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**MICHAEL J. SANDEL'S *JUSTICE: WHAT'S THE RIGHT THING TO DO?*: A RESPONSE OF MORAL REASONING IN KIND, WITH ANALYSIS OF ARISTOTLE AND EXAMPLES**

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INTRODUCTION

My intention is to respond to Michael Sandel's book, *Justice: What's the Right Thing To Do?*,<sup>1</sup> as much as possible in kind. I seek to engage in moral reasoning and consider the arguments of political philosophers, not in order to trace the history of ideas or refine their interpretation, but to clarify and express my own beliefs. Accepting Sandel's invitation to reflect on my moral

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<sup>1</sup> MICHAEL J. SANDEL, *JUSTICE: WHAT'S THE RIGHT THING TO DO?* (2009).

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and political convictions with his guidance, I will not rely on findings of non-philosophical disciplines, such as history, sociology, anthropology, psychology, law, or public policy, nor enlist their modes of analysis.

Also like Sandel, I will invoke examples, both public and personal.<sup>2</sup> The plethora of examples Sandel discusses is impressive, and a chief strength of the book. They challenge the reader to think hard about them. Yet the harder one thinks, the more alternative interpretations, contrary to Sandel's, one sees; his analysis does not always entertain, or acknowledge the possibility of, motives for conduct more complex than those expressed or apparent. This may be an unfair complaint; words on a page cannot entirely capture the complexity of human souls, and fiction may succeed more than philosophy. But maybe that acknowledgment helps rather than hinders the aims of philosophy. Philosophers whose accounts of the complexity of the human condition are especially helpful to my critique include Aristotle, Friedrich Hayek, Michael Oakeshott, and Adam Smith.

Although I intend to respond to Sandel and keep his views in the forefront, rather than becoming immersed in interpretive quarrels about political philosophers, I will have to discuss Aristotle fairly often. That is not only because Sandel takes his bearings from Aristotle, but also because I do too, more or less, and we evidently read Aristotle differently.

Sandel faithfully conveys Aristotle's view that a good society depends on the virtues of its citizens, that it should cultivate those virtues, and therefore that it needs to determine what virtues are worthy of honor and reward.<sup>3</sup> Aristotle does deny that law can be neutral; those who make law should first reflect on the most desirable way of life.<sup>4</sup>

Sandel's orientation to virtue, however, leaves out Aristotle's qualifications and skepticism. The most desirable way of life, both for individuals and a polity, attends to survival. Accordingly, Aristotle discusses not only distributive justice, which determines who should be recognized and what qualities honored, but also economic and punitive or criminal justice. Economic justice entails its own set of virtues and a proper disposition toward wealth. Parts I through V of this Essay – on economic justice, virtues connected to wealth, individualism, and (two on) consent – provide a stronger defense of market economy than does Sandel. Parts VI and VII concern Aristotle's skepticism about the possibility of a virtuous democratic culture and propose accordingly to restrict politically erosive talk to public and private

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<sup>2</sup> All personal examples are relegated to footnotes.

<sup>3</sup> SANDEL, *supra* note 1, at 9, 197-99.

<sup>4</sup> See ARISTOTLE, THE NICOMACHEAN ETHICS bk. V, 1129b14-24, at 108 (David Ross trans., Oxford Univ. Press rev. ed. 1980) (c. 384 B.C.E.) [hereinafter NICOMACHEAN ETHICS] (“Now the laws in their enactments on all subjects aim at the common advantage either of all or of the best or of those who hold power, or something of the sort; so that in one sense we call those acts just that tend to produce and preserve happiness and its components for the political society.”).

institutions such as universities. Part VIII applies, to the United States today, Aristotle's counsel that circumstances may require a polity to focus more on preserving itself than on virtue by calling for more attention to crime prevention and punitive justice. A final section of closing thoughts, in contradistinction to the interest of Sandel's book, makes a case for injustice and what lies beyond justice, namely happiness.

#### I. ARISTOTLE AND HAYEK ON JUSTICE, NEED, AND PRICE

Book V of Aristotle's *The Nicomachean Ethics*, devoted to the subject of justice, recognizes three kinds: distributive, economic, and punitive.<sup>5</sup> Government concerns distributive justice because it distributes offices and honors, rights and privileges. As Sandel writes towards the end of his book in Chapter 8, "Who Deserves What? / Aristotle": "When we discuss distributive justice these days, we are concerned mainly with the distribution of income, wealth, and opportunities. For Aristotle, distributive justice was not mainly about money but about offices and honors. Who should have the right to rule? How should political authority be distributed?"<sup>6</sup> Aristotle recognizes nonetheless that money-matters have a justice of their own, which differs from unilateral political justice inasmuch as it concerns mutually voluntary interpersonal conduct in the form of economic exchange.<sup>7</sup> Yet a third kind of justice pertains to involuntary or coerced interpersonal conduct, injurious and fatal.<sup>8</sup> Aristotle thus describes honorific, economic, and criminal justice as follows:

Of particular justice and that which is just in the corresponding sense, (A) one kind is that which is manifested in distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution . . . and (B) one is that which plays a rectifying part in transactions between man and man. Of this there are two divisions; of transactions (1) some are voluntary and (2) others involuntary – voluntary such transactions as sale, purchase, loan for consumption, pledging, loan for use, depositing, letting (they are called voluntary because the *origin* of these transactions is voluntary), while of the involuntary (*a*) some are clandestine, such as theft, adultery, poisoning, procuring, enticement of slaves, assassination, false witness, and (*b*) others are violent, such as assault, imprisonment, murder, robbery with violence, mutilation, abuse, insult.<sup>9</sup>

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<sup>5</sup> See *id.* bk. V, 1130b30-1131a9, at 111-12.

<sup>6</sup> SANDEL, *supra* note 1, at 192.

<sup>7</sup> See NICOMACHEAN ETHICS, *supra* note 4, bk. V, 1131a3-5, at 111.

<sup>8</sup> See *id.* bk. V, 1131a5-9, at 111-12.

<sup>9</sup> *Id.* bk. V, 1130b30-1131a9, at 111-12. For an extended analysis of Aristotle's teaching about justice in Book V of *The Nicomachean Ethics*, see Delba Winthrop, *Aristotle and Theories of Justice*, 72 AM. POL. SCI. REV. 1201 (1978).

Pertaining to economic justice, Sandel notes at the start of his book:

In medieval times, philosophers and theologians believed that the exchange of goods should be governed by a “just price,” determined by tradition or the intrinsic value of things. But in market societies, the economists observed, prices are set by supply and demand. There is no such thing as a “just price.”<sup>10</sup>

Both statements are true, but Sandel does not acknowledge that Aristotle holds both views, qualifying the idealistic, metaphysical concept of price with the practical, market concept of price derivative from demand.<sup>11</sup>

According to Aristotle, if goods and services are evaluated by the criteria of a well-lived life, with correct priorities, then their relative intrinsic worth becomes apparent.<sup>12</sup> The worth of a book exceeds the worth of a sandwich; the worth of an education exceeds the worth of a vacation; the worth of a museum exceeds the worth of an amusement park. But a well-lived life presupposes met needs, and needs are met only if they are made known, and they are made knowable most clearly by prices. Prices are determined by buyers estimating their own needs and the capacity of goods and services to fulfill those needs, and by sellers and laborers estimating their own needs (including costs) and the monetary compensation to fulfill them. Aristotle writes: “[I]n truth it is impossible that things differing so much should become commensurate, but with reference to demand they may become so sufficiently.”<sup>13</sup> Consequently, “money has become by convention a sort of representative of demand; and this is why it has the name ‘money’ (*nomisma*) – because it exists not by nature but by law (*nomos*).”<sup>14</sup> In short, money is the exchangeable representation of need.

If both of these claims are true, if the metaphysical worth of goods and services incorporates their satisfaction of needs, then prices that are just promote noble living by rewarding producers of goods and services of greater intrinsic worth more than producers of goods and services that merely meet needs, while at the same time allowing the maximum number of consumers to purchase goods and services of greater intrinsic worth. Ideally then, prices would reflect the prudence and moderation they seek among other virtues to encourage.

But economies will not fail if prices express ignoble or uneducated wants. Aristotle recognizes not only the intractability but the salutariness of wants or felt needs. Felt needs make human beings willing to exchange or reciprocate, and only exchange can bring about self-sufficiency.<sup>15</sup> A bargained price may

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<sup>10</sup> SANDEL, *supra* note 1, at 4.

<sup>11</sup> See NICOMACHEAN ETHICS, *supra* note 4, bk. V, 1133a18-29, at 119.

<sup>12</sup> See *id.* bk. I, 1094a17-23, at 1-2.

<sup>13</sup> *Id.* bk. V, 1133b19-20, at 120-21.

<sup>14</sup> *Id.* bk. V, 1133a26-30, at 119.

<sup>15</sup> *Id.* bk. V, 1133b6-10, at 120; ARISTOTLE, THE POLITICS bk. VI, 1321b14-18, at 193 (Carnes Lord trans., Univ. of Chicago Press 1984) (c. 384 B.C.E.) [hereinafter POLITICS].

not be just but the unifying effect of self-interest tends to outweigh its divisive potential.

