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Forum

ON THE ALLEGED “SOPHISTICATION” OF ACADEMIC MORALISM

*Richard A. Posner**

The editors of the *Northwestern University Law Review* have graciously invited me to respond to Professor Waldron’s review of my book *The Problematics of Moral and Legal Theory*.¹ Waldron’s review, though not uncritical, is generous, and it would be churlish of me to take sharp issue with it. More important than being generous, it gives an accurate impression of the book, thus fulfilling the reviewer’s elementary yet often neglected duty of telling readers enough about a book to enable them to make an informed decision about whether to read it. But several of the issues that Waldron raises may benefit from a further discussion. They all relate to the question whether normative moral philosophy is intellectually “sophisticated.” Waldron believes it is; I believe it is not.

The first issue is slight, but leads to the heart of our disagreement. He ascribes to me the view that “despite law professors’ desperate eagerness to be well thought of by philosophers, their efforts in this regard end up eliciting nothing but amusement from those specialists who actually understand what (if anything) makes philosophy worthwhile.”² He does not offer a page reference for this point supposedly of mine, and I don’t think he could. It is true that law professors who use normative moral philosophy in their work would like to be well thought of by philosophers, but I think many are. Certainly that is true of Ronald Dworkin, Joseph Raz, Charles Fried, Michael Moore, and others I could name. They may lack the subtlety or in some cases the philosophical erudition and range of reference, and perhaps the imagination, of the very best professional normative moral philosophers, but in a blindfold test it would be difficult to tell that they are merely law professors.

For normative moral philosophy, or, as I sometimes call it, “academic moralism,” is not an arcane or technical field, like music composition or high-energy physics, or, for that matter, modern economics. It is a body of texts, and though many of them are impenetrable without long study, people

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¹ Jeremy Waldron, *Ego-Blotted Hovel*, 94 NW. U. L. REV. 597 (2000).

² *Id.* at 598.

can write competently about the problems of moral philosophy without a first-hand acquaintance with the most difficult of those texts. The canonical texts are little more than window dressing. Academic moralism is a thin and flabby field, a game played without rules, a dressing up of personal values and political preferences in a solemn and censorious diction of duty and right.

Notice that Waldron, in the passage I quoted, wrote “philosophers” and “philosophy” whereas I talk in my book about “normative moral philosophy” or “academic moralism.” Waldron is aware that I am not against philosophy *tout court*, or even moral philosophy *tout court*, but in places he seems to forget these distinctions,³ and they are very important. I have written extensively about the application of philosophy to law and have even used philosophy in a number of my judicial opinions. Although I have tended to use epistemology, philosophy of science, and philosophy of action rather than moral philosophy, I greatly admire the kind of moral philosophy that one finds, for example, in Nietzsche and, among contemporaries, in Bernard Williams—moral philosophy that consists of philosophizing *about* morality, as distinct from arguing for one moral position or another. It is only the efforts of philosophers, or of law professors using the methods of philosophy, to argue the pro’s or con’s of a moral or legal issue, such as abortion, or equality, or euthanasia, or homosexual rights, or capital punishment, that seem to me to lead nowhere.

Waldron believes that my arguments—not those for the uselessness of academic moralism for law, with which he agrees, but rather those for the futility of academic moralism for any purpose other than academic careerism—betray a certain lack of inwardness with the philosophical tradition and, as a result, will make few converts among professional philosophers. I am sure that he is right on both counts. I plead guilty to being “quite unsophisticated.”⁴ But let us see what lack of sophistication amounts to in this context. It amounts in the first place, Waldron says, to thinking that “if a belief in objective moral truth or falsity is not based on divine command, it can only be based on universal consensus.”⁵ I don’t think I said that, though reading back over the pages he cites I see how I might easily have been misunderstood. For I did observe that “divine command” is not a respectable grounding for philosophical assertions in modern philosophy departments, and I did remark the absence of any nonempty universal moral laws, and these observations are certainly relevant to an assessment of the possibility of objective moral statements.

I did not, however, infer from these points *alone* that there are no objective moral truths. I did not circumscribe the term “objective” so narrowly as Waldron supposes. All I meant by it is capable of persuading

³ See, e.g., *id.* at 602.

⁴ *Id.* at 599.

⁵ *Id.* See also *id.* at 608.

people by rational means to accept a proposition, even though their disposition is to reject it. That is easier to do if the proposition concerns some part of the physical world that is accessible to our senses (or the metaphysical, in a society in which theology has the authority of science), but I did not lay that down as a precondition. The important thing rather is that people share the premises from which argument or investigation begins. If they do not, they will not argue to a consensus, however powerful their intellects. It is precisely the absence of shared premises that defeats efforts to establish "objective" moral propositions. Not always, of course. People in the same society, or in different but similar societies, often share many of the same premises, and this opens up an area for potentially fruitful inquiry—as I pointed out. But very few of the moral disagreements with which anyone in this society is concerned are of that character—that is, are disagreements over the logical implications of shared moral premises or over the evidence pro or con some hypothesis founded on those premises. Instead, they are disagreements over the premises themselves (such as whether the fetus is ensouled, or whether one's life belongs to oneself or to the community, or whether society should try to maximize average or aggregate happiness or perhaps to do something quite different, or whether equality is the *summum bonum*), and thus they defy "rational" resolution.

