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Doctrines and Decisions: towards virtuous decision-making

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> 'What advantage in his art will a weaver or a joiner get from a knowledge of the absolute good? Or how shall a doctor or a general who had a vision of Very Form become thereby a better doctor or general? As a matter of fact it does not appear that the doctor makes a study even of health in the abstract. What he studies is the health of the human subject or rather of a particular patient for it is on such a patient that he exercises his skill.' (Aristotle, 1955, p. 35)

1. In the ancient (western?, eastern?) world, ethics were richly diverse. There were many conceptions of lists of the virtues to which individuals, in their various stations in life, should aspire. Virtue consisted in fulfilling one's role in life well. [Red spider on kitchen window: what is its role? Can spiders be virtuous?] There were common recurring elements in such lists (for example, 'justice') but many of the items were inherently interpretive. One can even read Plato's theory of the forms as recognising, given limited human capacity for seeing the true form, the inevitability of interpretivlty.

2. Ludovic Slimak writes of how 'an alchemy between reason and imagination, in the stills of our conceptions and our representations, the real petri dishes of our theories' (Slimak L., *The Naked Neanderthal* by (Allen Lane, 2023 at page 8)

3. The Enlightenment period, as McIntyre and Haidt highlight, led to a reductive over-simplification of ethical argument. In seeking to be scientific and rigorous, the quest was for a single principle by which all ethical disputes could be resolved. Two contenders came to dominate: what we now call deontology; and consequentialism (especially in its utilitarian variant). We might think these two akin to the two dimensions of Flatland, and virtue ethics as the vertical that Spaceland illuminates.

4. Revival of virtue ethics. Macintyre, Haidt, Beauchamp and Childress, Sokol, etc.

5. Restores the pre-Enlightenment emphasis on the quality of decisions made and, hence, of the decision maker. In a systematised form, comes to dominate contemporary ethics for professionals.

6. But the identification – and reification - of the principles that feature in contemporary principlism, we perhaps neglect the exploration of what might be virtue in doctoring —> the virtuous doctor, the virtuous judge.

7. {Iris Murdoch, Philippa Foot) and imagination Expand}

8. In addition to being inherently interpretive concepts, particular virtues can – as can moral and legal principles – conflict with each other.[Can legal rules within a jurisdiction conflict? Ideally not, but a rule that imposes an unconditional obligation can conflict with rules that permit acts of self-defence, defence of another or necessity: Buckoke, R v Duffy, cf Dworkin's 'No Right Answer?' in Hacker and Raz page 84 'for practical purposes, there will always be a right answer in the seamless web of our law.' and 'integrity' in Law's Empire.]

9. All this emphasises the crucial role of the decision maker, who cannot take refuge in some quasi-scientific method of deriving the right answer from a given (clear) rule or principle.

Purpose

10. This paper focuses on process values in decision-making[1] — whether by judges, therapists, carers, etc. — and argues that virtue ethics provides decision-makers with some useful insights. As social complexity and change intensify, taken-for-grantedness decreases and the number of dilemmas and hard-to-decide cases increases. That challenges 'government — and medicine — for the public good' and increases the need for good/virtuous decision-*makers* and decision-making *processes.*

11. At bottom, good decisions depend on decision-makers' experience, empathy, good will and imagination. The modality of decision-making is important because, absent a ruthless doctrine of lexical priority, substantive norms will be inconclusive in 'hard cases'.

12. The decision-making role is crucial. The question 'what does it mean to decide well?' combines the 'what?' and the 'how?' of decision-making. However, we obsess about the 'what?' — and pummel the concepts that are invoked in its justification — but we neglect the 'how?'

13. Virtuous decision-making is inclusive. Its considerations can embrace duties, rights, rules, principles, and analogies, along with consequentialist policy considerations.

14. Section 2 Suicide Act provides a convenient illustration. Section 2(1) simply creates an 'offence'; viz. intentionally assisting or encouraging suicide. By

1 Returning to a theme explored in Weaver, 1978, which focussed on implications for legitimacy.

contrast, Section 2(4) requires DPP consent to prosecutions. After *Purdy*,[2] the DPP published a Policy for Prosecutors[3] that lists 16 factors 'tending in favour' (§43) and 6 factors 'tending against' (§45) prosecution. To make good decisions, prosecutors are required to weigh those factors in a manner more Aristotelean than deontological or consequentialistic.

Virtues

15. Divine command or revelation — which earthly rulers attach themselves to or imitate — can provide perceived authority for ethical and legal norms. That logic is deontological and dismissive of consequentialist arguments. But, with the Enlightenment, individual interests and consequences for individuals and groups of individuals launched a very different agenda.[4]

16. Ancient Greek thinking was more complex. Although Zeus was in charge, there were several other gods, with interests in the values of love, wisdom, beauty, prophecy and healing, etc. and in the phenomena of thunder and war. Tensions between these gods were imagined and portrayed in heroic and tragic forms. Similar complexity is also manifest in the argumentative form of Plato's dialogue and in Aristotelean virtue ethics.

17. This paper takes 'virtues' to be aspects of 'the good'.[5] Although we might list and think of them as *nouns* (patience, charity, kindness, etc.), in relation to decisions and decision-making, their use is often *adjectival* — qualifying outcomes and, for present purposes, processes. Recognition of that adjectival use might reduce the temptation of Platonistic[6] reification.

> 'Virtue is a disposition of the soul in which, when it has to choose among actions and feelings, it observes the mean relative to us, this being determined by such a

2 *R (on the application of Purdy)* v. *DPP* [2009] UKHL45.

3 See (CPS, 2014).

4 Although Dworkin asserts that '[v]alue is one big thing' (Dworkin R. , 2011, p. 1), he recognises that, 'The truth of any true moral judgment consists in the truth of an indefinite number of other moral judgments.' (p. 117)

5 Conceptions of the 'good' are socially determined and tend to reflect dominant interests' preferences.

6 'Platonism' is used throughout in the sense that it entails the metaphysical commitments that 'constructivism' avoids. See Plato, 1987, pp. 255-264, 7.7 The Simile of the Cave.

> rule or principle as would take shape in the mind of a [person] of sense or practical wisdom[7].' (Aristotle, 1955, p. 66)[8]

18. A 'good' watch tells the time reliably and accurately. Although a more beautiful watch might be more difficult to read, we easily count it 'good' so long as it fulfils that basic function.

> 'To call a watch good is to say that it is the kind of watch which someone would choose who wanted a watch to keep time accurately (rather than, say, to throw at the cat). The presupposition of this use of 'good' is that every type of item which it is appropriate to call good or bad — including persons and actions — has, as a matter of fact, some given specific purpose or function.' (MacIntyre, After Virtue, 1985, p. 70)

19. By contrast, whether assisted suicide should be legalised is a 'hard case' for decision-makers because the 'right answer' is hotly contested.[9] Furthermore, conceptions of the 'good' are socially determined and tend to reflect dominant interests' preferences.

20. Many legal cases are far from being 'hard'. A woman, finding herself unwelcomely pregnant, might somehow procure mifepristone and misoprostol and use them to end her pregnancy. Although she might have had reasons that might satisfy many ethicists and most of the conditions set out in Abortion Act 1967 sections 1(1) and 1(2), section 1 requires that two 'registered medical practitioners' certify fulfilment. Otherwise she commits the offence of 'procur[ing] her own miscarriage'.[10] [11] A decision to convict her would be — in purely *legal* terms — a 'good' decision. The applicable law affords no scope for (imaginative) empathy for the woman to

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7 See §.93 below.

8 See also David Hume's view that a true judge of aesthetics and morals is similarly practised,

> '[A] true judge in the finer arts is observed, even during the most polished ages, to be so rare a character; Strong sense, united to delicate sentiment, improved by practice, perfected by comparison, and cleared of all prejudice, can alone entitle critics to this valuable character; and the joint verdict of such, wherever they are to be found, is the true standard of taste and beauty.' (Hume, 1757, #23)

9 Sokol, 2018, considers 'Tough Choices' in medical ethics.

10 Offences against the Person Act 1891, Section 58.

11 However, recent amendments to sections 1(3) and 1(4) provide that, where the pregnancy does not exceed 10 weeks and the mode of abortion is 'the prescription and administration of medicine', the consent of one medical practitioner suffices. There is a possibility that the medication, once provided, might be used after the expiry of the 10-week limit.

influence the decision on criminality.[12] The legal decision-maker confronts difficult value-judgements only when fixing sentence.[13]

21. Nevertheless, there is an ethical contest — or dilemma — about whether the rules are the right rules. At least three principles are in play: (i) (deontological) 'sanctity of life'; (ii) (deontological) respect for women's autonomy; and (iii) (consequentialist) arguments about risky backstreet abortions.

