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On Being Among Friends: A Response to Eugene Garver's *For the Sake of Argument*

Richard K. Sherwin*

Being among friends, I allow myself to begin with a confession.

I have struggled with my response to Gene's book. I've asked myself: how do I do justice to this gesture of friendship? How can I reciprocate his gift to us, this book, *For the Sake of Argument*?¹ How can I be a good friend?

What is a friend?

Without an answer to this question, how can I know I've done well?

Let me begin with something about which I am more certain.

Eugene Garver has done us all a great service. He has written a lucid book about what needs to be integrated into our current understanding of practical reason. He invites us to set *pathos* and *ethos*, affect and character, alongside conventional notions of rationality.

The good person is someone who deliberates and persuades within a broad rhetorical base. Reason does not have to be disinterested to retain its identity as reason. Practical wisdom doesn't have to be anchored in rules, or avoid appealing to emotions, interests, or prejudices, to remain prudent. In short, practical reasoning is rhetorical, as well as ethical.

As a "living faculty,"² rather than a mechanical calculator of

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1. EUGENE GARVER, *FOR THE SAKE OF ARGUMENT: PRACTICAL REASONING, CHARACTER, AND THE ETHICS OF BELIEF* (2004).

2. *Id.* at 4 ("Understanding practical reasoning as 'the exercise of a living faculty in the individual intellect' is the purpose of this book. Reasoning as the exercise of a living faculty is ethical reasoning. We shouldn't infer that when method fails us, reason fails us too. Like *eros*, *praxis* is a great leveler.").

interests, practical reason flourishes in the spirit of friendship.

Friendship, it would seem, is on many people's minds these days.³ As the nation-state falters,⁴ and we search for new models for political community, it is not surprising that we turn to character and friendship as sources of normative replenishment. It is as if we were seeking anew the pre-contractual elements of civil society. We are drawn to revisit the mythical stories of political origin: Hobbes's cowering citizen,⁵ Rousseau's noble savage,⁶ Aristotle's political friend.⁷

And today, as the Internet links us all up in instant global communication, we wonder: what model of self will do justice to the circumstances of our lives? Is it enough to construct and project virtual identities, to create digital avatars at will? Is it enough to mingle affinities with others in a network of momentary amity?⁸

Jacques Derrida has recently written about political friendship,⁹ as has Peter Goodrich.¹⁰ There is perhaps more boldness in Gene Garver's work.

After all, it was only a couple of decades ago that Alasdair MacIntyre hit the philosophical scene with his glum indictment of contemporary culture in *After Virtue*.¹¹ According to MacIntyre, not only have we lost our comprehension, both theoretical and practical, of morality, but, he adds, "the dominant philosophies of the present, analytical or phenomenological, [are . . .] powerless to detect the disorders of moral thought and practice."¹² In sum, MacIntyre concludes, "philosophical analysis will not help us."¹³

In the face of such a devastating cultural critique, Gene's book is most welcome. His message is that things are not as bad as MacIntyre says they are. We can still reason together as political friends. In a word, we still have character.

But what sort of character is it?

Paul Kahn suggests it is the character of Hercules, Dworkin's fabled

3. See, e.g., JACQUES DERRIDA, *POLITICS OF FRIENDSHIP* (2000); Peter Goodrich, *Laws of Friendship*, 15 *LAW & LITERATURE* 23 (2003); *Friends in High Places: Amity and Agreement in Alsatia*, 1 *INT'L J.L. IN CONTEXT* 73, (2005), available at <http://ssrn.com/abstract=760376> (last visited Mar. 1, 2006).

4. See, e.g., PHILIP BOBBITT, *THE SHIELD OF ACHILLES* 667-714 (2002).

5. See THOMAS HOBBS, *LEVIATHAN* (1982 [1651]).

6. JEAN JACQUES ROUSSEAU, *A DISCOURSE ON INEQUALITY* 67-137 (1984 [1755]).

7. ARISTOTLE, *POLITICS* 49, 181 (1969 [350 BC]).

8. See generally Jack Balkin, *Law and Liberty in Virtual Worlds*, 49 *N.Y.L. SCH. L. REV.* 63 (2004-2005).

9. See DERRIDA, *supra* note 3.

10. See Goodrich, *supra* note 3.

11. ALASDAIR MACINTYRE, *AFTER VIRTUE* (1984).

12. *Id.* at 2-3.

13. *Id.* at 2.

judge.¹⁴ In this view, character is a matter of commitment to principles.

