January 1999

Response: The Law Professor as Moral Philosopher?

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Much contemporary moral philosophy, particularly but not only in the English-speaking world, has given such a narrow focus to morality . . . . This moral philosophy has tended to focus on what it is right to do rather than on what it is good to be, on defining the content of obligation rather than the nature of the good life . . . . This philosophy has accredited a cramped and truncated view of morality in a narrow sense, as well as of the whole range of issues involved in the attempt to live the best possible life, and this not only among professional philosophers, but with a wider public.

—Charles Taylor

Jean Bethke Elshtain observes in her essay that “[w]e do it all the time.”1 That is, we “legislate morality” all the time. Indeed, Elshtain is sharply critical of those who argue that we ought to de-moralize law: “[O]ne can rightly put ethical and moral questions to the law and expect ethical and moral answers.”2 Elshtain even suggests that we should think of “the law professor as an ethical and moral philosopher.”3 According to Elshtain, “the law professor as philosopher is in the best position to respect and to transmit” the

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3. Id.
4. Id. at 386.
5. Id. at 385.
law's moral and philosophical enterprise.  

Of course, law professors—even those who would be reluctant, if not loathe, to think of themselves or their colleagues as moral philosophers—understand that, in their professional work, they must often struggle with moral issues (or, at least, with issues that are widely regarded to be moral issues). Indeed, we citizens of the legal academy spend a lot of time these days talking about “morality.” Law schools feature courses in “law and morality” (or something to that effect). One of the most prominent legal academics of his generation, Ronald Dworkin, is, whatever else he may be, a moral philosopher. So is another influential Oxford law professor: Dworkin’s colleague and nemesis, John Finnis. The University of Chicago Law School has appointed a moral philosopher, Martha Nussbaum, to its faculty. A founding father of “law and economics,” Richard Posner, although not himself a moral philosopher, devoted the major part of his 1997 Oliver Wendell Holmes Lectures at Harvard to savaging what he called “academic moralism” and its practitioners, whom Posner termed “academic moralists.”

It is not surprising that law professors (among others) are engaged in moral controversies. Moral controversy is often at the center of legal controversy. Controversy about whether one or another practice (abortion, homosexuality, physician-assisted suicide, etc.) is morally permissible, at least in some instances, is often at the center of controversy about whether the practice should be legally permissible. Of course, one can believe a practice to be morally

6. Id. at 386.
8. I could go on listing the names of law professors, or former law professors, who are, whatever else they may be, moral philosophers: Charles Fried (Harvard), Michael Moore (University of Pennsylvania), Joseph Raz (Oxford and Columbia), Jeremy Waldron (Columbia), and so on. Some of my own work addresses issues in moral philosophy. See, e.g., MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES (1998) [hereinafter PERRY, HUMAN RIGHTS]; MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW (1988).

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. . . . 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.

Id. at 1648, 1649.
impermissible without also believing that the law ought to ban or otherwise regulate the practice. But a belief that a practice is morally impermissible is often an element in the argument that the law ought to regulate it. In any event, talk about morality is pervasive in the contemporary legal academy.

Notwithstanding all our discussion of morality, however, it is often obscure what we citizens of the legal academy are talking about when we use the term "morality." In many cases, it is clear that we are not all talking about the same thing. When is a reason for doing something, or for not doing something, a "moral" reason? What kind of reason is a "moral" reason? What does it mean to say that a reason is a "moral" reason? What is "morality" anyway?

Let us focus on actions of the most relevant sort: actions intended to serve the welfare of another person. (By "action," I refer to "not doing something" as well as to "doing something.") There are many kinds of reasons for acting in order to serve, rather than to ignore or

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One can also believe that particular instances of a practice—for example, physician-assisted suicide—are morally permissible while also believing that, all things considered, the law ought to ban the practice. As the Supreme Court explained in one of the physician-assisted suicide cases it decided in June 1997:

[The New York State Task Force on Life and the Law] expressed its concern that, because depression is difficult to diagnose, physicians and medical professionals often fail to respond adequately to seriously ill patients’ needs. Thus, legal physician-assisted suicide could make it more difficult for the State to protect depressed and mentally ill persons . . . .

Washington v. Glucksberg, 117 S. Ct. 2258, 2273 (1997). The Court then added:

[The State has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes. . . . We have recognized . . . the real risk of subtle coercion and undue influence in end-of-life situations. Similarly, the New York Task Force warned that “legalizing physician-assisted suicide would pose profound risks to many individuals who are ill and vulnerable. . . . The risk of harm is greatest for the many individuals in our society whose autonomy and well-being are already compromised by poverty, lack of access to good medical care, advanced age, or membership in a stigmatized social group.” . . . If physician-assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end-of-life health-care costs.

The State’s interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill persons from prejudice, negative and inaccurate stereotypes, and “societal indifference.” The State’s assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person’s suicidal impulses should be interpreted and treated the same way as anyone else’s.

Id.

even to attack, the welfare of another. I might have, for example, an economic reason for acting to serve your welfare: I can't do what I want to do this weekend unless I earn $100, and acting to serve your welfare is the only, or easiest, way for me to earn the money. I might also have a reason for acting to serve your welfare that does not depend on your ability or willingness to pay me for doing so. This additional reason might be a moral reason. But, again, what is a "moral" reason? When is a reason for acting to serve another's welfare a "moral" reason?

My aim in this brief Response is not to comment on what Elshtain says about "the econometric turn" or "the feminist turn." I substantially agree with what she says about each of these matters. My aim is more general. Elshtain and I have largely the same understanding of "moral." We reject what Elshtain refers to as "a strenuous Kantianism," and we accept, as Elshtain puts it, "a realist epistemology" lodged in "the conviction that there are truths to be discerned"—especially "the truths we have come to understand about human beings, the sorts of creatures they are, and the kind of treatment that should be theirs simply by virtue of their humanness." In this Response, I want to sketch my (and, I think, Elshtain's) non-Kantian understanding of "moral."