22. An ethical dilemma with a straightforwardly 'right' solution is an oxymoron. Although one solution might become socially dominant, the latent contestability of its 'rightness' will persist — and will sometimes become patent. Given only minimal social disagreement about the need for accurate time-telling, analogy with the 'goodness' of a watch breaks down. Ethical dilemmas, or 'hard cases', can be manifest in ethical argument and in cases before the courts. They can occur at different levels. Society, Parliament, and the Supreme Court sometimes confront such questions as whether one can sell one's kidney. Day-to-day, doctors and relatives might be unsure of the right course of treatment for a particular patient. Sometimes there is disagreement about who has the right to decide and by what criteria.[14]

23. The goodness of decisions in ethically and/or legally 'hard' cases is crucially dependent on virtue in the mode of decision-making and in the qualities of the decision-maker. Government for the 'public good' depends — not only on well-conceived institutions, principles and rules — but also, in considerable part, on the quality of decision-making, which we might regard as 'an art and craft' (Llewellyn, 1962, p. 145) and which makes demands of decision-makers in their approach to their responsibilities. Further, similar demands for virtue in decision-*making* are made of other decision-makers — pre-eminently doctors, whose dealings with

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12 Similarly, *habeus corpus* does not lie when the defendant does not 'have the body', even though, '[t]he [applicants'] current situation is indeed dire, however much it may be the result of their own choices; and it is made worse that it is shared by their innocent children.' [59]. *C3 and another* v. *Secretary of State for Foreign, Commonwealth and Development Affairs* [2023] EWCA Civ 444, *per* Underhill LJ. The case was about 'repatriation', not 'release from the defendant's custody', and *habeas corpus* was deemed appropriate only for the less 'mechanistic' process of judicial review.

13 Cf. Scott, 2023

14 E.g. *Great Ormond Street Hospital for Children NHS Foundation Trust* v. *Yates* [2017] EWCA Civ 410 (Charlie Gard). The argument (e.g. Auckland, 2020) that the criterion of 'child's best interests' should be replaced by 'risk of serious harm' is really an argument that the latter values parental discretion more highly. It is not in a child's best interests to be exposed to the risk of serious harm. However, 'harm' is interpretive and contestable.

patients' health, lives and deaths can be as momentous as are judges' dealings with litigants.

24. Here the 'direction of travel' is significant. Writing about assisted dying, Dworkin notes that competing ideas about 'a good life' — and, I suggest, virtues — are held,

> 'intuitively and in the background; We do not reexamine them except in moments of special crisis or drama. But these background ideas are always there, guiding decisions and choices that may seem to us automatic.' (Dworkin R., 1993, p. 200)

25. Social intuitionism emphasizes that these background intuitions,

> 'are social constructions. The virtues taught to children in a warrior culture are different from those taught in a farming culture or a modern industrialized culture.' (Haidt, 2013, p. 122)

These intuitions drive our fast thinking, and we tend mainly to think slowly (reason) to justify conclusions that have simply 'come upon us,' rather, than to deduce the conclusion without any pre-conceptions.[15] But *ex post* justification — however elegant or elaborate — does not guarantee virtuous decision-making.

> 'If you want to see post hoc reasoning in action, just watch the press secretary of a president or prime minister take questions from reporters.' (Haidt, 2013, p. 78)

Such intuitions also manifest as 'frames' that include some factors and exclude others from our deliberations.[16]

> 'Framing isn't just useful for influencing other people. It is necessary for our own sense making. Framing is a tool that *creates an interpretation of reality*, which allows us to evaluate it, reason about it, and coordinate around it.' (Enfield, 2022, p. 122, emphasis added)

> '[T]he idea that language is a coordination device will help us understand why it can be so good at the things it is good at: *directing people's attention, framing situations in arbitrary ways, playing to people's biases, tuning our interactions, managing reputations, and regulating social life*.' (Enfield, 2022, p. 3, emphasis added)

15 See Kahneman, 2012 and Gendler, 2014.

16 *Animal Frames*. Dogs, canaries, tortoises, and goldfish are all 'non-human', like Mount Everest. They are all 'animals' and are sometimes kept as pets. Dogs and tigers are 'mammals'. Tortoises and alligators are 'reptiles'; canaries and ostriches are 'birds'; goldfish and swordfish are 'fish'. Dogs and goldfish (but not canaries or tortoises) can swim. Canaries (but not ostriches) can fly. Only tortoises hibernate.

Furthermore, it takes effortful imagination to break out of well-established frames and to find new ways of framing.

26. We might think of ethical and legal concepts as serviceable, convenient and perhaps modestly adaptable, but fundamentally good/bad in and of themselves, irrespective of their consequences. Deontologists hold such views, and we can buy their concepts 'off the peg'.[17] By contrast, consequentialists hold public/public goodness/badness to be a function of consequences, which resonates with what lawyers call 'policy reasoning'. The resulting conception of the concept is 'bespoken' by the situation. Thus, if the consequences of requiring ultimate consumers to bear the risk of manufacturers' carelessness are deemed bad, the neighbour principle can be crafted[18] and added to the list of legal given principles (good in and of themselves).

27. Under the influence of 'principlism', bioethics has come to be too easily regarded as a matter of choosing from and applying a quartet of principles — beneficence, non-maleficence, respect for autonomy, and justice.[19] Whilst all four are regarded much as common lawyers regard 'principles', 'consequentialists find the first two —with their obvious resonance with JS Mill's 'harm principle — congenial. Respect for autonomy was a powerful influence the doctrine of informed consent in Nadine Montgomery's case,[20] although Keira Bell's *Gillick*-competence and autonomy were arguably exaggerated.[21]

FAA and FIA

28. We often assume — mistakenly — that rules and principles are mind-independent entities to be found and applied (FAA). Find-Interpret-and-Apply (FIA) is a more sophisticated variant, born of experience and exposure to 'hard cases' and perhaps less vulnerable to the following criticisms. However, both FAA and FIA constrain or distort our understanding of decision-*making*. The pedagogical IRAC acronym (Issue, Rule, Application, and Conclusion) is FIA based.

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17 Anscombe, 1958, p.6, points to 'a law conception of ethics'.

18 *Donoghue* v. *Stevenson* [1932] AC 562

19 Sanctity of life is an odd omission from this list of principles. It clearly has some force in the ethics of abortion and in end of life problems. See below.

20 *Montgomery* v. *Lanarkshire Health Board* [2025] UKSC 11, [68], [108-109].

21 *Bell* v. *Tavistock and Portman NHS Foundation Trust* [2021] EWCA Civ 1363.

29. Three factors contribute to FAA's inadequacy.

29.1. incompleteness,

29.2. interpretivity; and

29.3. conflicts between principles.

They are endemic. Even the White Queen — who, with 30 minutes practice each day, was able to '[believe] as many as six impossible things before breakfast.' (Carroll, 2023) Chapter 5 — could not believe' them[22] out of existence.

Incompleteness

30. As the debates over rights to abortion and to assisted dying illustrate, the sanctity of life principle is also in play. Though liberal in his conclusions, Dworkin emphasizes,

> 'two combined and intersecting bases of the sacred: natural *and* human creation.' (Dworkin R. , 1993, p. 83)

One of Haidt's six 'universal cognitive modules upon which cultures construct moral matrices' is 'sanctity/degradation' (Haidt, 2013, pp. 124-125). His list also predictably includes 'care' (beneficence and non-maleficence), 'fairness' (justice) and, less predictably, 'loyalty' and 'authority'.

Interpretivity:

> 'These potatoes belong to me'—is a statement about my rights and duties. The statement is entirely dependent on people's beliefs. It is true because of an agreement among people to treat it as true, whether that agreement is tacit or explicit.(Enfield, 2022, p. 20)

> Language has a complicated relationship with reality…[Reality] comes in two kinds. Brute reality is unaffected by our norms. It is not negotiable in the same way that property rights or word meanings might be. [It] is "that which, when you stop believing in it, doesn't go away"[23] and … can be captured by language only in the most partial, subjective, and fragmentary ways. It isn't affected by whether we talk about it or by how we choose to describe it or frame it. *By complete contrast, social reality—the realm of rights, duties, and institutions—cannot exist without language.* (Enfield, 2022, p. 16)

22 Note also that scholarly interest in any one of the factors can lead to (less scholarly) neglect of the others.

23 Quoting Dick P.K., 'How to Build a Universe That Doesn't Fall Apart Two Days Later' (1978), https://urbigenous.net/library/how_to_build.html.

