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The Problematics of Moral and Legal Theory

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In these Holmes Lectures, delivered a century after the publication of Oliver Wendell Holmes's great essay The Path of the Law, *Judge Posner argues for an essentially Holmesian conception of the proper relations among modern normative moral philosophy ("academic moralism"), morality, and law. Academic moralism, he argues, lacks either the intellectual cogency or the emotional power to change people's beliefs or behavior; the power to do so resides in "moral entrepreneurs," which academic moralists emphatically are not. Academic moralism's lack of cogency disqualifies it to guide judicial decisionmaking even — in fact, especially — in cases involving controversial moral issues, such as abortion and euthanasia, as the Supreme Court has recognized.*

I. THE LIMITS OF MORAL THEORIZING

A. The Thesis of Part I Summarized

My aim is to criticize moral theory, or, more precisely, a type of moral theory (the subject of Part I) and then use the criticisms as a lever for challenging the type of legal theory that resembles or draws on moral theory (the subject of Part II). I have in mind, for example, the constitutional theorizing of Bruce Ackerman, Akhil Amar, Walter Berns, Ronald Dworkin, John Finnis, Robert George, Andrew Koppelman, and David Richards, among others, occupying all points of the ideological compass, as well as the nonconstitutional legal theorizing of Jules Coleman, Joel Feinberg, George Fletcher, Charles Fried, Leo Katz, Gregory Keating, Margaret Jane Radin, and Ernest Weinrib, and again many others of diverse political hue. I shall argue that moral theory does not provide a solid basis for moral judgments, let alone for legal ones. I shall intermittently relate this thesis to one of the big and somewhat neglected stories of our time: the rise of professionalism in a sense illuminated by Max Weber's concepts of rationalization and disenchantment. And I shall indicate how in legal as well as private life we can get along without doing or even thinking about moral theory.

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* Chief Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. This is a revised and expanded version of the Holmes Lectures delivered at the Harvard Law School on October 14 and 15, 1997. For research assistance I thank Sorin Feiner, and for comments on earlier drafts I thank Lucian Bebchuk, Thomas Eisele, Ward Farnsworth, Lawrence Lessig, Robert Nozick, Martha Nussbaum, Eric Posner, Richard Rorty, David Strauss, Cass Sunstein, members of the lecture audiences, and Dennis Thompson and his students in the Program for the Study of Ethics and the Professions at Harvard's Kennedy School of Government.

My thesis has a strong form and a weak one. The strong form, again, is that moral theory does not provide a solid basis for moral judgments. The weak form is that even if moral theory can provide a solid basis for some moral judgments, it should not be used as a basis for *legal* judgments. Moral theory is not something that judges are, or can be, made comfortable with or good at, it is socially divisive, and it does not mesh with the actual issues in cases. I shall focus on the strong form of the thesis in Part I of the Lectures. The distinct arguments for the weak form will emerge in Part II, which is much shorter, not only because it builds on Part I, but also because, independently of the arguments in Part I, the case for the weak form is stronger.

The argument in Part I is complex and to some extent counterintuitive. It requires careful groundwork, which is the task of this and the next two sections.

"Morality," as I shall use the word, is the set of duties to others (not necessarily just other people) that are designed to check our merely self-interested, emotional, or sentimental reactions to serious questions of human conduct. It is about what we owe, rather than what we are owed, except insofar as a sense of entitlement (to happiness, self-fulfillment, an interesting life, the opportunity to exercise our talents, or the opportunity to realize ourselves) might generate a duty on the part of others to help us get what we are entitled to.

I do not question the existence or genuineness of morality — I do not argue that it is just a cynical cover for the operation of self-interest — although I do argue that it has less effect on behavior than many moralists believe. Nor do I disparage morality as a subject of inquiry, or question the practicability or importance of normative reasoning. If "moral theory" is used in its broadest possible sense, as a synonym for normative reasoning, you will find no criticism of moral theory as such in these Lectures. As for the frequent use of the word "moral" as an impressive synonym for "political,"[1] my only criticism is that labeling political arguments "moral" invites confusion.

My concern is with the type of moral theory that I call "academic moralism," the type found in the writings of present-day academic philosophers such as Elizabeth Anderson, Sissela Bok, Ronald Dworkin, David Gauthier, Alan Gewirth, Frances Kamm, Thomas Nagel, Martha Nussbaum, John Rawls, Joseph Raz, and Judith Jarvis Thomson. This is a diverse list, but there is at least a family resemblance among the persons listed; and the family is what I am calling

[1] Commentators have remarked on Dworkin's conflation of moral and political terms. *See, e.g.*, Thomas D. Eisele, *Taking Our Actual Constitution Seriously*, 95 MICH. L. REV. 1799, 1819 (1997). Dworkin famously believes that judges should engage in moral reasoning, at least in difficult cases. *See* sources cited *infra* note 118. His proposal would fall completely flat if he substituted "political" for "moral."

academic moralism. Some of those listed are considered primarily legal philosophers (for example, Dworkin and Raz) or political philosophers (for example, Rawls) rather than moral philosophers. But they all want the law to follow the teachings of moral theory, though not always at a close distance.[2] I present a series of reasons for doubting that academic moralism will help people who are seeking answers to moral questions, though as I have not read, let alone studied, every important work in the domain of academic moralism, I may have overlooked works that might still my doubts. Because Dworkin stands squarely at the intersection of the two bodies of literature that I discuss, academic moral theory and moralistic legal theory, I pay particular attention to his views.

I confess to a visceral dislike (no doubt reciprocated) of academic moralism. A lot of it strikes me as prissy, hermetic, censorious, naive, sanctimonious, self-congratulatory, too far Left or too far Right, and despite its frequent political extremism, rather insipid. But these vices in the bosom of the virtuous are perhaps not very serious. Moreover, they may reflect nothing deeper than the fact that, as in many other academic fields today, too many people, driven by the imperative "Publish or perish," are writing on moral theory. The best of the literature is free from these vices, and I want to focus on the best. I also want to be constructive. In Part II, I try to show that normative reasoning in law can be freed from dependence on the sort of moral theory that academic moralists propagate.

Very briefly, my reasons for doubting the fruitfulness of academic moralism, even in settings remote from law, are as follows.

First, morality is local. There are no *interesting* moral universals. There are tautological ones, such as "Murder is wrong," where "murder" means "wrongful killing," and there are a few rudimentary principles of social cooperation — such as "Don't lie all the time" or "Don't break promises without *any* reason" or "Don't kill your relatives or neighbors indiscriminately" — that may be common to all human societies.[3] If one wants to call these rudimentary principles the universal moral law, fine; but as a practical matter, no moral code can be criticized by appealing to norms that are valid across cultures, norms to which the code of a particular culture is a better or a worse approximation. Those norms, the rudimentary principles of social cooperation that I have mentioned, are too abstract to serve as standards for moral

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[2] Annette Baier and Bernard Williams are examples of students of morality who, like Nietzsche and Heidegger, are not primarily moralists — are indeed, like them, skeptical of normative moral theory. *See* Annette Baier, *Doing Without Moral Theory?*, *in* ANTI-THEORY IN ETHICS AND MORAL CONSERVATISM 29, 29–48 (Stanley G. Clarke & Evan Simpson eds., 1989); Bernard Williams, *The Scientific and the Ethical*, *in* ANTI-THEORY IN ETHICS AND MORAL CONSERVATISM, *supra*, at 65, 65–86.

[3] *See* DONALD E. BROWN, HUMAN UNIVERSALS 138–39 (1991).

judgment. Any meaningful moral realism is therefore out, and moral relativism (or rather a form of moral relativism, an important qualification to which I'll return shortly) is in. Relativism suggests an *adaptationist* conception of morality, in which morality is judged — nonmorally, in the way that a hammer might be judged well or poorly adapted to its function of hammering nails — by its contribution to the survival, or other goals, of a society. My analysis also suggests that no useful meaning can be given to the expression "moral progress" and that no such progress can be demonstrated.

Second, many so-called moral phenomena can be explained without reference to moral categories. This point reinforces my thesis that the content of moral codes is local by showing that most moral principles that claim universality are better understood as mere workaday social norms in fancy dress. It also implies that the domain of moral theory is smaller than academic moralists believe. This is not to deny the existence of universal moral *sentiments*, such as guilt and indignation and certain forms of disgust[4] (as distinct from altruism, which is not primarily a *moral* sentiment). But these moral sentiments are *object-neutral*, and hence not really moral. "Moralistic" would be a better word for them. They are instruments rather than ends.

Third, academic moralism cannot succeed in its aim of improving human behavior, for a number of reasons:

1. Knowing the moral thing to do does not furnish a motivation for doing it; the motivation has to come from outside morality.

2. The analytical tools employed in academic moralism — whether moral casuistry, or reasoning from the canonical texts of moral philosophy, or reflective equilibrium — are too feeble to override either narrow self-interest or moral intuitions. As a result, academic moralism is helpless when moral intuitions clash or self-interest opposes them, and otiose when there is no such conflict. So "right answers" moral realism is hopeless, just like the metaphysical kind. And academic moralists have neither the rhetorical resources nor the detailed knowledge of social reality that might enable them to persuade without good methods of inquiry and analysis.

3. There is so much disagreement among academic moralists that the reader can easily find a persuasive rationalization for his preferred course of conduct, whatever it is.

4. The character of a modern academic career in philosophy is not conducive to moral innovation or insight.

5. Exposure to moral philosophy may actually lead people to behave *less* morally by making them more adept at rationalization.

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[4] For an interesting recent discussion of this point, see WILLIAM IAN MILLER, THE ANATOMY OF DISGUST 179–205 (1997).

There is empirical evidence that moral reflection undermines the capacity for effective moral action.

Fourth, it would be a disaster if moral theorists succeeded in their implied aim of imposing a uniform morality on society. Of course, these theorists, in our society anyway, do not agree on what that morality should be. But every moral theory takes for granted that a uniform morality is desirable, while what a society like ours needs is moral variety. In fact, we need some immoralists, or at least amoralists.

It may be asked how, if academic moralism is ineffectual in changing people's behavior, moral change comes about. My answer emphasizes the role not only of material conditions, but also of moral entrepreneurs, and shows why the modern university professor is not well situated to play the role of moral entrepreneur. As for why there is moral debate if it is as inconclusive as I believe, the answer is that the fruitful moral debates take place outside the precincts of academic moralism. So why hasn't academic moralism withered and died? I suggest that it survives because of the religious needs of people who are attracted to a career in moral philosophy and the rhetorical needs of people who want courts to play an aggressive role in the formation of social policy.

B. My Moral Stance

The reader is entitled to know what exactly I mean in expressing skepticism about academic moralism. Does it mean I don't believe in morality, or in normative reasoning? I can best explain my position by situating it amidst the welter of competing moral philosophies with which it might be confused.

1. Moral Relativism. — If moral relativism means that the criteria for pronouncing a moral claim valid are local, that is, are relative to the moral code of the particular culture in which the claim is advanced, so that we cannot call another culture "immoral" unless we add "by our lights," then I am a moral relativist. But I do not embrace the "vulgar relativism"[5] that teaches, self-contradictorily, that we have a moral duty to tolerate cultures that have moral views different from ours. Nor am I a moral relativist in the "anything goes" sense more accurately described as moral subjectivism and discussed next.[6] And I

[5] BERNARD WILLIAMS, MORALITY: AN INTRODUCTION TO ETHICS 20–26 (1972). What my type of moral relativism does do, however, is spike one of the arguments against tolerance.

[6] In a recent paper, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 362–63 (1997) [hereinafter Dworkin, *In Praise of Theory*], Ronald Dworkin runs them together, while in another and philosophically more ambitious paper he runs moral relativism, moral subjectivism, and moral skepticism together, treating them as different names for what he calls "external [moral] skepticism." Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 88–89 (1996) [hereinafter Dworkin, *Objectivity and Truth*]. ("[I]nternal [moral] skepticism" is skepticism

shall be at pains, later, to distinguish moral relativism from cognitive or epistemic relativism, which may indeed be self-contradictory, because of its self-referentiality.

2. Moral Subjectivism. — Moral subjectivism, as I use the term, is the view that there are no criteria of validity for a moral claim; morality, in this view, is relative to the beliefs of each individual, so that an individual acts immorally only when he acts contrary to whatever morality he has adopted for himself. I am sympathetic to this position. If a person decides to opt out of the morality of his society, the way an Achilles or an Edmund (in *King Lear*) or a Meursault or a Gauguin or an Anthony Blunt did, or for that matter as the conspirators against Hitler did, there is no way to show that he is morally wrong, provided that he is being consistent with himself. Even if inconsistent, he can be morally wrong only if consistency with oneself, whatever exactly that means, is a tenet of his personal moral code. (I will say more on the confusing concept of being "consistent with oneself" later.) The most that can be said about such a person is that he is acting contrary to the morality of his society and therefore many people will think him wrong.

I don't think it adds much to say that as a matter of semantics he *is* wrong. It is true that moral terms have definitions that will often fit the circumstances unequivocally; the faithless spouse is — faithless. But the morality that condemns the traitor or the adulterer cannot itself be evaluated in moral terms; that would be possible only if there were reasonably concrete transcultural moral truths.

My version of moral subjectivism is consistent with moral relativism in its sense of rejecting transcultural moral truths. There is no inconsistency in saying that all moral truths are local and then adding that one's own morality is hyperlocal, being limited to oneself.

3. Moral Skepticism. — I am not a moral skeptic, that is, one who believes that moral truth is unknowable. It is a moral fact of our society, and of societies like ours, that infanticide is immoral unless, perhaps, the infant is acephalic or otherwise profoundly defective; but I shall assume a normal baby. Anyone who practiced infanticide (so defined) in our society would be confidently adjudged immoral by almost everyone one might ask, and if he claimed that infanticide was permitted by his private morality, emphasis would fall on the word "private." With respect to such a claim, I might even consider myself a kind of moral realist, believing that there is a "fact of the matter," though only a *local* fact, in the same way that the sentence "It is 35 degrees Fahrenheit in Chicago today" asserts a local fact. The only nonlocal moral facts are the useless rudimentary principles of social cooperation I

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about some but not all moral claims. *Id.* at 90.) I am not a moral relativist in his sense of the term.

mentioned earlier — useless, that is, for resolving any actual moral issue.

Dworkin, Nagel, and many other contemporary academic moralists subscribe to a sense of moral realism that is intermediate between metaphysical moral realism (Catholic natural law doctrine, for example, although there are secular versions as well, as we shall see) and the weak local realism that I accept. This is the "right answers" moral realism summarized in Nagel's remark that "realism need not (and in my view should not) have any metaphysical content whatever. It need only hold that there are answers to moral questions and that they are not reducible to anything else."[7] But unlike Nagel and the others, I claim that there are no *convincing* answers to the *interesting* moral questions. This claim marks me as a moral skeptic in the loose sense of one who doubts the possibility of making objective judgments about the moral claims that moral theorists want to make. The "wet" (nondogmatic) moral skeptic and the weak moral realist converge.

My belief that moral theory lacks the necessary resources for resolving moral controversies enables me to reconcile my qualified acceptance of moral subjectivism with my qualified rejection of moral skepticism. A person who murders an infant is acting immorally in our society; a person who sincerely claimed, with or without supporting arguments, that it is right to kill infants would be asserting a private moral position. I might consider him a lunatic, a monster, or a fool, as well as a violator of the prevailing moral code. But I would hesitate to call him immoral, just as I would hesitate to call Jesus Christ immoral for having violated settled norms of Judaism and Roman law, or Pontius Pilate immoral for enforcing that law. Had I been a British colonial official (but with my present values) in nineteenth-century India, I would have outlawed suttee,[8] but because I found it disgusting, not because I found it immoral. We tend to find deviations from our own morality disgusting, but our reactions prove nothing about the soundness of that morality. No doubt Hindu men thought widows who resisted their fate disgusting.

It was right to try the Nazi leaders rather than to shoot them out of hand in a paroxysm of disgust. But it was *politically* right. It created a trustworthy public record of what the Nazis had done. And it exhibited "rule of law" virtues to the German people that made it less likely

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[7] Thomas Nagel, *Universality and the Reflective Self*, *in* THE SOURCES OF NORMATIVITY 200, 205 (Onora O'Neill ed., 1996). For amplification of this view, see THOMAS NAGEL, THE LAST WORD 101–26 (1997).

[8] This is an illustration of my rejection of vulgar relativism. *See supra* p. 1642. That suttee (the immolation — at least nominally voluntary — of a widow on her husband's bier) was an accepted practice of Hindu society did not make it morally right, and so make its suppression by the British morally wrong.

that Germany would again embrace totalitarianism.[9] But it was not right because a trial could produce proof that the Nazis *really* were immoralists; they were, but according to our lights, not theirs.

4. Emotivism. — Emotivism is the view that moral claims are simple statements of preference or aversion and therefore cannot be falsified or confirmed even in principle. I have the same reaction to emotivism as to moral skepticism: strictly, I think it is false, but I agree that many moral claims are just the gift wrapping of theoretically ungrounded (and ungroundable) preferences or aversions.

5. Moral Particularism. — Moral particularism is the view that although there are universal moral truths, they must be applied to particular moral issues with greater sensitivity to social context than that exhibited by, say, Kant. As I don't think that there are universal moral truths that have any bite, I reject moral particularism.

So, in sum, I embrace a version of moral relativism, reject moral particularism, and accept diluted versions of moral subjectivism, moral skepticism, and emotivism. I have not exhausted the "isms" that have attracted moral theorists, but I hope that I have said enough to indicate my general stance. It might be called "pragmatic moral skepticism." Appropriately for this lecture series, it is similar to the general stance of Oliver Wendell Holmes, Jr., as reconstructed from his fragmentary writings on morality. Readers of these Lectures should understand, however, that they need not accept my overall position — or, a related point, my *entire* series of objections to academic moralism — to accept my conclusion, which, crudely put, is that there is "nothing to" academic moralism. For example, even if I am wrong in thinking that there are no interesting moral universals, they would be unusable in moral argument if we could not determine what they are. It is a question of fact, which has an answer independent of what anyone thinks, whether Julius Caesar at the age of twelve had an odd or an even number of hairs on his head. But it is a question impossible to answer with our present methods of historical inquiry. We could speculate about the answer, but our speculations would be worthless. Difficult moral questions are no less indeterminate.

But my objections to academic moralism, although they do not depend on each other, do support each other. For example, the objection that it is ineffectual supports the objection that it is epistemically feeble. When there is nothing materially or psychologically at stake in a debate, the observer is likely to agree with whichever debater has the better arguments. I would like to think, for example, that some readers of these Lectures, being young or otherwise uncommitted to any position on the merit or utility of academic moralism, will be per-

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[9] For elaboration of this point, see RICHARD A. POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA 4–6 (1996).

suaded by the Lectures if they conclude that I have better arguments than the moralists. But in the case of morality the audience for academic debate is likely to be either uninterested or, because of self-interest or moral intuition, already committed; and the committed cannot be swayed by, nor the uninterested persuaded to take an interest in, arguments about where one's moral duty lies. So there is a *futility* to academic moralism.

C. *What I Think of "Theory"*

I must be careful about criticizing theory, and this for two reasons. The first is my age. Not that I am ancient; but as people grow older, they often turn antitheoretical. This is in part because the type of mental acuity that is required for theorizing declines with age, in part (a related point) because older people have no comparative advantage in theorizing, and in part (another related point) because older people tend to move into nontheoretical activities, such as administration or, in my case, judging (with some administration thrown in, since I am the chief judge of my court). Judges in the Anglo-American system tend in any case to be antitheoretical because of the casuistic tradition in Anglo-American adjudication. So I must be doubly careful that my criticisms of theory are not merely the consequence of my particular perspective.

I take comfort in not being globally against theory. Economic theory, and the parts of the natural sciences with which I have at least a nodding acquaintance, such as evolutionary biology, seem to me both beautiful and useful, even though these are types of theory associated with youthful intelligence. I also find attractive and useful — and employ in these Lectures — the style of theorizing, very different from the scientific, that is associated with Nietzsche and Weber. What passes for theory in certain branches of moral and political philosophy is what I don't like.

It would be loading the dice to define "theory" narrowly and then reject academic moralism as falling outside the definition. But it may be illuminating to cite some examples of successful theories. The most successful are found in areas of natural science that study observable entities; such theories can be refuted by comparing the predictions generated by the theory with the results of observation. Two things are required — that the theory yield refutable predictions and that the data that would refute them can actually be observed. Theories in the natural sciences tend to satisfy the first requirement but sometimes stumble over the second. Evolution, for example, cannot be observed, because most of it occurred before there were any observers who have left records. So the theory of evolution cannot be falsified by comparing its predictions with what "really" happened; and what cannot be falsified empirically cannot be confirmed empirically either (the hypothesis that there is life after death is an example). Scientists can,

however, adduce various forms of indirect evidence for the theory of evolution, including fossil records, the study of genes, experience with the breeding of animals, and the behavior of plants and animals. These pieces of evidence, together with the absence of an alternative theory for which there is any good evidence, cumulatively provide strong support for the theory of evolution. Such indirect verification is widespread in science and often highly reliable; consider how we know — and we do know, with all but metaphysical certainty, which is unattainable — that no human being has ever eaten an adult hippopotamus in one sitting, that no cats grow on trees, and that the earth is more than ten thousand years old and used to be the habitat of dinosaurs.

Economics is a body of theory closely related in both form and content to the theory of evolution; concepts of maximization, competition, unconscious rationality, cost, investment, self-interest, survival, and equilibrium play parallel roles in both theories. Unlike the theory of evolution, economic theory deals with observable social behaviors, such as price movements, firm size, input costs, output, shortages, wages, methods of compensation of employees and other agents, capital investments, population growth, and industrial output. Unfortunately, experiments that would isolate the effect of a particular economic variable on observable behavior are difficult to construct. The economist instead must use statistical methods to correct for other possible causes of observed behavior. These methods, given the data, are sometimes unsatisfactory. But there have been a fair number of "natural" experiments in economics — such as the adoption and abandonment of price controls in different places and at different times, the deregulation of transportation, and the fall of communism — that cumulatively provide impressive evidence for central predictions of economics, such as that price controls cause queuing, that output under competition is higher than output under monopoly, that price discrimination leads to arbitrage, and that increases in excise tax rates lead to higher prices and lower output.

