commandment that inevitably leads to reconciliation between those who are in opposition to one another.⁴⁴⁹ As Cook pointed out, the message and teachings of Jesus “bolstered a sense of self-esteem diminished by the debilitating and degrading practices of a culture that relegated them to the status of objects.”⁴⁵⁰

Cook drew attention to Dr. King's “objective to rebuild community from the social death of slavery and segregation” by promoting a “sense of individual self-worth . . .”⁴⁵¹ Unlike the more restrictive and exclusive communities addressed by other Critical Race Theory scholars, Cook presented a holistic approach to this enterprise. As he contended, “[b]y closing the chasm between the individual and the society, [between] religion and ethics, and [between] spirituality and everyday existence,” Dr. King was able to address both oppression as well as reconciliation.⁴⁵² As Cook noted,

King held that disobeying human law, even unjust law, must be done out of love and with a willingness to suffer the penalty for its breach. Through this unjust suffering, the transgressor evidences the highest respect for law and order while remaining true to his higher Christian duty.⁴⁵³

Although King was a practical man who understood the “limitations” and shortcomings of human nature in achieving a racially just society, he did not give up hope in achieving such a society either.⁴⁵⁴ King was intent on seeing that the rights of every person were promoted and protected because they were God-given and not manufactured or granted by the state.⁴⁵⁵

445. See generally Cook, *supra* note 441.

446. See Cook, *supra* note 441, at 1019; see also *Isaiah* 61:1-2; *Luke* 4:18-19.

447. Jesus taught in a synagogue. See *Luke* 4:14-30. At first, “[a]ll spoke well of him and were amazed at the gracious words that came from his mouth.” *Luke* 14:22. Yet, a few verses later, the same listeners “were filled with rage” and were prepared to throw Jesus over a cliff. See *Luke* 4:28-30.

448. See *Leviticus* 19:18; see also *Luke* 10:25-37 (the parable of the Good Samaritan).

449. For several Biblical passages about reconciliation, see *Acts* 7:26; 2 *Corinthians* 5:18-20.

450. See Cook, *supra* note 441, at 1020.

451. See *id.* at 1022.

452. See *id.* at 1026.

453. See *id.* at 1027.

454. See *id.* at 1034.

455. See *id.*

Cook concluded that it is a community dialectic in which people of diverse backgrounds, cultures, races, and beliefs come together to deliberate, participate, and be respectful of one another in order to build a part of God's dominion in this world.⁴⁵⁶ Nothing better advanced these approaches to combating racial injustice than Dr. King's Letter from a Birmingham Jail.⁴⁵⁷

King understood that he was subject to the injustice of racial discrimination when authorities incarcerated him for contempt of an order restraining him and other ministers from conducting a peaceful civil rights march in Birmingham, Alabama in 1963.⁴⁵⁸ He wrote from a prison cell in Birmingham to his fellow Christian ministers who had encouraged him not to violate the restraining order.⁴⁵⁹ He reminded his readers that he was keenly aware of the "interrelatedness of all communities and states" and that the toleration of injustice in any one place constitutes the threat of injustice to every place.⁴⁶⁰ Given the choice, he preferred negotiation to civil disobedience; however, when those who conducted negotiations in good faith were exhausted by the bad faith of those with whom they were negotiating, such exhaustion created "the need for nonviolent gadflies to create the kind of tension in society that will help men rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood."⁴⁶¹ For King, separation and secession were anathema; inclusion, engagement, dialogue, and brotherhood were the goals.⁴⁶² For justice to prevail over racial discrimination, relationship rather than separation was essential.

While acknowledging distinctions from the racial majority, Dr. King did not

456. See *id.* at 1044. As Professor Cook argues, "[w]ith such mutual respect and openness to each others' pain, suffering, and faith, we must work out more fully and struggle toward King's ideal of the Beloved Community and thereby hew from our mountain of despair a stone of hope." *Id.* Professor Lawrence echoes this sentiment with the following:

Perhaps I am overly optimistic in believing that in the process of this difficult exploration we may discover and understand a collective self-interest that overshadows the multitude of parochial self-interests the unconscious seeks to disguise and shield. But of one thing I am certain. A difficult and painful exploration beats death at the hands of the disease.

Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 388 (1987).

457. See Martin Luther King, Jr., Letter from Birmingham Jail (1963), reprinted in David Benjamin Oppenheimer, *Martin Luther King, Walker v. City of Birmingham, and the Letter from Birmingham Jail*, 26 U.C. DAVIS L. REV. 791, 835 (1993).

458. See *Walker v. Birmingham*, 388 U.S. 307, 320-21 (1967); see also Oppenheimer, *supra* note 457, at 791-92.

459. See Oppenheimer, *supra* note 457, at 835.

460. See *id.* at 836.

461. See *id.* at 836-38.

462. See *id.* at 838, 843-44 (calling the black race to continue to work for freedom and not accept the status quo).

believe in separation or secession from the majority.⁴⁶³ He spoke in terms of relationship, of brotherhood.⁴⁶⁴ Even though he shared their exasperation with the never ending episodes of racial discrimination, he criticized African-Americans who pursued the route of separation and secession.⁴⁶⁵ King publicly disagreed with the view held by Elijah Muhammad of the Black Muslims, finding great fault with a political and social movement that “is made up of people who have lost faith in America, who have absolutely repudiated Christianity, and who have concluded that the white man is an incorrigible ‘devil’.”⁴⁶⁶

Castigation based on racial association is an evil thing to which separation based on racial classification is closely related. The labor to eradicate stigma and racial discrimination which members of racial minorities have suffered for too long is noble and virtuous. But the need to preserve separation from majoritarian groups continues and enhances racial discrimination. Shylock⁴⁶⁷ of William Shakespeare’s *The Merchant of Venice* portrays well the circumstance in which a member of a minority group reminded his fellow citizens that he is so much like them; yet, ironically, despite the compassion and understanding he sought for himself, he was quite willing to deny another.⁴⁶⁸ Shylock responded to Antonio’s circumstances as follows:

He hath disgraced me, and hindered me of half a million, laughed at my losses, mocked at my gains, scorned my nation, thwarted my bargains, cooled my friends, heated mine enemies; and what’s his reason? I am a Jew. Hath not a Jew eyes? hath not a Jew hands, organs, dimensions, senses, affections, passions? fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer, as a Christian is? If you prick us, do we not bleed? if you tickle us, do we not laugh? if you poison us, do we not die? and if you wrong us, shall we not revenge? If we are like you in the rest, we will resemble you in that. If a Jew wrong a Christian, what is his humility? Revenge. If a Christian wrong a Jew, what should his sufferance be by Christian example? Why, revenge. The villainy you teach me I will execute, and it shall go hard but I will better the instruction.⁴⁶⁹

To the extent that Critical Race Theory advocates a separationist or secessionist

463. Recently, attention has been given to another type of separation or secession from society. See Allan Gurganus, *At Last, The South Loses Well*, N. Y. TIMES, Dec. 8, 1996, at E15 (relating the movement in South Carolina to remove the Confederate flag from the South Carolina State House). The author notes that those forces wishing the flag to remain represent a “balkanization” that should cease. See *id.* As he says, “[t]he New Secessionism places ethnic identification above national purpose, group grievance over human commonality. Correct me, but isn’t that why the Civil War was fought? Isn’t that why all thinking people understand: The right side won?” *Id.*

464. See Oppenheimer, *supra* note 457, at 839, 844.

465. See *id.* at 843-44.

466. See *id.* at 844.

467. Shylock was a Jew in Christian Venice.

468. See WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, in *THE YALE SHAKESPEARE* act III, sc. 1 (Wilbur L. Cross et. al. eds., 1993).

469. *Id.*

thesis, it sustains rather than addresses the question of racial tensions and distrust that inevitably lead to segregation and discrimination. The social antidote to racial discrimination is focused not on separation but mutuality—reciprocity and relationship which enable each person to see the image of one's self reflected in all others. The solidarity among racial minorities upon which the members of Critical Race Theory rely can become the leaven that solves racial problems when extended to the universal, that is, to all members of the human race.

Society needs solutions to the injustice of racial discrimination, but these solutions must include all, not just some, members of the community.⁴⁷⁰ A simple but overlooked solution is the search for relationship with those who are a part of the injustice that is experienced—either through the desire to combat or the shared status of being victim. This relationship can be cultivated through a dependence on human virtues.

C. Virtue As A Path Toward Reconciliation

In the film *To Kill A Mockingbird*, the local judge asks Atticus Finch, a white, small-town Southern lawyer to defend a black man who is wrongfully charged with raping a young white woman.⁴⁷¹ Both Finch and his client are virtuous, compassionate, and merciful men who extend compassion to the suffering victim to achieve the overriding goal of equity and justice under law. Both share wisdom or practical reason which helps them to discern the situations each faces; each man is gifted with prudence which directs their respective actions; each possesses courage which steels them in dealing with their respective adversaries; and each seeks the justice premised on their recognition of the common heritage of mankind.⁴⁷²

470. See, e.g., NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 504 (1995). Duxbury suggests that Critical Race Theory scholars seem to question the possibility of a consensus and, instead, labor for a legal system acknowledging the reality of difference. See *id.*

471. TO KILL A MOCKINGBIRD (Universal Pictures 1962).

472. See SHAKESPEARE, *supra* note 468, at act IV, sc. I. Portia, portraying a doctor of the law, exhorts Shylock to reconsider his demand for Antonio's pound of flesh as follow:

The quality of mercy is not strain'd,
It droppeth as the gentle rain from heaven
Upon the place beneath; it is twice bless'd;
It blesseth him that gives and him that takes:
'Tis mightiest in the mightiest;
It becomes The throned monarch better than his crown;
His sceptre shows the force of temporal power,
The attribute to awe and majesty,
Wherein doth sit the dread and fear of kings;
But mercy is above this sceptred sway,
It is enthroned in the heart of kings,
It is an attribute to God himself,
And earthly power doth then show likest God's
When mercy seasons justice.
Therefore, Jew, Though justice be thy plea,
consider this, That in the course of justice
none of us Should see salvation:
we do pray for mercy,
And that same prayer doth teach us all
to render The deeds of mercy.

Id.

While a person may ask if this is all that need be known about virtue, one should keep prominently in mind the fundamental point about virtues: they are “a good quality of the mind” by which people live righteously.⁴⁷³ If the function of ethical systems is to guide citizens in their moral deliberation toward right action,⁴⁷⁴ a society whose members treasure virtue should expect to have better moral agents as its citizens.⁴⁷⁵ The course which the moral agent takes is directed toward a goal, a *telos*.⁴⁷⁶ Because individuals are also social beings whose existence is grounded in relationships with others, the concept of the *telos* can assist each person to understand and answer more deeply the ethical and moral questions which members of society face as they seek justice for themselves and for others. Justice is premised on the harmonious reconciliation of differences such as discrimination within society.⁴⁷⁷

Some scholars argue that the *telos* of a virtue-based method is inextricably intertwined with the means to achieve the goal.⁴⁷⁸ This approach provides a catalyst that moves society and its members toward a better understanding of the end—an end which forms a specific kind of person and promotes a kind of society that stipulates behavior directed toward a just society.⁴⁷⁹ For some individuals, being a certain kind of person identifies the sort of moral questions one addresses.⁴⁸⁰ This observation and conclusion suggest that the practice of virtue acknowledges the sense of “otherness”; that is, in making moral decisions about who we are, what our goals are, and what means we use to get there, we necessarily think of other individuals as we work toward the goal. The practice of virtue relies on a sense of community, on an awareness of relationships with others. I suggest here that the notion of living in right relation with others parallels the cultivation of the virtue of justice which is essential to a reduction of racial discrimination.

As noted earlier in this essay, Plato was one of the first to investigate the relationship between virtue and justice.⁴⁸¹ For him, justice was the fundamental

473. See AQUINAS, *supra* note 93, II-I, Q.55, at art. 4.

474. See James F. Keenan, S.J., *Virtue Ethics: Making A Case As It Comes Of Age*, 67 THOUGHT 115 (1992) [hereinafter Keenan, *Virtue Ethics*].

475. See *id.* at 116.

476. See ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 189 (Duckworth 1981) (“[T]here is a *telos* which transcends the limited goods of practices by constituting the good of a whole human life, the good of a human life conceived as a unity” Accord Keenan, *Virtue Ethics*, *supra* note 474, at 120, 123; Joseph J. Kotva, Jr., *An Appeal For A Christian Virtue Ethic*, 67 THOUGHT 158, 159 (1992). As James Keenan stresses, “[o]nly in virtue ethics is a *telos* constitutive of method; no other ethical system can make that claim.” Keenan, *Virtue Ethics*, *supra* note 474, at 123.

477. I have developed the idea of a *telos* underlying the social institution of law elsewhere. See Robert J. Araujo, S.J., *The Teleology of Law: Citizenship and Discipleship*, 35 CATH. LAW. 57-58 (1994).

478. See Kotva, *supra* note 476, at 159.

479. See *id.* As this author further suggests, “the means cannot be separated from the end because the means are central to the end. A *telos* which embodies the virtues of justice, courage, and fidelity cannot be severed from acts and social arrangements that are just, courageous, and faithful.” *Id.* at 160.

480. See *id.* at 166.

481. See PLATO, *supra* note 65, at 147-48.

component of society—"that one man should practise one thing only [justice] the thing to which his nature was best adapted . . ."⁴⁸² Above all else, justice—as a virtue—was the guarantor of other important virtues like temperance, courage, and wisdom, which facilitate reconciliation within a society.⁴⁸³ These virtues are important because they aid in directing human conduct which helps achieve the goal of a society in which its members live in right relationship with one another. Aristotle saw justice as the "complete virtue."⁴⁸⁴ In refining his understanding of justice as the greatest of virtues in which a person seeks to be in right relationship with others, Aristotle concluded that people who are true friends⁴⁸⁵ have no need for any other kind of justice because their friendship is the truest form of justice.⁴⁸⁶ Thomas Aquinas saw virtue as the good quality of the mind which facilitates people living righteously. He also acknowledged that the virtue of justice is a good habit in which each person perpetually renders to the other person that which is due, the *suum cuique*.⁴⁸⁷ Mary Ann Glendon reaffirmed Aristotle's position in her contemporary argument that the tendency to make some but not all rights absolute in the American legal culture has minimized the significance of fraternity.⁴⁸⁸ Glendon also argued that unrestricted individualism can foster a climate that is inhospitable to "society's losers"⁴⁸⁹ and, because it neglects civil society, it undermines both civic and personal virtue. For her, individualism "shuts out potentially important aids to the process of self-correcting learning [and promotes] mere assertion over reason-giving."⁴⁹⁰

The virtue of justice is practiced or engaged in by human beings in a community setting. It is not understood as something which is good or proper simply for the individual alone; rather, it manifests itself in good relationships or true friendship

482. See *id.* at 147.

483. See *id.* at 148.

484. See ARISTOTLE, *supra* note 77, Book V, Chapter 1, 1129b, at 399.

485. For example, true friends wish well to one another. See *id.* Book VIII, Chapter 3, 1156b, at 475.

486. See *id.* Book VII, Chapter 14, 1155a, at 471-472. For a helpful discussion of diverse views concerning the role of friendship in practical legal counseling, see generally Jack L. Sammons, *Rank Strangers to Me: Shaffer and Cochran's Friendship Model of Moral Counseling in the Law Office*, 18 U. ARK. LITTLE ROCK L. J. 1 (1995); Thomas L. Shaffer and Robert F. Cochran Jr., *Lawyers as Strangers and Friends: A Reply to Professor Sammons*, 18 U. ARK. LITTLE ROCK L. J. 69 (1995); John M. A. DiPippa, *Jacob's Blessing: a Review of Shaffer's and Cochran's Model of Moral Counseling*, 18 U. ARK. LITTLE ROCK L. J. 85 (1995).

