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REPLY TO CRITICS OF THE PROBLEMATICS OF MORAL AND LEGAL THEORY

Richard A. Posner*

The Review is to be commended for having assembled so formidable an array of distinguished scholars well qualified to criticize my Holmes Lectures. Nussbaum is a leading normative moral philosopher (what I call in the Lectures an "academic moralist"), with a side interest in law. Dworkin is also a distinguished academic moralist, but in addition he is the leading scholar of jurisprudence in the English-speaking world and a prominent constitutional theorist. Dean Kronman has a background in moral philosophy that has informed most of his influential academic writings. And Justice Fried and Judge Noonan are probably the most distinguished living judges who, before ascending the bench, made important contributions as academics to both jurisprudence and moral theory. Those who think, as I do, that John Stuart Mill was correct when he said in the second essay in On Liberty that no position can be confidently affirmed until it has been tested in the fires of hostile criticism will understand the importance of my five critics' Responses — and of this Reply — to a proper evaluation of my Lectures.

Having now read the Responses, I am more confident of the position taken in the Lectures, although willing to concede the need for amplification or correction in several particulars. The many disagreements among the five critics, their own criticisms of academic moralism and its applicability to law, the vulnerability (which I shall try to demonstrate) of their arguments, the defensive cast of some of the Responses and the scornful tone of the others, their sheer length, and their failure (with the very partial exception of Dworkin's Response) even to attempt to demonstrate how moral reasoning can actually convince doubters or aid judges reinforce my belief in the essential soundness of the Lectures.

I. RONALD DWORFIN

I am grateful to Professor Dworkin for supplying — and on the very first page of his Response, where it cannot be missed — a potent new argument for my position. Let me restate it. Either my arguments against the usefulness of moral theory are successful, and then I

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win this debate hands down, or my arguments are, as he believes, unsuccessful ("spectacularly unsuccessful" is his formulation), and then I have proved (for I am a judge, and he is kind enough to describe me as "intelligent" and even "eminently," though he may be speaking tongue in cheek) that judges are indeed incapable of doing moral theory. But he gives me too much credit in supposing that I made bad arguments deliberately, setting springs to catch woodcocks.

As this example suggests, Dworkin's gifts include a skill in polemical thrust and parry that I, greatly to my regret, cannot match. But his polemical gift has its dark side. A reviewer of his most recent book remarks "Dworkin's relentless 'spin' and partisanship" and his "reluctance . . . to make and confront the best arguments against [his] own views." Evidence to support these criticisms is everywhere in Dworkin's Response, but particularly noteworthy is his accusation that I have misrepresented his views by endorsing Duncan Kennedy's summary of Dworkin's legal positions on civil disobedience, the prosecution of draft-card burners, and the role of distributive considerations. For it turns out that Kennedy's reading of Dworkin is more accurate than Dworkin's own. It is true that Dworkin's main argument about civil disobedience, including that of draft-card burners and other dissenters from the draft during the Vietnam War, is that the government ought not to have prosecuted these people, not that if it had done so they should have been acquitted. He reserves judgment on the question whether the Constitution required their acquittal. But he goes on to say that even if the laws under which the draft resisters were convicted are constitutional, the "Court should [have] acquit[ted]" these defendants, because "before its decision [upholding the constitutionality of the laws,] the validity of the draft was doubtful, and it is unfair to punish men for disobeying a doubtful law." An acquittal on this ground would, of course, be a judgment of law, albeit not a ruling on constitutionality. Dworkin claims that he has been "careful to say that [his] views about civil disobedience, including

3 See id.
4 See id. Dworkin is alluding to WILLIAM SHAKESPEARE, HAMLET, act 1, sc. 3, l. 115, at 205 (Harold Jenkins ed., Methuen 1982). If the analogy is carried through, I am Hamlet and Dworkin is Ophelia!
6 He does say, however, that "a reasonable and competent lawyer might well think that [the arguments for the unconstitutionality of the draft] present a stronger case, on balance, than the counterarguments." RONALD DWORKIN, CIVIL DISOBEDIENCE, IN TAKING RIGHTS SERIOUSLY 206, 209–10 (1978). From this and other passages, it is possible to infer that Dworkin would have sided with those who thought the convictions of the draft resisters unconstitutional. See id. at 219.
7 Id. at 221.
draft-card burning, are not judgments of law. 8 He does not qualify "judgments of law" with the word "constitutional." Nor does Kennedy do so in describing Dworkin's position.

Dworkin also accuses Kennedy, and derivatively me, of incorrectly attributing to him a belief in "explicit consideration of distributive consequences rather than reliance on efficiency." 9 To refute this attribution, he cites a passage in his book Freedom's Law denying that "economic equality" should be a constitutional right. 10 Again, Dworkin misrepresents Kennedy's claim. The claim was that Dworkin believes that courts should consider distributive consequences rather than efficiency in deciding cases. Dworkin does not deny that claim. He could not, since he believes that the common law should be shaped not by efficiency, but rather by an egalitarian conception that he calls "equality of resources." 11

Because, when he is mounted on his polemical steed, Dworkin has difficulty giving an accurate account of his own writings, one should not be optimistic about the accuracy of his account of mine. I can barely recognize the argument of my Lectures in his reformulation of it. Either I am an unclear writer, or he is indeed an uncharitable reader. I spent much time at the beginning of the Lectures trying as best I could to explain, at the risk of losing my readers to tedium, what I meant by "moral theory," "moral skepticism," "moral relativism," and so forth; yet Dworkin is unable to extract any meaning from my efforts. (Affected obtuseness about an opponent's argument is a common tactic in philosophical debate; it is also employed in Nussbaum's Response.) He says that I erroneously classify moral relativism, moral subjectivism, and moral skepticism as forms of "external [moral] skepticism" in his sense, whereas the focus of his paper on moral skepticism that I cited is internal skepticism. 12 Internal skepticism is indeed the focus of that paper; but all I meant was that "moral relativism," "moral subjectivism," and "moral skepticism" as I defined them in my Lectures fit his category of external skepticism. I should have thought my meaning clear. Passing on to another of the points Dworkin makes

8 Dworkin, supra note 2, at 1721 n.12.
10 See id. (citing RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 36 (1995)).
11 RONALD DWORKIN, LAW'S EMPIRE 299 (1986). His Response implicitly endorses the use of distributive considerations to decide products liability cases, by citing favorably an article that makes clear that references to "fairness" by the judges in these cases have a significant distributive component. See Dworkin, supra note 2, at 1728 & n.35 (citing James A. Henderson, Jr., Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions, 59 GEO. WASH. L. REV. 1570 (1992)).
12 Dworkin, supra note 2, at 1721 n.11 (quoting Posner, supra note 9, at 1642 n.6) (internal quotation marks omitted) (alteration in original).
in his footnote nine, I thought I had made clear what I meant by "moral realism," "right answers," and "metaphysics" by quoting Dworkin's colleague Thomas Nagel on "right answers moral realism"13 and, by way of contrast, Charles Larmore on "metaphysical moral realism."

