University of Detroit Mercy Law Review
Summer 2005

Symposium: Law and Religion

McElroy Lecture

*509 LAW, ETHICS AND MYSTERY [FNa1]

Geoffrey C. Hazard, Jr. [FNaa1]

Copyright (c) 2005 University of Detroit Mercy School of Law; Geoffrey C. Hazard, Jr.

A. Diverse Normative Realms

For almost as long as mankind has been self-conscious about how a person should act, it has been recognized that we respond to several different guides to conduct. Children in their youngest years begin with simple ideas such as "I want"--"I want milk," for example. Also, "I don't want"--"I don't want to go to bed," or "I don't want spinach." Not long after, a child learns that there are family rules, such as "It is time to go to bed." [FN1] As life moves along, we discover that there are rules at school, at the playground, in our circle of friends, and in the workplace. In political society we learn that there is law, a formidable body of norms having something to do with the police, the courts, and formal regulations.

These guides to conduct operate in different domains, in that the rules of the playground do not correspond to the rules at home or those operating inside the schoolhouse, and so on. These different venues can be called normative realms, to fashion a common name for them. The term "normative realm" is perhaps pretentious, but it is analytically definite.

As for "normative," a guide to conduct is normative in the tautological sense that it affirmatively prescribes or fore-ordains a course of action, or negatively proscribes, or prohibits some other course of action: "wash the dishes" and "stay in line" are affirmative obligations; "don't pick on the little kids" and "don't be late for the meeting" are negative ones. Each of these obligations originates from a source, and many obligations originate from a common source. The common source of a set of obligations can be called a realm. The term "realm" derives from the idea of kingship, an old-fashioned form of political governance. "Realm" refers both to the ***510** authority from which the guidance has been issued and the arena in which the guidance is recognized as authoritative.

In a politically organized society there is a realm called law, referring to norms operative throughout the society and promoted by a commonly recognized authority. In a modern society, a legal system includes a complex body of formal regulations and a complex set of institutions that formulate, interpret, and apply those regulations. A modern legal system includes simple regulations such as highway speed limits and very complicated regulations such as the tax code and rules of court procedure. The legal system of course includes legislatures and courts, police and regulatory agencies, and lawyers and legal compliance officers. But the legal system also includes the ordinary citizens to whom most of the regulations are addressed. We lawyers often overlook the

fact that ordinary citizens are not only being addressed by the law, but also interpret and react to the law and thereby help define and reshape its meaning. Their acquiescence provides recognition of the legal systems and thus contributes to its authority.

B. Distinct Normative Realms

For a person living in a modern political regime, there are several normative realms that can be distinguished from each other, at least analytically:

• Personal moral ideas and ideals, such as "I should not steal or lie;"

• Communal or customary standards, including those in family, extended family, neighborhood, workplace, and other contexts in which local norms are recognized and more or less complied with. The special aspect of these norms is their group reference. Thus, their form is "we" should not keep others waiting, rather than the singular "I" should not keep others waiting; and

• Law and legal institutions, such as "one should not exceed the 55 miles-per-hour speed limit by more than the local police ordinarily permit."

For convenience of reference, these standards or guides can be respectively called "personal morals," "ethics," and "law." In some philosophical accounts a different nomenclature is employed, for example, using the term "morals" to refer to community norms. However, this three-fold general distinction is widely employed.

C. Personal Morals

"Personal morals" refers to guides or standards that are subjective to a particular person. Of course, one person's verbalization of a specific moral standard can be shared with others, for example, in the generally **511** proclaimed proposition that one should not lie or steal. But the operative meaning of a moral standard in the mind of a particular person is something that others can comprehend only by inference, sometimes no better than guesswork. Some people who profess that one should not lie are consistent in conforming to that moral virtue. However, many people who profess that they do not lie, nevertheless, cannot be counted on to tell the truth. We would say that the moral standard concerning the veracity of such people is "I should not lie, except when doing so is absolutely convenient." But we cannot determine how such people would state the norm to themselves.

Some people are punctilious about not stealing, but have more variegated approaches to telling the truth. Some are not scrupulous about either lying or stealing or bad-mouthing others, but draw the line at physical brutality. And there are bad actors whose primary standard of conduct apparently is merely aversion to the risk of getting caught.

The more important point, however, is that each person acts through a set of moral standards unique to that person. This set of moral standards has relationship to religious belief or spirituality, a matter to which I will presently return.