Like Aristotle, Friedrich Hayek, a twentieth-century political philosopher, characterizes prices as means to communicate wants.<sup>16</sup> Unlike Aristotle, however, he thinks only prices determine the worth or value of any good or service, and a government that presumes to determine the value of goods and services and discards the function of prices robs individuals of freedom:

[T]hough the conception of a ‘value to society’ is sometimes carelessly used even by economists, there is strictly no such thing and the expression implies the same sort of anthropomorphism or personification of society as the term ‘social justice’. Services can have value only to particular people (or an organization), and any particular service will have very different values for different members of the same society. To regard them differently is to treat society not as a spontaneous order of free men but as an organization whose members are all made to serve a single hierarchy of ends. This would necessarily be a totalitarian system in which personal freedom would be absent.<sup>17</sup>

Accordingly, the amounts individuals are paid for their work reflects the extent to which its result – a painting, architectural plans, a clean bathroom, a touchdown, a book on justice – is valued, that is, what other individuals are willing to pay for it. Because individuals have different skills, knowledge, and opportunities, the kind and quality of their work, and thus the amounts they are paid for it, vary. Hence, Hayek says that the contention that pay differentials need moral justification and the insistence on a just outcome that eliminates winners and losers are absurd and nonsensical.<sup>18</sup>

The view that pay reflects demand implies that individuals should not expect to be rewarded monetarily for work according to a standard of merit, worth, or value independent of demand. That is, while you may think that teaching high school contributes far more to society than does playing basketball, others are willing to reward playing basketball considerably more; if you have the opportunity, deciding to play (paid, professional) basketball, rather than teach, will thus better serve your financial interest.<sup>19</sup> The disjunction between merit and monetary reward reinforces rather than undermines Aristotle’s views about living and living well: because the latter cannot be done without the former, you should do what you must to live; at the same time, you should not confuse living with accumulation of wealth and respond exclusively to demand, but rather answer to a standard of merit above and beyond demand – a higher calling – in order to live well, that is, happily.

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<sup>16</sup> See 2 F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* 76 (1976).

<sup>17</sup> *Id.* at 75-76.

<sup>18</sup> *Id.* at 71, 180 n.28, 181 n.29.

<sup>19</sup> As Hayek says: “Reward for merit earned and indication of what a person should do, both in his own and in his fellows’ interest, are different things.” *Id.* at 72.

II. ARISTOTLE ON THE ANIMUS TO LIVE AND THE VIRTUES AND VICES  
ASSOCIATED WITH WEALTH

Aristotle observes at the start of *The Politics* that the animus to survive emanates from the individual; human beings want to live and to reproduce.<sup>20</sup> Self-preservation and reproduction are ends given by nature, and people form communities in order to fulfill them.<sup>21</sup> Although this claim converges with that of modern philosophers, such as Hobbes and Locke, who assert the primacy of self-preservation,<sup>22</sup> it cedes in Aristotle's account to the power of human beings to choose reasonably not to live – for example, to sacrifice their lives for others.<sup>23</sup>

Nonetheless, human beings cannot deny or alienate their neediness; they feel their bodily needs – chiefly in the form of hunger, cold and heat, and the desire for sex – and they feel them as individuals, not collectively. This fact pertains directly to the virtues that the laws of a community can expect citizens to uphold over time.<sup>24</sup> To live stoically, in perpetual denial of felt needs, is not natural according to Aristotle. Living well integrates satisfaction of physical desires into practice of virtues. Aristotle's depiction of moral virtues in the *Nicomachean Ethics*, as means between extremes,<sup>25</sup> bears that out.

These observations are relevant to the way in which Sandel frames civic virtue. Introducing it in opposition to greed, Sandel says greedy people “press for maximum advantage,” while people with civic virtue “look out for one another.”<sup>26</sup> A good society discourages and punishes rather than rewards the vice of “[e]xcessive greed”<sup>27</sup> and “affirms the civic virtue of shared sacrifice for the common good.”<sup>28</sup> Aristotle does not, however, contrast the vice of greed to selflessness or an exclusively social or other-oriented virtue; rather, the virtue associated with wealth, which he calls “liberality,”<sup>29</sup> involves not only giving, but also getting, receiving, and taking wealth.<sup>30</sup> The man who

<sup>20</sup> POLITICS, *supra* note 15, bk. I, 1252a27-31, at 35-36.

<sup>21</sup> *Id.* bk. I, 1252a29-1253a20, at 36-37.

<sup>22</sup> See THOMAS HOBBS, LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL 104-05, 110 (Michael Oakeshott ed., Collier Books 1962) (1651); JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II, § 6.19-25, at 271 (Peter Laslett ed., Cambridge Univ. Press student ed. 1988) (1689); *id.* bk. II, § 11.11-15, at 274.

<sup>23</sup> See NICOMACHEAN ETHICS, *supra* note 4, bk. IV, 1124b5-10, at 92; *id.* bk. IX, 1169a15-20, at 237.

<sup>24</sup> See *id.* bk. II, 1104a10-20, at 30-31.

<sup>25</sup> *Id.* bk. II, 1104a18-26, at 31.

<sup>26</sup> SANDEL, *supra* note 1, at 7.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 8.

<sup>29</sup> NICOMACHEAN ETHICS, *supra* note 4, bk. IV, 1119b20, at 79.

<sup>30</sup> *Id.* bk. IV, 1119b20-26, at 79. “The word [*lambanein*], the antithesis of ‘give,’ varies in meaning with the context between ‘get,’ ‘receive’ and ‘take.’” ARISTOTLE, THE

does not get, receive, and take wealth sufficiently – who lets it all go, spends too much, does not keep enough for himself – ruins himself by his own fault, Aristotle says, “life being held to depend on possession of substance.”<sup>31</sup>

This wasting of wealth, “prodigality”<sup>32</sup> strictly speaking, which endangers the well-being of an individual, stands opposite to greed or meanness, the vice of caring more for wealth than one should.<sup>33</sup> Virtue with respect to wealth, then, is the mean in between caring too little and caring too much for wealth. Neither self-neglectful prodigality nor obsessive greed is praiseworthy; the liberal man keeps some wealth for himself and gives some wealth to others. Nonetheless, a man who falls short of the ideal of liberality, as long as he does not steal, is still praiseworthy – not for liberality, “but rather for justice.”<sup>34</sup>

If Sandel’s concept of civic virtue encompasses the Aristotelian virtue of liberality, which Aristotle further characterizes as giving “to the right people, the right amounts, and at the right time,”<sup>35</sup> it would entail not only looking out for others in that way, but looking out for oneself: the liberal man does not “neglect his own property, since he wishes by means of this to help others” and “will refrain from giving to anybody and everybody,” though it is “highly characteristic of a liberal man also to go to excess in giving, so that he leaves too little for himself; for it is the nature of a liberal man not to look to himself.”<sup>36</sup> If he were to give too much relative to his income and cross into prodigality, he could not be said to have a bad character, but he would be foolish.<sup>37</sup>

At the other extreme in Aristotle’s spectrum of giving and taking lie meanness and two sorts of men: those who hoard their own money but do not covet that of others – miserliness – and those who take anything from any source to satisfy their “sordid love of gain” – greediness.<sup>38</sup> Aristotle nonetheless perceives in some miserly men a virtue: they hang on to their money because they want to avoid disgrace – “to avoid being forced at some time or other to do something base.”<sup>39</sup> In others he observes a semblance of virtue: a rational (if calculated) fear, of taking from others lest they be taken from.<sup>40</sup> By contrast, those who are greedy are shameless and fearless: they do

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NICOMACHEAN ETHICS bk. IV, at 188 n.a (T.E. Page et al. eds., H. Rackham trans., Harvard Univ. Press rev. ed. 1934) (c. 384 B.C.E.) [hereinafter NICOMACHEAN ETHICS (Rackham trans.)].

<sup>31</sup> NICOMACHEAN ETHICS, *supra* note 4, bk. IV, 1120a2-4, at 79.

<sup>32</sup> *Id.* bk. IV, 1120a4, at 79 (internal quotation marks omitted).

<sup>33</sup> *Id.* bk. IV, 1119b27-35, at 79.

<sup>34</sup> *Id.* bk. IV, 1120a19-20, at 80.

<sup>35</sup> *Id.* bk. IV, 1120a24, at 80.

<sup>36</sup> *Id.* bk. IV, 1120b2-6, at 81.

<sup>37</sup> *Id.* bk. IV, 1121a25-26, at 83.

<sup>38</sup> *Id.* bk. IV, 1121b10-1122a15, at 84-85.

<sup>39</sup> NICOMACHEAN ETHICS (Rackham trans.), *supra* note 30, bk. IV, 1121b25-26, at 201.

<sup>40</sup> NICOMACHEAN ETHICS, *supra* note 4, bk. IV, 1121b27-30, at 84.

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not care about their reputation and take from wrong sources, robbing even their friends and risking their own lives.<sup>41</sup> Meanness, in both forms of miserliness and greediness, appears then to be more contrary to liberality than does prodigality, and thus a greater vice, and also the more common of the two extreme vices.<sup>42</sup>

A. *Price-Gouging and Awarding the Purple Heart*

With respect to price-gouging, Aristotle would therefore empathize with Sandel's outrage at brazen greed, but would hesitate to recommend, as Sandel does, laws to restrain it by punishment,<sup>43</sup> preferring to rely on the responsiveness of consumers as the better way to promote virtue, freedom, and welfare. As indicated above, prices compel consumers to assess the intensity of their needs and wants; goods and services deemed necessary become unnecessary in other circumstances. High prices check impulsive and wasteful buying, reducing prodigality; in other words, they promote self-control or virtue with respect to wealth. In addition, price-gouging requires two parties; refusal of consumers to buy – their option to boycott – exercises their choice and communicates directly, rather than through government, to sellers, thus preserving freedom. Sellers who respond by lowering their prices are rewarded with purchases; sellers who do not lower their prices lose out financially (competition between even two sellers can be an antidote to price-gouging). If disastrous circumstances unequivocally favor sellers, then their windfall is fleeting – a temporary injustice – and may indeed promote the influx of goods and services where they are urgently needed. In such circumstances, a windfall for sellers may be the most efficient way to promote the welfare of individuals, as Sandel concedes when he makes a concession to the importance of life over virtue.<sup>44</sup> Moreover, while price-gouging vendors in disasters can be judged greedy, cannot reluctant buyers in disasters be judged miserly? Who would think twice before buying over-priced bottles of water or other necessities for their family? Nobility may overbalance greed, perhaps even shame the greedy. Hence, while disasters provide occasions for injustice – not only price-gouging but also looting, robbery, and rape – and challenge the exercise of virtue, they also illustrate the secondary importance of justice to survival.

