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LAW AND COMMUNITY: ALESSANDRO GIULIANI'S ARISTOTELIAN VISION*

di

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Introduction

This article considers the theoretical, practical and pedagogical significance that the classical understanding of community holds for contemporary legal theory. We draw our inspiration from the work of the Italian philosopher and legal theorist, Alessandro Giuliani (1925-1997). Giuliani argued that the dialectical logic of argumentation has important implications for civic life. To develop this thesis he recuperated Aristotle's conception of community and also drew from the substantial contribution to Aristotle's legacy by the seventeenth-century rhetoric scholar, Giambattista Vico. We will emphasize Giuliani's inventive use of these sources to articulate an argumentatively-based community that is capable of bearing the legal and civil demands of modernity.

In Part One we elaborate the conception of community at the center of Giuliani's work by providing an overview of the development of this line of thought as exemplified in Aristotle, Vico, and Giuliani's contemporary, Chaïm Perelman. We connect the main features of the logic of argumentation, which has its foundations in Aristotelian dialectics and rhetoric, to a "classical" or "isonomic" conception of community. We conclude Part One by explaining the implications that the connection between dialectics (a form of knowledge) and community (a form of practical coexistence) holds for understanding the role of law in modern society.

In Part Two we extend our thesis by providing concrete applications of our approach to contemporary legal, moral and social issues. First, we argue that the ongoing struggle by gays and lesbians to secure recognition under the law, in civil society and within social groups provides a vivid setting in which to explore Giuliani's concept of community. Next, we consider the pressing issues raised by domestic workers in the international economy, and again we conclude that Giuliani's concept of community provides a productive lens through which to study the entwined social and legal dimensions of these issues. We conclude that Giuliani's inventive use of Aristotle and Vico to promote a dialectical conception of community provides an excellent foundation for analyzing contemporary dilemmas that place stresses on democratic rule.

I. Giuliani's concept of community

A. Dialectical Argumentation and Truth.

In the *Topics*, Aristotle describes dialectics as the method of argumentation that brings different points of view together and generates knowledge of matters that cannot be demonstrated conclusively to be either true or false. Dialectics is a method by which to

identify “true” opinions, then, but only in the sense that the “true” opinion is convincing to those engaged in a particular discussion. Dialectics is premised on the logic of persuasion rather than the compelling force of deductive demonstration. An opinion that is “true” in this sense must be subjected to ongoing review, because it is always possible that a different truth will emerge when the opinion is re-examined under a different light, in different circumstances of time and place, and using different arguments that are invented and offered by new participants to the dialogue. Despite the impermanence of truth, Giuliani insists that dialectics yields a full-fledged form of knowledge, even if it is different than the type of knowledge found in mathematics or natural science.⁶

Critics who believe that all spheres of experience can and should be known through formal logic and explained in accordance with the principle of non-contradiction assert that dialectics yields only an unstable (and, therefore, untrustworthy) form of argument that is wielded by a rhetorician to secure mere *agreement* rather than to obtain secure *knowledge*. Along these lines, many commentators on Aristotle’s work have long considered dialectics a “lesser logic” in comparison to his privileging of hard, inferential logic that approaches problems of knowledge analytically, deductively, and systematically. We argue against this critique, contending that Giuliani remains true to one of Aristotle’s most highly celebrated passages, in which Aristotle emphasizes that it is equally inappropriate to expect a mathematician to be persuasive as to expect the rhetorician to offer definitive proofs⁷. Aristotle admonishes his students not to abuse reason in the field of opinion by treating that which is by nature arguable, uncertain, and unprovable as if it could be established with certainty; to do so is to commit an error that obscures the contextual nature of practical reasoning. Aristotle recognizes that arguable issues must be resolved through dialectical reasoning -- the form of knowledge appropriate for them – and he insists that these questions should be explored and known rather than merely regarded as to the expression of irrational belief.

Formal logic earned its prestige by identifying necessary results, but this prestige was premised on an assumption that definitive certitudes regarding “clear” concepts and “certain” definitions are preferable to “confused” or multivalent notions. Unfortunately, in modernity this bias has spread to fields of inquiry into human interaction, such as law. Under the

⁶ For an extended argument along these lines that draws from the rhetorical tradition that followed Aristotle, see Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Critical Legal Theory* (Tuscaloosa, AL: University of Alabama, 2006).

⁷ Aristotle, *Nicomachean Ethics*, I, 1094 b 24, which can be read in the most recent version edited by Robert C. Bartlett and D. Collins (University of Chicago Press, 2012).

classical understanding, legal scholars did not strive for such precision. They recognized that certainties are unattainable because the human life that law regulates is always in flux. Because law and other social sciences failed to meet the high standards of formal logic, they were deemed inferior to the “exact” sciences, thereby devaluing them and the special reasoning skills required in these areas.

Vico stood as the last great defender of the ancient reverence of rhetoric and dialectics at the time that the modern era of rationalism was gaining ascendancy over the classical worldview. Giuliani drew extensively from Vico’s bold stand against the bias of modernity, and also from Perelman’s effort in the last century to revive rhetoric and dialectics as forms of knowledge. These forms of knowledge were suited to comprehending relations between human beings with regard to matters that could be otherwise. Although this line of thinking has been castigated for being “antirationalist,” these scholars sought a rationality that is *suited* to spheres of human experience that cannot be reduced to logical relationships. Giuliani joins in this tradition by defending the importance of safeguarding this form of rationality, and he found his thesis to be especially illustrated in legal studies. Relating dialectical knowledge to law is a means of generating values that serve as a basis for informed choice regarding the arguable, complex, and changeable nature of questions that are posed to the jurist. Additionally, we may trace the consequences of the arguable and changing nature of the matter in discussion to lessons about how the jurist reasons or should reason, and his or her social role and education.

B. Dialectical Knowledge and Rhetoric.

Before continuing we must clarify Giuliani’s terminology, especially for the American reader. In common usage, “dialectics” is regarded as a more rule-bound and definitive practice of reasoning together with someone toward a conclusion, whereas “rhetoric” has a more open-ended connotation of persuading an audience through artful presentations. This division is reflected today in the contrast between the Dutch pragma-dialectical school on one hand, and American rhetorical theory on the other. These schools define the outer boundaries of the realm of reasonable dialogue that exists between the poles of rationalism and skepticism.

Giuliani refers to the rhetorical tradition, and particularly to the effort of modern theorists to revive Vico’s wisdom.⁸ He emphasizes that law, politics and ethics are all

⁸ Alessandro Giuliani, “Vico’s Rhetorical Philosophy and the New Rhetoric,” in Giambattista Vico’s Science of Humanities 31-46 (Giorgio Tagliacozzo and Donald Phillip Verene, Eds.; Salvator Rotella, Trans.) (Baltimore, MD: The Johns Hopkins University Press, 1976), p. 33.

enmeshed in both dialectic and rhetoric.⁹ Both arts reason toward solutions that are indeterminate because they rest on opinion and probabilities. Giuliani laments that dialectics was hijacked in the middle ages and made to appear more logical as part of the effort to discredit the rhetorical tradition.¹⁰ His goal is to reclaim dialectic as a counterpart to rhetoric, with neither collapsible to the other and with both occupying the realm between science and sophistry.¹¹ His respect for the rhetorical tradition is exhibited in his praise of the rhetorical dialectics of the common law method that persisted despite the logical pretense of civil lawyers.¹² He advocates an approach to legal education that imbues students with the classical lessons of both rhetoric and dialectics.¹³

Giuliani seeks to repair the efforts in the Middle Ages to redefine dialectics as a proto-logic of legal argumentation that can produce relatively definite results. He provocatively reclaims the ancient dialectical tradition and re-joins it with rhetoric as the core of the practice of law. Scholars have recently continued this effort to return to the original Aristotelian conception of dialectics and rhetoric. Noting that “it must be acknowledged that neither the dialectical perspective nor the rhetorical perspective is so clearly and univocally defined that we know exactly what we are talking about,” two editors of a recent volume of important essays conclude that there are distinctions to be made, even if they vary over time.¹⁴ But these distinctions are not fundamental. Even if dialectic is a means of testing a hypothesis through reasonable discourse, whereas rhetoric is a means of securing the agreement of an audience, these activities are entwined in most sophisticated dialogues.¹⁵ This is especially

⁹ Alessandro Giuliani, “The Aristotelian Theory of the Dialectical Definition,” *Philosophy and Rhetoric* 5:3 (Summer, 1972), pp. 129-42, 129.