487. See AQUINAS, *supra* note 93, II-II, Q. 58, at art. 1.

488. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 47-48 (1991) [hereinafter GLENDON, *RIGHTS TALK*]. Christopher Mooney has similarly commented on this theme in the context of the law and legal profession. See CHRISTOPHER F. MOONEY, S.J., *PUBLIC VIRTUE: LAW AND THE SOCIAL CHARACTER OF RELIGION* xi (1986). Mooney argues that the law's "privatizing impulse has tended to become dominant and it no longer conceives its primary mission to be the responsible exercise of public virtue." See *id.*

489. For example, "society's losers" include those who are especially dependent on others.

490. GLENDON, *RIGHTS TALK*, *supra* note 488, at 14.

where each person renders the other his or her due.⁴⁹¹ Justice as a virtue manifests itself in the midst of people who are in relationships with one another; it does not exist in the vacuum of persons who are isolated from one another or who seek separation from one another. The virtue of justice depends on community, and its prerequisite is two or more people who acknowledge one another's existence and honor the other's right to co-exist. Each person expects his or her own right to exist to be honored by the other. An important goal of the virtue of justice is the achievement of multiple levels of reciprocity throughout society where each person renders to the other those concerns which each has for the self.

Much of the kind of justice which has emerged in the present-day American legal culture has lost a good deal of its community-oriented goal. Some contemporary understandings about "justice" lead to a narrow focus on some individual's or select group's—not the entire community's—concerns because of the strong desire to protect isolated individuals rather than all the individuals in the community setting. For John Finnis, this necessitates an understanding of justice as the realization of basic human goods for one's self *as well as* for others.⁴⁹² In a similar fashion, Professor Glendon points out that the social, the communal, and the purpose-oriented components of duties which are the correlatives of rights are infrequently discussed in this contemporary environment.⁴⁹³ She correctly argued that these components are essential to dealing justly with some of the urgent legal issues which have, in the American context, been cloaked with near-absolute rights of privacy, individual autonomy, and isolation.⁴⁹⁴

If one tries to determine what is the just goal for both contemporary American

491. At *Exodus* 19:15, the Hebrew people were notified about the importance of giving the other that which is due: "You shall not render an unjust judgment; you shall not be partial to the poor or defer to the great: with justice you shall judge your neighbor." *Exodus* 19:15. In a similar vein, the Prophet Zechariah warned: "Thus says the Lord of hosts: Render true judgments, show kindness and mercy to one another; do not oppress the widow, the orphan, the alien, or the poor; and do not devise evil in your hearts against one another." *Zechariah* 7:9-10.

492. See FINNIS, *NATURAL LAW*, *supra* note 7, at 161.

493. See GLENDON, *RIGHTS TALK*, *supra* note 488, at x-xiii, 14, 45, 47-48, 171-72.

494. See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 37-38 (1987) [hereinafter *GLENDON, ABORTION AND DIVORCE*]. While proceeding from a different school of thought, Joseph Raz has offered a parallel thought. See RAZ, *FREEDOM*, *supra* note 324, at 250. Raz addresses the subject of personal autonomy and suggests that while "an individual's freedom, understood as personal autonomy, sometimes conflicts with the interests of others, it also depends on those interests and can be obtained only through collective goods which do not benefit anyone unless they benefit everyone." See *id.* Elsewhere, he acknowledges that the morally good person recognizes that the individual's interests are so inextricably related with those of other members of society "that it is impossible to separate his personal well-being from his moral concerns." See *id.* at 320. Raz makes it clear from the outset of *The Morality of Freedom* that his argument supports "a liberal morality on non-individualistic grounds." See *id.* at 18. His search is for a "morality which regards personal autonomy as an essential ingredient of the good life, and regards the principle of autonomy, which imposes duties on people to secure for all the conditions of autonomy . . ." See *id.* at 415. Raz does not offer an elaborate definition of the good life. He explains the good life as "a life which is a free creation" in which there will be "a multiplicity of valuable options to choose from. . . ." See *id.* at 412.

society as a whole and its individual members—be they from the racial majority or minority—a virtuous solution to interpersonal conflict could emerge. In response to legal controversies that work their way into courts, racial justice-as-virtue avoids the problems associated with the “winner-take-all” attitude. But, as a practical matter, how does a race-conscious society move toward the goal of justice as virtuous people? This is where the virtue of prudence comes into play.

If the virtue of justice prescribes the just goal or end, then prudence and compassion are means to that end.⁴⁹⁵ Permeating prudence is the virtue of compassion which tempers the just end.⁴⁹⁶ The virtues of prudence and compassion work in tandem to promote improvements in social structures that will simultaneously display greater charity toward both individuals and society at large—toward the victim of racial injustice as well as the perpetrator.⁴⁹⁷ Aquinas saw the connection between the virtue of prudence which directs people so that they relate their own good, to the good of others (the common good).⁴⁹⁸ Plato’s understanding

495. See Kotva, *supra* note 476, at 166 n.9 (acknowledging his debt to James Keenan, S.J. for this insight); see also, Anthony Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L. J. 1567 (1985). Dean Kronman examines through the vehicle of Alexander Bickel’s political philosophy, the value of prudence as both a political and legal virtue. See *id.* at 1569. Kronman further explains prudence:

By prudence, I mean a trait or characteristic that is at once an intellectual capacity and a temperamental disposition. A prudent judgment or political program is, above all, one that takes into account the complexity of its human and institutional setting, and a prudent person, in this sense, is one who sees complexities, who has an eye for what Bickel called the “unruliness of the human condition”. . . A prudent person is also one with a distinctive character—a person who feels a certain “wonder” in the presence of complex, historically evolved institutions and a modesty in undertaking their reform; who has a high tolerance for accommodation and delay and is able to accept the final incommensurability between any system of ideas and the world as it is given to us with all its raggedness and inconsistency; who values consent but is not demoralized by the process of irrational compromise that is often needed to achieve it. In the prudent person these qualities of intellect and character are joined.

Id. (citations omitted).

496. See Benjamin Zipursky, *DeShaney And The Jurisprudence Of Compassion*, 65 N.Y.U. L. REV. 1101, 1134-37 (1990).

497. When the disciples asked Jesus to teach them how to pray, he reminded them to “forgive us our debts, as we have also forgiven our debtors.” See *Matthew* 6:12.

498. See AQUINAS, *supra* note 93, II-II, Q. 50, at art. 2. For a helpful discussion of the relationship between virtue and law, see DANIEL WESTBERG, *RIGHT PRACTICAL REASON: ARISTOTLE, ACTION, AND PRUDENCE IN AQUINAS* 229-44 (Clarendon Press 1994). Westberg cautions against seeing only contradiction between law and virtue, and examines the link between them. See *id.* As Westberg argues, “[t]he reading of the moral philosophy of Aquinas in deontological terms is a bad mistake . . .” *Id.* at 234. In the context of the law profession and the common or public good, Robert Katzmann has acknowledged the “inextric[able] link” between the self interest of lawyers (and their responsibility as members of a profession) and the public. See Robert A. Katzmann, *Themes in Context, in THE LAW FIRM AND THE PUBLIC GOOD* 1, 15 (Robert A. Katzmann ed., 1995). As he states, “the law firm and the public good are inextricably linked and that each can draw strength from the other in ways that

of temperance advances the importance of prudence because prudence is the virtue which brings harmony into society by promoting concord among all the elements of the community.⁴⁹⁹

My concern about virtue raises considerations which every member of the contemporary American society can reflect upon and adopt. I suspect that even those with the strongest racial group orientation would take comfort knowing that their opponents practice the virtues of compassion and temperance. Both virtues provide an atmosphere which helps reassure that every view will be heard and that individual and mutual concerns will be carefully evaluated—just as the opponent’s concerns will be. The considerations set the stage for another important virtue: courage.

Courage is the virtue that enables any person to meet the challenge of harm or danger when one attempts to take action based on the care and concern that citizens should have for their fellow citizens.⁵⁰⁰ The exercise of this virtue takes place when people from any racial group face risks and threats in controversial cases but are prepared to seek the just end for all, not just some, of their fellow citizens.⁵⁰¹ One need only think of someone like Martin Luther King, Jr. who displayed this virtue in his life of devotion to his fellow citizens.

Underlying the virtues of justice (which recognizes the goal), prudence (which provides the means for acting justly), and courage (which reinforces those who take the action essential to reaching just goals), is the virtue of wisdom. Wisdom provides the insight, the sound judgment by which citizens come to understand their community as well as individual goods and the nexus between them.⁵⁰² Wisdom

nourish both.” *See id.*

499. *See* PLATO, *supra* note 65, at 145-46.

500. *See* MACINTYRE, *supra* note 476, at 179. In the context of the legal profession, Dean Anthony Kronman has described courage as resisting the pressures of “doing what his client wants in every case.” *See* KRONMAN, *THE LOST LAWYER*, *supra* note 345, at 145. Kronman further states, “A courageous lawyer is prepared to take risks for what he or she believes is right—to risk anger, contempt, and a lower income for the sake of the law’s own good—and nothing can be a substitute for the fortitude this requires.” *Id.*

501. *See* KRONMAN, *THE LOST LAWYER*, *supra* note 345, at 123. Azariah reminded Asa and the people not to abandon hope for God would give them courage if only they believed in Him:

In those times it was not safe for anyone to go or come, for great disturbances afflicted all the inhabitants of the lands. They were broken in pieces, nation against nation and city against city, for God troubled them [because of their apostasy] with every sort of distress. But you, take courage! Do not let your hands be weak, for your work shall be rewarded!

2 Chronicles 15:5-7. In a similar fashion, God came to give courage to St. Paul when he was on trial before the religious authorities: “That night the Lord stood near him and said, ‘Keep up your courage! For just as you have testified for me in Jerusalem, so you must bear witness also in Rome.’” *Acts* 23:11.

502. A remarkable example of this virtue is King Solomon, who, when presented with a difficult case (trying to determine which woman claiming the same child was the real mother), was up to the challenge to dispense justice. “All Israel heard of the judgment that the king had rendered; and they stood in awe of [Solomon] because they perceived that the wisdom of God was in him, to execute justice.” *1 Kings* 3:28. It is clear that Israel was reminded of the correlation between wisdom and justice, when Moses told them:

See, just as the Lord my God has charged me, I now teach you statutes and ordinances for you to observe in the land that you are about to enter and occupy. You must observe them

enlightens not only the individuals but the actions which they pursue in public life. Cultivation of this virtue can open the mind as well as the heart to matters which the person not relying on the virtue of wisdom may miss. It parallels prudence, and works in tandem with it.⁵⁰³ In a virtue-oriented approach to the problem of racial injustice in America and elsewhere, wisdom guides each citizen in the quest for understanding who we are as individuals and as members of society and what we want to become. In the American culture that is strongly characterized by “individual autonomy and isolation,”⁵⁰⁴ the focus of individual and community attention on who we are can be blurred. Wisdom helps remove the blur that otherwise inhibits the ability to identify not only who we are now but also what we want to be in the future. When wisdom permeates our consciousness, our knowledge of ourselves becomes more secure and more certain. And, when our self-knowledge grows, the vision of who we want to become both as individuals and as members of communities will become all the more clear. When our knowledge of who we want to become is better defined, our “moral idealism [can] be found and maintained.”⁵⁰⁵

If these virtues of prudence, justice, wisdom, compassion, and courage develop a model of the virtuous citizen, have they been used in concrete contexts involving the quest for racial justice? The dissenting voices of Justices Curtis and McLean in *Dred Scott*,⁵⁰⁶ Justice Harlan in *Plessy*,⁵⁰⁷ and Justices Murphy, Jackson, and Roberts in *Korematsu*⁵⁰⁸ are models of virtuous citizens who illustrate the model which seeks to achieve racial justice.

These individuals relied on virtues to deal with three of the most notorious cases of racial discrimination in American history. *Dred Scott* raised the issue of the status

diligently, for this will show your wisdom and discernment to the peoples, who, when they hear all these statutes, will say, “Surely this great nation is a wise and discerning people!” For what other nation has a god so near to it as the Lord our God is whenever we call to him? And what other great nation has statutes and ordinances as just as this entire law that I am setting before you today?

Deuteronomy 4:5-8.

503. The Book of Proverbs is a great source of the correlation between wisdom and prudence. For example, we are reminded the “fear of the Lord” is essential. “For learning about wisdom and instruction, for understanding words of insight, for gaining instruction in wise dealing, righteousness, justice, and equity; to teach shrewdness to the simple, knowledge and prudence to the young— . . . The fear of the Lord is the beginning of knowledge.” *Proverbs* 1:2-7. The author of Proverbs personifies Wisdom and has her say, “I, wisdom, live with prudence, and I attain knowledge and discretion.” *See Proverbs* 8:12.

504. *See* GLENDON, ABORTION AND DIVORCE, *supra* note 494, at 38.

505. *See* Keenan, *Virtue Ethics*, *supra* note 474, at 123.

506. *See* *Dred Scott v. Sandford*, 60 U.S. 393, 529-633 (1856) (McLean, J. and Curtis, J., dissenting).

507. *See* *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896) (Harlan, J., dissenting).