31. Many of the component concepts of ethical and legal norms are mind-dependent and interpretive. Pre-dating Gallie (1955-56),Wittgenstein (1958),[24] and Dworkin (1977), Aristotle wrote that,

> 'it is not easy to find a formula by which we may determine how far and up to what point a [person] may go wrong before [incurring] blame… such questions of degree are bound up with the circumstances of the individual case, where our only criterion *is* the perception.' (Aristotle, 1925, p. 75)

and that,

> 'it is things where our own agency is effective (though not always to the same extent) which engage our deliberations' (p. 85)[25] [and where] excellence in deliberation is a form of rightness or correctness…. [involving] investigating, reasoning and calculating.' (p. 183)

Similarly, Spinoza wrote in 1670,

> 'Words acquire a particular meaning simply from their usage.' (Spinoza, p. 165)

Unless a concept is fixed because true by definition, it is interpretive. It might appear certain, but that apparent certainty is an illusion caused by (near) unanimity of a current view. Social change can trigger its latent interpretivity.[26]

32. Furthermore, we too easily accept that all potential thoughts and feelings can be captured in words. Levinson and Majid (Levinson, 2014, p. 409) cite Everett's example of the Pirahã, whose language lacks words for number or colour, and hence provides no way to express such an idea as 'seven red tins' (Everett, 2005).

33. Levinson and Majid argue that, by reifying and resolutely ignoring their ineffability and interpretivity, we neuter the words we use to 'categorize' sense data and our normative ideas.

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24 'Concepts lead us to make investigations, are the expression of our interest, and direct our interest' (Wittgenstein, 1958) § 570).

25 And, in order to alert ourselves, imaginatively, to considerations that run counter to our predilections, 'imagination'.

26 E.g. 'violence' in section 177(1) Housing Act 1996, interpreted to include psychological violence in *Yemshaw* v. *London Borough of Hounslow* [2011] UKSC 3. Lady Hale, 'by the time of the 1996 Act the understanding of domestic violence had moved on from a narrow focus upon battered wives and physical contact.' [24]

34. Nietzsche's observed,

> 'Just as it is certain that one leaf is never totally the same as another, so it is certain that the concept 'leaf' is formed by arbitrarily discarding these individual differences and by forgetting the distinguishing aspects. (Nietzsche F. , 1861)[27]

35. Kant's 'maxims' — derived from his various formulations of the (abstract) categorical imperative[28] — exemplify FAA. They are quite specific,[29] and could plausibly be presented as a legal code. However, although he relies on specificity to avoid exceptions, Kant (we might say 'even Kant') recognises some plasticity of meaning or, at least, the impossibility of *absolute* specification.

> '[That] the law can prescribe only the maxim of actions, not actions themselves, … is a sign that it leaves a playroom (*latitudo*) for free choice in following (complying with) the law, that is, that the law cannot specify precisely in what way one is to act and how much one is to do by the action for men that is also a duty … [T]he wider the duty, therefore, the more imperfect is a man's obligation to action.' (Kant I. , 1996, p. 153 6:390)[30]

Kant distinguished perfect and imperfect duties. Perfect duties admit 'no exception in favour of inclination', whereas the imperfect duty of beneficence to others is to be observed 'as far as possible'. (Kant I., 1998, pp. 39, 4:430) and requires judgement in application. Perfect duties are proscriptions of specific kinds of actions, and violating them is morally blameworthy; imperfect duties are prescriptions of general ends, and fulfilling them is praiseworthy.

36. Whilst law is more formally institutionalized than ethics, they share: (a) normativity; and (b) dependence on significant degrees of social acceptance.

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27 Levinson and Majid cite Kukla's comment that, 'calling them 'leaves' ignores the indeterminately many ways they could be different. No finite set of categories, or finite vocabulary, could in principle capture all the individuating facts about this particular leaf — it (or the conjunction of the indefinitely many facts about it) remains ineffable. (Kukla, 2005, p. 30). Also, in a footnote, they report Lupyan's interesting finding that we are less likely to remember the particular chair seen when we have been told that it is an exemplar of the genus 'chair' (Lupyan, 2008)

28 See, e.g., (Kant I. , 1998) 4:438, page 44-45

29 Chapters 1-3 (Kant I., 1996) cover rights of possession, acquisition of property, contractual rights, marriage, parental rights, domestic service, money, publications, inheritance, reputations, gifts, loans, repossessions, and guarantees.

30 Furthermore, there are issues — such as abortion rights — that Kant does not address, leaving us to *construct* what he might have said. See (e.g.) (Hare, 1989) and (Denis, 2008)

> '[A]cross the whole spectrum of life, [society] will need some sense of what is expected and what is out of line. For human beings, there is no living without standards of living.' (Blackburn, 2021, p. 16)[31]

37. It seems that, despite language's inadequacy, words of categorization — concepts, the components of rules and principles — can have power over us and constrain of our thinking, making us less likely to appreciate subtle case-by-case variations. But we sometimes escape.

38. We might posit a spectrum of attitudes to norms. At one extreme, a Platonistic view of norms[32] — and of the language in which they might be expressed[33] — with an underlying assumption that the system of norms is somehow or another fixed.[34] At the other, the flexible fairness of ethical particularism[35] and comfortable recognition of interpretivity. The brute facts of ethical and legal change over time should persuade us away from the Platonistic view.

    The middle ground is occupied by creative adaptation, the various legal examples of which include: the institution of equity; the adaptation of a fiduciary duty owed by solicitors[36] to clients to create a reliance-based to duty to avoid negligent misrepresentation;[37] breach of contract as an unlawful act in the newly-remembered tort of intimidation;[38] etc.

    The ethical field might be more prone to radical changes: there was not much talk of human rights in the centuries before the Enlightenment and the earliest

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31 'Human beings are ethical animals … we grade and evaluate, and compare and admire, and claim and justify. We do not just 'prefer' this or that, in isolation. We prefer that our preferences are shared; when they are important to us we turn them into demands on each other.' (Blackburn, 2021, pp. 2-3).

32 Hence Parliament can simply decree 'Detinue is abolished': Torts (Interference with Goods) Act 1977, section 2(1).

33 Note Witt's ironic comment, 'The law professor's work is to identify the general patterns and the salient facts, to jettison the accidental and irrelevant.' (Witt, 2007, p. 7)

34 Weber held that 'legal science' has 'the highest measure of methodological and logical rationality' and that 'the law must actually or virtually constitute a "gapless" system of legal propositions, or must, at least, be treated as if it were such a gapless system'. (Weber, 1966, p. 64).

35 See §72.

36 *Nocton* v. *Lord Ashburton* [1914] AC 932

37 *Hedley Byrne & Co Ltd* v. *Heller & Partners Ltd* [1964] A.C. 465: see further, Cornish, et al Banks, Mitchell, Mitchell, & Probert, 2019, pp. 207-13, esp. 212.

38 *Rookes* v. *Barnard (No.1)* [1964] A.C. 1129. 1209, per Lord Devlin

precursors of utilitarianism are to be found in the seventeenth century (Driver, 2022, p. 1). Ideas like mediation and 'restorative justice' sit near the creative end of the spectrum. Progression towards that end increases the premium on decision-makers' judgement and justificatory capacity — and on the need for virtue in decision-making.

39. Awareness of and willingness to exploit interpretivity, to resuscitate disused concepts, to invent new ones or to re-frame[39] questions are *justificatory tools* and, as such, value-neutral. They are used when the decision-maker in a dilemma or hard case *imagines* and *favours* an outcome that FAA's discovery mode cannot easily justify.

> *Conflicting principles*
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> '[T]there are two things wrong with this restaurant—the food is terrible and the portions are too small.' (Dancy, 2004, p. 16)[40]
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> '[Principles][41] are like rats … two rats that are supposedly on the same side may in fact turn and fight amongst themselves.' (Dancy, 2004, p. 15)

40. Like legal principles, ethical principles can conflict. Consider the sometimes-competing duties to act for patients' benefit and to respect their autonomy (conceived as self-determination rather than, more narrowly, as bodily integrity). Some fairly 'hard' deontologists recognise limited 'exceptions'[42]

41. Other — 'softer' deontologists see the principles as *prima facie* rather than absolute. Thus James Childress explains that the 'four core principles' articulated in Beauchamp and Childress, 1979[43], *viz.* respect for autonomy, beneficence, non-maleficence, and justice,

> "are intended to provide a framework of moral theory for the identification analysis and resolution of moral problems in medicine". [They are to be] viewed

39 See (Enfield, 2022) and (Kahneman, 2012).

40 As told to Dancy by Jerry Dworkin.

41 Dancy wrote 'Reasons'.

42 E.g. whilst holding that the foetus has human rights from conception (129), Finnis recognises some exceptions where the threat to women's health is severe. (Finnis, 1977 pp. 129 & 141-14).

43 Published after their involvement in the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (set up in 1974 and issuing the 'Belmont Report' (Department of Health, Education, and Welfare; National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, 1979). The Commission was a response to the Tuskegee scandal (Prevention, 2023).

> as *prima facie binding*, *rather than absolute* requirements or mere maxims, with debates about their meaning and weights occurring *in situations*. Principles and rules are used in judgments in cases through *application and balancing*, structured by a modest *decision procedure*.' (Childress, 1997, pp. 25-26, emphases added)

42. The idea of *prima facie* principles had been articulated by W.D. Ross. For example, he argued that, whilst our 'neighbours' may benefit or suffer from our actions, other 'morally significant' relationships are in contention and cannot all be absolutes.