D. Community Norms: "Ethics"

"Ethics" is an appropriate term to refer to the standards of conduct recognized within a social group, but not

formalized into legal standards. The term "ethics" derives from the Greek word "ethos," which refers to the character of a group. Thus, the Athenian Greeks considered that their ethos was distinct and superior to that of the Greeks of Sparta. In modern society, there are as many ethics as there are distinguishable groups: ethics of the family (such as "be respectful of grandfather"), of the school ("don't mess with Dean Gordon"), of the workplace ("the boss is not always right, but she is always the boss"), of a region, of people having a common religious affiliation, etc.

Ethical variations within the larger community are particularly evident in our diverse society. People whose vocations involve dealing with the general public are especially aware of these ethical variations. It is familiar that advertising, for example, is carefully designed to avoid offending specific groups, or, on the other hand, to appeal to specific groups. Election campaigns by candidates for public office are similarly tailored. Members of professions such as medicine and law have ethical standards internal to their callings and somewhat different norms of conduct in dealing with customers (patients and clients). Lawyers take the variations into account in selecting and addressing juries, and indeed in their interchanges with judges.

E. Legal Norms

Law and legal institutions have gradually become a major source of normative guidance in the modern world. In ancient times, law in the form ***512** of the king's writ ran only infrequently into the farms and villages of the agricultural communities that then predominated. Today, as we well know, legal regulations penetrate deeply into workplaces, local institutions such as schools, and even into relationships within a family. The "legal invasion" is not only substantive, but also stylistic. In our country, legal regulations and legal procedures have become the model for exposition and discussion of all kinds of issues of right and wrong; witness, for example, the dominance in television of law enforcement dramaturgy.

Of course, classifying the normative realms into only these categories is a radical abstraction from reality. In fact, every single individual has a complicated moral credo in his or her head and heart. A particular credo is an amalgam of norms absorbed in childhood, through the educational system, experience at jobsites and, for lawyers, even law school. The variations among group norms are so complex as to be subjects of study in the disciplines of sociology and social anthropology. Law and legal institutions are now complex to the point that only trained lawyers can understand them and indeed many branches of law are understood only by specialists in particular subfields of law. However, a simplified categorization is an essential step in understanding the role of religion, which is the direction of this presentation.

F. The Coexistence of Multiple Normative Realms

The various normative realms in which all of us must live are not functionally separable. On the contrary, they coexist in complex interaction, like the components of our physical world. The guidelines in each normative realm generally correspond and reinforce each other. Thus, in a sale or contract transaction there is an alignment of the moral guide against lying, the common ethical norm about being truthful in business matters, and the legal prohibition against fraud. So also, the moral, ethical, and legal rules about avoiding physical harm to others generally point toward the same pathway. A child who goes forth to school does not lose his personal moral code or escape the teachings absorbed from his family. Instead, he comes to recognize that there are other normative realms having guidelines that must be taken into account. A few of us go on to law school and into the practice of law and thereby learn still other systems.

In this process of maturation, however, we discover that the guidelines in different realms often are in conflict, sometimes very sharp conflict. A familiar conflict is between an obligation in one realm to tell the truth and an obligation in another realm to be loyal to a fellow-member of a group. This form of conflict arises within a family ("who did it" versus "don't tell on your brother"), at school, in the neighborhood, and in the workplace. Similar conflicts between legal rules and group norms are familiar in everyday law practice.

Indeed, one can say that serious ethical dilemmas typically involve, not questions of distinguishing right from wrong, but deciding upon the ***513** priority between obligations emanating from different normative realms that dictate inconsistent courses of action. Lawyers deal all the time with actual or apparent inconsistencies in legal rules. People in ordinary life also confront similar inconsistencies. A continuing responsibility in real life is resolving, accommodating, or somehow adjusting to these inconsistencies.

G. Legalistic Reasoning

In contemporary American life it has become fashionable to resolve or accommodate among inconsistent obligations by resorting to reasoning that is "legalistic" in the pejorative sense. The same technique can be called casuistic in a similarly pejorative sense, as distinct from reasoning with close attention to specific circumstances, which is the classic meaning of casuistry. However, in my view there is such a thing as responsible and coherent legal or casuistic reasoning. Reasoning with regard to circumstances does not have to be a search for loopholes or an exercise in linguistic manipulation.