I do not want to claim that these theories are successful because they are true, or even that they are true. They are successful because they help us control our physical and social environments. Since morality is a feature of the social environment, it is a legitimate subject of theoretical reflection, and so I am not against moral theory *tout court*. Rather, I distinguish between theories *about* morality and theories *of* morality, the latter being normative theories about the content of our moral obligations. These Lectures present a theory about morality. A theory of morality, in contrast, is a theory of how we *should* behave. It tries to get at the truth about our moral obligations. It addresses such questions as the following: Is it always wrong to lie? Is infanticide immoral? Sex discrimination? Prostitution? Euthanasia? Affirmative action? Enforceable contracts of surrogate motherhood? Should a

person put loyalty to country above loyalty to friends? Is it proper to kill one innocent person to save ten innocent persons? Should a rich person be permitted to buy medical care that a poor person could not afford? Is eating meat immoral? Does fairness require compensation for injuries inflicted without fault? These are questions not about whether moral beliefs are widespread, where they come from, and how likely they are to influence behavior, but about whether we ought to act in particular ways.

I call theories of morality "moralism" to underscore their aim of changing human behavior and "*academic* moralism" to distinguish academic moral philosophy from moral preaching outside the academy. Jesus Christ was a moralist, but he did not make academic-style arguments in support of his preaching. I am interested in the type of moralizing that is, or at least pretends to be, free from controversial metaphysical commitments such as those of a believing Christian, and so might conceivably appeal to the judges of our secular courts.

Three further distinctions are important. The first is between the critical and the constructive employment of moral theory. If a moralist, academic or otherwise, makes a fallacious philosophical argument for a particular moral position, it is a proper office of the moral theorist to expose the fallacy. Just as the most important function of general philosophy may be to dispel philosophical errors, so the most important function of moral theory may be to dispel errors in moral reasoning. There is a role for the Socratic gadfly in moral as well as general philosophy — though whether it is an *important* role may be questioned. If a person's moral views and behavior are as impervious to moral argument as I believe they are, they should be equally impervious whether the argument is good or bad. The argument that God must exist because He is defined as the perfect being, implying that He possesses all the good attributes, which must include existence, is easily shown to rest on the fallacy of supposing existence an attribute; but how many people ever rested their belief in God on that argument and so would have lost their belief when they learned that the argument was unsound?

The second distinction is between proposing a particular morality and arguing for it, or in other words between discovery and justification. A valuable part of moral philosophy consists of setting forth possible moral systems with or without accompanying arguments — and any arguments, if present, may serve more to explain than to justify the system. In a mutable or pluralistic moral culture, moral philosophy offers people choices of how to live, or how to think about how to live. In this it resembles, indeed might be thought a form of, art, religion, or therapy. But it is not a matter of offering reasoned answers to moral questions. And it is also — this innovative or inspirational role of moral theory — not the sort of role that modern academics are well suited to play or that judges would feel comfortable in playing.

The third distinction is between moral reasoning and legal reasoning, both of which are subsets of normative reasoning. The question whether, if your watch is broken, you should have it fixed is a normative question, but not a moral or a legal question. The question whether contracts of surrogate motherhood are wrong is a specifically *moral* normative question, but the question whether they should be unlawful is a *legal* normative question. I argue in Part II that legal questions can and should be answered without first being translated into moral questions, and without the aid of moral theory.

D. The Relativity of Morals

The goal of the type of moral theorizing that I am criticizing is, for both strong (that is, metaphysical) moral realists and some intermediate ("right answers") moral realists, to identify a phenomenon that exists independently of theory: the "moral law," perhaps, or a "moral faculty." The suggestion is that there is a conceptual, psychological, juridical, or even material entity, respectively parallel to the number system, to the psychology of self-interest that generates many economic phenomena, to positive law, or to the stars. A universal moral law might enable us, at least if we are scientific realists, to conceive of moral theory on the analogy of scientific theory.

I can be summary with regard to the kind of metaphysical moral realism that one encounters in Plato or in canon law. The only warrant for believing that there is a moral law that is "out there" in the very strong sense claimed by a Plato or an Aquinas — a moral law that has been promulgated by a process that is analogous to the process by which positive law is promulgated or that has a tangible reality akin to that of the stars — is a certain type of religious faith, the faith in a Supreme Lawgiver and in a spiritual reality as real as a material reality; and religious arguments are not a part of academic moralism.

But not all metaphysical moral realism has a religious cast. Charles Larmore acknowledges as metaphysical his view that "reality also contains a normative dimension, constituted by reasons for belief and action," a dimension to which we gain access through "reflection," conceived of as an "organ of knowledge."[10] But in practice this organ of knowledge operates, rather, as an organ of assertion, as when Larmore states:

> Can we not in good conscience consider our own moral universalism as superior to earlier and very different tribal moralities, while acknowledging that thereby we have also lost the possibilities of good they embodied? The weighing of heterogeneous goods is not likely to yield a cardinal ranking. But surely we can have reason to believe that some such goods

[10] CHARLES LARMORE, THE MORALS OF MODERNITY 8 (1996). Larmore defends his position in chapter 5. *See id.* at 89–120.

> are more important than others, in the given circumstances or overall, and even a lot more important.[11]

Larmore acknowledges that this may strike the reader as "just so much assertion," and admits that he has no "fully satisfactory" reply to the charge.[12]

Even without any metaphysical grounding, there could be a universal moral law in the sense of a set of principles that all competent adults always and everywhere recognize as duties, and from which solutions to specific moral issues could perhaps be deduced or otherwise convincingly derived. There could be; but there doesn't appear to be a universal moral law that is neither a tautology (such as "Don't murder") nor an abstraction (such as "Don't lie all the time") too lofty ever to touch ground and resolve a moral *issue*, that is, a moral question on which there is disagreement. The moral *emotions* are universal; but, as we shall see, they have no moral content.

Every society, and every subculture within a society, past or present, has had a moral code, but a code shaped by the exigencies of life in that society or that subculture rather than by a glimpse of some overarching source of moral obligations. To the extent it is adaptive to those exigencies, the code cannot be criticized convincingly by outsiders. Infanticide is abhorred in our culture, but routine in societies that lack the resources to feed all the children that are born.[13] Slavery is routine when the victors in war cannot afford to feed or free their captives, so that the alternative to slavery is death. Are infanticide and slavery "wrong" in these circumstances? It is provincial to say that "we are right about slavery, for example, and the Greeks wrong,"[14] so different was slavery in the ancient world from racial enslavement, as practiced, for example, in the United States until the end of the Civil War, and so different were the material conditions that nurtured these different forms of slavery.[15] To call infanticide or slavery presumptively bad would be almost as provincial as to condemn them without qualification. The inhabitants of an infanticidal or slave society would say with equal plausibility that infanticide or slavery is presumptively good, though they might allow that the presumption

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[11] *Id.* at 162.

[12] *Id.*

[13] James Q. Wilson surprisingly acknowledges this point. *See* JAMES Q. WILSON, THE MORAL SENSE 20–23 (1993). For evidence supporting Wilson's point, see INFANTICIDE: COMPARATIVE AND EVOLUTIONARY PERSPECTIVES 427–520 (Glenn Hausfater & Sarah Blaffer Hrdy eds., 1984); Sarah Blaffer Hrdy, *Fitness Tradeoffs in the History and Evolution of Delegated Mothering with Special Reference to Wet-Nursing, Abandonment, and Infanticide*, 13 ETHOLOGY & SOCIOBIOLOGY 409, 431–37 (1992).

[14] Dworkin, *Objectivity and Truth*, *supra* note 6, at 121.

[15] Dworkin appears to confuse slavery in ancient Greece with slavery in the antebellum United States. *See id.* at 121 (referring to "the biological humanity of races they enslaved").

could be rebutted in peaceable, wealthy, technologically complex societies.

I have given explanations for infanticide and slavery that are consistent with modern beliefs concerning cruelty and inequality, and this may prime the reader to argue that I have conceded the universality of those beliefs, merely insisting that they be applied with a sensitive regard to circumstances. But, in the first place, our modern beliefs concerning cruelty and inequality are contingent, rather than the emanations of a universal law. One reading of Nietzsche is that he was against morality,[16] but another is that he simply preferred, on aesthetic grounds that are impossible to refute, the moral code of a warrior society, a code both cruel and inegalitarian, to that of bourgeois society. (He must have liked Blake's aphorism, if he knew it, that "One Law for the Lion & Ox is Oppression."[17]) There is no common ground to appeal to in arbitrating among competing moralities. Abortion is moral in cultures that have liberal attitudes toward sex or that have adopted a feminist ideology. It is immoral in ones that want to limit sexual freedom, promote population growth, or advance certain religious orthodoxies. These cultures coexist in the United States, and their respective adherents do not have enough moral ground in common to reason to agreement.

Nietzscheans and even Blakeans are not common in our society. Maybe everyone else agrees that slavery and infanticide are immoral unless justified by the sort of exigent social circumstances that I noted. Yet this should not be a consolation for the moral realist. The immorality of slavery and the immorality of infanticide are for many academic moralists prime candidates for universal moral principles.[18] Once we perceive that they are contingent on local circumstances, we realize that the only plausible candidates for universal moral principles are too abstract to provide any guidance in the resolution of an actual moral issue. What is more, these moral horrors that we like to denounce, like infanticide and slavery, slip out of focus the more we look at them. What *is* infanticide exactly? Is it killing a one-week-old fetus? How about an eight-month-old fetus? Is it letting a severely deformed or retarded infant die? And what is slavery exactly? Is it not being able to change employers? If so, were baseball players slaves of the owners when the reserve clause was lawful? Are prison inmates slaves? Children in a regime of compulsory education? Military

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16 *See* Brian Leiter, *Nietzsche and the Morality Critics*, 107 ETHICS 250, 263–71 (1997).

17 William Blake, *The Marriage of Heaven and Hell*, *in* ENGLISH ROMANTIC WRITERS 68, 75 (David Perkins ed., Harcourt Brace Jovanovich 1967) (1790–1793).

18 For other examples, see RENFORD BAMBROUGH, MORAL SCEPTICISM AND MORAL KNOWLEDGE 19–21 (1979). Bambrough's book is a powerful critique of moral skepticism, but it fails to show how any moral issue can actually be resolved unless the contestants' disagreement is at root one of fact.

draftees? Jurors? All these questions have answers, but not answers that owe anything to any universal moral law.

To say that a moral principle can be judged only by reference to its social setting, or, more narrowly still, to the common beliefs of its adherents and of its opponents, is not to say that it can never be judged. Some moral principles, like unenforced laws, lag behind social change, and for the same reason: they don't have much effect, so the benefits of "repeal" are small, and they require collective action to change, so the costs of repeal are large. The existence of obsolete moral principles provides a broad field for functional criticism. One reason for the widespread condemnation of the Nazi and Cambodian genocides is that we can see in retrospect that they were not adaptive to any plausible or widely accepted need of the societies in question. The genocidal policies that the United States pursued against the American Indians were adaptive and so receive less criticism, especially as we are the beneficiaries of those policies. We deplore human sacrifice in part because we are more squeamish than premodern people (a point I'll return to), but in part because we know that human sacrifice does not avert drought, flooding, and other disasters, and is thus a poor means to a society's ends.[19] When moral claims are founded on testable empirical hypotheses — when, in other words, they are defended as functional — a space is created for moral criticism based on empirical investigation. In that situation we can employ the moral premises of the culture whose morality is at issue, and reasoning from common premises reach a conclusion that our local interlocutor may be forced as a matter of logic to accept (if he is logical). If the only reason that virgins are hurled into volcanoes is to make crops grow, empirical inquiry should dislodge the practice. But when human sacrificers do not make falsifiable claims for the efficacy of the practice, our critical voice is stilled. Or rather, it becomes a voice expressing disgust — which is largely a reaction to difference — rather than a voice uttering reasoned criticisms.

Human sacrifice is passé. A contemporary example of a practice that outrages most Americans is female genital mutilation, which is common among African (including Egyptian) Muslims. Defenders of the practice claim that it is indispensable to maintaining the integrity of the family in those communities. The claim is arguable,[20] though I do not know whether it is correct. If it is correct, the moral critic is disarmed, for there is no lever for exalting individual choice or sexual pleasure over family values. It is vacuous to complain that the mutilated girls are often too young to be able to make a responsible choice

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[19] I emphasize this kind of *instrumental* criticism of moral codes, specifically codes of sexual morality, in RICHARD A. POSNER, SEX AND REASON 220–40 (1992). It seems to me the only defensible way of criticizing a moral code.

[20] *See id.* at 256–57.

(assuming they are even given a choice) whether to undergo the procedure, for the moral code of their communities is not founded on principles of freedom or autonomy. It is equally beside the point to show that many people in these societies are opposed to female genital mutilation. That just means that there are competing moralities within these societies, as there are within our society. As there is no basis for choosing on moral grounds between a dominant and a dissenting morality, moral pluralism provides no leverage for moral critique; indeed, it tends to reinforce the lesson of relativism. Yet we should not think it a disaster that moral pluralism renders some moral issues indeterminate, for we shall see that moral diversity can be a source of social strength. Moral pluralism is a disaster only for academic moralism.

The constant resort to the rhetoric of objectivity and realism in debating moral issues has been cited as evidence for moral realism.[21] That is like saying God exists because believers talk about God as existent. It is here that moral subjectivism has bite; we like to dress up our preferences and intuitions in universalistic language, giving a patina of objectivity to a subjective belief or emotion. We also like to debate factual issues, and that kind of debate *is* fruitful, is "objective" in a meaningful sense, and can bear upon, though it must not be confused with, moral theory.

The tendency to use a universalistic rhetoric is found in legal as well as moral theory, and has produced confusion. H.L.A. Hart and Ronald Dworkin, for example, have famously antagonistic jurisprudences. But the antagonism is largely an artifact of their insistence upon framing their respective theories in universalistic terms, when what each is really doing is offering a stylized description of the legal system of his own country.[22] Similarly, Jürgen Habermas fancies himself to be propounding a universal jurisprudence; actually he's just talking about Germany.[23]

I do not shrink from the implication of my analysis that there is no moral progress in any sense flattering to the residents of wealthy modern nations, and that we cannot think of ourselves as being morally more advanced than head-shrinkers and cannibals and mutilators of female genitalia. We are lucky in knowing more about the material world than our predecessors did and some of our contemporaries do. Armed with this knowledge, we can show that certain vanished moral codes were not effective instruments for achieving social goals (in some

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21 *See* DAVID O. BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS 29 (1989).

22 *See* POSNER, *supra* note 9, at 20.

23 *See* Richard A. Posner, *Law's Reason*, NEW REPUBLIC, May 6, 1996, at 26, 30 (reviewing JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996)). I do not doubt the value of such descriptions; my point is only that by claiming universality for them, the authors create an exaggerated impression of the extent of disagreement among themselves.

cases that is why they vanished), and perhaps that some current ones are maladaptive in this sense as well. If a moral code does not further the interests of the dominant groups in a society, or if it weakens the society to the point of making it vulnerable to conquest (even if only by arousing the fear or hatred of a stronger society), or if it engenders unbearable internal tensions, then either the code or the society will eventually become extinct; the moral code of the antebellum South, the moral code of the Nazis, and the moral code of the Soviet Union are all examples. As we have a different moral code, which naturally we prefer (it is ours), we like to describe the disappearance of the bad old codes as tokens of moral progress;[24] we call their adherents "immoral." But progress and adaptation are not the same thing. If a moral code is adaptive, it may still be alterable, but it will be difficult to *criticize.* Had Hitler or Stalin succeeded in their projects, our moral beliefs would probably be different (we would go around saying things like "You can't make an omelette without breaking eggs"); and they failed not because the projects were immoral, but because the projects were unsound.

The case of Stalin, and of communism more generally, casts doubt on the claim that either utilitarian or Kantian thought, each in its own way "inclusive" rather than ethnocentric, has "had a revolutionary impact on Western moral thought, despite the fierce resistance it has encountered, and the staggering violence and brutality that have been perpetrated by those committed to reversing it."[25] It is plain from the sentence as a whole, as well as from the discussion that precedes and follows it, that the author considers the "revolutionary impact" of Kantian and utilitarian inclusiveness a sign of moral progress. Yet the staggering violence and brutality inflicted in the name of communism from the days of Lenin and Stalin to those of Mao and Pol Pot were not part of any resistance to inclusiveness. Marxism and communism are internationalist and universalist ideologies, rather than racist, nationalist, and sexist ideologies (as Nazism was). Their violence and brutality were inflicted in the name of a universalist vision, though the actual motivation may have had more to do with the personality and political situation of the perpetrators than with any body of systematic thought. Even the Nazis, in their own way (obviously a crucial qualification), were inclusive, having taken the first measures for the protection of endangered animal species. Inclusiveness, lacking as it does any definite scope or content, has no moral valence, and so its (irregu-

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[24] *See, e.g.*, Dworkin, *Objectivity and Truth*, *supra* note 6, at 120 ("Anyone who is convinced that slavery is wrong, and knows that his view is now shared by almost everyone else, will think that general moral sensibility has improved, at least in that respect, since slavery was widely practiced and defended.").

[25] SAMUEL SCHEFFLER, HUMAN MORALITY 10 (1992).

lar) growth in the last two centuries cannot be considered a sign of moral progress.

It may be objected that my relativism is self-refuting. It might be if I were arguing for *epistemological* relativism, or if I were making a *moral* argument for moral relativism. I am doing neither. Consider beauty. A powerful argument can be made that it is relative. Most of us think warthogs ugly, but a talking warthog would tell us that warthogs are beautiful and human beings ugly, and there is no fact of the matter about beauty to which we and the warthog could appeal in order to resolve the disagreement. The argument that standards of beauty are relative in this way may be wrong, but it is not self-refuting. If warthogs could speak, they might agree that standards of beauty are relative.

I cannot completely avoid the paradox of self-reference. If moral theory does not convince because it lacks the cogency of scientific reasoning, how likely is it that these Lectures, which are not "scientific" in any but the loosest sense, will convince? Why then have I written them, especially if I am right that the academic moralists, against whom I am writing, have no impact on either personal behavior or public policy? May it not be that I fear their impact, that it is this fear which has motivated me? I am enough of a Freudian not to consider myself an expert on my own motivations, so I shall say only that fear is not the only possible motivation for writing and that I gave a reason earlier for thinking that lectures such as these might be more persuasive than an argument for a change in moral beliefs or behavior. But can't it be argued that these Lectures are covertly moral, that I am in fact commending a kind of existential morality (antimorality as morality) in which people take responsibility for their actions without the comfort of supposing that they are acting in accordance with universal moral norms?

These are not trivial or easily answered questions. But they do not undermine my effort to show, not that moral philosophy as a whole, let alone morality, is bunk, but only that the subset of moral philosophy that I call academic moralism is incapable of contributing significantly to the resolution of moral or legal issues or to the improvement of personal behavior.

It may further be objected, however, that the existence of a mind-independent moral reality accessible to human intelligence is not a necessary condition for convincing moral arguments. And that is true; most academic moralists today, even if they describe themselves as moral realists, don't assume that there is such a reality, but point out that it is not indispensable to objective reasoning. Mathematics is a rigorous discipline, but the ontology of numbers is deeply mysterious. Unicorns do not exist, but it is possible to make true and false assertions about them; for example, the assertion that a unicorn has two horns is false. Dworkin is not a metaphysical moral realist, but he be-

lieves that "the wrongness of abortion," if it is wrong, "does not depend on anyone's thinking it wrong."[26] And even if he is incorrect and morality is always a matter of local beliefs (that is, of someone's "thinking it wrong"), within each locale it may be possible to evaluate behavior by its conformity to a moral system, even though judgment about the morality of the system itself must be withheld. Indeed, the casuistic approach to moral questions assumes the givenness of the local moral system. It is indeed "startlingly counterintuitive to think there is nothing wrong with genocide or slavery or torturing a baby for fun"[27] — in our culture. That's the rub. The moral dictionary is local. Number theory is the same in every language; and unicorns, I suppose, have one horn in every language that has a word for them. If "unicorn" were defined as an animal with anywhere from one to *n* horns, depending on the local language group, the word would lose its universality; it would be like a moral term.

The most serious problem for normative moral theory in today's America is not the absence of a mind-independent moral reality; it is not even the international moral pluralism that is dramatized by the case of female genital mutilation and that makes it difficult for modern Americans to pass moral judgment on other societies, past and present. The problem is moral pluralism *within* the United States. A left-liberal secular humanist from New York or Cambridge does not inhabit the same moral universe as a Mormon elder, an evangelical preacher, a Miami businessman of Cuban extraction, an Orthodox Jew, an Air Force commander, or an Idaho rancher. (These universes do intersect at various points, but not the points that interest many academic moralists.) The reason that moral pluralism is a problem for moral theory is that without a mind-independent reality *or* a tight logical or linguistic framework it is difficult to say, if "the wrongness of abortion does not depend on anyone's thinking it wrong," what its wrongness (or rightness) *does* depend on. The secular humanist and the Mormon elder do agree that genocide, slavery, and baby torture are wrong, but there is nothing interesting, or even relevant, about such agreement, for it cannot be stretched to cover contested moral questions. Dworkin thinks, to the contrary, that to show that "[m]orality is a distinct, independent dimension of our experience,"[28] and that there is wide agreement about some moral propositions, helps us to resolve moral *issues*. It does not, as we would quickly discover by asking a Serb whether the Serbs have committed genocide in Bosnia and a prolifer whether abortion is a form of baby torture. The acceptability of a moral principle is inverse to its capacity to resolve an actual issue.

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[26] Dworkin, *Objectivity and Truth*, *supra* note 6, at 99; *see also id.* at 109.

[27] *Id.* at 118.

[28] *Id.* at 128.

Even if we reject scientific realism — even if we think that science yields "objective" results merely because scientists happen to form a cohesive, like-minded community, or in other words that consensus is the only basis on which truth claims can or should be accepted, because consensus makes "truth" rather than truth forcing consensus — moral theorists are up against the brute fact that there is no consensus on any moral principles from which answers to contested moral questions might actually be derived. If at some level moral theory is like scientific theory, as moral realists believe, it is like failed scientific theory.