In particular, I want to suggest what "moral" argument—much of it, anyway—is about. As I will explain, "moral" argument is centrally addressed to one or both of two questions: "Which human beings ought we to care about?" and "What is truly good for those human beings we do or should care about?" Along the way, I will have a few words to say about two of the principal "moral" issues in today's culture wars: abortion and homosexuality.

My point of departure is this passage in Judge Posner's Holmes Lectures:

"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 various 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.\footnote{15}{Posner, supra note 9, at 1639.}
We may infer from this passage that for Judge Posner to say that a reason of the relevant sort—a reason for acting in order to serve another's welfare—is a "moral" reason is to say that the reason does not appeal either to one's self-interest or to one's emotional or sentimental concern for, or attachment to, the other person—or, indeed, to one's emotional or sentimental concern for, or attachment to, any other person. (Rather than say "one's emotional or sentimental concern for or attachment to," I will say simply one's "emotional concern (or concerns).") A "moral" reason, in Posner's view, is meant to "check" both one's self-interest and one's emotional concerns.16 Posner's way of speaking ("duties to others") fails to accommodate the common view that among the things that one morally ought or ought not to do are things that one ought or ought not to do to or for oneself—the common view, that is, that one has moral duties to oneself as well as to others.17 But for present purposes let us bracket that problem and inquire whether Posner's definition about what a "moral" reason is otherwise problematic. Posner's position is common among many contemporary secular moral theorists, especially those writing in the Kantian tradition.18 So in asking what a "moral" reason is, Posner's position is a good place to begin.

I have criticized Judge Posner's understanding of what a "moral" reason is elsewhere.19 This is not the place to rehearse my critique. I do want to note, however, that my criticism of Judge Posner's account of "moral" reasons is less a criticism of Posner than of contemporary secular moral theorists in the Kantian tradition, who have influenced Posner's understanding of the "moral" by insisting, in one way or another, that a reason that appeals to one's self-interest or emotional concerns is not a "moral" reason.20 (As Posner

16. Posner's position does not deny that one's self-interest or emotional concerns or both can support one's doing (or not doing) something that a "moral" reason also supports. But if my self-interest or emotional concerns lead me in one direction and a "moral" reason leads me in another, why should I follow—what reason do I have to follow—the moral reason? See infra note 37.

17. At one point, Posner refers not just to "others" but, even more extremely, to "unknown" others. See Posner, supra note 9, at 1661 (referring to "morality in its modern sense as a set of duties toward unknown persons"). Even "in its modern sense," however, morality is concerned with what we owe many "known" persons (spouse, children, parents, friends, for example) as well as what we owe "unknown persons."

18. See infra note 20 and accompanying text.


20. See Richard Rorty, Justice as a Larger Loyalty, in JUSTICE AND DEMOCRACY: CROSS-CULTURAL PERSPECTIVES 9 (Ron Bontekoe & Marietta Stephanidis eds., 1997). Rorty writes: Would it be a good idea to treat "justice" as the name for loyalty to a certain very large group, the name for our current largest loyalty, rather than the name for something distinct from loyalty? Could we replace the notion of "justice" with that of loyalty to that group—for example, one's fellow-citizens, or the human species, or all living things?
says, “Kant’s footprints are all over modern moral theory.”

Posner’s account of “moral” reasons, however, is a secondary aspect of his Holmes Lectures. His primary point is that “the type of moral theory I call ‘academic moralism’ . . . does not provide a solid basis for moral judgments, let alone for legal ones.”

His principal claim is not “that moral philosophy as a whole, much less 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.”

Let us assume for the sake of this discussion that Posner’s claim about “academic moralism” is sound. It does not follow that there is no meaningful possibility of productive moral argument. Indeed, Posner does not deny that moral argument can be productive—or, as he puts it, that “moral debate” can be “fruitful.” He contends only “that the fruitful moral debates take place outside the precincts of

Would anything be lost by this replacement?

Moral philosophers who remain loyal to Kant are likely to think that a lot would be lost. Kantians typically insist that justice springs from reason, and loyalty from sentiment. Only reason, they say, can impose universal and unconditional moral obligations, and our obligation to be just is of this sort. It is on another level from the sort of affectional relations that create loyalty. Jürgen Habermas is our most prominent contemporary philosopher to insist on this Kantian way of looking at things: the thinker least willing to blur either the line between reason and sentiment, or the line between universal validity and historical consensus. But contemporary philosophers who depart from Kant, either in the direction of Hume (like Annette Baier) or in the direction of Hegel (like Charles Taylor) or in that of Aristotle (like Alasdair MacIntyre), are not so sure.

Id. at 9. Rorty continues:

What Kant would describe as [a conflict] between moral obligation and sentiment, or between reason and sentiment, is, on a non-Kantian account of the matter, a conflict between one set of loyalties and another set of loyalties. The idea of a universal moral obligation to respect human dignity gets replaced by the idea of loyalty to a very large group—the human species.

Id. at 11. Reviewing T.M. Scanlon’s book, What We Owe to Each Other, Simon Blackburn writes that “[w]e can still do moral philosophy if we recognize that many of our concerns have passion and desire as their ancestors rather than truth and reason.” Simon Blackburn, Am I Right?, N.Y. TIMES BOOK REV., Feb. 28, 1999, at 24 (reviewing T.M. SCANLON, WHAT WE OWE TO EACH OTHER (1999)). Referring to “the view that reasons that are seen only in the pull of the will and of love are not real reasons at all,” Blackburn says: “[W]hen we reflect what a cold picture of human nature that [view] implies, I think we should find it rather sad.” Id.

21. Posner, supra note 9, at 1664 n.48; cf. Elshtain, supra note 2, at 390 (“[T]he task of defending moral propositions and principles is overtaken increasingly by neo-Kantian philosophers or post-structuralists who aim to undermine the neo-Kantian enterprise.”).