Nevertheless, legal reasoning by definition involves reasoning in terms of legal rules. Legal rules have a unique combination of characteristics. For one thing, legal rules are formally stated in words, whereas morals and ethics ordinarily are not formally explicated. Second, legal rules are governed by a constitutional premise peculiar to law, namely that formality of expression must generally prevail over a meaning that might have been understood, but which was not said. In any event, reasoning about legal rules must take account of literal meaning, whereas that is not required in comprehension of ethical norms. In my judgment the law must adhere to its constitutional premise, for otherwise we would be subject, not to the rule of law, but to the rule of persons--judges or magistrates or agency officials.

Normative realms other than the law operate on a different premise, namely that what counts is what was meant, not merely what was said. In modern moral philosophy, perhaps the most famous illustration of the primacy of meaning over language is Wittgenstein's parable about teaching children a game. In this parable, one adult asks another to "teach the children a game," in response to which the instructor addresses the game of shooting craps, whereupon the initiating adult says: "That is not the kind of game I meant."

I suggest that in contemporary American society we have become overly obsessed with what is said compared with what is meant. But recognition of this deplorable development obliges us to consider the normative source implied by the reference to "what is meant." More precisely, in asking for an understanding of "what is meant," we need to inquire into the kind of knowledge involved in such an understanding. It is only with such understanding that we can appreciate our obligations and ***514** hence, what actions we should undertake and what actions we should avoid.

H. Complexity in Understanding Obligations

Appreciating our obligations and how we ought to act is the ultimate personal problem in life. In most forms of Christianity, it is held that there is an afterlife and there are consequences in that stage for what has been done in present life. Belief in an afterlife carries with it an expectation of such consequences. But resolving how to act in life is significant in our present existence, quite apart from afterlife.

Present existence in the modern world proceeds in normative complexity, indeed perhaps chaos. Today we are situated as in years past in the normative realms of family, parish, neighborhood, and workplace, with occasional visits from the tax collector and government inspectors. But today we are also confronted by, and give some allegiance to, norms emanating from other groups, such as nationalism, ethnic identity, multiple political affiliations (city, state, etc.), multiple vocational affiliations (legal profession, firm, or agency, etc.), and groups defined in terms of "life style." Indeed, the currently fashionable term "diversity" has a negative connotation as well as a positive one. "Diversity" reminds us of the many communities that we inhabit simultaneously in the modern condition and the conflicts and contradictions in the norms that emanate from the different communities.

So how do we act or inhibit ourselves from acting in various circumstances? I suggest that, in serious consideration of proper courses of action in difficult situations, particularly those involving conflict among the guidelines emanating from different normative realms, determining how to act is a religious or spiritual experience. In the classic biblical phrase, it "passeth all understanding." [FN2]

This conclusion is supported by both negative and positive considerations. The negative considerations are perhaps more familiar. Most legal analysts would now agree with Justice Oliver Wendell Holmes that "general propositions do not decide concrete cases." [FN3] I suggest that limitation applies not only to general propositions of law, but also to general propositions in other normative realms as well. For example, it is pretty well recognized that telling a lie is not always sinful: consider the case of the family member's response to inquiry from the secret police as to the whereabouts of a son or daughter. The same is true of an individual's personal moral realm. All of us are familiar with the dilemma of trying to act in the face of personal norms that we fully accept, but which are contradictory as applied to a specific case.

 *515 It should not be concluded that general verbal formulations are useless or meaningless. Legal rules, ethical guidelines, and conclusions from moral discourse are an essential element in worthwhile human existence. Of equal importance can be instruction and discourse within a religious community, for example, the Ten Commandments, the parables of Jesus, and the insights in religious commentaries. Parables and generalizations are at least starting places. That is, we recognize that we should not lie or steal or fail to lend assistance to the needy--except perhaps under certain circumstances. Unless there are relevant "certain circumstances," we should follow the general rule. Perhaps more important, generalization and repetition of normative guidelines remind us that there are differences between good and evil and between right and wrong, even if we cannot consistently distinguish between them.

Yet most reasoning in law, moral philosophy, and other modes of formal normative discourse comes to a halt more or less at this place. On one hand, there is reiteration of the accepted generalizations against lying, stealing, assault, etc. On the other hand, there is recognition that a generalization should not apply in various circumstances. The typical conclusion is that "it all depends." And so on to the next exercise in legal reasoning or moral philosophy.

I have to say that many of these exercises seem to me to be little more than verbal maneuvers, conducted in such terms as "intention," "possible worlds," "unconditional evaluative judgment," "Humean," and "Kantean."