¹⁰ Giuliani, “The Aristotelian Theory,” at 135. See also, Alessandro Giuliani, “The Influence of Rhetoric on the Law of Evidence and Pleading,” 62 *Juridical Review* 216-51, 229 (1962).

¹¹ Giuliani, “The Aristotelian Theory,” at 132-33.

¹² Giuliani, “The Influence of Rhetoric,” at 244-51.

¹³ Alessandro Giuliani, “Dialectical Mind Versus Bureaucratic Mind,” in *L’Educazione Giuridica. IV: Il Pubblico Funzionario: Modelli i Storici e comparativi* (Perugia, Università degli Studi di Perugia e Consiglio Nazionale delle Ricerche, 1981), pp. 515-22. In particular, he argues against the formalism and rationalism of the natural law tradition by arguing that legal education must recognize that man’s nature is rhetorical and dialectical, that we are subject to a natural law of argumentation. Giuliani, “The Aristotelian Theory,” at 133-34. It is precisely the rhetorical dimensions of legal education that preserved the anti-formalist tradition during the rise of modernity. Alessandro Giuliani, “Observations on Legal Education in Antiformalistic Trends,” *L’Educazione Giuridica I. Modelli di Università e Progetti di Riforma*, pp. 79-98.

¹⁴ Frans H. Van Eemeren and Peter Houtlosser, “And Always the Twain Shall Meet,” in *Dialectic and Rhetoric: The Warp and Woof of Argumentative Analysis* 3-11 (Frans H. Van Eemeren and Peter Houtlosser Eds.) (Dordrecht: Kluwer Academic Publishers, 2002), pp. 3.

¹⁵ In the words of one commentator,

I think that the remaining vestiges of a thinking that tries to demarcate rhetorical and dialectical considerations in terms of territorial claims could be eliminated even more decisively by treating dialectical and rhetorical aspects of argumentation analysis as complementary, rather than asserting primacy of one over the other.

true of legal reasoning and argumentation. “It is surely no accident that the faith in the critical workings of this argumentative interplay [of dialectic and rhetoric] also lies at the root of our confidence, however circumscribed, in the proper working of the legal adversarial system, and that legal argumentation perhaps more clearly than other forms of reasoning highlights the need to link dialectical soundness and rhetorical acceptability in the analysis and design of good arguments.”¹⁶ We utilize this rich notion of argumentation in our explication of Giuliani’s dialectical theory.

C. Law and Ordinary Language.

Dialectics is a form of knowledge that is generated by the use of ordinary language to express opinions about uncertain matters. Dialectics has strong bonds with ethics, for it seeks only a provisional and probable truth and does not pretend that there is an ultimate truth that stands separate and distinct from the means of inquiry. Giuliani emphasizes the close links between dialectics and juridical experience, for legal reasoning also involves the proffering and testing of opinions in ordinary language¹⁷. Dialectics is a general method and legal reasoning is a more specific instance of that method that poses particular problems, but the social importance of the legal venue means that this focus has a special potential for generating understanding. Giuliani insists legal reasoning provides a concrete basis for exploring the dialectical basis of the logic of disputation. He works through the modern rhetorical tradition of Vico and Perelman but he shifts the accent to dialectics from rhetoric, although (as clarified above) he does not draw a sharp distinction between these practices. His deep insight is that the dialectical and rhetorical mindsets generated by the nature of argumentation give rise to an ethical relation, and it is this ethical dimension that binds dialectical method with rhetorical argumentation to form the basis of community.

The cognitive function of ordinary language is the initial bridge between dialectics and law, because the language of law is ordinary language. Ordinary language has a certain degree of truth because it conveys common sense knowledge and understanding, but at the

Hanns Hohmann, “Rhetoric and Dialectic: Some Historical and Legal Perspectives,” in *Dialectic and Rhetoric: The Warp and Woof of Argumentative Analysis* 41-51 (Frans H. Van Eemeren and Peter Houtlosser Eds.) (Dordrecht: Kluwer Academic Publishers, 2002), p. 49. We might summarize this integrative position as one that deals “with the various degrees of rhetoricity in persuasion dialogues and of dialecticity in persuasive speeches and with the shifts between these various types of speech events as well as with their mutual embeddings.” Erik C.W. Krabbe, “Meeting in the House of Callias: An Historical Perspective on Rhetoric and Dialectic,” in *Dialectic and Rhetoric: The Warp and Woof of Argumentative Analysis* 29-40 (Frans H. Van Eemeren and Peter Houtlosser Eds.) (Dordrecht: Kluwer Academic Publishers, 2002), p. 39

¹⁶ Hohmann, “Rhetoric and Dialectic,” at 50.

¹⁷ Alessandro Giuliani, *La definizione aristotelica della giustizia. Metodo dialettico e analisi del linguaggio normativo* (Perugia, Cooperativa Libreria Press, 1971), p. 130.

same time it is inevitably imprecise. This is why we find imprecision in the language of law, whose terms “have a vast area of meanings.”¹⁸ Legal discourse has a veneer of specialized terms and convoluted logic, but at base it always rests on common terms such as “good faith” and “reasonableness” to reach decisions. The apparent imprecision of legal language is not an inevitable failing that we should bemoan and seek to eradicate; rather, it is the central, productive feature of legal language. Legal discourse relies on metaphors to temporarily fill some of the gaps caused by the imprecision of ordinary language by making analogical connections and illustrating similarities that bring common sense (in the classical meaning of *sensus communis*) to bear on the circumstance of reality or to the case being considered, the person using it, the context in which it is used, and the moment when it is used. Giuliani insists that it is especially important for the jurist never to lose sight of being immersed in ordinary language, arguing that “when there is no awareness of the metaphorical nature, the road to the most dangerous abuses of language is opened.”¹⁹ We lose this awareness when we attempt to force the ordinary language of law to embody formal precision and objectivity. This error sacrifices the depth and multi-valence conveyed by the metaphoric structure of ordinary language, and it abandons the concreteness of experience of both individuals and society as a whole, including the encrustation of history, memory, and sharing that is part of ordinary language.

Giuliani’s critical insight into the nature of judicial discourse is that ordinary language simultaneously has a degree of imprecision and a degree of truth. This is rooted in the fact that ordinary language uses metaphors, and metaphors can invite unproductive analogies but they also can generate genuine insight. For this reason, legal language operates dialectically and not logically. The jurist’s commitment to analyzing language “is correction of metaphors. But the passage from metaphor to concept, to definition, is always unstable and subject to revision.”²⁰ This means that legal definitions cannot be considered as essential, objective truths. To the contrary, these definitions are just the temporary results of deliberations; that is, solutions justifiable in relation to the nature of things in the circumstances at hand. Therefore, conceptual definitions are not neutral, but “involve taking

¹⁸ Alessandro Giuliani, *Contributi a una nuova teoria pura del diritto*, (Pavia, The University of Pavia Press, 1953), p. 95.

¹⁹ Alessandro Giuliani, *La definizione aristotelica della giustizia*, quoted at n. 17, p. 13

²⁰ Alessandro Giuliani, “La Nuova Retorica e la logica del linguaggio normativo”, in 3-4 *Rivista Internazionale di Filosofia del Linguaggio* 3-4 (1970), p. 378.

stances with respect to reality, the defense of a value”²¹ rather than neutral descriptions of an objective order.