22. Posner, supra note 9, at 1638-39. Specifically, Posner contends:

My thesis has a strong form and a weak one. The strong form . . . 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.

Id. at 1639. For Posner’s explanation of what he means by “academic moralism,” see supra text accompanying note 9.

23. Posner, supra note 9, at 1655; see also Posner, supra note 10, at 1822-23 (elaborating this point).
Is Posner right? I am inclined to make a different, more agnostic claim: Whether or not fruitful moral debates take place outside the precincts of academic moralism, there is reason to doubt that such debates take place inside its precincts.

What is "moral" argument about? What is the subject matter of an argument such that we call it a "moral" argument? Whatever else it is about, "moral" argument is often about this: Which human beings ought we to care about? Which ones, that is, besides those we already happen to care about, those we already happen to be emotionally or sentimentally concerned for or attached to (ourselves, our families, our tribes, and so on)? Variations on the question include: Which human beings ought to be the beneficiaries of our respect? The welfare of which human beings ought to be the object of our concern? Which human beings are subjects of justice? Which are inviolable (or "sacred")? All human beings, or only some?24

Moreover, "moral" argument is also often about this: What is

24. Posner, supra note 9, at 1642.
25. But, as Charles Taylor has emphasized, "Anglo-Saxon moral philosophy has tended to see morality as concerned with questions of what we ought to do and to occlude or exclude questions about what it is good to be or what it is good to love." Charles Taylor, Iris Murdoch and Moral Philosophy, in IRIS MURDOCH AND THE SEARCH FOR HUMAN GOODNESS 3, 3 (Maria Antonaccio & William Schweiker eds., 1996) (emphasis added).

Consider Richard Rorty's comparison of "the rather rare figure of the psychopath, the person who has no concern for any human being other than himself," to "the much more common case: the person whose treatment of a rather narrow range of featherless bipeds is morally impeccable, but who remains indifferent to the suffering of those outside this range, the ones he or she thinks of as pseudohumans." Richard Rorty, Human Rights, Rationality, and Sentimentality, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 111, 123-24 (Stephen Shute & Susan Hurley eds., 1993). According to Rorty, moral philosophy, to its detriment, has "systematically neglected" the latter in favor of the former. See id. Rorty's "much more common case" is also much more common than the person at the other extreme from the psychopath: someone who cares deeply about the authentic well-being of every human being. We sometimes mark just how uncommon such persons are, in the real world, by calling them "saints."

There is a related question, but it is really just a variation on the question about which human beings are inviolable: Who is a human being; that is, what members of the species Homo sapiens are truly, fully human? Women? Nonwhites? Jews? Cast as the claim that only some individuals are human beings, the claim that only some human beings are inviolable has been, and remains, quite common. According to Nazi ideology, for example, Jews were pseudohumans. See Johannes Morsink, World War Two and the Universal Declaration, 15 HUM. RTS. Q. 357, 363 (1993). There are countless other examples, past and present:

Serbian murderers and rapists do not think of themselves as violating human rights. Further they are not doing these things to fellow human beings, but to Muslims. They are not being inhuman, but rather are discriminating between the true humans and the pseudohumans. They are making the same sort of distinction as the Crusaders made between the humans and the infidel dogs, and the Black Muslims make between humans and blue-eyed devils. [Thomas Jefferson] was able both to own slaves and to think it self-evident that all men are endowed by their creator with certain inalienable rights. He had convinced himself that the consciousness of Blacks, like that of animals, "participates more of sensation than reflection." Like the Serbs, Mr. Jefferson did not think of himself as violating human rights.

The Serbs take themselves to be acting in the interests of true humanity by purifying the world of pseudohumanity.

Rorty, supra, at 112; see also id. at 125.
good—truly good—for those we do or should care about (including ourselves)? And what is bad for them? In particular: What are the requirements of one’s well-being? (Again, the “one” may be, at one extreme, a particular human being or, at the other, each and every human being.) What is friendly to (the achievement of) one’s well-being, and what is hostile to it? What is conducive to or even constitutive of one’s human well-being, and what impedes or even destroys it? 26

In defining “moral” argument in this way, I am not suggesting that “moral” argument is not sometimes about other important subjects too: Should I act in a way that is good for A in one respect but bad for her in another? Or in a way that is good for A but not good, or even bad, for B? Or in a way that is good for me but not good, or even bad, for you? According to the Gospel vision, that I should love the Other does not mean that I should not love myself too; I should love the Other “as myself.” 27 But “moral” argument is often and even preeminently about these two issues: Which human beings ought we to care about? And what is truly good for those we do or should care about—and what is bad for them? In a sense, the second question—or at least a particular instance of it—is, existentially, the more fundamental of the two. Normally, one cares about oneself; one is committed to one’s own welfare. So a particular instance of the question, “What is truly good for those we do or should care about?” is the question, “What is truly good for oneself?” 28 And a

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26. Of course, achieving well-being is not an either-or matter, but a question of degree.
27. The Gospel according to Matthew relates:

But when the Pharisees heard that he had silenced the Sadducees they got together and, to put him to the test, one of them put a further question, “Master, which is the greatest commandment of the Law?” Jesus said to him, “You must love the Lord your God with all your heart, with all your soul, and with all your mind. This is the greatest and the first commandment. The second resembles it: You must love your neighbor as yourself.”


28. Stephen Scott writes:

When he was deliberating about how to live, St. Augustine asked, “What does anything matter, if it does not have to do with happiness?” His question requires explanation, because he is not advising selfishness nor the reduction of other people to utilities, and even qualification, because other things can have some weight. All the same, the answer he expects is obviously right: only a happy life matters conclusively. If I had a clear view of it, I could have no motive to decline it, I could regret nothing by accepting it, I would have nothing about which to deliberate further.