The Purple Heart award debate, concerning whether the Purple Heart is limited to veterans with physical injuries or if soldiers can also receive the award for psychological injuries, also illustrates the secondary importance of justice to survival or welfare.<sup>45</sup> Key to deciding the question of whether veterans with post-traumatic stress disorder (PTSD), in addition to veterans

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<sup>41</sup> *Id.* bk. IV, 1121b30-1122a10, at 85.

<sup>42</sup> *Id.* bk. IV, 1122a12-20, at 85.

<sup>43</sup> SANDEL, *supra* note 1, at 7-8.

<sup>44</sup> *See id.* at 8.

<sup>45</sup> *See id.* at 10-12.

who have lost limbs, should receive the award is the former's eligibility for government-funded medical treatment; it is not contingent on receipt of the award.<sup>46</sup> That both mentally and physically injured veterans are guaranteed medical care lessens the intensity of the debate over magnitude of sacrifice, and could be speculated to have paved the way for the Pentagon's decision about awarding the Purple Heart for physical injuries only. People are more willing to grant honors if honors do not affect welfare or monetary compensation.<sup>47</sup>

The primacy of welfare or survival in this case is underscored by the failure of two compelling arguments to justify awarding the Purple Heart only to soldiers with physical injuries. One is the diagnosis argument: even though it could be agreed that losing a limb and losing one's mind are morally equivalent sacrifices, it has to be acknowledged that diagnosing the latter with certainty is impossible in every case. The second is the recovery argument: losing a limb and losing one's mind are not equivalent sacrifices inasmuch as recovery of one's mind is possible, while recovery of a limb is not. Either argument favors giving the Purple Heart only to those who have lost a limb,<sup>48</sup> but neither argument wins if medical coverage is at stake. That is, neither the uncertainty of diagnosis nor the possibility of recovery justifies denial of medical care to those with (apparent) PTSD, because their welfare or survival is at stake. If their needs are covered, however, then they can easily live without recognition in the form of a medal, like Aristotle's properly proud, great-souled man, who does not regard honor as "a very great thing."<sup>49</sup> The debate and resolution apropos the Purple Heart award thus appear to illustrate valuation of economic justice (in the form of medical coverage) over distributive justice (honor or recognition).<sup>50</sup>

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<sup>46</sup> See *id.* at 10 (explaining that veterans with psychological injuries cannot receive the Purple Heart "even though they qualify for government-supported medical treatment and disability payments").

<sup>47</sup> Although Purple Heart recipients are entitled "to special privileges in veterans' hospitals," *id.*, they appear to be minor benefits relative to the costs of medical treatment. See Lizette Alvarez & Erik Eckholm, *Purple Heart Is Ruled Out for Traumatic Stress*, N.Y. TIMES, Jan. 8, 2009, at A1 ("The medal entitles veterans to enhanced benefits, including exemptions from co-payments for veterans hospital and outpatient care and gives them higher priority in scheduling appointments.").

<sup>48</sup> I modified the Pentagon's two 2009 arguments, which coupled the diagnosis argument with an intentionality argument: the enemy does not intentionally inflict mental disorders. See SANDEL, *supra* note 1, at 10 ("The Pentagon offered two reasons for its decision [to reserve the Purple Heart for soldiers with physical injuries]: traumatic stress disorders are not intentionally caused by enemy action, and they are difficult to diagnose objectively." (citing Alvarez & Eckholm, *supra* note 47)).

<sup>49</sup> NICOMACHEAN ETHICS, *supra* note 4, bk. IV, 1124a16, at 91.

<sup>50</sup> The Purple Heart award strikes me as embarrassing. What tone should the award ceremony take? With what sort of disposition should veterans receive the award? I cannot imagine any tone or disposition that would be fitting – only discomfort and unsettling

## III. INDIVIDUALISM AND THE MORAL LIMITS OF THE MARKET

Sandel criticizes unregulated individual free choice in the market.<sup>51</sup> To determine which goods and services our laws should regulate, and whether something should be for sale at all, we – citizens in public debate – should enlist Aristotle’s functionalism. That is, we should ask, “What is the purpose of X?” The answer to that question provides a criterion of guidance, but, even from Aristotle’s point of view, does not exclude other considerations – or more precisely, even other purposes or ends connected to X. As indicated in the discussion above, living well requires living, that is, self-preservation, though a happy life may nonetheless entail the choice to die. A happy life is the ultimate human goal according to Aristotle,<sup>52</sup> but many ingredients make up a happy life – health, wealth, looks, family, friends, and occupation, with philosophical and political engagement being the best and second best occupations.<sup>53</sup> In other words, multiple functions – physical, moral, and intellectual – need fulfillment. Alternative ways to fulfill those functions present themselves daily in every adult human life, and having to choose constantly among those ways is the inescapable human condition, at least in a free society. That is, the only way we can escape making choices is by forming a society that robs us of choice, by legislating conduct. Although Aristotle does not deem the freedom to choose, or the activity of making choices, an end in itself, he does deem it integral to virtue and happiness;<sup>54</sup> we can and should be habituated to the right ends – by our parents and yes, the laws – but no human beings or institutions can replace the discretionary powers an individual needs in particular, and especially in unusual, circumstances to actualize those ends.<sup>55</sup>

Circumstances call for discretion, not merely reliance on principles, because they present unique combinations of available knowledge and opportunities and because individuals bring different knowledge to, and, given their different capabilities and resources, have different opportunities in, the same circumstances. No two individuals in the same circumstance have the same knowledge and the same opportunities. Furthermore, their respective knowledge includes their respective self-knowledge, or lack thereof.

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emotions on the part of all present.

<sup>51</sup> See SANDEL, *supra* note 1, at 265 (“Markets are useful instruments for organizing productive activity. But unless we want to let the market rewrite the norms that govern social institutions, we need a public debate about the moral limits of markets.”).

<sup>52</sup> NICOMACHEAN ETHICS, *supra* note 4, bk. I, 1097b1-7, at 11-12; *id.* bk. X, 1176a30-33, at 261.

<sup>53</sup> See *id.* bk. I, 1099a31-1099b8, at 17; *id.* bk. X, 1176a33-b5, at 261.

<sup>54</sup> See *id.* bk. I, 1099b10-25, at 17-18.

<sup>55</sup> On my way to my office some years ago, I passed a student on the sidewalk, yelling furiously into his cell phone a pathetic plea for such discretionary powers: “Well it’s your job as a parent to tell me what to do!”

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As Aristotle says, doing the right thing requires doing it at the right time, in the right way, to the right people;<sup>56</sup> those considerations involve knowledge of those involved, including the actor's knowledge of himself – and thus knowledge of character, position, and relationships in a particular circumstance. What is your role and with whom are you dealing: are you a husband responding to your wife, father responding to your son, son responding to your father, professor responding to your student, homeowner responding to an intruder, consumer responding to a sales representative, or patient responding to a doctor? What are your character traits, or tendencies: kind, brusque, passive, oblivious, disdainful, gregarious, reserved, impatient, solicitous, explosive, self-effacing? According to Aristotle, you should know them and try to correct them toward the relevant mean.<sup>57</sup>

If circumstances and the individuals in them vary, then whatever should be bought and sold to promote the best lives for all concerned should be free to vary, because the individuals in those circumstances, the ones deciding what to buy and what to sell, are the best judges of what will be conducive to their happiness (which is coincident, according to Aristotle, with their virtue<sup>58</sup>). Legislated restrictions on goods and services should be confined to transactions involving living beings who cannot give their consent and cannot defend themselves: children, mentally-handicapped adults, and animals. They should not apply to non-mentally-handicapped adults – Kant's imperative to treat all human beings as ends, that is, as moral persons,<sup>59</sup> notwithstanding.

A. *Selling Kidneys, Assisted Suicide, and Consensual Cannibalism*

If this perspective about the market is adopted to consider examples Sandel gives, then conclusions will differ from his results. Sandel questions the application of libertarian logic to selling kidneys, assisted suicide, and consensual cannibalism.<sup>60</sup> If individuals have a property right in their own respective bodies, then they should be able, without constraints or conditions, to sell a kidney, enlist others to help them die, and allow another person to eat them. Sandel argues that the first two examples are defensible, but not on libertarian grounds,<sup>61</sup> and the first only with qualifications: only organ sales “that save lives and that do not imperil the life of the seller” should be

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<sup>56</sup> *Id.* bk. IV, 1120a24, at 80.

<sup>57</sup> *Id.* bk. II, 1106b16-22, at 38; *id.* bk. II, 1109b2-7, at 46.

<sup>58</sup> *See id.* bk. X, 1177a10, at 263.

<sup>59</sup> IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 46-47 (Allen W. Wood ed. & trans., Yale Univ. Press 2002) (1785).

<sup>60</sup> SANDEL, *supra* note 1, at 71-74.