D. Dialectical Means of Seeking Truth.

In matters which are not subject to definitive resolution, dialogue is a form of cooperation: the parties to dialectical dialogue join together to seek the truth. The parties to a juridical dispute are engaged, perhaps unwittingly in adversarial systems, in just such a cooperative dialogue. We do not take a rosy-eyed view of dialogue, however. Dialectic, no less than language generally, is subject to abuses. Giuliani outlines the logic – in the sense of the order for resolving the dispute – that is required if we are to prevent such abuses. First, dialogue participants should concentrate on eliminating other opinions from consideration by progressively casting light upon the reasons why certain arguments cannot be made, or would be immaterial to the specific dispute in question, based on the circumstances under discussion. This posture requires one to grapple with the proffered opinion in its own right, rather than reflexively attacking it from the perspective of one’s own opinion. The guiding norm of dialogue is “identifying contradictions between conflicting opinions” rather than selecting one’s preferred opinion and defending it at all costs by characterizing the contest as placing the decisionmaker on the “horns of a dilemma.”²² Additionally, dialectical argumentation should take inspiration from the logic of relevance and pertinence: the arguments that are introduced must be connected with the issue being investigated. To make this possible, the participants must reach some topical agreements connected with the content and the characteristics of the dispute, so as to permit development of a common basis from which the participants may reason. This brings to the fore the need to limit the field of investigation, so as to protect against the possibility of error and abuse by focusing on the concrete nature of the case being considered rather than on the superficial eristic battle.

The truth that can be reached in dialectical exchange is a partial and relative one, subject to future revisions, precisely because of the procedure of dialogue. The goal is a “probable” truth, but this does not mean “probable” in the modern sense of an objective or statistical regularity of occurrences confirming or disproving a certain point of view²³. Instead, probability must be appreciated qualitatively: the discussion always takes place with reference to a single event and must be sensitive to the surrounding elements that influence

²¹ Alessandro Giuliani, *ibid*, p. 380.

²² Alessandro Giuliani, *La controversia. Contributo alla logica giuridica*, (Pavia, 1966), p. 160.

²³ For these observations see Francesco Cerrone, “*Ragione dialettica e Retorica nell’opera di Alessandro Giuliani*”, in *Sociologia* (2/2009), pp. 57-58..

the configuration of that event, but also must be anchored topically to broader issues and historical developments. Truth is inevitably *Kairotic* – which is to say, sensitive to the time in which the event is produced, because as times change, so do such qualitative elements as the provisional judgments, common sense, and ways of thinking that configure it. Probable truth depends on the participants complying with rules of fair debate and avoiding sophistic manipulations. This means that dialectical truth can be achieved only if the participants display an ethical commitment to each other. The ethical commitment is not collaboration with the aim of establishing a single definitive truth, but rather is openness to everyone expressing their opinions in an honest and forthright manner with the expectation that they will be taken seriously by the others in the dialogue. The truth that is attained in the dialectical exchange, Giuliani stresses, has a logical character but it also has an axiological dimension – of exchanging truth in truth²⁴. This is the fundamental distinction between dialectical dialogue and sophistic: dialectics is ethically oriented by the mutual recognition of each participant for the other, acknowledging their ability to contribute to seeking the truth, and thus their equality as dialogue partners.

E. Justice as Reciprocity.

The characteristics of the truth that we can attain through dialectical exchange are also characteristics of a just result that can be reached in a legal dispute, and may be summed up in a single word: *fairness*. Justice is fairly adhering to the nature of the case. Giuliani stresses the relationship between truth (in a dialectical sense) and justice,²⁵ drawing from Aristotle an idea of justice that corresponds to the values upon which dialectical exchange is founded: justice as reciprocity. Although Aristotle describes this form of justice after describing distributive justice (to each his own: laws) and corrective justice (compensating a wrong: the trial), Giuliani insists that reciprocity is the Aristotelian idea of justice. Justice as reciprocity is not merely added to distributive justice and corrective justice, nor is it opposed to them. Rather, it reinvigorates these other conceptions by problematizing them. Justice as reciprocity responds to the need that “no one have more than the other, nor the other have less,” and this demands a judgment that can never be resolved *a priori*. Justice as reciprocity expresses the idea that justice is a search that is sensitive to the characteristics of the disputed situation and is carried out in dialectical argumentation, because the right – which is to say, proportionate –

²⁴ Alessandro Giuliani, “Intervento” in *Retorica e Filosofia in Giambattista Vico* (G. Crifò Ed.) (Napoli, Guida, (1994), p. 101.

²⁵ Alessandro Giuliani, *La definizione aristotelica della giustizia*, quoted at f. 17, p.90.

arrangement derives from the nature of the situation being considered. This search cannot take place without considering both distributive questions and compensative questions, and therefore justice as reciprocity invigorates the other two forms of justice. Justice as reciprocity reflects and reproduces the dynamic idea of social equilibrium that Aristotle expresses with the term *philia*, or friendship, which, in its classical sense, includes disparate social relationships in which persons place themselves in reciprocal equilibrium that respects their differences, their mutual needs, and their various qualities and abilities.

F. From the Isonomic Logic of the Dispute to the “Classical” Conception of the Community.

Because reciprocal justice follows from the nature of dialectical logic, Giuliani argues that we have a basis to understand the form of coexistence that is contained within the order of dialectical discussion. Dialectical logic is premised on a confutative isonomic practice that begins with the idea that no one person possesses truth, prohibits the assertion of absolute truth, and insists that every point of view merits consideration and the opportunity to be appropriately refuted before being rejected. The civil implication that follows from the nature of dialectical exchange is “isonomia,” or equality. This is the heart of what Giuliani calls the “classical” conception of community which is contained *in nuce* in a dialectically ordered logic of dispute²⁶.

Giuliani draws a connection between a way of knowing (Aristotelian dialectics) and a political form of community (the nonhierarchical isonomic values of Greek democracy), but this is not solely motivated by the archaeological goal of contemplating a great moment from the past. Rather, he is guided by the insight that it is still true that “the order of the community is connected to the order of knowledge.”²⁷ Giuliani emphasizes that law provides the most productive site for observing this connection. The order of knowledge is the focus of several questions: What can be known? How is it known? What relationship exists between the thing and the how, the object and the method of knowledge? Following Vico, Giuliani argues that the way in which we frame and provide responses to these questions is connected with how we conceive and build the social order. “The concept of order is not merely

²⁶ Alessandro Giuliani, “Il problema della comunità nella filosofia del diritto”, in *La Comunità tra cultura e scienza*, I, *Il concetto di comunità nelle scienze umane* (G. delle Fratte Ed.) (Roma, Armando, 1993), pp. 83-97.

²⁷ Alessandro Giuliani, “Il problema della comunità”, at 84.

institutional, but logical as well: it is one of the most complex terms of Western philosophical tradition, in which it feels the effects of the eternal conflict between logic and rhetoric.”²⁸

The classical conception of community does not correspond to the idea of reason that the modern era has endorsed. The instrumental ideal of reason as a means of expunging contradictions through formal logic has given rise to the modern conception of community (from the time of Hobbes) as an order that exists to suppress and control, if not eliminate, conflicts. This conception is sustained by the “utopian ideal of society without law”²⁹ – which is to say, a society without conflicts – because conflicts are regarded as unnecessary for human coexistence, and in fact are deemed to be detrimental. The isonomic community, on the other hand, is ordered by beginning with the recognition that we are in a state of conflict, just as reason is ordered by the dialectical conception by acknowledging the plurality of contradictory points of view. By placing the diversity of viewpoints at the center, the isonomic conception of community is radically pluralistic and egalitarian. It starts from the idea that each community is composite, complex, and conflicting; that a community is comprised of associations, interest groups, factions, and minorities. Therefore, it is more precise to say that the classical conception does not focus on the order of the *community*, but rather on the order of relationships *between* communities. In place of “boundaries” that underscore the existence of barriers, of separate identities and fractures that cannot be overcome, the classical conception posits a community that is a convergence between diversities that maintain their character and do not dissolve into a vague, singular identity³⁰.