Stephen Scott, Motive and Justification, 85 J. PHIL. 479, 499 (1988). On the term “happiness,” see Julia Annas, Virtue and Eudaimonism, 15 SOC. PHIL. & POL’Y 37, 53 n.35 (1998) (“Despite the differences between eudaimonia and happiness which I have explored in this essay, and which are striking to philosophers reflecting on virtue and happiness, ‘happiness’ is clearly the
particular instance of that question, in turn, is “Which human beings is it truly good for one to care about?” But it is useful, I think, to keep the two questions distinct: Which human beings ought we to care about? And what is truly good for those we do or should care about—and what is bad for them?

Consider the first of these two large questions. Some religions give a radically inclusive answer—for example: “Love one another; love one another just as I have loved you.” Moreover, much of modern correct translation for *eudaimonia* in ancient literature of all kinds, and it would be a mistake to conclude that we should translate *eudaimonia* by some other term.”. But see Richard Taylor, *Ancient Wisdom and Modern Folly*, 13 MIDWEST STUD. IN PHIL. 54, 57, 58 (1988) (“The Greek *eudaimonia* is always translated ‘happiness,’ which is unfortunate, for the meaning we attach to the word *happiness* is thin indeed compared to what the ancients meant by *eudaimonia*. Fulfillment might be a better term, though this, too, fails to capture the richness of the original term. . . . The concept of happiness in modern philosophy, as well as in popular thinking, is superficial indeed in comparison.”).

29. According to the Gospel vision, the answer is that each and every human being is a child of God and a sister/brother to oneself. No life better befits us as God’s children, no life better fulfills us as beings created as God has created us, than to “love one another, love one another just as I have loved you.” *John* 13:34. “We are well aware that we have passed over from death to life because we love our brothers. Whoever does not love, remains in death.” *John* 3:14.

Such a conception of human good is not confined to Christianity or even to the Semitic spiritualities. For many Buddhists, for example, the good life centrally involves compassion (*karuna*) for all sentient creatures and therefore for all human beings. Moreover, one need not be religious to believe that the perfect way of life for human beings—the most deeply satisfying way of life of which human beings, as participants in a shared humanity, are capable—is one in which human beings “love one another.” See KRISTEN RENWICK MONROE, THE HEART OF ALTRUISM: PERCEPTIONS OF A COMMON HUMANITY 238 (1996) (“We do good because that is what makes us human, fully and richly human, and not just greedy and graspingly self-centered.”).

30. For Christians, the basic shape of the good life is indicated by the instruction given by Jesus at a Passover seder on the eve of his execution: “I give you a new commandment: love one another; you must love one another just as I have loved you.” *John* 15:12, 17. The “one another” is radically inclusive:

You have heard how it was said, You will love your neighbor and hate your enemy. But I say this to you, love your enemies and pray for those who persecute you; so that you may be children of your Father in heaven, for he causes his sun to rise on the bad as well as the good, and sends down rain to fall on the upright and the wicked alike. For if you love those who love you, what reward will you get? Do not even the tax collectors do as much? And if you save your greetings for your brothers, are you doing anything exceptional? Do not even the gentiles do as much? You must therefore set no bounds to your love, just as your heavenly Father sets none to his.

*Matthew* 5:43-48; see also *Luke* 6:27-35. Recall, too, the Parable of the Good Samaritan:

But the man was anxious to justify himself and said to Jesus, “And who is my neighbour?” In answer Jesus said, “A man was once on his way down from Jerusalem to Jericho and fell into the hands of bandits; they stripped him, beat him and then made off, leaving him half dead. Now a priest happened to be travelling down the same road, but when he saw the man, he passed by on the other side. In the same way a Levite who came to the place saw him, and passed by on the other side. But a Samaritan traveller who came on him was moved with compassion when he saw him. He went up to him and bandaged his wounds, pouring oil and wine on them. He then lifted him onto his own mount and took him to an inn and looked after him. Next day, he took out two denarii and handed them to the innkeeper and said, ‘Look after him, and on my way back I will make good any extra expense you have.’ Which of these three, do you think, proved himself a neighbour to the man who fell into the bandits’ hands?” [The man] replied, “The one who showed pity towards him.” Jesus said to him, “Go, and do the same.
secular moral philosophy reflects its religious genealogy in giving a similarly inclusive answer. Indeed, the proposition that every

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yourself.”

Luke 10:29-37. In The New Jerusalem Bible, a footnote attached to “Samaritan” explains that “[t]he contrast is between the element in Israel most strictly bound to the law of love, and the heretic and stranger... from whom normally only hate could be expected.” THE NEW JERUSALEM BIBLE 1707 (Henry Wansbrough ed., 1985).

According to the Gospel vision, then, we have reason to care about every human being—indeed, we have reason to love (in the sense of agape) every human being. We have reason to respect every human being; we have reason to be concerned about the well-being of every human being. All human beings are subjects of justice; all are inviolable. See generally GARTH L. HALLETr, CHRISTIAN NEIGHBOR-LOV: AN ASSESSMENT OF SIX RIVAL VERSIONS (1989); THE LOVE COMMANDMENTS: ESSAYS IN CHRISTIAN ETHICS AND MORAL PHILOSOPHY (Edmund N. Santurri & William Werpehowski eds., 1992).