But I wonder.

I had thought that what was distinctive about the narrative turn¹⁵ in contemporary philosophy and jurisprudence was precisely its recognition of the inadequacy of abstract principles as a basis for judgment.

In addition to our effort to anchor character in principles, I would have thought the challenge that we face is to construct character and community through our choice of root metaphors¹⁶ or narratives, through our joint efforts to realize a self-reflexive, constitutive *ethos*.¹⁷

The question then becomes: what sorts of images cue up what sorts of emotional responses, or collective memories, or shared cultural resources? What kind of community do we create in conversation together? Consider, for example, Johnnie Cochran beseeching jurors to “do the right thing” in the O.J. Simpson case. This was not a matter of principle, but rather of discursive practice and the dialogical community to which it gave rise. Cochran was emplotting his listeners in a subjunctivized,¹⁸ “heroic” struggle against “endemic police racism,” a state of affairs, according to Cochran, that only the jurors, by their verdict, could end.¹⁹

Or consider the initial state criminal trial against the officers responsible for beating motorist Rodney King. In that case the defense team sought to re-constitute reality by digitizing George Holiday’s amateur videotape, which had fortuitously captured the event. But visual reality, no less than the verbal kind, needs narrative emplotment for meaning’s sake. In the defense version of Holiday’s videotape, jurors saw the officers’ batons coming down only when King’s body rose up off the ground. When he lay prone, as ordered, the batons harmlessly lifted into the air. In this way, when they watched, the jurors saw causation at work. It was King himself who, in defiance of police orders, caused the batons to rain down upon him. Or so several jurors, when called upon to explain their verdict of acquittal, would later assert.²⁰

It wasn’t abstract principle that guided their judgment. It was a

14. See RONALD DWORKIN, *LAW’S EMPIRE* 379-99 (1986).

15. See, e.g., Peter Goodrich, *Antirrhesis: Polemical Structures of Common Law Thought*, in *THE RHETORIC OF LAW* 57 (Austin Sarat & Thomas R. Kearns eds., 1996); Richard K. Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 *MICH. L. REV.* 543 (1988); DONALD SPENCE, *NARRATIVE TRUTH AND HISTORICAL TRUTH: MEANING AND INTERPRETATION IN PSYCHOANALYSIS* (1st ed. 1982).

16. See VICTOR TURNER, *DRAMAS, FIELDS, AND METAPHORS: SYMBOLIC ACTION IN HUMAN SOCIETY* 29, 48 (1974).

17. See, e.g., JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984).

18. JEROME BRUNER, *ACTUAL MINDS, POSSIBLE WORLDS* 25-26 (1986).

19. See RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* 44-46 (2000).

20. *Id.* at 212-213.

story about the justified use of force.

It's the same with Justice Scalia's opinion in *Michael H. v. Gerald D.*²¹ As Anthony Amsterdam and Jerome Bruner observe, Scalia's narrative invokes a mythic tale of "Adultery as Combat."²² Or consider Justice Kennedy's narrative in *Freeman v. Pitts*.²³ There, Kennedy offers another familiar narrative type: the tale of the "Conquering Hero Turned Tyrant."²⁴

Rather than obsessing, in the company of Dworkin's Hercules, about the right (principled) outcome, these decision makers seem more in tune with Richard Bernstein's concern with the contingencies of human meaning making.²⁵

Rather than calling Ronald Dworkin to mind, in reading Gene's work I was reminded of Richard Rorty. Character is embodied in the give and take of human conversation and storytelling. Rather than embedded principles, this is a matter of radical contingency.²⁶

It's not about right answers, but rather a process of unfolding decisions out of local practices. As Rorty puts it, "It is a matter of playing off scenarios against contrasting scenarios, projects against alternative projects, descriptions against redescriptions."²⁷

In his book, Gene gives us examples of this sort of thing. But I must admit, I wasn't always sure what to make of them, or how to generalize from them.

For example, it is indisputable that South Africa's Truth and Reconciliation Commission started a national conversation with noble goals.²⁸ But as South Africans know, the public performance was not always echoed in private. And the sad fact is that to a significant extent a good number of South Africans today have not reconciled with their past.

Not without reason.

For the most part, many black South Africans have remained poor and isolated, while many white South Africans remain rich and powerful. Victims got to speak, yes; but later they were left alone: with their grief, without reparations or therapeutic intervention to ease their suffering and loss.

In Gene's discussion of practical reason as exemplified in *Brown v.*

21. 491 U.S. 110 (1989).