I should have thought it also clear that I was not contradicting myself in saying that a society's unquestioning acceptance of a taboo against intermarriage would not make the taboo morally right. That acceptance would make the taboo part of the moral code of the society, but people in other societies would be entitled to embrace a different morality, one that would condemn the taboo. Similarly, the Chinese might "validly" condemn the Irish law on abortion, and vice versa — two moral claims, both valid within the presuppositions of the culture in which they are made, but incompatible, and with no higher morality in light of which the difference in opinion could be arbitrated.

Dworkin says that I argue that his proposal for judges to use moral theory to decide cases would fall flat if he substituted "political theory" for "moral theory";14 he points out that political theory and moral theory are very similar. They are — I made that point in my Lectures — but he has misquoted me. I said that his proposal would fall flat if he argued in political rather than moral "terms," that is, if he acknowledged that he was asking the courts to enact his left-liberal policy agenda, the agenda summarized by Duncan Kennedy.

Dworkin implies that I believe that pragmatism can resolve the moral disagreement between the prolife and prochoice camps.15 On the contrary, pragmatism, at least my sort of pragmatism, recognizes that the moral disagreement is insoluble and wishes to use this recognition as the starting point when deciding what abortion rights, if any, to recognize.

Dworkin again shows his recklessness as a critic in his discussion of my comments on "British legal practice," which he claims are "ill-informed."16 The term "British legal practice" is a solecism, since Britain (he means, I take it, the United Kingdom) does not have a unitary legal system. The comment of mine that he claims is "ill-informed," and moreover inconsistent with what I wrote in a recent book on English law (that is, the law of England and Wales, but not of Scotland or Northern Ireland), is that English judges so rarely have to make policy choices that when they do so they have the feeling that "they're step[ping] outside the law," a term that I quoted from H.L.A.17

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13 This is Dworkin's position. In his Response, he puts it this way: "Any moral principle, no matter how thoroughly embedded in our culture, language, and practice, may yet be false — or, no matter how thoroughly rejected, may yet be true." Id. at 1719. He states this dogmatically; he does not acknowledge that it is a contestable position.

14 Id. at 1730 n.46.

15 See id. at 1735.

16 Id. at 1727 n.32.
Hart’s writings. Dworkin says that my book “rejects the descriptive accuracy of Hart’s statement, as much for British as for American practice.”

Anyone who cares to look at my book will see that this is incorrect: although I say that it is not semantically accurate for Hart to call what judges do in the “open area” in which the conventional materials of judicial decisionmaking run out “stepping outside the law,” I also say that his account of judicial activity in the open area is “descriptively” more accurate than Dworkin’s, certainly for English judges. Throughout the book I emphasize that English judges, like Continental judges but unlike American judges, constitute in fact, though not in form, a career judiciary, which “tends to be homogeneous in values and preferences, narrowly professional, technically adept . . . and politically timid — adding up to a mindset highly congenial to legal positivism.” Hart was an English legal positivist, and his positivism captured important features of English law, just as Dworkin’s very different jurisprudential stance captures important features of American law.

As evidence of my “culpable misdescription” of what he insists on calling “British practice,” Dworkin cites an English case in which the question was whether removal of life support from a patient in a vegetative state was lawful; the answer given was “yes,” and was based, Dworkin claims, on moral reasoning. But Dworkin cites only the decision of the intermediate appellate court, not the decision of the Appellate Committee of the House of Lords, which corresponds to our Supreme Court. It’s like discussing Roe v. Wade and citing only the Fifth Circuit decision that the Supreme Court reviewed. The judges of the House of Lords, like the judges of our own Supreme Court in last Term’s euthanasia cases, reached their decision on legal rather than moral grounds. Their queasiness about the moral issue was well expressed by one of the Lords, Browne-Wilkinson. He pointed out that while the judges of the intermediate court had attached importance to “impalpable factors such as personal dignity and the way Anthony

17 Id.
19 Id. at 31–32 (footnote omitted).
20 Dworkin, supra note 2, at 1727 n.32. The reference to “British practice” is of course a small mistake; Dworkin’s reference elsewhere in his Response to the Equal Protection Clause as protecting only citizens, see id. at 1732, is only a little larger; but these mistakes, like his uncritical belief that references to “fairness” in tort cases invoke moral categories, are suggestive of a lack of interest in the actual texture of law, a lack highly consistent with his overall approach.
21 See id. at 1728 n.32 (citing Airedale NHS Trust v. Bland, [1993] 1 W.L.R. 316 (C.A.)). Dworkin calls it a “parallel case” to the Supreme Court’s recent euthanasia cases, id., echoing the argument of the philosophers’ brief that there is no morally significant difference between killing and failing to save. This is the same mistake that Judith Jarvis Thomson makes in equating abortion by a rape victim to a refusal to save a famous violinist.

Bland would wish to be remembered,” those judges had not taken into account “spiritual values which, for example, a member of the Roman Catholic church would regard as relevant in assessing such benefit.” With the moral issue thus a standoff, Browne-Wilkinson opined that “the moral, social and legal issues raised by this case should be considered by Parliament,” and added that he had reached his own conclusion about how to decide the case on “narrow, legalistic grounds.”

I could go on beating back Dworkin’s charges of obscurity, ignorance, and contradiction one by one, but I think I’ve said enough to induce a warranted distrust in his accuracy, so let me turn instead to the significant propositions in his Response. The first is that everyone who isn’t a clod does moral reasoning and does it by starting with an intuition and then defending it against arguments, and that all the academic moralist does is carry this process of justificatory expansion or ascent (what the legal process school of the 1950s called “reasoned elaboration”) to higher levels of abstraction. This is not in fact how the “common man,” which is to say virtually everyone not professionally engaged in moral philosophy, arrives at his moral opinions. As I said in my Lectures, moral arguments, even when made by someone with the analytical and polemical skills of a Ronald Dworkin, are too feeble to move people. I offered some evidence in support of that proposition; he offers no contrary evidence (none of the critics does), but instead tries some intellectual jujitsu. He claims that my thesis that moral theory does not provide a “solid basis” for moral judgments is itself a moral thesis. But his entire argument for this claim consists of translating “solid basis” into “sound basis” and then equating “sound” with “morally sound.” This definitional chain, forged without an explanation, is arbitrary. I argue that moral reasoning in the style of Dworkin and other academic moralists is too weak to shake anyone’s moral intuitions: not too weak morally, but epistemologically — that is, as a matter of logic and evidence. This is not to say that utilitarianism or Kantianism, or any other normative moral position, wholesale or retail, is unsound, but only that the arguments pro or con are too flaccid to induce a sensible person to change his beliefs or behavior.