E. Reconceiving Morality Functionally

A good deal of moral and immoral behavior is explicable without regard to moral categories.[29] This suggests that moral theory may not have a large domain. It may be little more than a primitive amalgam of psychology, sociology, economics, and biology. And moral discourse may to a considerable extent be a mystification rooted in a desire to feel good about ourselves — to feel that we are more than just monkeys with big brains, that we are special enough for God to take a particular interest in us.

Why is it, for example, that the more bystanders there are at the scene of an accident the less likely the victim is to be helped?[30] Because of deficiencies in moral training or insight? No. Because the expected benefit to each bystander of stepping forward — the altruistic benefit of helping a person in distress, discounted (multiplied) by the probability that he will not be helped by someone else if you hang back — is less the more bystanders there are. Someone, you think to yourself, will surely step forward, someone better at this sort of thing than you are. The cost to each bystander of intervening is no less, however, so the benefit to each is less likely to equal or exceed the cost.[31]

The example assumes that there is such a thing as altruism; and to acknowledge this may seem to give my game away. But I think not, and not only because my objection to moral theory is not that there are no moral sentiments. Altruism, even when directed toward strangers

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[29] An economist, for example, would explain the intuition behind Judith Jarvis Thomson's suggested solution to the "trolley" hypothetical in two words: ex ante. *See* JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 176–202 (1990).

[30] For the evidence, see ROBERT B. CIALDINI, INFLUENCE 133–36 (1984); Bibb Latané, Steve A. Nida & David W. Wilson, *The Effects of Group Size on Helping Behavior*, *in* ALTRUISM AND HELPING BEHAVIOR 287, 290–97 (J. Philippe Rushton & Richard M. Sorrentino eds., 1981).

[31] Suppose the benefit of a rescue to a rescuer is 100 and the cost 80. Then if there is only one potential rescuer, he will rescue, since 100 is greater than 80. But suppose there are 10 potential rescuers, and each one thinks that there is a 30% chance that, if he doesn't perform the rescue, one of the other nine will. Then each will reckon the net expected value of his rescuing at 70 (.7 x 100), and since the cost (80) now exceeds the expected benefit, he will not rescue.

rather than, as is more common, the members of one's family, need have nothing to do with any moral law or even with morality, though this is in part a matter of how "altruism" is defined. When defined broadly, as helping behavior not motivated by the promise of reward or the threat of punishment, altruism is something that can be and often is motivated by love, or by some dilute form of it such as compassion or sympathy. And love and its cognates are not, or at least need not be, moral sentiments.

My definition leaves open the question whether a particular altruistic act is motivated by love or sympathy or some other positive feeling toward the person helped, by a sense of moral obligation, or by the essentially aesthetic or prideful desire to act in accordance with a heroic conception of oneself.[32] The last of these motivations is underemphasized, yet it identifies, as I hinted earlier, a genuine role for moral philosophy, that of self-discovery. Through reading the classics of moral philosophy, you might discover yourself to be an Aristotelian, a Stoic, a Humean, a Rousseauian, a Benthamite, a Millian, a Nietzschean, or even a follower of G.E. Moore. A moralist cannot persuade you to one morality or another, but he can *offer* you a morality that you can then accept or reject for reasons of pride, comfort, convenience, or advantage, though not because it is "right" or "wrong." If you accept it, you can then try to spin out its implications, in the hope that if enough other people accept it too, your demonstration of those implications will alter people's views of specific issues.[33] Thus, rather than poets and novelists being moral philosophers manqué, moral philosophers are poets and novelists manqué. This suggests that they can do no more for our moral development than can poets and novelists; and what poets and novelists can do is to give us different world views to try on for size.[34] Plato's paean to homosexual love in the

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[32] *See generally* NANCY EISENBERG, ALTRUISTIC EMOTION, COGNITION, AND BEHAVIOR 30–56 (1986) (explaining the differences among "sympathy," "empathy," and "personal distress" motivations for altruistic behavior). Other motivations are possible as well; those motivations are self-interested. *See* Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 569–85.

[33] Thus, in my book *Sex and Reason*, cited above in note 19, I tried to spell out the implications for the regulation of sex of adopting Mill's political and moral philosophy. I disclaimed the possibility of convincing anyone to adopt his philosophy. *See id.* at 230–31.

[34] I have made this argument with reference to poets and novelists in Richard A. Posner, *Against Ethical Criticism*, 21 PHIL. & LITERATURE 1 (1997), which appears in amplified form in RICHARD A. POSNER, LAW AND LITERATURE 305–44 (revised and enlarged ed. 1998). Here is how Rorty puts it:

> It would be better [for Western moral philosophers] to say: Here is what we in the West look like as a result of ceasing to hold slaves, beginning to educate women, separating church and state, and so on. Here is what happened after we started treating certain distinctions between people as arbitrary rather than fraught with moral significance. If you would try treating them that way, you might like the results.

Richard Rorty, *Justice as a Larger Loyalty*, *in* JUSTICE AND DEMOCRACY: CROSS-CULTURAL PERSPECTIVES 9, 19–20 (Ron Bontekoe & Marietta Stepaniants eds., 1997).

Symposium was passed over in embarrassed silence by his admirers for many centuries, until a change in sexual mores made it available as a prestigious source to cite in support of the change. When Plato wrote, philosophy had not yet become academicized, and the line between it and literature was indistinct. The *Symposium* is a moving work, but it contains no arguments or evidence that would trouble those who believe that homosexuality should be discouraged. It moves us as literature moves us. Moral philosophy, like literature, enriches; it does not edify.

Evaluative literary criticism bears the same relation to literature as the exegetical works of modern moral philosophy bear to the canonical works of moral philosophy. The critic cannot give the reader convincing reasons why one work of literature is finer than another unless the reader happens to agree on what the criterion of literary quality should be. But he can point to things in the work that the reader may have missed and that, when understood, show the reader that it is the kind of work he likes. Evaluative literary criticism is more apt to sway people than is moral theory, because people's aesthetic commitments are generally weaker than their moral commitments. It is easier to develop a person's taste for modern art by persuading him to look at features or details that he may have overlooked than to persuade him that capital punishment is required or forbidden by the categorical imperative.

This is not to deny that the classic moral philosophers had insight into human personality and aspirations and the requisites of human cooperation. To the extent that the social conditions that molded their views persist in our society, the philosophers have something to say to us that is not just poetry, although there is no reason why it has to be said in their original voices rather than restated in a modern idiom.

Take Benthamism. Its details are anachronistic and sometimes absurd even by the standards of Bentham's time; and utilitarianism as a philosophy can be made to seem absurd by asking such questions as whether the community whose happiness is to be maximized includes animals and future generations of human beings (and perhaps of animals too), or whether Prozac should be put into the water supply, or why people who have large capacities for enjoyment should be thought moral heroes. But in the conditions of modernity it is apparent that any viable society is going to have to concern itself with the happiness of the population. There is nothing in theory to refute a Nietzschean project of maximizing the power of an elite; it just is not in the cards in an age in which the growth and diffusion of wealth have made "ordinary" people self-confident and assertive. Utilitarianism epitomizes this inevitability and so cannot be completely refuted.

This discussion has carried me away from altruism; let me now come back to it. Evolutionary biology hypothesizes that altruism derives from the evolutionary imperative of inclusive fitness — the drive

to maximize the number of "copies" of one's genes by maximizing the number of creatures carrying them, weighted by the closeness of the relation (the closer the relative, the more copies of one's genes he will carry).[35] A proclivity to help one's relatives increases humans' inclusive fitness, and so it is plausible to suppose that this proclivity evolved as an adaptive mechanism.[36] During the prehistoric epoch in which our instinctual preferences were formed, people lived in tiny, isolated bands, so most members of one's community would have been either one's relatives, or nonrelatives having very close affective ties to one or continuous dealings with one, such as one's mate and his or her family. So it was not essential to have an innate capacity to discriminate between intimates and others, particularly others — call them "strangers" — with whom one did not have repeated face-to-face interactions.[37] Conditions today are different. We interact very frequently with strangers. But the instincts are easily fooled when confronted with conditions to which man has not had a chance to adapt because they did not exist in prehistoric times. That is why a pornographic photograph can arouse a person sexually or a violent movie frighten its audience, why people can love an adopted infant as much as they would their own biological child, and why men do not clamor to be allowed to donate to sperm banks. Voting, giving to charities, and refraining from littering, in circumstances in which there is neither visible reward for these cooperative behaviors nor visible sanctions for defection, may be a kind of instinctual mistake. It may be a generalization of cooperation from small-group interactions, in which altruism is rewarded (and hence reciprocal) and failures to reciprocate punished, to large-group interactions in which the prospects of reward and punishment are so slight that cooperation ceases to be rational.[38]

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[35] *See* ROBERT TRIVERS, SOCIAL EVOLUTION 41–65, 109–44, 361–94 (1985); Matt Ridley & Richard Dawkins, *The Natural Selection of Altruism*, *in* ALTRUISM AND HELPING BEHAVIOR, *supra* note 30, at 19, 24–31. So, other things being equal, having three nephews (each of whom will have 25% of your genes) will contribute more to your inclusive fitness than having one child (who will have 50% of your genes).

[36] *See* Susan M. Essock-Vitale & Michael T. McGuire, *Predictions Derived from the Theories of Kin Selection and Reciprocation Assessed by Anthropological Data*, 1 ETHOLOGY & SOCIOBIOLOGY 233, 237–42 (1980); *cf.* MARTIN DALY & MARGO WILSON, SEX, EVOLUTION, AND BEHAVIOR 37–58 (2d ed. 1983) (describing the strategies that various organisms evolved to maximize inclusive fitness).

[37] *Cf.* Charles J. Morgan, *Eskimo Hunting Groups, Social Kinship, and the Possibility of Kin Selection in Humans*, 1 ETHOLOGY & SOCIOBIOLOGY 83 (1979) (demonstrating the importance of social kinship in Eskimo whale-hunting parties); Charles J. Morgan, *Natural Selection for Altruism in Structured Populations*, 6 ETHOLOGY & SOCIOBIOLOGY 211, 215–17 (1985) (explaining how altruistic individuals and clans are more likely to survive because of the benefits to the larger group).

[38] *See* ODED STARK, ALTRUISM AND BEYOND: AN ECONOMIC ANALYSIS OF TRANSFERS AND EXCHANGES WITHIN FAMILIES AND GROUPS 132 (1995); Cristina Bicchieri, *Learning to Cooperate*, *in* THE DYNAMICS OF NORMS 17, 39 (Cristina Bicchieri, Richard Jeffrey & Brian

Charities know that the way to get people to give money for the feeding of starving children is to publish a picture of a starving child, not to talk about a moral duty. I think that most Americans would actually be miffed to be told, other than by their own religious advisors, that it was their *duty* to support the needy.

When we see a person in distress, or even a picture of such a person, our impulse is to help (though it is balanced, and often outweighed, by contrary impulses, such as the impulse of self-preservation), even though nowadays the person is unlikely to be a relative or other intimate. We react that way, and approve of others who react that way, not because there is a moral law dictating altruism, but because we are social animals. Cats, for example, are not. If a cat sees another cat (unless it is its own kitten) in distress, it reacts with indifference. This is not because cats are stupid, but because the fewer cats there are, the better it is for cats — the hunting is easier. Cats grow up solitary; children grow up in groups; a moral code will develop in children from their interactions with each other and with adults.[39]

Some feminists admire bonobos, a species of monkey in which the female is dominant. It would make as much sense to admire sharks, vultures, or leeches. These creatures are adapted each to its particular environment, which is neither our prehistoric nor our present environment.[40] Admiring bonobos or deploring sharks is like calling a warthog ugly. A shark who had a moral lexicon would pronounce the eating of human swimmers moral, just as a warthog with an aesthetic vocabulary would snort derisively at the Venus de Milo.

Evolutionary biology has a further bearing on moral reasoning: it suggests that we may not be any good at it. During the ancestral era in which human beings lived in tiny bands, we didn't need morality in its modern sense of a set of duties toward unknown persons. So there is no reason to believe that the human brain evolved a capacity for reasoning intelligently about moral questions. Of course, people can reason on many matters that were of no concern to our ancestors of thirty thousand and more years ago; the brain is to a considerable extent a general-purpose reasoning machine. Yet we have a great deal of trouble reasoning about questions — such as whether we have free

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Skyrms eds., 1997). Generalization (less grandly, pattern recognition) seems to be an innate and very valuable, but of course fallible, capacity of the human animal.

[39] *See* JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD 19–69, 116–59 (Marjorie Gabain trans., Free Press 1948).

[40] *See* FRANS DE WAAL, BONOBO: THE FORGOTTEN APE (1997). De Waal explains:

> Bonobo society offers females a more relaxed existence [than does chimpanzee society]. . . . The rich forest habitat of the bonobo evidently permits such an organization. Our ancestors . . . adapted to a much harsher environment [the savanna]. It is dubious that a bonobolike primate could have made it in a savanna habitat while keeping its social system intact.

Id. at 135. Of course, it is legitimate for feminists to invoke bonobos against anyone who claims that the behavior of monkeys shows that human males are inherently patriarchal.

will, what existed before the universe (or before time), and how causality operates (if it does operate) at the subatomic level — that lack close counterparts in the questions that confronted early man. The question of our duties to strangers may be similarly baffling because it is similarly remote from the questions that troubled early man.

F. The Moral Sentiments

Altruism as I have discussed it thus far fits comfortably into the picture of man as "economic man," motivated by self-interest; you help a stranger, even when there is no expectation of reciprocity, because you "like" him, even if only momentarily. A lot of what we think of as moral behavior is in fact self-interested. But not all. Some acts of helping are not directed toward people we like. Some of us will make a sacrifice to help people we actually dislike; this is not uncommon in the dealings that people have with their aged parents. This kind of altruism, when it is not just showing off, is the product of a genuine moral sentiment. We might call it dutiful altruism. The converse is the indignation we direct at people who misbehave even if their misbehavior imposes no cost on us. These emotions, and the behaviors they impel, reflect the influence of rules that are obeyed (though not by everyone) even when there is no legal or other tangible sanction for disobedience. That influence might seem to imply the existence of a moral faculty — a faculty that moral theories might move — alongside the faculty of rational calculation of advantage and disadvantage.

All that the moral emotions actually imply, however, is that we are social animals with large brains. The sociality makes desirable, and the large brain makes feasible, the development and enforcement of rules of social cooperation and differentiation, as opposed to the kind of hard-wired role differentiation found in ants. The most important rules of cooperation in a human society are embodied in its moral code, but what is codified is what is useful rather than what idealists might think is good. To be effective, the rules must be obeyed. Many of them are self-enforcing; if you don't cooperate with other people, they won't cooperate with you, and so you'll lose the benefits of cooperation.[41] Some rules are enforced by law. Some become internalized as duties whose violation engenders the disagreeable feeling that we call guilt. Where there are no sanctions at all, however, not even guilt (and not all people feel guilt if they violate a particular provision of their society's moral code), it is difficult to understand why a person would obey such a rule unless it were consistent with his self-interest. That is, the *motivational* effect of an unenforced rule is obscure.[42] I

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[41] *See* Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV., May 1997, at 365, 365.

[42] *See* JOHN DEIGH, THE SOURCES OF MORAL AGENCY: ESSAYS IN MORAL PSYCHOLOGY AND FREUDIAN THEORY 133–59 (1996).

shall return to that point; for now, I wish to point out only that the capacity to feel guilt, and the moral emotions more broadly, imply the existence not of a distinctive moral faculty but merely of internalized rules of conduct. Such rules often are morally indifferent. We feel guilty if we forget to brush our teeth. Lady Macbeth felt guilty about being unable to stab Duncan while he slept. She is an unusual (as well as fictitious) person, who like many Shakespearean villains (Iago is the clearest example) seems particularly villainous because her viciousness is not adequately motivated, is gratuitous. But guilt about yielding to pity is not unusual and is not always misplaced.

Other moralistic reactions, such as indignation, also bear no predictable relation to morality. We are more indignant at the driver who runs down a child carelessly than at the more careless driver who through sheer luck misses the child.[43] The difference between our reactions is difficult to ascribe to morality; it is more easily ascribed to altruism, which comes into play only in the first incident. We are hurt by the loss of the child even though it is not our own child. Altruism — like love — typically is nonmoral: the example shows that the moral emotions are independent of morality, or at least of any consistent body of moral rules. Members of a criminal gang are indignant about informers. The quality of their emotion is the same as that of the good citizen who is indignant about traitors; the difference is that the circle of their altruistic feelings encloses the gang, rather than the country.

There may be *more* moral sentiment in the average gang member than in the average law-abiding citizen. Law, a substitute for moral sentiment, is unavailable to gang members. They are forced back on the oldest system for enforcing human cooperation. Even before there was a state with coercive powers, there must have been rules of conduct, explicit or implicit, but enforced to some degree; a human society could not survive without such rules. Compliance with them must have depended on the moral emotions, as well as on supernatural beliefs, force and the threat of force, and love and reciprocal altruism. The moral emotions include guilt and shame on the part of transgressors and moralistic indignation on the part of victims and their kin. The universality of these emotions, their inarticulateness, their beginnings in very early childhood,[44] their survival value, and their

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[43] *See* BERNARD WILLIAMS, *Moral Luck*, *in* MORAL LUCK 20, 21 (1981); BERNARD WILLIAMS, *Moral Luck: A Postscript*, *in* MAKING SENSE OF HUMANITY 241, 245 (1995). This point is overlooked in Griffin's discussion of the "fat tourist" moral dilemma. *See* JAMES GRIFFIN, VALUE JUDGEMENT 102–03, 110 (1996). The fat tourist is blocking, albeit innocently, the way to safety of the thin tourists; killing him to remove the block is not the same atrocity (Griffin believes) as killing an innocent person who does not have any causal relation to the peril of others in order to save the others. Why sheer causality, shorn of any triggering effect on altruism, should affect our moral sentiments is a big puzzle for moralists.

[44] *See generally* THE EMERGENCE OF MORALITY IN YOUNG CHILDREN (Jerome Kagan & Sharon Lamb eds., 1987) (describing the origins and development of morals in children).

animal parallels all suggest that they are instinctual,[45] just as altruism is. Because they are instinctual, they continue to be an important element of human psychology. Originally, I assume, they operated primarily within the family; but their potential scope was always broader, for the reason that I have already indicated.

Emotions, being triggered by beliefs, have a cognitive element.[46] But, as in my example of the criminal gang, they are not always triggered by the same beliefs or directed toward the same objects. The moral emotions are morally neutral, in much the same way that a schedule of criminal punishments (one year's probation, six months in jail, ten years in the penitentiary, a $5000 fine) is neutral with respect to the substantive content of the criminal law; different societies attach the same punishments to different conduct. The universality of the moral emotions no more proves the existence of a universal moral law than the universality of criminal punishment proves the existence of a universal criminal law. The moral emotions are enforcers, all right, but what they enforce depends on the needs, circumstances, and history of a particular culture.

It is thus misleading, though not incorrect, to cite indignation as an example of an emotion that "presuppose[s] moral beliefs" and so, together with like emotions, demonstrates "the ramification of moral concerns throughout our mental and social lives."[47] This makes it sound as if there must be something to moral theory; all it really shows is that groups have norms the violation of which may trigger an emotional reaction.

G. The Problem of Motivation and the Methods of the Moral Entrepreneur

The ambition of the academic moralist is to change people's moral beliefs and thus change their behavior. It is not a realistic ambition. To begin with, it is not clear that a change in moral beliefs will in fact lead to a change in behavior. Academic moralists believe that if you are persuaded that you ought to do something because it is the moral thing to do, this recognition, this acceptance, will furnish a motive to do it; Kantians believe that it is irrational to act otherwise.[48] I find this position difficult to understand, or to accept as a psychological proposition. Seeing a train bearing down on you will not, in and of it-

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[45] *See* J. Hirshleifer, *Natural Economy Versus Political Economy*, 1 J. SOC. & BIOLOGICAL STRUCTURES 319, 332, 334 (1978); Robert L. Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. REV. BIOLOGY 35, 49 (1971).

[46] *See, e.g.*, RONALD DE SOUSA, THE RATIONALITY OF EMOTION 171–203 (1987); MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: A THEORY OF THE EMOTIONS (forthcoming).

[47] SCHEFFLER, *supra* note 25, at 68.

[48] *See, e.g.*, Christine M. Korsgaard, *Kant's Formula of Universal Law*, 66 PAC. PHIL. Q. 24, 26 (1985). Kant's footprints are all over modern moral theory.

self, make you want to get out of its way, though we talk as if it would. The *perception* does not contain a desire to avoid pain or death. Similarly, being persuaded that a proposed course of action would be morally wrong might lead you to change course because you are the kind of person who obtains satisfaction from doing the right thing, but the satisfaction would have to come from outside the moral code. That is, you would have to have a *desire* to obey the code. If we set to one side their "exaggerated" group loyalties, criminals generally have the same moral beliefs as the law-abiding do.[49] They just don't want to act on those beliefs.

Your motivation to be moral might come from the pride you take in being a "good" person, which is to say better than other people. That would be an illustration of moral pride rather than of morality. It would be related to the incessant human striving for status, a striving that does not require either publicity or the prospect of any material gain. A person can derive satisfaction from knowing that he is better dressed than anyone around him, even though no one besides himself knows this.

Moral pride is not a dependable spur to moral behavior. Moral pride is object-neutral and so is consistent with romantic outlawry and other dangerous forms of egoism. A different kind of person from that envisaged by academic moralists, a Promethean or Nietzschean rather than a Swedish socialist or a scrupulously observant Christian, might be proud to flout the norms of those who, in Nietzsche's phrase, are tame because they have no claws. Such a person might agree with Nietzsche that moral preening — for example, fancying that you are advancing "toward the complete control over our sensuous nature that is implied by freedom"[50] — is a form of self-aggrandizement psychologically no different from the antisocial forms.[51] He might consider nature normative and therefore rebel against trying to make people more sociable than they were before the rise of organized societies.

You *might* want to do the conventionally right thing because you are innately good (so Augustine was wrong) or perhaps innately nothing, but made good by education. At this juncture I shall simply regis-

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[49] *See* WILSON, *supra* note 13, at 11. Of course, most people are not criminals, but I am unaware of evidence that would permit an estimate of how many of the law-abiding refrain from crime for reasons of morality, as distinct from fear of punishment, lack of motive, altruism (natural rather than dutiful), or other considerations of self-interest narrowly or broadly defined.