> '[T]hey may also stand to me in the relation of promisee to promiser, of creditor to debtor, of wife to husband, of child to parent, of friend to friend, of fellow countryman to fellow countryman, and the like; and each of these relations is the foundation of a prima facie duty, which is *more or less incumbent on me according to the circumstances of the case*. When I am in a situation, as perhaps I always am, in which more than one of these prima facie duties is incumbent on me, what I have to do is to study the situation as fully as I can until then I am bound to think that to do this prima facie duty is my duty *sans phrase* in the situation.' (Ross, 1930, p. 19, first emphasis added)

43. Striking a balance between conflicting virtues is not quite finding the Aristotelian 'mean' between a virtue and it opposite vice, but it requires similarly virtuous judgement. Decision-makers' duties to act virtuously require them to be virtuous in their modes and processes of balancing and interpreting. Just putting substantive principles on the table does not suffice.

Modal virtues

44. What is here called 'soft deontology' shares with virtue ethics the tendency to throw the spotlight on the decision-makers and the manner of their decision-making. Consequently, the relevant virtues are 'modal' (i.e. about 'how?') rather than purely 'substantive' (i.e. about what a virtue considered as logically prior to its application consists in).[44]

45. The interpretivity factor and, especially, the fact that principles conflict resonate with the revival in the last sixty years of 'virtue ethics', with its potential to transcend the deontological-consequentialist confrontation. That ongoing battle emerged from European Enlightenment philosophers' attempts to construct and justify moral codes, which — in Enlightenment thinking — had to be individualistic

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44 It is of course possible to hold Platonistic conceptions of virtues, but the processes of decision-making entailed in virtue ethics tend to involve the interpretivity of virtues and/or their prima facie quality.

(and 'bottom up'). They could no longer be ('top down') divine commands or firmly established expectations of how the various roles in society should be played and what virtues those roles each demanded. Instead,

> 'all evaluative judgments and more specifically all moral judgments [came to be regarded as] nothing but expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character' (MacIntyre, 1985, p. 13)

And sadly, the roots of substantive virtues will be shallow. without established 'forms of social life' (pp. 70, 186 & 265)

> *Qua* individual, the individual is blessed with 'rights' but has a limited interest in the 'good'. (Blackburn, 2021, p. 2)

46. The result for ethical thinking was that,

> 'several rival and incompatible accounts, utilitarians competing with Kantians and both with contractarians, so that moral judgments, as they had now come to be understood, became *essentially contestable*, expressive of the attitudes and feelings of those who uttered them, yet still uttered *as if there was some impersonal standard by which moral disagreements might be rationally resolved*. And from the outset such disagreements concerned not only the justification, but also *the content of morality*. (MacIntyre, 1985, p. 72, emphases added)

47. The Enlightenment, with its emphasis on individualism and the rise of what MacIntyre calls 'emotivism'[45], ousted virtue from ethical salience and — until the latter part of the twentieth century — leaving the field of ethics clear for: a battle between deontology and consequentialism;[46] and for various 'contractual' ideologies: social contract theory, sanctity of contract and the — all-too-easily abusable —'freedom of contract.[47]

48. MacIntyre charts many of the shifts in the conceptions of virtue over the pre-Enlightenment millennia and notes that,

> 'even medieval thought, let alone medieval life, finds it difficult to be entirely systematic. There is not only the difficulty of fitting together the feudal with its

45 'Emotivism is the doctrine that all evaluative judgments and more specifically all moral judgments are nothing but expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character.' (MacIntyre, 1985, p. 13)

46 See Bragg, Elizabeth Anscombe, 2023.

47 See further. MacIntyre's, Short History, 1998, pp. 85-89, 100, 118-120, 136-137 & 157-8. (Atiyah, 1979, pp. 263-266). Anscombe, 1958 was a harbinger of the revival of virtue ethics.

> inheritance from the heroic and the Christian, but there is also the tension between the Bible and Aristotle.' (MacIntyre, 1985, p. 206)

49. Whilst a definitive list of virtues over time is hard to seek, Aquinas, writing after the rediscovery of Aristotle's writing, could outline,

> 'what had become the conventional scheme of the cardinal virtues (prudence, justice, temperance, courage) and the triad of theological virtues [*viz.* faith, hope and charity].[48] (MacIntyre, 1985, p. 206 & 196)

50. Our thinking is often dominated by the Platonistic notion that, say, courage exists independently of our minds and that we must somehow *discover* its (logically prior) meaning, which will then inform our moral code. However, holding courage to be a virtue does not so much specify substantive duties as enjoin us to 'act courageously' in whatever role we find ourselves. Virtues are as much about modes as codes.[49]

51. Despite his disdain for the 'windings of eudomonism' (Kant I. , 1996, pp. 105, 6:332), Kant recognised some *modal* virtue in a sort of integrity. He saw 'virtue' as 'the strength of … human being[s'] maxims *in fulfilling* [their] duty', noting that our 'natural inclinations… can come into conflict with…our *moral resolution*.'[50] Even for Kant, the 'how' — and not just the 'what' — of decision-making sometimes matters.

52. Susan Sontag argues that all 'capital moral truths [are] a bit simple minded',[51] and pointed to,

> 'normative virtues of the intellect (its acknowledgement of the inevitable plurality of moral claims; the rights it accords, alongside passion, to tentativeness and detachment)'

53. She thus drew attention to virtues that relate to 'mode of procedure' or 'process'. Similarly, Nietzsche linked the courage and truthfulness that are needed by virtuous decision-makers.

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48 MacIntyre adds, 'But what then of, for example, patience?' (MacIntyre, 1985, p. 206)

49 Consequentialists can disagree amongst themselves about what the right rule to have. Similarly, deontologists.

50 Kant I. , 1996, pp. 156-7, emphases added.

51 New York Review of Books, 20 March 1975. Feminism was Sontag's particular example.

> 'How much truth does a spirit endure, how much truth does it dare? More and more that became for me the real measure of value.' (Nietzsche F. , 1979, p. 34)[52]

54. Anderson explains that Nietzsche connects,

> 'truthfulness and *courage*, thereby valorizing honesty as the manifestation of an overall virtuous character marked by resoluteness, determination, and spiritual strength.' (Anderson, 2022, 3.2.3)

55. *'How?'* matters, especially when *'What (rule, principle or outcome)?'* is controversial. In short, there is a need to understand what makes for virtue in decision-making, and obsession with principles and rules can distract us from that necessity. Hence, this paper does not concentrate on competing and subtly-changing lists of *substantive* virtues, but concentrates on 'virtues-in-the way-of-doing' — call them '*modal* virtues'.

Modal Virtues and Capacities

56. Modal virtues can be distinguished not only from substantive virtues but also from capacities. A psychopath planning a mass murder has capacities to:

    56.1. *reason* (about cause and effect); and

    56.2. *imagine* how the enterprise would go if method B were to be preferred to method A; and

    56.3. feel pleasure at attaining the evil end.

57. Thus *imagination* is not a virtue. Instead, *imaginative capacity* is a pre-condition of *empathy,* but not (strictly or perhaps pedantically) of *sympathy*.[53] Sympathy requires no effort of imagination. IT just comes upon us. Hence, we can consider *empathy* to be a modal virtue dependent upon the capacity to imagine. Similarly, the capacities for courage and to resist peer pressure[54] can be used for good or ill.

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52 Nietzsche continues, with this anti-Platonistic swipe, 'Error is cowardice…every acquisition, every step forward in knowledge is the result of courage, of severity towards oneself.'

53 The Greek root of 'sympathy' is *sympatheia* 'fellow-feeling, community of feeling', whereas *empathy* was coined in 1908 as 'A term from a theory of art appreciation that maintains appreciation depends on *the viewer's ability to project* his personality into the viewed object.' (Online Etymology Dictionary, current)

54 E.g. (Dimant, 2019), discusses the role of reference groups in norm-nudging.

Principles

58. Principles are normative. Virtues are qualities to which we ought to aspire. A virtue is a good (maybe, one of several). A principle could enjoin one or more virtues, or be value neutral, or enjoin vice.

59. Viewed Platonistically as being mind-independent,[55] *substantive* principles and rules have great power — through FAA and FIA — to distract from the *modal*. Similarly unsympathetically to the notion of modal virtues, Kant held that virtues exist in the noumenal world, each an 'in-itself reality independent of human cognition' (Sosa, 2005).[56]

60. Given its constitutional status, we might expect law to be dominated by 'the authority rather than the enquiry paradigm' (Samuel 468) as deontological ethics also are, although the authority is that of the concept rather than of any divine or human entity. The 'authority paradigm' resonates with Platonistic views of concepts. Indeed, Samuel suggests that,

> 'advances in legal thought have been made only through programmes and postures that make use of developments from outside law.' (Samuel, 468) [and that]'[l]aw, *like theology*, is trapped now in an authority paradigm.' (477 emphasis added)[57]

61. That 'authority paradigm' entails that any normative system's capital concepts be defended against the existential threat that unconstrained interpretivity would constitute, where anything can be interpreted to mean whatever the speaker or interpreter might choose.