22. See ANTHONY AMSTERDAM & JEROME BRUNER, MINDING THE LAW 81 (2000).

23. 503 U.S. 467 (1992).

24. AMSTERDAM & BRUNER, *supra* note 22, at 153.

25. See, e.g., RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS (1983).

26. See, e.g., RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1980).

27. RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 174 (1989).

28. See GARVER, *supra* note 1, at 17-21.

Board of Education,²⁹ we encounter a compelling vision of equality between the races.³⁰ But what are we to make of the fact that the *ethos* exhibited in *Brown* could not keep the Court from subsequently losing interest in historical reconciliation between the races? It could not keep the post-*Brown* Court from talking about the goal of “reducing the historic deficit of traditionally disfavored minorities”³¹ as an “unlawful interest in racial balancing.”³²

And today, affirmative action strikes many as an affront, a social injustice.

Is this a sign of bad character?

Gene says that value pluralism and pragmatism are successors to Aristotle’s project. But how does this help us avoid the dangers of treating law as simply a form of politics? Friendship is nice, but politics, as everyone knows, is a game of power.

Why should I turn to Gene and Aristotle’s *Ethics* rather than to Karl Rove³³ and Machiavelli’s *The Prince*?

I need to make choices. How should I proceed?

Should I become the instrumental character, the one who weighs means and ends?

Or should I prefer instead to become the Kantian rational character, who posits universal human rights and principles?

Or should I perhaps take on the guise of the Kierkegaardian therapist, the character who shows the dangerous deceits of aesthetics?

This is MacIntyre’s cast of modern characters.³⁴

How am I to say which, or whether, or when, one is better than another? And what if they are all equally fictitious, or at least equally lacking in all but self-serving, self-evident rationalizations, as MacIntyre asserts?

Or maybe now there’s a fourth character that we should add to MacIntyre’s list. Let’s call him the postmodern rhetorician, the inveterate mapmaker.

The rhetorician categorizes moves and makes maps so that he knows where he stands. “Oh, so now you’re playing the structuralist binary card,” he’ll say. Or the reifying historicist card. Or the genealogy of power card. “I’ve got your number,” cries the self-comforting

29. 347 U.S. 483 (1954).

30. GARVER, *supra* note 1, at 69.

31. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 306 (1978).

32. Grutter v. Bollinger, 539 U.S. 306, 323 (2003).

33. For more information on Karl Rove, advisor to President George W. Bush, see http://en.wikipedia.org/wiki/Karl_Rove.

34. See MACINTYRE, *supra* note 11.

cartographer.³⁵

But none of these characters, not even the postmodern one, really counters Nietzsche's devastating critique.

Again, using MacIntyre as my double here, the critique goes as follows: In the absence of good reasons for particular moral preferences, why not let the will replace reason? "Let us make ourselves into autonomous moral subjects by some gigantic and heroic act of the will."³⁶

So we start our moral quest from scratch, with an act of will.

But how do we know, beyond the desire that it be so, what the new tables of morality should contain, or how they should be created?

Gene wants to save us from such moral confusion.

Taking a page from Aristotle's *Nicomachean Ethics*, he finds virtue in friendship. He reminds us that we honor others in virtue of something that they are or have done to merit the honor.

But what is it that we honor today?

What *is* honor?

What do we value in a friend?

The times play a hand in assigning meanings to these words. For example, it is not unknown for virtue and vice to trade places. Consider the Greek experience during the Peloponnesian War. In his history of that terrible conflict, Thucydides writes: "Reckless audacity came to be considered the courage of a loyal ally; prudent hesitation, specious cowardice; moderation was held to be a cloak for unmanliness. . . . [T]he use of fair phrases to arrive at guilty ends was in high reputation."³⁷

I will resist the temptation to make comparisons between that period and other, more recent moments, when the fog of war once again clouds the mind and perverts human judgment. Suffice it to say, the meaning of words like "honor," "character," and "friendship" is hardly written in stone.

And we might well ask, what meanings do these words have based on our own cultural practices? What do we honor? What *should* we honor?

Without a satisfactory answer to these questions, we shall hardly find vindication in Aristotle's ethics.

So I ask, what kind of character should I become?

And how free am I to choose?

35. Cf. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047 (2002); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979).

36. MACINTYRE, *supra* note 11, at 114.

37. THUCYDIDES, THE PELOPONNESIAN WAR (Book 3.82.4). (Robert Maynard Hutchins et al. eds., Richard Crawley trans., Encyclopedia Britannica 1952) (427 BC).