Dworkin asks us to imagine that there are many people who, though not philosophers or even intellectuals, have “a yearning for ethical and moral integrity” or “want a vision of how to live.” Such people, he claims, “might well ask themselves, for example, whether

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23 Id. at 879.
24 Id.
25 Id. at 884.
26 Dworkin, supra note 2, at 1725 (quoting Posner, supra note 9, at 1639) (internal quotation marks omitted).
27 See id.
28 Id. at 1726.
their views about abortion presuppose some more general position about the connection between sentience and interests or rights.\textsuperscript{29} The picture is of people standing around waiting to connect with Dworkin, who speaks in just those lofty terms.\textsuperscript{30} I don't think there are many people like that; very few people outside the academy talk in the high-falutin' style of academic moralism or can understand arguments couched in that style; how many even know what "sentience" means? Dworkin takes me to be denying the value of a parent's appeal to a child's sense of fairness.\textsuperscript{31} That is absurd. My criticisms are of academic moralism, the high-flown stuff of Dworkin's own writings. It is especially odd for him to locate his work on the same spectrum with parental instruction because he defines "morally responsible people" as people who "worry about whether their [moral] convictions are sound."\textsuperscript{32} This definition excludes children and limits morally responsible people to people who are a potential audience for Dworkin. I define a morally responsible person as a person who behaves morally. I shall remind the reader when I get to Nussbaum's Response that being moral and being reflective are not the same thing, and may even be in tension.

Even if many people could understand and be moved by Dworkin's arguments about abortion and other issues of law or public policy, as soon as these people were exposed to counterarguments they would be moved right back to wherever they had been before reading Dworkin. Every move in normative moral argument can be checked by a countermove. The discourse of moral theory is interminable because indeterminate. Dworkin no doubt believes that he has won his duels with his academic opponents over abortion and euthanasia and the like, but one like myself who does not have strong views on these questions rates these duels as ties.

Dworkin tries to refute pragmatic moral skepticism by broadening the definition of moral theory to encompass all normative argument (this is a recurrent feature of the Responses), so that a judge would have to be speechless to avoid doing moral theory. But the simplest type of normative argument — argument in reference to stipulated goals — eludes even Dworkin's definitional sweep. That kind of argument cannot be understood as moral. Were there a consensus that the goal of accident law should be to minimize the sum of accident and accident-avoidance costs, letting the insurance markets buffer the wealth effects of accidents, then it would be possible to evaluate the

\textsuperscript{29} Id. at 1722.

\textsuperscript{30} Here is a sample of Dworkin's rhetoric, picked virtually at random: "The courts are the capitals of law's empire, and judges are its princes, but not its seers and prophets. It falls to philosophers, if they are willing, to work out law's ambitions for itself, the purer form of law within and beyond the law we have." DWORKIN, supra note ii, at 407.

\textsuperscript{31} See Dworkin, supra note 2, at 1724.

\textsuperscript{32} Id. at 1722.
doctrines of that law without entering contested moral territory. Policy arguments would be omnipresent, but they would owe nothing to moral theory. Consensus on ends or goals is found in some areas of law, but not in all. When it comes to issues like abortion and euthanasia, there is no consensus on ends, and so the issues have to be resolved by force, elections, compromise, legislation, judges' values, public opinion, default, exhaustion, distraction by other issues, changes in religious belief (not themselves induced by moral theory) or in demographics or in technology, considerations of feasibility, or emotional appeals (for example, the film *The Silent Scream*). Moral theory won't play a role.\(^3\)

Dworkin confuses the issue by dividing the normative realm into moral theory on the one hand and "instrumental or strategic considerations" on the other.\(^4\) But "instrumental" and "strategic" are not the same, and joining them muddies the waters. "Strategic" has overtones of game theory, warfare, and Machiavellian scheming. The relevant distinction is between reasoning over ends and reasoning over means. I argue in my Lectures that the latter is productive and the former unproductive. Dworkin presents no counterargument.

Might there be a way of reasoning over moral ends without using moral theory? I don't think so. Whether or not the academic moralist or his legal counterpart decides to trundle out the great names of moral philosophy is a question of taste rather than of substance. I claim that there is no profitable reasoning over ends, though of course there is frequent choice among ends — choice that is determined, however, by things other than the "weight" of opposing arguments. I am speaking of ultimate ends — for there are of course mediate ones — but it is the ultimate ends that are in contention in the moral debates over abortion, euthanasia, and the other topics that Dworkin likes to discuss.

He argues that a moral relativist, conceding that there are moral truths — even if only local rather than universal — must likewise concede a role, albeit only a local one, to moral theories based on those truths.\(^5\) But this point, too, founders on Dworkin's failure to distinguish reasoning over ends from reasoning over means. If there is consensus within a community on some moral principle, then arguments

\(^3\) For a striking example of the indeterminacy of moral argument, and hence the wisdom of judges in steering clear of it, see the criticism of the philosophers' brief by a moral theorist colleague of Dworkin's who shares his general philosophical and ideological bent. See F.M. Kamm, *A Right to Choose Death?: A Moral Argument for the Permissibility of Euthanasia and Physician-Assisted Suicide*, BOSTON REV., Summer 1997, at 20, 23. The subtitle is misleading. Kamm endorses physician-assisted suicide only when unbearable pain cannot be otherwise relieved and the patient prefers death to continued pain, although she leaves open the possibility that it might be permissible in other situations as well. See id.

\(^4\) Dworkin, supra note 2, at 1730 n.46.

\(^5\) See id. at 1725–26.
over the validity of the principle drop out, and the issue becomes the principle's proper application. A good example is the principle that infanticide is wrong. It is not a universal principle, but it is solidly entrenched in our society. Dworkin is not interested in the areas of moral consensus within our society. He wants to talk about precisely those issues that cannot be stabilized by reference to a local consensus. Nor can they be stabilized by stretching consensus notions to cover them (as by appealing to our consensus on the immorality of infanticide to resolve the issue of abortion) — this stretching being what Dworkin fancily describes as "showing the implications of principles and ideals latent in the public culture of modern democracies." The moral theorist either picks controversial principles that determine his preferred outcome, or picks consensus principles and draws an arbitrary line connecting them to that outcome.

Dworkin contends that moral issues are inescapable in adjudication. In evaluating this contention, we shall do well to distinguish among three possible relations between a moral issue and a case. First, the legal issue may have moral significance to some part of the community; the legal issue of abortion rights has moral significance to prolife and prochoice people. Second, judges might decide some cases on moral grounds. And third, they might decide some cases using the argumentative methods of academic moralism. I have no quarrel with the first relation between law and morality — or with the second. Some legal principles, notably those of the criminal law, are plainly informed by the moral opinions of the community. But the application of a moral principle to a legal issue must not be confused with taking sides on contested moral issues and using normative moral philosophy to resolve the contest. That is the relation between morality and law that I question. You don't find moral theory deployed in appeals from convictions for rape or murder, even though the criminalizing of rape and murder is based upon a moral principle; and this absence is no loss.