> 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.' (Carroll, 2023, Ch. 6)

62. Three principal defences can be deployed against this threat.

'Core and penumbra'

62.1. This protects the idea of a *de-finite* core. Hart can be too easily taken to have asserted that, despite the interpretive penumbra, there is — somewhere and always — an 'interpretation-proof 'core'. He wrote,

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55 See note 6 above.

56 Kant held that we are able, 'to cognize objects only as they affect us and we remain ignorant of what they may be in themselves' (Kant I., 1998, pp. 56, 4:451). See also Beck, 2005, p. 694.

57 Samuel continues, 'which means that cumulativité is probably the privilege only of those disciplines functioning within an enquiry paradigm.' Samuel 477-478

> '[T]he general words we use … must have some standard instance in which no doubts are felt about its application. There must be a core of *settled* meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.' (Hart, 1958, p. 607, emphasis added)

Hart had read Wittgenstein and would have recognised that 'settled cores' are socially determined. For example, moral and religious codes have forbidden extra-marital sexual relations as being wrong in and of themselves, but some social conventions are now more accommodating. Nevertheless, arguably, the typical reader of 'no vehicles in the park' will more likely treat 'vehicle' Platonistically — as having some discoverable meaning that is insensitive to changing social conventions.

In response to socio-political changes, lists of favoured of substantive virtues change. Aristotle considered humility a vice and did not mention patience, whereas medieval writers came to see patience and purity as important virtues (MacIntyre, 1985, p. 206). Furthermore, recent years have seen successful attempts to recast the meanings of — or to re-frame — some words in order to reflect, defend or even impose particular values.

Exceptions

62.2. Similarly, the notion of exceptions. If there were no firm rule there would be no need for exceptions. Thus the deontological philosopher, John Finnis, whilst strongly against abortion, recognises some (limited) exceptions where the abortion is an unavoidable side effect of treatment required to save the life of the pregnant woman. (Finnis, in Dworkin, 141-142)

Jurisdictional separation

62.3. The jurisdictional separation of equity enabling contradictory principles to coexist in separate compartments.[58]

Tasks for decision-makers

63. Decision-making tasks in 'hard cases' — in law and in ethics — are mostly seen as FIA rather than crude FAA. The conceptual components of rules and principles are subject to interpretive development, manipulation and creative combination. These processes are triggered by the 'equitable pull' of consequences — which some

58 See §0 on equity and §79 on dissenting judgements.

might recognise as 'policy' (the preference for one rather than another set of outcomes or consequences).[59]

64. Thus, a willingness to protect businesses from union 'closed shops' led to the innovative combination of three concepts: (i) 'unlawful means' conspiracy; (ii) to intimidate; (iii) by treating threats to break employment contracts as 'unlawful means'.[60] The style of that ingenious manipulation depended upon finding and interpreting the core principles involved. The approach to (iii) was especially creative.

65. To provide an ethical example, consider how the virtue of beneficence (acceptable to deontologists and to consequentialists) might be interpreted as:

    65.1. a more or less deontological duty, probably role-based, giving rise to more specific duties in the processes of doctoring, judging, teaching, parenting, etc.; or

    65.2. a more obviously modal supererogatory ideal (going above and beyond the call of duty).

66. Because human foresight and ingenuity are limited, and because, in complex societies, social consensus is imperfect and clashes of interests are inevitable, controversies and dilemmas will arise. Concerns to protect judicial legitimacy encourage the ostensible depersonalisation of legal decision-making processes and the deflection of attention from the decision-maker to the concepts that comprise the norm. The decision-maker is only their guardian and respectful interpreter. It is the rule that rules. Depersonalisation invokes the ideology of 'the rule of law' — in John Adams's phrase 'a government of laws and not of men'[61] — a shared set of valuable values, but nonetheless something of myth (Weaver, 1978).

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59 See Frenkel 2001 for an intersting blend of judgement as a process and clinicla legal education, citing, at fn. 28, Anthony Kronman, Living in the Law (1987) 54 U Chicago L Rev 835, 847, ('one striking feature of the process of judgment is what might be called its "nondeductive" character.') Gerald Postema, Moral Responsibility in Professional Ethics (1980) 55 NYU L Rev 63; 'Our ability to resolve conflicts on a rational basis often outstrips our ability to enunciate general principles. In doing so, we exercise judgment. Judgment is neither a matter of simply applying general rules to particular cases nor a matter of mere intuition. It is a complex faculty, difficult to characterize, in which general principles or values and the particularities of the case both play important roles.' David Luban & Michael Millemann, Good Judgment: Ethics Teaching in Dark Times (1995) 9 Georgetown J of Leg Ethics 31.

60 *Rookes* v. *Barnard (No. 1)* [1964] A.C. 1129

61 Massachusetts Gazette in 1775 and then in Massachusetts Constitution1780.

67. In respect of 'harder cases', the 'discovery model of rules' — FAA — does not pass muster, and we have seen some limitations in FIA. Their legal-pedagogical variant: 'issue, rule, application, conclusion' (IRAC) is similarly vulnerable.[62] Nevertheless, it is the way that law is often viewed by legal educators, some jurisprudes and the popular press, in a manner that Wittgenstein likened to having,

> 'a pair of glasses on our nose through which we can see whatever we look at. It never occurs to us to take them off.' (Wittgenstein, 1958, §103[63])

68. Of course, ethical reasoning is not always as straightforwardly deductive as the inflexible elegance of Kant's deontological scheme — deriving clear and inflexible moral maxims from the preferences of individual free will and the logic of universalizability — might suggest. He held that,

> '[M]oral proof … can be drawn only by means of rational knowledge *from concepts*.' (Kant I., 1996, 6:403, page 162, emphasis added)

69. Goaded by Benjamin Constant,[64] Kant famously wrote, in a way often taken to exemplify his principled anti-consequentialism, that,

> 'To be truthful (honest) in all declarations is, therefore, a *sacred and unconditionally commanding law of reason that admits of no expediency whatsoever*.'[65]

70. Although this asserts that adherence to the universalised 'maxim' entails the toleration of harmful consequences, Kant's maxim-making logic — favouring universalization and abhorring self-contradiction — is sometimes triggered by his recognition that some *consequences* of conduct are *harmful*. We all might need to

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62 Even with the additional subtleties proposed in Yin, 2023.

63 Similarly, 'We are apt to take our own ideas for granted, so much so that we may not even be aware of them. It is as if they form the lens through which we see the social world, but we may not be aware of the lenses themselves.' (Blackburn, p. 1)

64 In his 1797 pamphlet, 'Des réactions politiques'.

65 Kant I., 2010 84, 8:427 (emphasis added).
A. Anscombe comments, '[Kant's] own rigoristic convictions on the subject of lying were so intense that it never occurred to him that a lie could be relevantly *described* as anything but just a lie (e.g. as "a lie in such-and-such circumstances") (Anscombe, 1958, p. 2, emphasis added).
B. For a limiting view, see Varden, (2010, p. 413): 'Kant's analysis [in that passage] simply addresses the question of how an already instituted *public court* should address the problem of lying when positing laws governing private conflicts.' See also Kant's own (unanswered) 'Casuistical Questions': (Kant I., 1996, p. 184, 6:432).
C. To say, like Kant, that honesty just is a virtue is little different to saying that there is a duty to not lie. But Kant does not address polycentric decision-making processes.

borrow money, which would be impossible — and *consequentially* harmful — if no-one could rely on the enforceability of a universalized maxim obligating repayment. (Kant I. , 1998, pp. 32, 4:422) Similarly, Kant recognises a duty of benevolence because the consequences to us might be harmful were we unable to get some 'love and sympathy' from others when in need of their assistance.

> '[We] would not will' to 'rob [ourselves] of all hope of the assistance [we wish] for [ourselves].' (1998, pp. 33, 4:423)

71. We should also note a 'mirror image'. Whilst Kantian deontology sometimes responds to risks of harmful consequences, consequentialists require a test — and hence a 'doctrine' — of the 'good' by which to evaluate consequences. For Bentham it was pleasure (Bentham, 1970, p. 11). For others it might be: well-being, capability-realisation, equality, preference-satisfaction or some conception of justice.[66] However — when *ruthlessly principled* — consequentialism tolerates instances of the 'bad' in pursuit of a 'good aggregate score'..[67]

Particularism

72. We might hesitantly posit a spectrum: deontology depends on abstract norms taken as 'givens'; consequentialism takes great account of practical effects, but evaluates them by a single normative principle; and virtue ethics is sensitive to many

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66 See more generally, (Sinnott-Armstrong, 2022) and (Obens, 2023) and Llewellyn's comment, 'I have no hope of meeting any formula regarding the substance of justice which accomplishes much more than the focusing of issues and then some suggestion about desirable direction, of the nature of "somewhere between East and North East".' (Llewellyn, 1962, p. 203).