<sup>61</sup> *Id.* at 71-72 (arguing that kidney sales are defensible on the grounds that they save lives without the death of the seller, but pointing out that these considerations are irrelevant to the libertarian argument); *id.* at 73 (arguing that assisted suicide is defensible on grounds of dignity and compassion, rather than libertarian grounds of personal autonomy).

permitted.<sup>62</sup> Although Sandel says that “such a policy would not rest on the principle of self-ownership,”<sup>63</sup> he does not say explicitly on what it does rest, though it appears to rest not only on the value of life itself – on staying alive – but on the utilitarian logic of maximization, that is, on keeping as many people alive as possible. From Aristotle’s perspective, however, not only the life of the seller but the quality of his life is a consideration: is his life worth living if he carries on without having risked or sacrificed his life? Only the seller can be cognizant of all the considerations. It appears that on Aristotelian grounds of quality of life, a person should be able to imperil his own life for a noble sacrifice. And if a donor uses money he receives in compensation to help others, then the meaning or worth, and therewith the quality, of his life, or death, is further increased. If selling kidneys can increase the quality of the donor’s life, then it resembles assisted suicide, which Sandel defends, or at least says is defensible, on the grounds of dignity and compassion.<sup>64</sup> Why not allow that dignity and compassion toward the father who thinks that the best use of his life is to sell his body parts for the education of his children?

Unlike the selling of kidneys, Sandel recognizes consensual cannibalism as “an extreme form of assisted suicide.”<sup>65</sup> If consensual cannibalism saved another’s life or several lives, however, then there would be little moral difference between it and the example of organ sales. A father in a lifeboat with his children might well implore them to eat him, motivated by love, just like the father who chooses to sell his kidneys for his children’s education. Cannibalism that does not save a life but is experimental or recreational, is anomalous, bizarre human behavior that Aristotle would say should be outlawed because it indulges the low, beastly side of human nature.<sup>66</sup>

#### B. *Military Service*

To further determine the morality of the market, Sandel considers the matter of national defense.<sup>67</sup> Should government conscript citizens by lottery and

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<sup>62</sup> *Id.* at 72.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 73.

<sup>65</sup> *Id.* at 74.

<sup>66</sup> Aristotle says that human beings are the worst of all animals with respect to sex and food when they are unregulated by law and education. *POLITICS*, *supra* note 15, bk. I, 1253a32-40, at 37-38. Castigating the practice, observed by alleged barbarians, of killing and eating prisoners of war, the philosopher Michel de Montaigne nonetheless remarked that the practice, accepted by civilized peoples, of torturing live men, is no less contrary to the rules of reason and even more barbarous by comparison. MICHEL DE MONTAIGNE, *OF CANNIBALS* (1580), *reprinted in* THE COMPLETE ESSAYS OF MONTAIGNE 150, 155-56 (Donald M. Frame trans., 1958). Taking Montaigne’s cue – to recognize moral similitude between generally condemned extreme behavior and “our ordinary vices,” *id.* at 156 – I would argue that mutually-consented-to cannibalism is more reasonable and less morally repugnant than eating animals because animals have no say in the matter.

<sup>67</sup> SANDEL, *supra* note 1, at 75.

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fund their military service as economically as possible with taxes, or should government attract volunteers by offering market-competitive salaries? Sandel finds libertarian and utilitarian arguments in favor of a volunteer army initially compelling; a volunteer army is non-coercive and makes both parties better off; the revenue saved by forcing random citizens to serve at below-market pay would not be deemed worth the cost to their freedom and happiness.<sup>68</sup> But would not a coercive lottery worry citizens for another reason? Namely, the prospect of being protected by randomly chosen people, many of whom would not, given odds, have the requisite strength, aptitude, courage, and inclination to serve in the armed forces? A voluntary system would be far more likely to attract fitting types than a coercive one would to chance upon them; and not having in principle to conscript everyone equally and fairly without prejudice (if in practice, randomly) as does a universal lottery, a voluntary system can opt to reject unsuitable volunteers with physical and aptitude tests. Rewarding service with market salaries increases the odds of a competitive pool of applicants and further justifies accepting them selectively.

Absence of this criticism of universal conscription and defense of a volunteer army from Sandel's analysis stands out because the arguments reflect Aristotle's functionalism and its political implications. According to Aristotle, different human beings have different strengths and weaknesses – different virtues – and well-constituted individuals, whose souls are not conflicted, want to play to their strengths or serve purposes for which they are best suited. Right desire characterizes virtue.<sup>69</sup> From an Aristotelian view, it makes sense to want armed forces composed only of citizens who are suited for military service and who want to serve. Establishing a volunteer army with qualifying exams to discriminate the better from the worse and choosing the best candidates would ensure both qualities. By aspiring to place the best candidates in service, rather than the randomly chosen, such a system would be like the U.S. electoral system – in a word, not democratic, but aristocratic, the sort of regime Aristotle admires most.<sup>70</sup>

Having found support, in libertarian and utilitarian reasoning, for a volunteer army, Sandel questions the freedom such an army presupposes; if poverty and lack of opportunities are widespread, then the choice to enlist may not be “all that free”<sup>71</sup> but rather forced by necessity.<sup>72</sup> If substantial economic inequalities are alleviated however, then, he adds, that objection disappears; a level playing field restores freedom and would make a choice to join the army truly voluntary.<sup>73</sup> Apart from the difficulty of determining what counts as

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<sup>68</sup> *Id.* at 79-81.

<sup>69</sup> See *NICOMACHEAN ETHICS*, *supra* note 4, bk. II, 1105a3-5, at 33.

<sup>70</sup> See *POLITICS*, *supra* note 15, bk. IV, 1293b1-20, at 129.

<sup>71</sup> SANDEL, *supra* note 1, at 81.

<sup>72</sup> *Id.* at 82.

<sup>73</sup> *Id.* at 84.

alleviation from economic disadvantages, or fair “background conditions,”<sup>74</sup> Sandel characterizes enlistment in the military as both a form of employment and as a less worthy alternative to an education.<sup>75</sup> Only if individuals have a reasonable number of educational opportunities, he says, can the choice to enlist be said to be free, because then they would not be “unfairly pressured by economic necessity.”<sup>76</sup> But there are plenty of people with degrees, including PhDs, who cannot find jobs, and plenty of people who think military training more worthwhile than academic education. Sandel characterizes military service as a choice of last resort, one that far fewer people would make in a genuinely free society with fair background conditions.<sup>77</sup> But what about Aristotle’s different virtues, different passions argument? Perhaps appearance belies reality and neither economic necessity nor lack of opportunity, but rather aptitude, patriotism, a sense of duty, or a combination of the three induce many to serve their country voluntarily.

In fact, Sandel identifies civic obligation as another objection against using markets to allocate military service; all citizens have a duty to serve.<sup>78</sup> The military should not rely on the labor market to fill its ranks because those who serve should be motivated by patriotism, not only by pay and benefits.<sup>79</sup> Military service divorced from civic responsibility, as if the former were only another form of employment, sacrifices the motivation needed to serve and implies that non-citizens could defend a country as well as its own citizens. Although Aristotle too assumes citizens are obligated to defend the polis, for the sake of preserving it, he dwells only on the practical matter of suitability, not on the moral and psychological matter of motivation.<sup>80</sup> Identifying young men, around the age of eighteen, as the most able in a population to prepare for war,<sup>81</sup> he depicts defense as a need to be met not an obligation to be honored or, as in Sparta, the sine qua non of civic virtue.<sup>82</sup> For Aristotle, military service is not a form of, but for the sake of, civic virtue; it preserves the polis for the sake of politics to bring about the good life.<sup>83</sup>

### C. *Gestational Surrogacy*

In addition to military service, money should not be able to procure other services, according to Sandel, though for reasons other than patriotism. In the

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 82.

<sup>76</sup> *Id.* at 84.

<sup>77</sup> *See id.* at 82-83.

<sup>78</sup> *Id.* at 84.

<sup>79</sup> *See id.* at 86.

<sup>80</sup> *See* POLITICS, *supra* note 15, bk. VII, 1333a30-1333b3, at 220; *id.* bk. VIII, 1339a4-5, at 233.

<sup>81</sup> *See id.* bk. VIII, 1339a4-5, at 233.

<sup>82</sup> *See id.* bk. VII, 1333b5-1334a1, at 221.

<sup>83</sup> *See id.* bk. VII, 1333a30-1333b3, at 220.

case of gestational surrogacy, for example, the reason is the freedom of the surrogate, the possibility that her choice is forced by poverty and not free.<sup>84</sup> A woman in India who made \$25 a month as a maid became a gestational surrogate for a British couple who paid her \$4500.<sup>85</sup> But in the spirit of Aristotle we should ask not whether her choice was free, but whether it was a good one for her. Only she could, and did, answer that question; it looks like it was a good choice, in her circumstances, inasmuch as it alleviated her economic hardship.

Sandel worries that if the practice of paid pregnancy becomes a global industry it will degrade women by sanctioning the use of their reproductive capacities to make money.<sup>86</sup> Women in poor countries, even women in rich ones, might respond, “Thanks for your concern, but we’re grown-ups and can decide for ourselves how to use our bodies.” Because surrogacy is a way for women to make money in a way that men cannot, it should be allowed *especially* in countries in which women are denied equal opportunities to men and discriminated against in multiple ways.

