IN PRAISE OF REALISM
(and Against "Nonsense" Jurisprudence)

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Ronald Dworkin describes an approach to how courts should decide cases that he associates with Judge Richard Posner and Professor Cass Sunstein as "a Chicago School of anti-theoretical, no-nonsense jurisprudence."[1] Since Professor Dworkin takes his own view of adjudication to be diametrically opposed to that of the Chicago School, it might seem fair, then, to describe Dworkin's own theory as an instance of "pro-theoretical, nonsense jurisprudence."

That characterization is not one, needless to say, that Professor Dworkin welcomes. To be sure, he describes his preferred approach to jurisprudential questions as "theoretical," in opposition to what he calls the "practical" orientation of the Chicago School. He writes, as he says, "in praise of theory," while the Chicago School he opposes views court decisions as "a political occasion" in which there is an "immediate practical problem" which demands of us an answer to the question: "How can we make things better?"[2]

It is familiar to students of jurisprudence that Professor Dworkin is an unreliable guide

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[1] Ronald Dworkin, *Justice in Robes* (Cambridge, Mass.: Harvard University Press, 2006), p. 51.
[2] *Id*. at 50.

to the views of his opponents,[3] and matters are no different in this instance. Judge Posner has a "theory" in any recognizable sense of that term.[4] He argues that the cases confronting appellate courts are frequently indeterminate as a matter of law and that, in fact, judges are often influenced by their non-legal views about questions of morals and politics. Judge Posner suggests resolving those cases with a rough-and-ready cost-benefit analysis, in which costs and benefits are understood (again loosely) in terms of utility which is, in turn, understood as the economists understand it, namely, in terms of revealed preferences (for example, willingness to pay). The claim that the law is indeterminate, that judges are influenced by non-legal factors, that judges ought to employ cost-benefit analysis, and that utility should be understood in terms of revealed preferences certainly sound like theoretical claims to my ear. What else could they be?

There is, to be sure, a real dispute between Dworkin and Posner (I shall bracket Sunstein's views, since they are, as Dworkin himself ultimately acknowledges,[5] quite different from Posner's), but it is not a dispute illuminated by the contrast between theory and practice. It is, rather a dispute about the kind of theory that is relevant and illuminating when it comes to law and adjudication. And the fault line marked by this dispute is profound indeed, one that extends far beyond Dworkin and Posner and has a venerable and ancient history that runs through Plato and Thucydides, Kant and Nietzsche, Hegel and Marx, as well as Rawls and Geuss in the present. I shall describe it, instead, as a dispute between Moralists and Realists, between those whose starting point is a theory of how things (morally) ought to be versus those who begin with a theory of how things really are. That is only a crude first approximation of what is at stake, but

[3] See, e.g., my "Beyond the Hart/Dworkin Debate: The Methodology Problem in jurisprudence," in *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007), esp. pp. 155-160 (and see also n. 32)

[4] [cite standard Posner sources, as well as *How Judges Think*]

[5] *Justice in Robes*, p.__ [intro to volume]

it will be the burden of this essay to fill it out.

We shall return shortly to Dworkin and Posner, but let us go back in time to the first emblematic instance of this dispute: between the Moralist Plato and the Realist Thucydides in antiquity. There will prove to be a sense in which our contemporaries, Ronald Dworkin and Richard Posner, are merely reenacting a version of the dispute between the paradigmatic philosophical moralist Plato and the paradigmatic historical realist Thucydides.

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Plato is both a moralist—a philosopher with a robust conception of the good life and the just society which he advocates—and a moralizing philosopher, whose metaphysical and epistemological views are in the service of his moral aims, a philosopher who illustrates Nietzsche's dictum that "the moral…intentions in every philosophy constitute the real root from which the whole plant has always grown."[6] For Plato, immoral behavior is irrational behavior,[7] and it is in the interest of rational beings to forego the selfish satisfaction of their desires in favor of acting justly. The true nature of reality, justice, and what is in our interests, are all possible objects of rational cognition for Plato, though the objects of such cognition are a realm of facts that transcend the merely empirical world. The world around us, the one visible to our senses, is merely apparent, a pale imitation of the true world in which the rational is the moral, self-interest coincides with justice, and a harmony obtains between objective knowledge, objective reality, and the good. The Cambridge political philosopher Raymond Geuss aptly characterizes this Platonic "optimism" (as he calls it) in terms of a number of propositions, of which the most important for

[6] *Beyond Good and Evil*, section 6.

[7] The later Plato arguably has a different view, so consider this a point about the earlier, and better-known, Platonic view.

our purposes is the Platonic assumption "that when the world was correctly understood, it would make moral sense to us."[8] Dworkin, the jurisprudential Moralist, wants the correct understanding of what courts do to make a certain kind of "moral sense" as well, namely, that court decisions are morally justified in licensing the exercise of the state's coercive power in virtue of their conforming to a kind of Dworkinian ideal of judicial decision. We shall return to that ideal shortly.

Platonic optimism and moralism, as Nietzsche most famously argued, is the dominant theme in Western philosophy from Plato onwards, and it is for this reason that Nietzsche so much prefers the pre-Socratic philosophers, especially the 5th-century Sophists, whom Nietzsche takes (somewhat, though not wholly, idiosyncratically) to be best-exemplified by the historian Thucydides. In Thucydides, Nietzsche says,

> that culture of the most impartial knowledge of the world finds its last glorious flower: that culture which had in Sophocles its poet, in Pericles its statesman, in Hippocrates its physician, in Democritus its natural philosopher; which deserves to be baptised with the name of its teachers, the Sophists. . .."[9]

In Thucydides, in other words, "the culture of the Sophists, by which I mean the culture of the realists [die Realisten-Cultur], reaches its perfect expression."[10] "Realism," here, means not Plato's metaphysical doctrine about the reality of a supra-empirical world, but rather "the courage

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[8] Raymond Geuss, *Outside Ethics* (Princeton: Princeton University Press, 2005), p. 223.

[9] *Daybreak,* section 168. Cf. *The Will to Power,* section 428 (a note of 1888): "The Greek culture of the Sophists had developed out of all the Greek instincts; it belongs to the culture of the Periclean age as necessarily as Plato does *not*; it has its predecessors in Heraclitus, Democritus, in the scientific types of the old philosophy; it finds its expression in, e.g., the high culture of Thucydides. . .."

[10] *Twilight of the Idols*, chapter X, section 2.

of all strong spirits to know their own immorality,"[11] that is, to face up to the role that (for example) avarice, malice, and selfishness play in what is otherwise instrumentally rationally behavior by persons. Thus, Thucydides, the quintessential realist, is described by Nietzsche as,

> …the last revelation of that strong, severe, hard factuality which was instinctive with the older Hellenes. In the end, it is courage in the face of reality that distinguishes a man like Thucydides from Plato: Plato is a coward before reality, consequently he flees into the ideal; Thucydides has control of himself, consequently he also maintains control of things.[12]

Plato "flees into the ideal" by pretending, for example, that it is always in the rational self-interest of agents to act justly and that no rational person ever knowingly acts wrongly. Thucydides's "courage in the face of reality," by contrast, is on display in his portrayal of the dialogue between the Athenians and the vanquished Melians--a dialogue that one distinguished scholar, W.K.C. Guthrie, has called "the most famous example of amoral realism."[13] Negotiating over the terms of surrender, the Athenians address the Melians, in relevant part, as follows:

> For our part, we will not make a long speech no one would believe, full of fine moral arguments--that our empire is justified because we defeated the Persians, or that we are coming against you for an injustice you have done to us. . . Instead, let's work out what we can do on the basis of what both sides truly accept: we both know that decisions about justice are made in human discussions only when both sides are under equal compulsion

[11] *The Will to Power*, section 429.

[12] *Twilight of the Idols*, chapter X, section 2.

[13] W.K.C. Guthrie, *The Sophists* (Cambridge: Cambridge University Press, 1971), p. 85.

[i.e., only among equals does right prevail over might]; but when one side is stronger, it gets as much as it can, and the weak must accept that.

Nature always compels gods (we believe) and men (we are certain) to rule over anyone they can control. We did not make this law, and we were not the first to follow it; but we will take it as we found it and leave it to posterity forever, because we know that you would do the same if you had our power, and so would anyone else.[14]

Nietzsche's own commentary on this particular dialogue highlights some of the key themes of Sophistic Realism:

Do you suppose perchance that these little Greek free cities, which from rage and envy would have liked to devour each other, were guided by philanthropic and righteous principles? Does one reproach Thucydides for the words he puts into the mouths of the Athenian ambassadors when they negotiated with the Melians on the question of destruction or submission?