67 Williams writes of utilitarianism (the paradigm instance of consequentialism), '[I]t cuts out a kind of consideration which for some others makes a difference to what they feel about such cases: a consideration involving the idea, as we might first and very simply put it, that each of us is specially responsible for what he does, rather than for what other people do. This is an idea closely connected with the value of integrity. It is often suspected that utilitarianism, at least in its direct forms, makes integrity as a value more or less unintelligible.' (Williams, 1973, p. 99, latter emphasis added).

Blackburn argues that, '[u]tilitarianism fits better [than deontological approaches do] with a 'gradualist' approach to ethical issues.' Arguably virtue ethics shares something of this *gradualism*, which contrasts with deontology's tendency to *absolutism*. Cf. W D Ross and prima facie principles §41 above. Blackburn comments that '[d]eontological notions of justice, rights, duties, invoke the words of law, as much as words of ethics. Utilitarianism by contrast gives us the language of social goods…. Asked about a law, a utilitarian would wonder what benefits and harms arise from the criminalizing of activities. *The cast of mind is that of the engineer, not the judge*.' (Blackburn, 2021, pp. 68-69, emphasis added).

principles and practical effects. Particularism goes further and expels principles from the normative calculus.[68]

73. Aristotle is sometimes enlisted as the "forefather" of particularism (Ridge M. &. McKeever S. 2020, section 1). He certainly held that:

> '[W]e must be content if we attain as high a degree of certainty as the matter of it admits' (Aristotle, 1955, p.27),

and wrote,

> 'To be sure we are not hard on a man who goes off the straight path in the direction of two much or too little, if he goes off only a little way… But this difficulty of definition is inherent in every object of perception; Such questions of degree are bound up with the circumstances of the individual case, where our only criterion *is* the perception. (Aristotle, 1955, pp. 74-75)[69]

74. However, particularism goes significantly further:

74.1. principles are reduced to mere generalizations that have no normative gravitational force — all reasons are 'contributory' and 'overall' reasons are simply the balance of them;[70] and

74.2. analogy, casuistry and imagination are banished less they distort our view of the case before us.[71]

Those are steps too far. Principles, rules, analogy and imagination should all be accommodated. As Solum writes about the related virtues,

> 'For a theory to be virtue-centred, it *need not* make the claim that judging can be *explained solely and exclusively by reference to the virtues*. Thus, the full story about correct or just or virtuous decision making will necessarily make reference to facts about the world (including the facts of the disputes that judges decide) and legal facts (including facts about what statutes have been validly enacted, what prior decisions are binding precedent, and so forth). A virtue-centred theory must claim *that judicial virtues are a necessary part of the best theory of judging and that judicial virtue plays a central explanatory and normative role.*' (Solum, 2003, p. 184, emphases added)

68 Dancy (2004) is titled 'Ethics Without Principles'.

69 Closely following (Ridge, 2020).

70 (Dancy, 2004, p. 16) However, Dancy does recognise that some reasons might be 'decisive' of the particular case.

71 See Smith, 2002 and references there given.

75. Particularism serves as a useful antidote to Platonism. Particular cases confronted in medical practice can involve factors that the naive application of principles might mask from full consideration. Whilst law without norms would be palm tree justice, particularism encourages the deeper consideration of hard cases, which consideration can illuminate the evolution and interpretation of principles and rules. But the idea that every case is one of first impression is impractical and unreflective of both social morality and legal and medical practice. It seems best to treat particularism as a cautionary tale.

76. Our practical reason can combine several elements, some of which are paricularistic. Thus, in *Montgomery* v *Lanarkshire*, the recognition of the ethical principle of respect for autonomy led to the introduction of a legal principle of informed consent to medical treatment.[72] However, the resulting duty was limited by an interpretive — 'fact-sensitive, and sensitive also to the characteristics of the patient'[73] — concept of 'materiality', by which courts must construct case-by-case what the reasonable patient in the claimant's situation *ought* to be told. Additionally, a category of 'therapeutic exceptions' was identified. That too would be case-specific in application.[74]

Who must be virtuous?

77. In considering abortion ethically, we mostly focus on the woman and whether she can justify having an abortion. But a GP might be asked to advise a woman whose pregnancy is unwelcome to her or to arrange an abortion for a patient. How is the GP to be virtuous in advice and action?

78. Of course there are simple cases. We all agree that we need a clear rule about driving on one or other side of the road. The UK Parliament has decreed 'left'[75]and, in the particular context, the term 'left' leaves little interpretive scope. But hard cases are, by definition, more challenging.

72 {2015] UKSC 11, [107]

73 Ibid [89]

74 Ibid [85] and [91]. For an interesting exploration in medical ethics and the right to die, and the tension between principles and particularities, see the case of Dax Cowart, described in (Childress, 1997, pp. 121-140)

75 Highway Act 1835, section 78

Dissenting Judgments

79. Dissenting judgments sit uncomfortably with FAA. It is as if two expeditions, having planted their flags several miles apart, both claim to have reached the pole. Dissent suggests legal uncertainty, emphasizes the personal choice element, and tends to undermine 'rule of law (and not of persons)' ideology. Dissent might be explicable as part of the process of discovery, but at appellate levels it is more likely to be marginalised as evidence of *either*

79.1. 'personal' — and not disembodiedly 'legal' — ethical and/or political value-judgement; and/or

79.2. poor legal craftsmanship by the dissenter or the majority.[76] However, being distinct from the authority-bearing decision,

> 'dissent, with all its theatricality, operates not only in a counter-hegemonic fashion (offering windows into what 'could be') but also *to consolidate and enact hegemonic legal authority*.' (Mistry, 2023, p. 754, citing Peters, 2008, emphasis added.)

Equity

> [A] court of equity (in conflict with others about their rights) involves a contradiction. Only where the judge's own rights are concerned… may and should he listen to equity.' (Kant I., 1996, p.27, 6:235).

80. The very existence of a concept of equity (at one time in England and Wales concretized in a separate jurisdiction) powerfully implies that FAA's 'model of rules' is in some way defective, that — despite any association of certainty, competence and legitimacy — more flexibility is required than the 'model of rules' provides — or, perhaps, can — provide. (Solum, 2003, pp. 204-206)

81. System insiders might agree with Llewellyn that,

> '[l]egal doctrine cannot wisely attempt to achieve what is impossible of achievement.' (1962, p. 144)

They might also take comfort from jurisdictional separateness, which deflects attention from the personal element. Indeed, when each institutional home has sufficient charisma to maintain legitimacy, jurisdictional separation provides an ideological mask for legal and ethical contradictions that might undermine legitimacy. Nevertheless, the contradictions persist.

76 For a rich exploration of dissenting judgments, see (Mistry, 2023).

82. Bernard Jackson helps us to unpack these contradictions Taking examples from the laws of various religions, he observes that,

> 'a normative text…is sometimes said to mean not only that everything in that text is true but that *all truth is in the text*.' (Jackson, 1983, pp. 341-342, emphasis added)

That claim of comprehensiveness raises the expectation of an intra-systemic consistency that skilled (if not unskilled) analysis can *discover*.

But Jackson also cites examples of the flexible accommodation of inconsistent views within one system. He gives a Talmudic example where it is,

> 'implied that what may be right for the decision in a particular case may not be appropriate to serve as a precedent.' (Jackson, 1983, p. 344)

Similarly, common law judges sometimes — retrospectively — confine a case to its own facts rather than label it 'wrong'.[77]

83. Jackson goes on to contrast the flexibility of *analogical* reasoning — we might call this 'the comparing of stories' — with

> 'the 'analytical mode of interpretation which is characteristic of modern Western systems.' (Jackson, 1983, p. 342) citing (Schacht, 1964, p. 208)

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77 See (e.g.) *Barnet LBC* v *Kamyab* [2021] 2 Cr. App.R.(S.) 53, H8, 'Where *Panayi* could be distinguished, it should not be applied. A decision on whether it was rightly decided but confined to its own facts or decided *per incuriam* had to await a case where it could not be distinguished.' See also (Murphy, 2023) on 'anomalies'.