G. Conflict and Stability.

The classical, isonomic conception of community embraces change rather than fearing change as a destabilizing force. Conflict is a necessary factor in change, because through the confrontation of argumentation certain tentative shared principles and agreements may be identified and promoted. Conflict is a positive point of departure for working out the values of coexistence, because the objective of coexistence is not pacification to ensure that individuals may make their way through the world untroubled. Justice arises under the stresses of conflicts, which are necessary for the growth and development of society. Justice is not expressed in the will of a rational lawgiver, but rather is a product of the dialogic

²⁸ Alessandro Giuliani, “Il problema della comunità”, at 84.

²⁹ Alessandro Giuliani, “Il problema della comunità”, at 83.

³⁰ F. Cerrone, “Alessandro Giuliani: Logical and Ethical Premises of a Civic Community and its Juridical Order” (unpublished paper, forthcoming 2013).

encounter between people that yields different visions and requirements as to what fairness demands for the moment.

Giuliani's vision of conflict as a factor of change is not irenic, as he certainly agrees that there are connections running through societies. In dialectics, conflict is always present and has a potentially destructive force. Society is traversed by a diversity of interests and conditions. Argument lurks everywhere. Appealing to the image of the classical community leads Giuliani to reflect on the conditions that make it possible to transform necessary conflict into a factor of constructive change that develops the social bond. To permit conflict to arise unfettered would threaten the annihilation of society, and so there are social frameworks within which conflict is manifested and negotiated.

The overriding condition of constructive dialogue is to preserve the equality of the dialogic partners, because where there is inequality in the pursuit of truth there already is injustice. Inequality flows from an abuse of language, a deterioration or abandonment of ordinary language as a reciprocal exchange. These abuses arise in situations when exchanges of information are insufficient, when communication is limited, and when the sources of knowledge are restricted (for example, to technical or specialized sources). The primary abuse of language occurs when participants neglect the ethical orientation toward the truthfulness of dialogue, often by ignoring the *Kairotic* and topical nature of inquiry that is linked to specific circumstances of time and place. These abusive uses of reason involve attempts to assign meanings and importance to interests, values, or needs in accordance with an *a priori* vision that either does not take into account the point of view of others or simply places too much confidence – even if only out of inattention, optimism, or ignorance – in the capacity of concepts and definitions that are valid for one person, group, or history, to be valid always, above the diversity of situations and circumstances of time and place.

The characteristics of the classical community are fostered by the dialectical logic of dispute and its attendant ethics, but these features do not arise out of thin air. The quality of legal institutions – the trial, legislation, and regulation – shapes the level of morality of a civic community at a particular point in time³¹. In other words, justice relates to the quality of the civil bond that establishes nurtures and conserves the social order, and this requires a political and juridical order capable of expressing a plurality of assessments with the goal of weighing preferences, differences, and similarities between citizens to promote reciprocity.

³¹ Alessandro Giuliani, "Il modello di legislatore ragionevole. Riflessioni sulla Filosofia italiana della legislazione", in *Legislazione, profili giuridici e politici* (M. Basciu Ed.) (Milano, Giuffr , 1992), p. 14 (interpreting Vico's opinion on the links between ethics, reason and institutions).

Aristotle places the network of connections in the foreground when he explains that the various *poleis* can be preserved only by adopting equality as reciprocity. Given that citizens are different from one another, it is necessary to ensure a certain complementariness in needs, a division of labor, and a cooperation (even if unwitting) in economic exchange and in civil society. The equality in diversity that maintains the social bond – that is, *philia* – and that focuses on the need people have for one another as the cement for the social bond, can spread only if each citizen experiences equality between what is given and what is received. This equality is complex. It is not a matter of exchanging identical things, but rather exchanging that which is proportionate, adequate, and fair. Indeed: “a city is kept together by proportionate reciprocity.”³² Questions of justice by nature are complex, evaluational, non-arithmetic, and irreducible to calculation because giving to each his own means giving neither more nor less than what is due in the particular circumstances. This requires proportion and appropriateness in posing problems of value that are structured upon need, interest, the relationship being reasoned about, and the circumstances of time and place in which it emerges.

H. The Presence of Value in Judicial Reasoning.

Giuliani’s interpretation of dialectics and its connections with civic order revolves around recognizing the presence of value in the processes of judicial reasoning. He explains that ethics and law cannot be disentangled, and that this complex relation is always unstable and subject to change. He does not suggest that we should harbor hope for a moral theory of law, and even less does he seek to use Aristotelian dialectics as the basis for systematic constructions and theories of justice. To the contrary, Giuliani’s interpretation of Aristotelian dialectics anchors justice to the procedures employed in seeking to do justice, which involve both reasoning and ethics, and emphasizes that justice exists at all times as an open *problem*. We do not need a *theory* of morality or a *theory* of justice. We need something much more modest, but which in fact is extremely delicate and elusive. We need the jurist to be *aware* that value is present in judicial reasoning, to openly embrace that he or she is charged with making suggestions on possible solutions to disputes between interests bearing distinct and conflicting orientations of value. Giuliani concludes that we must protect and foster this awareness by endorsing the precautionary reasoning techniques inspired by a negative,

³² Aristotle, *Nicomachean Ethics*, V, 5, 1132 b.

confutatory, and conflict-based logic of relevance, but that we must simultaneously reject the antisocial abusive uses of reason that threaten the isonomic order.

II. The classical conception of community at work: re-thinking two contemporary legal issues.

According to the classical conception of community, situations of conflict may be virtuous experiences. Instead of tending necessarily towards the community's destruction, the experience of conflict may ensure its vitality and consistency. A conflict is virtuous when it is recognized as a disputed issue, and thus as an occasion to discuss, examine, and elaborate this experience or feature of social life as an important value in itself. Dialectical reasoning enables conflicts to be manifested non-destructively, and elaborates the qualitative questions raised by the conflicts.

Characteristics of the classical conception of community are implied by the idea of reciprocal justice: a justice that sees conflict as signaling a consideration of the importance of the value assigned to someone (a group or an individual), and to one's own interests, tastes, preferences, and orientations. Seen in this way, every conflict is a sign that those who make a claim belong to the community, because it is in the community that they feel the lack of adequate recognition, and it is from the community that they wish to obtain adequate recognition. This gives rise to the constructive potential of conflicts, and the transformative and challenging capacity of conflicts. Remaining open to conflicts signals the possibility of repairing coexistence, but for this to take place there must be a framework of values capable of change. For the same reason, when conflicts are neglected – or, conversely, exacerbated by ignoring the demand to reweigh the importance and value assigned in the community to a fact or experience – there is a risk that social connection will degrade. Reciprocal justice keeps in mind that justice and injustice are sentiments that accompany and express values: those who feel themselves to be treated unjustly feel corresponding emotions, such as anger. The idea of reciprocal justice requires a form of appropriate reason that is able to avoid the abuses that sentiment can foster, but it is also capable of not denying these sentiments by adopting reasoning structures that claim to ignore the emotional and subjective component of the questions of justice. The classical conception sees the dialectical/rhetorical tradition of law as the model for this form of reason.

In this section, we apply these premises to two burning social problems: recognition of LGBT rights with regard to the specific question of same-sex marriage, and the ensuring the rights of immigrant domestic and care workers. In particular, we demonstrate that the classical

conception of the community, and the idea of reciprocal justice, make it possible to reconsider the theoretical approaches by which these themes are formulated in the prevailing debate; lead to a judgment on the goodness and utility of judicial decisions in disputed matters, that emphasizes frequently neglected, minimized, or even criticized potentials of juridical reasoning; and authorize the jurist to cultivate, in his or her own research and education, attention to a multitude of manifestations of culture and thought.