There are pseudomoral issues in law. Dworkin argues that when judges use moral terms such as "fairness," as they often do, they must be doing moral theory. But as Holmes pointed out in The Path of the Law — it is one of his major themes — the same word may be used in a moral and in a legal sense, and the two senses need not coincide.

The threefold distinction that I have sketched can help us see the fallacy in Dworkin's argument that when a court decides a case in which there is a moral issue, it cannot avoid making a moral judgment. Suppose Congress amended the Constitution to abolish the con-

36 Id. at 1726.
37 See id. at 1728–29.
stitutional right to abortion, and afterward a case came up to the Supreme Court challenging a law forbidding abortion. The Court would throw out the case, giving victory to the opponents of abortion, but it would not be resolving a moral issue. That is obvious. And it is almost as obvious that if the Court decided that the Due Process Clause of the Fourteenth Amendment does not create substantive rights, and on that ground overruled Roe v. Wade, it would be deciding the legal question of abortion rights but saying nothing about the moral right. Yet I am not sure that Dworkin would agree. He says that once Roe v. Wade was decided, abortions early in pregnancy imposed no moral cost comparable to the cost to pregnant women refused abortions, because the Court’s decision diminished the moral entitlement of the fetus by depriving it of its rights. It seems to me that Roe v. Wade left the moral issue exactly where it found it. To think otherwise is to suppose that the Dred Scott decision increased the moral worth of slavery, Plessy v. Ferguson the moral worth of racial segregation, and Bowers v. Hardwick the moral worth of antisodomy laws. (You can see in these examples where Dworkin’s approach of thinking of law as a branch of moral philosophy can lead.) All three decisions may have affected public opinion or even the public’s moral views; but none of the decisions was a contribution to moral truth or value. Like everyone else, judges have moral views, and those views may — sometimes quite properly — influence judicial decisions. I just don’t think that their (that anyone’s) moral views are likely to be improved by immersion in moral theory, or that judicial decisions furnish right answers to moral questions, such as the moral rights of a fetus.

Dworkin is the only one of my critics to take up a specific issue and try to show how moral theory can resolve it. He sketches a moral argument for the decision in Brown v. Board of Education: that the Equal Protection Clause does not allow government to justify a law on the basis that some citizens (actually the Equal Protection Clause is not limited to citizens) are inferior to others or less deserving of consideration, and that it is demonstrable that official segregation could not be justified on any alternative assumption. I have no objection to reading an anticaste principle into the Equal Protection Clause, given the history of the Clause and the recession of nineteenth-century racist theories. But you don’t need moral theory to do this. I don’t see how it could do this, because if nineteenth-century racial science were true, which is an issue of science rather than of moral theory, it would mean that blacks were inferior, and then there would be an argument for providing them a different public education.

39 See Dworkin, supra note 2, at 1729-30 & n.43.
40 See id. at 1731–32.
The problem for the Court in *Brown* was to exclude interpretations of segregation that were rivals of the caste interpretation. That was neither a scientific nor a moral problem, but a political problem; the Court wanted to avoid accusing the Southern states of operating a caste system. There was no work for moral theory to do in the case, except mischief. The problem for equal protection today is that the anticaste principle does not work in the areas (such as abortion and homosexual rights) in which people want to use the Equal Protection Clause to invalidate laws; but moral theory doesn’t help there either. It’s otiose in either type of case.

If Dworkin wishes to continue our debate, here is a method by which he can test his claim that moral reasoning is omnipresent in judicial opinions. I have written more than 1500 judicial opinions, covering pretty much the whole range of fields and issues that Dworkin has discussed over his long career (including civil disobedience and, yes, a murdering heir case), except for euthanasia and homosexual rights (but I’ve had cases involving transsexuals). Let him find, if he can, in a sample, random or otherwise, of my opinions the proof that no judge (at least no “eminent” judge) can escape having to do moral philosophy.

II. CHARLES FRIED

Justice Fried makes a good point against me — that in defining morality as the set of duties to others that are designed to check our merely self-interested, emotional, or sentimental reactions to serious questions of conduct, I was implying that moral judgments cannot be reduced to raw emotion and therefore acknowledging a role for moral reasoning in those judgments. That may indeed be an implication of what I said. But it is not what I meant, as should have been clear from the Lectures as a whole. The social function of moral duties, such as the duty (in our society) not to respond to the discovery of the adultery of one’s spouse by killing the adulterer, is indeed to impose a check, in the interest of social order, on the instinctive or impulsive reaction to an affront, a threat, or an opportunity. In other words, a moral duty is like a leash — and a dog is constrained by a leash without having to reason. When I swerve to avoid hitting a pedestrian or help an elderly person across the street, I am not enacting the conclu-

41 An argument against *Brown* can easily be generated from John Stuart Mill’s *On Liberty*, a favorite of Dworkin’s. See Ronald Dworkin, *Liberty and Liberalism*, in *Taking Rights Seriously* 259 (1978). Mill famously argued that, however odious polygamy is (and he considered it odious), the Mormons should have been left to their own devices in Utah, provided only that persons who did not like polygamy were free to leave. See Mill, *supra* note 1, at 91–92. By 1954, blacks who did not want to live under the Jim Crow laws had long been able to move to Northern states that did not have such laws. Many had done so.

ission of a process of moral reflection. A check on an emotional reaction can be another emotion (for example, fear might check hunger); it needn’t be an argument.

I take Fried to be meeting me halfway when he describes the arguments that academic moralists make as “argument fragments.” What I would like to see now is a demonstration of how those fragments can be assembled into a convincing argument. Fried says they can be, and remarks intimidatingly that Rawls and O’Neill are the peers of Gödel and Fermat, but he gives no examples of convincing moral argument except to cite his own book on contracts, and so I will content myself with a countercitation. I am tantalized by his reticence, because he is derisive on the one hand about the “whole catechism of canonical left-liberal opinions” (read: Dworkin’s opinions) and on the other hand about the natural-law theory expounded by John Finnis. One would like to hear how moral philosophy can navigate between these shoals.

Fried wants particularly to show that academic moralism influences judges. This surprises me. He has written that lawyers (and implicitly judges) should think of themselves not as social architects or social engineers, but as social “janitors,” and that law is emphatically not philosophy: “So what is it that lawyers and judges know that philosophers and economists do not? The answer is simple: the law.” I had not thought he meant that the difference between philosophers and lawyers is that philosophers know only philosophy, and lawyers know philosophy plus law; that would be an awful lot to ask of lawyers, and would make philosophers seem a lazy bunch, unless they too have a second field. But now he cites three judicial opinions to show that judges do moral philosophy after all — one by Judge (now Justice) Breyer, one by Justice Thomas, and one by Justice Fried. It is instructive to examine these opinions. (Oddly, none is a majority opinion.)