If choices that are forced – or more accurately, motivated – by economic necessity are common and made by such dissimilar individuals as “pregnant surrogates in India and the soldier Andrew Carnegie hired to take his place in the Civil War,”<sup>87</sup> so are choices induced by other, less apparent, motives, or additional motives. In fact, the foremost rationale for an unregulated economy, the most compelling reason to keep a market free, are the unknown, multiple motives behind human conduct – motives that may not be apparent, that may emanate from self-knowledge, and that may best promote the interests and good of the individual making the choice. Maybe poverty induced the Indian surrogate and the Carnegie surrogate to become surrogates for money. But maybe poverty was not their decisive motive. Maybe they were motivated by love or by pleasure. Maybe the Indian woman enjoys being pregnant because it gives her a sense of well-being (not an unknown phenomenon), but her husband does not want to raise any more children; surrogacy allows her to be pregnant and to avoid having to raise another child and, as a bonus, generates income. Maybe the soldier volunteered to fight for Carnegie because he wanted to win the admiration of a woman with whom he was in love and become financially comfortable enough to marry her. Indeed, how many choices are motivated, often secretly and especially when young, by romantic love or lust for someone?

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<sup>84</sup> SANDEL, *supra* note 1, at 101.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 101-02.

IV. IDEALIZING CONSENT: THE MORALITY OF FREEDOM AND THE WHOLE TRUTH

According to my reading of Sandel, in order for consent to be moral, it must meet two conditions: (1) whatever is consented to must be fair to both parties; in other words, benefits must be commensurate; and (2) in order for benefits to be commensurate, the parties must be equal in power and knowledge. Most acts of consent do not meet these two standards, and thus agreements are not necessarily fair, Sandel says, because “[i]n real life, persons are situated differently”<sup>88</sup> – they are unequal and cannot equally arrange that to which they really want to consent.<sup>89</sup>

Sandel refers to the above moral standards of consent as the ideals of “reciprocity” and “autonomy.”<sup>90</sup> One observation: the standard of reciprocity or, I will now say, commensurability, entails or presupposes the standard of autonomy, but not the other way around. For an exchange to be commensurate, both parties must make a knowledgeable or informed assessment of the worth of the goods and/or services exchanged, and be in a position to refuse an unequal transaction and negotiate an equal one. Autonomy does not however necessarily lead to commensurable agreements. One party may be equal in knowledge and power to another and choose to receive less from an agreement. But does this mean that it is not fair?

Sandel’s two moral standards for consent do not reflect common understanding and common practice, which have become common for good reasons. First of all, parties to agreements routinely factor in a host of considerations that are not necessarily apparent or even objectively measurable. A woman may consent to pay nearly half again over market price for a house because it is two doors away from her cancer-stricken mother or two doors away from a man with whom she is in love. The transaction may appear to be unfair – no house in the neighborhood has ever sold for nearly that much – and the seller may appear to have exploited the buyer, but the buyer may think the price well worth the proximity to her dying mother or hoped-for husband. Because people often keep their motives and desires to themselves, the benefits of their agreements also may not be apparent; rather than obvious, measurable, and objective, those benefits may be private, intangible, and subjective.

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<sup>88</sup> *Id.* at 150.

<sup>89</sup> *Id.* at 149-50.

<sup>90</sup> *Id.* at 149. By characterizing the first standard as commensurability, I am thus taking a liberty of interpretation: according to his analysis of examples, I think Sandel means not only that both parties to an agreement should benefit – that a mutual, two-way, reciprocal exchange should take place – but that they should benefit *comparably*. In other words, neither party should take advantage of the other, as did the plumber who charged an elderly widow \$50,000 to fix a leaky toilet, *id.* at 145 – an agreement that “mocks the ideal of reciprocity,” *id.* at 146.

No one can accurately say, then, what something is worth to someone else or proclaim what is a fair or unfair deal for that person. No one knows the whole truth of someone else's situation, their priorities, or what they deem is at stake. Empirical facts – the size of a house, the amount of alimony, the length of an employment contract – may be secondary to other considerations – memories evoked by the house, the shame of alimony, and passion for a calling. No one can have another person's self-understanding.

But \$50,000 to fix a leaky toilet?<sup>91</sup> “Come on,” you might say, “anyone can see that that's exploitation, especially of an elderly widow.” Sandel admits, however, that he “do[es]n't know the details of the case.”<sup>92</sup> What if that widow was the imperious billionaire Leona Helmsley, and she had wanted her toilet fixed “*Now!*” What if she had made a quick calculation and decided that, relative to her worth, fifty grand was not an amount worth haggling over? Would the judgment then favor the plumber: he was right to take the money, considering not only her obscene wealth but her nasty attitude to boot? Or, what if the plumber had consented to repair the toilet for two dollars? Would the elderly widow have exploited him, or would that judgment depend on whether the woman was rich or poor? Maybe a plumber routinely fixes the toilets of poor old women for two dollars and feels compensated by their gratitude. All of these scenarios presuppose that both parties were of sound mind, but if the details of the case revealed that the elderly widow was not,<sup>93</sup> then her consent would have been invalid and she would not have been morally obligated to pay the \$50,000. But the larger point remains: because consent may accrue intangible benefits, reciprocally beneficial does not mean objectively commensurate.<sup>94</sup>

Two practices, often seen within families, further illustrate consent motivated by intangible benefits: (1) an older person employs a younger relative for a rate of pay far above the current market wage (e.g., for stocking shelves at uncle's hardware store, xeroxing at mother's law firm, or mowing grandma's lawn); and (2) a relative sells a house to another relative – often a parent to an adult offspring – for a price well below the current market price, even for the token amount of one dollar. The agreement is only fair if it is conceded that intangible benefits compensate. Otherwise, nepotism best illustrates consent to exploitation.

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<sup>91</sup> See *id.* at 145 (describing the example of an elderly widow who was going to pay \$50,000 to a plumber to fix her leaky toilet).

<sup>92</sup> *Id.* at 146.

<sup>93</sup> Which seems to me the likely crucial detail.

<sup>94</sup> That is why electricians, plumbers, and other repairmen can charge high prices for their labor; homeowners are willing to pay for convenience, safety, and peace of mind. While writing this Essay, I paid a plumber \$120 just to replace a washer in a leaking sink faucet because I did not want to take the time to learn how to do that simple repair. Even he indicated incredulity at my expenditure, saying he could have told me how to fix it “over the phone.”

Regarding Sandel's second condition for moral consent, autonomy of each party, two difficulties emerge. It is unrealistic, because no two people, as Hayek so effectively points out, have or can have the same knowledge and opportunities (or power); everyone is in a different situation even if they appear to be in the same situation or attempts have been made to correct or equalize their situations.<sup>95</sup> That does not mean that in every transaction one person necessarily has or takes the advantage; rather, it means that only each person can judge whether a transaction is satisfactory. Moreover and ironically, the expectation that autonomy yields commensurate agreements circumscribes consent's potential moral force, for, as mentioned above, it requires or implies that a person should never accept less than he is due. The implication that an autonomous person always seeks his share or due undermines acts of graciousness and generosity.

The fact that unequal individuals in free societies consent daily to transactions in which they appear to get less than they deserve suggests not only that an observer cannot know another person's degree of satisfaction, but also that their satisfaction derives in part from the freedom to consent. Michael Oakshott proposes that the value individuals place on such freedom presupposes and springs from an "historic disposition" characteristic of those "brought together and held together in a modern European state": "the disposition to recognize imagining, deliberating, wanting, choosing, and acting not as costs incurred in seeking enjoyments but as themselves enjoyments, the exercise of a gratifying self-determination or personal autonomy."<sup>96</sup>

While Aristotle agrees with Oakshott that human beings need to be habituated to choice making, he notes also that we are born suited for that habituation.<sup>97</sup> Because making choices is one of our functions or purposes, it is in itself gratifying.

#### V. CONSENT AND MORAL OBLIGATION

The moral importance of choice making or the morality of freedom recedes even further in Sandel's account when he claims that moral obligations do not necessarily involve consent.<sup>98</sup>

They can arise if one party receives benefits without his consent.<sup>99</sup> Sandel illustrates the distinction between "consent-based" and "benefit-based" aspects of obligation<sup>100</sup> with three examples: Hume's house, New York City squeegee

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<sup>95</sup> 2 HAYEK, *supra* note 16, at 82-85.

<sup>96</sup> MICHAEL OAKSHOTT, ON HUMAN CONDUCT 236 (1975). In Oakshott's account, "autonomy" does not bear the burdens of knowledge and power Sandel places on it.

<sup>97</sup> See NICOMACHEAN ETHICS, *supra* note 4, bk. II, 1103a24-25, at 28; *id.* bk. II, 1106b36, at 39.

<sup>98</sup> SANDEL, *supra* note 1, at 146.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 147.

men, and Sam the auto mechanic.<sup>101</sup> While Sandel sees a similarity between the first two examples,<sup>102</sup> he apparently does not see a similarity between either of them and the case of Sam, which he discusses separately. By contrast, I see a strong similarity between the New York squeegee men and Sam and would put the Hume's house case in a different moral category. Sandel characterizes "high-pressure sales tactics and other abuses" of the sort used by the squeegee men as a morally downward "slide" from the repairs on Hume's house contracted by a subtenant, which he deems, without saying exactly why, as "morally plausible."<sup>103</sup> But the difference between the two cases is less a slide than a chasm, due to the legally-recognizable fact that Hume's subtenant contracted to live in his house – that is, pay rent for the benefit of shelter and the other particular conveniences of the house – whereas the squeegee men did not contract to rent and drive the cars whose windows they cleaned. The subtenant could and likely did defend in court the "need" for repairs on the grounds of utility and safety, if not also on the standard of living that the original design and construction of the house incorporated (e.g., indoor plumbing), whereas the squeegee men could not comparably argue that the car windows needed cleaning for the sake of their own driving safety, as if they were chauffeurs or taxi drivers.