A. Community and Gay Rights

1. Conflicts without controversy? The epistemic trap of liberal and critical theories.

In a famous passage in *Minima Moralia*, Adorno writes: “When a guest comes to stay with his parents, a child’s heart beats with more fervent expectation than it ever did before Christmas. It is not presents that are the cause, but transformed existence.”³³ The excitement of the child perceiving something new in the order of life exceeds the pleasure of satisfying a material desire (Christmas gifts) because it heralds a radical transformation of the status quo and new ways of conceiving the social order. We use this frame to discuss the potential for diversity brought by the LGBT community seeking full participation in the broader community. But how can this potential be grasped?

According to liberal conceptions, the questions raised by LGBT claims are no different than those raised generally by other minorities. These claims are to be formulated as questions of tolerance, such that the rights acquired by a minority are viewed only in the light of the rights enjoyed by the majority. The latter rights are not called into question, and provide the yardstick by which to measure the extent to which the minorities’ claims should be tolerated – which, in this approach, means only to the extent that they are compatible with society’s underpinning structures, and are useful to the general public. Gays and lesbians are free to live their lives as they choose, provided that they do not interfere with the rights of others – for example, and in particular, that they do not imperil the rights of such weak subjects as minors, or their claims do not extend so far as to attain full equality with heterosexual relations, which are seen as the necessary bastion of the community. Founded upon Bentham’s utilitarian paradigm of the ‘greatest happiness of the greatest number,’ the liberal approach promotes the enjoyment of a freedom equal for all, within a unitary vision of political rights. In this incremental logic, to recognize a right means to reallocate a quantity of recognition which is, and remains, fixed. This way of reasoning bears a heavy price to pay – it

³³ Theodor W. Adorno, *Minima Moralia* (Engl. Transl. London, Verso, 2005), p. 177.

reaffirms inequality by purporting to “normalize” diversity – and, for this reason, has been radically attacked by post-liberal critical doctrines, which at heart condemn the repressive implications of the liberal approach.

Post-liberal and critical perspectives regard the ‘normalizing’ of differences promoted by liberal doctrines as nothing more than a hidden re-proposition of stigmatizing stereotype. Although the liberal and critical mindset differ greatly from one another, and are bound to ideological and political paths quite different from one another, one can observe a similar structural error in their thinking. Normalizing or stereotyping is seen as resulting from the institutionalization of male power practices (MacKinnon³⁴); from instruments of discipline inscribed in every rhetoric of freedom (Foucault³⁵); or from a gender categorization that replicates heterosexual dualism (Butler³⁶). Concentrated on the problem of normalization, post-liberal and critical theories often result in the description of an irreconcilable contradiction. The possible alternatives in the face of the conflicts raised by minorities are only two in number: either the minorities preserve their own recognizability, but then remain ‘others’ (which is to say, enemies) outside the boundaries; or the boundaries are overcome, but in this latter case there is a risk of assimilation and the loss of the capability of transformation, because normalization is always lying in ambush.

Thus, the debate is between two sides of the same coin. The liberal ideal of a majority that coexists with the minority while ignoring it, when compared to the post-liberal and critical proposal that entrusts the minority’s survival to its ability to protect itself from the majority’s colonizing contact, results in a striking similarity. Like liberal theories, critical theories are also motivated by the conviction that it is important to identify, *a priori*, a balancing point – in concrete terms, a mechanical point of equilibrium – between one (the majority, its values, its rights, its institutions) and the other (the minority, the different, the others). The resulting image of the community is without dialectics, which is to say: without confrontation and exchange between its components. In the liberal approach, this results from the will to protect the majority’s interest, which is the quantitative reference point for utilitarian assessments; in the critical approach, the same concern arises from the desire to protect the minority, given that the outcome of a closer confrontation with the majority is pessimistically viewed leading inexorably to assimilation.

³⁴ See *Feminism Unmodified: Discourses on Life and Law* (Harvard, Harvard University Press, 1987).

³⁵ See *The History of Sexuality, Vol. I* (New York, Pantheon Books, 1985).

³⁶ See *Undoing Gender* (New York/London, Routledge, 2004).

The fact that post-liberal critical theories mirror liberal ones signals that they do not take full measure of what should have been their target – the mechanical and distributive conception of justice. In truth, they share this narrow conception of justice. Justice, understood here as the recognition of the equal dignity to be accorded to subjects that express sexual desires different from the majority, is seen from both perspectives as calling for a fixed quantity of protection, which can be granted or opposed as the case may be, but which may never be questioned as to its underlying value with the goal of initiating a transformative dialogue. For this very reason, post-liberal theories cannot overcome the failure of liberal theories by preserving the potential to transform collective values by addressing LGBT claims in their own right. When attention is concentrated on demonstrating the legitimacy of a certain claim, there may very well be a one-sided, ideological, discourse that is unaffected by other people's viewpoints. It is no accident that in the post-liberal and critical perspectives as the conflict's dimension is exaggerated and the claim becomes more of an ultimatum, there is less attention to law, which generally is derided as entirely conservative, as a code of mere normalization. For both liberal and post-liberal orientations, the law, the knowledge of the law, and the language of law are deemed to lack the ability to take on and transform collective values in situations of dialectical confrontation; law is accorded only the ability to stabilize balances of power.

Unlike liberal and critical theories, Aristotle's and Vico's idea of community, as seen in the light of Giuliani's contemporary interpretation, considers the possibility that the solution to the problem of just recognition and just treatment of different persons such as gays and lesbians can only be developed through dialectical discussion. A discussion that takes into consideration the viewpoints of all the parties with a stake in the problem stresses the equality of the parties – which is to say, the right balance between them – is not a fact existing before the discussion but rather is dynamically created by their participation in the confrontation, which continuously shifts and redefines the formulation of the right and good.

Justice as reciprocity is a form of corrective (or commutative, according to the Scholastics' lexicon) justice. It is conceptually opposed to distributive ideals because it is not based on an idea of truth to be formulated and applied in society but on the idea that truths are multiple, dynamic, and changeable based on circumstances of time and place, and that forums are needed in which these truths may confront one another, seeking agreements in relation to situations – through topical agreements. Furthermore, this idea of reciprocal justice refers to a theory of argumentation founded upon refutation. Because the point of departure is recognizing pluralism -- the multitude of interests and of orientations of value -- discussion oriented to forming agreements is not aimed at identifying preferred ideas or solutions, but

rather towards negatively identifying the subjects that are of no relevance or pertinence within the scope of the concrete controversy.

2. How can court cases promote change? The classical conception of community illuminates the contributions that judicial decisions can make in recognizing LGBT rights, which differ both from the disenchantment of the critical doctrines (which expect from jurisprudence only normalizing confirmations of the status quo), and from liberal moderation (according to which the quantity and type of recognition to which a minority is entitled can only be measured against the institutions already available to the majority, thus confirming their stability and priority).

For example, consider the 2010 decision in which the European Court of Human Rights found it could not yet consider the prohibition against same-sex marriage to be a violation of human rights³⁷. Called upon to rule against Austria by a gay couple denied the right to marry, the Court considered the state of the legal systems in the various countries adhering to the ECHR. Finding that many legal systems have yet to recognize gay marriage, the Court concluded that there was no so-called ‘European consensus.’ Especially when dealing with particularly delicate issues, the Court acknowledges that the national states enjoy a certain ‘margin of appreciation’ to be accorded in deciding cases³⁸. Thus, the Court held that the absence of an underlying consensus between European legal systems on gay marriage prevented the Court from setting a standard of common protection, with the effect that the individual states may freely act within the scope of their own margins of appreciation until that convergence takes place. On the other hand, in developing this reasoning, the Court embarked on a path of argument openly favorable to gay marriage. First, it found that the precise language of art. 12 of the European Convention, recognizing the right to marry and establish a family for a “man” and “woman,” was not determinative of the question because a narrow and literalist reading of the text would go against an evolving understanding of the Convention. The European Court, therefore, accepted that claims to the right of gays to marry came within the scope of the ECHR’s fundamental rights, and in particular to the right to family life. All this, however, was not enough to result in a declaration that the national regulations prohibiting same-sex marriage were incompatible with the Convention.