508. *See* *Korematsu v. United States*, 323 U.S. 214, 225-72 (1944) (Roberts, J. and Murphy, J., dissenting).

of an African-American slave who had been taken into a territory where slavery was illegal.⁵⁰⁹ In writing for the majority, Chief Justice Roger Taney noted the popular sentiment that black people have “been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations.”⁵¹⁰ Taney investigated this sentiment in the context of the foundational documents of the republic, including the Declaration of Independence and the United States Constitution.⁵¹¹ In his desperate effort to justify the Court’s decision on both legal and moral grounds, he turned to the language of the Declaration which states that “all men are created equal; that they are endowed by their Creator with certain unalienable rights; [and]... that to secure these rights, Governments are instituted...”⁵¹² Taney asserted that this language was not intended to apply to the African race presumably because this class “formed no part of the people who framed and adopted” the Declaration.⁵¹³ Regrettably, the Chief Justice presumed that no one in “the civilized world” would suppose that these protections would extend to the “negro race.”⁵¹⁴ His presumption that the “unhappy black race were separated from the white by indelible marks... and were never thought of or spoken of *except as property*,”⁵¹⁵ took no account of other, more ancient authority in the Bible telling Christian and Jew alike that blacks had been earlier thought of in quite another regard.⁵¹⁶

D. The Application Of Virtues

The dissenters exercised virtue when, in the face of overwhelming opposition, they publicly acknowledged that the Chief Justice and the rest of the Court were wrong. Justices McLean and Curtis raised questions and offered answers about the case and its racial injustices which escaped the consideration of the members of the

509. See *Dred Scott*, 60 U.S. at 400.

510. See *id.* at 407. Chief Justice Taney continued with traditional views of blacks as articles of merchandise who could “justly and lawfully be reduced to slavery for his benefit.” See *id.*

511. See *Dred Scott*, 60 U.S. at 407.

512. See *id.* at 410.

513. See *id.*

514. See *id.*

515. *Id.* (emphasis added).

516. See, e.g., 2 *Chronicles* 14:9-13 (telling about the conflict between Asa’s army and that of the Ethiopian Zerah who had “an army of a million men and three hundred chariots . . .”). Isaiah’s prophecy tells of King Hezekiah being warned that King Tirhakah of Ethiopia (sometimes called Nubia) “has set out to fight against you.” See *Isaiah* 37:9. Jeremiah’s prophecy informs about the Ethiopian (or Nubian) Ebed-melech, a servant but also a man of influence in King Zedekiah’s household, who persuaded the king that evil doers had cast Jeremiah into a muddy cistern and that the king should have the prophet rescued. See *Jeremiah* 38:7-13. To this request, the king agreed and, because of Ebed-melech, Jeremiah was rescued from certain death. See *id.* Again, in the New Testament, we hear of the Ethiopian eunuch was the treasurer of the queen of the Ethiopians, who was baptized by Philip. See *Acts* 8:26-40.

majority. In particular, it was the appropriation and exercise of the virtues of wisdom, courage, compassion, prudence, and justice which enabled the two dissenters to understand the case more deeply and to offer a better, more equitable solution. At the outset of his dissent, Justice McLean challenged Taney's view that the law had long acknowledged the inferior position of the members of the black race. He pointed out that the different and inferior treatment extended to the black was "more a matter of taste than of law."⁵¹⁷ In fact, the legal tradition would tend to support the dissenters' view more than the position of Chief Justice Taney and the majority. For example, under both European civil and English common law, the removal of a slave from slave territory to non-slave territory led to emancipation.⁵¹⁸

The notion that the Negro slave was anything less than another fellow human being deserving of the same entitlements of citizenship did not comport with the law of other civilized nations prior to and at the time *Dred Scott* was decided.⁵¹⁹ Nevertheless, Chief Justice Taney maintained that the Negro was not entitled to the same rights and privileges as citizens because they were not deemed citizens by the framers of the Declaration and the Constitution.⁵²⁰

No doubt these thoughts had a strong impact on Justice McLean who acknowledged that "James Madison, that great and good man, a leading member of the Federal Convention, was solicitous to guard the language of [the Constitution] so as *not* to convey the idea that there could be property in man."⁵²¹ McLean was a

517. See *Dred Scott*, 60 U.S. at 533 (McLean, J., dissenting).

518. See *id.* at 534 (McLean, J., dissenting).

519. Under his compilation of the English common law of 1765 to 1769, William Blackstone noted that the "spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or negro, the moment he lands in England, falls under the protection of the laws, and so far [with regard to all natural rights] becomes a freeman." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Book I, Chapter 1, at 127-28 (4th ed., James DeWitt Andrews ed., Callaghan & Co. 1899). Blackstone later commented that because the principles of English law give no countenance to slavery, "the slave is entitled to the same protection in England before, as after, baptism; and, whatever service the heathen negro owed of right to his American master, [the same] . . . is he bound to render when brought to England and made a Christian." *Id.* at 425.

520. See *Dred Scott*, 60 U.S. at 410-12.

521. See *id.* at 537 (McLean, J., dissenting) (emphasis added). Madison, as a principal drafter of the Constitution and co-author of the FEDERALIST PAPERS suggested otherwise in a way that supports the dissenters and counters the majority. See ALEXANDER HAMILTON ET AL., THE FEDERALIST (Benjamin Fletcher Wright ed., Belknap Press 1961). The first insight offered by Madison concerning the wrongness of slavery is in his contrast and comparison between the Confederation and the Constitution. Importation of slaves would have been a permanent feature under the Confederation, but under the Constitution, it would be permitted for only twenty years. See FEDERALIST NO. 38, ¶ 9. Admittedly, this particular text of Madison was silent on the propriety or impropriety of slavery beyond this period of twenty years; the only clear point was the recognition that the importation of slaves beyond the year 1808 would no longer be tolerated. See *id.* However, in several subsequent papers, Madison questioned the longevity of the institution itself. Madison mentioned not only the cessation of slave importation

practical individual who understood well the times in which he lived. Yet, the execution of his office in this case was guided by the virtue of practical wisdom and prudence. While noting that the federal republic was not created especially for blacks, it was nonetheless created to include them because, at the time of the Constitution's adoption, there were states in which blacks did enjoy the rights and privileges of citizenship.⁵²²

Justice Curtis' research revealed that at the time the Articles of Confederation were ratified, all free, native-born inhabitants of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina "though descended from African slaves . . . were not only citizens of those states," but also enjoyed "the franchise of electors", on equal terms with other citizens."⁵²³ This attitude of five of the states is vital to understanding exactly who were the "people" who formed "the more perfect union" of the Constitution. Chief Justice Taney's analysis of the two clauses examined earlier suggested that the Negro race was "not regarded as a portion of the people or citizens of the Government" formed under the Constitution.⁵²⁴ In applying wisdom, prudence, courage, and justice, McLean convincingly argued to the contrary that "as free colored persons were then citizens of at least five states, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established."⁵²⁵

To dispel the myth that the Black race was inferior to the White race as suggested in the social history referred to by Chief Justice Taney, McLean wisely, prudently, and justly reminded his fellow citizens that the white man had also been enslaved at different times in different communities; as he stated, "white men were

after 1808, but the stiff fine for the time as well. See FEDERALIST NO. 42, ¶ 1. Madison was not satisfied with so indirect a criticism of slavery and its maintenance as an American institution. He continued by arguing that it would have been preferable to not postpone the banning of importation until 1808 but to outlaw continuation of this "barbarism of modern policy" immediately. See *id.* at ¶ 7. The most extensive discussion of slavery and the status of the negro offered by Madison appears in *Federalist* No. 54 which addressed the matter of apportioning seats to the House of Representatives. Madison acknowledged that the Constitution was a document of compromise, rather than one of complete principle. See FEDERALIST NO. 54, ¶ 7. Madison began his critique in by suggesting that opponents to the Constitution understood slaves to be property rather than fellow human beings; however, the Madisonian Publius quickened the chase by offering an opposing view. See *id.* at ¶ 3. He disabused the reader that a slave is merely property rather than a person. See *id.* at ¶ 4. Madison argued that while the slave may "appear to be degraded from the human rank, and classed with those irrational animals which fall under the legal denomination of property," he recognized that the Negro is a member of society who is both rational creation and moral person. See *id.* at ¶ 4.

522. See *Dred Scott*, 60 U.S. at 537.

523. *Id.* at 572-73 (Curtis, J., dissenting). Justice Curtis resigned from the Supreme Court shortly after *Dred Scott* was decided. Although he gave financial considerations as justification for his resignation, it has been pointed out that his dissatisfaction with the outcome of *Dred Scott* was an important factor as well. See Emily Van Tassel, *Resignations and Removals: A History of Federal Judicial Service and Disservice—1789-1922*, 142 U. PA. L. REV. 333, 356 (1993).

524. See *Dred Scott*, 60 U.S. at 411.

525. See *id.* at 582 (Curtis, J., dissenting).

made slaves. All slavery has its origin in power, and is *against right*.⁵²⁶ One important justification for this view offered by Justice McLean was that he took seriously the language of the Declaration quoted by the Chief Justice that “all men are created equal... [and] endowed by their Creator with certain unalienable rights.”⁵²⁷ As Justice McLean said, “A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to endless existence.”⁵²⁸

With these thoughts in mind, one might think that forty years later after a civil war was fought and the Thirteenth, Fourteenth, and Fifteenth Amendments were added to the Constitution, the question of equality of the races would have been addressed and answered once and for all. However, the case of *Plessy v. Ferguson*⁵²⁹ raised once more the existence of practices and beliefs which forced inferior status on individuals who were either black or shared some African ancestry. Plessy had a mixed racial ancestry— he was seven-eighths white and one-eighth black.⁵³⁰ We also know that he was a citizen and “entitled to every recognition, right, privilege, and immunity secured to... the white race.”⁵³¹ On June 7, 1892, Plessy boarded a train whose operators were obliged to carry both white and black passengers, but, in accordance with a state statute, were also required to “provide equal but separate accommodations for the white, and colored races...”⁵³² Plessy violated the law when he purchased a first class ticket and sat in a coach reserved for white passengers.⁵³³ Any passenger who violated this provision by sitting in a coach or area designated for the race not his own was liable to criminal prosecution and subject to either a fine or prison sentence if convicted.⁵³⁴

As a consequence of his action, Plessy was charged with and convicted for violating the statute.⁵³⁵ He subsequently challenged the state laws on the grounds that they violated the Thirteenth Amendment which abolished slavery and the Fourteenth Amendment which prohibited race-restrictive state legislation.⁵³⁶ In his

526. *Id.* at 538 (emphasis added).

527. *See id.* at 410.

528. *Id.* at 550 (McLean, J., dissenting). Justice McLean’s view reflects the thoughts of St. Paul in his letter to the Roman Christian community where he states: “Esteem others more highly than yourself... Do not be proud, but be ready to mix with humble people. Do not keep thinking how wise you are.” *Romans* 12:10b, 16.

529. 163 U.S. 537 (1896).

530. *See id.* at 538.

531. *Id.*

532. *See id.* at 540.

533. *See id.* at 538.

534. *See id.* at 541. Excepted from coverage under this act were nurses “attending children of the other race.” *See id.*

535. *See Plessy v. Ferguson*, 163 U.S. 537, 539 (1896).

536. *See id.* at 542.

decision for the majority affirming the judgment convicting Plessy, Justice Brown found that Plessy's position was premised on the fallacy that "enforced separation of the two races stamps the colored race with a badge of inferiority."⁵³⁷ Justice Brown bristled at the notion that equal rights could only be achieved with "an enforced commingling of the two races."⁵³⁸ He rejected this proposition by declaring: "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals."⁵³⁹ But the wise and discerning person might ask how could other individuals discover these "natural affinities" or develop "mutual appreciation" if they were legally forbidden to be with one another?

Justice Brown concluded that if Plessy were considered white, as indeed he might be under some state laws where the proportion of white to black ancestry was crucial in determining this question, that would have dramatically changed the complexion of the case and very possibly its outcome.⁵⁴⁰ There were no separate concurring opinions, and there was one dissenting opinion authored by Justice Harlan, who identified the "wrong values" which justified the Court's opinion.⁵⁴¹

Justice Harlan has been described as "the quintessential voice crying in the wilderness" because he publicly rejected the separate-but-equal justification of Louisiana law.⁵⁴² In seeking justice for Plessy, Justice Harlan exercised wisdom and courage because he:

... transcended, without slighting, mechanical legal analysis; he sought to announce fundamental constitutional truths as well. He spoke not only to his peers, but to his society, and, more important, across time to later generations. He was, in this sense, a secular prophet, and we continue, long after *Plessy*... to benefit from his wisdom and courage.⁵⁴³

It took wisdom to see and courage to challenge the erroneous view of the majority opinion with these words: "The destinies of the two races... are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."⁵⁴⁴ Justice Harlan could step back from the case and observe that "[t]he arbitrary separation of

537. *Id.* at 551.

538. *Id.*

539. *Id.*

540. *See id.* at 552. A few years ago, Judge Leon Higginbotham wrote that it was not bad people who allowed the "separate but equal" rule of *Plessy*, but rather "wrong values" which poisoned the society and allowed treatment of its citizens of color in such a harsh way. *See* A. Leon Higginbotham, *An Open Letter To Justice Clarence Thomas From A Federal Judicial Colleague*, 140 U. PA. L. REV. 1005, 1010 (1992).

541. *See Plessy*, 163 U.S. at 552 (Harlan, J., dissenting). Justice Brewer took no part in the deliberation or deciding of this case. *See id.*

542. *See* William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L. J. 427, 431-32 (1986).

543. *Id.* at 432.

544. *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting).

citizens” along racial lines generates an unconstitutional “badge of servitude” that cannot be reconciled with any source of lawful authority.⁵⁴⁵ With these virtues guiding his investigation, Justice Harlan identified that the majority’s rationale to uphold the state action in *Plessy* would lead to injustice of a subtle variety. Noting that slavery as a lawful institution was now a thing of the past, Justice Harlan courageously prophesied that this “sinister legislation” would dangerously interfere with the goal of enabling citizens, regardless of their race, to obtain “the blessings of freedom” guaranteed to all.⁵⁴⁶

World War II brought again to the nation’s highest court questions regarding official conduct denying to some what was expected by others. The occasion was the internment of Japanese-Americans and the petitioner was Fred Korematsu, an American citizen of Japanese extraction who remained in a particular area of California contrary to the mandates of the Civilian Exclusion Order No. 34 issued by a U.S. Army general. General DeWitt’s exclusion order mandated that all persons of Japanese ancestry were to be removed from specified areas of the west coast of the United States as long as hostilities with the Japanese Empire continued.⁵⁴⁷ While noting that most Japanese’s loyalty to the United States was not in question,⁵⁴⁸ and while taking account of the belief that “nothing short of the gravest imminent danger to the public safety” could constitutionally justify the conduct pursued by the military authorities against American citizens,⁵⁴⁹ the majority opinion authored by the great civil libertarian Justice Hugo Black concluded that not even “the calm perspective of hindsight” could say that at the time, actions taken by the Federal authorities against Japanese-American citizens who were physically removed from their homes and interned in prison camps were not justified.⁵⁵⁰ But once again, several individuals whose actions were influenced by wisdom, courage, and prudence took steps to voice their concern that a great injustice had been accomplished under the guise of the Constitution.