31. There are exceptions. For an example of a morality based on rational self-interest, see David Gauthier, Rational Constraint: Some Last Words, in CONTRACTARIANISM AND RATIONAL CHOICE: ESSAYS ON DAVID GAUTHIER’S MORALS BY AGREEMENT 323, 330 (Peter Vallentyne ed., 1991) (arguing “that rational persons will recognize a role for constraints, both unilateral and mutual, in their choices and decisions, that rational persons would agree ex ante on certain mutual constraints were they able to do so, and that rational persons will frequently comply with those mutual constraints in their interactions.”). As one commentator has observed, “[Gauthier’s] main interest is to give an account of rational and impartial constraints on conduct. If this does not capture the traditional conception of morality, so much the worse for the traditional conception. Rationality—not morality—is the important notion for him.” Peter Vallentyne, Gauthier’s Three Projects, in CONTRACTARIANISM AND RATIONAL CHOICE: ESSAYS ON DAVID GAUTHIER’S MORALS BY AGREEMENT, supra, at 1, 2. Vallentyne continues:

[Gauthier’s contractual] view of the relationship between the individual and society has some implications about which even the most committed contractarians are uneasy. If justice is wholly a matter of reciprocity, do we have any obligation to support people who are so severely handicapped that they can offer us nothing in return? ... Gauthier has to concede that the handicapped lie ‘beyond the pale of morality tied to mutuality’; if we have moral duties in these cases, [Gauthier’s] theory cannot account for them. Each of us may feel sympathy for the handicapped, and if so, the welfare of the handicapped will be among the ends we pursue; but this is a matter of preference, not moral obligation.

Id.; cf. Robert Sugden, The Contractarian Enterprise, in RATIONALITY, JUSTICE AND THE SOCIAL CONTRACT: THEMES FROM MORALS BY AGREEMENT 1, 8 (David Gauthier & Robert Sugden eds., 1993) (“At the core of [Gauthier’s project] is the thought that traditional moral theory relies on the supposed existence of entities, such as God or goodness, which are external to human life yet somehow matter. A defensible morality should dispense with such mysterious entities, and accept that life has no meaning outside itself.”).

Gauthier has written that Morals By Agreement is an attempt to challenge Nietzsche’s prescient remark, “As the will to truth... gains self-consciousness... morality will gradually perish.” It is an attempt to write moral theory for adults, for persons who live consciously in a post-anthropomorphic, post-theocentric, post-technocratic world. It is an attempt to allay the fear, or suspicion, or hope, that without a foundation in objective value or objective reason, in sympathy or in sociality, the moral enterprise must fail.

David Gauthier, Moral Artifice, 18 CAN. J. PHIL. 385, 385 (1988). In the end, however, Gauthier does not challenge Nietzsche so much as he embraces a Nietzschean conception of justice. Nietzsche wrote:

Justice (fairness) originates among those who are approximately equally powerful, as Thucydides... comprehended correctly... [J]ustice is repayment and exchange on the assumption of an approximately equal power position. ... Justice naturally derives from prudent concern with self-preservation; that means, from the egoism of the consideration: “Why should I harm myself uselessly and perhaps not attain my goal anyway?”

human being is inviolable (or some functionally equivalent proposition) is axiomatic for so many secular moralities that many secular moral philosophers have come to speak of “the moral point of view” as that view according to which “every person [has] some sort of equal status.” 32 Bernard Williams has noted:

[I]t is often thought that no concern is truly moral unless it is marked by this universality. For morality, the ethical constituency is always the same: the universal constituency. An allegiance to a smaller group, the loyalties to family or country, would have to be justified from the outside inward, by an argument that explained how it was a good thing that people should have allegiances that were less than universal. 33

But, as I have explained elsewhere, it is far from obvious what it means for one who is not a religious believer to give the radically inclusive answer—to say, for example, that each and every human being is inviolable. 34 Let me put the point somewhat differently. Assume that one asks: Why ought we to care about every human being; why ought we to respect every human being; why ought we to be concerned about the well-being of every human being; why are all human beings subjects of justice; why are all inviolable? Christianity has an intelligible answer, although some people might not find it persuasive: Every human being is a child of God and a sister or brother to oneself, and no life better befits us as God’s children, no life better fulfills us as beings created as God has created us (imago Dei) than to “love one another” just as Jesus loved us. “We are well aware that we have passed over from death to life because we love our brothers. Whoever does not love, remains in death.” 35 Indeed, one might, like Nietzsche, find the answer distasteful. It is not clear, however, that academic moralism has an intelligible answer, much less a persuasive one. Listen, in that regard, to Jürgen Habermas: “It is true that a philosophy that thinks postmetaphysically cannot answer the question that [David] Tracy . . . calls attention to: why be moral at all?” 36 Commenting critically on moral theories of the sort

34. See Perry, Human Rights, supra note 8, at 11-41; Perry, supra note 19.
35. 1 John 3:14.
36. Jürgen Habermas, Transcendence from Within, Transcendence in this World, in Habermas, Modernity, and Public Theology 226, 239 (Don Browning & Francis Schüssler Fiorenza eds., 1992). Habermas’s “why be moral at all?” asks, why accept “the moral point of view,” that is, the view according to which “every person [has] some sort of equal status.” What Habermas then goes on to say is really quite remarkable:

At the same time, however, this philosophy can show why this question does not arise meaningfully for communicatively socialized individuals. We acquire our moral intuitions in our parents’ home, not in school. And moral insights tell us that we do not have any
that Posner dubs "academic moralism," Charles Taylor has observed:

[Such theories] leave us with nothing to say to someone who asks why he should be moral. . . . But this could be misleading, if we seemed to be asking how we could convince someone who saw none of the point of our moral beliefs. There is nothing we can do to "prove" we are right to such a person. But imagine him to be asking another question: he could be asking us to make plain the point of our moral code, in articulating what's uniquely valuable in cleaving to these injunctions [e.g., act "impartially"]. Then the implication of these theories is that we have nothing to say which can impart insight. We can wax rhetorical and propagandize, but we can't say what's good or valuable about [the injunctions], or why they command assent. 37

37. TAYLOR, supra note 1, at 3. Recall here the passage by Taylor I have put at the beginning of this Response. Taylor's book, Sources of the Self, is, among other things, a powerful argument for a different, larger understanding of "moral." See id. at 4, 14-15, 63-64, 79, 87; see also Taylor, supra note 25, at 3; Charles Taylor, A Most Peculiar Institution, in WORLD, MIND, AND ETHICS: ESSAYS ON THE ETHICAL PHILOSOPHY OF BERNARD WILLIAMS 132 (J.E.J. Altham & Ross Harrison eds., 1995).