43 Id. at 1750.
44 See id. at 1747.
45 See id. at 1740 n.12, 1745 n.45 (citing CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981)).
47 Fried, supra note 42, at 1740.
48 See id. at 1746–47.
The issue in Breyer's case was whether remarks by a supervisor revealed anti-union animus, and Breyer's opinion discusses the problems involved in drawing inferences. It is possible, though not obvious from his opinion, that Breyer was drawing on epistemology, but as there was nothing remotely resembling a moral issue in the case, I cannot see how the opinion can be thought to illustrate the use of moral theory by judges. The issue in Thomas's case was the constitutionality of a state statute banning the advertising of liquor prices. His opinion argues that government shouldn't be allowed to keep people ignorant (for example, of the price of lawful products). There is no reference to anything recognizable as moral theory, unless the argument that I have just mentioned, on which Thomas (who is said by Fried to have "dabbled" in political philosophy) does not elaborate, can be thought a product of it. Fried's own opinion involves a registration requirement for convicted sex offenders. One will search the opinion in vain for moral theory. The heart of the opinion is the proposition that for the state to justify "a continuing, intrusive, and humiliating regulation" of a convicted person by the urgency of the need to prevent his inflicting further harm on the community, "the urgency must be shown by the severity of the harm and the likelihood of its occurrence." This sounds like Learned Hand's cost-benefit formula for determining negligence, rather than like philosophy. Fried makes no effort to derive the Fried formula from moral theory, unless it is through moral theory that we learn that "we do not have a general regime regulating adult competent persons as such," that "[p]ersons are left to choose freely and if they make the wrong choices they are subject to retrospective condemnation and punishment." One begins to suspect — and there are further hints elsewhere in Fried's Response and in a discussion of homosexual rights to which he refers the

52 See Transportation Management, 674 F.2d at 132-33.
53 See 44 Liquormart, 116 S. Ct. at 1501.
54 See id. at 1516 (Thomas, J., concurring in part and concurring in the judgment).
55 See Fried, supra note 42, at 1744 & n.36.
56 See Doe, 686 N.E.2d at 1016 (Fried, J., concurring).
57 Id.
58 See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); Richard A. Posner, Economic Analysis of Law § 6.1 (5th ed. 1998). Earlier in his opinion, Fried said in like vein that the registration requirement "may be imposed after a careful weighing of three factors: the kind and severity of the regulatory imposition, the kind and severity of the danger sought to be averted, and the aptness of the fit between the remedial measure and the danger to be averted." Doe, 686 N.E.2d at 1016 (Fried, J., concurring).
59 Fried also conjectures that one of Justice Brennan's opinions (once again, not a majority opinion) was directly influenced by an essay of Ronald Dworkin's on affirmative action. See Fried, supra note 42, at 1745 n.42 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part)). On the basis of what I know about Brennan's intellectual horizons and mode of work, I consider this unlikely.
60 Doe, 686 N.E.2d at 1015 (citation omitted).
reader — that, like Dworkin, Fried equates moral principle to principle and morality to normativity.

Fried tries to demonstrate the influence of the ideas of moral philosophy on history. In this endeavor he draws a sharper distinction than I would be inclined to draw between Lenin and Marx. The former is, in Fried’s words, a “master rhetorician[].” The latter he groups with writers who are “systematic, elaborately reasoned, attentive to and careful about method, explicit about premises, and explicit as well about how conclusions flow from them.” Marx, Fried says, is a thinker “who [sought] to persuade by argument and reason, not . . . by exhortation and rhetoric.” I do not recognize Marx in this description. He was highly rhetorical, was neither careful about method nor explicit about his premises, was a prophet rather than a thinker and a journalist rather than an academic. I am surprised that Fried would wish to enroll him with Rawls, O’Neill, and Fried himself in the ranks of academic moralism. But there is a more important reason for leaving him out than his lack of the professorial virtues and vocation. Marx was one of those moralists whose moral claims are entangled with factual claims, such as the misery of life under capitalism, the growing disparity between the wealth of the capitalists and the poverty of the workers, the inevitability of a workers’ revolution, and the withering away of the state and attainment of earthly paradise upon the completion of that revolution. Every one of these factual claims has been falsified by history. A moral philosopher whose moral claims are as dependent on factual claims as Marx’s can fairly be considered refuted when his factual claims are falsified. So Marx has been refuted — but I certainly will not deny that he has been influential.

As for Locke, Kant, and Hegel, the unrefuted moral philosophers who Fried claims have influenced the world outside the academy, they did their work in milieus that cannot be compared to today’s world of academic moral philosophy, because knowledge was so much less specialized and the academy so much less professionalized. And I have doubts that even those three great philosophers influenced the real world, doubts not stilled by the references in Fried’s footnote twenty-eight. But as the question of intellectual influence is a profoundly difficult one, I will content myself with merely recording my doubt that there would have been no American Revolution, or that it would have eventuated in a different constitutional structure, had Locke never lived.

But I should say a word more about specialization. As late as the nineteenth century, the boundaries between philosophy and the sci-

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61 See Fried, supra note 42, at 1745 n.43 (citing CHARLES FRIED, ORDER AND LAW 82–83 (1991)). Those pages are faintly Millian; his discussion of homosexual rights as a whole, see FRIED, ORDER AND LAW 83–85, has no philosophical compass that I can discern.

62 Fried, supra note 42, at 1742.
ences — both the natural and the social sciences — were indistinct and often crossed. Bentham was a lawyer, economist, and practical reformer, as well as a philosopher, and his suggestions for the reform of criminal justice can be accepted by people who reject utilitarianism; the suggestions do not collapse when their philosophical scaffolding is removed. Locke’s influential political theory can be detached from its metaphysical foundations in Christian theology and its moral foundations in the idea that productive labor creates entitlements. Such political innovations as republicanism, the separation of powers, the system of checks and balances, and the secularization of politics can likewise be detached from their philosophical aegis and evaluated without regard to philosophical principles. So Locke can be discussed by both political scientists and moral philosophers, but the discussions by the political scientists are likely to be more fruitful.

Herbert Spencer, another of Fried’s examples of influential moral thinkers, was a leading proponent of social Darwinism, a body of thought that I concede was influential in nineteenth-century America and elsewhere. And it can be described as a moral philosophy. But it was influential because it was marketed and bought as science — as, indeed, was Marxism (“scientific socialism”). Also like Marx, Spencer is thoroughly discredited. It is ironic that Fried’s best exemplars of the influence of moral philosophy on behavior are also the most discredited.