It was wisdom which led Justice Roberts to comprehend that thousands of loyal American citizens who happened to be of Japanese ancestry were being forced into “concentration camps” (as the Jews and other non-Aryans were in German camps around the same time) without any evidence whatsoever of conduct or belief which

545. See *id.* at 562 (Harlan, J., dissenting).

546. See *id.* at 563 (Harlan, J., dissenting).

547. See *Korematsu v. United States*, 323 U.S. 214, 216 (1945). Unlike the court in *Plessy*, see *supra* notes 529-42, and accompanying text, the *Korematsu* court was able to dignify the petitioner by acknowledging that he had a first as well as last name. He was not simply the petitioner, he was a human being entitled to the dignity which a body of names gives to each person and his individuality. See *id.*

548. See *Korematsu*, 323 U.S. at 216, 219.

549. See *id.* at 218.

550. See *id.* at 224.

would place into question their loyalty to their country.⁵⁵¹ Unlike their counterparts in the Nazi camps, Fred Korematsu and his fellow citizens may not have been literally deprived of life, but they were denied their liberty by General DeWitt's orders. Sharing the wisdom of Justice Roberts, Justice Murphy also had the courage to identify this action taken by the Federal government for what it was—an “ugly abyss of racism.”⁵⁵²

Justice Murphy offered prudent counsel which is just as helpful today as it was in 1945, to detect and avoid the chasm of racism. His focus was on the issue: how a nation can “deal intelligently with matters so vital to the physical security of the nation.”⁵⁵³ Justice Murphy's practical wisdom provided him with the clarity of vision enabling him to acknowledge publicly that there were a *few* Japanese-Americans who were disloyal to the United States evidenced by action they took that aided and abetted Imperial Japan.⁵⁵⁴ Justice Murphy's courage and wisdom enabled him to reveal to his fellow citizens the danger of making the unjustifiable conclusion that if a few Japanese-Americans were disloyal, then they must all be suspect. As he asked, what became of that important legal principle and common sense that only “individual guilt is the sole basis for the deprivation of rights...”?⁵⁵⁵ For Justice Murphy, the goal was a “democratic way of life” for all Americans regardless of their race, or ancestry.⁵⁵⁶ In the exercise of prudence, this goal could not be achieved by engaging in the blindly discriminatory action pursued by the west coast American military authority. The exercise of virtues in dealing with racial discrimination did not stop with the work of the dissenters in *Dred Scott*, *Plessy*, and *Korematsu*.

In a nationally broadcast address made in 1963, President John Kennedy called the attention of the American people to the pressing legal, political, and social issues of civil rights.⁵⁵⁷ Kennedy was concerned with and alarmed about the impoverished social, economic, and political status of the African-American.⁵⁵⁸ In his speech, he called the nation's concentration to the imbalances in the status of the African-American within the exercise of human conduct and institutional practices which solidified these inequities.⁵⁵⁹ In particular, the President called attention to the plight of the African-American whose wage, education, and general living circumstances were further reduced by the lack of equal opportunity to compete for educational and employment opportunities because of artificial barriers erected over racial differences.⁵⁶⁰

551. *See id.* at 226 (Roberts, J., dissenting).

552. *See Korematsu v. United States*, 323 U.S. 214, 233 (1945) (Murphy, J., dissenting).

553. *See id.* at 234 (Murphy, J., dissenting).

554. *See id.* at 240 (Murphy, J., dissenting).

555. *See id.* (Murphy, J., dissenting).

556. *See id.* at 242 (Murphy, J., dissenting).

557. *See generally* Radio and Television Report to the American People on Civil Rights, 237 PUB. PAPERS OF JOHN F. KENNEDY, 1963 (June 11, 1963).

558. *See id.*

559. *See id.*

560. *See id.*

Among most of the statements issued by political, social, and religious leaders during the middle of this century in regard to the civil rights movement, few, if any, surpassed the President's in its graphic and compelling advocacy of the need to provide for and cultivate equality of opportunity for every American. In his passionate address to the nation, Kennedy simply, but bluntly, advanced the cause for raising the consciousness about the lack of and the need for equality and the awareness of the suffering experienced by Americans who were deprived of the substance of equality when he stated:

The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated. If an American, because his skin is dark, cannot eat lunch in a restaurant open to the public, if he cannot send his children to the best public school available, if he cannot vote for the public officials who represent him, if, in short, he cannot enjoy the full and free life which all of us want, *then who among us would be content to have the color of his skin changed and stand in his place? Who among us would then be content with the counsels of patience and delay?*⁵⁶¹

The President indirectly showed the American people how the concern about both the individual and common goods are related through the inconsistency of denying other persons that which individuals expect for themselves. As Reinhold Niebuhr once mentioned, "[t]he most perfect justice cannot be established if the moral imagination of the individual does not seek to comprehend the needs and interests of his fellows."⁵⁶² After all, each person may some day find himself or herself to be *that* fellow.

Another perspective that needs to be considered is that of Kent Greenawalt who has reflected on the questions surrounding civil rights and discrimination. As lawyer and legal philosopher, he has considered the relation between law and ethics or law and morality.⁵⁶³ In the realm of discrimination and equality, Greenawalt has pointed

561. *Id.* at 461 (emphasis added). As if responding to the points made by President Kennedy, Lloyd Weinreb suggests:

Equality of opportunity has to find an equilibrium between the extreme that merely reflects current practice and policy and endorses the success of those who succeed, and the other extreme that eliminates all differential qualities and tends toward a lottery. It has to find a basis for consistent application over the whole course of life, so that opportunities are real and significant without being so decisive that equality of opportunity thereafter is out of the question.

WEINREB, *supra* note 351, at 175.

562. REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS* 257-58 (1932).

563. *See, e.g.*, KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* (1987); *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988).

out that ethical evaluation can be “vitaly important” to the legal evaluation of social, political, and economic conditions which consign certain groups or classes of Americans “to a permanent underclass.”⁵⁶⁴ The reality that our society could permit and foster an underclass of citizens strongly suggests that inequality rather than equality prevails in some regions of American society.

D. Virtues Open The Relationship Between The Individual And The Common Good

The notion of equality can mean different things to different people. Within an American legal framework, equality does not mean nor does it have to mean that everyone must be treated exactly alike. Such a fiction would not withstand the scrutiny of reality. Many might agree with Jean Porter who stated, “that a normative commitment to equality does not imply that everyone is equal in every respect...”⁵⁶⁵ This point raises the question: in what way are Americans to be considered equal? Another way of considering the issue is with the following inquiry: how are the interests of the individual reconciled with those of other individuals and, in turn, how are they reconciled with those of the community?⁵⁶⁶

The investigations of Thomas Aquinas, particularly his examination of virtues, provides a good deal of insight that is useful in addressing the problems of racial discrimination. Critics of this approach might argue that Aquinas was torn between emphasis on the individual versus the common good. In the realm of a discussion on contemporary civil rights and racial discrimination, it might seem paradoxical that Aquinas would argue that “a man ought to love himself more than his neighbor.”⁵⁶⁷ This thought, by itself, tends to eviscerate the notion of equality and the common good which Aquinas discusses elsewhere.⁵⁶⁸ But this portion of Thomistic thought must be evaluated in the context of the rest of Aquinas’ treatment of the issue. He stated that humans love, or ought to love, God first; yet, by loving God, each individual also loves (and cares for/has concern for) the neighbor.⁵⁶⁹ As Aquinas

564. See KENT GREENAWALT, DISCRIMINATION AND REVERSE DISCRIMINATION 10-11 (Alfred A. Knopf 1983).

565. JEAN PORTER, THE RECOVERY OF VIRTUE: THE RELEVANCE OF AQUINAS FOR CHRISTIAN ETHICS 23 (1990) [hereinafter PORTER, THE RECOVERY OF VIRTUE].

566. Oscar Brown raised the question in another way: “The equality of justice, another leading motif in Thomistic doctrine on law and providence, could scarcely be preserved if unequals were ranged equally. Rather, since the equality of justice is a proportional one, unequals must be maintained in inequality precisely to preserve the order of true justice.” OSCAR BROWN, NATURAL RECTITUDE AND DIVINE LAW IN AQUINAS: AN APPROACH TO AN INTEGRAL INTERPRETATION OF THE THOMISTIC DOCTRINE OF LAW 72 (Pontifical Institute of Medieval Studies 1981).

567. See AQUINAS, *supra* note 93, II-II, Q. 26, at art. 4.

568. See *id.* II-II Q. 58, at art. 10; *but see*, AQUINAS, *supra* note 93 at art. 7. James Keenan provides a helpful discussion about the inconsistencies in the *Summa Theologiae* on this point. See generally KEENAN, GOODNESS AND RIGHTNESS, *supra* note 373.

569. See AQUINAS, *supra* note 93, II-II Q. 25 at art. 4.

argued, God is loved “as the principle of good, on which the love of charity is founded; while man, out of charity, loves himself by reason of his being a partaker of the aforesaid good,” he must also have concern for the neighbor “by reason of his fellowship in [the good of God].”⁵⁷⁰ The sensibility of what Aquinas has to offer begins to unfold: God, as the common good of all humanity, becomes the focus of our concern for one another,⁵⁷¹ because the more we love God “the more [we put] enmities aside and show love towards [our] neighbor.”⁵⁷² Self-love is tied to love of God, and love of God is interrelated with concern for our fellow human beings.⁵⁷³ Aquinas acknowledged that this component of his work is compatible with Mosaic law which has both religious and civil components. He noted that the precepts of the decalogue, such as the Ten Commandments, are the foundation of the moral precepts for the Christian,⁵⁷⁴ because the Decalogue mandates that we love both God and our neighbor.⁵⁷⁵ While love of God has a strong religious bearing, the love of one’s neighbor clearly has both strong civil and religious significance.

Elsewhere, Aquinas took additional steps to reconcile the differences between the individual good and the common good. There is for Aquinas a vital bond between the good of the community and the good of the individual:

the individual good is impossible without the common good of the family, state, or kingdom . . . [and] since man is a part of the home and state, he must consider what is good for him by being prudent about the good of the many . . . [for] the good disposition of parts depends on their relation to the whole . . .⁵⁷⁶

Porter interpreted Aquinas to mean that the “individual and communal good stand in

570. See *id.* II-II, Q. 26, at art. 4.

571. See *id.* at art. 3.

572. See *id.* II-II, Q. 25, at art. 8.

573. It would not be *prudent* to assume that Aquinas consistently viewed and explained the interrelationship of love, justice, and the individual and common goods in the *Summa Theologiae*. James Keenan notes the following:

Toward the end of the *Secunda secundae*, Thomas asserts not only that the love of neighbor is secondarily related to charity but also that it is accidental to charity. Earlier, Thomas had asserted that neighbor love belongs to justice and love of God to charity. Later, however, he argues that the end of charity is love of God and of neighbor; and, still later, that love of neighbor is an extension of the love of God. But finally, Thomas argues that the love of neighbor is accidental to charity. Thomas sees that even neighbor love can be enacted from another motivation. There are other reasons for neighbor love than charity... No act but the love of God is essentially an act of charity. Love of neighbor is not an act of charity unless one loves God.

KEENAN, GOODNESS AND RIGHTNESS, *supra* note 373, at 135-36.

574. See AQUINAS, *supra* note 93, II-I, Q. 100, at art. 3.

575. See *id.* at art. 4.

576. *Id.* II-II Q. 47, at art. 10.

reciprocal relationship such that the good of the individual is intrinsic to the common good."⁵⁷⁷ As the correlation between the individual and common goods increases, the precept of Thomistic thought that the first principle of justice is equality becomes increasingly evident.⁵⁷⁸ Implicit within the principle of justice-as-equality are the notions of mutuality and reciprocity among individuals.

The theme of mutuality and reciprocity of individual and common goods is examined in the investigation of John Finnis. As Finnis pointed out, "the good that is common between friends is not simply the good of successful collaboration or coordination, nor is it simply the good of two successfully achieved coinciding projects or objectives; it is the common good of mutual self-constitution, self-fulfillment, self-realization."⁵⁷⁹ Finnis echoed, albeit in a different voice, much of what has been suggested earlier in the discussion of virtues about the interrelationship of law, prudence, justice, and equality. Finnis saw justice being a function of the exercise of practical reasonableness which acknowledges that human beings seek to achieve human goods not only for themselves, but also for others—for the members of the community and for the community itself.⁵⁸⁰ His understanding of justice was premised on three elements: "other-directedness" (how we relate to and deal with other people); the duties we owe each other; and, equality among individuals.⁵⁸¹ In a contemporary mode, Finnis appropriates and reaffirms the nexus between the individual good and the common good identified and addressed by Aquinas. He noted that while the exercise of personal rights by an individual is not subject to the common good, the recognition and practice of these rights is "a fundamental component of the common good."⁵⁸² For Finnis, "the common good *is* the good of individuals, living together and depending upon one another in ways that favour the well-being of each."⁵⁸³

E. A Return To Racial Discrimination And Affirmative Action

Let me refocus this examination that relies on virtuous conduct to seek just solutions to racial discrimination by briefly commenting on *Regents of the University of California v. Bakke*.⁵⁸⁴ The first claim of inequality and discrimination surfaced in the conclusion made by University officials that, due to past racial discrimination, the school admitted an insufficient number of minority students to the entering classes of its medical school.⁵⁸⁵ The second claim of inequality and discrimination

577. See PORTER, THE RECOVERY OF VIRTUE, *supra* note 565, at 125.

578. See AQUINAS, *supra* note 93, II-II, Q. 57, at art. 1.

579. FINNIS, NATURAL LAW, *supra* note 7, at 141.

580. See *id.* at 161.

581. See *id.* at 161-63.

582. See *id.* at 218.

583. *Id.* at 305.

584. 438 U.S. 265 (1978).