The effort to evade the why-be-moral question by distinguishing between "reasons" and "motives" is unavailing—as, indeed, is implicit in Taylor's comments. Henry B. Veatch writes:

[T]he stock answer given to this question ["Why should I be moral?"] has long been one of trying to distinguish between a reason and a motive for being moral. For surely, it is argued, if I recognize something to be my duty, then surely I have a reason to perform the required action, even though I have no motive for performing it. In fact, even to ask for a motive for doing something, when one already has a reason for doing it, would seem to be at once gratuitous and unnecessary—at least so it is argued. Unhappily, though, the argument has a dubious air about it at best. For does it amount to anything more than trying to prove a point by first attempting to make a distinction, implying that the distinction is no mere distinction, but a distinction with a difference—viz. the distinction between a reason and a motive. But then, having exploited the distinction, and yet at the same time insinuating that one might conceivably have a reason for doing something, but
Nonetheless, there is substantial agreement among most citizens of liberal democracies—believers and nonbelievers alike—about the answer to the first large question. Among these citizens, moral argument is not likely to be about which human beings are subjects of justice.38 (At least, it is not likely to be about which born human beings are subjects of justice.) Indeed, the Constitution of the United States is understood to declare that no human being is inferior to any other on the basis of race, sex, religion, and so on. And according to the idea of human rights to which the United States and other liberal democracies are committed, each and every (born) human being is inviolable.

There is, however, as I have just signaled, a glaring exception to this generalization. One of the central issues in the abortion controversy is whether we should care as much about human fetuses as about human infants—whether unborn human beings, no less than born human beings, are subjects of justice. Robert George has written that “[o]pponents of abortion . . . view all human beings, including the unborn . . . as members of the community of subjects to whom duties in justice are owed . . . . The real issue of principle between supporters of abortion . . . and opponents . . . has to do with the question of who are subjects of justice.” 39 In George’s view, “[t]he challenge to the orthodox liberal view of abortion . . . is to identify nonarbitrary grounds for holding that the unborn . . . do not qualify as subjects of justice.” 40 Given my emphasis in this essay on religiously-based moralities, and especially on the role of such

38. Samuel Brittan writes:

[Perhaps the litmus test of whether the reader is in any sense a liberal or not is Gladstone’s foreign-policy speeches. In [one such speech,] taken from the late 1870s, around the time of the Midlothian campaign, [Gladstone] reminded his listeners that “the sanctity of life in the hill villages of Afghanistan among the winter snows, is as inviolable in the eye of almighty God as can be your own . . . . that the law of mutual love is not limited by the shores of this island, is not limited by the boundaries of Christian civilization; that it passes over the whole surface of the earth, and embraces the meanest along with the greatest in its unmeasured scope.” By all means smile at the oratory. But anyone who sneers at the underlying message is not a liberal in any sense of that word worth preserving.


40. Id. at 466. George adds: “Frankly, I doubt that this challenge can be met. In any event, Dworkin here fails to make much progress toward meeting it.” Id. at 446.
moralities in the abortion controversy, it bears mention here that one need not be a religious believer to doubt that there are any such “nonarbitrary grounds.”

With the exception—the large exception—of the abortion controversy, moral argument among citizens of liberal democracies is less likely to be about which human beings are subjects of justice than about the requirements of well-being, whether the well-being of a particular human being or, at the limit, the well-being of each and every human being. I should note here the currently fashionable view that universalistic talk about human well-being—that is, about the well-being of human beings as such—is mistaken because there is no such thing, but only the well-being of this or that human being or group of human beings.

41. Amy Gutman and Dennis Thompson have recently made a different but closely related point. In their view, “[a]lthough pro-life advocates sometimes invoke a religious conception of human life, the belief that the fetus is a human being with constitutional rights does not depend on a distinctively religious conception of personhood.” AMY GUTMAN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT: WHY MORAL CONFLICT CANNOT BE AVOIDED IN POLITICS, AND WHAT SHOULD BE DONE ABOUT IT 75 (1996).

42. As Bernard Williams has noted,

[Richard] Rorty is so insistent that we cannot, in philosophy, simply be talking about human beings, as opposed to human beings at a given time.... Rorty... contrasts the approach of taking some philosophical problem and asking... “What does it show us about being human?” and asking, on the other hand, “What does the persistence of such problems show us about being twentieth-century Europeans?”

Bernard Williams, Auto-da-Fé, N.Y. REV., Apr. 28, 1983, at 33 (emphasis in original). For an example of what Williams is talking about, see RICHARD RORTY, CONSEQUENCES OF PRAGMATISM 173-74 (1982). Rorty explains:

[The pragmatist] can only say... that truth and justice lie in the direction marked by the successive stages of European thought. This is not because he knows some “necessary truths” and cites these examples as a result of his knowledge. It is simply that the pragmatist knows no better way to explain his convictions than to remind his interlocutors of the position they both are in, the contingent starting points they both share, the floating, ungrounded conversations of which they are both members. This means that the pragmatist cannot answer the question “What is so special about Europe?” save by saying “Do you have anything non-European to suggest which meets our European purposes better?” He cannot answer the question “What is so good about the Socratic virtues, about Miltonic free encounters, about undistorted communication?” save by saying “What else would better fulfill the purposes we share with Socrates, Milton, and Habermas?”

*Id.; cf. EDMUND LEACH, SOCIAL ANTHROPOLOGY 56 (1982) (“I have seen in my time Frenchmen, Italians, and Russians. I even know, thanks to Montesquieu, that one may be a Persian, but as for Man, I declare that I have never met him in my life; if he exists it is without my knowledge.”) (quoting Joseph de Maistre, Considerations sur la France (1797) (commenting on then-recent developments in revolutionary France)).