III. Anthony Kronman

I find much with which to agree in Dean Kronman’s Response, in particular his criticism of the professionalization of moral philosophy. And I am pleased that, like me, he thinks the Supreme Court is right not to treat law as a “subfield of morality” (contrary to Dworkin, whose claims about the relation between morality and law Kronman calls “extravagant”) and not to decide the abortion or euthanasia cases on the basis of briefs submitted by philosophers. A large area of disagreement remains, however. The key to it, oddly enough, lies in Kronman’s claim that my Lectures are permeated by “pessimism” and

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63 See id. at 1743.
64 One small point, finally, of clarification. Fried seems to infer from my classifying Catharine MacKinnon as a moral entrepreneur (and from the alleged similarity of our platform styles to each other’s and Fidel Castro’s) that MacKinnon and I are intellectual soulmates. See id. at 1739 & n.3. That is not correct; we have profound differences over a broad range of issues. See Richard A. Posner, Law and Literature 352–53 (rev. & enlarged ed. 1998); Richard A. Posner, Overcoming Law 357–67 (1995); Richard A. Posner, Sex and Reason 32–33, 371–72 (1992). I meant “moral entrepreneur” as a descriptive rather than as an evaluative term.
66 See id. at 1764.
are "despairing from start to finish." \(^{67}\) I would not be surprised to be described as a complacent optimist, a Pollyanna who revels in the fall of communism, the discomfiture of collectivists, the worldwide triumph (however brief it may prove to be) of free markets and commercial values, and the wealth, freedom, diversity, opportunity, and dazzling technological advances powered by that triumph. The pessimist is Kronman, because he believes that moral philosophy, which he agrees is in a sorry state, is essential to civilization. I do not believe that.

Kronman's pessimism may result in part from his using words like "moral" and particularly "reason" too broadly; this imprecision may have confused him about what is really at stake (very little) in the decline of normative moral philosophy. He says that "[t]he kind of moral quandary in which ordinary men and women find themselves from time to time, and which demands the exercise of reason, is for judges a routine predicament." \(^{68}\) What is true is that judges routinely confront issues that cannot be resolved by the application of an algorithm — that require instead the application of "practical reason," which (in the sense in which I am using the term) is the ensemble of methods, including gut reaction, that people use to make decisions when scientific or mathematical or logical exactness is unattainable. This means that judicial opinions will often fail to achieve the certitude of a logical, mathematical, or scientific demonstration. But it does not mean that judicial opinions are unreasoned, and it certainly does not mean that the judge is in a "predicament" or a "moral quandary" and has to employ something called "moral reason" \(^{69}\) to get out. The world of inquiry isn't divided into just two compartments, the exact (including the logical, the mathematical, and the scientific) and the moral. Editing a newspaper requires the constant use of practical reason, but only very occasionally the making of moral judgments. The same is true of adjudication. Judges get into moral quandaries only when the law points to a result that violates their deeply held moral beliefs. That is not a routine predicament in this country, and moral philosophy will not help judges out of it. As I argued in my Lectures, moral philosophy is good only at posing, and not at resolving, moral dilemmas. Judges do legal reasoning, which is not much different from ordinary reasoning about nonmoral issues; rarely do they engage in moral reasoning, and when they do, it is without the help of academic moral philosophy.

\(^{67}\) Id. at 1753; see also id. at 1754 (mentioning the "pessimism that gives his Lectures their bleak and depressing tone").

\(^{68}\) Id. at 1762. This is the equivalent of saying that the ordinary man or woman is sick occasionally, but the doctor is sick all the time. Incidentally, judges are "ordinary men and women."

\(^{69}\) Id.
I bridle at the suggestion that it is a judicial responsibility to help "a people achieve[...] self-conscious maturity."\(^{70}\) Such a view of the judicial role implies a condescending view of the American people, echoing the patronizing and self-important plurality opinion in Planned Parenthood v. Casey\(^{71}\) (reaffirming the core of Roe v. Wade), in which three Supreme Court Justices declared that Americans' "very 'belief in themselves'" as "people who aspire to live according to the rule of law" is "not readily separable from their understanding of the [Supreme] Court."\(^{72}\) The American people are as mature as any other people and, in any event, don't need and won't benefit from judicial efforts to help them to mature further. Although judicial decisions (along with everything else — except possibly moral theory) may have some effect on moral opinion and behavior, it does not follow that judges should think of themselves as the moral tutors of the nation, as Kronman (an Aristotelian, hence one to whom moral preachment de haut en bas comes naturally) would like them to do. Kronman might do well to ponder Jürgen Habermas's rebuke to American constitutional theorists for casting the Supreme Court in the role of "a pedagogical guardian or regent" of an incompetent "sovereign," the people.\(^{73}\) "The addressees of law would not be able to understand themselves as its authors if the legislator [or judge] were to discover human rights as pregiven moral facts that merely need to be enacted as positive law."\(^{74}\) (These passages, incidentally, are a precise description of Dworkin's constitutional theory.)

Kronman's use of the expression "self-conscious maturity" and his remarks that "[r]eason is the perfection of collective as well as individual character" and that "[o]nly through moral reflection can a people understand its values and hence itself"\(^{75}\) seem to be linked to his suggestion that psychoanalysis is a route to a better moral character. I had thought the purpose of psychoanalysis was to make people happy.\(^{76}\) If Kronman has evidence that psychoanalysis improves moral character, I would dearly love to see it, especially as he offers no other evidence that moral philosophy can make us better people. (And is psychoanalysis really a branch of moral philosophy, even if it does sometimes conduce to the improvement of character? And should judges think of themselves as the psychoanalysts of the nation?) I do not deny the influence of either the Stoic philosophers or Socrates. But

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\(^{70}\) Id. at 1763.
\(^{71}\) 505 U.S. 833 (1992).
\(^{72}\) Id. at 868.
\(^{74}\) Id. at 454.
\(^{75}\) Kronman, supra note 65, at 1763.
\(^{76}\) Kronman may be joining character and happiness when he says that "an examined life of virtue is superior" to "[a]n unexamined life of habitual virtue." Id. at 1759.
these are not academic moralists in the modern sense — Socrates least of all. And Kronman cites the Stoic philosophers only for their feat of having "reasoned their way into an extraordinary posture of detachment from ordinary human concerns." Indeed so, and with curious results, as when Anaxagoras, upon learning of his child's death, said, "I was already aware that I had begotten a mortal." There is much valuable psychology in the ethics of Stoicism. But the detachment that Kronman describes as "extraordinary" must really be called inhuman, and it suggests that there is danger in too much moral reflection. As I said in my Lectures, moral reflection can make the moral compass wobble.

Kronman mentions no moral philosopher more recent than Aristotle. And he could not have named a Stoic philosopher much more recent than the third or fourth century A.D., when philosophical Stoicism petered out, though traces and more than traces can be found in medieval and Renaissance thought, and in Kant and Nietzsche and elsewhere. That Kronman must cast his net so wide to retrieve a handful of dubious examples of moral reasoning's effect on behavior is consistent with his view "that the true spirit of moral reasoning — which starts from the Socratic premise that it can change the way one lives — is missing from professional philosophy today." Indeed it is.