585. See *id.* at 269-73.

came from Allan Bakke, a white male, who was twice unsuccessful in obtaining admission into the medical school.⁵⁸⁶ Bakke argued that the University discriminated against him because it failed to consider him for one of the positions of the entering class governed by the special admissions program.⁵⁸⁷ The contention was that this program violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and Title VI of the Civil Rights Act of 1964.⁵⁸⁸ The justices of the Supreme Court wrestled with the difficult issues of the remedial purpose of the Civil Rights Act—the protections afforded individuals historically denied opportunities because of race or ethnic heritage and the desirability that Americans be treated equally so that those persons qualified for admission into educational programs would not be denied opportunities to participate because of the artificial barriers caused by racial and other prohibited discrimination.⁵⁸⁹

The allegation of reverse discrimination by Bakke placed historical and social discrimination of Black-Americans against an affirmative action plan designed to address this long standing exclusion from equal opportunity. Lloyd Weinreb defined this conflict accurately when he identified the variety of “injustices” that emerge from cases such as *Bakke*.⁵⁹⁰ As Weinreb pointed out,

If the minority is preferred, we deny a crucial possibility of self-determination for some members of the majority, who lose out even though they are individuals more deserving according to the understood criteria than some members of the minority who benefit. If the minority is not preferred, we deny such possibility for some of them; without affirmative action, no “equality of opportunity” is sufficient, because differential entitlements in the past have made them undeservedly less able to compete.⁵⁹¹

After commenting on the unsuitability of solutions based on utility, the future well-being of communities, and immediate social needs, Weinreb looked elsewhere for resolution of the problems generated by racial discrimination. In his search for answers to these problems, he discovered that

[T]he least unjust solution—at any rate, the solution that minimizes the burden of injustice for any individual—is for the community as a whole to bear the cost of remedying the injustice of the past and to recognize the claims of both groups, until coherent principles of liberty and equality reemerge together and become a part,

586. See *id.* at 276-77.

587. See *id.* at 277-78.

588. See *id.*

589. See *id.* at 284-87.

590. See WEINREB, *supra* note 351, at 233.

591. See *id.* at 233.

seriously and substantially, of the community's reconstituted way of life.⁵⁹²

But how do members of the community come to realize the sense of Weinreb's recommendation? Jacques Maritain's understanding of the human person could very well help in reaching this "reconstituted way" of community life.⁵⁹³ Maritain recognized that "the common good is the *human* common good, [which] includes within its essence... the service of the human person."⁵⁹⁴ For Maritain, to be truly human is to be a person in dialogue and communication with other persons.⁵⁹⁵ But, this communication among individuals does not exist simply for itself; rather, it exists so that each person can (1) have knowledge of the other person(s), and (2) extend help to other(s).⁵⁹⁶ As with Aquinas, Maritain sees an important connection between the good for the person and that for the community:

There is a correlation between this notion of the *person* as a social unit and the notion of the *common good* as the end of the social whole. They imply one another. The common good is common because it is received in persons, each of whom is a mirror of the whole.⁵⁹⁷

Within his understanding of the common good derived from Thomistic thought, Maritain offered some substantive contributions to resolve the dilemmas posed by discrimination, affirmative action, and reverse discrimination. For Maritain, justice determines the evolution of the common good.⁵⁹⁸ Accordingly, justice simultaneously mandates that the good for the community "must flow back upon persons" so that each person's freedom to pursue a meaningful existence can expand.⁵⁹⁹

592. *Id.* For Weinreb, this community will have to be a harmonious one which "will subscribe to principles of liberty and equality that are congruent and give a coherent shape to its members' conceptions of themselves as self-determining actors within a determinate social order." *Id.*

593. See JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* (John J. Fitzgerald trans., 1972).

594. *Id.* at 29. Maritain made the distinction between the individual which is the material pole of the human and the person which is the spiritual pole. See *id.* at 33. Maritain, moreover, was sympathetic to Aquinas' view of the person as that "which is most noble and most perfect in all of nature." See *id.* at 32 (quoting Aquinas). Both saw that love of the self (the human person) is tied into the love of God. See *id.* at 32-33.

595. See *id.* at 41-42.

596. See *id.* at 47-48.

597. *Id.* at 49. Maritain explained the end of the social whole this way:

The end of society is the good of the community, of the social body. But if the good of the social body is not understood to be a common good of *human persons*, just as the social body itself is a whole of human persons, this conception would lead to other errors of a totalitarian type.

Id. at 50. In his practical commentary, Maritain saw that the greatest problem of totalitarian governments (of his time) as the repudiation of respect for the person; any move toward "human exaltation" is through "myths of outward grandeur and unending efforts toward external power and prestige." See *id.* at 96-97.

598. See *id.* at 55.

599. See *id.*

American legal institutions are to safeguard the rights of individuals. They also target the elimination of impermissible discrimination based on categories and classifications (e.g., race, ethnic background, religious belief, or sex) that have little to do with the person's ability to contribute to personal and communal development. In operating these legal institutions, members of the American national community—as individuals and as elements of the community—should have access to what Maritain called the “liberty of expansion.”⁶⁰⁰ What the laws and their interpretations must not do is isolate any person from his or her liberty of expansion. If this were to occur, the expansion and flourishing of the community is detrimentally affected.

These undesirable results can be avoided and individuals and communities will flourish if the citizens of our society seek justice directed by the virtue of prudence. Each person's work to safeguard liberty of expansion becomes society's work. As Anthony Cook suggested, the diverse communities of American society can flourish if the following: their members converse with one another; they participate with one another in public life; they deliberate with one another about how the community is to be governed for the benefit of all and the detriment of none; and, they cultivate mutual respect for one another.⁶⁰¹

In the final analysis, communities realize that their individual good is contingent on the communal good, and that this result is based on whether the two are seen in relationship with one another. The good for all cannot be maintained; unless the good for the one is also maintained. By the same token, the good for each is threatened until the good of all is secured. Earlier I referred to the scriptural commandment to love your neighbor as yourself. Recognition of this scriptural commandment is important because the command requires members of a community to be intimately aware of their similarities as human beings. Specifically, what does the commandment mean in the context of rectifying racial injustice?

I think it means this: when people are willing to discuss questions surrounding race relations, they can, and often do, learn a lot more about the subject. This is especially possible when talking with others who hold different views. As people dispose themselves to engage in a difficult, but still important, discussion, they must come together in a community that does not necessarily share the same views, but does share the same interest in this topic. As a community, they can build a foundation of recognition that they have something in common (our humanity begins and ends in the same way: with life and death). This commonality forges the foundational link between individuals and helps recognition that all share a “likeness to one another.”⁶⁰²

600. *See id.*

601. *See* Cook, *supra* note 441, at 1044.

602. *See* PHILIP J. ROSSI, S.J., TOGETHER TOWARD HOPE: A JOURNEY TO MORAL THEOLOGY (1983).

This approach of recognition of likeness with the other may seem incompatible with notions of individuality and freedom. Yet, as Philip Rossi noted, the mistake people often make about themselves and their freedom is that they “conceive of freedom primarily, if not exclusively, by reference to human agents in their individuality and independence, rather than in terms of their shared human communalities and their fundamental interdependence.”⁶⁰³ While many think their independence makes them human, it is really their social dimension and interrelation. The fact that individuals are also members of a society, distinct human beings who nevertheless flourish when they relate to one another—not in isolation from one another. It is, after all, human interdependence that brings people together into the community of human beings.⁶⁰⁴ Community fosters exchange among people (and their interests). The exchange, in turn, promotes the opportunity to see that human interaction is mutually beneficial, that it serves and promotes their common good to “care for one another’s well-being.”⁶⁰⁵ At this point, the stage for understanding justice as a relational concept should be recognized. But if justice is a relational concept, does this assist in the resolution of racial discrimination and affirmative action cases?

V. JUSTICE AS RIGHT RELATIONSHIP

Brian Weber’s story is useful to construct and illustrate the notion of justice as right relationship. It is a case in which the law struggles to do a good thing—to rectify the harms of discrimination. Does it always achieve the just result? To reach this just result, it is essential that all sides or interests are heard in the context of and in relation to the other, before judgment is passed. Justice cannot be achieved until the due of each person is understood; and each person’s due must take into account the due of every other person who is involved.

The Civil Rights Act of 1964, particularly Title VII, was Congress’s response to the discrimination experienced and suffered by American denied equal opportunity to participate in employment arenas.⁶⁰⁶ More particularly, the Civil Rights Act was

603. *See id.* at 5.

604. *See id.* at 68. As Philip Rossi argues,

[T]his community is, first and foremost, a community of mutuality; a community of those who conscientiously foster the skills that enable the essential interdependence of their lives to work for the attainment of good for one another. Mutuality fostered in this way constitutes the core of the charity or love that in the Catholic tradition has been claimed to be the fundamental form of the life of virtue. Thus the human community that provides a condition fundamental for satisfying, for each and all, our basic human cravings is a community in which charity gives form to virtue.

Id. at 68.

605. *See id.* at 145.

606. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). The unanimous Court stated: “The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.” *Id.*

designed to remedy the denial of full citizenship resulting from religious, ethnic, racial, and sex discrimination.⁶⁰⁷ In the initial legislative debates regarding this proposal, the focus of Congress's concern was on the status and plight of the African-American.⁶⁰⁸ The terms of the statute frankly state:

It shall be unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual... or...to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin.⁶⁰⁹

Moreover, Congress specified that it shall be an unlawful employment practice: “to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.”⁶¹⁰ It was, of course, a training program that was at the focus of the *Weber* case.

Even a careful examination of the terms of the statute, whether it be the specific provision under investigation, or some larger segment of the complete statute of which the specific provision is a part, does not automatically lead one to the statute's meaning. Perhaps the terms and phrases of the statute provide distinct images in each interpreter's mind about meaning. For example, one interpreter may conclude that an employer who asks candidates in a pre-employment questionnaire to list the candidates' personal attributes such as race, color, sex, and religion—may commit an unlawful employment practice because such information *might* be used to evaluate the candidate. Another interpreter may consider that the employer who gives each candidate this questionnaire does not commit an unlawful employment practice unless there is a nexus between the information gathered and action taken by the employer that discriminates against and is prejudicial to this applicant.

In another factual context such as the one found in *Weber*, interpreters can give the language of Title VII different emphasis and, therefore, different interpretations.

607. In addition to employment discrimination, which is covered by Title VII, the scope of the issues include: discrimination in public accommodations (Title VIII), in the participation in and enjoyment of benefits from Federally assisted programs (Title VI), and in the participation and enjoyment of benefits of Federally funded educational programs and activities (Title IX). See Title VII, 42 U.S.C.A. § 2000e-5(f) (West 1999); 8 U.S.C. § 1188 (1999); Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000 et seq. (1999); Education Amendments of 1972 § 901 et seq., as amended, 20 U.S.C.A. § 1681 et seq. (West 1999).

608. See Special Message to the Congress on Civil Rights and Job Opportunities, 248 PUB. PAPERS OF THE PRES., JOHN F. KENNEDY 483 (June 19, 1963).

609. § 703(a), 78 Stat. 255, 42 U.S.C. §2000e-2(a) (1994).

610. § 703(d), 78 Stat. 256, 42 U.S.C. §2000e-2(d).

For example, one person may construe the language to mean that affirmative action designed to redress racial discrimination relies on racial classification to combat discrimination. For this interpreter the affirmative action remedy employs one form of racial discrimination to address another form. But, any form of racial discrimination used in employment practices violates the statute; therefore, affirmative action (which the statute does not mention by name) is an impermissible and unlawful remedy. Another interpreter may look at the same language and factual context and conclude that if affirmative action is the only effective means of eliminating long standing racial discrimination in the workplace, it is harmonious with the language of the statute.

I now introduce a hypothetical judge, Sophia, who will illustrate the role of justice as right relationship. She concludes that the issue in the case is whether the employment practices of Kaiser and the union discriminate against workers from the racial majority because they rely on racial, ethnic, religious, or sex considerations. If there is this discrimination, does it violate Title VII?

Sophia is familiar with the facts of the *Weber* case. She recognizes that Kaiser is not consciously attempting to favor racial minorities and exclude white employees from the on-the-job training program. Also Sophia sympathetically understands the plight of racial minorities excluded from the social, political, and economic mainstream of American culture. She acknowledges that racial minorities, particularly African-Americans, have historically been denied access to employment opportunities because of their race. The fact that the Gramercy-area labor force is almost forty percent African-American but only comprises two percent of the higher skilled, higher paid craft positions, however, she realizes the disproportionate distribution of these positions to white workers.

Our judge is a sensitive and objective person. She acknowledges and appreciates the disappointment of the disgruntled applicant twice denied entry into the on-the-job craft training program. The judge knows the applicant is an employee in good-standing who has acquired seniority necessary to be accepted into the training program were it not for the affirmative action plan.⁶¹¹ The judge acknowledges the discrimination allegation because of this plan giving racial preference to more junior black workers thereby excluding him, thereby excluding the applicant due to racial considerations. Also the judge, accepts the logical force of the pleadings that the use of racial considerations deprived him of the opportunity to participate in the craft training program resulting in discrimination. This judge faces the charge that the employer's plan deprived the applicant of employment opportunities because of racial considerations which violate the provisions of Section 703 of the Civil Rights Act.

This conscientious judge must examine meaning of the words of Section 703 in

611. See *United Steel Workers of Am. v. Weber*, 443 U.S. 193, 199 (1979) (explaining that Brian Weber had more seniority than the most senior black employee who was selected into the training program under the affirmative action plan).

the context of this case. She concludes that the on-the-job training program is an employment practice because it was used by the employer to train or retrain workers to do particular kinds of work demanding higher skills. Also, she determines that the affirmative action plan designed to promote greater opportunities for racial minorities is an additional employment practice of the company and the union.

In applying the determinations to the present case, Sophia identifies two areas of Section 703(a) which seem to be dispositive. First, subsection (2) contains a provision which deals with denying an individual of employment opportunities because of "such individual's race."⁶¹² It seems that this subsection could apply to the applicant. After all, the applicant twice was denied the opportunity to participate in the training program due to race, even though he had more seniority than the most senior African-American who was chosen to participate in the program. However, Sophia sees that Weber, as a member of the majority white race, was not necessarily deprived of the training program on racial grounds because other white workers were selected for this training.⁶¹³ The judge concludes that the plain language of subsection (2) is open to several interpretations. In the final analysis, she could plausibly opine either that Brian Weber was deprived of an employment opportunity because of his race, or that he was not deprived of the opportunity because other white workers more senior to him were chosen.

Sophia wonders if subsection (d) of Section 703 is less susceptible to such different conclusions,⁶¹⁴ if so, is it more helpful in answering whether the applicant had suffered discrimination. She acknowledges that the employer and the union developed an on-the-job training program designed to grant members of its current workforce an opportunity to enter the sought-after craft worker positions. Twice the employee applied for admission to the program and twice was turned down, even though less senior black workers were accepted. Sophia can see merit in Weber's claim that this employment practice, giving African-American plant workers training opportunities, worked against him due to race.

Due to the selection and participation of white employees in the program, Sophia can conclude that white workers were not denied participation in the training program because of non-remedial racial considerations.⁶¹⁵ However, if either no

612. 42 U.S.C. § 2000e-2(a) (1994).

613. See *Weber*, 443 U.S. at 199.

614. 42 U.S.C. § 2000e-2(a) (1994).

615. This conclusion was based on the premise that the ratio of one-black-to-one-white continues until racial imbalance is eliminated. If this ratio were to change substantively so that a disproportionate number of workers from one racial group are selected (thereby excluding a disproportionate number of workers from other races), using racial considerations to place production workers into the craft training program would be suspect. See Harry E. Groves & Albert Broderick, *Affirmative Action Goals Under Title VII: Statute, Legislative History, and Policy*, 11 T. MARSHALL L. J. 327, 340-41 (1986) [hereinafter GROVES AND BRODERICK, *Affirmative Action*].

white workers been accepted on either occasion or if their number was disproportionately small, Sophia would probably conclude otherwise. But, a proportionate number of whites were accepted into the training program, even though the applicant was not.⁶¹⁶

Judge Sophia pauses to reflect on the adequacy of resolving the applicant's case by simply applying the plain language of Section 703 to his case.⁶¹⁷ She is satisfied that this approach might resolve the case for some individuals (e.g., where no whites were admitted into the training program); however, she is not satisfied that it is the preferable way to apply the law in this case. In order to ascertain if some better result of this difficult case can be achieved, the judge examines the intent of Congress in enacting Title VII.