Posner espouses, in his Holmes Lectures, a kind of moral relativism. He writes: “[M]orality is local. There are no interesting moral universals.” Posner, supra note 9, at 1640. He also explains, “I don’t think that there are universal moral truths that have any bite.” *Id.* at 1645. But Posner’s discussion of moral relativism is brief, asserted rather than argued, and—as discussions of moral relativism frequently are—confused. In particular, Posner’s discussion seems confused as between (what I have elsewhere called) “anthropological relativism” and “epistemological relativism.” I have elsewhere disentangled several different strands of relativism relevant to moral discourse, and I have appraised the strengths and weaknesses of the various relativisms. See PERRY, HUMAN RIGHTS, supra note 8, at 57-86; see also Martha C. Nussbaum, *Public Philosophy and International Feminism*, 108 ETHICS 762 (1998).
Let me now mention another great controversy in today's culture wars: homosexuality. Whereas the abortion controversy primarily implicates the question, "Which human beings ought we to care about?", the homosexuality controversy implicates mainly the other large moral question, "What is truly good for those we do or should care about—and what is bad for them?" The controversy over the morality of homosexual sexual relationships is centrally an argument about the requirements of human well-being; it is centrally an argument about the nature of a human being's true interests and about what kind of relationships do or do not serve one's true interests. A theologically conservative religious believer might object that for him or her, the argument about the morality of homosexual sexual relationships is not about the requirements of human well-being, but rather about God's revealed will. However, is it plausible to believe that a loving God—indeed, a God who is love—has fashioned human nature—has defined the requirements of human well-being—in such a way that some kinds of homosexual sexual relationships can be, for some, truly and deeply fulfilling for them as human beings, but at the same time has willed that no human being ever enter into any such relationship?43

If not, the argument about the morality of homosexual sexual relationships is, whatever else it may be, an argument about the requirements of human well-being. Some theologically conservative religious believers hold that the Bible answers, at least implicitly, the

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43. Peter Cicchino notes:

- Consider the question of whether God's commands are intrinsically related to the flourishing of human life. If God's commands are only accidentally related to human flourishing, then God is a capricious tyrant. If God's commands inhibit or prevent human flourishing, then God is a sadistic tyrant. If God's commands are intrinsically related to human flourishing, then presumably we have a reason for obeying those commands independent of whether God commands them: namely, our own good. . . .

Letter from Peter Cicchino, Assistant Professor of Law, American University School of Law, to Michael J. Perry, University Distinguished Chair in Law, Wake Forest University School of Law (Sept. 2, 1998) (on file with author).
question whether any kind of homosexual sexual relationship can be, for anyone, truly and deeply fulfilling. But I concur in the judgment of Anthony of the Desert, a fourth-century Christian monk, that we must look to a different book for our answer: "My book, O philosopher, is the nature of created things, and any time I wish to read the words of God, the book is before me." As I have argued elsewhere, in answering the question whether any kind of homosexual sexual relationship can be, for anyone, truly and deeply fulfilling, we religious believers cannot but consult and sift historically extended human experience.

Earlier I said that given what "moral" argument is fundamentally about, there is reason to doubt that productive moral argument takes place inside the precincts of academic moralism. In the shadow of the great contemporary moral controversies over abortion and homosexuality—controversies that have been so long-lived—one can easily and reasonably doubt that productive moral argument takes place either inside or outside the precincts of academic moralism. But, pace Posner, the present issue concerns the likelihood of productive moral discourse inside the precincts of academic moralism. More generally, what persons are best positioned to discern what morality requires?

Consider the first of the two large "moral" questions I have identified in this essay: Which human beings ought we to care about—which ones, that is, besides those we already happen to care about, those we already happen to be emotionally or sentimentally concerned for or attached to: ourselves, our families, our tribes, and so


What Catholic moral theologian James Burtchaell has explained about the nature of moral inquiry or discernment in the Catholic religious tradition is true, I think, of any religious tradition—though not every religious tradition will accept it as true:

The Catholic tradition embraces a long effort to uncover the truth about human behavior and experience. Our judgments of good and evil focus on whether a certain course of action will make a human being grow and mature and flourish, or whether it will make a person withered, estranged and indifferent. In making our evaluations, we have little to draw on except our own and our forebears' experience, and whatever wisdom we can wring from our debate with others... Nothing is specifically Christian about this method of making judgments about human experience. That is why it is strange to call any of our moral convictions "religious," let alone sectarian, since they arise from a dialogue that ranges through so many communities and draws from so many sources.

In the real world, if not in every academic moralist's study, one's answer to this question has long been intimately bound up with one's answer to certain other fundamental questions: Who are we? Where did we come from; what is our origin, our beginning? Where are we going; what is our destiny, our end? What is the meaning of suffering? Of evil? Of death? And there is the cardinal question, the question that comprises many of the others: Is human life ultimately meaningful or, instead, ultimately meaningless and absurd? If any questions are fundamental, these questions—"religious or limit questions"—are fundamental. Such questions—"naive" questions, "questions with no answers," "barriers that cannot be breached"—

47. See Denise Lardner Carmody & John Tully Carmody, Western Ways to the Center: An Introduction to Religions of the West 198-99 (1983) ("All people by nature desire to know the mystery from which they come and to which they go."); see also Abraham J. Heschel, Who Is Man? 28 (1965) ("In an old rabbinic text three other questions are suggested: "Whence did you come?" 'Whither are you going?' 'Before whom are you destined to give account?'").

48. Communities, especially historically extended communities (or, "traditions") are the principal matrices of religious answers to such questions: Not the individual man nor a single generation by its own power, can erect the bridge that leads to God. Faith is the achievement of many generations, an effort accumulated over centuries. Many of its ideas are as the light of the star that left its source a long time ago. Many enigmatic songs, unfathomable today, are the resonance of voices of bygone times. There is a collective memory of God in the human spirit, and it is this memory which is the main source of our faith.

Abraham J. Heschel, Faith, 10 The Reconstructionist (1944). For a later statement on faith, incorporating some of the original essay, see Abraham J. Heschel, Man Is Not Alone 159-76 (1951).