Only complete Tartuffes [i.e., Socrates and Plato] could possibly have talked of virtue in the midst of this terrible tension--or men living apart, hermits, refugees, and emigrants from reality--people who negated in order to be able to live themselves….

[The English scholar] Grote's tactics in defense of the Sophists are false: he wants to raise them to the rank of men of honor and ensigns of morality--but it was precisely their honor not to indulge in any swindle with big words and virtues--.[15]

Contempt for any "swindle with big words and virtues" may be one of the hallmarks of Realism, but what exactly does it mean? In the case under discussion, Realist impatience with

[14] Paul Woodruff, *Thucydides on Justice, Power and Human Nature* 103, 106 ((¶¶ 89, 105).

[15] *The Will to Power*, section 429.

the "swindle with big words and virtues" signifies the candid recognition that the Athenians in their dealings with the Melians are not moved at all by "philanthropic and righteous principles," but are driven, instead, by selfish and self-aggrandizing concerns, restrained only by the limits of their own power. (We should notice here the resonance with contemporary "realist" theories of international relations, which frequently acknowledge Thucydides as their inspiration.[16]) Socrates and Plato, by contrast, engage in a "swindle with big words and virtues" when, as Thucydides makes plain, virtue and justice play little role in human affairs.

Of course, the speeches Thucycides presents are his own creations; in many cases (as with the Melian dialogue), he could not even have been present to hear them. Yet this is precisely why Thucydides is a Realist in Nietzsche's view: how he chooses to reconstruct events reflects his Realism about human affairs. As the classical philosophy scholar Paul Woodruff aptly observes, "Thucydides' speakers are made to say what Thucydides thinks they actually believe, whether they would have said those things in public or not.... He shows us their speeches refracted through a lens of honesty."[17] Thucydides, in other words, puts into the speakers' mouths their true, amoral motives, reflecting Thucydides' realistic view of human nature and human affairs, in contrast with the idealistic fantasies of a Socrates or Plato.[18] Thus, Nietzsche declares:

> my cure from all Platonism has always been Thucydides. Thucydides and, perhaps Machiavelli's *Principe* are most closely related to myself by the unconditional will not to

[16] See, e.g.,

[17] Woodruff, *Thucydides on Justice, Power, and Human Nature,* supra n. __ at xxiii. As Geuss puts it: Thucydides's "project is to exhibit what really moves people to act, and what then happens to them and to others as a consequence of how they act, not to write an edifying treatise or a partisan tract." *Outside Ethics*, supra n. __ at 226.

[18] Of course, on one prevalent understanding of Plato, he too accepts that humans are self-interested, and tries to show them simply that "justice" and "virtue" are in their self-interest. The Realist might object that this identification of morality with self-interest is so implausible as to be no different from preaching "justice" and "virtue" quite apart from any appeal to self-interest.

gull oneself and to see reason in reality--not in "reason," still less in "morality."[19] Thucydides the Realist views political leaders as essentially motivated by selfish concerns--power, fear, wealth--and as creatures for whom moral considerations are rhetorical window-dressing, rather than a reason for action.[20] The *History of the Peloponessian War* is a microcosm for what happens when these perennial facts about motivation encounter the recurring circumstances of human social existence. Rather than delude his readers with a "swindle of big words and virtues," Thucydides puts into the mouths of his actors their actual self-serving motives: for glory and for power.[21]

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We have traveled far from Dworkin and the "Chicago school of no-nonsense jurisprudence," but some points of contact between the ancient quarrel between Moralism and Realism and the contemporary jurisprudential dispute may have already suggested themselves. Dworkin, as is no doubt familiar, believes that there exists a right answer as a matter of law in every (or almost every) dispute, and that judges discover that answer by the process of what he calls "constructive interpretation," that is, by figuring out which result would cohere with the moral principles that best explain and justify the prior official acts—the court decisions, legislation, and so on--constituting the institutional history of the legal system. Dworkin's

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[19] *Twilight of the Idols*, chapter X, section 2.

[20] Cf. Guthrie, *The Sophists*, supra n. __ at 85: "It is remarkable how seldom even [Thucydides'] orators, aiming at persuasion, see any point in appealing to considerations of right, justice or other normally accepted moral standards: it is taken for granted that only an appeal to self-interest is likely to succeed."

[21] In the case of Thucydides, none of the preceding is incompatible with his having a "moral" to convey to his readers about the consequences of naked lust for power and glory. But his method for conveying this is to illustrate the consequences of the conduct of the Athenians, rather than to construct a moral theory about why such conduct is not justified. In this respect, Thucydides is something like one of Judge Posner's "moral entrepreneurs," discussed below.

"nonsense jurisprudence," then, takes what judges say they are doing at face value: if they say they are reaching the result the law requires (and they usually do say that), then that is what they are doing and so we must interpret them. If judges invoke moral and political principles in deciding hard cases, then we must view those principles as legally binding on them, and construct a theory of law that shows it to be so. Nonsense jurisprudence treats the judicial "swindle of big words and virtues" (to borrow Nietzsche's provocative phrase) as not a swindle, but a faithful report of the essence of legal reasoning, and thus the central data point to which any theory of law and adjudication must answer. Moreover, it treats the results of adjudication—the recognition of apparently new rights and remedies and causes of action—as making a kind of "moral sense," that is, as being morally justified exercises of coercive power in virtue of corresponding to the demands of "constructive interpretation."

No-nonsense jurisprudence, from Karl Llewellyn to Richard Posner, sees matters otherwise. What judges say they are doing is one thing, what they are really doing is another. Official legal reasoning often fails to determine a single outcome as a matter of law—that, of course, is a theoretical claim in jurisprudence—so the idea that one could really understand what courts are doing by attending only to the legal arguments they present in their opinions is an illusion. Just as Thucydides shows us the Athenian "speeches refracted through a lens of honesty," so too Realists from Llewellyn to Posner strip away the obfuscating doctrinal rationales judges offer to identify the real non-legal considerations influencing the decisions.

To be sure, our jurisprudential Realists need not ascribe to judges self-aggrandizing motives! Judges are not necessarily like our ancient Athenians in pursuing "power and glory," though, as it happens, Posner himself has explored the possibility that judges are rationally self-

interested maximizers of leisure, reputation, and prestige, among other desiderata.[22] From the Legal Realism of the 1920s and 1930s,[23] to the contemporary political science literature[24] though, the primary emphasis has been on the role that non-legal value judgments—for example, judgments about the fairness of a particular business practice, or simply value judgments reflecting a particular political ideology—play in explaining why judges decide as they do, even when those non-legal values are absent from the opinions.

Now Judge Posner has sometimes expressed unhappiness with the "Realist" label, notwithstanding the obvious affinities between the law and economics revolution he brought to fruition in the 1970s and the Legal Realist movement of the 1920s and 1930s. He has written that, "We economic types have no desire to be pronounced the intellectual heirs of Fred Rodell, or for that matter William Douglas, Jerome Frank, or Karl Llewellyn. The law and economics movement owes little to legal realism…."[25] Whatever the chain of influence, it seems clear that economic analysis of law, like Legal Realism, is predicated on a thorough-going skepticism about the adequacy of existing legal categories, and the need for an alternative explanation of the actual course of decisions.[26]

The legal historian Neil Duxbury aptly summarizes Posner's approach to economic analysis of law as follows: "Owing to the fact that judicial opinions are frequently suffused with rhetoric, it is invariably very difficult to figure out what types of concerns lead judges to reach

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[22] Richard A. Posner, "What Do Judges Maximize?" in *Overcoming Law* (Cambridge, Mass.: Harvard University Press, 1995), esp. pp. 135-136. And see more recently Richard A. Posner, *How Judges Think* (Cambridge, Mass.: Harvard University press, 2008), pp. 35 ff., which also notes limitations of this approach.

[23] See esp. my "Rethinking Legal Realism: Toward a Naturalized Jurisprudence," in *Naturalizing Jurisprudence*.

[24] [cites: Cross, Miles & Sunstein, Segal & Spaeth etc.]

[25] *Overcoming Law,* p. 3.