In searching for the intent of Congress in enacting the Civil Rights Act of 1964, Sophia begins with the language of the statute to determine what institutional intent can be ascertained from the text itself. Sophia concludes that while the language of Title VII does not reveal very much about intent, it does illustrate Congress's concern with widespread discrimination and deprivation of employment opportunities based on grounds of race, sex, ethnic or religious background or color. Little more of the intent of Congress can be revealed by the language of Title VII.

Next, Judge Sophia turns to the traditional method of examining the legislative history to determine the intent of Congress in enacting the statute. In so doing, Sophia's search resonates with the Supreme Court's statement that the legislative history of the Civil Rights Act is voluminous and the portion underlying the enactment of Title VII is vast.⁶¹⁸ Sophia asks what, if anything, does this bounty of legislative history reveal, about the meaning of Title VII in the context of the present case.⁶¹⁹

The nucleus of Sophia's inquiry concentrates on what Congress, as a legislative institution, *intended* the Civil Rights Act to mean in the realm of employment discrimination and employment opportunity. This much is clear: member after member of Congress reiterated individual concerns over "the plight of the [African-American] in our economy."⁶²⁰ Many members expressed their corporate and individual concerns that the black worker in the American labor force is reduced to

616. See *Weber*, 443 U.S. at 208.

617. 42 U.S.C. § 2000e-2(a) (1994).

618. See *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 284 (1978); see generally *Weber*, 443 U.S. 193.

619. See Earl Maltz, *Statutory Interpretation And Legislative Power: The Case For A Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 13-14 (1988) (commentating that the legislative history of a statute can demonstrate multiple intentions of the legislature and its members). But see P. Wald, *Some Observations On The Use Of Legislative History In The 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 201 (1983) (supporting the view that legislative history in the field of civil rights legislation is not helpful in ascertaining legislative intent because of the level of political compromise needed to enact this type of legislation). Cf. *Weber*, 443 U.S. at 222 (Rehnquist, J., dissenting).

620. See *Weber*, 443 U.S. at 202 (citations and internal quotations omitted).

menial positions with little, if any, hope of advancement into higher paying jobs.⁶²¹ Although the *Weber* Court agreed that the legislative history supports the conclusion that Congress did not intend to preclude the use of affirmative action plans such as the one used by Kaiser to remedy the condition of the African-American in the labor force, Judge Sophia reaches a different conclusion.

While acknowledging that much of the legislative history reveals Congressional concern about the economic inferiority of the black worker caused by discrimination in employment practices, she does not agree that the 88th Congress intended that temporary and voluntary affirmative action programs would be a solution to the economic discrimination faced by the African-American. To the contrary, she contends that this vast resource of legislative materials reveals a very different institutional intent of Congress to promote a color-blind society in which concerns about race and ethnic background (along with regard to sex, religion, and national origin) were *not* to be considered in the hiring, training, and promotion of workers.

While the Supreme Court majority stated that private, voluntary affirmative action plans were not prohibited by Congress because it intended to integrate "blacks into the mainstream of American society,"⁶²² Sophia contends that such an interpretation conflicts with her reading of this history. She concludes that the 88th Congress did not intend to permit voluntary resolution of racial discrimination in employment practices through affirmative action programs such as the one developed by the employer in this case. Sophia does not see that Congress intended such remedial actions to be permissible because, in her estimation, Congress never envisioned them in the first place.

Moreover, Sophia finds the *Weber* Court's discussion and analysis of Section 703(j)⁶²³ of Title VII to be problematic.⁶²⁴ She does not construe the legislative history to support the conclusion reached by the majority that private affirmative action plans constitute one of the means of voluntary resolution of discrimination mentioned in one House Report.⁶²⁵ Like Justice Blackmun, Judge Sophia is skeptical that the legislative history supports the creative conclusion reached by the majority.⁶²⁶ Similarly, it is doubtful that voluntary affirmative action programs were ever identified and discussed by the 88th Congress from 1963 to 1964 when it worked on

621. *See id.* at 202-03.

622. *See id.* at 202-04.

623. 42 U.S.C. § 2000e-2(j) (stating: "Nothing in this title shall be interpreted to require any employer...to grant preferential treatment to an individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons.").

624. *See Weber*, 443 U.S. at 204-06.

625. H. R. REP. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963).

626. *See Weber*, 443 U.S. at 209 (Blackmun, J., concurring).

this legislation.⁶²⁷

Militating against the majority's conclusion is Justice Rehnquist's plain language approach.⁶²⁸ His analysis revealed a very different and plausible conclusion about what Congress *intended* when it enacted Title VII. The bulk of this evidence reveals that Congress wanted to promote a society blind about color, race, sex, and religion because, in such a society, discrimination based on these factors would be eliminated, or so Congress and its members thought in 1964.⁶²⁹

Sophia sees that the 88th Congress intended the entire Civil Rights Act to prohibit race as a factor in making *any* decision about employment. In other words, considering race as a factor in employment decisions would violate the law. As the text of Section 703 states, "[i]t shall be an unlawful employment practice for an employer to [a list of types of prohibited action] . . . because of . . . race, color, religion, sex, or national origin . . ."⁶³⁰ In short, the 88th Congress viewed any employment practice that relied on these considerations as illegal and supportive of the same discrimination which Congress intended to combat. So, in one sense, Title VII was implicated when racial considerations were at the source of Mr. Weber being denied training for several craft positions at the Gramercy plant.

Sophia appears to agree with Justice Rehnquist that Congress did not foresee the need for affirmative action programs as a way of interpreting and implementing Title VII. Congress did not intend the use of affirmative action programs for stamping out racial and other discrimination in employment practices. To the contrary, the legislative history demonstrates that members of Congress viewed such practices as discriminatory because they relied on racial preferences violative of Title VII.⁶³¹

Judge Sophia cannot avoid the conclusion that if congressional intent is the key to interpreting Title VII, Justice Rehnquist's approach would substantively be more accurate in ascertaining the will of Congress than would the majority approach. Sophia however, thinks that the Rehnquist approach would not because the Civil Rights Act did not substantially change the lot of racial minorities, especially African-Americans. Consequently, Sophia considers an alternative approach that relates to but extends legislative intent: what were the Congressional goals of the Civil Rights Act?

By pursuing this inquiry about Title VII's purpose, Sophia garners additional insight into the meaning of the statute *vis-a-vis* discriminatory employment practices. Sophia's investigation of Congressional intent revealed the legislature's concern with the inferior status of racial minorities in the workplace. But, Congress also demonstrated that the means to achieve statutory goals were through a color-blind society. Does Sophia see this as the exclusive method of dealing with the inferior

627. *See id.*

628. *See id.* at 222-54 (Rehnquist, J., dissenting).

629. *See id.* at 252-55 (Rehnquist, J., dissenting).

630. *See* Civ. Rights Act § 703.

631. *See Weber*, 443 U.S. at 247-51 (Rehnquist J., dissenting) (discussing the legislative history of Section 703).

employment status of African-Americans?⁶³² Not necessarily, particularly when she examines the broad goals of the statute.

One specific issue that Congress had to address was the lack of equal opportunity for African-American to compete successfully in the employment market because of racially discriminatory employment practices. To be equal meant more than simply having hotels, restaurants, and universities opened to black people; it also meant that African-Americans must have the same opportunity to earn wages and salaries that would enable them to enjoy in practice the rights they theoretically had. Sophia remembers what President Kennedy said in his challenge to Congress that, “[t]here is little value in a Negro’s obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job.”⁶³³ Sophia rightly recognizes that one major purpose of the statute was to remedy employment discrimination which plagued African-American and other racial minorities for centuries.

In turning to the statute’s underlying history, Judge Sophia sees that the method Congress identified to meet this goal was to eliminate employment practices that used racial considerations. If such considerations were identified as being unlawful then black employees or candidates for employment could benefit from color-blind employment procedures concerning hiring, training, and promotion. Many members of Congress shared their common belief that if racial considerations were eliminated from employment practices, the only thing that mattered in making the hiring, training, or promotion decisions would be the substantive qualifications of the individual.⁶³⁴ By following this line of reasoning, Sophia sees that any affirmative action program, be it voluntary or ordered by an official agency could run afoul of the proscription of using racial factors in employment practices. When considering the purposes of Title VII, Sophia acknowledges the strength of Mr. Weber’s discrimination claim.⁶³⁵ Still, Sophia is concerned about how the strength of his argument may continue to exclude African-Americans from the mainstream of the U.S. economy. After all, because color-blind practices did little to assist minority workers for 1964-74, the color-blind standard advocated by Mr. Weber would, too, most likely offer little help to minorities. Sophia develops the following analogy to

632. See *id.* at 202-03. “Congress feared that the goals of the Civil Rights Act - the integration of blacks into the mainstream of American society - could not be achieved unless . . . blacks were able to secure jobs ‘which have a future.’” *Id.*

633. See Special Message to the Congress on Civil Rights and Job Opportunities, 248 PUB. PAPERS 483 (June 19, 1963); see also Special Message to the Congress on Civil Rights, 82 PUB. PAPERS 221 (Feb. 28, 1963).

634. See 110 CONG. REC. 6549 (1964). As Sen. Humphrey stated, “Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion.” *Id.* (emphasis added).

635. See *Weber*, 443 U.S. at 201.

better understand the predicaments of Weber *and* African-Americans: Sophia imagines a line of people trying to enter a house in order to seek shelter from a harsh climate. Those who are at the front of the line just outside the doorway happen to be white people who got in line first. People are slowly admitted to the shelter as vacancies arise. However, as time passes, virtually no blacks are admitted because they are at the rear of the slow-moving line. Many blacks measure the slow progress of entering the house and wonder if they will ever be admitted.

At this point, Sophia encounters a paradox. It seems that racial considerations in voluntary affirmative action programs are designed and established to help one race overcome discriminatory employment practices that have traditionally excluded them from better jobs. However, use of such programs could adversely affect members of other groups by discriminating against them on racial grounds.

The questions of what the 88th Congress intended and what problems did it identified and attempted to resolve by enacting the Civil Rights Act are no longer the only relevant questions which must be addressed. An important and crucial component to understand the statute is the context in which Title VII is applied. The context of 1964 when the law was enacted is important to construing the statute; however, grappling with the contemporary context is also significant. When considering the context in which the statute is applied, Sophia sees something very different about the problems Title VII is capable of addressing than when she restricted her investigation to the time frame of the 1963-64 legislative history.

Sophia realizes that to understand and apply the law to this difficult case, the positions and needs of all those involved must be considered. In doing so, Sophia considers the following: when Congress passed the Civil Rights Act in 1964, it saw the need to encourage society to be blind about considerations of race, sex, color, religion, and national origin which have an adverse impact on crucial employment practices. These employment practices ended up tolerating and even encouraging discrimination in the workplace. In 1964, Congress envisioned that the solution to these discriminatory employment practices would be to make it unlawful to consider race in hiring, training, and promoting people in the labor force.⁶³⁶

A decade after the Civil Rights Act was passed, Kaiser and the United Steelworkers of America agreed that certain minorities were still being excluded from the workplace. Ethnic and racial imbalance was seen in several of their plants including the one at Gramercy. While there was not a conscious effort to exclude racial minorities from the prized craftworker positions,⁶³⁷ racial minorities were making virtually no headway into higher paying positions. They were like those racial minorities who were at the end of the shelter line. The goal of the Civil Rights Act to provide equal employment opportunities to all qualified individuals was somehow not being met.

636. See *id.* at 204-06.

637. See *Weber v. Kaiser Aluminum & Chem. Corp.*, 415 F. Supp. 761, 764-65 (E.D. La. 1976) *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd and remanded*, 443 U.S. 193 (1974).

Kaiser and the union implemented the affirmative action program to address the racial imbalance in the workforce extending from what appeared to be *de facto* societal discrimination.⁶³⁸ The voluntary affirmative action plan appeared to be a justifiable response to this lingering problem in the sense that it was designed to do something about achieving a major goal of Title VII, i.e., the integration of racial minorities into the American economy by giving opportunities to those who were still excluded from a particular strata of the labor force. But, the search for a just resolution does not end here.

Sophia sees Brian Weber and other white employees who have greater seniority than the black candidates chosen being turned away. Again, Sophia goes back to the image of the line of people who are waiting to enter the shelter. She sees Brian Weber who slowly made progress to enter now being told to step out of line so that others behind him can either take his place in line or be admitted to the shelter immediately. Sophia is disturbed at seeing any person being denied the opportunity of moving up the socioeconomic ladder because of race. By removing the impediments that traditionally blocked racial minorities from being integrated into the economic mainstream through affirmative action plans, are people like Brian Weber now being discriminated against?

As a conscientious judge, Sophia recognizes that a proper solution to this dilemma has a moral component to it. The moral question, in part, concentrates on the propriety of displacing one group of people (those who happen to be white) to make room for another group of individuals (those who happen to be black). This question is akin to the one moral philosophers and ethicists have debated for some time: what does the person in charge of an overcrowded life boat do to help those who swim up to it looking for refuge?⁶³⁹

Sophia recognizes that it is desirable, in principle, to take affirmative steps to promote racial minorities who have historically been excluded from higher paying jobs. Kaiser took this abstract principle and implemented it through its affirmative action program.⁶⁴⁰ A major problem which arises with the application of this principle through the Kaiser affirmative action plan is that it displaces and denies other individuals from the same opportunity because of their race which is what Title VII was originally designed to avoid *and* prohibit.⁶⁴¹ Sophia sees that this principled approach to justice does have its limitations: here the principle is to eradicate the racial imbalance in the workplace by giving preference to those who have tradition-

638. See *Weber*, 563 F.2d at 225.

639. See *Lifeboat* (Alfred Hitchcock, director 1944).

640. See *Weber*, 563 F.2d at 225.

641. See 88th Congress 2nd Session, 2 U.S. Code Congressional & Administrative News, 2355, 2362 ("In a nation dedicated to the proposition that all men are created equal - racial discrimination has no place.").

ally been denied the opportunity to move into the higher paying jobs.⁶⁴² But, by implementing this principle, Sophia sees that Brian Weber, and others who could have moved into the craft positions, as being displaced by workers who had less seniority but who were members of a racial minority.

Thus, Sophia is faced with the following dilemma: through a principled approach that relies on a rule recognizing affirmative action, does she displace from the realm of employment opportunities the Brian Webers' of the world so that members of racial minorities can be given the chance to improve themselves? What happens to Brian Weber and his opportunities for advancement from the unskilled production jobs to the craft positions? Sophia sees herself as the commander of the life boat; if she orders someone out of the boat in order to allow someone else in, what will happen to the person displaced? What will happen to Brian Weber?