[50] Christine M. Korsgaard, *Morality as Freedom*, *in* KANT'S PRACTICAL PHILOSOPHY RECONSIDERED 23, 47 (Yirmiyahu Yovel ed., 1989).

[51] The egotism of altruism is illustrated by the first sentence of Bertrand Russell's autobiography: "Three passions, simple but overwhelmingly strong, have governed my life: the longing for love, the search for knowledge, and *unbearable pity for the suffering of mankind.*" BERTRAND RUSSELL, THE AUTOBIOGRAPHY OF BERTRAND RUSSELL 3 (1951) (emphasis added). For some tart words on the altruistic personality, see JAMES FITZJAMES STEPHEN, *Philanthropy*, *in* LIBERTY, EQUALITY, FRATERNITY AND THREE BRIEF ESSAYS 292, 292–96 (Chicago Univ. Press 1990) (1859).

ter my doubt about these two possibilities, for I am straying from my main point in this section. It is that the academic moralist who wants to alter behavior, as I think he has to want to do in order to feel good about his project (unless he is just a dilettante or an academic careerist), ought to worry about a person's motivation to do whatever the moralist can persuade the person is the "right" thing to do, just as legal scholars ought to worry about how to motivate life-tenured federal judges to behave in accordance with the best conception of the judicial function.[52]

Even if more people get satisfaction out of doing the right thing than the wrong thing, the academic moralist could have an effect on behavior only if he could produce cogent arguments for the moral positions that he advocates. He can't; this is true whether or not there is anything "to" moral realism. Even if there are moral universals, unless there is some means of demonstrating their existence and their content to doubters, they might as well not exist as far as influencing behavior is concerned. Even if people are innately good or are made good by education or are proud to be good, history and experience and, I think, honest introspection (if that's possible) teach that the vast majority of us are unwilling to pay a high price in selfish joys and comforts forgone to be good. We are reluctant to pay *any* price to be good. We can avoid having to pay any price, without suffering any pangs of conscience — we can have our cake and eat it — by denying that morality requires us to change our behavior.

The academic moralist strives to prevent that denial but lacks the requisite tools. He has a lot to overcome, compared, say, to the literary critic; that's why he needs *cogent* arguments, not just pretty good ones. A person's moral code is not a balloon that the philosopher's pinprick will burst; it is a self-sealing tire. For every argument on one side of a moral issue, there is an equally good one on the other side. The arguments cancel each other, and the issue is resolved by a change in social conditions or sometimes by a charismatic moral innovator. For think: when was the last time a moral code was changed by rational persuaders, intoning or refining the arguments of Aristotle, Aquinas, Kant, Hegel, or Mill? And think of how we acquire our moral views. We acquire them mostly in childhood, when moral instruction that appeals to reason takes a back seat to parental example, experience, and religion.[53] Once engrained in us, a morality is difficult to change. Sometimes it is changed, but by a very different type of moral advo-

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[52] On the problem of judicial motivation, or what I call the "judicial utility function," see RICHARD A. POSNER, OVERCOMING LAW 109–44 (1995).

[53] *See* ROBERT COLES, THE MORAL INTELLIGENCE OF CHILDREN 179–82 (1997) (referring specifically to the ineffectuality of classroom instruction in moral philosophy in improving moral behavior).

cate from the academic moralist — by what I call the "moral entrepreneur."

Moral entrepreneurs typically try to change the boundaries of altruism, whether by broadening them, as in the case of Jesus Christ and Jeremy Bentham, or by narrowing them, as in the case of Hitler. They don't do this with arguments, or at least good arguments. They mix appeals to self-interest with emotional appeals that bypass our rational calculating faculty and stir inarticulable feelings of oneness with or separateness from the people who are to constitute or to be ejected from the community that the moral entrepreneur is trying to create. They teach us to love or hate whom they love or hate. The techniques of arational persuasion, prominently including the example of their way of life, that moral entrepreneurs employ are not a part of the normal equipment of scholars.[54]

More precisely, I should say "of the vast majority of scholars"; for there are examples of moral entrepreneurship in the modern academy, even the modern legal academy, the outstanding example there being Catharine MacKinnon.[55] MacKinnon does not offer her influential version of radical feminism 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, and what passes for martyrdom in the academy today: her inability, until well into her career, indeed until long after she had become one of the most influential legal thinkers in the nation, to obtain tenure — a setback that was due to her defiance of the conventional norms of academic law. An example of failed moral entrepreneurship in the legal academy is Duncan Kennedy, a more proficient scholar than MacKinnon but a less impressive personality, and one handicapped in the moral entrepreneurship sweepstakes by his early receipt of tenure from the Harvard Law School. It gave him a status that makes his rebellious posturings faintly ridiculous; he is that oxymoron, the "tenured radical."

Religions know that to motivate people to act against or outside their normal conception of self-interest you have to employ sticks and carrots, rituals (to build a sense of community), habituation, and pageantry (or an ostentatious simplicity). The military knows, and early Christianity knew, that to motivate people to sacrifice, or even just risk, their lives you have to employ psychology to forge group loyalties, and you have to provide posthumous rewards, whether salvation or

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[54] Martha Nussbaum has acknowledged the tension between moral philosophers and moral entrepreneurs (whom she calls "prophets"). *See* Martha C. Nussbaum, *Rage and Reason*, NEW REPUBLIC, Aug. 11 & 18, 1997, at 36, 36. She notes that "Mill's *The Subjection of Women* didn't have much influence with its calm, rational arguments." *Id.* at 37. Yet Mill was a good deal less academic than modern academic philosophers are.

[55] *Cf.* Lawrence Lessig, Erie-*Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1805–06 (1997) (describing MacKinnon as an "entrepreneur[] of social change").

glory;[56] you won't get far enough by trying to persuade people that your cause is, upon reflection, morally best. The Christian martyrs and the Japanese *shimpu* (kamikaze) pilots are impressive examples of the ability to transcend a quotidian sense of self-interest, the kind of ability that moral philosophers want to develop in us, in at least a diluted form.[57] In neither case was the motivation a moral one, and it is possible to regard the martyrs as fools and the kamikazes as murderers. And this suggests that it's not even certain that we *want* people to be *really* "good." It might make them dangerously docile — one recalls Churchill's description of the German soldiery in World War II as "lethal sheep." A society that has lots of rather selfish, rather shallow, and even rather cowardly people may be best, though this may depend on whether a society's goal is glory or happiness. Which goal a society should have, the moral philosopher cannot say.

H. The Scholarship of Morality

1. Functional Analysis. — What scholars can do — but this owes nothing to moral theory — is to criticize moral codes by showing that they lack functionality, instrumental efficiency, or rationality. I gave some examples earlier; here are two more. A social scientist might point out that norms against polygamy and homosexuality are functional in societies that place a high value (for practical reasons, be it added) on companionate marriage, but are anachronisms when, as may be happening in the wealthy nations today, society moves away from companionate marriage. Or he might point out that while the kind of vengeance-promoting code of "honor" found in Homeric Greece and other primitive societies, and in the American South and West in the nineteenth century, is functional in societies in which the state is very weak, its survival in parts of the modern-day American South is dysfunctional, causing more violence than it deters.[58]

Benjamin Franklin said that honesty is the best policy; one way to interpret this precept is that for people who have a better prospect than to be members of the criminal class, a steady policy of honesty is

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[56] *See, e.g.*, RODNEY STARK, THE RISE OF CHRISTIANITY: A SOCIOLOGIST RECONSIDERS HISTORY 179–89 (1996).

[57] During World War II, and for years after, most Americans believed that the kamikaze pilots had been drunk, chained into their cockpits, or otherwise coerced or bamboozled into undertaking suicide attacks. We now know that the pilots were genuine volunteers and that most of them were motivated by what appear to have been the purest motives of altruism, honor, duty, and patriotism. *See, e.g.*, EDWIN P. HOYT, THE KAMIKAZES 19, 52–53 (1983); RIKIHEI INOGUCHI & TADASHI NAKAJIMA WITH ROGER PINEAU, THE DIVINE WIND: JAPAN'S KAMIKAZE FORCE IN WORLD WAR II 180–90 (Greenwood Press 1978) (1959); RICHARD O'NEILL, SUICIDE SQUADS: W.W. II 10–15, 134–97 (1981).

[58] *See* DAVID HACKETT FISCHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA 892 (1989); RICHARD E. NISBETT & DOV COHEN, CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH 88–91 (1996).

a more dependable formula for maximizing their self-interest than the cleverer-seeming policy of choosing between honesty and dishonesty on a case-by-case basis.[59] The requisites for survival in the conditions in which humankind evolved to its present state have made us innately skillful at reading people for signs of sincerity and insincerity. This skill suggests that the best way to show you are trustworthy is to be trustworthy, rather than to employ trustworthiness as an occasional tactic — as a mask that might slip at a critical time. Altruistic parents may wish to instill a norm, enforced by guilt or shame, in their children for the sake of the children's own advancement, rather than because the parents have been persuaded by moral philosophers that honesty is right. It is right for them and for their children, but on instrumental grounds. The benefits of habitual, hence sincere and unstrategic, compliance with the norm may exceed the costs of occasionally forgoing a dishonest but real advantage. And the costs of guilt will never be incurred if the norm is so well and deeply planted that it is never violated.[60]

It might be objected that functionality or survival is just another moral norm, so that in commending it as a guide to the study of morality I am doing what I accuse academic moralists of doing — defending a controversial moral stance. But this objection confuses instrumental reasoning with reasoning about ends, and value clarification with value argument. To advise a person (or, for that matter, an entire society) about the consequences of alternative paths to the goal that the person or society has chosen is not to commit oneself to a moral view. If a person wants not to live, but to die, the expert can advise him about the different methods of bringing about death — their cost, their legality, the pain associated with each, the length of time each requires, and so forth. If a society wants to die — if it has a Masada complex — the expert can likewise advise it on the means. In most societies, both elite and ordinary people[61] want to survive, and so the usual social functionalist analysis, the sort of thing that economists do all the time, is oriented in a more positive way. But the important point is that the expert, the scholar, does not choose the goal, but confines himself to studying the paths to the goal, thus avoiding moral issues.

This discussion may clarify my position on the normativity of economics. Economists ranging from Adam Smith, Jeremy Bentham, and

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[59] Even criminals, especially when they operate in gangs, might, as I suggested earlier, be better off if they behaved honestly toward their associates in crime.

[60] *See generally* Richard A. Posner & Eric Rasmusen, Creating and Enforcing Norms, with Special Reference to Sanctions (Oct. 1997) (unpublished manuscript, on file at the Harvard Law School Library) (discussing the creation and enforcement of norms).

[61] I include the "elite" to avoid taking a position on how one determines what a society, as opposed to an individual, wants.

Alfred Marshall to Oscar Lange and Abba Lerner and thence to Friedrich Hayek, Milton Friedman, and David Friedman have sometimes tried to make economics a source of moral guidance by proposing, often under the influence of utilitarianism, that the goal of a society should be to maximize average or total utility, or wealth, or equality as a means toward maximizing utility, or freedom, or some combination of these goods. These are doomed efforts.[62] What the economist can say, which is a lot but not everything, is that if a society values prosperity (or freedom or equality), these are the various policies that will conduce to that goal, and these are the costs associated with each. The economist cannot take the final step and say that a society's ultimate goal should be growth, equality, happiness, survival, conquest, stasis, social justice, or what have you. An economist discussing a "hot" topic, such as whether human cloning should be permitted, might estimate the private benefits and social costs of human cloning, and even advise on the consequences of ignoring costs and benefits in fashioning public policy. But he could not tell the policymaker how much weight to give costs and benefits as a matter of social justice.

2. High Moral Theory. — The scholars who make the sort of points that I made in the preceding section about honesty and vengeance and family structure are not moral philosophers. Issues of social functionality, into which many moral issues dissolve when studied carefully,[63] are not philosophical issues. This is not merely a matter of definition. People who major in philosophy in college, or who get advanced degrees in philosophy, do not obtain, in their philosophy studies anyway, the intellectual tools required for the analysis of social and policy issues. They do not learn law or medicine, psychology or economics, business or public policy, statistics, biology, political science, sociology, anthropology, social work, or history. And right away they find themselves back in school, using their school training to teach and write. People who specialize in moral philosophy as students and later as professors spend their working time reading and discussing and annotating and elucidating the great texts of the philosophical tradition, from Plato to Rawls, and mastering the analytic techniques that the authors of these texts used to deal with the issues that interested them. The texts were written in widely different societies over a period of almost two and a half millennia. When viewed together as constituting a canon or tradition of insight and analysis, they lose all reference

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[62] I speak from experience. See Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979), powerfully criticized in RONALD DWORKIN, *Is Wealth a Value?*, *in* A MATTER OF PRINCIPLE 237 (1985).

[63] *See generally* BERNARD WILLIAMS, *Nietzsche's Minimalist Moral Psychology*, *in* MAKING SENSE OF HUMANITY, *supra* note 43, at 65, 68–69 (identifying excess moral content in psychology and urging a more "realistic" moral psychology).

to the particulars of the society in which each was written. Moral philosophers don't read them as would historians or anthropologists, seeking to identify dysfunctional rules of conduct in the societies in which the texts were written. They read them as having something to say about our own, very different society. To be read so, they have to be read as uttering general truths. "The philosopher's self-indulgence is over-generalization."[64]

Such overgeneralization is inevitable; for the canonical philosophers are difficult to understand. Many wrote obscurely, or in foreign languages, some of them "dead" languages that cannot be fully understood even by scholars. They wrote in social contexts vastly different from modern-day America, and because meaning is contextual, the interpretation of their writings may require immersion in history, as well as linguistic mastery. The mastery of the classic texts of moral philosophy, and of the methods of analysis employed in them, is the work of a lifetime. Little time is left for investigating the particulars of any concrete moral issue, which requires relating it to the social conditions that either make it an issue or remove it from the agenda of contestable moral issues. Many moral philosophers hope to extract from the canonical texts some overarching concept, such as duty or human flourishing, and use that to deduce the answers to contemporary moral questions. ("What Plato would allow."[65]) So they are apt to say such things as, "[T]he first step towards a substantive account of justice must be to establish some inclusive principles of justice."[66] Other moral philosophers, those who think like canon lawyers or common law lawyers, hope to use the method of casuistry or analogy to move from our settled moral intuitions to cases in which our intuitions give out.

The hope of the textmongers, whether they are moral universalists or moral particularists (that is, whether they think that little or that much local context must be added to the general principles from which they start), is the more forlorn. To those not overly impressed by the prestige of the classics, the idea that Plato, Aristotle, Kant, Hegel, or even Mill holds the key to solving any modern social problem is as implausible as thinking that the Bible does. Religious, philosophical, and literary texts have value as consolation and inspiration, as stimuli to reflection, and as sources of wonder and pleasure. And the modern academic philosopher, more properly the historian or philologist of

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64 GRIFFIN, *supra* note 43, at 104.

65 This is the title of Jeremy Waldron's paper in THEORY AND PRACTICE: NOMOS XXXVII 138 (Ian Shapiro & Judith Wagner DeCew eds., 1995) [hereinafter THEORY AND PRACTICE]. For criticism of Waldron's implied answer ("Nothing"), see Martha C. Nussbaum, *"Lawyer for Humanity": Theory and Practice in Ancient Political Thought*, *in* THEORY AND PRACTICE, *supra*, at 181.

66 ONORA O'NEILL, TOWARDS JUSTICE AND VIRTUE: A CONSTRUCTIVE ACCOUNT OF PRACTICAL REASONING 157 (1996).

philosophy, has therefore a useful role to play in explaining what the classic philosophers were trying to say, a role akin to translation and to literary and artistic criticism and scholarship. The philosophical classics, and commentary that makes them intelligible to a modern reader, thus are valuable. But they do not contain answers to, or methods for answering, contemporary moral questions.

They fail to do this not only because they were, all but the most recent, created in different cultures from ours. Both the technique of reasoning from classic texts and that of analogizing from specific cases, examples, or intuitions founder on the recalcitrance of moral intuitions — their imperviousness to argument — or, stated differently, on the *emotionality* of moral issues. A deductive moral theory might begin plausibly enough with the claim that human beings owe special duties to each other by virtue of the power of reason, which most human beings, but not animals, possess. Yet it would be monstrous in our culture to deduce that the severely retarded are entitled to no more consideration than are animals or even that they are entitled to less consideration than are the smartest animals, which are smarter than the dumbest people; just to refer to people as "dumb" grates on our sensibilities. We have, most of us, a passionate loyalty to our own species, which moral philosophy can neither accommodate nor dislodge. Collisions between principles and intuitions can be avoided by keeping the principles vague, as when Onora O'Neill says that the objective of justice "is to establish institutions and practices which (as far as possible) prevent and limit systematic or gratuitous injury."[67] But the price is banality.

Not everyone has a strong intuition about every issue of morality, and those who do not may seem fair game for the academic moralist. To evaluate this suggestion requires distinguishing among three types of people. The first is someone who is not interested in a particular moral issue. That is the situation of many people with regard to the issue of abortion; they do not think of it as touching their own lives. They might therefore be swayed by the academic moralist — except that they have no incentive to attend to what he has to say about the issue. The second type of person has a certain moral queasiness about something he does. Maybe he eats meat, and he knows that there is a philosophical argument for vegetarianism. This type of person is likely to avoid investigating the moral issue further; he steers clear of academic moralism. The third type of person considers some moral issue to be very important but cannot make up his mind how to resolve it, because he has conflicting intuitions; maybe he feels strongly both that fetuses are human beings and that a law criminalizing abortion subjects women to a kind of slavery. This person faces a moral

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[67] *Id.* at 173.

dilemma, and moral theory no more has the ability to resolve moral dilemmas than mathematics has to square the circle. "Moral dilemma" is the term we use to describe a moral issue that moral theory *cannot* resolve.[68] When was the last time a moral dilemma was resolved? Moral theory is like a system of mathematics that has never gotten beyond addition.

3. Reflective Equilibrium. — The method of "reflective equilibrium" tries to weave our embedded principles and intuitions into some sort of coherent structure. When modestly applied in specialized fields of applied moral theory, such as bioethics, the method can produce a commonsensical type of policy analysis illustrated by James Childress's recent book on bioethics.[69] His approach has been criticized as insufficiently theoretical.[70] That is its strength. Philosophically ambitious reflections on bioethical issues produce such unappetizing novelties as a "view of personhood [that] implies that infanticide need not wrong a newborn infant and that infants lack any serious moral right not to be killed."[71]

No one is going to surrender his moral intuitions to moral theory; nor should he. You may feel, contra Rawls, that your natural endowments — your intelligence and appearance and so forth — are, despite their fortuitous character, proper sources of moral entitlements, in the same way that the infliction of a fortuitous, even an unavoidable, injury may be a proper source of moral condemnation. In other words, since we're blamed for the bad things that we do for reasons beyond our control, maybe we should be rewarded for the good things that we do for reasons beyond our control. If you feel this way, reading Rawls will not change you. And it should not. Rawls does not present an argument; he presents a form of life, and one that you may not like:

> Rawlsian man in the original position is finally a strikingly lugubrious creature: unwilling to enter a situation that promises success because it also promises failure, unwilling to risk winning because he feels doomed to losing, ready for the worst because he cannot imagine the best, content with security and the knowledge he will be no worse off than anyone else because he dares not risk freedom and the possibility that he will be better off . . . .[72]

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[68] It is not much consolation to be told that the existence of a moral dilemma presupposes moral values. *See* BAMBROUGH, *supra* note 18, at 95–96. Otherwise there would not be a dilemma, at least not a moral one. I am not denying the existence of moral values, but only the cogency of moral theory.

[69] JAMES F. CHILDRESS, PRACTICAL REASONING IN BIOETHICS (1997).

[70] *See id.* at 32.

[71] DAN W. BROCK, LIFE AND DEATH: PHILOSOPHICAL ESSAYS IN BIOMEDICAL ETHICS 385 n.14 (1993).

[72] Benjamin R. Barber, *Justifying Justice: Problems of Psychology, Politics and Measurement in Rawls*, *in* READING RAWLS: CRITICAL STUDIES ON RAWLS' *A THEORY OF JUSTICE* 292, 299 (Norman Daniels ed., Stanford Univ. Press 1989) (1975).

If you don't like this "strikingly lugubrious creature," or if you don't feel that your genes are something you rented from a common pool, you're not going to be persuaded otherwise by Rawls.

Because the academic mind prizes consistency, academic moralists believe that showing that a person's moral beliefs or behaviors are inconsistent can be a powerful agent for moral change. They believe that if you point out to a meat-eater that he considers suffering a bad thing and slaughtered animals suffer, you may persuade him to become a vegetarian. But behavioral consistency is a much weaker ordering principle than is logical consistency. It is far more difficult to defend asserting both a proposition and its negation than to tell a story that will unify "inconsistent" behavior or reconcile one's behavior with an inconsistent belief about how one should behave. This kind of story-telling is called rationalization, and because "rationalization" is a pejorative, people who engage in it do not describe what they are doing as rationalization and so cannot be caught up short by being told, "That's just a rationalization." The meat-eater might distinguish between human and animal suffering; might deny that slaughtered animals need to suffer (they can be killed without pain, and since they do not know what is going to be done to them, they do not suffer psychologically in anticipation); might point out that his own consumption of meat is too trivial to affect the number of animals killed; might even argue that to put animals on a par, as it were, with human beings could make us less sensitive to *human* suffering (could, for example, put the annual slaughter of tens of millions of turkeys for Thanksgiving on a level with the Holocaust); might point out that Genesis explicitly invites us to eat meat; or might equivocate, by confining his meat eating to the meat of animals raised and killed humanely, or to road-kill, or by adopting the position that the moral philosopher R.M. Hare calls "demi-vegetarianism."[73] If you want to turn a meat-eater, especially a nonacademic meat-eater, into a vegetarian, you must get him to love the animals that we raise for food, and you cannot argue a person into love. If you want to make a person disapprove of torturing babies, show him a picture of a baby being tortured; don't read him an essay on moral theory. An academic moral argument is unlikely to stir the conscience, incite a sense of indignation, or engender feelings of love or guilt. But if it does, one has only to attend to the opposing moral arguments — and every contested moral issue evokes opposing moral arguments, in just the same way that every lawsuit involving a scientific issue evokes opposing expert witnesses — to be returned to one's starting point.