[26] Judge Posner tells me that he arrived at his views about adjudication quite independently of he Legal Realists *and* that he is mainly concerned not to be associated with some of the more extreme and sillier aspects of Legal Realism in writers like Fred Rodell or Jerome Frank's armchair psychoanalytic speculations about judicial motivations.

the decisions that they do."[27] Yet the resonance with familiar Realist refrains is obvious here—to take but one example, here is Karl Llewellyn:

> [I]f I am right, finding out what the judges say is but the beginning of your task. You will have to take what they say and compare it with what they do. You will have to see whether what they say matches with what they do. You will have to be distrustful of whether they themselves know (any better than other men) the ways of their own doing, and of whether they describe it accurately, even if they know it.[28]

The task Llewellyn identifies is, of course, precisely the task the Posnerian lawyer-economist would discharge. Indeed, Alan Schwartz has recently argued[29] that Llewellyn was a proto-economic efficiency theorist when it came to the optimal rules for contract law, a thesis which, if correct, would suggest an even deeper affinity between Posnerian law and economics and Legal Realism.[30]

These historical details, however, do not matter for our purposes. What matters are the broad thematic affinities that set "Realists" like Holmes, Llewellyn, and Posner against Moralists like Dworkin when it comes to thinking about adjudication. Realists want to tell us what really goes on when courts decide cases; moralists want to understand adjudication in terms that they

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[27] Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Oxford University Pres, 1995), p.410.

[28] Karl Llewellyn, *The Bramble Bush* (New York: Oceana, 1930), p. 5.

[29] "Karl Llewellyn and the Origins of Contract Theory," in *The Jurisprudential Foundations of Corporate and Commercial Law*, ed. J. Kraus & S. Walt (Cambridge: Cambridge University Press, 2000).

[30] Llewellyn, as Schwartz argues persuasively, "used commercial practice as the best evidence of the efficient transaction" (*id*. at 16), and thus by treating normal commercial practice as the benchmark for decision-making, he effectively privileged economic efficiency as the goal of the rules of commercial law. (I should note that Schwartz does, however, misunderstand the meaning and nature of Llewellyn's rule- skepticism, as I discuss in my *Naturalizing Jurisprudence*, pp. 108-112. But that disagreement does not affect the point at issue here.) It is also striking that Llewelly and Judge Posner have strikingly similar views on precedent: compare Posner, *How Judges Think*, p. 45 with Llewellyn, *The Bramble Bush*, pp. __-__.

adjudge morally defensible, which means, for Dworkin, taking what judges say at "face value." The dispute between Realists and Moralists would be clear cut if it were only a descriptive question about what is actually happening. After all, in recent years, much evidence has been adduced that strongly supports the conclusion that the political ideology of the judge has a strong influence on his or her decisions.[31] In a widely noted recent article on "The New Legal Realism,"[32] for example, Thomas Miles and Cass Sunstein identify what they call a "Standard Pattern of Judicial Voting" in "ideologically contested cases"[33]—such as those involving "environmental protection, labor law, sex discrimination, abortion, and campaign finance law"[34]—in which "the political affiliation of the appointing president greatly matters to judicial votes."[35] Moreover, while "in many areas of law, Democratic appointees cast liberal votes more often than Republication appointees do," in some areas, the composition of the panel matters: "the liberal voting rate typically increases with the number of co-panelists who are Democratic appointees—and correspondingly falls with the number of Republican appointees."[36]

The Standard Pattern is not, as Miles and Sunstein readily concede, universal, even with respect to subjects that might seem to be fraught with ideological discord. As they remark: "Republican appointees and Democratic appointees do not differ in their voting patterns in some areas in which significant differences might well be expected; examples include criminal

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[31] See, e.g., Segal & Spaeth; Epstein & Knight; Cass R. Sunstein, David Schkade, Lisa M. Ellman, & Andres Sawicki, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (Washington, DC: Brookings Institution Press, 2006); Frank Cross, *Decision Making in the U.S. Courts of Appeals* (Palo Alto: Stanford University Press, 2007).

[32] __ U. Chi. L. Rev. __ (2008).

[33] *Id*. at 10.

[34] *Id*. at 9.

[35] *Id*. at 10.

[36] *Id*. Cases where panel composition does not seem to matter include those dealing with abortion and capital punishment. As Miles and Sunstein write: "In those domains, judges apparently vote their convictions and are not influenced, at least in their conclusions, by the other judges on the panel." *Id*. at 11.

appeals, property rights, congressional power under the Commerce Clause, and standing to sue."[37] As to what explains this convergence, Miles and Sunstein offer two possibilities: "Perhaps the law imposes a great deal of discipline in these domains, so that ideological differences cannot emerge; perhaps Republican and Democratic appointees do not much disagree in such areas."[38]

Beyond political ideology, studies have also found that "in sex discrimination cases a judge's sex matters" to the outcome[39] and the race of the judge appears to affect outcomes in voting rights cases.[40] Judge Posner, in his recent book *How Judges Think*, notes that "the outcome of Supreme Court cases can be predicted more accurately by means of a handful of variables, none of which involves legal doctrine, than by a team of constitutional law experts."[41] That most people, including many legal professionals, are surprised by this indicates what an "unrealistic" view they have, Posner says, of what judges do. The explanation for this state of affairs is partly attributable to the judges themselves. Judge Posner writes:

> [M]ost judges are cagey, even coy, in discussing what they do. They tend to parrot an official line about the judicial process (how rule-bound it is), and often to believe it, though it does not describe their actual practices.[42]

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[37] *Id*. at 11.
[38] *Id*.
[39] *Id*.
[40] *Id*. at 12.
[41] *How Judges Think*, p. 24.
[42] *Id.* at 2. Judge David F. Levi takes issue with Judge Posner in "Autocrat of the Armchair," 58 *Duke Law Journal* 1792 (2009), claiming that Posner's "generalizations about the ways of the judge and the world are ex cathedra pronouncements that generally lack any identified objective support outside of his own experience and belief." *Id*. at 1792-1793. This is an odd charge to make against a book which synthesizes a massive amount of empirical literature from the social sciences about courts, judges, and human decision-making. See esp. the overview in Chapter 1 in *How Judges Think*. Judge Levi identifies a dozen *very specific* observations and claims ("Autocrat of the Armchair," pp. 1796-1797) that are offered by Judge Posner without empirical citation, but many of them are, as Judge Levi concedes, "not…clearly untrue" (most are, in fact, *prima facie* plausible), and they are in any case fairly minor points, rather than central themes. (Those that are more central—like Judge Posner's claim about the central role of "intuition" in decision-making by judges—are, indeed, fair inferences from the empirical literature cited and discussed.) But the key difficulty with Judge Levi's critique is that he appears to misunderstand the central argumentative structure of the book, which is to

Their "actual practices," according to Judge Posner, are better described by a variety of theories that emphasize their political attitudes, their strategic behavior (as in the "panel effects" noted by Miles and Sunstein), their behavior as "rational, self-interested utility maximizer[s],"[43] and, most importantly for Posner, their "preconceptions" which shape, often subconsciously,[44] their "responses to uncertainty" in the face of new cases.[45] To be sure, Judge Posner, like the Legal Realists of the 1920s and 1930s, acknowledges that law matters,[46] that it constrains, often determines, decisions at the lower court level, but that as we move up through the levels of appellate review, non-legal factors matter more and more to the outcomes--until we get, of course, to the U.S. Supreme Court which is, as Judge Posner candidly acknowledges, "a largely political court."[47]

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What is the Moralist Dworkin to say in the face of such overwhelming evidence that judges, especially appellate judges, are often--though to be sure not always--political actors? They do not, to be sure, write opinions saying, "Since I was appointed by the Republican Reagan, I can not possibly find in favor of the appellee," nor do they say, "As an African-American man, I can not countenance the electoral practices of Georgia in this instance."[48] Yet if the Realists, now

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claim that the *best explanation* for the massive empirical evidence about judicial decision-making is that "legalism" is false as a descriptive theory of adjudication.

[43] *Id.* at 35.

[44] *Id.* at 11.

[45] *Id*. at 35.

[46] For pertinent citation and discussion, see Brian Leiter, *Naturalizing Jurisprudence*, pp. __-__.

[47] *How Judges Think,* p. 8.