But Sophia finds that this approach to applying Title VII has serious limitations. Her understanding of the limitations of the principled approach focuses on the conflict and tension between the political justification of the statute and its underlying moral principles.⁶⁴³ Sophia looks at the *Weber* case and asks what is the "best political justification" of Title VII? She considers the legislative history in addressing this question.

Upon review of the legislative materials of Title VII, she identifies the emphasis on individuals belonging to racial minorities and their entrenched societal discrimination. In 1974, many individuals who belonged to these racial minorities continued to suffer discrimination in the workplace. Ten years earlier, Congress decided to take legislative action designed to eliminate racial and other discriminations from the workplace.⁶⁴⁴ At the time of the statute's enactment, Congress envisioned a color-blind society as the best way of ensuring that racial and other types of discrimination would be eradicated.⁶⁴⁵ Even the very language of the statute states that using race as a grounds for limiting or classifying employees which in any way deprives or tends to deprive any employee of employment opportunities will constitute an unlawful employment practice prohibited by Section 703(a)(2).⁶⁴⁶

However, as her investigation and deliberation continue, Sophia sees other forces at work. Since color-blind practices have not proven to be as effective as was once thought in stamping out racially motivated unlawful employment practices, interest groups representing racial minorities and sympathetic public officials see affirmative action programs as being a method to overcome discrimination that continues in the American workplace.⁶⁴⁷ This method consciously uses employment

642. See *supra* notes 633-35 and accompanying text.

643. See *supra* notes 244-72 and accompanying text.

644. See *supra* note 633.

645. See 88th Cong., *supra* note 641, at 2393 ("[N]ational leadership provided by the enactment of federal legislation will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.").

646. 42 U.S.C. § 2000e.

647. See *supra* notes 40-43 and accompanying text.

practices which give preference to racial minorities. While there is conflict between these two political justifications, Sophia puts this tension aside to concentrate her attention on the relationship between the contemporary best political justification (i.e., affirmative action) and the moral principles underlying anti-discrimination legislation.

Sophia recognizes that the law identifies a fundamental moral principle: racial and other discrimination is an evil which society must address;⁶⁴⁸ therefore, it will be unlawful to use race (and other considerations such as sex, national origin, and religion) to deprive individuals of employment opportunities including admission into training programs (as happened to Weber). But the political environment may justify affirmative action plans as the best course of action to correct long-standing racial imbalance which color-blind employment practices have failed to eliminate. By relying on affirmative action as the new remedy, the underlying moral principle of Title VII, the elimination of race as a consideration in employment practices, is violated.

One group of facts illustrates that racial minorities still experience difficulty in entering the craftworker jobs.⁶⁴⁹ Another set of facts demonstrates that when affirmative action plans are implemented, other workers are denied admission into training programs solely because of racial considerations.⁶⁵⁰ Is there a just solution to this predicament which confronts Judge Sophia?

Sophia begins by examining the text of not only Section 703 but the entire body of Title VII.⁶⁵¹ This review provides her with the fundamental blueprint of the statute. In the text, she discovers the basic outline of concepts which members of a reasonable interpretive community would conclude the statute covers. Sophia acknowledges that the core of Title VII, along with that of Section 703, involves the elimination of discriminatory practices that use racial, ethnic, sex, and religious considerations to distinguish between employees or candidates for employment.

Sophia's approach enables her to comprehend the statute in a dialectical fashion. The text of the statute is surrounded by the intent of the legislature, the purpose for which the statute was designed to achieve, the contemporary context in which the statute is being applied and interpreted, and the underlying principles which can influence the interpretive process. The legislative history of the statute unifies all of these concepts.

The legislative history can be seen as a continuum which records the evolution

648. 88th Cong., *supra* note 641, at 2430 ("The right to be free from all forms of racial intolerance is so fundamentally the privilege of each and every citizen of the United States that it cannot be made the plaything of politics.").

649. *See Weber*, 563 F.2d at 225-26.

650. *See id.* at 223.

651. *See* 42 U.S.C. § 2000e.

of the statute. The legislative history begins with the statute's origins as a bill (or series of bills), to textual modification debates, to interpretations about the meaning of the statute as offered by sponsors of the legislation and committee members, and, finally, to the record for the vote of the legislature. In some cases, this history contains further insights offered by members of subsequent convocations of the legislature.⁶⁵²

An important part of the social, political, and economic history of the Civil Rights Act is the legal struggle involving racial minorities over the course of American history recorded by Supreme Court cases such as *Dred Scott v. Sandford*,⁶⁵³ *Plessy v. Ferguson*,⁶⁵⁴ and *Brown v. Board of Education*.⁶⁵⁵ Each of these cases entails a part of the history of racial minorities in their struggle for equality with the members of the majority race.

Sophia derives some initial understanding about the meaning of Title VII from the language chosen by Congress to combat racial and other discrimination in the workplace. The text helps her focus on the immediate concern of the 88th Congress to identify and ban discriminatory practices by employers and labor unions. Discriminatory practices have had a deleterious effect on the careers of American citizens, not because of these workers' inability to perform a particular job, but because of nonsubstantive issues having no bearing on ability to perform successfully. Congress was especially concerned about nonsubstantive criteria pertaining to an individual's race, ethnic background, sex, or religious persuasion being used to prohibit racial minorities' and members of other groups from entering and competing in all segments of the labor market.

Sophia then examines the institutional intent of Congress which identified general employment practices that used these nonsubstantive criteria to deny workers employment opportunities that would otherwise be open to them. She identifies the general intent of Congress to take action directed against these practices which the legislature deemed harmful to the American worker.

Closely related to these reflections about intent of the legislature is identification of the purpose or the goals of the Civil Rights Act. Sophia traces through the social, economic, and political history leading up to the introduction of the 1963 civil rights bill and she identifies that Congress' principal target was the elimination of nonsubstantive criteria that adversely affected an individual's employment opportunity. She instead sees the goals of Title VII as being directed against the use of nonsubstantive criteria.

The goal, therefore, of Title VII is eliminating nonsubstantive and discriminatory criteria by employers and unions. According to the history of the legislation, Sophia concludes that Congress initially believed this goal would be achieved by cultivating

652. See HETZEL, LIBONATI AND WILLIAMS, *LEGISLATIVE LAW AND PROCESS* 438 (2nd Ed. 1993) (detailing a list of the different components of legislative history).

653. 60 U.S. 393 (1856).

654. 163 U.S. 537 (1896).

655. 347 U.S. 483 (1954).

a society in which decisions about hiring, training, and promotion would be done without *any* consideration being given to the criteria of a person's sex, race, religious beliefs, or skin color. The judge recognizes that this was an objective and potentially effective mechanism for achieving a discrimination-free workplace in 1964. In the context of the time during which Title VII was enacted, there was a consensus that the goals of the statute could be achieved through the implementation of color-blind employment practices. But, in 1974, the color-blind approach for achieving the purposes of Title VII was not working in employment markets such as Gramercy, Louisiana. Although the Civil Rights Act had been in place for a decade, the African-American workers in Gramercy were still excluded from the higher paying positions that were available to white workers at the Kaiser plant.⁶⁵⁶

What seemed to have been a solution to the problem of racial discrimination in 1964—the encouragement of color-blind employment practices—was not addressing the problem of racial imbalance a decade later. In 1974 less than two percent of the higher paid craftworkers consisted of racial minorities while forty percent of the work force in the Gramercy labor market was African-American. Color-blind employment practices were not successful in the Gramercy-Kaiser work environment.⁶⁵⁷ Even though there was no evidence demonstrating that Kaiser's employment practices used racial considerations to prevent entry and promotion of African-Americans, the fact of the matter is that racial minorities were still being excluded from higher paying jobs.

A critic of Sophia's method might raise the point that her approach is too

656. See *Weber*, 563 F.2d at 222.

657. Some critics of affirmative action programs have suggested that this type of remedy against racial discrimination may have an adverse effect on racial minorities, viz. the implication that they are inferior to whites. See S. Steele, *A Negative Vote On Affirmative Action*, N.Y. TIMES MAG., May 13, 1990, at 46. Professor Steele argues that affirmative action is "more bad than good" for minorities in that they stand to lose more than they gain from such remedial programs. As he states, "I think one of the most troubling effects of racial preferences for blacks is a kind of demoralization. Under affirmative action, the quality that earns us preferential treatment is an implied inferiority." *Id.* at 48. See also Randall L. Kennedy, *Racial Critiques Of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (discussing how discrimination (and racism) psychologically reinforce the notion of "inferiority" cultivated by affirmative action). Although Professor Kennedy suggests that there is "nothing necessarily wrong" with affirmative action plans that use racial preferences (indeed, they may be needed to address and remedy some forms of racial discrimination), he does "not want race conscious decision making to be naturalized into our general pattern of academic evaluation." *Id.* at 1807. By doing so, the notion that some individuals cannot compete with others in particular fields institutionalizes the erroneous belief that some people could never compete due to such "inferiority." I would think that Professor Kennedy's comment need not be restricted to the academic environment. Professors Groves and Broderick have pointed out that the notion that African-Americans might be considered inferior by whites or by themselves is "pious hypocrisy." See Groves and Broderick, *Affirmative Action*, supra note 615, at 341. See generally STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991) (discussing affirmative action in contemporary America).

subjective and leads to indeterminacy about the meaning of legislative texts. But Sophia has a response built upon considerations of true justice. To render the most just decision possible, Sophia places herself in the position of each of the principals who are or might be involved with the statute's application. By doing this, she accomplishes two important objectives. First, she experiences what each person involved with the case endures. Second, she brings under one roof, the accumulation of these experiences and *relates* them to one another.

Sophia understands *and* accepts the importance of this moral principle calling for the rescue of racial minorities who have long been discriminated against. After all, Title VII's goal is, to stop discrimination and to prevent its reoccurrence. This is also the goal of the affirmative action plan adopted by the Kaiser-United Steelworkers joint committee: redress long standing discrimination which has excluded African-American from the higher-paying craft work. But this temporary plan adversely affects the original justification of the statute by assaulting the idea of equal opportunity for all, because some workers are excluded as beneficiaries of the plan on racial grounds. Mr. Weber was not a beneficiary of the affirmative action plan. He was twice denied the chance to move into the training program because of the existence and operation of the plan. Sophia acknowledges that the initial justification for implementing color-blind employment practices is contradicted by Kaiser plan. This contradiction emanates from the fact that affirmative action promotes a new form of discrimination that directly conflicts with the text of Title VII, the intent of the 88th Congress to establish color-blind employment practices, and the goals of Title VII.

Sophia seeks a solution to this contradiction. A major source of contradiction is found in the imbalance of paying too much attention to the historical exclusion of racial minorities and not enough attention to the newly developed exclusion of the majority. Sophia realizes that the majority in *Weber* stated that Mr. Weber did not suffer discrimination because white workers *were* accepted into the training program even though he himself was not.⁶⁵⁸ However, Sophia recognizes that Weber, as an individual, not as an anonymous member of a class, was twice denied admission because of *his* race. The fact that some whites were admitted into the training program does not hurt his argument because as an individual he was still excluded on the basis of racial considerations.

Sophia is in search of an understanding of the law that renders justice to all concerned. Most, if not all law, exists to make society more just. For example, environmental statutes seek to protect mankind's natural surroundings. Health and safety legislation protects workers in their places of employment from industrial hazards and to ensure the maintenance of their health. The justice underlying anti-discrimination legislation seeks to reconcile the existing and potentially conflicting interests of Weber and the African-Americans who formed the Kaiser-Gramercy labor pool. In addition, the values associated with justice deal with the very heart of

658. See *Weber*, 443 U.S. at 195.

Title VII anti-discrimination legislation: the permanent elimination of considering race, sex, national origin, and religious beliefs in employment practices in the American workplace.

Sophia must acquire an understanding of justice which will give her a basis from which to understand and apply statutes in such a way that both the individual and society in general can flourish together.⁶⁵⁹ This pursuit is not conducted to solicit an unattainable ideal. Rather it is a process by which the judge, the parties, the lawyers, and everyone else concerned with the outcome can objectively and determinatively charter a course to a better future.⁶⁶⁰

As she plots her course, Sophia has in mind the notion of interpreter as Cardozo's "wise pharmacist"⁶⁶¹ who from the general language of a statute can develop not only a fitting remedy but one that is capable of finding and utilizing the just goals underlying Title VII.

Sophia now takes the text of Section 703 and identifies that the value to be promoted is the cultivation of a labor environment in which the individual worker can flourish because of one's personal ability and desire to do certain work competently, not because of one's sex, skin color, ethnic heritage, or religious affiliation. The texts of Section 703 and Title VII contain the tools that will assist Sophia in constructing the promising future in which the individual and society generally can flourish.

The intent of the 88th Congress and the goals detected from the statute are identified in the legislative history. The legislative history confirms her belief that members of society would be better off if individuals could have opportunities to flourish (to seek better jobs, for example) based on their abilities to perform work and not on physical characteristics, places of origin, or religious views.

Does this mean that the most important underlying value of the statute (and

659. Some of this search for values underlying programmatic statutes is related to the contemporary natural law concepts of John Finnis, A. P. d'Entreves, and Ronald Dworkin. The foundation of Professors Finnis's understanding of natural law is: (1) a set of basic principles which indicate the basic forms of human flourishing as goods to be pursued and realized; (2) a set of methodological requirements of practical reasonableness which distinguish sound from unsound practical reasoning; and, (3) a set of general moral standards. See FINNIS, *NATURAL LAW*, *supra* note 7, at 23. Prof. d'Entreves views natural law as humankind's "quest for an absolute standard of justice . . . [that is] based upon a particular conception of the relationship between the ideal and the real...between what is and what ought to be." A. P. D'ENTREVES, *NATURAL LAW*, *supra* note 351, at 95. Finally, Ronald Dworkin views the law as an "interpretive, self-reflective attitude addressed to politics in the broadest sense . . . Law's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past. It is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction." DWORKIN, *LAW'S EMPIRE*, *supra* note 7, at 413.

660. See DWORKIN, *LAW'S EMPIRE*, *supra* note 7, at 413.

661. See CARDOZO, *supra*, note 123.

therefore its interpretation) is to cultivate a color- (or sex-, or religion-, or ethnic-) blind society. Yes, for the long-term. But, crucial to Sophia's investigation of *Weber* is that a color-blind application of Title VII was not producing a racially balanced workforce in which minorities could experience equal employment opportunities. While the statute was not designed to deal directly with racial balance, indirectly it was in this important sense: if any person is excluded from employment opportunities due to racial considerations, then might this exclusion be attributable to some persistent, subtle form of discrimination which has survived long after outright discrimination was purged?