[FN4] The beginning place of philosophical analysis often is Aristotle's mysterious term "akrasia," [FN5] referring to the discrepancy often observed between a supposedly rational calculation of course of action and a failure of will (or, as Aristotle called it, "moral weakness") in carrying through with action. [FN6] One modern ending place has been Bernard Williams's conclusion that we cannot get there through philosophical analysis, as suggested by his title Ethics and the Limits of Philosophy. [FN7]

I. Religious Understanding

Perhaps the inquiry should proceed in different terms. Perhaps, in other words, it is not "other words" that are to be sought. Instead, what is needed is a different appreciation of how the human mind actually resolves difficult problems of how to act--that what is involved is a religious or **516** spiritual process. In this connection, I think it was very well said by William James in The Varieties of Religious Experience:

> When we drop abstractions and take what we call our will in the act, we see that it is a very complex function. It involves both stimulations and inhibitions; it follows generalized habits; it is escorted by reflective criticisms; and it leaves a good or a bad taste of itself behind, according to the manner of the performance. [FN8]

A modern analyst, Ronald de Sousa, more sharply refers to a mental state that is "an anarchic, disparate, and potentially conflicted amalgam of dispositions." [FN9] Professor Charles Curran more positively refers to "prudence":

> Prudence in the Thomistic tradition is the virtue associated with practical reason. . . . Prudence for Aquinas is associated with art, not science. . . . The artist does not work by deduction [but by] imagination, the ability to discern what is appropriate, the feeling for the most expressive, and a sense of harmony among all the parts. . . [FN10]

And yet, when faced with difficult problems of action, most people in fact take action. Taking action of course includes the action of remaining in place, often called "inaction." Only a few descend into catatonic paralysis.

When a person can exercise the "will in the act," to use James' term, in the face of a serious normative dilemma, they act with at least the confidence required for action itself. Somehow we can do it, or at least most of us can do it most of the time. Otherwise, we go into denial or paralysis or insanity.

But is it possible to have a better understanding of exactly what is involved in what Professor James called the religious experience? I suggest that it is not possible to fully understand, which is the basic point. But it is possible to unravel the complexity at least up to a point.

J. Inconsistency and Incommensurability

One level of understanding is to accept that the normative guidelines originating in various realms are inconsistent. Put bluntly, it is the case that we often must choose a course of action, including the choice of inaction, that is consistent with one norm that we accept and believe in, but which, at the same time, is inconsistent with another norm that we also accept and **517** believe in. There is no way that a rational mind can reconcile the proposition "do A" (for example, tell the truth) with the proposition "do not do A" (for example, betray a friend or family member). Endless confusion originates with refusal to accept this simple fact.

A second level of understanding is to accept that the normative guidelines to which we are subject emanate from different sources and that the different sources have different authoritative standing. For example, if I am outraged at bad treatment administered at school to my child, my parental norm counsels seeking revenge, whereas my civic norm counsels simply protesting through the appropriate channels. In this situation, the law clearly prescribes that I should protest through the appropriate channels and prescribes also that the legal procedure is more authoritative. But even the law appreciates that there is civil disobedience, entailing denial of the law's own authority. One interpretation of the collision between Jesus and Pontius Pilate is that it involved a dispute as to which normative realm should have primary authority-- the realm of God as Jesus understood it or the realm of Rome as Pilate understood it.

That is, a moral dilemma often involves not merely conflicting rules or admonitions, but conflicting normative systems from which specific rules or admonitions have emanated. Issues of disloyalty, even treason or apostasy, thus can be implicated.

A third level of understanding is that the conflicting norms and inconsistent systems we confront often are predicated on very different previous assumptions and commitments. The example of Jesus is perhaps most vivid, certainly so for Christians. In a fundamental sense, the law of Rome was irrelevant for Jesus because he was proceeding with a life and mission outside the framework of Roman law. On the other hand, the essence of Pilate's responsibility was bureaucratic enforcement of Roman law. The norms at issue were incommensurable or, as we would say in modern slang, "not on the same page."

There is yet another level of complexity in religious experience, however. This can be called the unintelligibility of critical normative choice. Stated simply, a person simply does not know and cannot know how he or she makes or has made a normatively important choice. For example, can any of us be absolutely sure whether we would lie to protect a child or a spouse, or steal food for our family, or give evidence that might convict a friend? Can we be sure, after the event, about the basis on which we acted? Soldiers who have been decorated for bravery on the battlefield typically say that they cannot recall how they chose what to do. Even those who were not heroic typically can recall only that they froze. In a very different domain, Yogi Berra put it well when he said that "you can't think and hit at the same time."