[48] Since on Dworkin's view of adjudication, moral/political judgments are, of course, central to fixing the content of the law, perhaps he should simply claim that the empirical literature confirms his theory of adjudication! To be sure, so the argument would go, judges differ in their moral judgments, but it has never been part of Dworkin's theory to claim that we always *know* what the right answer is, only that one exists, and that it follows from a process of constructive interpretation that requires moral/political judgment. The difficulty, however, for this rejoinder is twofold: first, to show that the patterns of decision identified in the empirical

armed with their empirical studies, are right, then this may actually be the correct explanation for the decisions. Dworkin has, throughout his career, called attention to the fact that judges write their opinions as if they are discovering the right answer as a matter of law. But none of the empirical studies just noted deny that fact about the opinions they write: they simply confirm—again and again and again—that non-legal considerations and influences actually explain the decisions, and there is no way for Dworkin's interpretive theory of law to accommodate what at times appears to be naked political partisanship.[49]

So how is a Dworkinian Moralist to respond? Although Dworkin claims to be describing what judges actually do—"the hidden structure of their judgments" as he says[50]—his theory is quite explicitly driven by a normative vision. Like Plato, Dworkin wants his subject-matter to make "moral sense," which, for Dworkin, means that unless judges are deciding cases through the Dworkinian method of "constructive interpretation," their decisions could not supply a moral justification for coercing the losing party before the court.[51] It does not matter for our purposes that Dworkin's own unusual theory of the conditions under which coercion is justified is so implausible[52] that it has only one adherent. What is more significant is that we have no

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literature can be reconstructed in terms that look anything like a constructive interpretation; and second, to explain why the "face value" of the opinions fails to correspond to the social scientific explanation for the pattern of decisions. I am hard-pressed to see how either difficulty can be overcome, but invite a reader sympathetic to Dworkin's view to undertake the theoretical challenge the empirical literature poses.

[49] Note that Posner's view is that "naked political partisanship" is relatively rare, but only because he thinks the ideologies of the political parties are not themselves coherent. See *How Judges Think*, pp. __-__. That just means, however, that the category of the "political" needs to be individuated in a more fine-grained way.

[50] *Law's Empire*, p. 265. He means, of course, the hidden "logical" or "rational" structure that underlies the opinions they write, not the "hidden" psychological motivations.

[51] It is important to recognize that Judge Posner, like most theorists, is silent on this question. To be sure, he think utility-maximizing decisions are good ones, but that is because he thinks maximizing utility is good, not because he thinks it is necessary for the moral justification of court coercing the losing party. Indeed, like a good realist, he thinks that question is largely idle. See esp. *Law, Pragmatism, and Democracy* [cite].

[52] [cite Dworkin in LE on "associative obligations" and Les Green's critique in *Oxford Handbook*]

reason (and Dworkin supplies none) for assuming that it will or should turn out that the exercise of coercive power by courts *is* morally justified. We may certainly hope it is justifiable (at least in otherwise morally commendable legal systems) for courts to decide even "hard" cases where the law seems up for grabs, and there are reasons to think it is quite apart from the law supplying a "right answer" in every case--most obviously, by appeal to the Hobbesian idea that the alternative to authoritative and final resolution of societal disputes by courts would be an intolerable war of all against all, given how unrealistic it is that legislature could address all these problems.[53] But we need not derail our discussion into the justification of political authority, since the key point is that Dworkin is not entitled to his assumption that a theory of adjudication must show the exercise of coercive power by courts to be morally justified.

Now this response to Dworkinian moralism no doubt seems too quick, as well it should. For there is, in fact, another way of framing the Moralist's challenge to Realism about adjudication. Perhaps we have good realist reasons to be skeptical about the surface of judicial opinions, with their feigned supine posture before the force of the law and legal reasoning, and certainly we have no reason to assume in advance that courts are actually justified in bringing the coercive power of the state to bear against individuals in matters where the law seems to be uncertain. But a realistic Dworkinian—I assume, for sake of argument, that this is not an oxymoron—might concede both points, and still note that, in principle, all legal arguments have the property of being susceptible to what Dworkin has recently called "justificatory ascent." By "justificatory ascent," Dworkin means that in any legal argument it is always possible that a particular principle on which we are relying "is inconsistent with…some other principle that we

[53] Hart, himself, endorses a variation on this response in the "Postscript" to *The Concept of Law*, p. 275.

must rely on to justify some other and larger part of the law."[54] And what that means is that even if, in reality, judges are not really deciding based on the legal principles they invoke, it is still the case that we, as observers, might demand that their decisions answer to the demand of a principled justificatory ascent suggested by the arguments they offer. (Here Dworkin signals his profound debt to the Legal Process school of thought.) Moreover, the Dworkinian Moralist might say, when such an ascent is carried out properly—namely, as Dworkinian "constructive interpretation"—it even yields results that would justify the court's exercise of its coercive powers.

Dworkin must surely be right that there is "no a priori limit to the justificatory ascent into which a problem will draw" lawyers and judges, but everything turns on what legal constraints actually govern this ascent. The Realist worry is that, at some point, there are no meaningful legal constraints on justificatory ascent, and that all Dworkin has noticed is what the Realistic Sophists noticed 2500 years ago, namely, that a skilled rhetorician can give arguments for conflicting propositions. The Realist worry, in short, is that this new Dworkinian mantra about "justificatory ascent" is just another "swindle with big words and virtues."

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Let us consider Dworkin's own central example in his recent work of justificatory ascent: namely, Judge Benjamin Cardozo's seminal 1916 decision in *MacPherson v. Buick Motor Co.*.[55] *MacPherson* established that manufacturers of potentially dangerous products could no longer escape liability to the consumers injured by their products based on lack of contractual privity, which was usually absent since consumers typically purchased the product from some

[54] Ronald Dworkin, "In Praise of Theory," in *Justice in Robes* (Cambridge, Mass.: Harvard University Press, 2006), p. __.

[55] *Justice in Robes*, p. 55.

intermediary. As the former Attorney General and late University of Chicago Law School Dean Edward Levi—exemplar of an earlier and also Realistically-minded "Chicago School"—noted in his famous book *An Introduction to Legal Reasoning*,[56] *MacPherson* is a powerful illustration of the basic pattern of evolution of legal concepts, which moves from creation of the concept (in this case, that of the "inherently dangerous" product for which contractual privity is not required for liability), to "the period when the concept is more or less fixed," to the final "breakdown of the concept, as reasoning by example has moved so far ahead as to make it clear that the suggestive influences of the word is no longer desired."

Thus, we move from *Langridge v. Levy* in 1837, in which the son, injured by a gun sold to his father, was able to recover against the seller since the seller "knew it was defective and…was to be used by the" son,[57] to *Winterbottom v. Wright* in 1842, where recovery against the supplier of a carriage was denied to the coachman injured when it broke down due to a latent defect, on grounds that carriages were not a "weapon of a dangerous nature" and, in any case, there was no evidence the supplier was aware of the latent defect.[58] By 1851, in *Longmeid v. Holliday*, "the concept of things dangerous in themselves…finally won out," as Levi puts it, even though the wife injured by an exploding lamp was denied recovery against the storekeeper who sold it to her husband.[59] The key to the decision, however, was the finding that "the lamp was not in its nature dangerous," which meant the absence of privity decided the matter. The next stage in the movement of the concept, according to Levi, was *Thomas v. Winchester* in 1852, in which recovery against the packager was permitted for mislabeled poison purchased from an

[56] (Chicago: University of Chicago Press, 1949), pp. 2-3.
[57] *Id*. at 11.
[58] *Id*. at 12.
[59] *Id*. at 13.

intermediary, since "defendant's negligence had 'put human life in imminent danger.'"[60] Soon enough, privity was waived when we were dealing with a defective hair wash, but not "a defective balance wheel for a circular saw."[61] Yet by 1880 a defective scaffold was found inherently dangerous (and so recovery permitted), though emphasis was laid upon the fact that "the necessary workmen were in effect invited by the dock owner to use the dock and appliances".[62] By turn of century—from the 19th- to the 20th that is—Levi notes that, "The dangerous concept had in it a loaded gun, possibly a defective gun, mislabeled poison, defective hair wash, scaffolds, a defective coffee urn, and a defective aerated bottle. The not-dangerous category, once referred to as only latently dangerous, had in it a defective carriage, a bursting lamp, a defective balance wheel for a circular saw, and a defective boiler."[63] If this is Dworkinian "justifcatory ascent," its principled basis is, shall we say, a bit obscure.

Just one year before *MacPherson*, our story of "justificatory ascent" seems to culminate with the opinion of the U.S. Court of Appeals for the Second Circuit (the Circuit encompassing New York, of course) in *Cadillac v. Johnson*, in which we learn that there is no requirement of privity when it comes to manufacturers of "articles inherently dangerous," but "one who manufactures articles dangerous only if defectively made, or installed"—including automobiles—"is not liable to third parties for injuires caused by them, except in cases of willful injury or fraud."[64]

A year later that rule simply vanished in the hands of Judge Cardozo in *MacPherson*.[65]

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[60] *Id*. at 14-15.
[61] *Id*. at 15.
[62] *Id*. at 16.
[63] *Id*. at 18.
[64] *Id*. at 19-20, quoting 221 Fed. 801, 803 (C.C.A. 2d 1915).
[65] Of course, the New York Court of Appeals would not have been bound by the Second Circuit decision, but Judge Cardozo did feel the need to mention it, as discussed, below, in the text.