In other words, is it possible that some forms of discrimination can resist interpretations and applications of Title VII?⁶⁶² It would seem to Sophia that this is indeed the case because her examination of the record reveals that Kaiser and the union were not considering race in their respective employment practices. Nevertheless, enrollment of African-Americans in the higher paying, more desirable craft positions changed minimally in the decade since the passage of Title VII. Again, the statistics show that in 1974, while forty percent of the labor force in the Gramercy labor pool was comprised of African-Americans, less than two percent of those holding the better-paying craftwork jobs at Kaiser were black.⁶⁶³

But the case's history also demonstrates that Weber was twice denied admission into on-the-job training programs established to promote unskilled production workers into higher paying jobs.⁶⁶⁴ The reason for his being twice turned down was not because of any lack of competence nor was it because other individuals with more employment seniority were to be first invited into the training program. Rejections, instead were based on his race. Why does this then not constitute an unlawful employment practice within the meaning of Title VII under the synthetic approach?

Sophia concludes that to be just, the law must promote and preserve a labor market in which employment practices will *not* rely on race, sex, national origin, skin color, and religion. But, if within the context of a given labor market individuals from an identifiable racial group such as African-Americans are being excluded, then Sophia sees that the just goals of the statute (equal opportunity without regard to

662. Professor Greenawalt provides a good example of sex discrimination that seemingly uses sex-neutral language. See KENT GREENAWALT, *LAW AND OBJECTIVITY* 136 (1992). The example he presents consists of sex-neutral language contained in the rule specifying that candidates for police officers must be of a certain height. See *id.* There is no formal requirement that the candidate must be of a particular sex. See *id.* As a matter of fact, the rule has standard language stating that the police department welcomes applicants from all backgrounds regardless of race, national origin, religion, skin color and sex. See *id.* However, the physical requirements, particularly that concerning height ("a height requirement of five feet ten inches"), could effectively preclude most female candidates. See *id.* Even though the requirements for police candidates say nothing about an applicant's sex and thus appear to be sex-neutral, they in fact discriminate against women because many more men would meet the height requirement than women. See *id.*

663. See *Weber*, 443 U.S. at 210. Kaiser's work force, was less than fifteen percent black. See *id.*

664. See *id.* at 198.

racial and other considerations) are not being fulfilled. True, race did not seem to be a factor in the employment practices of Kaiser in 1974; but, what is also true is that for some reason, African-Americans had not proportionally moved into the craft positions as their white colleagues had. The moral values underlying anti-discrimination legislation emphasize that each individual, regardless of race, is entitled to equal employment opportunity, and that is the fundamental value of justice contained in the *Weber* case.⁶⁶⁵

Sophia realizes that there exists the potential for abuse of affirmative action plans which consider race in making employment decisions. *Extraordinary remedies* can be easily abused when they are not carefully designed and persistently monitored once implemented. As with many extraordinary remedies [such as chemotherapy which poisons the body to eradicate cancer], a great deal of care has to be used. A substantial element of the care to be exercised in using affirmative action programs is to monitor periodically and thoroughly the progress being made integrating those currently excluded groups into the mainstream of the economy and the labor market. At the same time, this scrutiny must see if any other groups are being pushed out of this mainstream, such as non-minority individuals who have no advocacy group lobbying on their behalf.⁶⁶⁶ One component of this scrutiny is to be attentive to any person or group who becomes marginalized from the mainstream of the economy and are excluded from the training programs as new positions within these programs become available. This is where the interests of Brian Weber, and all individuals, must be taken into account if justice is to be achieved. If Weber were to be repeatedly turned down in his applications to enter the training program, this could reveal a continuing pattern of exclusion that would constitute discrimination fostered and perpetuated by the extraordinary remedy of affirmative action. Affirmative action, if it is to be just, must consider and relate the interest of non-benefactors as well as to those to the who benefit from the preferential treatment.

Sophia sees a need to give structure to this scrutiny that exists in order to determine whether affirmative action is harming any individual or group of

665. See *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547 (1990). The Supreme Court upheld a policy of the Federal Communications Commission granting minority preferences in the field of radio and television station licensing. See *id.* at 552. It appears from this 5-4 decision that the concept of affirmative action is still regarded as a means for ensuring that no segment of the population is discriminated against. The majority found that the F.C.C. policy did not violate the equal protection clause. See *id.* However, Justice Brennan, who wrote the majority opinion in *Metro Broadcasting*, has resigned from the court. Justice Brennan's successor, Justice David Souter, has not had an official opportunity to reveal his views on the subject consequently, there is a question about whether the Court will uphold similar affirmative action plans in the future.

666. See *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 657-70 (1987) (acknowledging Justices Scalia, Rehnquist and in part Justice White concern about trammeling the legitimate interest of non-minorities).

individuals who previously had not suffered from discrimination in the labor market. It is vital that the interests of each person affected by the law be considered. It is equally important that these interests be considered and evaluated in relation to one another. The first step is to frequently examine the racial status of those being promoted by affirmative action plans and those being excluded. If members of certain racial groups are repeatedly denied admission into employment programs affected by the affirmative action plans, there is evidence revealing a need to redefine the affirmative action plan and its administration. If the plan is voluntary the initial responsibility of monitoring falls on the parties who initially devised and administered it. If, however, the plan is a remedy ordered by an official institution (such as a government agency or court), then the agency or court shares in the responsibility to monitor any potential or actual abuse derived from the plan's implementation.

As a practical matter, most judges simply do not have the time to retain the responsibility to monitor cases once the court's decision is issued.⁶⁶⁷ However, this does not mean that some kind of monitoring is impossible.

One method of dealing with this problem is to ensure that judicially issued or approved affirmative action plans are sufficiently precise so that the parties (along with appropriate government agencies) will be adequately informed about the kind of evidence needed to trigger judicial involvement with the case. Another way of dealing with affirmative action programs is to ensure that they contain a sunset provision (as some statutes do). Thus, prior to the plan's expiration date, the affirmative action program can be evaluated to determine if it can be repealed (if its purpose has been achieved), renewed for a specific period of time (if its goals have not yet been reached), or modified. Under these two methods, much of the burden of monitoring the plan falls not on the shoulders of the courts but on the parties who have a stake in the outcome of the plan's implementation.⁶⁶⁸

A second component of monitoring is the exercise of an objective standard by which the affirmative action plan is conducted. At the heart of this standard is the fact that each person who is involved always remains in the sight of those resolving

667. See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications Of The Supreme Court's Limited Resources For Judicial Review Of Agency Action*, 87 COLUM. L. REV. 1093 (1987) (commenting on the limited resources of the Supreme Court in meeting the demands of a large and potentially enormous case load). Professor Strauss considers "whether, and in what ways, the stresses on the Court might be manifesting themselves in its opinions and, particularly, in doctrine." *Id.* at 1094. The demands on the lower Federal courts (which do not have the same personnel and resources as does the Supreme Court) are even greater since they have less discretion about which cases to hear and which ones will not. Simply put, the lower courts have less resources but a numerically greater case load.

668. See *Dowell v. Board of Educ. of Okla. City Pub. Sch.*, 890 F.2d 1483 (10th Cir. 1989), *rev'd*, 498 U.S. 237 (1990) (explaining how the plaintiffs in a school desegregation case shouldered the burden of reopening a case involving a judicially-approved school busing plan). In an earlier opinion issued by the Tenth Circuit, the court pointed out that while the busing decree was still operative, the court would not supervise its implementation. See *Dowell v. Board of Educ. of the Okla. City Public Schools*, 795 F.2d 1516, 1520-21 (10th Cir. 1986). It is up to the parties in the case to bring to the court's attention the need to reassert the order and the rights it established and the duties it imposed. See *id.*

the controversy or dispute. In this fashion, all individuals are able to flourish. The conscionable and just judge like Sophia can achieve this ideal by placing herself into the different positions of the individuals involved with the application of the affirmative action plan.⁶⁶⁹ Sophia looks at the implementation of the plan from as many different perspectives as possible.⁶⁷⁰ This means that she attempts to see the operation of the plan from the perspective of the employer, the union, the government agency involved with administration of the plan, *and* the legislature which enacts statutes designed to remedy social problems, those groups of people targeted as the primary beneficiaries of the plan, those individuals, such as Weber, who might or are being displaced from employment opportunities by the program's operation.⁶⁷¹

In assessing the individual interests being promoted or harmed by the application of Title VII, Sophia's scrutiny of the affirmative action plan is a continuing

669. See Radio And Television Report To The American People On Civil Rights, 237 PUB. PAPERS OF JOHN F. KENNEDY 461 (June 11, 1963). In his address to the American people, President Kennedy appealed to the nation prior to his submitting the Administration's civil rights bill to Congress by asking every individual to place one's self in the circumstances of others. He stated:

The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated. If an American, because his skin is dark, cannot eat lunch in a restaurant open to the public, if he cannot send his children to the best public school available, if he cannot vote for the public officials who represent him, if, in short, he cannot enjoy the full and free life which all of us want, then *who among us would be content to have the color of his skin changed and stand in his place? Who among us would then be content with the counsels of patience and delay?*

Id. (emphasis added).

670. Around 1894, the French artist Claude Monet painted several scenes depicting the same subject, the cathedral at Rouen. Monet painted the facade of this church at different hours of the day when the light played differently upon the stone. In one depiction, the facade is flooded with the brilliant light of midday. In another, the structure is shrouded with the shadows of dusk. In still another, the stone is beginning to reflect the warmth and brightness of a new day at dawn. Monet was both artist and interpreter. Like the interpreter of statutes, Monet took the same scene (as the interpreter takes the same statute) and looks at it in a different light to arrive at a different interpretation. As shade, lighting, perspective, and weather conditions influenced Monet's interpretation of the same subject, the facts of cases usually influence the interpretation of the same statute. Although there is one body of facts in a given case, the judge should understand these facts from the different perspectives of those parties affected by the outcome of her interpretation. By looking at the statute from the different perspectives involved in a particular case, the judge should be able to arrive at the best meaning of the statute in this case.

671. This is an important facet of judicial interpretation that should be shared with legislators and administrators. By each branch of the government (or at least the people who hold the offices in the different branches) placing itself in the position of the other branches and reflecting upon their experiences, each branch broadens and deepens its understanding of the role it has in conjunction with the other branches in making and implementing rules that affect the lives of the citizenry. See generally ROBERT A. KATZMAN, THE UNDERLYING CONCERNS, IN JUDGES AND LEGISLATORS; TOWARD INSTITUTIONAL COMITY 7, 7-20 (Robert A. Katzmann ed., 1988).

process.⁶⁷² This process calls for ongoing examination and reflection. She periodically checks to see who is being promoted into the training programs and she simultaneously determines who, if anyone, is finding it more difficult to get into the training slots and the craft worker positions. If, for example, Mr. Weber and those similarly situated are being continuously denied access to the on-the-job training designed to promote workers into the higher paying jobs, Sophia may conclude that affirmative action subsequent to 1974 may no longer serve its goals. Justice can help identify such abuse and arrest its practice. What is due each person can only be determined once each person's view is considered—*audi alteram partem*. What is due each person must then be considered and understood in relation to the due of every other person. Indeed this is work, but it is a labor imposed by true justice. For a society which claims to be just and which seeks justice, it is a charge that cannot be abandoned.

VI. CONCLUSION

I conclude this essay (but not the debate, nor the discussion) on the search for true justice in the forum of race, racial distinctions, race relations, racial discrimination, and racial reconciliation by drawing attention to an insight of Philip Rossi.⁶⁷³ Rossi framed the solution to the question about true justice by recognizing the similarity of individuals and their interests.⁶⁷⁴ With this insight, he acknowledged the common good that emerges from “the recognition of communality at the heart of moral life: ‘I am as she; she is as I.’”⁶⁷⁵ I convey this fundamental point into the present day controversies surrounding racial relations and affirmative action by arguing that many of the problems that emerge from racial difference do not take stock of the sameness or mutuality of human existence.

The notion of the common good which I have attempted to present in this discussion about race relations, racial discrimination, and harmonious relations amongst all people regardless of race is the following: when we are willing to engage one another on some common ground and explore our mutual interests in addition to those things which separate us, we can and do learn about one another. By cultivating the virtues of wisdom, compassion, courage, prudence, and justice, we can learn what we did not know before about racial injustice and one of the most effective ways of eliminating it. By proceeding from a virtuous foundation, we can learn what we thought but what we did not want to admit: we discover that we are different, surely, because that is what makes us individuals. But, more importantly,

672. Again, this process is subject to the time and resources available to the judge. Ideally, Sophia would like to be more involved with the process. But since the demands of her office militate against assuming too much of this burden, she will follow the course of action I outlined earlier. *See supra* notes 633-36 and accompanying text.

673. *See generally* ROSSI, *supra* note 602.

674. *See id.* at 143.

675. *See id.* at 154.

we also discover that we are similar to one another in many ways. Each time we engage in conversation with one who seems different, we see a reflection of ourselves in the other with whom we converse. What is just for the self, that is, what is each person's due, can only be identified and understood in the context of what is simultaneously just for the other. Each person's due, therefore is defined by what is due to all others. Our individual rights-oriented culture reinforces the differences which make us superficially opposite but, in truth, mask our fundamental similarity. By being honest about our human nature, that we are individuals who must flourish in a community, we discover our resemblance each time we engage one another in dialogue and debate. We see in each of our conversations a piece of a mosaic that reflects the other. When we assemble more of the mosaic, not only do we see the other, but, we also see ourselves.

This is how the questions about distinction and similarity come together. The more we discuss these issues, the more we see that the concerns of people from different racial groups are similarly our concerns. Racial distinction does not mean that individuals do not have common interests that transcend racial identity. There is, after all, interrelatedness between and amongst all communities.⁶⁷⁶ A person of one racial identification or another, each shares concerns of our common habitat, e.g., health care, the safety of communities, the quality of the environment, and access to good educational and employment opportunities. A threat to one person is a threat to the community. Moreover, a threat to one group within the community is also a threat to all others. Therefore, solutions for one group would also be solutions for others. Just as significant, when we hear about the concerns of those not from our own racial group, we see the concerns that belong to us. When we see that other human being, we also see ourselves. When we make this discovery, and allow it to penetrate into our deepest consciousness, we can then acknowledge that the portrait that emerges from our many conversations is common to us all. It is both our portrait *and* the portrait of the other.

Dr. King was right when he said that more important than our external characteristics is a far more precious and important internal quality: the content of our character.⁶⁷⁷ And it is the content of our individual character which reflects much of the content of the character of others. What is just for the one can never be

676. See Oppenheimer, *supra* note 457, at 836. Dr. King states that he was "cognizant of the interrelatedness of all communities and states . . . Injustice anywhere is a threat to Justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly." *See id.*

677. As Dr. King exclaimed in his speech at the civil rights march in Washington, D. C. on August 29, 1963, "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character." *Reprinted in*, THE OXFORD DICTIONARY OF MODERN QUOTATIONS (1991).

comprehended until what is just for each other person who is connected with the question is taken into account. To understand properly what is due each person, it is essential to discern what is due every other person concerned with the issue. Justice for the individual is incomplete without comprehending what is justice for the community of individuals who are related to the issue. This is justice as right relationship.