³⁷ Schalk and Kopf v. Austria, ECHR 30141/04 (June 24, 2010).

³⁸ See now, on this Court’s interpretative tool, G. Repetto (ed.), *The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective* (Antwerpen, Belgium, Intersentia, 2013). See also, in the perspective of sexual orientation rights, particularly L.R. Helfer, “Consensus, Coherence and the European Convention on Human Rights”, in *Cornell International Law Journal* (1993), p. 26.

Are these contradictions that signal the Court's limited approach evidence of a lack of courage, or merely a culturally-inspired delay by the Court? For those who already have in mind what the fair outcome of the question is – and that a fair outcome is necessarily also a certain and defined one – the ruling is inevitably disappointing: the Court espoused neither the idea that gays are entitled to marry, the thesis to the contrary, or even a well-defined intermediate thesis. The important point, however, is that the decision did not leave the competing arguments as they were: the balance of different viewpoints in the case mark the moment of consolidation and recognition of gay rights; even so, the court acknowledged that an effective decision must be accompanied by consensus, and cannot deviate from the political and decision-making itineraries calibrated to the public spheres within the various member states³⁹. In short, the ruling calls on the European nations to address their duty to take this issue into serious consideration.

For those who believe that a fair result in the case cannot be separated from the method of reasoning, this ruling is rich in content and highly important. It shows the judges' awareness that protecting gay and lesbian couples in Europe is a contested question that cannot be resolved in a facile manner. For this reason, the strength of a single Court opinion to fully overcome the current situation is cast into doubt, no matter how authoritative that court is. The positive effects of a definitive 'yes' to gay marriage, if isolated from and not embraced by national political identities, would not advance the cause of justice. A decision that went too far could foster endemic disagreement, which would risk a negative reaction on a par with what occurred after *Roe v Wade* in the United States, with the decision being viewed as an aggressive advancement of a single viewpoint and triggering a political backlash in the United States. The subsequent legacy of *Roe* has been an unrelenting series of retreats on abortion rights, with the overall issue remaining an open, divisive and corrosive issue.⁴⁰ Ignoring competing viewpoints regarding same-sex marriage in the name of issuing a decisive opinion that clearly and unilaterally embraced an absolute right to gay marriage would have had additional costs. By implying that the correct response to LGBT claims is to extend the same treatment as heterosexuals, a decision would have reduced the margin of available solutions to a bivalent choice, excessively predetermining the meanings and terms of recognition of a

³⁹ This approach could be compared to that of the US Supreme Court, which since *Miller v. California*, 412 U.S. 15 (1973) entrusts the States with the task of individuating the public morality standards, in certain occasions and on the basis of the local context's peculiarities. See on this point M.A. Case, "Community Standards and the Margin of Appreciation", in *Human Rights Law Journal* (2004), p. 11.

⁴⁰ However, even this divisiveness leaves room for rhetorical knowledge, to the extent that there is some engagement between the parties and not simply open violence. Francis J. Mootz III, *Rhetorical Knowledge*, p. 51-60 (discussing the issue of affirmative action).

certain right in ways that would confine them within cultural prejudices that may turn out to be too restricted to deal with the complexity of modern life.⁴¹

A number of critics challenge the possibility of absolutely recognizing the claims and expectations of gays and lesbians. Those who reflect upon the transformations in the sense of intimacy in capitalist societies openly wonder whether it is worth “taking the achievement of freedom or equality as the final yardstick for assessing social transformations,” or whether “we should not ask ourselves precisely about the manner in which the new norms of equality and freedom have transformed the ‘emotional framework’ of personal relationships.”⁴² In other words, a virtue of the open nature of the decision we are considering is that recognition of an underdetermined structuring of rights permits an articulation of models for the protection of gay relations that is not hastily traced upon institutions already in existence, institutions that heterosexuals have shaped for their own interests. The emancipatory goal of seeking a “yes to gay marriage” poses a threat that we will normalize and colonize the claims⁴³.

In light of these considerations, the apparent ‘non=decision’ by the ECtHR, by resorting to the margin of appreciation in the absence of European consensus, productively identifies lines of argument that may be used in the future (as occurs when the ruling aims at developing forms of protection, and at interpreting the ECHR and the Charter of Nice), and does not claim to superimpose its argumentation upon the paths of legislative policy in the individual states. In short, the value of the open nature of the decision is not in the ruling, but in the fact that it initiates a line of argument that excludes definitive answers but also provides fundamental direction to the future dialectical confrontation on these questions. The image raised in the decision is one frequently evoked by Giuliani: the necessary balance between legislation and

⁴¹ Cass R. Sunstein, “Incompletely Theorized Agreement,” 108 Harv. L. Rev. 1733, 1748 (1985).

⁴² E. Illouz, *Cold Intimacies. The Making of Emotional Capitalism* (London, Polity Press, 2007), p. 62.

⁴³ In France, where civil partnerships have been legalized since many years and now same sex marriage is about to be introduced, Homovox, an association of gay people, fiercely opposes. To Homovox adherents, same-sex marriage denies the difference of being homosexual: “it is not equality that counts, but justice, and there is a fair justice and a unfair justice”, Mrs Nathalie de Williencourt declared to the Italian newspaper “Il Foglio” (www.ILfoglio.it, 15.12.2013). “This law encourages homosexuals to think they can copy and fit in the way heterosexual couples do. It makes them think they have to follow the example of man, woman and child, without respecting sexual difference. It denies respect to homosexual couples in reality with regard to their specificity and who they really are. (...) Even if you present this to gay couples like a gift, it’s still denying who they really are. It is not question of equality. Equality isn’t inherently positive. There are bad/wrong equalities. We call that conformism, uniformity. A lack of recognition to the realities of people. The gay activists who treat equality as sacred do not differentiate between equal rights and equality of self- respect and dignity”, declared Mr Philippe Arino, interviewed by M. Gallagan on www.nationalreview.com (“Extraordinary French Rebellion Against Gay Marriage”, published on Jan. 10, 2013). On the Homovox website these words are displayed: “Instead than ‘marriage for everybody’ gay citizens claims freedom of expression for everybody”.

judicial review⁴⁴. This image captures the bond between the theory of argumentation, justice as exchange or reciprocity, and an idea of civic community and juridical order in which it is necessary for jurisdiction and legislation to find forms and modes of reconciliation between their respective roles. This is not a matter of stressing the absolute value of the principle of separation of powers at the expense of the judge's role, but rather of being aware of the necessity that a progressive role for the judiciary cannot be expanded indefinitely without taking account of the political and legislative balances present in society at a given historical moment.

3. Controversy and transformation of the social order. Because the classical conception of community seeks transformation, it cannot be validated by considering its process and performance as data to be assessed, approved, or criticized from the standpoint of being able to definitively and clearly determine the recognition of rights. Instead, the process is assessed by its ability to foster the development of knowledge about different positions, values, and viewpoints with regard to the value of the options under discussion. Therefore, the classical conception of community is translated into a way of reading and using jurisprudence that is interested in the quality of the reasoning and argumentation, and in their ability to construct an evolving and open framework which, precisely because it shuns opposing alternatives, may be more favorable to consolidating the values of diversity, confrontation, and pluralism rather than purporting to promote the interests of this or that minority.

Courts often are criticized when they keep questions open that critics would like to be decided in a clear fashion. The critics fail to understand that definitive resolutions keep the solutions to value conflicts enclosed within possibilities already contained in the status quo. In many cases, keeping a question open is the most effective way to ensure a genuine consideration of value conflicts, which is to say their ability to transform the status quo.