Cardozo rehearses the narrative of the concept of "inherently dangerous" products, much as Levi does, but starting with *Thomas v. Winchester*, and admitting, at the start, that in the application of the so-called "principle" of that case "there may at times have been uncertainty or even error."[66] Soon enough, Cardozo tells us that even if the rule in *Thomas v. Winchester* was restricted to "things imminently dangerous to life" like "poisons, explosives, deadly weapons," that no longer governs: the rule, he says, "no longer has that restricted meaning."[67] What matters, Cardozo says, is "the trend of judicial thought."[68] And that trend quickly leads Cardozo to the conclusion that if a thing is "reasonably certain" to be dangerous if negligently made, "it is then a thing of danger."[69] At that point, privity does not matter as to the right of the injured plaintiff to recover.

But what then of the prior year's contrary decision in the U.S. Court of Appeals for the Second Circuit on essentially the same set of facts as at issue in *MacPherson*? It merits only passing notice by Cardozo that its holding was "contrary," and that there was "a vigorous dissent," yet Cardozo offers barely any discussion of the reasoning.[70] He does observe that the "contrary" view holds "that the contractor who builds a bridge, or the manufacturer who builds a car, cannot ordinarily foresee injury to other persons than the owner as the probable result," to which Cardozo retorts—in probably the crucial line of the whole opinion: "We think that injury to others is to be foreseen not merely as a possible, but as an almost inevitable result."[71]

[66] 217 N.Y. 382, 385 (1916)
[67] *Id*. at 387.
[68] *Id*.
[69] *Id*. at 389.
[70] *Id.* at 391.
[71] *Id*. at 392.

That the majority opinion by Cardozo had, quite obviously, changed the law[72]— not via any justificatory ascent, but by a bit of quasi-legislative fiat--was not lost on the now-forgotten dissenter, Judge Bartlett, who remarked:

> It has heretofore been held in this state that the liability of the vendor of a manufactured article for negligence arising out of the existence of defects therein does not extend to strangers injured in consequence of such defects but is confined to the immediate vendee. The exceptions to this general rule which have thus far been recognized in New York are cases in which the article sold was of such a character that danger to life or limb was involved in the ordinary use thereof; in other words, where the article was inherently dangerous.[73]

After reviewing the long history of cases, Judge Bartlett concludes that the majority's decision is tantamount to "overruling what has been so often said by this court and other courts of like authority in reference to the absence of any liability for negligence on the part of the original vendor of an ordinary carriage to any one except his immediate vendee."[74]

You will notice that neither the Dworkinian Moralist nor the Posnerian Realist has reason to disagree with Cardozo's result: both can agree about the soundness of the outcome, which is why Cardozo is a celebrated figure and Bartlett a footnote. The question is whether we describe Cardozo's decision as an exercise in "justificatory ascent," or whether we describe it as an exercise in sensible legislation by the courts?

As Levi noted in his original discussion of the transformation of a legal concept, "matters

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[72] Cardozo's was also a bit loose with the facts of the case, as discussed in James A. Henderson, Jr., "*MacPherson v. Buick Motor Company*: Simplifying the Facts While Reshaping the Law," in *Torts Stories*, R. Rabin & S. Sugarman eds. (New York: Foundation Press, 2003).

[73] *Id*. at 396.

[74] *Id*. at 400.

of kind vanish into matters of degree and then entirely new meanings turn up," and judges will, of course, pretend that "some overall rule" governs. Yet, as Levi remarks, "the rule will be useless," adding "The statement of the rule…is window dressing."[75] One doubts Judge Cardozo would have disagreed. The new rule of *MacPherson*, after all, made good economic sense in an age of retailers who distributed mass-produced goods to thousands (sometimes millions) of consumers. Here, the potential for injury was enormous, but producers (not retailers) were obviously in the best position to minimize the dangers. Cardozo's decision is thus justly celebrated as skillfully eliding clear precedents (including, of course, the Second Circuit Court case directly on point one year earlier!) establishing the necessity of contractual privity for liability, in order to create the best new rule for new social circumstances[76]—precisely the kind of outcome-oriented decision Judge Posner often commends. As Dean Prosser noted, in his seminal 1960 article on "The Assault on the Citadel"—the citadel being the immunity from liability afford by the requirement of contractual privity—Cardozo "wielding a mighty axe, burst over the ramparts, and buried the general rule under the exception."[77]

Dworkin, by contrast, wants to celebrate the opinion as an exercise in "justificatory ascent." Yet if we are to distinguish legally-principled justificatory ascent in Dworkin's sense from Levi's or Posner's enlightened, albeit incremental, policymaking by courts, we need some compelling explanation of how the result in *MacPherson* was required by the existing legal materials and the principles they embodied. Dworkin does not even try to provide one, and Cardozo himself, in reflecting on the decision, does not pretend that there is such an account.

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[75] *An Introduction to Legal Reasoning*, p. 9.

[76] See, e.g., Levi, *An Introduction to Legal Reasoning*, p. 24.

[77] William L. Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)," *Yale Law Journal* 69 (1960), p. 1100.

"What…was the posture of affairs before the Buick case had been determined?," he asks. "Was there any law on the subject? A mass of judgments, more or less relevant, had been rendered by the same and other courts. A body of particulars existed on which an hypothesis might be reared. None the less, their implications were equivocal."[78] Indeed, Cardozo explicitly repudiates the "extreme" notion that, "Law is fixed and immutable, that the conclusion which the judge declares…has a genuine preexistence, that judgment is a process of discovery, and not in any degree a process of creation,"[79] which is to say that he rejects precisely Dworkin's view of the case.

None of this will be surprising to those who recall Cardozo's 1923 book *The Nature of the Judicial Process*,[80] where he declares early on: "I take judge-made law as one of the existing realities of life."[81] To be sure, says Cardozo, "in countless litigations, the law is so clear that judges have no discretion,"[82] but "within the confines of [the] open spaces [of language] and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made."[83] When Cardozo titles one of his chapters "The Judge as Legislator," there can be little doubt that the author of *MacPherson* is a Realist and not a Moralist when it comes to understanding what judges really do, at least some of the time.

Dworkin often takes Judge Posner to task for purporting to renounce moral theory, while

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[78] *Growth of the Law*, p. 41.

[79] *Growth of Law*, p. 54. See, too, Cardozo's discussion of one of the seminal cases in the history of English contract law, *Strangborough v. Warner* from 1588, about which he observes: "Before the rendition of that judgment, we cannot say with justice that there was a preexisting principle or rule which the judges were extending or applying. They formulated the rule or principle for themselves, and gavie it potency thereafter by a process of creation." *Id*. at 39.

[80] (New Haven: Yale University Press, 1923).

[81] *Id*. at 10.

[82] *Id*. at 129.

[83] *Id*. at 115.

at the same time asking judges to reach the "best" decisions, on crudely utilitarian grounds, without excessive regard for past practice, except to the extent that practice had affected reasonable expectations. As Dworkin has quite plausibly argued, Posner "is himself ruled by an inarticulate, subterranean…but relentless moral faith,"[84] namely, in the utilitarian perspective that informs his analyses of concrete legal problems. Perhaps Cardozo was, himself, so too ruled? He does say, after all, in *The Nature of the Judicial Process* that, "when [judges] are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction, and its distance."[85] And it is, of course, now familiar to read Cardozo as a proto-economic analyst of the law, designing rules that would minimize the costs of accidents. Perhaps these facts might explain a subject on which Dworkin has always remained oddly silent, namely, the extraordinary influence of Judge Posner's opinions (just like Judge Cardozo's) with other courts,[86] which might suggest that, even without theoretical foundations, Posner is the proverbial Hegelian "Owl of Minevra," who has captured the moral ethos of his time and place. That Dworkin's own writings about concrete legal problems, by contrast, have had almost no influence at all on the American courts[87] might also be thought confirmation of Judge Posner's infamous skepticism about moral theory,[88] at least if we agree that Dworkin is the more skillful moral theorist. In any case, when Dworkin castigates Posner as purportedly "avoiding

[84] From Chapter 3 of *Justice in Robes*, p. __.

[85] *The Nature of the Judicial Process*, p. 67.