Waldron points out that there is such moral heterogeneity in American society that I cannot be right in "assert[ing] that the ambit of moral claims is confined within the cultures or subcultures that provide their criteria for validity."⁶ I did not say that it was. Of course we make moral claims about other societies—we say, for example, that the Islamic code of criminal punishment is wrong, or that men shouldn't be permitted to have plural wives (at the same time). It's just that there is no objective procedure for arbitrating such claims. Waldron seems to agree, for he "suspect[s]" that I am right in suggesting that "intercultural moral judgments *are* expressive."⁷

Waldron says that in claiming that knowing the moral thing to do furnishes no motive for doing it, I have blundered all unknowingly into "a very complex and well-debated issue."⁸ He cites a single sentence in my book, where I indeed make the bald claim that he cites, but the sentence is part of an introduction, summarizing the views to be developed in the long chapter that ensues—where I discuss the particular issue of the motivational or causal force of moral beliefs at some length: not, it is true, with reference to the subtle disputations of the philosophers, but as an issue that can be resolved with the aid of common sense, social science, and empirical inquiry. For the question whether moral beliefs move people to action is not a philosophical question at all—it is a factual question, and the evidence suggests a negative answer. Consider the role of rationalization in allowing us to do—

⁶ *Id.* at 600.

⁷ *Id.* (emphasis in original).

⁸ *Id.*

with a good conscience—what we want to do for reasons having nothing to do with morality. The opportunity to rationalize one's way into any position that happens to promote one's self-interest construed without regard to morality is maximized in a pluralistic society such as that of modern America; the menu of moral postures to choose among is long enough to allow each of us to choose the moral code that lines up best with his or her structure of self-interested preferences.

Waldron points out that pragmatism is a slippery concept, which it is, and he argues that "it is simply question-begging to think that such debates can be superseded by a good-natured commitment to pragmatic amelioration."⁹ The "such debates" to which he is referring are "debates about what would count as making things better and debates about the fair distribution of improvements," debates that he says are "more or less unavoidable . . . in the disputes that face courts and legislatures."¹⁰ But it is not the goal of pragmatism to take over from moral philosophy and resolve the issues that moral philosophy cannot resolve. The pragmatists' hope is rather that by abstaining from moral disputation and focusing instead on the facts—by being, in short, a pragmatist—the judge or legislator may find some common ground after all. It is possible, for example, that if more people knew how partial-birth abortion does—and does not—differ from other forms of late-term abortion, and knew too the circumstances under which women decide to have such abortions, the people who are not at either extreme of the abortion debate but rather are centrists (that is, the majority) would discover once that they actually agreed about how it ought to be approached.

Waldron (and this is the last point of his that I want to comment on) makes a useful distinction, which he says, with some merit, that I overlooked, between "questions whose answers may require individuals to override self-interested or other inclinations" and questions "about what the law ought to be or how society's force ought to be deployed"—and the latter are not questions about "overcoming individual inclinations."¹¹ He thinks that obstacles to political action may not be "impervious to normative argument in the way that self-interested inclinations are."¹² (Notice that in emphasizing this distinction, Waldron is underscoring the motivational weakness of morality—the issue he had suggested that I had blundered into rather haplessly.)

I don't think the distinction does much work, or at least not the kind of work from which academic moralists might take comfort. The reason is that "inclinations" are everywhere. Waldron prefers to call these "intuitions" when the most obvious kinds of self-interest are at stake,¹³ but not

⁹ *Id.* at 601.

¹⁰ *Id.*

¹¹ *Id.* at 613.

¹² *Id.*

¹³ *Id.* at 616-18.

much turns on this distinction, which if anything undermines his point. Intuitions are a class of beliefs, and if I am right that moral beliefs are, by themselves, helpless to move us to action, it follows that moral intuitions, too, have to hook up to some motive (the position summarized in Hume's dictum that reason is and ought to be the slave of the passions) before they can alter behavior. The judge needs an "inclination" to decide for one party to a case rather than the other, the voter needs an "inclination" to vote for one candidate rather than another, and the legislator needs an "inclination" to vote for one bill or another. Any moral argument, if it is to have an effect on behavior, even if the behavior is of a political rather than a personal character, has to trigger an inclination. We all have inclinations concerning moral issues, and if I am right that moral discourse is indeterminate, there is no reason to think it likely to affect our views on those issues. If I am inclined to detest abortion—or to detest the right-to-life movement—I will have no difficulty finding a philosopher to give an aura of philosophical respectability to my inclination, should I be one of the rare people who is actually interested in what philosophers might have to say about an issue of public policy or, for that matter, of private morality.

It should be apparent that I agree with Waldron's basic point, that academic moralism has little if anything to offer law; but even on its home ground, academic moralism has less to recommend it than Waldron believes.