50. In Milan Kundera's The Unbearable Lightness of Being, the narrator, referring to "the questions that had been going through Tereza's head since she was a child," says that the only truly serious questions are ones that even a child can formulate. Only the most naive of questions are truly serious. They are the questions with no answers. A question with no answer is a barrier than cannot be breached. In other words, it is questions with no answers that set the limits of human possibilities, describe the boundaries of human existence.

Milan Kundera, The Unbearable Lightness of Being 139 (1984); see also Robert Coles, The Spiritual Life of Children 37 (1990) ("The questions Tolstoy asked, and Gauquin in, say, his great Tahiti triptych, completed just before he died ('Where Do We Come From? What Are We? Where Are We Going?'), are the eternal questions children ask more intensely, unremittingly, and subtly than we sometimes imagine."). After I prepared the first draft of this essay, I noticed that in the introduction to his recent encyclical, Fides et Ratio, issued on Sept. 14, 1998, John Paul II wrote:

Moreover, a cursory glance at ancient history shows clearly how in different parts of the world, with their different cultures, there arise at the same time the fundamental questions which pervade human life: Who am I? Where have I come from and where am I going? Why is there evil? What is there after this life? These are the questions which we find in the sacred writings of Israel and also in the Veda and the Avesta; we find them in the writings of Confucius and Lao-Tze, and in the preaching of Tirthankara and Buddha; they appear in the poetry of Homer and in the tragedies of Euripides and Sophocles as they do in the philosophical writings of Plato and Aristotle. They are questions which have their common source in the quest for meaning which has always compelled the human heart. In fact, the answer given to these questions decides the direction which people seek to give to their lives.
are "the most serious and difficult... that any human being or society must face...." 51 John Paul II is clearly right in his recent encyclical, *Fides et Ratio*, that such questions "have their common source in the quest for meaning which has always compelled the human heart" and that "the answer given to these questions decides the direction which people seek to give to their lives." 52 Why should we think that academic moralists, as such, have some specialized knowledge, some expertise, that enables them to struggle with one or more of these questions, particularly the question "Which human beings ought we to care about?" more effectively than other persons either inside or outside the academy? That we should think so is far from obvious.

Consider now the second of the two large "moral" inquiries: *What is good—truly good—for those we do or should care about (including ourselves)? And what is bad for them? What are the requirements of well-being, whether the well-being of some human beings or that of each and every human being? What is conducive to or even constitutive of well-being, and what impedes or even destroys it?* Why should we think that academic moralists, as such, are more "expert" than other persons (both inside and outside the academy) at pursuing this inquiry? Imagine this multiple choice question: 53 "Of the following, who are best prepared, in virtue of training and practice, to address difficult, controversial questions about the requirements of human well-being and the conditions of human fulfillment? (a) psychologists; (b) anthropologists; (c) pastoral counselors; (d) social workers; (e) academic moralists." It is an impossible call as among (a) through (d), but isn't (e) easily ruled out as a serious possibility?

Now, a brief concluding comment. Recall Jean Bethke Elshtain's invitation to law professors to think of ourselves "as ethical and moral philosopher[s]." 54 There is no reason to think that law professors, as such, are more likely than other academics to engage in productive moral discourse. But neither is there any reason to

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51. DAVID TRACY, THE ANALOGICAL IMAGINATION 4 (1981). Tracy adds: "To formulate such questions honestly and well, to respond to them with passion and rigor, is the work of all theology.... Religions ask and respond to such fundamental questions... Theologians, by definition, risk an intellectual life on the wager that religious traditions can be studied as authentic responses to just such questions." *Id.*

52. JOHN PAUL II, supra note 50, at Introduction, pt.1; see also *id.* at ch. 3, pt. 26. *Fides et Ratio* would more accurately be named *Fides et Philosophia.*


54. Elshtain, supra note 2, at 385; see also *supra* text accompanying notes 2-6.
think that we are less likely to do so than are Posner’s “academic moralists.” Moreover, because we are professionally concerned with a variety of political conflicts about what conduct the law ought or ought not to ban, or require, or otherwise regulate, law professors have many more occasions than many other academics, including academic moralists, to struggle with moral issues not as rarefied abstractions but as the real-world, flesh-and-blood questions that they typically are—and, at the limit, as the life-and-death questions that they sometimes are. A suggestive comment by Michele Moody-Adams, in her book *Fieldwork in Familiar Places*, is apt here: “[T]here is often more to be learned from the engaged moral inquiry of ‘workmanlike’ moral agents and inquirers than from the disengaged speculations of moral theorists and social scientists.”

Whether or not law professors are prepared to accept Elshtain’s invitation—an invitation surely more sobering than flattering—to think of ourselves “as ethical and moral philosopher[s],” we should understand that there is, finally, no good reason for law professors, *as such*, to defer to academic moralists, *as such*, in navigating the difficult moral issues, large and small, that confront, perplex, and divide us.

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As someone who has spent his adult life—as a Jesuit and as an attorney—in direct services to poor people, to prisoners, to the homeless, to gay and lesbian youth, I am amazed at the lack of such direct experience with poor and suffering human beings among my friends and colleagues in the academy and especially among those who write academic moral philosophy. Pedro Arrupe, former General Superior of the Society of Jesus, used to exhort all Jesuits, especially those in intellectual service, to go to the soup kitchens, shelters, and prisons and, at a minimum, tithe time to the materially poor and socially disenfranchised. This, I take it, was no more than an extension of what Ignatius had done when he allowed Jesuits to act as advisors to the bishops at the Council of Trent: each Jesuit was to serve several hours each day in hospitals for the poor. And medieval hospitals were about as hellish as human institutions get. Arrupe’s exhortations can also be seen as integral to the praxis-reflection model, and its demand for existential integrity, that the theology of liberation in Latin America had developed in the 1970s.