[86] [some citation data here]

[87] [add pertinent citation data, esp. regarding dearth of USSC citations (six in total, most in dissent, none on central jurisprudential claims)]

[88] Richard Posner, *The Problematics of Moral and Legal Theory* (Cambridge, Mass.: Harvard University Press, 1999). I am in the somewhat odd position of being a philosopher by training who is basically in agreement with Posner's skepticism. See, e.g., my "Marxism and the Continuing Irrelevance of Normative Theory," *Stanford Law Review* 54 (2002): 1127-1149. My Nietzschean and Marxian sympathies in philosophy no doubt explain my heresy.

moral theory but keeping its use dark, cloaked under all the familiar phlogistons like the mysterious craft of lawyerlike analogical reasoning," one thinks that Posner might as easily have castigated him for not acknowledging the role of law-making by courts "but keeping its use dark, cloaked under all the familiar phlogistons like the mysterious justificatory ascent."

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How are we to adjudicate this dispute between Moralists like Dworkin and Realists like Posner about adjudication? At bottom, as Nietzsche noticed long ago, such fundamental philosophical disputes often seem to reflect differences of temperament and disposition. In this instance, the Moralist finds solace in a vision of how the world works that is morally upright and defensible, while the Realist expresses his impatience with what he deems childish illusion and empty rhetorical posturing. Is there any more to be said, or must we simply declare our allegiance (predetermined or otherwise) to one temperament or the other?

Notice that the Moralist Dworkin and the Realist Posner need have no dispute about the epistemology of judicial decision, only about its metaphysics. Dworkin can agree that Cardozo in *MacPherson* takes himself to be crafting a new utility-maximizng rule for changed economic circumstances, and still insist that, in reality, his decision can be understood as an exercise in "justificatory ascent"—that is, that the outcome in *MacPherson* was, in fact, required by the "logic" of legal reasoning over all the prior cases surveyed by Levi and cited by Cardozo. To be sure, that was not Cardozo's view or Levi's, but they, so Dworkin must contend, are confusing their Realism about the process by which the result was reached, with the metaphysical question whether there exists a right answer as a matter of law.[89] The hope that there is a "justificatory ascent" story to be

[89] This has been Dworkin's familiar rhetorical trope throughout his career: to be sure, he allows, reasonable judges and lawyers disagree about the right answer as a matter of law, but that fact about our epistemic situation settles nothing about whether such an answer *really* exists. But the skeptic about right answers need not, as Dworkin

told about the decision in *MacPherson* is just the Moralist's hope that the decision conforms to what Dworkin takes to be a morally attractive picture of adjudication, in which courts always aspire to find rather than make the law, and in which all possibly relevant moral considerations are, themselves, always part of the fabric of the law that is binding on the judge. It is an uplifting picture and aspiration, but is it not, says the Realist, complete obscurantist nonsense, denying the cogency of the settled law prior to *MacPherson*, as well as Cardozo's genius in his quasi-legislative role as law reformer transforming antiquated rules of liability in response to the demands of a new economy?

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Raymond Geuss, in defending Thucydides' Realism against Plato's Moralism, remarks that, "What Plato takes to be morally reprehensible behavior must, he thinks, finally be a form of irrationality that is self-defeating, and this puts such narrow limits to his ability to understand humans that it renders him unfit to be a serious guide to the world in which we live."[90] Thucydides, by contrast, fully appreciates that historical actors can be both quite rational and morally abhorrent, which is one of several reasons why his *History* is a source of insight into historical events more than two thousand years after its composition. But might we not have a similar worry about the Dworkinian Moralist, namely that he is "unfit to be a serious guide to the world in which we live"? After all, if we were all Dworkinian Moralists, then we would take every judicial opinion at face value, and never inquire into the politics or the individual or group psychology of the decisions, as Realists like Posner and Llewellyn and the contemporary political scientists do. We

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falsely claims (*Taking Rights Seriously*, pp. __-__) be committed to "verificationsm"—roughly, the view that there are no non-verifiable truths or right answers—he need only ask what the best explanation for intractable disagreement about the truth really is. If there were right answers, one would expect, absent a non-question-begging specification of cognitive defects, that jurists would converge on them. If they do not converge, one natural explanation is that there is nothing there to converge upon, i.e., there is no fact of the matter, no right answer to discover. See generally my "Objectivity, Morality, and Adjudication," in *Naturalizing Jurisprudence*, supra n. __.

[90] *Outside Ethics*, p. 220.

would only ask about the theory of "justificatory ascent" that supports the decision, and never entertain the hypothesis that the best way to make sense of what judges like Cardozo or tribunals like the U.S. Supreme Court are really doing is that they are making decisions on non-legal grounds and then offering legalistic window-dressing for those quasi-legislative decisions. As Geuss notes, when "the most reflective members [of society] are committed to the search for abstract definitions, general principles, [and] dialectically sustainable hypotheses…Thucydidean political thinking informed by a study of the reality of what actually happens will be likely to wither away."[91] Dworkin's "nonsense jurisprudence" has almost nothing to do with "what actually happens" in the courts: it is a just-so story, about "justificatory ascent," constructed after-the-fact—constructed, moreover, even in cases like *MacPherson* where the central actor, namely Cardozo, renounces the Moralist's story!

But is it any worse for that? Why should we *not* articulate ideal standards of conduct, even if they currently have no purchase in actual practice? It can not simply be because of Geuss's curious worry about deflecting "reflective members" of society from Thucydidean political thinking! After all, most academic disciplines that might be interested in empirical study of political and social life—political science, economics, sociology, anthropology, social psychology—are notoriously unaffected by academic philosophy, with its emphasis on "abstract definitions, general principles, [and] dialectically sustainable hypotheses." Why not let "a thousand flowers bloom"? Let the academic moralists in philosophy articulate ideal standards of conduct, and let the empiricists tell us what is *really* happening now? The latter do not seem to be dissuaded by the activities of the former.

[91] *Id*. at 230.

This is the dilemma over which Geuss's recent Realist broadside[92] against Anglophone political philosophy, as exemplified by Rawls, founders. On the one hand, Geuss suggests that we should "reject" a Moralistic approach to politics according to which we do ideal ethical theory first (a theory that abstracts from empirical particulars) and in which politics is then just a kind of applied ethics.[93] Yet he admits that he thereby fails to "distinguish sharply between a descriptive theory and a 'pure normative theory' (the former purportedly giving just the facts; the latter moral principles, imperatives, or ideal norms)."[94] But why shouldn't he distinguish between those two kinds of theoretical inquiries, one "Realistic" and one "Moralistic" in the terminology I have been using here? His reasons for repudiating this "is/ought distinction" as he calls it are, alas, utterly obscure.[95]

And yet the particulars of Geuss's indictment of Rawlsian Moralism in political philosophy are in many ways damning.[96] As he observes,

> [I]t is extremely striking, not to say astounding, to the lay reader that the complex theoretical apparatus of *Theory of Justice*, operating through over 500 pages of densely argued text, eventuates in a constitutional structure that is a virtual replica (with some extremely minor deviations) of the arrangements that exist in the United States.[97]

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[92] Raymond Geuss, *Philosophy and Real Politics* (Princeton University Press, 2008). See also Chapters 1 and 2 in *Outside Ethics,* which in many ways constitute a more effective polemic; its criticisms of Rawls, in particular, are more cogent than those in *Philosophy and Real Politics*.

[93] *Id*. at 7-9.

[94] *Id*. at 16.

[95] See *id*. at 16-17. I have no idea what the argument is here, or if there even is one.

[96] The attack in *Philosophy and Real Politics* is, it seems to me, less successful, involving often sophomoric mischaracterization of the Rawlsian view—for example, in complaining that "the 'original position' is obviously not at all a very good model for political deliberation or action" (*id*. at 72), when Rawls, of course, never presented it as any such thing!

[97] *Outside Ethics*, p. 23. Cf. *Philosophy and Real Politics*, p. 90.

A version of that charge has long been familiar with respect to Dworkin's jurisprudence as a theoretical rationalization of the decisions of the Warren Court.[98] And just "as Rawls's purportedly egalitarian theory became more entrenched and more highly elaborated, social inequalities in fact increased drastically in virtually all industrialized countries,"[99] so too the elaboration of Dworkin's jurisprudential theory (though without the same army of acolytes) over the past forty years has coincided with the demise of his preferred picture of constitutional adjudication.