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[73] *See* R.M. HARE, ESSAYS ON BIOETHICS 220 (1993) (stating that demi-vegetarians are those whose diet contains some, but very little, meat).

And not everyone is committed — indeed, I would guess that even among intellectuals few are committed — to behavioral consistency. The skilled and conscientious geriatric physician, who treats his aged patients with the utmost care and solicitude, may be a child molester, and if confronted with the tension between his professional and his personal behavior might reply that he can't help being a child molester, or that while he feels guilty about molesting children he is solaced by the good he does in his professional life, or that the molestation reflects unbearable tensions created by the devotion and scruples of his professional life. People are rational in the sense of fitting means to ends more or less intelligently given the information they have, but the ends don't have to fit together; indeed, if they did, people would be dull (this is one reason that so much academic moralism is dull). One of the questionable assumptions in *A Theory of Justice* is that a rational person is a single self, with consistent preferences, over his adult lifetime. There is nothing irrational about having a sequence of selves (young, middle-aged, old, healthy, sick, and so on) with different preferences, or about playing a variety of roles at the same time (mother, investment banker, pill-popper, adulteress) that are not well integrated, at least in the sense of "integration" that appeals to academic moralists.[74]

4. Moral Casuistry. — The analogical or casuistic approach is no more trenchant than is the deductive. Analogies stimulate inquiry; they do not justify conclusions. Consider Judith Jarvis Thomson's comparison of a woman forced to carry her fetus to term with a person forced to spend nine months in bed connected by tubes to a stranger (a famous violinist) in order to prevent his dying from kidney disease.[75] Thomson offers the comparison to show that abortion should not be forbidden, at least on the ground that it is always wrong to take innocent life. It is intuitively obvious that the stranger has no right to force a person to spend nine months connected to him by tubes, even though the stranger's life is at stake; no more should a pregnant woman be forced to spend nine months connected to her fetus, even though the fetus's life is at stake.

It is difficult to take this reasoning seriously. To begin with, we can have no settled or reliable intuitions regarding the stranger case, because the case is outside our empirical experience; it belongs to science-fiction. So the analogy fails at the start. Second, a woman is not immobilized by being pregnant. Third, the fetus is not a "stranger" to its mother in the ordinary sense of the word, which is the sense it bears in the analogy. And fourth, the abortion doctor doesn't merely "pull the plug" on the fetus; he chops it up or sucks it out of its mother's

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[74] *See* Richard A. Posner, *Are We One Self or Multiple Selves? Implications for Law and Public Policy*, 3 LEGAL THEORY 23, 23–24 (1997).

[75] *See* Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48–49 (1971).

womb. Because opponents of abortion consider the fetus a full-fledged human being (and Thomson grants their premise for the sake of argument), they consider the abortion doctor and the woman who hires him to be murderers, and this is perfectly consistent with not deeming the failure to rescue a true stranger a crime at all, even if such failure could be thought a "taking" of innocent life.

You couldn't argue the opponents of abortion out of their position even with a good analogy, because for most of them their position is founded on religious conviction, and one of the strongest norms of debate in our society is that you don't question another person's religious convictions. You couldn't argue the opponents of abortion out of their position even if it were founded on simple altruism — on liking to think of fetuses as babies. The more that fetuses are seen as babies (with the help of ultrasound[76]), the greater will be the opposition to abortion, holding religious conviction constant. Indeed, it seems that because of ultrasound, which enables one to see even a very early fetus as a kind of human baby, more and more people are becoming troubled by abortion, whether or not they think it should be prohibited — a separate question. I dislike abortion more since my grandchildren were born; this change in "moral" feeling has nothing to do with argument. Liberal philosophers begin with the pro-choice position and then dress it up as a philosophical argument. Conservative philosophers begin with the opposite position and try to dress it up as a philosophical argument. In either case it is only window dressing.[77]

Familiarity can alter moral opinion, as I have just suggested; one ultrasound, or one grandchild, may be worth a thousand syllogisms and analogies. And likewise unfamiliarity. As Hamlet put it, "The

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[76] *See* CYNTHIA R. DANIELS, AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS 16–17, 19–23 (1993); John C. Fletcher & Mark I. Evans, *Maternal Bonding in Early Fetal Ultrasound Examinations*, 308 NEW ENG. J. MED. 392 (1983). The other side of this particular coin is Robin West's report that she became "fervently prochoice" as a result of seeing a photograph of a woman who had died during an illegal abortion. Robin L. West, *The Constitution of Reasons*, 92 MICH. L. REV. 1409, 1435 (1994). West noted, very much in the spirit of these Lectures, "that moral convictions are changed experientially or empathically, not through argument." *Id.* at 1436.

[77] The problem of what (if anything) government should do about abortion crosses the wavering line that separates moral from political philosophy. When Rawls descends from the abstractions of political philosophy to concrete issues of law and public policy, he becomes a superficial dispenser of the "liberal" dogmas concerning abortion, campaign financing, income distribution, socialized medicine, and the rights of women in a divorce. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 243 n.32, 407 (1996); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 772–73, 793 (1997). For criticisms of the "practical work" of Rawls, Putnam, Kamm, Habermas, and others, see RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 334–52 (1990); POSNER, cited above in note 52, at 171–97, 444–67; POSNER, cited above in note 19, at 220–40; and Posner, cited above in note 23, at 29–30. These earlier writings of mine (especially the first three) sketch the critique of moral philosophy that the present Lectures develop more fully.

hand of little employment hath the daintier sense."[78] Squeamishness is an important factor in morality. In very poor societies, most people have seen human corpses and have participated in killing, at least of animals. They are inured to blood and gore, and so they do not recoil from sports that involve the torture of animals. If it is a social project to make people peaceable, tame — the sort of project Nietzsche so hated — one way to advance the project is to shield people from the sight of blood and death. (So despite our devotion to the free market, we prohibit contracts to engage in gladiatorial combat to the death.) But whether it is the right project for a society depends on the material circumstances of that society. Squeamishness could spell extinction for societies in which the absence of professional police and of a professional military places the burden of internal security and external defense on a large fraction of the adult male population. We congratulate ourselves on being morally more refined than our predecessors; actually we just have a different technology of security and defense, enabling us to kill from afar.

Amy Gutmann and Dennis Thompson, in an ambitious effort to make moral reasoning the core of democracy, take for granted that Judith Thomson's abortion analogy "should convince even people who perceive the fetus to be a full-fledged person that to permit abortion is not obviously wrong in the case of a woman who becomes pregnant through no fault of her own (for example, by rape)."[79] The word "obviously" signifies an equivocation characteristic of Gutmann and Thompson's book, a tacit admission that moral reasoning can at best refute only the most extreme moral contentions. It is like saying that legal reasoning can at best decide only the easiest cases — an assertion that will not satisfy people who consider it a powerful instrument for resolving legal disputes. But Thomson's analogy does not carry even the little weight that Gutmann and Thompson think it does; this error is part of Gutmann and Thompson's larger error of believing that moral reasoning can refute even extreme positions, short of complete lunacy.[80] Thomson's analogy conceals the difference I noted earlier between "pulling the plug" and "chopping up." Suppose that the only way to release the involuntary rescuer from the stranger would be to put the latter through a meat grinder. I doubt that Thomson would consider this a proper response to the rescuer's desire to be free, let

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[78] WILLIAM SHAKESPEARE, HAMLET, act 5, sc. 1, ll. 66–67, at 113 (Susanne L. Wofford ed., St. Martin's Press 1994).

[79] AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 85 (1996). The qualification "through no fault of her own" is not a part of Thomson's own analysis. *See* Thomson, *supra* note 75, at 49.

[80] I elide the profound difficulties involved in trying to infer lunacy from the holding of weird opinions.

alone an entitlement, even if it is wrong to force a person to be a rescuer in the first place.[81]

What is so revealing about the treatment that Gutmann and Thompson accord Thomson's analogy is that they appear not to *see* the distinction that I have just pointed out between pulling the plug and chopping up. The reason they do not see this — for it is hardly a subtle distinction — is, I suspect, that they cannot really conceive of wanting to prohibit a woman who has been raped from having an abortion. In their social set, a set consisting of secular liberal academics for whom feminism is an orthodoxy and the right to abortion the very symbol of feminism, such a desire is too outré to register as a possibility. Yet an appreciable number of other people, not certifiably insane, feel differently, and moral philosophy has no resources for resolving the disagreement.

One can imagine the counterparts of Rawls, Gutmann, and Thompson sitting around in third-century A.D. Rome chewing over the moral issues presented by gladiatorial combat, concubinage, and infanticide, all settled practices of the time but ones that Christianity opposed. My guess is that these philosophers, being comfortable members of the establishment (whatever corresponded in imperial Rome to being a tenured professor at Harvard or Princeton), would have wanted to show, and would have had no difficulty in showing, that the ethical assertions of this upstart religion should receive no consideration, being based on the metaphysical claims of a foreign religion. Philosophers are never so parochial as when they are placing beyond the pale of the "reasonable" the moral claims of people who do not belong to their social set.

Moral philosophy is not unique in running aground on strong moral intuitions or emotional commitments. If scientists ever prove that there are racial differences in the heritable component of intelligence, there will be outrage, just as the theory of evolution continues to provoke outrage in some quarters. The difference between scientific and moral theory is that the former can overcome opposing intuitions, in most societies anyway, because most people accept the authority of science; societies that do not accept that authority weaken and die. Most societies accept the authority of science precisely because it is such a successful practice, compared, say, to magic, from the standpoint of societal survival and flourishing. It is successful because it employs techniques of proof that are powerful enough to convince most skeptics. Nazi hostility to "Jewish" physics and Soviet belief during the period of Lysenko's ascendancy in the inheritance of acquired characteristics illustrate the folly of pitting ideology against science.

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[81] Actually, it is unclear from her article how she would treat this case. *See* Thomson, *supra* note 75, at 66.

Science has the power to convince skeptics because it ordinarily deals with what can be perceived, though often only with the aid of instruments. It is true that most of these instruments cannot actually be used by a layperson to verify an observation made with their aid. We trust the scientific community not to jigger the instruments. But we have reasons for this trust, the main one being the track record of science in delivering on its promises. The scientists said that an atomic bomb could be built; it was built; it exploded. Given the success of science in predicting and altering important features of the physical world, we believe that scientific instruments augment and correct rather than deform our perceptions. And we have confidence in perceptions, because they are public. Our intuitions, however, are private.[82] When we perceive, we are seeing (hearing, feeling, and so forth) something outside us, and to the extent that we have similar perceptual apparatus, whether natural or artificial, our perceptions will agree when we are sensing the same thing. Moral intuitions don't link up with anything outside of, or common to, all of us. If your intuition about a moral question differs from mine, you cannot tell me to look harder, or to look through a microscope or a telescope, or to consult a reputable scientist, or reputable anyone. You cannot show me that my intuition is an illusion, like the apparent movement of the sun or the bent appearance of a stick in the water. There are also no "crucial experiments," and no statistical regularities, by which to validate a moral argument. And there are no useful "inventions" embodying moral theory, which is another way of saying that there has been no moral counterpart to material progress. Yes, we've abolished slavery, but we no longer have an economy in which slavery would be productive; the world is just emerging from an era in which more than a billion people lived in something rather akin to slavery, unremarked by a large number of moral philosophers; we live in a period of criminality unprecedented in the modern era and, some would say, a period of unprecedented selfishness as well; and the academic moralists who denounce their predecessors for indifference to the fate of the Jews in Nazi Germany or the blacks in South Africa during apartheid have been for the most part indifferent to the genocides in Bosnia and Africa.

It might seem that the existence of inconsistent intuitions would make all of us more tentative about our own intuitions, and therefore more ready to listen to the philosopher who wants us to change. But that isn't how it works. Intuitions are strongly felt even by people who know both that they are impossible to verify and that many other people have opposite intuitions. That is one reason why, contrary to the fears of academic moralists, believing in moral relativism doesn't

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82 This contrast is stressed in GRIFFIN, cited above in note 43, at 14.

affect a person's moral attitudes or behavior.[83] What is strongly felt will yield to proof, but not to an opposing intuition.

Against the arguments for distinguishing scientific from moral theory it can be urged that scientific belief is diverse and that bringing all doubters into line is impossible. This is the sort of thing one hears from scientific relativists, and it is paradoxical to find moral realists using the arguments of relativists to bolster moral realism. Still, it is striking how many people in this land and era of science and technology believe in astrology, UFOs, reincarnation, fortune-telling, diabolism, faith-healing, and other scientifically specious theories, phenomena, and practices; the best example may be the tenacious rejection by a substantial minority of Americans of the theory of evolution. But what is notable about these antiscientific beliefs is that they either concern matters as to which nothing, or very little, of a practical nature turns on one's beliefs (the theory of evolution is an example) or are not held tenaciously enough to affect behavior. Virtually no one rejects scientific theory in those areas in which science impinges on everyday life. We fly in airplanes, consult doctors, vote for legislators who want to control acid rain or global warming, take vitamins, follow the weather report, use computers, talk over the telephone, undergo *in vitro* fertilization, and (tens of millions of us) give up cigarette smoking, in all these ways demonstrating a deep faith in scientific theory. There is no corresponding faith in moral theory. We don't say things like, Kantians taught us how to be *X* (the moral equivalent of being able to fly or generate heat from nuclear fuel cells or cure syphilis), so we'll accept their current teaching that *Y* (for example, that animals shouldn't be eaten).

It is because moral philosophy, even in the hands of its most skillful practitioners, lacks techniques that can override either our moral intuitions or our self-interest that there are so many unsolved *old* moral dilemmas.[84] The efforts to resolve them go in circles. The reason should be plain by now. Moral dilemmas involve disputes about ends; fruitful deliberation, the sort of reasoning that moves the ball down the field, is deliberation over means. When Dworkin says that he thinks it clear that Picasso is a greater painter than Balthus,[85] he implicitly appeals to an agreed sense of what "greatness" in painting

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[83] As Holmes put it:

> The world has produced the rattlesnake as well as me; but I kill it if I get a chance, as also mosquitos [sic], cockroaches, murderers, and flies. My only judgment is that they are incongruous with the world I want; the kind of world we all try to make according to our power.

Letter from Oliver Wendell Holmes to Lewis Einstein (May 21, 1914), *in* THE ESSENTIAL HOLMES 114, 114 (Richard A. Posner ed., 1992).

[84] *See generally* MORAL DILEMMAS AND MORAL THEORY *passim* (H.E. Mason ed., 1996) (discussing the philosophical debate over the intractability of moral dilemmas).

[85] *See* Dworkin, *Objectivity and Truth*, *supra* note 6, at 133.

means. If agreement lapses, his argument collapses. His example has force because artistic "greatness" has factual rather than purely aesthetic connotations; it includes criteria of scope, influence, and quantity of output. On those dimensions, Picasso does clearly outclass Balthus. If we asked instead who is the better painter, I would vote for Balthus and would be happy to argue my preference to Dworkin in an effort to improve his "eye" for art. But if I could not persuade him I would not conclude that he was "mistaken" to persist in preferring Picasso.

I. The Perils of Uniformity

Each moral theorist believes implicitly that his is the right approach and everyone should follow it. Everyone should agree with him that abortion is wrong or that capital punishment is wrong; should be pacifist or belligerent, hedonistic or ascetic; should defend or attack pornography. But given the variety of necessary roles in a complex society, it is not a safe idea to have a morally uniform population. On the one hand, we need soldiers, police, jailers, judges, spies, and other operators of society's security apparatus; we also need politicians, entrepreneurs, managers of huge enterprises, and administrators of lunatic asylums. On the other hand, we need mothers, nurses, forest rangers, kindergarten teachers, zoo keepers, and ministers of religion. We need gentle, kind, and sensitive people, but we also need people who are willing to employ force, to lie, to posture, to break rules, to enforce rules, to fire people, to rank people. We need people who are empathetic and sympathetic, but also people who are brave, tough, callous, and obedient — and others who are brave, tough, callous, and defiant. One can imagine everyone being brought up to be such a finely calibrated moral being that he could adjust his suite of moral feelings to meet the exigencies of every social role, or so perfectly socialized that there would be no need for discipline or defense. But that would not be a realistic expectation. Failing it, we may be better off with moral variety, and this places the entire project of moral education in question.

I have noticed in discussions of judicial behavior, too, the implicit assumption that every judge should be the same kind of judge — empathetic or legalistic, activist or restrained, liberal or conservative, depending on the taste of the analyst — when what we really need is (within limits) a variety of types of judge, if we are to have any confidence in the robustness of judge-made law.[86] Something in the nature of the academic enterprise causes the values of variety and heterogeneity too often to be overlooked. The oversight is particularly serious in the domain of morality. A uniform judiciary would not be a na-

[86] *Cf.* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 77, at 449.

tional disaster; moral uniformity might well be. A society of goody-goodies, the sort of society implicitly envisioned by academic moralists, would not only be boring; it would lack resilience, adaptability, and innovation. A society of Jewish or Islamic fundamentalists, Nietzschean *Übermenschen*, or Japanese samurai would not be dull, but it would be brittle, frightening, and perilous.

J. Professionalism's Cold Grip and the Impotence of Education

Modern moral philosophers are not in the motivating business. They are in the nonmotivating business of academic writing and university teaching. There is no good evidence that moral philosophers or their students behave more morally than other members of the educated class, scientists for example or even lawyers and economists. It can be argued that we should not expect moral philosophers to be moral, that it is only people troubled by the discrepancy between the moral code and their own behavior who would be attracted to a career in moral philosophy. I shouldn't think this would apply to undergraduates enrolled in courses on moral philosophy. I would like evidence that it is a genuinely edifying experience for at least some of them.

There is contrary evidence. I begin with the Oliners' statistical study of German and Polish rescuers of the Jews from the Holocaust.[87] I have culled from their study all the explanatory variables that they found to be statistically significant, indicating in the table in the appendix whether the variable was positively or negatively correlated with the propensity to rescue. The table has something for everyone. This includes the moralist, because the "ethical" variables are positively related to the propensity to rescue, unless (but it's a big unless, indicative of the amorality of the moral sentiments) "obedience" is given a high value as a moral principle. But education does not appear in the table. This is not because there are no educational variables in the Oliners' study — there are several — but because none has a statistically significant correlation with the propensity to rescue, except that being a student is negatively related to that propensity. The religious variables in the table are significant but difficult to interpret, since both "being very religious today" and "being irreligious today" are positively correlated with the propensity to rescue, but being in between is negatively correlated, while religiosity during the war shows no correlation. So education and religion, conventional sources of moral values, have no demonstrable effect. But being a caring person, or having had Jewish friends (but not Jewish coworkers!), or living in the country (where the sense of community is greater than it is

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[87] SAMUEL P. OLINER & PEARL M. OLINER, THE ALTRUISTIC PERSONALITY: RESCUERS OF JEWS IN NAZI EUROPE 261–356 (1988).

in a city, and probably the Nazi presence was less pervasive), or being hostile to Nazism or authoritarian politics, or having had a good relationship with one's parents, or having a cellar (which would reduce the riskiness of being a rescuer), or having links to the Resistance but not being active oneself in the Resistance (which would increase the risk of detection) predisposed people to rescue Jews. All this is pretty much as one would expect. But it does suggest — along with the behavior of German moral philosophers during the Nazi period[88] — that moral philosophy has little to do with moral behavior.

Reinterpreting the data compiled by the Oliners and other students of rescuers of the Jews, Michael Gross concludes that morally reflective people were *less* likely to be rescuers than morally unreflective people.[89] Effective rescue of Jews required collective rather than merely individual action, and the "morally competent" tend to display "political incompetence."[90] Gross explains that political competence requires parochial motivations such as material self-interest, civic and patriotic norms often unrelated to the fate of the Jews, and small-group solidarity — motivations that are actually undermined by universalistic moral reflection.[91]

Less dramatic evidence of the futility (for Gross, the perversity) of moral theory, but evidence that may resonate more deeply with readers of this journal, is the transformation of law students over the course of their legal education. They come to law school, many of them, full of idealism and determined to resist the lures of large-firm practice. They receive an idealistic education from law professors, most of whom believe that law and morals interpenetrate. They depart, almost all of them,[92] for large firms at the end of their third year, chastened by the realization that their ideals, far from having been strengthened by the idealistic teaching of their professors, have been shattered by material constraints and inducements trivial in comparison to those that any moral hero ever faced.

I acknowledge a literature in psychology that finds gains in "moral judgment" from college education, including college courses that have

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[88] *See* 5 GEORGE LEAMAN, HEIDEGGER IM KONTEXT: GESAMTÜBERBLICK ZUM NS-ENGAGEMENT DER UNIVERSITÄTSPHILOSOPHEN [HEIDEGGER IN CONTEXT: OVERVIEW OF THE NAZI INVOLVEMENT OF UNIVERSITY PROFESSORS] 25–27, 109–33 (1993). Professors were notable by their absence from the cells of resistance to Hitler that developed during his rule. *See* ALICE GALLIN, MIDWIVES TO NAZISM: UNIVERSITY PROFESSORS IN WEIMAR GERMANY 1925–1933, at 4–5, 100–05 (1986).

[89] *See* MICHAEL L. GROSS, ETHICS AND ACTIVISM: THE THEORY AND PRACTICE OF POLITICAL MORALITY 150 (1997).

[90] *Id.*

[91] *See id.* at 149–50.

[92] Some, however, find employment in the public-interest sector, at considerably lower wages than in private firms — an indication of altruistic motivation. *See* Robert H. Frank, *What Price the Moral High Ground?*, 63 S. ECON. J. 1, 10–12 (1996).

a significant component of moral education.[93] The authors acknowledge, however, that the link between moral judgment and moral behavior is weak, because of insensitivity, weakness of will, and lack of motivation.[94] And Gross's more recent study notes empirical data that "there are relatively few principled moral thinkers in any given population, and efforts to cultivate extensive moral development have proved disappointing."[95]

Academic moralists are apt to reply not that instruction in moral philosophy (or cognate legal theory) has a *direct* effect on moral behavior or even moral beliefs, but that it increases the students' moral sensitivity and thus enables them to think through any moral dilemmas they encounter after graduation. The implication, however, must be that the graduates will behave more morally as a result of having been sensitized to, and made more skillful in resolving, moral issues. Otherwise, either the instruction has failed even to get them to think more, or more clearly, about moral issues, or (the problem of motivation) knowing what's right has had no effect on their propensity to do what's right.