Turning to the specific arena of LGBT claims, the classical approach would foster paths of inquiry and reflection that gradually create the conditions to make it possible for different desires to contribute towards the structuring of the social order. An argumentative approach that embraces controversy does not claim to establish a definitive idea of the common good, but instead is centered on a critical and selective focusing of the arguments that confront one another, with the objective of gradually excluding alternatives that are out of proportion, in Aristotelian terms, with the conflicting interests and desires at stake. For example, the

⁴⁴ For this remark, see F. Cerrone, quoted at f. 30.

accusation that gay rights undermine moral values is a means of refuting the proposed claim of rights. On the other hand, we must be aware that placing diversity at the center of the community cannot be achieved through the a priori disqualification, or blaming, of GLBT persons as happens too often among social conservatives in society. The objective should be to recognize this conflict but to render it non-destructive. We should not tap into society's reactionary sentiments; rather, we should organize the conflict by requiring the members of the dialogue to recognize each other as interlocutors.

Recognizing that this dialogue requires time, considerable energy, and an abundance of creativity is not to conclude that GLBT persons may hope to obtain justice only after so much time has elapsed that they may not even care about the specific dispute any more. Rather, the point is to recognize that each individual experience that is voiced in the process helps build the ideal of a transformed society, without elevating any of these experiences immediately to an absolutized or generalized principle that purports to prefigure a stable future.

B. The Classical Conception of Community and the Evolution of the Domestic Sphere.

1. The silence of Western liberal thought on justice in domestic and care work. We can develop a different angle on the question of community by considering another social question that pulls back from the debate over civil rights in the polity and implicates the justice of arrangements in the so-called “private” domestic sphere. Aristotle, Vico, and Giuliani understand that dispute promotes social connections by generating knowledge because they recognize that human communities are composed of a highly complex and rich emotional fabric. Hobbes traced the emotional motive that leads people to live together to a fundamental fear, but in the classical conception of the community the range of emotions leading to connection are more variegated and include the desire for recognition and honor, as well as revenge, shame, and rage⁴⁵. All these sentiments are linked to the idea of justice inasmuch as they signal different moments in which the balance of justice is considered broken within a society and requiring some form of redress. Stressing the fact that society's emotional fabric is central to identifying the dynamic balances of fairness, the classical conception of community and the rhetorical-- dialectical vision of law say that justice is historically conditioned, because “what is right and good” is something that is exposed to revision and change. Moreover, justice is a social fact, which is to say that the need, and

⁴⁵ A. Giuliani, *La definizione aristotelica*, quoted at f 17, p. 82.

ethical capacity, for justice is rooted in the actual social conditions of a community rather than in abstract philosophical doctrines.

The goal of rendering individuals competent to pursue justice in their concrete and direct relations is a goal that has important implications. First, it compels reflection on the ethical components of the market that does so much to structure social relations, re-proposing the problem of justice for a setting that has claimed to be outside the purview of justice as a seemingly natural feature of human interaction. This means that we must subject economic relations to inquiry even if they have been neglected by contemporary theories of justice.

Consider domestic and care work, which in many Western homes is performed by immigrant workers who are predominantly women. This issue provides a kind of mirror image of the struggle for LGBT rights, because the people seeking recognition have difficulty having their voices heard as part of the civil rights movement, or in articulating concrete reform proposals. Many commentators dwell on condemning the radical injustice that lies behind the massive presence of immigrant domestic and care workers, and that accompanies their condition in our homes, but the noble intention of condemning injustice actually impedes the effort to articulate a just form of domestic community because it tends to paint the situation as an uncomfortable reality that should not exist.

The theory of “global care chains” that spread in the United States in the early 2000s, and that today provides the paradigm of reference in this area, provides a highly significant example of this theme.⁴⁶ This theory hinges on the fact that the great inflow of immigrant domestic and care work, generally performed by women in Western homes, is a result of the failure of the feminist revolution of the 1970s. Western women managed to leave the home and enter the labor market, but they did not change the habits of men, who generally failed to take on their share of domestic and care work. The imbalances that feminism had condemned are thus re-inscribed on a global scale: the work in the home that Western women abandoned is in many cases performed by women that belong to disadvantaged minorities or that come from countries in economic difficulty. Immigrant domestic and care work is a multiplier of injustices: gender imbalances are layered on top of racial and economic ones. Western studies of domestic and care work incite a sense of guilt in the emancipated Western woman who relies on the work of another woman, one who has often abandoned her own home, or cannot lead a life of her own. Working in another’s home reduces or impedes her full participation in public life, which Western women have apparently reduced to entry into the labor market. In

⁴⁶ Barbara Ehrenreich and Arlie Russell Hochschild, “Global Women: Nannies, Maids and Sex Workers in the New Economy” (New York, Henry Holt, 2002).

this setting, friendship is considered an impossible relationship: given that the disparity between the employer and the care worker is felt to be unbridgeable and irremediable.

Western men who do not assume caretaking duties advance a theory of “global care chains” that promotes a message according to which “if *we* were a better society, *they* would not have to be here.” By dwelling on condemning the injustice and the radical disparity in these situations, the critique inscribes them within the metaphor of the slave/master relationship. This message considers domestic and care work outside the civic sphere, confining it to the margins of the community in a wholly private realm. Perhaps involuntarily, the critique validates the premises of the liberal and utilitarian conceptions of society: the insignificance of the domestic sphere; its irrelevance to public life; the hierarchical order of productive labor over reproductive work, and the idea that juridical order may operate independently of the social order.

2. Shifting our gaze: Raquel's story. Under present conditions, it is predominantly through art, literature, and cinema that we question the relationship between employers and domestics in private homes. Majoritarian theories consider the relationship to be embarrassing; an impossible one that they wish did not exist. However, artistic portrayals provide elements rich in meaning that permit us to make sense of this condition.

In the 2009 Chilean film, *The Maid* (based on the director's personal recollection), Raquel is a 41-year-old domestic who has been living for 23 years with the wealthy Valdez family in Santiago. Raquel has a difficult personality, and recently has been suffering from a host of infirmities. The family does not recognize that it is her stifling and restricted life within the confines of the family for whom she cares that has caused her difficulties. Concerned about her, the Valdezes decide to hire another maid to help her perform the housework in order to reduce the burden on her. Raquel takes this intervention very badly: she behaves so poorly with the first two maids hired by the family that the new maids quickly quit their position. With the third helper, Lucy, things go differently. Lucy is a person capable of relating to others, and a friendship between the two of them is born. When Lucy leaves home, it is clear that Raquel has been transformed. In the final scene, we see Raquel going out in the morning, exiting the house that she never used to leave, to go jogging through the open city streets.

With this highly significant ending, *The Maid* underscores that the domestic sphere and the civil sphere are in a relationship with one another; they are contiguous and connected. The relationships taking place in the home between employers and the domestic help create closure and hostility because of their disordered nature and not because the setting happens to

be the domestic sphere. A disordered domestic sphere impoverishes and disqualifies the public sphere as well. A home where relationships are more ordered enriches the public sphere by cultivating persons who are capable of inhabiting it.

Theories of global care chains transmit a sense of dispossession, guilt, and impotence. With painful awareness of these emotions, *The Maid* motivates the viewer to take responsibility for human beings' need to regulate their relationships proportionately. Raquel overcomes her *ennui* after the clumsy effort made by the Valdez family to help her – an effort that had not taken into due consideration that Raquel might not have appreciated the company of another woman in her sphere of the household relationships because she symbolized Raquel's inability to perform her role. The Valdezes did not understand that they were doing the right thing badly, and in this sense they were doing the wrong thing. It was Raquel's unpleasant and brutal resistance to the first two maids that indicated that the Valdez family's choice was out of proportion, and, in a manner that was random and undeterminable in advance, led towards a reconciliation. The film advances the thesis that relationships in the household can improve, and if they do, this benefits everyone. However, the film also makes clear that relationships in the household can improve only if members acknowledge each other's concrete existence, instead of merely hoping abstractly for global conditions that would permit others not to emigrate, not to belong to disadvantaged minorities, not to work as domestics – conditions that probably will never occur during the lifetime of today's employer and domestic workers.