Again, though, we may ask what conclusions to draw from this? The time frame in which a highly articulated moral theory makes its impact may be longer than a generation or two, so the fact that the theory has had little or no impact on practice so far is hardly an objection.[100] Perhaps the stronger objection to the method of Rawlsian Moralism about politics

[98] [add some standard cites]

[99] *Outside Ethics*, p. 34. Geuss offers a number of interesting, and *prima facie* plausible, explanations for the success of Rawlsian Moralism in political philosophy, even in the face of growing inequality and unRawlsian outcomes in society at large. He suggests, for example, that "Rawls's theory gained in attractiveness as a compensatory fantasy," that is, as compensating for "inability to understand or exercise any control over" the actual world. *Id.* at 35. Alternatively, Geuss notes that, "Rawls's system…is intricately elaborated and self-contained, and it also claims to embody a particularly well-grounded moral view of the world Perhaps the pleasure in discussing such an aesthetically attractive and purportedly morally serious construction, and the associated sense of being part of an elite group of people who are both very clever and highly righteous, is a sufficient explanation of the omnipresence of the theory." *Id*. at 36-37. He omits an equally important consideration, namely, the emergence of normative moral and political philosophy as an area of professional specialization precisely during the massive expansion of higher education in the 1960s. The Rawls industry is surely, in part, a consequence of the creation of a professional infrastructure supporting academic careers in its service.

[100] In her spirited response to Judge Posner's polemic against academic moral theory, Martha Nussbaum calls attention to purported examples in which philosophical "arguments have mattered in public life," including "the influence of Locke and Montesquieu on the American founding" and "the influence of Marx on many modern governments" and "the influence of John Dewey on American education." Martha Nussbaum, "Still Worthy of Praise," 111 *Harvard Law Review* 1776, 1779, 1780 (1998). The examples are striking, however, for how well they actually confirm Judge Posner's thesis. No one, including Professor Nussbaum, thinks that the American Revolution was brought about by arguments from Locke; to the contrary, the Revolution is most

is its inherent conservativsm.[101] As Geuss puts it:

> Despite the conscientious angst of Rawls the man, and his openness to well-focused criticism of individual sections of his work, the structure and ethos of this theory as a whole is deeply complacement, not to say smug. We who have the great good fortune to live in countries that are sufficiently like the United States in structure have got our politics basically right; all we really need to do is fine-tune our economies in various ways, particularly so as to maximize equality (while respecting the principle of difference)…. [A] major danger in using highly abstractive methods in political philosophy is that one will

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plausibly explained by a variety of more familiar economic and power-seeking motivations by elites in the American colonies [add standard cites]. Locke's conclusions, not his arguments, proved useful fodder for those instigating the revolt. The Marx example is even worse: he developed no moral or political theory, no arguments about the injustice of capitalism, no Marxian counterpart to the Rawlsian theory of justice. Instead, Marx, in both his popular polemics (of which there was much) and his scholarly investigations, exposed the mechanisms by which capitalism operated and its effects on the vast majority. Marx took for granted, quite reasonably, that the victims of capitalism (whom he thought were multiplying) were motivated to do something *once they understand, realistically, what was really happening to them*. Dewey shared with Marx a skill at popular prose and polemics; his poor reputation among academic philosophers, to the present, is some evidence that his influence on pedagogy, to the extent it is real (even at the University of Chicago Lab School, which he founded, his 'influence' is nowhere felt much beyond the 2nd or 3rd grade), was due more to his skills as a moral entrepreneur than his philosophical acumen. What Professor Nussbaum misses is that the case against the efficacy of "academic moralism" is a case against the ability of systematic, discursive reasoning to change people's views and motivate action.

It is often suggested to me that a stronger case for the practical import of moral philosophy is Peter Singer's influence on the animal rights movement. Yet even Singer has admitted [get interview citation] that the most influential part of his book *Animal Liberation* was chapter 3, which was an evocative *description* of factory farming, one designed to elicit a strong emotional reaction from those with a pre-existing empathy for animals and sensitivity to apparent suffering. That the quality of the discursive reasoning has little or nothing to do with Singer's purported influence on "animal rights" should be evident from the fact that the line of reasoning—based on the moral importance of sentience and the utilitarian imperative to maximize pleasure over pain—that leads Singer to vegetarianism also leads him, quite naturally, to positions that are widely rejected and denounced, such as his willingness to countenance infanticide and the killing of the handicapped. Singer draws the correct conclusions from his premises; if people were *actually* influenced by his arguments, then there would be as many advocates for infanticide of the mentally defective as there are for not eating meat.

[101] Obviously this sense of "conservatism" has little to do with the use of the term current in the United States, where it mostly picks out views that involve a retreat from the status quo, not an attempt to conserve it.

> succeed merely in generalizing one's own local prejudices and repackaging them as demands of reason…. Rawls [on this view] is not a major moral and political theorist, whose work self-evidently deserves and repays the most careful scrutiny. Rather he was a parochial figure who not only failed to advance the subject but also pointed political philosophy firmly in the wrong direction.[102]

R.M. Hare, the late White's Professor of Moral Philosophy at Oxford (who, unlike Geuss, is certainly no critical theorist), identified more than a generation ago the source of the conservatism, namely, in the method of "reflective equilibrium" (hereafter RE) central to Rawls's theory of justice. In this method for doing normative philosophy, we test our general theory—of justice, or of what is morally right, or of what is good—against our intuitive judgments about particular moral cases, and we either adjust our theory to do justice to the intuitions or give up some of our intuitions about the particular cases, until we achieve a theoretical equilibrium between the two. But as Hare scathingly, and correctly, observed:

> It is certainly possible, as some thinkers even of our times have done, to collect all the moral opinions of which they and their contemporaries feel most sure, find some relatively simple method or apparatus which can be represented, with a bit of give and take, and making plausible assumptions about the circumstances of life, as generating all these opinions; and then pronounce that that is the moral system which, having reflected, we must acknowledge to be the correct one. But they have absolutely no authority for this claim beyond the original convictions, for which no ground or argument was given. The 'equilibrium' they have reached is one between forces which might have been generated by prejudice, and no amount of reflection can make that a solid basis for

[102] *Outside Ethics,* at 38, 39.

morality.[103]

The now notorious parochialism of the method of RE afflicts subjects far afield of ethics,[104] but it is the case of Rawslian Moralism that concerns us here.[105] Is Moralism in political or legal theory *necessarily* conservative in the way Rawls is? [106] Why should it be once severed from the method of RE?

And yet we may also fairly ask if anything other than moral exhortation, polemics and rhetoric is left once RE is off the table?[107] If we are not going to systematize and make theoretically

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[103] R.M. Hare, *Moral Thinking: Its Levels, Method and Point* (Oxford: Clarendon Press, 1981), p. 12. Hare does not, however, draw the skeptical (and, in my view, correct) conclusion that morality lacks a solid basis, but instead thinks its content follows from claims about the logic of moral language. Hare's positive program has, it is fair to say, been a failure, inspiring nothing comparable to the Rawls industry.

[104] See, e.g., Robert Cummins, "Reflections on Reflective Equilibrium," in *Rethinking Intuition* (M. DePaul & W. Ramsey eds.; Lanham, MD: Rowman & Littlefield, 1998); Jaakko Hintikka, "The Emperor's New Intuitions," 96 *Journal of Philosophy* __ (1999); Jonathan Weinberg, Shaun Nichols, & Stephen Stich, "Normativity and Epistemic Intuitions," 29 *Philosophical Topics* 429 (2001).

[105] In an otherwise judicious critical review of *Philosophy and Real Politics*, Samuel Freeman's response to this kind of worry is telling. He writes: "given that we have to begin somewhere in moral theorizing, it seems more reasonable to begin with our considered moral and evaluative intuitions rather than with anyone else's or anywhere else." Book Review, __ *Ethics* 175, 181 (2009). No argument is given for this assumption, or the assumption—surely the main one that Geuss, Posner, Marx, et al. deny—namely, that we need to "begin" moral *theorizing* at all.

[106] The conservativism of the Rawlsian approach is most clear in one of his last, and least successful works, *The Law of Peoples*, which, as Geuss notes, "even on the most superficial inspection" articulates "a specifically American political position—more enlightened, perhaps, than that of George W. Bush or Condoleeza Rice, but generically the same kind of thing. Of course, no one can object *in principle* to citizens helping to elaborate the national ideology (provided it is not actively vicious), but philosophy has in the past aspired to something more than that" (*id*. at 34).