IV. JOHN NOONAN

I agree with Judge Noonan's central theses: that one needs a lawgiver if there are to be moral universals, apart from the tautological and the vacuous; that no human lawgiver could lay down universal moral duties; and that, in short, the only tenable ground for believing in a universal moral law is religious. And naturally I agree with his criticisms of academic moralism. There is also merit in his point that because "every society fails in the long run," it is impossible to use success as a criterion for evaluating a society. But he has raised the standard of proof too high. I cannot imagine anyone thinking the Third Reich a success merely because it hung on for twelve years, the last three of them in dreadful shape; it completed none of its major projects except the construction of the autobahns. Thanks to Hitler,
the only major European nation of the nineteenth century that has not just shrunk but completely disappeared is Prussia. But all this is a detail. I said in my Lectures that you can judge the success of a nation relative to its goals, not that you can judge the nation itself on a transcultural standard of morality. And just as I don’t think my own “agnosticism” about moral reasoning is “feigned,” so I don’t think the Supreme Court’s agnosticism about the moral issues involved in the abortion and euthanasia cases is feigned. That a case involves a moral issue does not mean that the court must resolve that issue in order to decide the case.

Noonan’s examples of moral progress are troubling. Concerning slavery, he points out that “after force had decided what the law should be, a moral consensus emerged.” But what if the South had won the Civil War, which it might well have done? Maybe a moral consensus would not have emerged until much later, when slavery would have become uneconomical. Would that make moral progress a function of warfare? Or does Noonan believe that the North won the war because slavery is immoral, as Lincoln hinted in his second inaugural address? Most scholars think the North won because it was wealthier, more populous, more industrialized, and more centralized, and had an abler president.

Noonan’s second example of moral progress is the disapproval of bribery. That disapproval is an excellent example of the truth of moral relativism, and not, as he thinks, of its falsity. A bribe is not a natural kind; it is merely a name for forms of compensation that are disapproved. The criteria for disapproval vary from society to society and even within societies, according to distinctions that are often fine. In our society a judge who accepts equal bribes from the disputants, so that his judgment is not affected, is still guilty of a crime; but the identical mode of payment is used for the compensation of arbitrators and is perfectly legal. Threatening to expose someone’s secret if he won’t pay you for your silence is blackmail, a crime closely related to bribery. (Technically, blackmail is a form of extortion, which is the eliciting of bribes by threats.) But threatening to sue a person if he doesn’t settle with you is perfectly legal. These examples show that characterizing a transaction as bribery depends on circumstances that are bound to vary widely across societies and epochs. One would have to know more than I do, or, I suspect, Judge Noonan does, about the Middle

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82 See Noonan, supra note 80, at 1772 n.24. Noonan’s own opinion in one of the euthanasia cases that the Supreme Court decided last Term — vindicating Noonan’s position — avoids any reference to the moral issues that swirl around euthanasia. See Compassion in Dying v. Washington, 49 F.3d 586 (9th Cir. 1995), rev’d en banc, 79 F.3d 790 (9th Cir. 1996), rev’d sub nom. Washington v. Glucksberg, 117 S. Ct. 2258 (1997).
83 Noonan, supra note 80, at 1773.
84 See id.
Kingdom of Egypt to fault it for permitting what we consider bribery.\textsuperscript{85}

I no longer doubt — and here I am qualifying a point in my Lectures — that one can speak intelligibly of moral progress. But always one is speaking from a particular standpoint, rather than \textit{sub specie aeternitatis}. To us, slavery is an abomination, so we consider its abolition a mark of moral progress. There was a time when enough people disagreed to make the issue of the morality of slavery contestable, and such contests cannot be resolved by the use of reason; the issue of slavery, as Noonan remarks, was resolved by war.

Noonan ends his Response with some striking observations about empathy, divinity, and love. To respond to the first: I agree with him that “to see babies is to see human beings,”\textsuperscript{86} but I don’t think that this recognition takes us any distance toward resolving the moral dilemma of abortion on the basis of moral theory. (He may agree with me on this point.) As I mentioned in my Lectures, Robin West asks us to see the woman who dies in a botched illegal abortion as a victim of the laws forbidding abortion. There is no process of reasoning that will tell us which sight should move us more. Noonan’s religious beliefs, which inform his views on abortion and other moral issues, are not, I take it, the product of theoretical reflection. There are religious converts, but I do not believe that he is one, and I doubt that theoretical reflection plays a big role in many conversions.\textsuperscript{87} Finally, I did not intend to draw a sharp line between altruism and love. There is selfish altruism (“reciprocal altruism,” for example) and selfish love; there is also selfless altruism, which is a form of selfless love, as Noonan suggests. My doubts concern the possibility of using this insight to power moral reasoning.

\textbf{V. Martha Nussbaum}

Professor Nussbaum is known for treating Greek tragedies, the novels of Henry James, and other works of imaginative literature as works of moral philosophy, and one of her motives for doing so is her opposition, like that of Kronman, to “the academicization and professionalization of philosophy.”\textsuperscript{88} But, faced with a challenge by an outsider, she closes ranks with the academicized and professionalized moral philosophers and endeavors to catalogue their successes in the

\textsuperscript{85} See id.
\textsuperscript{86} Id. at 1774.
\textsuperscript{88} \textsc{Martha C. Nussbaum, Love's Knowledge: Essays on Philosophy and Literature} 20 (1990); see also \textsc{Martha C. Nussbaum, The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy} 15–16 (1986); \textsc{Martha C. Nussbaum, Rage and Reason, New Republic}, Aug. 11 & 18, 1997, at 30.
world of action. To make the catalogue at all impressive, she is forced, again much like Kronman, to range far afield — to Rousseau, Cicero, Marx (again!), and Burke, none of whom was an academic; to Amartya Sen, who is primarily an economist rather than a philosopher; and to John Dewey in his capacity as a philosopher of education, which is not the same thing as a moral philosopher. Nussbaum suggests that if Cicero and the others were living today, they would be tenured academics, just like herself. But in saying this she reveals that she has missed the point of my distinction between moral entrepreneurs and academic moralists. These are different vocations. The conditions of the modern academy (tenure, specialization, professionalization, physical safety, material comfort, careerism, political irrelevance) make it virtually impossible for its denizens to acquire the vision and prestige of the long-dead philosophers for whom she claims influence — more influence, I might add, than they deserve. I find the idea that the world is more peaceful because of Kant an amazing one.

She gives only two examples of the influence of academic moralism on thought or action in the United States: Peter Singer's advocacy of animal rights and the philosophical literature on bioethics. These are examples of influence, all right, but they are not good examples of the influence of academic moralism. Singer does not write like an academic philosopher (more power to him!) or, more to the point, offer much in the way of philosophical argument. And the best bioethics is the least philosophical.

Nussbaum says that "there are many different routes to influence" and adds that "[s]ometimes ethical theorists are also influential politicians." But the most recent of her examples, Marcus Aurelius, died 1800 years ago. She notes that some other ethical theorists have been "practical entrepreneurs," but her examples are Dewey (as the foun-
The all-time greatest entrepreneur, in her sense, among moral philosophers should be Bentham. I acknowledge that since Sen is also a philosopher, it is possible that his success as a practical entrepreneur owes something, and maybe a lot, to his philosophical training. I further acknowledge the possibility that Nussbaum herself, a prominent "public intellectual," may fit the "practical entrepreneur" bill. She does not claim that, possibly out of modesty, and I will not attempt to evaluate such a claim.