Perhaps it would be more accurate to say that we can think and hit at the same time, but only that we cannot think what we are thinking as we hit. We can pretend to do so, like the athletes in post-game interviews, but **518** everyone knows those accounts are simply for the media. Instead, as a thoughtful Catholic philosopher has suggested, we should pursue "the recovery of mystery," perhaps understanding that we can know it but not understand it. [FN11]

K. Poetic Realism

The essential nature of this phenomenon is suggested in poetry. Poetry can be said to be the use of language in non-analytic ways to convey meanings and truths that cannot be conveyed in analytic terms. It is quite the opposite of legal or philosophic discourse, which aim at meaning and truth through precise language. But if meaning and truth are beyond precise comprehension, then legal and philosophic discourse have insurmountable limits. Poetry, and perhaps also music and art, are as close as we can get to capturing what is involved in a difficult normative choice.

I believe this idea is expressed in a poem by Pope John Paul II. It may not be generally recognized that the

Pope has written poetry all his life, beginning before he was twenty years of age and continuing through his adult life. These are now published in English translation in the volume, The Place Within. [FN12] Several of his poems convey the meaning I am trying to suggest. One of them seems to say it all. It is entitled Thought's Resistance to Words. The title itself makes the point. The poem goes as follows:

Sometimes it happens in conversation: we stand

facing truth and lack the words,

have no gesture, no sign;

and yet--we feel--no word, no gesture

or sign would convey the whole image

that we must enter alone and face, like Jacob.

This isn't mere wrestling with images

carried in our thoughts;

we fight with the likeness of all things

that inwardly constitute man,

But when we act can our deeds surrender

the ultimate truths we presume to ponder? [FN13]

<center>Conclusion</center>

The fact that "no word, no gesture or sign" can convey what we face in serious moral dilemmas surely is disturbing. It means that morally important decisions are unfathomable and hence beyond complete ***519** explanation. For those of us whose vocations involve the precise use of words, it is difficult to accept that there are matters we cannot adequately address. Philosophers, jurists, journalists, and politicians all have vocations in that category. Perhaps artists, artisans, and engineers know better. But if they do, of course they cannot say, because what needs to be said about difficult normative choices really cannot be said. We are driven back to faith, perhaps in ourselves, but perhaps also in religious teaching and tradition.

[FNa1]. Law, Ethics and Mystery is the title of the speech delivered by Geoffrey C. Hazard, Jr. on March 3, 2005 at the University of Detroit Mercy School of Law as the School of Law's seventh annual Phillip J. McElroy Lecture. The Phillip J. McElroy Lecture is presented annually by the School of Law's Center for Law and Religion.

[FNaa1]. Trustee Professor of Law, University of Pennsylvania Law School; L.L.B., Columbia; B.A., Swarthmore.

[FN1]. See generally Robert Fulghum, All I Really Need to Know I Learned in Kindergarten (1988).

[FN2]. Phillipians 4:7 (King James).

[FN3]. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

[FN4]. An interesting recent anthology of philosophic essays is Weakness of Will and Practical Irrationality (Sarah Stroud & Christine Tappolet eds., 2003) (I am grateful to Professor Charles Raff for this reference and for discussion of the problem.).

[FN5]. 7 Aristotle, Ethics 226 (J.A.K. Thompson & Hugh Tredennick trans., Penguin Books 1976).

[FN6]. Aristotle, Nicomachean Ethics, Book Seven, at 174 (Martin Ostwald, trans., Bobbs-Merrill Co., 1962).

[FN7]. See Bernard Williams, Ethics and the Limits of Philosophy (1985) (see particularly chapter seven).

[FN8]. William James, The Varieties of Religious Experience 298 (1902).

[FN9]. Ronald de Sousa, Paradoxical Emotion: On Sui Generis Emotional Irrationality, in Weakness of Will and Practical Irrationality, supra note 4, at 297. See also Ronald de Sousa, The Rationality of Emotion (1987).

[FN10]. Charles Curran, The Catholic Moral Tradition Today 180 (1999).

[FN11]. See John Mahoney, The Making of Moral Theology: A Study of the Roman Catholic Tradition 337 (1987). See also id. at 78, 254-58.

[FN12]. Pope John Paul II, The Place Within (Jerzy Peterkiewicz trans., 1979).

[FN13]. Id. at 53.

END OF DOCUMENT