[107] I am assuming that the goal of moral and political philosophy is to have some influence upon practice or at least on what others believe, but that is a controversial assumption and not one shared by all (or maybe even most) moral and political philosophers. As the Harvard moral philosopher T.M. Scanlon observed—responding to Posner's critique of "academic moralism"—"Posner gets off on the wrong foot…by assuming that the only point of moral philosophy is to convince people to change their moral views. This is one of the reasons that I do not find his book very enlightening or challenging. My aims in engaging in moral philosophy are (1) to get a clearer understanding of what kind of quesion I am thinking about in thinking about right and wrong and (2) to make up my mind what to think about it (both how to understand certain crucial terms such as rights, blame, responsibility, and so on, and which moral claims to accept.)…. Insofar as I find my thoughts about morality to be unclear and

explicit inchoate moral commitments we already share (as the later Rawls claims he is doing), what *can* we do except become what Judge Posner has aptly dubbed "moral entrepreneurs," of whom his prime example is feminist theorist and advocate Catharine MacKinnon: "Her influential version of radical feminism is not offered without supporting arguments. But her influence is not due to the quality of those arguments. It is due to her polemical skills, her singlemindedness, her passion…"[108] MacKinnon's work, even her most theoretically ambitious work,[109] is notorious for its analytical and argumentative weaknesses: it is no one's idea of sound moral or political philosophy. And yet her ideas have changed the law and the discourse about women and feminism well beyond the walls of the academy.

Judge Posner has a straightforward Humean/Nietzschean explanation for why this should be so—that is, an explanation based on the assumption that there is no necessary or intrinsic connection between knowing what is morally right[110] and being motivated to act accordingly. On the Humean/Nietzschean view, only if some idea engages our pre-existing desires or emotions can it give rise to motivation and action. Thus, Judge Posner claims that academic moral theory, of the Rawlsian or Dworkinian kind,

> has no prospect of improving human behavior. Knowing the moral thing to do furnishes no

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conflicted, I imagine that some others may share these difficulties. So if I come up with what seems to me a satisfactory way of resolving one of them, I imagine that others might take these thoughts into account in deciding what to think. But persuading them to do so is not my main aim." Comment by Professor Scanlon posted at http://leiterreports.typepad.com/blog/2006/06/posners_pragmat.html?cid=18847876#comment-6a00d8341c2e6353ef00d834cfa41e69e2 (June 21, 2006).

[108] *The Problematics of Moral and Legal Theory*, p. 43. Judge Posner also suggests that her difficulties getting tenure constituted a kind of academic martyrdom that helped her cause, but that strikes me as implausible speculation for which he adduces no evidence.

[109] See, e.g., Catharine MacKinnon, *Towards a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989).

[110] Assuming, of course, that such knowledge is possible.

> motive, and creates no motivation. Motive and motivation have to come from outside morality. Even if this is wrong, the analytical tools employed in academic moralism—whether moral casuistry, or reasoning from the canonical texts of moral philosophy, or careful analysis, or reflective equilibrium, or some combination of these tools—are too feeble to override either narrow self-interest or [pre-existing] moral intuitions. And academic moralists have neither the rhetorical skills nor the factual knowledge that might enable them to persuade without having good methods of inquiry and analysis. As a result of its analytical, rhetorical, and factual deficiencies, academic moralism is helpless when intuitions clash or self-interest opposes, and otiose when they line up.[111]

We could hardly invent a more stunning confirmation of Judge Posner's Realist skepticism about Moralism than the reaction to an important book of moral and political philosophy by the late Chichele Professor of Social and Political Theory at Oxford, G.A. Cohen, *If You're an Egalitarian, How Come You're So Rich*?[112] Cohen argues that genuine egalitarians (at least those who are not welfarists) are moral hypocrites if they do not give away significant portions of their money consistent with their egalitarian principles. The argument is careful and often ingenious. Yet consider the response of a committed liberal, and non-welfarist, egalitarian like Thomas Nagel:

> I have to admit that, although I am an adherent of the liberal conception of [justice and equality], I don't have an answer to Cohen's charge of moral incoherence. It is hard to render consistent the exemption of private choice from the motives that support redistributive public policies. I could sign a standing banker's order giving away everything I earn above the national average, for example, and it wouldn't kill me. I

[111] *The Problematics of Moral and Legal Theory*, p. 7.

[112] (Cambridge, Mass.: Harvard University Press, 2000).

> could even try to increase my income at the same time, knowing the excess would go to people who needed it more than I did. I'm not about to do anything of the kind, but the equality-friendly justifications I can think of for not doing so all strike me as rationalizations....[113]

If high quality moral theory cannot even influence high quality moral philosophers to change their behavior, then it seems hard, indeed, to resist Judge Posner's Realist conclusion that Moralism "has no prospect of improving human behavior."

So here, then, is a Realist conclusion on which thinkers as different as Hume, Marx, Nietzsche, and Posner converge: unless a normative position engages the antecedently existing desires, passions and emotions of persons, it will get no purchase in practice. No discursively articulated system of moral norms will yield action unless the actors are already affectively disposed to the force of those norms. But if that is correct, then normative theorizing can serve only two *practical* purposes, namely, (1) to make vivid to the agent what he or she is already disposed to care about, or (2) to change the affective predispositions of its audience, such that they will care about, or value, other things. Since affective dispositions are non-rational, the medium of traditional philosophy—discursive reasoning—will be causally inert with respect to (2). And *vivid* and *emotionally moving* representation of what the agent is already disposed to care about has never been the strong suit of traditional philosophy, per (1).[114] So for both purposes, it seems moral entrepreneurs like MacKinnon or Nietzsche or Marx will be far more effective than Moralistic

[113] Thomas Nagel's review of Cohen, *Times Literary Supplement* (June 23, 2000), p. 6.

[114] Even Nussbaum, in her rejoinder to Judge Posner, admits as much: "the jargon-laden nonwriting of the philosophical journals is a good style for persuading no human being…" Nussbaum, *supra* n. __ at 1795.

philosophers like Rawls or Dworkin. Judge Posner's impact on his fellow judges and academic contemporaries, on this account, is not attributable to his superior skills of rational discursiveness, but to his being the more effective moral entrepreneur, one who exploits the antecedent intuitions of jurists in a thoroughly capitalist and commercialized society, for whom "efficiency" and welfare-maximization require no argument.[115]

There is a further consideration that supports skepticism about the efficacy of Moralism, and that is an obvious complement to what I have been calling the Humean/Nietzschean view embraced by Realists like Posner (and also, arguably, Llewellyn). If one thinks—as Hume, Nietzsche, and Posner do—that there are no moral truths, then there is nothing to *know* about what's morally right and wrong that could be the upshot of discursive reasoning. More precisely, on this view, there's nothing to *know* that's *distinctively moral*, since, of course, rational inquiry might illuminate non-moral facts that affect one's moral judgments (if I think efficiency is good, and discover through rational inquiry that the non-moral fact that a certain rule maximizes efficiency, then I will change my moral judgment).[116] To the extent moral theory is committed to systematic discursive reasoning about the *moral*, its target is an illusion: there is no subject-matter there about which one could make a cognitive mistake.[117] Arouse the passions, or make vivid the non-moral facts, and one might well cause a change in moral view. Discursive reasoning of the kind practiced by systematic

[115] As Judge Posner writes: "I do not argue that economic analysis should convince opponents of [a particular position recommended by economic analysis] to give up their opposition. I do not believe that economics (or any other body of thought, for that matter) can compel a moral judgment." *Frontiers of Legal Theory* (Cambridge, Mass.: Harvard University Press, 2001), p. 47.

[116] See generally, Brian Leiter, "Objectivity, Morality, and Adjudication," reprinted in *Naturalizing Jurisprudence*, esp. pp. 251-255. And for classic discussions, see [Ayer and Stevenson cites].

[117] To be sure, there may be a sociological datum, like the "intuitions" of bourgeois academics who have been appropriately socialized, but it is hard to see why armchair sociology masquerading as moral philosophy will be compelling to those who don't share the relevant socialization experiences.

moral philosophers can do neither.

Praise for Realism, then, is praise for clarity about *what really happens*, since what really happens is the very stuff on which instrumental reasoning—reasoning about how to achieve what we already want or prefer or value—operates. By the same token, opposition to Moralism is not opposition to entrepreneurial advocacy for a normative vision, to moral polemics, and skillful rhetoric: people change their moral views, to be sure, but they do so, as Humeans and Nietzscheans claim, because their passions and emotions are suitably engaged and aroused, not because they follow through the conclusions of discursive reasoning—since such reasoning can establish the *truth* of no moral position.[118] If there is a case for Realism and against Moralism--whether in the form of "nonsense jurisprudence" or Rawlsian political philosophy--it is captured by a paraphrase of Marx's Second Thesis on Feuerbach: a philosophical dispute "which is isolated from practice is a purely *scholastic* question." Add in Judge Posner's Humean/Nietzschean assumptions (about how moral views change and about moral skepticism), and the case against Moralism, whether Rawlsian or Dworkinian, is complete.

[118] A claim well-supported by recent work in empirical psychology as well [*vide* Haidt et al.]