The similarity between the squeegee men and Sam the auto mechanic is greater than the similarity between the squeegee men and Hume's subtenant: both the squeegee men and Sam are con-artists after money. By contrast, Hume's subtenant did not seek financial gain or the house itself. Sandel writes that his dealings with Sam highlight the common misunderstanding that obligations imply prior consent,<sup>104</sup> when they appear rather to highlight, with all due respect to Professor Sandel, that the young Sandel was had. Sandel says that Sam mistakenly inferred that, had he fixed Sandel's car, Sandel would have owed him money because he implicitly agreed to hire him to do that.<sup>105</sup> Sam made no such mistake. He knew full well that Sandel did not hire him. Exactly like the squeegee men, Sam began working on the car without permission from the owner. After Sam began "poking around under the steering column"<sup>106</sup> without objection from Sandel ("I was unsure what to do"<sup>107</sup>), Sam inferred that his tactic would work and that Sandel would feel obligated to pay him, an inference very likely based on the majority of his past initiatives (if not also on his prior experience with college boys from the East). If, alternatively, Sandel were to object later and refuse payment, a possibility Sam had likely figured into his scheme, Sam knew he could argue that, by

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<sup>101</sup> *Id.* at 146-49.

<sup>102</sup> *See id.* at 146-47.

<sup>103</sup> *Id.* at 147.

<sup>104</sup> *Id.* at 148-49.

<sup>105</sup> *Id.* at 148.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

letting him look under the steering column to investigate the problem, Sandel had tacitly given his consent and agreed to hire him. (Sam might have said: “If you didn’t intend to pay me, then why did you let me look under your hood?”)<sup>108</sup>

A final observation about Sandel’s rendition of events: he does not say how the episode ended. Did Sandel give Sam any money, even a token amount, like a few bucks, as thanks for his time? How did Sandel get his car fixed? Once again, the whole truth is not apparent.

#### VI. IMAGINE ALL THE PEOPLE: A PUBLIC CULTURE HOSPITABLE TO DISAGREEMENTS?

In order to achieve a just society according to Sandel, citizens must talk – a lot, in public, and seriously – about moral, spiritual, and religious matters.<sup>109</sup> To promote such an intensively verbal means to justice, he calls for an infrastructure deliberately redesigned to bring together socioeconomically divergent individuals.<sup>110</sup> “[C]itizens from different walks of life” should encounter each other in trains, parks, libraries, museums, clinics, schools, playgrounds, and community and recreation centers.<sup>111</sup> Their encounters will generate politically relevant dialogue about serious topics, dialogue made possible by a “public culture hospitable to the disagreements that will inevitably arise.”<sup>112</sup>

Sandel’s argument, however, raises several questions. Does Sandel want citizens to talk their way to a just society, or does he want to achieve a just society to encourage talk? Numerous political philosophers throughout history have addressed the topic of public discussion, its ideal participants, optimum amount, and aim;<sup>113</sup> Sandel seems to veer away from Aristotle’s orientation to the good life, as well as away from a modern natural rights defense of silent minorities, toward a late- and post-Enlightenment emphasis on association,<sup>114</sup>

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<sup>108</sup> Though I am saying that Sandel was conned, I am not implying my own invulnerability to con-artists. Not too long ago, I was duped by a freelance house painter with a scheme designed to confuse payment for supplies with payment for labor. Realizing his game after he had begun the job, I fired him, but not in time to stop payment on my checks. My point is that con-artists exist, and some are very good – i.e., bad.

<sup>109</sup> *Id.* at 248 (“Why should we not bring our moral and religious convictions to bear in public discourse about justice and rights?”); *id.* at 262 (inviting us to imagine “a politics that takes moral and spiritual questions seriously”).

<sup>110</sup> *Id.* at 267.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 261.

<sup>113</sup> See, e.g., Joshua Cohen, *Reflections on Deliberative Democracy*, in CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY 247, 248-53, 256-59 (Thomas Christiano & John Christman eds., 2009) (discussing the goals of participation and deliberation within the radical-democratic philosophy).

<sup>114</sup> This emphasis on association appeared first in Jean-Jacques Rousseau’s *On the Social*

replacing a politics of ends, or a politics of freedom, with a politics of process, or at any rate suggesting a convergence rather than a tension between community and happiness. One wonders if the hospitable culture of engagement he imagines presupposes the justice it seeks.<sup>115</sup>

Whether public discussion is a means or an end, it will encounter two problems in this day and age: language and technology. Sandel does not want citizens to talk about the weather; he wants them “to reason together about the meaning of the good life.”<sup>116</sup> That is a challenging task even when all parties to the conversation speak the same language, but an impossible one when one speaks Portuguese, another Turkish, and another English. In addition to multiple languages, multiple gadgets impede conversation among strangers: these days, everyone, everywhere is looking down at an iPad, listening to an iPod, or talking into an iPhone. A redesigned infrastructure that encourages

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*Contract* (1762). See JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 102 (Roger D. Masters ed., Judith R. Masters trans., St. Martin’s Press 1978) (1762) (“The better constituted the State, the more public affairs dominate private ones in the minds of the citizens. . . . In a well-run City, everyone rushes to assemblies.”). While Rousseau regarded participation as a gauge of political health, his predecessor David Hume, for example, recognized association or participation as a problem and threat. See DAVID HUME, *Idea of a Perfect Commonwealth* (1752), reprinted in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 512, 523 (Eugene F. Miller ed., LibertyClassics rev. ed. 1987) (“If the people debate, all is confusion: If they do not debate, they can only resolve; and then the senate carves for them. Divide the people into many separate bodies; and then they may debate with safety, and every inconvenience seems to be prevented.”).

<sup>115</sup> Three months after this Symposium, on January 8, 2011, Arizona congresswoman Gabrielle Giffords was shot in the head during an open meeting she was holding in a supermarket parking lot. Eighteen others at the event, called “Congress on Your Corner,” were also killed or injured by the gunman, whose actions may or may not have been politically motivated. See *2011 Tucson Shooting*, WIKIPEDIA, [http://en.wikipedia.org/wiki/2011\\_Tucson\\_shooting](http://en.wikipedia.org/wiki/2011_Tucson_shooting) (last modified Apr. 15, 2011, 12:51 PM).

Ordinary citizens’ encounters with strangers in public also sometimes include alarming conduct that fosters avoidance rather than engagement, such as (to borrow from my own experience): a man exposing himself (to me and my friends sitting on a park bench); a wallet taken from my purse on a train and another from my pocket in a Walgreens; a teenage boy hiding in a stall in a women’s bathroom; a man imitating cunnilingus in my line of vision while I was lying on the grass in a park; a hot dog hurled at my back while I was jogging; witnessing a purse-snatcher knock an elderly woman to the sidewalk; a run-by groping of a woman sunbathing on a lakeshore; and other such lewd and threatening conduct, further examples of which can be found daily in the metro sections of city newspapers.

<sup>116</sup> SANDEL, *supra* note 1, at 261. Whereas Sandel apparently thinks that deliberation about the good life is the means to justice, Aristotle does not deem justice the end of the good life, see *NICOMACHEAN ETHICS*, *supra* note 4, bk. X, 1178b7-11, at 267; *id.* bk. X, 1178b20-24, at 268, nor does Aristotle think that the good life requires deliberation about all conventions, customs, and practices, see *POLITICS*, *supra* note 15, bk. II, 1268b33-1269a25, at 72-73, and therewith, by inference, about sports, as Sandel does, see SANDEL, *supra* note 1, at 184-86 (discussing cheerleading); *id.* at 204-05 (discussing golf).

public interactions may bring people together physically, but their linguistic and technological handicaps will maintain their intellectual and psychological barriers.

Oddly, among the many places that Sandel hopes people will meet and greet, churches – as well as other religious centers such as synagogues and mosques – are absent.<sup>117</sup> Is that because he supposes everyone inside them believes the same thing? Perhaps. But their absence from his list of public gathering places does not hide the difficulty that their actual existence poses to the public culture he envisions; the absence of churches from the list even suggests that that culture may require their absence – that is to say, their disappearance – from the public domain. Such a secular culture, by favoring atheism, would regard all religions equally, but not seriously. But how can a public culture take seriously the full range of moral, spiritual, and religious convictions if some convictions exclude others? Only if convictions respect rights would that be possible. In that case, the principle of toleration, a Western liberal principle that forecloses the freedom of intolerance, would inform them.<sup>118</sup> In a tolerant culture, citizens keep their intolerant moral and religious convictions private, separate from their identity as citizens, and religious institutions honor the rule of law.

#### VII. THE BEST PLACE FOR CANDID POLITICAL TALK: UNIVERSITIES?

Sandel's call for lots of candid, serious talk in public among all citizens – talk about virtue – appears to be Aristotelian. Aristotle connects citizenship with political participation: a citizen is a person who is entitled by a government to participate, and therefore should participate; it is the chief privilege of citizenship.<sup>119</sup> Aristotle also observes, however, that most human beings, when given the opportunity to participate in political life, do not want to talk about virtue.<sup>120</sup> Only a minority care about virtue. The majority wants instead to promote freedom; they want to protect and expand their right to live as they wish.<sup>121</sup> From Aristotle's point of view, then, a government that opens citizenship to everyone – namely, a democracy – should not expect a public culture that fosters virtue. The majority of people will not collectively generate such a culture.

If the goal is a virtuous culture or society, then, government should count not on the majority but on a minority passionate about virtue. A society led by such individuals would be, in Aristotle's eyes, an ideal aristocracy. Aristotle

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<sup>117</sup> See SANDEL, *supra* note 1, at 267.

<sup>118</sup> The principle of toleration suggests a solution to the chicken or egg problem alluded to above: justice is a condition of serious talk among citizens.

<sup>119</sup> POLITICS, *supra* note 15, bk. III, 1275b18-21, at 87.

<sup>120</sup> See *id.* bk. VI, 1319a24-30, at 187.