In *Lawal* v. *Northern Spirit* [2004] 1 All ER 187 (HL) [21] the House of Lords held that, where counsel for the other side had previously sat as a part-time in a case before an Employment Appeal Tribunal that included one or two lay members with whom he had previously sat as a part-time judge, 'a fair-minded and informed observer might conclude that there was a real possibility of such lay members being subconsciously biased in favour of counsel's submissions….a fair minded and informed observer might conclude that there was a real possibility of such lay members being subconsciously biased in favour of counsel's submissions; that public confidence in the system was thereby undermined and the practice permitting such appearance should be discontinued.' In Introduction (1.4.3) to Making Decisions Judicially (Bloomsbury), Godfrey Cole suggests that conclusion 'might be thought surprising given the typically robust independence and experience of tribunal members that there was a real risk that there would be a perception of bias.' Cole then comments, 'However, *Lawal* is very much a decision on its own facts and does not establish a rule.' Nevertheless, it is a decision of a top court that one might reasonably expect to not evidence a rule (or principle). Cole's approach suggest that *Lawal* cannot be used as the basis for an analogical argument, and that its normative scope is limited to instances that are nearly identical. If *Lawal* can only have such limited application, it is wrongly decided.

And he points to George Orwell's *1984*, where CRIMESTOP involves imagination-ectomies.

> 'the training of the party member included "the power of not grasping analogies".' (Orwell, 1949, p. 195)

That 'training' is part of Orwellian CRIMESTOP, which,

> 'in short, means protective stupidity. But stupidity is not enough. On the contrary, orthodoxy in the full sense demands a control over one's own mental processes as complete as that of a contortionist over his body.' (Orwell, 1949, p. 195).[78]

84. But, as Eric Wiland explains, *imaginative* use of analogy is vital when confronting dilemmas and hard cases.

> 'Moral philosophers have no special authority when it comes to determining what's right and what's wrong. But they sometimes are able to identify relevant similarities between situations. … *[T]he whole point of using analogies in moral philosophy is to get us past our self-interest, inertia, lack of empathy, lack of imagination and defensiveness. Analogies do this by getting us to look at seemingly all-too-familiar moral problems in a new light.*' (Wiland, 2000, p. 468 emphasis added).

85. Whilst we can imagine a duty to find 'the' *equitable* outcome, that is probably indistinguishable from a duty to find a *just* outcome. We can 'see', and — 'bottle' — *factual* examples — beloved of consequentialists — of pain and pleasure and of harm and advantage. But we can only 'see' *justice* and *equity* through *evaluative* lenses. That produces two problems:

    85.1. we do not each have the same lenses; and

    85.2. we use point-and-shoot 'cameras' that we forget change their settings without our conscious consideration.

86. Rather than regard equity as a substantive virtue, it is more useful to concentrate on a duty to act equitably *whilst determining* a dispute or *making* a decision. The capacity to decide equitably is a modal virtue.

Using imagination virtuously

> 'Many would say that language is a way of conveying experience and ideas to other people, but it does not transfer the contents of what we have in mind. Rather, it invites people to *imagine* what we have in mind.' (Enfield, 2022, p. 15, emphasis added)

78 Cf. legal education and professional induction?

87. In the 65 years since the revival of interest in virtue ethics was signalled by Anscombe (1958), a related interest in the role of imagination (and in Iris Murdoch's philosophy) has slowly emerged. Iris van Domselaar's essay in (Amaya, 2020) provides an excellent exemplar. Murdoch's approach emphasizes the commitment and energy that moral reasoning demands,

> 'It is a task to come to see the world as it is. A philosophy which leaves duty without a context and exalts the idea of freedom and power as a separate top-level value ignores this task and obscures the relation between virtue and reality.' (Murdoch, 1999, p. 375)

Van Domselaar argues that a Murdochian approach requires,

> '[an] … engaged form of reflection, which does not occur "in detachment from [the judge's] deepest sense of self".' (van Domselaar, 2020, p. 90)[79]

She also takes Murdochs' cue that public life differs from private life in that is,

> 'characterised by certain firmly ensconced axioms, such as the ideas of equality, dignity and inviolable rights [and] … conformity to generally accepted rules and principles in a liberal democratic society.' (87)[80]

88. We can imagine states of physical affairs and ethical states of affairs, but not always easily. It is rather like this vignette.

> Judge Henry (perhaps descended from Dworkin's Herbert, 1977, p. 125) would face a particular variant of the decision-maker's 'task' if asked whether Arthur can camp at Greenacre next week. Henry must bring to mind and choose between possible outcomes – possible states of affairs that Henry has to imagine. Arthur's camping could be: (i) permitted; (ii) permitted under certain conditions (e.g. no fires or loud music and a maximum stay of two weeks); or (iii) forbidden. Since none of those outcomes is a physical reality, all three must be imagined.
>
> All three imaginings involve the physical and the normative, but (ii) probably requires the greatest effort of imagination. It is difficult to imagine a norm without imagining any physical states of affairs, but one might imagine a state of affairs (e.g. that tree might fall down) without considering any related norms (e.g. it *ought* to be felled to prevent the risk of consequential harm).

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79 Citing (Clarke, 2012)

80 Citing (Murdoch, 1992, p. 362)

89. Although virtuous decision-making requires effortful imaginative empathy for all sides, we sometimes need an automaticity that transcends language.

> 'A firefighter automatically imagines a backdraft before opening a door, and rightly decides not to open it. It is not, therefore, our lack of control over imagination that is epistemologically worrying, but our lack of training and experience. And that is, to some extent, under our control.' (Stuart, 2021, p. 1341)

90. Imagination (usually effortful) is needed for two particular functions.

Hypothesis formation

This involves using available evidence to construct inferences that are potentially falsifiable by subsequent evidence (e.g. that the damage to the wharf was caused by a spark igniting waste material, which burned brightly enough to reach the flashpoint of the bunker oil in which it was floating). Enfield comments,

> 'The reason we are forced to rely on inference is that we have no recourse to telepathy. When we coordinate around the maps that language draws for us, we naturally fill in the details by imagining what must be there. Language is a portable device for constructing such landmarks at will.' (Enfield, 2022, p. 13)

Norm-setting

Norm-setting requires choices between alternative possible attributions of responsibility (e.g. the risk of damage by fire should be regarded as normatively distinct from the risk of pollution damage).[81]

91. What then triggers or directs imagination? Dual process theory provides a plausible answer.

> 'The set of imaginative processes is … divided into two kinds: one that is unconscious, uncontrolled, and effortless, and another that is conscious, controlled, and effortful.' (Stuart, 2021, p. 1329)

92. Stuart cites McAlister's view that our imaginations are impoverished and arbitrary and implies that they should be less so.

> 'The poverty of imagination refers to our tendency to imagine in ways that are tightly constrained by our previous experience of the world, as when people who are told to imagine an alien typically imagine something with two arms, two legs, a head and two eyes. The arbitrariness of imagination refers to our ability to

81 *Overseas Tankship (UK) Ltd* v. *Morts Dock & Engineering Co (The Wagon Mound)* [1961] A.C. 388.

> imagine anything we want: it is underconstrained by the world, and therefore not a reliable informant about the world.' (McAllister, 2013, p. 12)[82]

Nevertheless a decision-making process without imagination and some empathy will not be a virtuous process. In hard cases various possible factual and normative states of affairs must be imagined.

Some relevant virtues

> 'Nobody who appeared before him could come away without feeling that he or she had received a patient and proper hearing, that the judge had fully understood the case and that counsel had been treated with good manners and understanding.' (Obituary, Slade LJ, The Times 19 March 2022)

93. We might hold that — instead of or in addition to FAA or even FIA — virtuous decision-makers should, and sometimes do, strive to choose from, interpret and reconcile many ethical considerations. Consequently, the most relevant virtues attach to (or are attributes of) virtuous decision-makers and of their methods rather than to results. We can examine some candidates.

Self-control, self-knowledge and integrity

94. Baumeister and Exline argue that,

> 'the selfish interests of the individual are sometimes in conflict with the best interests of the collective. In those cases, virtue involves putting the latter ahead of the former. Stifling self-interest for the sake of the greater collective good requires self-control. Thus … self-control deserves consideration as the core psychological trait underlying the majority of virtues. (Baumeister, 1999, p. 1166)

To control oneself, one must know oneself. As Socrates is believed to have said,

> 'Daily to discourse about virtue … is the greatest good of man… and the unexamined life is not worth living.' (Plato, 2015, pp. 50-51)

To protect integrity there should be a special alertness to:

94.1. our own biases; and

94.2. a ubiquitous tendency to mistake 'reasons' that we have concocted as *ex post* rationalisations for foundational principles.

Prudence as sound judgement

95. Aristotle wrote of *phronêsis* —approximating to 'prudence' — that,

82 Stuart also cites, 'As J. B. S. Haldane puts it, "My own suspicion is that the universe is not only queerer than we suppose, but queerer that we can suppose."' (in McAllister 2013 p. 15).