Heraclitus famously said: "Character is fate."³⁸ A two-way street: at once deterministic and open-ended. If I choose my self, I determine my fate. If fate elects me, I am chosen.

If I were naturally gifted with the virtue of prudent judgment in the way of personal excellence, I most likely would be able to answer this question.

I think Gene is suggesting that by engaging in practical reasoning I might find the way out of my ethical dilemma. But if I lack the requisite virtues, how am I to engage in such reasoning in the first place? And won't my ignorance even prevent me from recognizing such reasoning when I come across it?

It's the old Socratic query: can virtue be taught, or is it a gift?³⁹

Can I learn, and teach others, to be a friend?

When I think of the requirements of friendship, at least as Aristotle understood it, I find myself growing pale in the face of what it demands of me. Like the demand to share all things in common for the sake of the common good.

But what is the common good? In common with whom?

Not many people these days seem to be choosing a common good.⁴⁰ Not unless they happen to find pleasure in sharing the goods with the friends that they have. The common wisdom seems to suggest no one is obliged to share anything with anyone. Common access is tragic. Give people access to a common good and they'll just use it up, with no thought of tomorrow. It's the tragedy of the commons, the economists tell us. That's why we're told to acquire our own stuff, and to compete in the open market for the right to use other people's stuff.

Property rights give me power and control. I can protect the value of my things. And I can keep people out. I can even block their unlicensed access to my digital data online.⁴¹

If the good is understood as internal to those cultural practices in which we currently engage, then it must be good to consume, to own. And while social institutions may be viewed, at least to some extent, as external to individual practices, they certainly help to create the conditions for particular kinds of practices to occur. Our institutions are constructed to encourage private ownership and competition, not to share all in common, as Aristotle requires of friendship.

How can it be doubted? Surely MacIntyre was right when he wrote

38. PHILIP WHEELWRIGHT, *HERACLITUS* 68 (1968 [c. 500 BC]).

39. See *Meno*, in *THE COLLECTED DIALOGUES OF PLATO* 353-384 (Edith Hamilton and Huntington Cairn, eds., 1961).

40. But see Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 *YALE L.J.* 369 (2002).

41. See *id.*

that we are a long way from Aristotle.

So on what basis shall I (or should I?) find the will or desire to resist, and become a different sort of character from the one my society tells me to be? How do I learn to be a friend?

It would surely help if there were a living tradition, a living community, in which I might practice the "living faculty" of practical reason that Gene praises in his book.

But where am I to find such a community?

Where do I find such friends?

We cannot even agree on the same set of virtues.

Is it determined by Bentham's felicific calculus of pleasure and pain? Kantian universal human rights and principles? The Calliclean and Nietzschean will to power? Duncan Kennedy's and Pierre Schlag's deconstructive tactics of lucid disillusionment?

Given our ethical disarray, how are we to attain true political friendship? Friendship requires community. There are no virtues in solitude.

Two decades ago, Alastair MacIntyre concluded that we need "new forms of community . . . within which the moral life could be sustained, so that both morality and civility might survive the coming ages of barbarism and darkness."⁴²

To my ears, this dire warning rings truer, and more disquietingly, today than when it was first pronounced.

Gene encourages us to believe that we can still bring life to the classical ethical tradition. I want to be persuaded by him. I want to hope.

But hope risks the pain of disappointment.

I think of the line attributed to Aristotle, the one on which Derrida dwells in his work on political friendship, "O my friends, there is no friend."⁴³

A contradictory statement: caught between aspiration and reality.

But there is authenticity even in contradiction.

Perhaps this is the place from which we must begin.

To begin to act like a friend, even when there is no friend to speak of.

Perhaps to speak as a friend might, to speak about friendship itself, is enough. To begin.

Out of a common yearning, we invoke together the friendship that is to come, the friendship that we would create.

Might it be that daring to speak in this way constitutes the very first

42. MACINTYRE, *supra* note 11, at 263.

43. See DERRIDA, *supra* note 3, at 1.

act of political friendship?

In closing, I must convey my gratitude to Gene, for what he has done. For here we are, not exactly sure what to think, or how to choose who we should become. And yet, we remain bound together by the questions that we ask one another.

So I offer my thanks to Gene, for clearing a path to this conversation, now, at this critical moment, about the meaning and place of political friendship.

I hope I have done well, in response to the gift of his book.

I hope I have done justice to the spirit of friendship which allows practical reason to flourish.