<sup>121</sup> See *id.* bk. VI, 1317a40-1319b32, at 183-88. Democracy is a “[d]evia[nt]” – not “correct” – type of regime because its rulers rule in their own interest, not for the sake of the common good. *Id.* bk. III, 1279a17-21, at 95; *id.* bk. III, 1279b4-10, at 96.

thus positions democracy in opposition to aristocracy and presents us with a choice between a society that welcomes the participation of everyone and a society that fosters virtue.

One of the hazards of the majority advocating freedom is that it can lead to immoderate speech. The intensity of the majority's advocacy may discourage the minority from making moderate defenses of contrary views. Those who are not talkative, opinionated, and politically-inclined, but rather quiet, reserved, and privately-inclined, may go unheard. According to John Stuart Mill, strident speech deters people from professing contrary opinions and from listening to those who profess them:

In general, opinions contrary to those commonly received can only obtain a hearing by studied moderation of language, and the most cautious avoidance of unnecessary offence, from which they hardly ever deviate even in a slight degree without losing ground: while *unmeasured vituperation employed on the side of the prevailing opinion*, really does deter people from professing contrary opinions, and from listening to those who profess them. *For the interest, therefore, of truth and justice, it is far more important to restrain this employment of vituperative language than the other* [i.e., than the use of invective by opponents of popular opinion] . . .<sup>122</sup>

Whether moderate or immoderate, public criticism of morality and religion undermines public mores and traditions core to a country's identity, unsettling citizens particularly in times of war and national holidays. Socrates paid the price of his life for publicly questioning the moral and religious convictions of his fellow Athenian citizens,<sup>123</sup> and Plato and Aristotle teach a lesson, by making an example of Socrates, about the wisdom of keeping politics and philosophy in separate spheres.<sup>124</sup> Because certain traditions are integral to every society, free skeptical speech should find another home, namely in universities and centers for intellectual discourse. Removed from the public domain, critics of prevailing mores, beliefs, and practices can speak in the candid way that moral philosophy demands. Sandel wants us to speak frankly wherever we are and to whomever we are with, assuming no need to tailor the form and content of our speech to the environment or audience. That democratic impulse to speak in the same way to everyone betrays a naïve and

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<sup>122</sup> JOHN STUART MILL, ON LIBERTY (1859), *reprinted in* ON LIBERTY AND OTHER ESSAYS 1, 61 (John Gray ed., Oxford Univ. Press 1991) (emphasis added). Mill does not prescribe cloistering speech, but does think it should be directed by an educated elite. *See* JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861), *reprinted in* ON LIBERTY AND OTHER ESSAYS, *supra*, at 203, 311-13, 315-17, 334-37, 340-41.

<sup>123</sup> *See* PLATO, THE APOLOGY 19C, 24C, 39A, 42A (c. 399 B.C.E.), *reprinted in* EUTHYPHRO, APOLOGY, CRITO, PHAEDO, PHAEDRUS 61, 75, 91, 137, 145 (G.P. Goold ed., Harold North Fowler trans., Harvard Univ. Press 1914).

<sup>124</sup> *See* LEO STRAUSS, THE CITY AND MAN 25-29, 122-28 (1964).

potentially lethal faith in human beings and in the power of conversation to resolve our differences.

#### VIII. THE JUSTICE THAT MATTERS MOST: CRIMINAL

Sandel says that people do not want politics and law to become entangled in moral and religious disputes because they worry about coercion and intolerance; they do not want their freedoms taken away.<sup>125</sup> But they also worry about violence. Today, in our post-9/11 world, that worry is palpable, but not new. Threatening and inflammatory speech and conduct in free societies have two related implications for justice. Such speech and conduct implies that, of all the sorts of justice, criminal justice matters most, and that public and private institutions should provide citizens legitimate means of vigilance.

Recall that Aristotle identifies three kinds of justice: distributive or honorific, economic, and punitive or criminal.<sup>126</sup> Although he recognizes politics as the most authoritative science because it establishes the priorities of citizens by way of distributive justice, he indicates that preservation of a polity by way of economic and punitive justice takes precedence whenever its viability becomes questionable.<sup>127</sup> Politics in peril should in other words fall back on the liberal conception of justice, here articulated by Adam Smith:

Mere justice is, upon most occasions, but a negative virtue, and only hinders us from hurting our neighbour. The man who barely abstains from violating either the person, or the estate, or the reputation of his neighbours, has surely very little positive merit. He fulfils, however, all the rules of what is peculiarly called justice, and does every thing which his equals can with propriety force him to do, or which they can punish him for not doing. We may often fulfil all the rules of justice by sitting still and doing nothing.<sup>128</sup>

One reaction to my point may be, “Of course criminal justice matters most. That is taken for granted. Protection from harm is the basis of a liberal society. But if we want a better society, then distributive justice – the fair distribution of power and resources – matters too.” The more common response today, however, reflects Sandel’s view that poverty forces choices: distributive justice matters most because crime results from its failures. The response implies that if society solves the problem of distributive justice, the problem of crime will

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<sup>125</sup> SANDEL, *supra* note 1, at 248-49.

<sup>126</sup> *See supra* notes 5-9 and accompanying text.

<sup>127</sup> *See* POLITICS, *supra* note 15, bk. VII, 1332a12-15, at 217 (“In the case of just actions, for example, just retributions and punishments derive from virtue, but they are necessary, and have the element of nobility only in a necessary way (for it would be more choiceworthy if no man or city required anything of the sort) . . .”). *See generally id.* bk. V, 1307b25-1310a38, at 162-67 (describing how to make regimes lasting).

<sup>128</sup> ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 82 (D.D. Raphael & A.L. Macfie eds., Liberty Fund photo. reprint 1982) (1759).

disappear or diminish. My point is, it is no longer taken for granted that criminal justice matters most, at least not by those who talk and write about justice. In a free and liberal society, and perhaps especially among the prosperous, it is easy to forget that it is criminal justice that matters most. Yet it is the prosperous who live in the gated communities about which Sandel complains. Sandel wants them to emerge and mingle, but does not reflect on why they choose to live behind gates and beyond cities. Crime is the reason why. And it is not necessarily politically-provoked, post-9/11 crime that prompted the escape.<sup>129</sup> Isolated residential compounds, which sprang up before September 11, 2001, are a consequence, not a cause, of atomistic, alienated communities.

The cause of atomistic, alienated communities is crime. The cure is not more talk about serious matters among socioeconomically, linguistically, and culturally divergent citizens; the cure is prevention of crime.<sup>130</sup>

Citizens can help prevent crime by not acting generously toward strangers. When was the last time you held a door open to an ATM, or to an apartment building, for someone you did not know? Any police officer will tell you that criminals rely on the kindness of strangers.

A. *Private Eyes, Private Sanctions: Guardians of Justice*

Citizens can help not only prevent, but also detect and report, crime. Free societies should continue to encourage citizens to do so, and create more legitimate means of vigilance. After September 11, the federal government encouraged citizens to help in the war against terrorism with the slogan, "If You See Something, Say Something."<sup>131</sup> More recently, as Sandel describes in

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<sup>129</sup> I have been the victim of eight personal and property crimes that I can recall. I have witnessed two others and one attempt. I also know of crimes perpetrated on friends and relatives. From these incidents, as well as published crime statistics, I infer that I am not alone and that the typical American citizen experiences crime.

<sup>130</sup> The crimes that should be prevented foremost are those against children, mentally-handicapped adults, and animals, all who lack the language to refuse and to consent. More stringent definitions, more strenuous prosecutions, and more severe punishments of those crimes are needed. Crimes that should be prevented include the torture inflicted on a dog by Tremayne and Travers Johnson, who doused her with gasoline, poured it down her throat, and set her on fire; and the abuse of a puppy, who was duct-taped, painted, then put in an oven – the fur-lined and nail-scraped walls evidence of his desperate effort to escape. Charles Siebert, *The Animal-Cruelty Syndrome*, N.Y. TIMES, June 13, 2010, at MM 42. Every day animals are immolated, baked, microwaved, bludgeoned, stabbed, mutilated, asphyxiated, drowned, poisoned, ritually murdered, and sexually assaulted – in part because perpetrators are not prosecuted or not punished severely enough. *See id.* For research on the connection between violence against animals and violence against people, see, for example, Frank R. Ascione, *Children Who Are Cruel to Animals: A Review of Research and Implications for Developmental Psychopathology*, in CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE 83 (Randall Lockwood & Frank R. Ascione eds., 1998).

<sup>131</sup> Manny Fernandez, *A Phrase for Safety After 9/11 Goes Global*, N.Y. TIMES, May 11,

his book, the state of Texas began allowing citizens to watch its border through a webcam in order to report illegal crossings.<sup>132</sup> But not only international conflicts and times of war call for domestic vigilance. The pervasiveness of crime in local communities spawns efforts to induce citizens to stop or report crime.<sup>133</sup> Citizens are an important resource to all stages of criminal justice. Calls for their participation in public life should solicit their observations of criminal activity instead of their opinions, beliefs, and arguments, of which we already have too many, or at least enough.