> '[persons are] prudent when [they] calculate well for the attainment of a particular end of a fine sort…. [It is] the virtue of one of the two parts of the soul which have reason, and this must be the calculative or opining part…*[It is not] a purely rational quality*. (Aristotle, 1955, p. 176 & 177, emphasis added)

Ross's translation explains 'opining part' as,

> 'that part which forms opinions; for opinion is about the variable and so is practical wisdom.' (Aristotle, 1925, p. 143)

MacIntyre explains that prudence was,

> 'originally an aristocratic term of praise, characteriz[ing] someone who knows what is due to him, who takes pride in claiming his due.'

And that it later came,

> 'to mean more generally someone who knows how to exercise judgment in particular cases. *Phronêsis* is an *intellectual virtue*; but it is that intellectual virtue without which none of the *virtues of character* can be exercised.' (MacIntyre, 1985, p. 180, emphases added)

He goes on to explain that, for Aristotle,

> 'intellectual virtues are acquired through teaching, [whereas] the virtues of character are acquired] from habitual exercise. We become just or courageous by performing just or courageous acts; we become theoretically or practically wise as a result of systematic instruction … [T]he exercise of practical intelligence requires the presence of the virtues of character; otherwise it degenerates into or remains from the outset merely a certain cunning capacity for linking means to any end rather than to those ends which are genuine goods for man.' (pp. 180-181)

96. What are called here 'modal virtues' involve the affective domain that prompts or pushes us to use our intellects imaginatively. Whilst its allies might be breadth of vision, imagination and empathy, the opposites of prudence might be the vices of hubris, tunnel vision, confirmation bias, and want of imagination.

Empathy

97. Unlike sympathy ('I've been there too dear. It's too awful!') and unlike the automatic firing of our mirror neurons when we see pain inflicted on others, empathy requires an effort of imagination (What if I were them?). In a hard case, the virtuous decision-maker uses effortful imagination *in order to be empathetic* and to appreciate possible impacts on those — actually or potentially — affected, by the various decisional options that others advocate or the decision-maker imagines. Empathy is a modal virtue, without which decision-makers' decisions would be less virtuous.

98. Medics need empathy if they are not to treat patients as practice dummies. But, if that empathy distracts them from choosing the best course of treatment, it can undermine the virtues of benevolence and non-maleficence and might lead to the doing of harm. Furthermore, empathy demands emotional energy and can contribute to professional burn-out unless carefully managed.[83] We might therefore regard empathy as a *prima facie* virtue.

99. One-sided empathy will not do. It amounts to bias. The requirement is for effortful even-handedness, exploiting imaginative capacity, and then, oddly, the capacity to then become detached. 'Sleep on it!' is often good advice.

Persons of principle

100. We can distinguish 'persons of principle' from 'principled decisions' that could be either:

100.1. conscientiously derived from and justified by established norms; or

100.2. deliberately or unknowingly *ex post* justifications of conclusions prompted by biases and prejudices.

'Principled persons' are not necessarily 'virtuous persons'. They might hold that they should act always to favour their own family members, or never favour foreigners. Or they might hold that: the *lex talionis* should apply in all things; efforts at rehabilitation are pointless; and progressive taxation is anathema.

101. However, as Dancy argues,

> '[i]t is standard, at least in cultures informed by the Christian tradition, to think of the moral person as the person of principle.' (Dancy, 2017, section 2)

Is the good judge similarly regarded?

In the specific milieu of ancient Athens, particular substantive virtues were *functionally* derived from socially-established strong normative expectations from those who have particular *roles*.

> 'Their role-specificity is akin to 'something's being a watch and the criterion of something's being a good watch'. [Being and functioning]—are not independent of each other… [A]ccording to [the classical] tradition, to be a man is to fill a set of roles each of which has its own point and purpose: member of a family, citizen, soldier, philosopher, servant of God.' (MacIntyre, 1985, p. 69) …

83 See Delgado, N. et al., 2023)

> I confront the world as a member of this family, this household, this clan, this tribe, this city, this nation, this kingdom. There is no 'I' apart from these. (p. 201)….
>
> Every particular view of the virtues is linked to some particular notion of the narrative structure or structures of human life.' (p. 204)

Solum's List of Judicial Virtues

102. Solum distinguishes a 'virtue-centred theory of judging from a theory of judicial character' (Solum, 2003, p. 183 & 184). That distinguishes 'principled decision' from a 'decision-maker of principle' and points towards a theory of the 'how?' of decision-*making*.

> '[W]e might say that virtue ethics is especially well suited to handling those features of ethical life that are not well served by moral rules. … Judging seems to be the paradigm case in which we want adherence to constraining rules and transparent decision procedures. (185)

Medical practice is arguably somewhat less rule-governed than legal practice, but established practice and guidance notes abound.

103. Solum lists five 'judicial virtues'. Notably, the role-related epithet 'judicial' is particularly significant in those instances in which the noun has ambiguous ethical valance.

> *Judicial temperance:*
>
> 'Judges who care too much for their own pleasures are prone to temptation'… [and to loss of face when not] "as sober as a judge".' (189-90)

In the role of judge, temperance is a virtue, whereas, in ordinary life, we tend only to condemn excessive intemperance.[84] Relaxed enjoyment is not

84 See: https://www.bostonglobe.com/2023/07/17/nation/democrats-press-supreme-court-ethics-rules-over-gop-opposition/?et_rid=707674352&s_campaign=todayinpolitics:newsletter

Democrats to press Supreme Court ethics rules over GOP opposition

By Carl Hulse New York Times, Updated July 17, 2023, 5:34 p.m.

WASHINGTON — Senate Democrats plan to push ahead this week with legislation imposing new ethics rules on the Supreme Court in the wake of disclosures about the justices' travel and outside activities, despite blanket opposition by Republicans who claim the effort is intended to undermine the high court.

On Thursday, the Judiciary Committee is scheduled to consider legislation by Senator Sheldon Whitehouse, Democrat of Rhode Island, that would require the Supreme Court to establish a new code of

widely condemned. In the role of triple trophy winning footballer, post-victory intemperance seems *de rigueur*.

Judicial courage:

'Judicial courage is a form of "civic courage," distinguishing this quality of character from courage with respect to physical danger. The courageous judge is willing to risk career and reputation for the ends of justice.' (190)

However, 'courage' *simpliciter* is more *capacity* than virtue. A murderer who, to escape from custody, runs the gamut of armed guards acts courageously.

Judicial temperament:

'The virtue of good temper requires that judges feel outrage on the right occasions for the right reasons and that they demonstrate their anger in an appropriate manner.' (191)

'Temperaments' can be good or bad. Being 'temperamental' has negative connotations.

Judicial intelligence:

'[E]xcellence in understanding and theorising about the law' (191)

Intelligence surely is a capacity. Hence the epithet is essential. The development of nuclear weapons utilised enormous intelligence, but many would not hold that virtuous.[85] As already mentioned, it can degenerate into cunning used for no good purpose. (MacIntyre, pp. 180-181)

Judicial wisdom:

'The practically wise judge has developed excellence in knowing what goals to pursue in the particular case and excellence in choosing the means to accomplish those goals. In the literature of legal theory, Karl Llewellyn's notion of "situation sense" captures much of the content of the notion that judicial wisdom corresponds to the intellectual virtue of *phronesis*. (Solum, pp. 192)

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conduct for justices, set firmer ground rules for recusal from cases, create a new investigatory board, and promote transparency about ties with those before the court.

Senate Republicans have made it clear they won't support the legislation, and it has no chance in the GOP-controlled House. But Whitehouse said he saw the fight over the measure as just the first step, after a string of revelations about undisclosed luxury travel, relationships with affluent Americans, and speaking engagements tied to book sales, as well as the shocking leak last year of the court's decision overturning precedent on abortion rights. NEEDS to be drastically summarised.

85 See (Bragg, 2023).

Perhaps there is somewhere a wisdom of the wicked, but generally wisdom seems tied to the good and qualifies as a capacity and a modal virtue.

Conclusions

104. Virtue ethics suggests that we compartmentalise too readily and too rigidly. Without resort to strong particularism, the holism of virtue ethics can accommodate: absolute and prima facie principles; and their contestability (interpretivity) and contested-ness; along with consequentialist considerations. It is not wedded to a single conception of the good. It can improve the quality of private and public decision-making and hence further 'public good'.

105. Decision-making is not always a simple matter of deduction from rules or principles. Neither can it be guaranteed to produce a *result* that will be regarded as just by a sufficient proportion of the governed (Weaver, 1978). It follows that good government requires a virtuous judiciary and legislature that will use virtuous *processes*. Process values are vital to legitimacy when there are value and interest tensions.

106. Similar issues arise in determining the best treatment for patients, especially in controversial cases of: withdrawal of life-sustaining treatment; administering analgesics that inevitably shortens lives; assisted suicide; abortion; and the allocation of scarce resources (Childress, 1997, pp. 169-236). Of course, judges are also faced with similarly hard cases.

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