If justice is implicated in every exchange between two people, the conceptions of reciprocal justice and of *philia* are immediately relevant. If justice and injustice are experienced in social life, we cannot view the private and public spheres as dichotomous, separate, or vertically ordered, but rather as contiguous and porous with one another. The Aristotelian idea of *philia* expresses the operation of a sense of justice in human relations. The classical conception of community can address problems of justice within contexts, like the domestic sphere, that traditionally are excluded from reflections on citizenship, politics, and justice. By limiting itself to condemning the injustices suffered by immigrant domestic and care workers, liberal theories lack the ability to formulate a transformative practical idea. This failure largely is due to their resistance to, and difficulty in rethinking, the value of domestic life, of care activities, and of reproductive functions, inasmuch as liberal theories valorize productive activities in the public sphere.

3. “The home as city.” So long as our conception of the domestic sphere is framed by images of slavery and subordination, it remains quite difficult for our society to assign a value to domestic and care work. To direct ourselves towards greater justice for this work and those who perform it, we need a new metaphor that moves beyond the slave/master dialectic, and is capable of conceiving these domestic relations as relevant and rich in importance.

In studying the deepening of Aristotelian thought by Medieval Italian jurists, Giuliani stresses that they had identified a “paradigm not only rational but also ethical, for the exploitation of resources, that is the antithesis of the *homo oeconomicus* so dear to “utilitarian” theories⁴⁷ Aristotle also saw in economics a discipline auxiliary to politics. In reinterpreting his thought in the presence of the new economic development in their time, Medieval Italian humanist jurists placed political ethics and economics in a relationship of parity. In this context, the Aristotelian idea by which *coniugalis societas* is a natural and spontaneous order was reread in the sense of indicating a “parallelism between family order and economic order,” as expressed in the metaphor: “the home as city”⁴⁸.

The idea of reciprocal justice and the Aristotelian image of *phília* play an important role in composing the image of the “home as city.” On one hand, these ideas remind us that obligation and responsibility are not premised only on the participants’ abstract equality, but on real exchanges between them. On the other hand, they remind us that the central actors in identifying just compensation are not legal functionaries – which is to say judges and legislators – but the persons involved in the exchange. *Phília* is justice in interpersonal relationships: it warns us that the quality of the relationships we have with others is highly significant to whether justice pervades a community.

By appealing to the role that exchanges between individuals that differ from and encounter one another based on their needs have in their configuration of a fair society, reciprocal justice and *phília* represent two highly important components for removing today’s main conceptual obstacle to imagining the possibility for justice for those who have left their own home to provide domestic and care work. The obstacle is the perpetuation of the idea that the domestic sphere is subordinated to the public sphere, is disconnected from and is of no relevance in formulating problems of justice – which by definition appear to have to be delegated to judges or legislators, instead of involving an ability to regulate oneself in one’s own affairs, by which everyone has a stake in justice and spreads it in society.

⁴⁷ A. Giuliani, “Le radici romanistiche della dottrina italiana della concorrenza” in A. Giuliani, A. Palazzo, I. Ferranti, *L’interpretazione della norma civile* (Torino, Giappichelli, 1996), p. 115.

⁴⁸ *Ibid.*

If the home may be considered "on a par with the city," the conflicts, relationships, and encounters that take place in the domestic environment -- and the ways in which they are dealt with, elaborated, and composed -- may be recognized as conditioning the quality of coexistence: in this perspective, the private sphere is translated into a space which generates relationships that qualify the systems of social connections, and that leave their mark in the public sphere.

Conclusion

In this article we have outlined the theoretical dimensions of Alessandro Giuliani's work and shown how his writings generate practical understanding of the legal system. Giuliani rescued dialectics from the attempt in the Middle Ages to restrict it to a quasi-logic that overcame the vagaries of rhetoric. We have shown that his revitalized dialectics reunites dialectic and rhetoric as *antistrophos* that mark a realm between indisputable logic and sophism. This recovery is particularly important for legal studies, because law always operates on the basis of provisional truths that are reached in ordinary language. Legal argumentation is inventive, creative and cooperative in nature.

Giuliani connected the form of reasoning in law, its "logic of inquiry," to a form of civic life. If our truths are only provisional, and based on dialogic engagement, then a notion of community is implied in the form of reasoning itself. The lesson to be drawn is the inevitability of conflict and the need to negotiate the conflict through attention to reciprocal justice. Aristotle's studies of dialectics and rhetoric are thus connected intimately to his inquiries into justice.

We rendered our discussion concrete by considering two contentious legal questions and how they shed light on the necessity of community. The liberal model of toleration for discussing gay rights elides the fact that different communities within the polity are in constant negotiation about the "norm" that must then tolerate deviations. Gays and lesbians are not striving to be tolerated by the dominant model of sexuality; rather, they seek to be accepted as members of a dialogue about the nature of sexuality and its communal dimensions. Law is not a technical conferral of rights based on a fixed norm, but rather is a site for dialogue on an evolving issue.

In a different vein, the confluence of immigration and global economics gives rise to a substantial question regarding the justice of domestic workers being "imported" into wealthy Western countries. However, the abstract critique of the socio-economics involved results in a sterile guilt about the master/slave dialectic, accompanied by an ephemeral wish that things

could be otherwise. Taking Giuliani's critique to heart, we should move away from such grand pronouncements and recognize that "the home is a city." Attending to the concrete relationships of the people involved in domestic caregiving means to recognize that justice operates at this level too.

We close by noting the need for legal scholars to reawaken their role as humanists in the tradition of the liberal arts. We referred to a film while speaking of immigrant domestic and care work, and in discussing gay marriage we took into account the reflections of gay people that reveal perplexity over the idea, albeit asserted by many progressive scholars, that merely recognizing the same right to marriage already valid for heterosexuals is the proper measure for giving appropriate recognition to the gay experience of love and sexuality. The dialectical and rhetorical conception that inspired Giuliani and his conception of community requires us to expand the field of materials that the jurist considers relevant to her work and training. In the classical conception of community, law is a moment of building coexistence, because it is the locus where the controversy over the values that inspire it takes place. But the controversy over the values that inspire coexistence does not start and end in courtrooms, or even in legal debates. The dialogic controversies run through the manifestations of culture, art, literature, and cinema, but also are illuminated in the analyses and debates that involve sciences other than jurisprudence -- such as psychology, sociology, and religion -- that quite often give voice to visions and assessments sensitive to what takes place in everyday life but which are not yet enveloped in theoretical analyses, philosophical reflections, or general doctrines. For this reason, the classical conception of the community imagines a humanist jurist, a cultured and curious jurist, attentive to and interested in the paths of culture not out of a taste for erudition, but out of passion and responsibility for understanding the conflicts that generate and transform coexistence.

Recognizing that justice is a social fact means that we must accept law as a historical experience, consisting of institutions, practices, and ideas that respond to the constant question of what is fair and good which, according to Vico, reflect the degree of morality and the mentalities of a given time. Many believe that reasoning in this manner means, at most, legitimating a natural conservative tendency of law. However, law's porosity to expressions of culture, art, and thought has quite different effects and manifestations. These manifestations offer elements to be pondered when reflecting on the acceptability of a decision, and offer guidance to the desire for a non-partial, non-abstract, non-abusive argumentation of a disputed question. Direct knowledge of testimony, viewpoints, and experiences entrusted to narrative, cinema or non-judicial studies fosters the consideration of

a multitude of viewpoints – for example, it allows us to take into account that within a given minority, such as the GLBT community, claims and aspirations are not monolithic. Acknowledging the complexity and diversity of views raises the jurist's awareness of the need to seek solutions for disputed problems that do not crush demands for emancipation and liberation into a normalization of these problems. Today, film and literary works that concentrate on domestic work call attention to the operation and importance of such human capabilities as friendship and a sense of justice, even in spheres and contexts neglected by theoretical reflection, such as the home. They constitute as many testimonies that encourage the jurist to recognize the possibility of inaugurating and formulating problems that would otherwise stand mute and be suppressed. And so, in the quest for truth and justice in a realm that admits only of contextual probabilities, we must immerse ourselves in the subtleties and diversity of the humanistic tapestry of life.