If anything, instruction in moral philosophy seems likely to engender moral skepticism, by exposing students to the variety of moral philosophies (some monstrous by contemporary standards) and to the methods of analysis by which to criticize, undermine, modify, and upend any given moral philosophy. More important — for as I said earlier, I don't think that being a moral skeptic is likely to affect one's behavior — instruction in moral philosophy equips the student both to craft a personal moral philosophy that places the fewest restrictions on his own preferred behavior and to rationalize his violation of "conventional" moral duties. This is true in spades for his professor. Moral philosophers pick from an à la carte menu the moral principles that coincide with the preferences of their social set, and they have both the intellectual agility to weave an inconsistent heap of policies into a superficially coherent unity and the psychological agility to honor their chosen principles only to the extent compatible with their personal happiness and professional advancement.

If some moral principle that you read about in a book and that may have appealed to your cognitive faculty collides with your preferred, your self-advantaging, way of life, you have only to adopt an alternative morality, or, if you're bold enough, an antimorality like that

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[93] *See, e.g.*, James Rest & Darcia Narváez, *The College Experience and Moral Development*, *in* 2 HANDBOOK OF MORAL BEHAVIOR AND DEVELOPMENT 229, 243 (William M. Kurtines & Jacob L. Gewirtz eds., 1991).

[94] *See id.* at 243–44; *see also* Stephen Thoma, *Moral Judgments and Moral Action*, *in* MORAL DEVELOPMENT IN THE PROFESSIONS: PSYCHOLOGY AND APPLIED ETHICS 199, 201 (James R. Rest & Darcia Narváez eds., 1994) (noting research that found only a weak relationship between moral judgment and moral action).

[95] GROSS, *supra* note 89, at 85.

of Nietzsche (who famously attributed the morality of "good" people to their will to power), that does not contain that principle. Then you will be free from any burden of guilt. Do you find Kantian strictures against lying irksome? Then read Nyberg;[96] better yet, identify with one of the great liars of history, Odysseus for example. The better read you are in philosophy or literature, and the more imaginative and analytically supple you are, the easier you will find it to reweave your tapestry of moral beliefs so that your principles allow you to do what your id tells you to do.

My point is not that it's costless to change one's moral stripes, but only that the cost is less for a highly educated person. Ignorance is the ally of morality, as the medieval Roman Catholic Church recognized when it instructed priests not to ask parishioners in the confessional about specific sexually deviant practices, lest they give them ideas. Moral education equips the student to argue against moral preceptors. So even if instruction in moral reasoning improves people's moral beliefs (which I greatly doubt), the effect may be completely offset by the reduction in the likelihood that people would conform their behavior to moral precepts. To be confident that moral instruction would not have this effect, you would have to agree with Socrates that people are naturally good and do bad things only out of ignorance.[97]

Higher education, moreover, encourages feelings of superiority to ordinary people. The moral philosopher may come to feel that the moral code of his society should not bind him; that instead the society should adopt, or at least condone, his personal moral code, a code apt to reflect his personality and social milieu rather than some "objective" order of goodness (for there is none). The personal codes of academic philosophers tend to be hackneyed and predictable. The liberals favor abortion and women's rights and greater equality and a mild socialism. They disapproved of Soviet-style communism, but very quietly, with maybe a soft spot for East Germany or Yugoslavia. They are internationalists, multiculturalists, environmentalists, and sometimes vegetarians. They are against capital punishment, and so it might be said of them unkindly and perhaps unfairly that they pity murderers more than fetuses. They are for the theory of evolution when the question is whether creationism should be taught but against the theory of evolution when the question is whether there is a biological basis for differences in behavior between men and women. They want to regulate cigarette smoking out of existence, but they want to permit

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[96] *See* DAVID NYBERG, THE VARNISHED TRUTH: TRUTH TELLING AND DECEIVING IN ORDINARY LIFE (1993).

[97] As Martha Nussbaum puts it, "in order to believe that a logical argument can produce a result in calling the soul to an acknowledgement of its own deficiencies," moral philosophers have to believe "that at least a good part of evil is based on error . . . [and] that people have many good beliefs and good intentions." Nussbaum, *supra* note 54, at 36.

the smoking of marijuana. They are for the strongest possible public measures for safety and health, but they are against quarantining people who are infected by the AIDS virus. They are secular, consider sexual practices morally indifferent, and fear the religious right; they are, in short, "PC," and, of course, they vote Democratic.[98]

Other moral philosophers hold the opposite of each of these positions. They pity fetuses, but not sea otters or harp seals. They are against multiculturalism — unless it is religious. They object strenuously to governmental efforts to discourage cigarette smoking and alcohol imbibing but are vigorous supporters of the "war against drugs." Some of them expound an orthodox Catholic view in a manner incomprehensible to the secular mind. John Finnis's criticisms of homosexuality come packaged in such sentences as — I quote virtually at random — "[T]he union of the reproductive organs of husband and wife really unites them biologically."[99] I do not know what this means, or how it distinguishes sterile marriage from homosexual coupling (the distinction Finnis is particularly interested in drawing), or whom he hopes to persuade. It may seem unfair of me to quote Finnis out of context, but the context is dominated by equally strange sentences, which read as if they had been translated from medieval Latin,[100] and which make me wonder whether Finnis would agree with Aquinas that masturbation is a worse immorality than rape.[101] Still, with diffi-

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[98] Duncan Kennedy has a pertinent observation on this theme, anent the policy preferences of Ronald Dworkin: "Hercules" — Dworkin's model judge, who Dworkin claims decides cases on the basis of principle, not policy — "is not just a liberal; he is a systematic defender of liberal judicial activism from Brown [*v. Board of Education*] to the present. He is actually a left liberal, as close as you can get in terms of outcomes to a radical." DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 128 (1997).

> Over the course of his career, Dworkin has endorsed as the legally "right answer" not just Brown without delay and racial quotas, but civil disobedience, nonprosecution of draft card burners, the explicit consideration of distributive consequences rather than reliance on efficiency, judicial review of apportionment decisions, extensive constitutional protection of criminals' rights, the constitutional protection of the right of homosexuals to engage in legislatively prohibited practices, the right to produce and consume pornography, and abortion rights.

Id. at 127–28 (footnotes omitted).

[99] John Finnis, *Is Natural Law Theory Compatible with Limited Government?*, *in* NATURAL LAW, LIBERALISM, AND MORALITY: CONTEMPORARY ESSAYS 1, 15 (Robert P. George ed., 1996).

[100] Here is the sentence in full, together with the sentence that follows; all the italics are in the original:

> The union of the reproductive organs of husband and wife really unites them biologically (and their biological reality is part of, not merely an instrument of, their *personal* reality). Reproduction is one function and so, in respect of that function, the spouses are indeed one reality, and their sexual union therefore can *actualize* and allow them to *experience* their *real common good — their marriage* with the two goods, parenthood and friendship, which are the parts of its wholeness as an intelligible common good even if, independently of what the spouses will, their capacity for biological parenthood will not be fulfilled in consequence of that act of genital union.

Id. at 15.

[101] *See* 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA 1825–27 (Fathers of the English Dominican Province trans., Benziger Brothers 1947).

culty one can dig arguments out of Finnis,[102] as out of Aquinas, but not arguments that will appeal to anyone who does not already agree with Finnis — or even to someone who shares his theological and metaphysical premises.[103] But my present point is only that his stance is dictated by religion — as is no less true of the stance of his secular opponents, provided that "religion" is understood broadly enough to include any deep emotional commitment that determines where one stands on fundamental issues of value. Secular humanism is a religion in this sense. Thomas Nagel is a self-proclaimed atheist,[104] yet he thinks that no one could *really* believe that "we each have value only to ourselves and to those who care about us."[105] Well, to whom then? Who confers value on us without caring for us in the way that we care for friends, family, and sometimes members of larger human communities? Who else but the God in whom Nagel does not believe?

Modern moral philosophers are not seers, prophets, saints, or even rebels. They are professionals, and their moral values are those of their professional set. Specifically, they are humanities professors, and their moral values are similar to those of other humanities professors. Moral values are rules of social cooperation adapted to the particular society or subculture in which a person finds himself. In today's United States, moral philosophers belong to a subculture of humanities professors that is in turn divided into a liberal-secular and a conservative-religious subsubculture. These professors reflect in their work the values of their set, of the people they "hang out" with. The social pressures that play upon them create a form of life against which the wings of moral theory beat feebly. It is a form of life that in many cases is morally chaotic on the level of theory, to say nothing of practice. The same academic moralist is apt to be hard and selfish in defending the right to an abortion, while at the same time proclaiming what Holmes called the "slapdash universals" — "Never tell a lie. Sell all thou hast and give to the poor etc."[106]

The age of professionalism is also, and in consequence, the age of what Weber memorably called the "disenchantment of the world."[107] This is as true in moral philosophy as it is in medicine. It was not always thus in moral philosophy, or in medicine for that matter. Socra-

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[102] *See* Paul J. Weithman, *Natural Law, Morality, and Sexual Complementarity*, *in* SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE 227, 235–37 (David M. Estlund & Martha C. Nussbaum eds., 1997).

[103] As does Weithman. *See id.* at 244–45.

[104] *See* NAGEL, THE LAST WORD, *supra* note 7, at 130.

[105] *Id.* at 121; *see also id.* at 122 (declaring this belief "highly unreasonable and difficult to honestly accept").

[106] Letter from Oliver Wendell Holmes to Lewis Einstein (July 23, 1906), *in* THE ESSENTIAL HOLMES, *supra* note 83, at 58.

[107] MAX WEBER, *Science as a Vocation*, *in* FROM MAX WEBER 129, 155 (H.H. Gerth & C. Wright Mills eds. & trans., 1946) (1919).

tes was not a tenured professor, and he gave his life for his principles. Cicero was proscribed. Seneca was murdered on the authority of Nero. Hobbes was an exile, as was Rousseau. Bentham was a lawyer, an economist, and a practical reformer, but not a professor. Mill was not a professor either: he was a civil servant, an economist, and a member of Parliament. Nietzsche gave up a safe berth as a professor of philology to become a ridiculed and impoverished outcast. Wittgenstein was a soldier in World War I and a medical orderly in World War II, a mechanical engineer, an architect, a secondary-school teacher, a flouter of academic convention, a nonpublisher, an exile; he gave away all his money (a fortune), and he abandoned his professorship. Bertrand Russell spent time in prison for his beliefs. (Granted, neither Wittgenstein nor Russell was primarily a moral philosopher.) All that is history. Moral philosophy has become as thoroughly professionalized as accounting. The modern moral philosopher is a lifetime academic: he never leaves school. (How odd it is to think that the people who have never left school should be society's moral preceptors.) He takes no professional risks until he gets tenure. After that he takes few professional risks; he never takes any serious personal risks. He lives a comfortable bourgeois life, with maybe a touch of the bohemian. He either thinks Left and lives Right, or he thinks Right and lives Right. I do not mean to criticize. I like academic people; I consider myself basically one of them; I am as unheroic as they; I am the same kind of comfortable bourgeois. I just don't think that they (that we) are a likely source of moral entrepreneurship.[108] Modern moral philosophers are not moral innovators, and they are not moral heroes, either, or the makers of such heroes. Being teachers and intellectuals, moral philosophers exaggerate the importance of instruction, analysis, culture, and intelligence to moral improvement and moral behavior. In this they resemble political theorists, who, also being teachers, have a tendency to base their model of democracy on the analogy of faculty meetings ("deliberative democracy").

There isn't even any evidence or reason to believe that academic moralists have moral insight superior to that of other people. In saying that they are not moral entrepreneurs, I was emphasizing the problem of "selling" a new morality; but academic moralists are not even closet inventors. They dress up in academic language the moral opinions of their set, the opinions that are "in the air," the opinions held by powerful senior colleagues or, in some cases, by passionately opinionated students. And so in complaining that academic moralists

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[108] For similar arguments from within philosophy, see Annette Baier, cited above in note 2, at 29. But I am quick to add that although I admire science, I do not delude myself that scientists are morally superior people any more than moral philosophers are. For some pertinent remarks on this score, see Gordon Tullock, *Are Scientists Different?*, 20 J. ECON. STUD. 90, *passim* (1993).

lack the charisma necessary to change the moral code of their society, I am not denying the division of labor. One can imagine the academic moralist thinking up moral innovations and the charismatic leader picking them up and imparting them to the masses. In this spirit Peter Unger, acknowledging that his book urging Americans to give away all their money above subsistence needs to poor children in the Third World will be read by only a handful of people, expresses the hope that someone will write a bestseller advocating his position.[109] The division of labor that he envisages is similar to that between the production manager and the sales manager of a business firm.

Something like this is indeed discernible in the history of morality. Christianity was influenced by the thought of Plato and the Stoics, and later by Aristotle; modern notions of gender equality owe a debt to Mill; Rousseau influenced the Jacobins; Hegel influenced Lenin and Stalin via Marx. Maybe the successors to the giants of moral philosophy in the modern university are turning out moral innovations that in the fullness of time will be absorbed into our moral code through moral or religious middlemen. I doubt it. The modern academic career is not conducive to moral innovation. The modern academic moralist, even one who has had the profound *academic* impact of a Rawls, is a narrow specialist, a professional. He tidies up after the moral innovators, who are (or were) not other modern-style academics, but instead the classic figures of the past; practical people, such as politicians; preachers and visionaries; and, yes, at times, rebellious youth.

Some academic moral or political philosophers aspire to be "public intellectuals." That is, they hope to communicate directly with, and so to influence, an audience not limited to other academics. It is a forlorn hope in a society such as that of the United States, in which the public has no interest in philosophy. The American public wants pragmatic solutions to practical problems. The training and experience of the philosopher do not equip him to devise or even articulate such solutions.

K. Moral Change and the Persistence of Moral Debate — and of Academic Moralism

I pointed out earlier that the rejection of academic moralism does not leave us helpless to explain the phenomenon of moral change. A society's moral code changes when it is shown to be nonadaptive, when changes in material conditions (such as the recession of close combat, the advent of ultrasound images of early pregnancy, the su-

[109] *See* PETER UNGER, LIVING HIGH AND LETTING DIE: OUR ILLUSION OF INNOCENCE 156 n.10 (1996). To spur his anticipated tiny readership to open their pockets, Unger considerately lists the toll-free phone numbers of three charities. *See id.* at 175.

persession of magic by science, and the technological changes that have enabled the vastly increased participation of women in the labor force) challenge factual assertions entangled in the moral code, or when a charismatic moral leader uses nonrational methods of persuasion to alter moral feeling. Academic moralism, however, is not an agent of moral change. So too, the validity of that moralism is not demonstrated by the persistence of moral debate. Persisting, even interminable, moral disagreement and debate do not prove that there is "nothing to" academic moralism, though it is some evidence for the lack of cogency of the methods used by academic moralists. But neither do disagreement and debate prove that there *is* something to academic moralism. Given morality, moral pluralism, moral change, and moral emotions, we can expect moral discussion that will generate competing moral claims, whether or not it generates rational backing for those claims.

The greater puzzle is the persistence of academic moralism. It is puzzling on several grounds besides the one I have been emphasizing, academic moralism's intellectual weakness. It is puzzling because the nation is in the midst of one of its periodic revivals of theistic religion ("theistic" in contrast to the kind of "secular religion" that one finds in Confucian and modern left-liberal thought), and theism is a substitute for philosophical moralism. It is puzzling because morality is losing its grip on the American people, who are increasingly constrained in their behavior (to the extent that they are constrained at all) by law rather than by norms, as privacy, wealth, urbanization, and education have all weakened the power of social norms to coerce behavior.[110] There's no dearth of moral norms today, including such novel ones as an antismoking norm and a norm of political correctness. But the new norms, and many of the old, are not imperative. You choose the norms you like. More precisely, you choose the community, the occupation, the church, the social set that has a system of norms compatible with your character and preferences. Of course, you might be attracted into a community, an occupation, or a church by features of it unrelated to norms, and then find yourself willy-nilly bound by its norm system. Yet one way in which communities compete is by relaxing norms. With some exceptions, such as ultra-Orthodox Judaism, modern religions in America and the other wealthy countries keep up the number of their members by reducing the cost of membership in hedonistic pursuits forgone.

The persistence of academic moralism is puzzling for the further reason that the increasing scope and sophistication of the natural and social sciences have compressed the space within which a generalist

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[110] For a discussion of the relative effectiveness and efficiency of law and social norms, see Posner, cited above in note 41.

can say anything interesting about a specific issue. Philosophy is the field of residual speculation and is constantly losing ground to specialized fields. It is more and more difficult for a philosopher to talk intelligently about social behavior. Philosophical critiques of economic policy are a case in point. An economist or sociologist would find comical the claim by a distinguished moral philosopher that private philanthropy has a built-in tendency to "encourag[e] a 'culture of dependency,'" and that we therefore need a welfare state.[111] By creating legal rights to welfare, a welfare state is more likely to encourage dependency than private charity would be, since private groups would be free to reduce or withdraw their largesse at the first sign of dependency. Another moral philosopher advocates workers' cooperatives on the ground that "environmental protection tends to harmonize more with the interests as well as the ideals of worker-managed firms than with the interest of capitalist firms," since "workers, unlike capitalists, have to live in the communities where they work and so must live with the pollution they create."[112] But since workers include office workers as well as factory workers, since only some of the firm's factories may pollute, and since the effects of the pollution caused by a factory may be felt far away, the majority of a cooperative's worker-owners may not be affected by the firm's pollution. And even if they are, they have more to lose — their jobs — from pollution-control measures than shareholders would. Elsewhere in the same book it is argued that workers undervalue workplace dangers,[113] but it is not explained why this should be less true of worker-owners who must choose between fewer jobs and less pollution. The plywood cooperatives in the Northwest, the principal "success story" of worker-owned industrial firms in the United States, have, according to an admirer of worker-owned firms whom the author cites, the same dirty, noisy, and dangerous working conditions as capitalist sawmills.[114]

The persistence of an academic field despite a lack of intellectual vitality or practical utility is not very surprising. Competition among universities is, in part because of their governance structure, highly imperfect,[115] especially with regard to academic research and especially in politicized fields of research, which include not only black, gay, and gender studies but also applied moral philosophy. Still, the reasons for the persistence of this weak field deserve consideration. They are several. One is moral pluralism, which multiplies the number of moral is-

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111 ONORA O'NEILL, CONSTRUCTIONS OF REASON 231 (1989).

112 ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 213 (1993).

113 *See id.* at 195–203.

114 CHRISTOPHER EATON GUNN, WORKERS' SELF-MANAGEMENT IN THE UNITED STATES 130 (1984).

115 For some pertinent observations, see Arthur Levine, *How the Academic Profession is Changing*, DAEDALUS, Fall 1997, at 1, 4–5.

sues for academic rumination. Another is a certain exhaustion in traditional philosophical inquiry, which has stimulated a search for new topics.

Two other reasons, however, are more important. The first is the Nazi experience. I have referred to Nazism several times in this Article — unavoidably, given my subject matter. The revulsion against Nazism, although understandable without reference to morality, being based on altruism for the victims and fear of the perpetrators, created a demand for a really powerful vocabulary of condemnation. To write of Nazism as a failed experiment in social organization by limited, violent, and dangerous people who didn't share our values seems inadequate to our anger. I have no objection to the employment of moral terminology to denote degrees of indignation, just as I have no objection to the use of the forms of law to express our condemnation of the Nazi leaders. Moral terminology is too persistent and pervasive a feature of our discourse to be deemed a mistake. But our use of a universalistic terminology of condemnation — our use of generalization and even exaggeration as rhetorical devices or to vent anger — does not show that there are universals that our terms denote. Appealing to universal moral values (the "brotherhood of man," for example) as a bulwark against the kind of aggressive ethnocentrism epitomized by Carl Schmitt's slogan "All right is the right of a particular *Volk*,"[116] has a *political* value, whether or not universal moral values exist.

Moralists warn, however, that we may not be able to repress ominous or disgusting tendencies in ourselves or others unless we believe that when we say that particular conduct or its perpetrators are immoral, we are saying something that is universally true, rather than expressing fear and revulsion or at most uttering a local truth. This *may* be psychologically astute, but it is no answer to the skeptic. That a belief might be socially valuable is not evidence that it is true.

I don't even think it's psychologically astute. Most people more or less obey the moral code of their society, and they do so for a variety of pragmatic reasons and nonreasons. If you are driving down a street and there is a child in the middle of it, you stop without thinking about whether children have moral rights greater than those of squirrels; you do this whether you are a moral skeptic or a metaphysical moral realist or something in between. A person who somehow managed to become perfectly reflective about his behavior would be a kind of monster; speaking for myself, I would prefer to be surrounded by ordinary, morally unreflective people (the implication of Gross's study).

But the main reason for the persistence of academic moralism despite its manifold shortcomings has nothing to do with Nazis. It is

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[116] Quoted without an indication of its source in Mark Lilla, *The Enemy of Liberalism*, N.Y. REV. BOOKS, May 15, 1997, at 38, 38.

that academic moralism serves a social (in the sense of sociological) function. I noted earlier that Professor Finnis attacks homosexuality in a style of argument unlikely to be intelligible, let alone persuasive, to people who do not share his religious beliefs. This leads me to conjecture that his principal intended audience consists of his coreligionists, people already convinced of the immorality of homosexuality. (His unintended audience consists of his secular critics.) I have already intimated and here make explicit that I think the same is true of the people on the other side, such as Thomson, Gutmann, and Thompson. They too are preaching to the converted.

Well, most preaching *is* to the converted, and it serves the important function of convincing people who think like you that they are not alone in their beliefs, that they have the backing of someone who is confident, competent, and thoughtful. Academic moralism is not really about making us better; it is about manning the ramparts and rallying the troops who defend the groups into which we are divided.