Asking citizens to watch out for and report crime and suspicious activity works because of their desire for retribution, on which both Aristotle and Adam Smith comment. Aristotle observes that human beings are inclined to reciprocate; they want to return not only good for good however, but also evil for evil, and if they cannot do so, they feel enslaved.<sup>134</sup> When they feel they have been treated unjustly then, they want to retaliate. Similarly, according to Adam Smith, unsocial passions, such as hatred and resentment, “are regarded as necessary parts of the character of human nature. A person becomes contemptible who tamely sits still, and submits to insults, without attempting either to repel or to revenge them. We cannot enter into his indifference and insensibility.”<sup>135</sup> According to Smith, we want people who are victimized to take revenge, “provided it is not immoderate”;<sup>136</sup> we feel indignation on their behalf.<sup>137</sup>

The desire for retribution explains the motivation of those Texas citizens who spend hours on the internet scouting for illegal migrants. One person said that it gives him “a little edge feeling.”<sup>138</sup> There is nothing like satisfying a desire for revenge. As Leo Strauss, writing on Machiavelli, says: “The satisfaction of a good conscience is not in all cases as gratifying as the sweetness of triumph or of revenge.”<sup>139</sup>

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2010, at A17 (internal quotation marks omitted).

<sup>132</sup> SANDEL, *supra* note 1, at 230-31 (citing John Burnett, *A New Way to Patrol the Texas Border: Virtually*, NAT’L PUB. RADIO (Feb. 23, 2009), <http://www.npr.org/templates/story/story.php?storyId=101050132>).

<sup>133</sup> In the Hyde Park neighborhood of Chicago during the 1980s, university campus police distributed whistles for residents to blow if ever (or rather whenever) they were attacked or saw an attack. Richard Letchinger, *WhistleStop: The Story of a Community That Rallied Around the Whistle*, HYDE PARK HERALD, Sept. 21, 1983, at 22. I can testify that the plan worked: whistles pierced quiet nights, and people sprang out of their homes and apartments to help. (I now use my yellow plastic whistle, with the faded imperative “Be Alert” on one side, to summon my dog.)

<sup>134</sup> NICOMACHEAN ETHICS, *supra* note 4, bk. V, 1133a1-2, at 118.

<sup>135</sup> SMITH, *supra* note 128, at 34-35.

<sup>136</sup> *Id.* at 35.

<sup>137</sup> *Id.* at 34-35.

<sup>138</sup> SANDEL, *supra* note 1, at 231 (internal quotation marks omitted) (quoting Burnett, *supra* note 132).

<sup>139</sup> LEO STRAUSS, THOUGHTS ON MACHIAVELLI 194 (1958). For scientific evidence that

Whoever came up with the idea to invite citizens of Texas to patrol the border on the internet counted not on their patriotism, but on their resentment. They recognized, in other words, that such passions have public utility as “guardians of justice.”<sup>140</sup> Resentment, apparently given to us by nature to defend ourselves against injustice, Smith says,

is the safeguard of justice and the security of innocence. It prompts us to beat off the mischief which is attempted to be done to us, and to retaliate that which is already done; that the offender may be made to repent of his injustice, and that others, through fear of the like punishment, may be terrified from being guilty of the like offence.<sup>141</sup>

Citizens taking justice into their own hands, however, guarantees tragedy. The *Oresteia*, Aeschylus’s ancient Greek play, dramatizes revenge’s infectious cycle.<sup>142</sup> Free societies that seek to maintain individual liberty should therefore furnish legitimate ways for them to channel and express their resentment. Law-abiding whistle-blowing has a place in a just society and should be encouraged in both public and private institutions. Citizens need to be assured, however, that their initiatives will not endanger themselves or others. They need to be assured of the utmost privacy – anonymity.

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revenge satisfies the brain, see Brian Knutson, *Sweet Revenge?*, 305 *SCIENCE* 1246, 1246-47 (2004). I can testify to this phenomenon (albeit with a clear conscience) with a personal story. A decade or two ago I began receiving hang-up phone calls. I soon guessed whom they were from. (A guess coincidentally bolstered by my happening to have lunch at the time with a former student of the supposed caller, who mentioned that her phone had been ringing; apparently I was not the only recipient of his calls.) After many months, I got fed up and decided I had to do something. I called the local police department and told them about the calls. They said that they could not do anything unless the caller was making threats, and told me that a percentage of hang-up calls are accidental. When I incredulously repeated, “You can’t do anything?,” they said they could file a report but would need to send a police officer to my home to take the needed information. As the officer sat across from me at my dining room table and wrote down my answers to questions he asked, I volunteered the name and professional affiliation of the caller – speculation he could not write down, but heard. While we were sitting there, the phone rang. I gestured toward it, on the kitchen wall. The officer got up, strolled over to it, and on the fourth ring, picked up the receiver. His demeanor instantly changed. Back at the table, he told me that a tracer could be put on my phone and he instructed me to press \*57 after each call. The police would need three successful traces to confirm the caller. A week later, the officer called and told me, “we got him.” He could not tell me the identity of the caller, nor again could any action be taken to stop the calls, but the validation I felt when the officer himself picked up a hang-up call in my kitchen, and the elation I felt when he told me that the calls had been successfully traced, made the effort worthwhile and subsequent hang-up calls more tolerable.

<sup>140</sup> SMITH, *supra* note 128, at 35.

<sup>141</sup> *Id.* at 79.

<sup>142</sup> AESCHYLUS, *ORESTEIA* (illustrating the intergenerational consequences of revenge, as each actor attempts to avenge a death but incurs the wrath of another).

Unfortunately, that assurance will encourage false allegations and bogus claims, along with warranted complaints, but the benefits to justice will outweigh the costs of identifying the former.

#### CONCLUSION

##### A. *A Case for Injustice: Gratitude*

We live in an imperfect world that will remain, regardless of human efforts, imperfect. Human beings will never extirpate injustice because they will continue to be the cause of it. That is not a reason to stop trying, but it is a reason to consider injustice in another light: to consider what it does not only *to* us, but *for* us. Injustice unquestionably has the power to fell us once and for all, to take us down, emotionally, spiritually, and physically. It makes us angry, hateful, bitter, misanthropic, melancholic, and hermetic.<sup>143</sup> It is a cliché that injustice puts life in perspective. It tends rather to whack life out of perspective; one takes one's bearings from the extreme.<sup>144</sup> But injustice can also induce gratitude. Paradoxically, acts of injustice more than acts of justice make us grateful, because justice, by giving or not taking, equilibrates, whereas injustice, by taking, alerts us to what we have.<sup>145</sup> When human beings survive scares, losses, and hardships, they often feel, above all other emotions, grateful: grateful to be alive, to have loved, love, and be loved.<sup>146</sup> What

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<sup>143</sup> It makes us feel as if we deserve some slack or credit – a “break.” This feeling is corrected by the realization that cumulative experiences of injustice simply go with the territory of getting older. Injustice can also make one prefer the company of a dog, but I would not include that among its negative consequences.

<sup>144</sup> If you take your bearings from the extreme, as Machiavelli advised leaders, *see* STRAUSS, *supra* note 139, at 9, you are apt to take risks and commit injustices, including (as Nietzsche, but not Machiavelli, saw) injustices against yourself – by setting austere or masochistic standards. *See* FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* § 345 at 284, § 352 at 295 (Walter Kaufmann trans., Vintage Books 1974) (1887); FRIEDRICH NIETZSCHE, *Third Essay: What Is the Meaning of Ascetic Ideals?*, in *ON THE GENEALOGY OF MORALS* 97, § 13 at 120-21 (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., Vintage Books 1967) (1887); LESLIE PAUL THIELE, *FRIEDRICH NIETZSCHE AND THE POLITICS OF THE SOUL* 23-24 (1990). For example, a well-known Catholic scholar and novelist, now deceased, told me at a conference that the reason he no longer drank was that after the death of his daughter in a car crash, he made a deal with God never to drink again.

<sup>145</sup> *See* SMITH, *supra* note 128, at 82 (“[A]s [justice] does no real positive good, it is entitled to very little gratitude.”).

<sup>146</sup> A soul-stilling gratitude came over me after I survived being raped at gunpoint when I was twenty-four. *See Tenants May Have Let Rapist into Building*, *HYDE PARK HERALD*, Sept. 1, 1982, at 1; Phillip J. O'Connor & Jim Casey, *Arrest Clears 6 Hyde Park Rapists, Cops Say*, *CHI. SUN TIMES*, Sept. 9, 1982, at 4; *Suspects Arrested, Charged with Area Crimes*, *CHI. MAROON* (on file with author); Robin Kirk, *Hyde Park Security: Words to the Wise*, *CHI. MAROON*, Sept. 24, 1982, at 7; *Rapist Pleads Guilty, Gets 45 Years in Jail*, *CHI. MAROON*, Feb. 25, 1983.

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Shakespeare's Constance in *The Life and Death of King John* said of grief, over the loss of her son, might be said about injustice and life: "Grief . . . [r]emembers me of all his gracious parts . . . . Then, have I reason to be fond of grief."<sup>147</sup> Injustice remembers us of life and happiness, past and future.

B. *Beyond Justice: Happiness*

Happiness, more than justice, is what human beings want – at least according to Aristotle.<sup>148</sup> The desire for happiness may be more evident at the opposite ends of life, in youth and in old age, during which we are more likely to seek sensory and contemplative pleasures. In the middle years of adulthood, righteous indignation and concern for others peak, and individuals thus seek justice. That quest recedes, subdued by the persistence of injustice, and the cumulative weight of a lifetime's injustices. With one's own death on the horizon, it seems best to leave justice to others and mind one's own business. And yet, our indignation at injustice remains latent until the end, resurfacing in our last months when we become dependent on others, and rail at our caregivers.

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<sup>147</sup> WILLIAM SHAKESPEARE, *THE LIFE AND DEATH OF KING JOHN* act 3, sc. 4, lines 93, 96, 98 (Claire McEachern ed., new ed. 2000).

<sup>148</sup> See NICOMACHEAN ETHICS, *supra* note 4, bk. I, at 1-27; POLITICS, *supra* note 15, bk. VII, 1331b25-1332b10, at 217-18.