II. THE LIMITS OF MORAL REASONING IN LAW

A. Law and Morality: The Relation Reargued

I have now to explain what my criticisms of academic moralism have to do with law. If this were England and I wanted to talk about English law, the answer would be "Almost nothing." Law in England is an autonomous discipline. Novel issues are resolved largely by interpretation of authoritative texts, consisting of statutes, regulations, and judicial decisions, none of which incorporates a controversial moral theory. Sometimes English judges have to make policy choices, but so rarely that when they do so they have the feeling that they're "step[ping] outside the law."[117] It is different in the United States, as in the constitutional courts of Central Europe, but my focus will be on the United States. For reasons unnecessary to dwell on, the standard sources of positive law in our system do not resolve most of the novel issues that judges must decide. As Ronald Dworkin has long and persuasively argued, legal positivism is an inadequate descriptive or normative theory of American law, because so much of it is the product of judicial decisions that cannot be justified by reference to the standard sources, yet are not usurpative or even unsound. From time to time judges have to go outside those sources, and the question is where they should go; one possible answer is, to moral theory. This has been Dworkin's answer. He and his epigones think that judges should be — not in every case, of course, but in the cases that we care about the

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[117] POSNER, *supra* note 9, at 17.

most, the cases that forge new law — moral philosophers.[118] But as long as there are other places outside "law" in its narrow positivist sense in which to look for answers to legal questions — and we shall see that there are — the only reason to look for the answers in moral theory would be that it is a better place to look than the alternatives. If the argument in Part I is correct, it is unlikely to be a better place to look, though this depends, of course, on the alternatives.

There is another reason to think that moral theory might be an inescapable concern of law, however, and that is the overlap between moral and legal obligations. The overlap is inescapable even in the English legal system. Tort law and criminal law deal with responsibility for harmful acts — and also with responsibility for failure to prevent harmful acts, as when a plaintiff seeks to place liability on someone who could have rescued the plaintiff without danger to himself, yet stood by. Criminal law bases responsibility, most of the time anyway, on culpable mental states. Contract law deals with the binding character of promises. The law of inheritance confronts such issues as whether a person who murders his benefactor shall be disqualified from inheriting, and property law asks whether ownership includes the right to evict a starving tenant. And so on ad infinitum. The reason for the overlap is simply that morality and law are parallel methods of social control. They are different methods, the first being the earlier, for bringing about the kind and degree of cooperation that a society needs in order to survive and flourish.

This might tempt one to say that law backs up morality, adding temporal sanctions to the sanctions of conscience, though selectively, with due regard for the costs and benefits of the addition. If this is right, it might seem to follow that judges in a system such as ours, in which they have a lot of discretion to shape the law, would have to decide contested issues of morality from time to time in order to determine what moral "horse" the law should be backing. I consider both propositions independently mistaken. I don't think that what law does is helpfully described as backing up morality, and even if it were, it would not follow that when the relevant moral principles are contested, judges have to make a choice between them.

Many moral principles have no backing from law. Lying is not a tort or a crime, and charity is not a legal duty. The law is indifferent to most promise-breaking. Seduction is no longer a tort in most states, and adultery has in practice been almost entirely freed from legal sanc-

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[118] *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2–12 (1996); Dworkin, *In Praise of Theory*, *supra* note 6, at 360; Ronald Dworkin, *Reply*, 29 ARIZ. ST. L.J. 432, 432–35 (1997) [hereinafter Dworkin, *Reply*]. For criticism, see Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's 'Moral Reading' of the Constitution*, 65 FORDHAM L. REV. 1269 (1997).

tions. Ugly group libels are constitutionally privileged, and much official misconduct is placed beyond the reach of legal sanction by doctrines of immunity. Bystanders in most states can with impunity turn their backs on persons in distress, even when it would cost the bystander nothing in expense or risk to save the person. On the one hand, then, the law does not in general enforce morality. On the other hand, the law prohibits or attaches sanctions to a great deal of morally indifferent conduct, such as fixing prices, trading securities on inside information, hiring an illegal alien when no else is available to do the work, driving with your seatbelt unfastened, breaking a contract involuntarily, or inflicting injury in the course of a hazardous but socially necessary activity even though the injury could have been avoided only by discontinuing the activity. One can give reasons for the laws that impose sanctions for these behaviors, but the reasons owe nothing to moral intuitions or theories. It is even doubtful that the laws punishing drug trafficking can be justified by reference to such intuitions or theories, given that such close substitutes for illegal drugs as cigarettes, alcoholic beverages, tranquilizers, and antidepressants such as Prozac have identical effects, yet are lawful. The difference in legal treatment seems to result mainly from the popular association of illegal drugs with hippies, rock artists, bohemians generally, the urban underclass, and other less than entirely respectable elements of the population.

A potent source of confusion is the law's frequent borrowing of moral terminology, of such terms as "fair" and "unjust" and "inequitable" and "unconscionable," a borrowing that reflects in part the ecclesiastical origins of the equity jurisdiction, and that has misled Dworkin into believing that law is suffused with moral theory.[119] Holmes warned long ago of the pitfalls of misunderstanding law by taking its moral vocabulary too seriously; it is the major theme of his great essay *The Path of the Law*.[120] A big part of legal education consists of showing students how to skirt those pitfalls. The law uses moral terms in part because of its origins, in part to be impressive, in part to speak a language that the laity, to whom the commands of the law are addressed, is more likely to understand — and in part, I admit, because there is a considerable overlap between law and morality. Only it is too limited an overlap to justify a project of trying to align these two systems of social control, the sort of project that Islamic nations such as Iran and Pakistan have been engaged in of late. (So Dworkin and his allies are the Taliban of Western legal thought.) It is not a scandal when the law fails to attach a sanction to immoral conduct or when it attaches a sanction to conduct that is not immoral. Indeed, it is not a

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[119] *See, e.g.*, Dworkin, *Reply*, *supra* note 118, at 435–36.

[120] *See* Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457–64 (1897).

criticism of law to pronounce it out of phase with current moral feeling. It often is, and for good practical reasons. When people make that criticism of a law — it is a typical criticism of the laws, still found on the statute books of many states, punishing homosexual relations — what they mean is that the law neither is supported by public opinion nor serves any temporal purpose, that it is merely a vestige, an empty symbol.

It may be objected that I am being unhistorical in trying to divorce law and morals in this way. Suppose, to take the most exciting possibility, that the Framers of the Constitution, imbued as they were with the philosophical thinking of the Enlightenment, intended that judges would interpret the Constitution in accordance with evolving conceptions of moral theory. Then, in the absence of some principled objection to honoring the Framers' intentions, any discrepancy between constitutional law and the best moral theory would be due to error or malevolence on the part of judges, or to inescapable practical considerations having to do with feasibility, priorities, resources, and public opinion.

This argument opens up too large a vista of historical inquiry to be explored here, so let me merely state dogmatically that there is no convincing evidence for it. No philosopher took a hand in drafting any of the founding documents or such successor texts as section 1 of the Fourteenth Amendment or Title VII of the Civil Rights Act of 1964. No evidence of the thought of Plato, Aristotle, Aquinas, Smith (of *The Moral Sentiments*), or Kant, or even of Priestley, Hutchinson, or Bentham (despite the reference in the Declaration of Independence to "the pursuit of happiness"), can be found in any of these documents. Of course, such salient Enlightenment notions as liberty, religious toleration, and political equality inform these documents, and these notions had received philosophical treatment. But that is a far cry from supposing that the draftsmen and ratifiers were doing philosophy, let alone philosophy congenial to a modern outlook,[121] or that they meant to appoint judges to serve as philosopher kings or philosophical acolytes or, if they did, that judges must or should accept the appointment. Notions such as toleration and equality can be given a philosophical or religious construction — or they can be treated as policies instrumental to various social goals, such as peace, strength, prosperity, and the conciliation of the potentially disaffected.

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[121] For a striking illustration, consider the discrepancy between the original and modern meanings of the phrase "all men are created equal" in the Declaration of Independence. Originally it referred to the situation of man in the state of nature, not in society; hence it had no reference to the position of slaves. *See* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 135–36 (1997). The right of "all men" (that is, of all citizens) to "the pursuit of happiness" apparently comprehended such interests as safety, security, the right to acquire property, and the ability to decide how to live one's life. *See id.* at 134, 165–67, 270–71 n.79.

Here is an example that has practical significance in present-day American law. We can decide to treat criminals with dignity because we buy into the Kantian notion that people are entitled to be treated as ends, or because we think (perhaps knowing nothing about Kant) that cultivating a "we-they" or "enemy within" or even a "medical" mentality of criminal punishment can, like tolerating or encouraging police torture, have untoward political consequences and even undermine the deterrence and prevention of criminal behavior. You wouldn't have to be a utilitarian to make a judgment of this sort. The point would be not that police torture (an example often turned *against* the utilitarian) reduces the sum of American (or human, or cosmic) happiness, but that it collides with specific political and criminological objectives of our society, having mainly to do with reducing the amount of unauthorized violence. A moral vocabulary would be adopted for pragmatic purposes. For these objectives are not to be thought of as validated by moral theory. If you happen not to agree with them, either because you think it presumptuous to posit goals for an entire society or because you think (let's assume correctly) that these goals can be achieved only by degrading or subordinating people whom you value more than the comfortable bourgeois for whom peace and prosperity are so important, moral theory will not and should not convince you otherwise.

Adjudication is a normative activity, and any time a judge does more than just apply positive law — and that is often, as Dworkin has shown — the problem of getting from "is" to "ought" rears its troublesome head, and it may seem that the judge is plunged into the domain of moral theory. But I do not think so. Ethics and practical reason are not interchangeable with moral theory, unless the term is to be used unhelpfully to denote all normative reasoning on social questions. Judges are expected to give reasons for what they do, and the reasons cannot always be found neatly packaged in the authoritative sources of law. From the reasons a judge gives across a range of cases can be stitched, if the judge is consistent, a "theory" that he might be called upon to defend. It would not follow that he would be helped by reading or thinking about moral theory. Consider education. We have had education theory as long as we have had moral theory. Is there any evidence that teachers or principals who are saturated with theory are better than those who are not? Moral theory, starting at the same place, with Plato, has as long a history of false starts and inconclusive debate. Why then should we think a course in moral theory good for judges? Dworkin argues: "[W]e have no choice but to ask [judges] to confront issues that, from time to time, are philosophical. The alternative is not avoiding moral theory but keeping its use dark."[122] Substi-

[122] Dworkin, *In Praise of Theory*, *supra* note 6, at 375.

tute "teachers" for "judges," "pedagogical" for "philosophical," and "education" for "moral" — so that the passage reads, "[W]e have no choice but to ask [teachers] to confront issues that, from time to time, are pedagogical. The alternative is not avoiding education theory but keeping its use dark" — and the emptiness of Dworkin's actual claim becomes evident.

It is worse than empty. It is misleading. It suggests that moral issues are inescapable in the practice of adjudication. They are not. If I am right that there is no necessary or organic connection between law and morality, then judges need not take sides on moral questions because the rejection of legal positivism creates the need, or because law and morality are continuous, or because morality gives law its content, or because judges have been directed to apply the moral law. Considerations drawn from moral theory and designed to illuminate moral issues are only a subset of the normative considerations that are potentially relevant to adjudication. Moral issues can be elided, or recast as issues of interpretation, institutional competence, practical politics, the separation of powers, or stare decisis — or treated as a compelling reason for judicial abstention.

The careful reader will have noticed that I am now making a claim that in one respect is broader than that in Part I. There I argued that there was "nothing to" a certain type of moral reasoning, but that was only one type, what I called academic moralism and associated with a subset of contemporary moral philosophers. Here I am arguing that moral theory has nothing for law, but I am not limiting myself to academic moralism. The idea that racial discrimination is immoral owes very little to academic moralists; it owes a lot to nonacademic moral entrepreneurs such as Abraham Lincoln and Martin Luther King, Jr. Yet we shall see in considering *Brown v. Board of Education* that the courts do not rely on these moralists, either, to support decisions in racial cases, and we shall see that there are good prudential reasons for this forbearance. I do not mean that moral entrepreneurs are never cited in judicial decisions, but they are cited as representatives of *uncontested* moral positions, rather than as authorities for taking one side or another of a moral issue.

B. Some Cases

If moral theory is optional for judges, they will be reluctant to exercise the option without some assurance that moral theory provides an objective method of resolving disputes. I take this to be conceded when Moore (M.S., not G.E.) says that "when judges decide what process is due a citizen or what equality requires, or when a punishment is cruel, they judge a moral fact capable of being true or false."[123] If

[123] Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424, 2470 (1992).

no moral claim is capable of being adjudged true or false, judges will not feel comfortable posing and answering legal questions as questions about the moral law.

Some moral judgments are so widely accepted that they can plausibly claim the name of moral truth. Killing a human being is in our society (the essential qualification) immoral behavior unless there is an accepted justification; killing a fly is not. These truths, which give moral realism what little plausibility it can claim, do not interest a Moore or a Dworkin. They are interested in the moral truths that are discoverable by a process of reasoning when there is disagreement over what they are. Is it a moral fact that killing a human being is immoral if the human being is still a fetus, or, in the case of an adult, if the killer is a physician killing at the victim's request? *Is* the fetus, though undeniably human, a human being? Is it "killing" if you just refuse to help someone who will die without your help? Should homosexual marriage be permitted? Interracial adoption? Should people be permitted to clone themselves? Moral theory cannot answer these questions, because it has no tools for bridging moral disagreements. The existence of these unanswerable questions — of these insoluble "moral dilemmas"[124] — argues, as I suggested in Part I, against the idea that moral theory can bring us into contact with a moral reality that exhibits the regularities of physical reality.

The argument is not conclusive. The stubbornness of moral dilemmas owes something to their being so often underspecified; this does not mean that there is no moral reality in which to seek a resolution. The reason for this lack of specificity is internal to the field of moral philosophy and is one reason that some moral philosophers consider realistic novels, with their dense texture, to be aids to philosophical reflection.[125] The underspecification of the moral dilemma reflects the underspecialization of moral philosophy when conceived of as a method of resolving, or even just illuminating, issues of law or policy. You don't have to know anything about cannibalism on the high seas to ponder the question whether the starving occupants of a lifeboat should be entitled to kill and eat the weakest or the poorest of them. You don't have to know anything about the family and sexuality to ponder the morality of abortion. These issues can be stated as dilemmas and argued over from very general premises about autonomy, responsibility, cruelty, humanity, the bounds of the community, and so forth. And when such an issue arises in a case at law, it can receive a similarly abstract treatment — but fortunately for law, it need not.[126]

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124 *See, e.g.*, WALTER SINNOTT-ARMSTRONG, MORAL DILEMMAS (1988).

125 *See, e.g.*, COLIN MCGINN, ETHICS, EVIL, AND FICTION (1997); MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE (1990).

126 Dworkin acknowledges the possibility that an issue unresolvable in one normative domain might be resolvable in another, specifically the legal domain. He points out that although the

Cases in the Anglo-American system of adjudication arise out of concrete disputes, and there is no rule against bringing to bear on those disputes a wide range of empirical data drawn from historical, psychological, sociological, and economic research. Often when this is done the moral issue disappears, as happened with the two euthanasia cases decided by the Supreme Court at the end of its last Term.[127] This is a reason to regard moral theory as useless for law,[128] even if it has some socially valuable uses in its own domain.

1. The Euthanasia Cases. — The question whether a person should be allowed to hire a doctor to kill him is a favorite of moral philosophers, so much so as to have provoked a group of distinguished moral philosophers, including Thomas Nagel, John Rawls, and Judith Thomson, to join with Ronald Dworkin in submitting a brief amicus curiae urging the Court to recognize a constitutional right to physician-assisted suicide.[129] The Court refused to recognize (or, more realistically, to create) such a right.[130] It did this without taking sides on the philosophical issue, which had been vigorously contested, the "philosophers' brief" representing but one point of view. The Justices did not explain why they ducked the philosophical issue, but they had compelling practical reasons for doing so. The first is that given the balance between the opposing philosophical arguments as they would appear to most people both inside and outside of philosophy, the Court could not have written a convincing endorsement of either position; it would have been seen as taking sides on a disagreement not susceptible of anything remotely resembling an objective resolution.

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question whether Picasso or Beethoven was the greater artist may be unanswerable, if Congress directed the erection of a statue to whoever was the greater it might be determinable from the text or history of the statute what concept of "greatness" was to be employed and how it might be made operational. *See* Dworkin, *Objectivity and Truth*, *supra* note 6, at 137–38.

127 *See* Vacco v. Quill, 117 S. Ct. 2293 (1997); Washington v. Glucksberg, 117 S. Ct. 2258 (1997).

128 *Cf.* Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 489–91, 497–98 (1989) (making a similar point about the attempts of Charles Fried and Randy Barnett to use philosophical theories about promising to construct a theory of contract law). And it is interesting to note that Bobbitt, in his typology of constitutional arguments, excludes moral arguments. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE 94–95 (1982).

129 The brief is reprinted in Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon & Judith Jarvis Thomson, *Assisted Suicide: The Philosophers' Brief*, N.Y. REV. BOOKS, Mar. 27, 1997, at 41.

130 *See Quill*, 117 S. Ct. at 2297; *Glucksberg*, 117 S. Ct. at 2267–71. Dworkin tries to put a positive "spin" on this defeat, but he is highly critical of the Justices' opinions nonetheless, as well as, of course, the outcome of the two cases. *See* Ronald Dworkin, *Assisted Suicide: What the Court Really Said*, N.Y. REV. BOOKS, Sept. 25, 1997, at 40. What is most interesting about Dworkin's post mortem is his belated but still very welcome recognition that the empirical experience with euthanasia, notably in the Netherlands, where it is quasi-legal and quite common, is relevant to the constitutional question. *See id.* at 41–43; *see also Assisted Suicide and Euthanasia: An Exchange*, N.Y. REV. BOOKS, Nov. 6, 1997, at 69 (letter of Ronald Dworkin). Yet Dworkin continues to insist that cases in which facts or consequences matter to constitutional decision-making are "rare." *See* Dworkin, *Reply*, *supra* note 118, at 433.

Second, the issue of physician-assisted suicide was fermenting in a number of state legislatures, and there did not appear to be any obstacle to a fair resolution of the matter by the democratic process. The people favoring the status quo — the legal prohibition of all forms of euthanasia — had the strength of inertia and intense conviction behind them. The people favoring change were by and large the wealthier and better educated, who generally get their way in politics as elsewhere. The political struggle not being one-sided, the case for judicial intervention was correspondingly attenuated.

In speaking of a "fair resolution of the matter by the democratic process," I may seem to be smuggling into the analysis a moral theory about self-government. This is true only if "moral theory" is equated to social theory, so that every claim about the political or judicial process is deemed a moral claim. Such an equation should be avoided because it is confusing. One shouldn't need moral theory in any less expansive sense to point out that the case for judicial intervention is weakened in areas in which democracy can be expected to "work" in some crude but serviceable sense because the competing points of view are both represented and articulated in the political process. That is not a moral point unless morality is a synonym for policy.

Third, formulating actual protocols and safeguards for physician-assisted suicide involves complex technical and practical judgments that resist reduction to legally enforceable rules. In this respect the issue differs critically from the parallel issue of physician-assisted abortion (a parallel exploited in Judge Reinhardt's opinion for the Ninth Circuit[131]). We can count forward from conception and thus can authorize abortions trimester by trimester under progressively stricter standards. We cannot count backward from death and, knowing when someone is going to die, allow him to accelerate the date by some more or less exact period. Crafting a legally administrable right of physician-assisted suicide requires investing such vague concepts as "dying" and "unbearable pain" with precise, operational legal meanings and specifying tiers of review to protect the dying patient from impatient physicians and relatives. The judgments required are quintessentially legislative or administrative rather than judicial. They are also difficult; the Dutch experience with euthanasia has revealed abuses that might be repeated in this country.

Fourth, Supreme Court Justices, like other judges, work under time pressures that make them reluctant to engage with esoteric arguments presented in amicus curiae briefs. And judges more than law professors want to preserve the autonomy of law, not make law the handmaiden of other disciplines, especially one as remote from the under-

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131 *See* Compassion in Dying v. Washington, 79 F.3d 790, 813–814, 829–831 (9th Cir. 1996) (en banc), *rev'd sub nom.* Washington v. Glucksberg, 117 S. Ct. 2258 (1997).

standing and affections of the average American as philosophy. Dworkin considers the concern "that judges as a group lack the competence to engage in sustained analysis of difficult issues of political morality" to be "surely much exaggerated."[132] He thinks that judges don't require "much if any background in general philosophy" in order to be able to "reflect on complex moral issues," as distinct from issues of biology and economics, which he considers more challenging to the judicial intellect.[133] Yet he gives no examples of judges who have had either the competence or the inclination to engage in reflection on complex moral issues. I don't think that there are any judges in the American judiciary who have both the competence and, at least in relation to their job as judges, the inclination. The two most philosophically competent judges in our history, Holmes and Hand, had the least inclination. I have not seen the inclination, for example, in Charles Fried, an academic moralist turned state supreme court justice, though it may be too soon to tell. Reflection on complex moral issues does not lead to conclusions that convince doubters; it merely entrenches existing intuitions. It is a common mistake to think that "technical" problems are the most difficult to solve. Most technical problems are readily solvable by people who have the right technical training. Philosophical issues are not solvable by even the best-trained philosophers. Judges know or sense all this and steer clear of such issues.

For all these reasons, the moral issue in the euthanasia cases dissolved in the judicial consideration of the cases, just as conflict of law issues frequently dissolve when it is discovered that there is no difference in the laws of the jurisdictions between which the judge is trying to choose. However the moral issue of euthanasia is to be resolved, the Court had compelling reasons not to recognize a constitutional right. The philosophers' brief was beside the point.

2. The Abortion Cases. — The Court had, we tend to forget, ducked the moral issue in the abortion cases as well. The long discussion of the history of abortion policy that occupies so much of Justice Blackmun's opinion for the Court in *Roe v. Wade*[134] was designed to show that abortion has not always and everywhere been anathematized. From the fact that abortion has provoked divergent moral reactions in the Western tradition, the Court seemed to infer that there is no moral fact of the matter about abortion. To argue from disagreement to indeterminacy is fallacious. I do not want to defend the Court's implicit assumption that there is no moral issue about abortion; a moral issue is not resolved by being ignored. My point is only that the Court was trying to neutralize rather than resolve the issue. To which one might add that it is almost inevitable in a morally plu-

132 Dworkin, *Reply*, *supra* note 118, at 451.

133 *Id.*

134 410 U.S. 113 (1973).

ralistic society to regard morality as a matter of public opinion, of counting noses.

The Court went on to suggest that the question of the right to an abortion was one primarily of professional autonomy. The judgment whether to perform an abortion should be that of the doctor; the state should not intrude.[135] The issue of professional autonomy could be cast as a moral issue, but was not, and is in any event remote from "the" moral issue about abortion, which has to do with the rights of the fetus. There was more that the Court could have said without bringing in moral philosophy. For example, it could have said, much as it would later say in the euthanasia cases, that abortion was an issue that could be left, at least initially, to resolution by the states. At the time *Roe v. Wade* was decided, there was considerable ferment in state abortion law and a rapidly growing number of legal abortions. Or the Court could have said, again as in the euthanasia cases, that abortion was such a focus of irresolvable moral and religious debate that the Court could only stir up a hornets' nest by taking sides, as it would inevitably be seen as doing even if, as in *Roe v. Wade*, it sedulously avoided the moral issue. The methodology of the euthanasia decisions is inconsistent with that of the abortion decisions, and so it is no surprise that both in the lower courts and in the Supreme Court much of the analysis of the claimed right to physician-assisted suicide involved efforts to distinguish, or to show that it was impossible to distinguish, the abortion decisions as precedents.

The dissenting Justices in *Roe v. Wade* did not discuss the moral issue either.[136] For them the existence of such an issue was a compelling reason to keep hands off. This is consistent with a general, and it seems to me prudent, policy that judges not take sides on moral issues. Dworkin has criticized the prudential position for ignoring "the moral cost, in the case of abortion, of many thousands of young women's lives being ruined in the meantime."[137] This begs the question; there is a moral cost on the other side — the lives of millions of fetuses. Almost my entire point is that the courts are not capable of balancing "moral costs."

3. The Segregation Cases and a Note on Affirmative Action. — Another famous case in which the Court ducked a conspicuous moral issue was *Brown v. Board of Education*.[138] The Court did not say that integration was a moral imperative or that public school segregation denies blacks the dignity and respect accorded whites. It said that education is terribly important to people in the modern world and that

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[135] *See id.* at 163.

[136] Justices Rehnquist and White dissented. *See id.* at 171 (Rehnquist, J., dissenting); *id.* at 221 (White, J., dissenting).

[137] Dworkin, *Reply*, *supra* note 118, at 437.

[138] 347 U.S. 483 (1954).

psychologists had found that segregation impaired the self-esteem and educational success of blacks. To these nonmoral points could have been added the difficulty of assuring that segregated schools were really equal in quality, segregation's ill-concealed purpose of maintaining blacks in a subordinate position, the suffering that is created when one is publicly declared inferior (the well-understood message of segregated public facilities ranging from drinking fountains to buses and schools), the inconsistency between segregation and U.S. foreign policy objectives and propaganda, and, more subtly, the fact that barriers to trade (including the noncommercial "trade" that consists of social interactions) hurt a minority more than they do the majority because the majority is more likely to be self-sufficient, just as the United States is more self-sufficient than Switzerland. Most of these points are independent of considerations of physical equality or even of educational quality, as can be seen by imagining that the Southern states had spent the same amount of money per pupil on black schools and that as a result those schools provided as good an education as did the white schools (that is, suppose that integration as such conferred no educational benefits on blacks). The element of quarantine, of stigmatization, would have remained and would have provided a compelling argument against segregation, unless the Southern states had some compelling counterarguments, which they did not.

So there is plenty to say about public school segregation without getting entangled in moral issues. It should be added that moral philosophers, who in modern times have tended to be moral Johnnys-come-lately rather than moral pioneers, weren't talking much about racial equality in the 1950s.

Yet could it not be argued that implicit in all these "practical" points that could have been made in *Brown* is a moral theory, if only that suffering, that insult, is entitled to consideration in formulating a rule of law in a difficult case? And we know that you can start with suffering and end with vegetarianism. But I want to insist once again upon the difference between a moral principle and a moral *issue*. Morality is a pervasive feature of social life and is in the background of many legal principles. But the shared morality that forms the backdrop to a case, and that in *Brown* included a belief that a government should have a good reason for inflicting material or emotional harm on its citizens or for allocating benefits or burdens on the basis of race (as the Nazis had done) — more simply, that a government should have a reason for inflicting suffering on human beings — is like the stipulated facts of a case, which are a given rather than a subject of contention. Moral theory of the casuistic variety comes in when one wants to build on the existing bedrock of moral intuitions. Only there are no building blocks.

In speaking of "bedrock," I do not wish to be misunderstood as sliding into moral realism. A moral principle may be unshakable at

present without being "right." The fact that no one in a society has questioned a taboo against, say, racial intermarriage would not make that taboo morally right. To think it would, would be to embrace vulgar relativism, the idea that a society's acceptance of a moral principle makes that principle morally right. All that such acceptance does is make the moral principle a moral principle.

What distinguishes the segregation case from the abortion case is that most, perhaps all, of the Justices (possibly excepting Justice Reed), and almost all the people in the Justices' set, thought that racial segregation in public facilities was immoral. Yet the Court did not pitch its decision on moral grounds. This was partly, no doubt, for a political reason — to minimize the offense to Southern whites, who had a different morality so far as race was concerned. (So here is an example of the potential divisiveness of casting judicial decisions in moral terms.) But it was partly because moral arguments are weak arguments in a court. And I could leave out "in a court." Everyone agrees and in 1954 agreed that the government should not inflict suffering gratuitously. They disagreed over whether segregation inflicts suffering and whether, if it does, the suffering is gratuitous. Everyone agrees and in 1954 agreed that the state is required to treat similarly situated people the same way. The question is whether "separate but equal" education violates this principle; and if the answer to that question is yes, the Court must then ask whether and in what sense blacks really are equal to whites, a proposition that in 1954 would have been contested, with many Southerners arguing that blacks should not be recognized as even the political equals of whites. And even if no one had denied that the races should be deemed equal, it would still have been possible to make a moral argument that they should be kept separate, that mixing the races in the public schools would lead inevitably to intermarriage and to the resulting erasure of racial distinctions that God, in creating different races, had ordained for inscrutable reasons. This is a moral argument that would have carried a lot of weight in the nineteenth century and, for that matter, in the American South as late as the 1950s and 1960s.

A Court determined to go down the moral path would soon have lost its way in a maze of arguments, counterarguments, and factual claims. Better to say either what the Court said, though it was incomplete and indeed disingenuous (for the Court was shortly to strike down segregation in other public facilities on the basis of a bare citation to *Brown*,[139] a case ostensibly limited to education), or to say simply that "everyone knows" that segregation by law in schools and other public places is meant to keep black people "in their place," that it is

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139 *See, e.g.*, Gayle v. Browder, 352 U.S. 903 (1956) (mem.).

an ugly practice,[140] and that the Equal Protection Clause was in some sense intended, or should be used, to prevent it. An opinion so drafted would not be an impressive specimen of "legal reasoning," but it would at least be honest. The opinion of the Court was less honest but politically adroit. An opinion that tried to use moral theory on the issue would have lacked either virtue.

This is equally true with respect to judicial responses to today's hottest legal question involving race — the constitutionality of affirmative action by public universities and other public agencies. One can get nowhere discussing the morality of affirmative action. Here is my nonmoral take on the issue: Americans of all races today are uncomfortable with racial classifications used to allocate public benefits and burdens, yet recognize that the disaffection of blacks poses a serious social problem.[141] Although the problem may actually have been aggravated by affirmative action, which undermines the claims of all blacks to be recognized as true equals of whites, its sudden and complete elimination today throughout the public sector (and the private sector, if the civil rights statutes were to be reinterpreted to prohibit affirmative action) could not be "sold" to blacks as the elimination of an unjust preference. It would be provocative, exacerbating racial tensions — something our society can, on pragmatic grounds, ill afford. In these circumstances, neither complete acceptance nor complete rejection of affirmative action seems a practical course of action. The issue will have to be resolved at retail, case by case, rather than at wholesale with a sweeping either/or. When affirmative action imposes heavy costs on identified whites, as when blacks are given superseniority in firms that lay off surplus workers in reverse order of seniority, it will probably be rejected. When it is plainly necessary, either as a remedy for demonstrable racial discrimination by the public entity that is being ordered or permitted to engage in it, or in order to maintain the legitimacy of the government's security apparatus (as in the case of affirmative action in police forces and correctional staff), it will probably be accepted. Between these extremes, decision will turn on the values of individual decisionmakers. This implies that if the decision is entrusted to judges, and if the conventional judicial guideposts, such as constitutional and statutory texts and precedents, are unhelpful, the decision will be inescapably political.[142]

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[140] Ugly to us — to the Justices deciding the case and to like-thinking people. Not ugly *sub specie aeternitatis*.

[141] The case for affirmative action in favor of other groups is far weaker, and I will ignore it.

[142] This leads to the paradox that the acceptability of the decision may depend on the political diversity of the judiciary, which means that a proper resolution of the issue of affirmative action may depend on an anterior decision to use affirmative action to constitute the decision-making body!

To acknowledge the inescapably political character of some important judicial decisions will scandalize many legal thinkers. But no better solution to the issue of affirmative action is available through moral reasoning, which would soon become bogged down in interminable debates over historical injustices, justice between generations, entitlements, reasonable expectations, rights, and equality.

4. The Case of the Murdering Heir. — One can keep going back, for example to the nineteenth century and *Riggs v. Palmer*,[143] the "murdering heir" case that Dworkin likes to discuss.[144] The majority opinion, in holding that the New York wills statute did not entitle the murderer-grandson to take under his grandfather's will even though he was named as a legatee and the will conformed in every particular to the requirements for validity set forth in the statute, expressly invoked the moral tradition, going back to Aristotle.[145] But it did not do so in order to resolve a moral issue. There was no moral *issue*. Everyone agreed that the grandson had acted immorally and should not, as a matter of sound moral principle, be rewarded. The issue was whether his immorality was a *legal* defense to his claim under the wills statute, which made no mention of a murdering heir. The answer was that it was a defense. No inference could be drawn from the draftsmen's failure to write it into the statute, because they hadn't foreseen such a case. To interpret the statute as entitling murderers to inherit from their victims would have disserved the intentions of testators, the principal interest that the statute protects; it would have been a goofy interpretation.[146] Another reason it would have been goofy is that it would have created a totally arbitrary distinction between testamentary and intestate succession, since the grandson had pitched his entire argument on the wills statute. This process of analysis owes nothing to moral theory — yet Dworkin reasons from *Riggs v. Palmer* that judges can and indeed must do moral philosophy to come up with satisfactory results. So I repeat: there was no moral issue in *Riggs*. The

143 22 N.E. 188 (N.Y. 1889).

144 *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 15–21 (1986).

145 *See Riggs*, 22 N.E. at 189–91.

146 The dissenting judges were concerned that taking away the murderer's legacy added to the punishment for his crime without legislative warrant. *See id.* at 193 (Gray, J., dissenting). This concern was questionable, to say the least. Compare two murderers, one who kills a poor person and derives no monetary benefit from the crime, and the other who kills his grandfather and obtains a legacy as a result. If they are given the same criminal sentence, the second murderer is actually punished more lightly, the legacy being a partial (it could even be a complete) offset to the sentence. He could be given a longer sentence and allowed to keep the legacy, but what would be the point?

In endorsing the result in *Riggs v. Palmer*, I don't wish to be thought complacent about the dangers, which Holmes warned against in *The Path of the Law*, that are involved in judges' trying to use their moral beliefs, however unexceptionable, to decide technical legal issues. For a striking example, see the opinions in *Mazzei v. Commissioner*, 61 T.C. 497 (1974), dealing with the deductibility from federal income tax of a fraud loss incurred by the participant in a criminal conspiracy.

issue was whether a proper interpretation of the wills statute, proper in the nonmoral sense of conforming to some notion of draftsmen's intentions, permitted the moral result.

C. *Conclusion to Part II*

If not morality, what? I am not one of those who thinks that constitutional issues can be intelligently resolved just by reconstructing the intent of the Framers. Dworkin and others have demolished, to my satisfaction anyway (and I have played a part in the demolition derby), the pretension that such issues can be resolved by such means. I have mentioned practical considerations that can resolve many constitutional issues more or less satisfactorily because the disagreement is not over morality but over facts or institutional competence or some other nonmoral consideration that judges worry about. Some constitutional and other legal issues cannot be resolved so, and then the judge has two choices. One is to say that if public opinion is divided on a moral issue, judges should refuse to intervene, should leave resolution to the political process. The other is to say, with Holmes, that while this is ordinarily the right way to go, every once in a while an issue on which public opinion is divided will so excite the judge's moral emotions that he simply will not be able to stomach the political resolution that has been challenged on constitutional grounds, and would feel immoral in rejecting the challenge. That is the position in which the first Justice Harlan found himself in *Plessy v. Ferguson*[147] and in which Holmes found himself from time to time — showing that moral skeptics, moral relativists, have the same moral emotions as everyone else and differ only in not thinking that moral disagreements can be resolved by moral reasoning.

I prefer the second route. It leaves a place for conscience. If judges are carefully selected, as is generally true of federal judges, a judge's civil disobedience — his refusal to enforce a law "as written" because it violates his deepest moral feelings — is a significant datum. It is a portent of a possible revolt by the elite, which is the sort of thing that ought to give the political authorities pause. True, it injects a destabilizing element into the governance of the nation, but no more so than would a license for judges to engage in moral reasoning, given the indeterminacy of such reasoning; it may even retard destabilizing innovations in public policy by the more populist branches of government.

The legal profession, and in particular judges and other lawyers who want to expand the power of the judiciary, resist the idea that there is an irreducibly discretionary, in the sense of an unruled, a "sub-

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[147] 163 U.S. 537 (1896); *see id.* at 552 (Harlan, J., dissenting).

jective," element in constitutional adjudication. They resist in part for reasons of professional pride and self-interest, but also because one's moral intuitions or (in Holmes's phrase) "can't helps"[148] don't seem to be very heavy counterweights to democratic preference as reflected in the actions of the political branches. Hence the appeal of moral philosophy, which seems to offer the hope of arming judges to *prove* that those actions are "wrong" and have to be prevented. Public actions that are demonstrably wrong are rare, so that the kind of moral skepticism or moral relativism that I have been arguing for does cast rather a pall over the liberal judicial activism that is in vogue in the legal profession today, particularly among law professors and law students; Holmes was not an activist. The professionalism that I said in Part I has paradoxically weakened rather than strengthened moral philosophy, by depriving it of the "enchantment" that might enable it to alter the moral code, has increased the demand of the legal profession and particularly of the professoriat for the kind of analytical rigor irrelevantly associated with modern moral philosophy. I do not say "falsely associated with it." Modern moral philosophers are intelligent people and careful analysts. But they lack the tools for resolving moral disagreement. They cannot help judges. Judges will have to look elsewhere, or perhaps will have to scale down their ambitions to remake society.

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[148] Holmes elaborated:

> When I say that a thing is true, I mean that I cannot help believing it.... I therefore define the truth as the system of my limitations, and leave absolute truth for those who are better equipped. With absolute truth I leave absolute ideals of conduct equally on one side.

Oliver Wendell Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1, 2 (1915).

APPENDIX

STATISTICALLY SIGNIFICANT FACTORS IN THE PROPENSITY TO RESCUE JEWS

POTENTIAL SOURCES OF INFORMATION: JEWISH CONTACTS

Positive	*Negative*
• Jews lived in prewar neighborhood • Had Jewish friends before the war • Spouse had Jewish friends	• Had Jewish coworkers • Spouse had Jewish coworkers

KNOWLEDGE OF EVENTS

Positive	*Negative*
• Aware of Nazi intentions toward Jews before Nazi takeover • Aware of Nazi intentions toward Jews during Nazi takeover	• Aware of Nazi intentions toward Jews after liberation

RISK

Positive	*Negative*
• Lived on farm for longest period during the war • Lived in village for longest period during the war	• Lived in small city for longest period during the war • Lived in medium-size city for longest period during the war • Lived in large city for longest period during the war

WORK STATUS BEFORE WAR

Positive	*Negative*
• Employed	• Military
• Housewife	• Student
• Other	
• Unemployed	

WORK STATUS DURING WAR

Positive	*Negative*
• Employed	• Military
• Housewife	• Student
• Unemployed	• Other

OCCUPATIONAL STATUS DURING WAR

Positive	*Negative*
• Professional	• Clerical
• Business	• Semiskilled
• Administrative	
• Skilled	
• Unskilled	

NETWORKS: POTENTIAL SOURCES OF INFORMATION, BEING ASKED FOR HELP, AND RECRUITING OTHERS TO HELP

Positive	*Negative*
• Family members involved in helping Jews or in resistance	• Member of resistance group

SHELTERING POTENTIAL

Positive	*Negative*
• Having a cellar in dwelling	• Not having a cellar in dwelling

PARENTAL ATTITUDES TOWARD JEWS

Positive	*Negative*
[None]	• Neither discussed Jews • Stereotypes mentioned • Negative stereotypes mentioned • Other negative comments

RELIGIOUS AFFILIATION AND EDUCATION

Positive	*Negative*
• Protestant elementary school • Nonsectarian elementary school • Protestant gymnasium • Nonsectarian gymnasium	• Catholic elementary school • Other elementary school • Catholic gymnasium • Other gymnasium

RELIGIOSITY GROWING UP, BEFORE WAR, TODAY: SELF

Positive	*Negative*
• Very religious today • Not at all religious today	• Somewhat religious today • Not very religious today

POLITICAL AFFILIATIONS: SELF

Positive	*Negative*
• Democracy	[None]

PARENTS' POLITICAL AFFILIATIONS

Positive	*Negative*
• Democracy	[None]

VALUES: MOST INFLUENTIAL PARENT/ROLE MODEL

Positive	*Negative*
• Ethical	• Values relating to self
• Ethic of care	• Economic competence
• Universal ethical	• Obedience
• Universal care	

FAMILY CLOSENESS

Positive	*Negative*
• Very close family	• Somewhat close family
• Very close to mother	• Not very close family
• Very close to father	• Not at all close family
• Very close to most influential person other than mother or father	• Somewhat close to mother
	• Not very close to mother
	• Not at all close to mother
	• Somewhat close to father
	• Not very close to father
	• Not at all close to father
	• Somewhat close to most influential person other than mother or father
	• Not very close to most influential person other than mother or father
	• Not at all close to most influential person other than mother or father

FEELINGS OF SIMILARITY TO DIVERSE GROUPS

Positive	*Negative*
• Felt very similar to the rich	• Felt somewhat similar to the rich
• Felt not very similar to the rich	• Felt not at all similar to the rich
• Felt very similar to Jews	• Felt somewhat similar to Jews
• Felt very similar to Gypsies	• Felt not very similar to Jews
• Felt somewhat similar to Gypsies	
• Felt not very similar to Gypsies	
• Felt not at all similar to Jews	
• Felt not at all similar to Gypsies	

VARIETY OF FRIENDSHIPS

Positive	*Negative*
• Having close friends different from you in social class while growing up	[None]
• Having close friends different from you in religion while growing up	
• Having any Jewish friends before the war	

RESPONDENTS' PERCEPTIONS OF EVER HAVING RECEIVED DISCIPLINE

Positive	*Negative*
• Disciplined by mother	• Disciplined by other
• Disciplined by father, mother, and other	

TYPE OF DISCIPLINE

Positive	*Negative*
[None]	• Physical punishment • Verbal punishment • Discipliner punished through reasoning • Miscellaneous

PERCEPTIONS OF DISCIPLINE AS GRATUITOUS

Positive	*Negative*
• No perception of gratuitous discipline	• Perception of gratuitous punishment

OCCUPATIONAL STATUS AFTER THE WAR

Positive	*Negative*
• Professional • Business • Administrative • Semiskilled	• Clerical • Skilled • Unskilled

CHILDREN'S KNOWLEDGE ABOUT RESPONDENT'S WARTIME ACTIVITY

Positive	*Negative*
• Children have quite a bit of knowledge	• Children have some knowledge • Children have very little knowledge • Children have no knowledge at all

CHILDREN'S FEELINGS ABOUT RESPONDENT'S WARTIME ACTIVITY

Positive	*Negative*
• Children strongly approve • Children neither approve nor disapprove	• Children somewhat approve • Children somewhat disapprove • Children strongly disapprove • Don't know children's feelings

HELP GIVEN IN PAST YEAR

Positive	*Negative*
• Helped feed the sick or the aged or visited the ill very often • Helped feed the sick or the aged or visited the ill often • Taught children or adults or counseled anyone about jobs or personal problems very often • Taught children or adults or counseled anyone about jobs or personal problems often • Made telephone calls on behalf of a group or cause or helped raise money for a group or cause very often • Made telephone calls on behalf of a group or cause or helped raise money for a group or cause often • Made telephone calls on behalf of a group or cause or helped raise money for a group or cause a few times	• Helped feed the sick or the aged or visited the ill a few times • Helped feed the sick or the aged or visited the ill once • Helped feed the sick or the aged or visited the ill never • Taught children or adults or counseled anyone about jobs or personal problems a few times • Taught children or adults or counseled anyone about jobs or personal problems once • Never taught children or adults or counseled anyone about jobs or personal problems • Made telephone calls on behalf of a group or cause or helped raise money for a group or cause once

HELP GIVEN IN PAST YEAR, CONTINUED

Positive	*Negative*
• Gave speeches or lectures or wrote letters on behalf of an issue or cause very often • Gave speeches or lectures or wrote letters on behalf of an issue or cause often • Gave speeches or lectures or wrote letters on behalf of an issue or cause a few times	• Never made telephone calls on behalf of a group or cause or helped raise money for a group or cause • Gave speeches or lectures or wrote letters on behalf of an issue or cause once • Never gave speeches or lectures or wrote letters on behalf of an issue or cause

HEALTH TODAY

Positive	*Negative*
• Fair • Poor • Very poor	• Excellent • Good

Source: SAMUEL P. OLINER & PEARL M. OLINER, THE ALTRUISTIC PERSONALITY: RESCUERS OF JEWS IN NAZI EUROPE 261–366 (1988).