Nussbaum, supra note 90, at 1794.

Id. at 1795.

Id.

Id. at 1794. She turns Nietzsche into a contented academic who resigned his professorship solely because of bad health. It is true that his resignation (in May of 1879) was precipitated by poor health, but he had already decided that "in the long run an academic existence is impossible for me." Letter to Franz Overbeck (Aug. 1877), quoted in R. J. Hollingdale, Nietzsche 133 (1965); see also Ronald Hayman, Nietzsche 190 (1980). As early as 1874, he was thinking of giving up his professorship. See id. at 171.
altruists, by Kristen Monroe. Nussbaum makes strong claims for Monroe’s study:

[The study] shows that the most salient feature [that rescuers and other altruists] share is a particular outlook on the relatedness of human beings, an outlook that holds that all human beings are interconnected, interdependent, and equal in worth. This outlook could, of course, be imparted in many ways, and philosophy is only one way through which it came to the rescuers. But it is a universal moral-theoretical view.

Nussbaum’s summary is misleading and indeed reverses Monroe’s meaning. Monroe does find that altruists tend to have “a particular way of seeing the world, and especially themselves in relation to others.” She says that “[a]ll the altruists I interviewed saw themselves as individuals strongly linked to others through a shared humanity.” But as for people being “equal in worth,” that is Nussbaum’s addition; the rescuers in Monroe’s study tended to value life in all its forms, nonhuman as well as human, rather than being egalitarian or socialist. And there is no hint that any of the rescuers or other altruists became such through philosophy. The index to Monroe’s book contains no entries for philosophy or education. On the contrary, this book that Nussbaum has nominated to illustrate the moral-theoretical springs of altruism emphasizes the spontaneous, unreflective, nontheorized character of altruistic behavior, whether episodic or, as in the case of many World War II rescuers, stretched out long enough to give the rescuers time to engage in moral reflection if they had wanted to; they didn’t want to. Monroe denies that altruistic behavior emanates from “the conscious adoption of and adherence to certain moral values.” Indeed, she finds: “[I]t was the rescuers, the individuals who came closest to pure altruism on my conceptual continuum, who deviated most from the universal moral principles of ethics and morality.

102 Nussbaum, supra note 90, at 1783 n.33 (citation omitted).
103 MONROE, supra note 101, at 213.
104 Id. It should be noted, however, that her interview sample was very small. It consisted of only 20 altruists, of whom five were philanthropists, five were “heroes” (ordinary people who risked their lives to save people in danger), and ten were rescuers of Jews. See id. at 16–18.
105 See id. at 206–07. But don’t think that love of animals is a dependable route to love of man. Luc Ferry, in his book The New Ecological Order, remarks on the pioneering role of Nazi Germany in the protection of animals, and notes that the founding statement was by Hitler himself, who declared that “in the new Reich cruelty toward animals should no longer exist.” Luc Ferry, THE NEW ECOLOGICAL ORDER 91 (Carol Volk trans., Univ. of Chicago Press 1995) (1992). Ferry remarks “the disturbing nature of this alliance between an utterly sincere zoophilia (it was not limited to words but was borne out in law) and the most ruthless hatred of men history has ever known.” Id. at 93.
106 Although one of them, an ethnic German who lived in Prague during the Nazi era, “described himself as some combination of agnostic, Kantian, and pantheist,” he was emphatic that he “never made a moral decision to rescue Jews.” MONROE, supra note 101, at xi (internal quotation marks omitted).
107 Id. at 231.
Furthermore, this deviance was necessary in order to act altruistically."108 Here she anticipates Michael Gross's study, published the following year, which I cited in my Lectures.109

I note some other inaccuracies in Nussbaum's Response:

Elizabeth Anderson will be surprised to read that her "philosophical critique[] of economics," from which I quoted in the Lectures, is not "serious."110 My quotations are from a book by Anderson that, as its title, Value in Ethics and Economics, indicates, is centrally, rather than peripherally or casually, concerned with economics.111

Rawls does not deem persons in the Original Position risk-averse only with respect to political and other noneconomic questions, as Nussbaum suggests.112 The difference principle, which uses the concept of maximin — maximizing the welfare of the worst-off — to limit unequal distribution of wealth, is profoundly risk-averse.113 Also, Rawls does believe that a rational person has consistent time preference over his lifetime.114

Nussbaum misunderstands my point about the undesirability of moral uniformity. She thinks that I am preaching tolerance of divergent views of the good life, just like Mill and Rawls. My point, supported by Monroe's book, is rather that society needs people who do not obey the moral code115 as well as "good" people, whether or not the "bad" are acting in accordance with a dissenting morality.

Like Dworkin, Nussbaum ascribes to me radical positions that I made clear I do not hold. She says I keep insisting "that people have no right to criticize societies that do things differently."116 I expressly repudiated that view, calling it "vulgar relativism."117 I am also not a

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108 Id. at 185.
109 See Posner, supra note 9, at 1683 & n.89 (citing MICHAEL L. GROSS, ETHICS AND ACTIVISM: THE THEORY AND PRACTICE OF POLITICAL MORALITY (1997)).
110 Nussbaum, supra note 90, at 1777 n.9. And Onora O'Neill may wonder what restoration of context Fried proposes, see Fried, supra note 42, at 1747, to salvage her economic analysis of philanthropy, which, with all respect, I continue to think economic nonsense.
112 See Nussbaum, supra note 90, at 1778 n.11.
113 Rawls does not justify his maximin principle in terms of risk aversion in the technical economic sense, so both Nussbaum and I are imprecise in speaking of risk aversion in this connection. But he comes close in discussing the "strains of commitment." JOHN RAWLS, A THEORY OF JUSTICE 176-78 (1971); see also id. at 153-54.
114 See id. at 293-95. I should have thought it clear from the context of my statement that I was referring to time preference, that is, to whether people discount the future at different rates over their lifetimes. Obviously people's preferences for specific goods and services (toys, baby sitters, artificial hips, philosophical treatises, and so forth) change during their lives.
115 A need that has nothing to do, as Dworkin supposes me to believe, with "mutations." See Dworkin, supra note 2, at 1736.
116 Nussbaum, supra note 90, at 1786.
117 Posner, supra note 9, at 1642.
Pyrrhonian, who aims at “ridding people of belief.” I do not advocate peace of mind as the supreme good for man or deny the principle of noncontradiction. I do not argue that “rational argument never persuades people.” I argue that academic moralism is useless, and I regard Nussbaum’s parsing of the differences between neo-Humeans, neo-Aristotelians, and neo-Kantians as just so much sand in the eyes. Rather than relying on the “common presumption that [moral] theories have an influence,” a presumption common only to moral theorists, she should have given the reader some examples of how moral theory (not education theory, not economic theory, and not animal rights polemics) is influencing law and public policy in America today.

Nussbaum accepts my characterization of abortion as “chopping up” rather than “pulling the plug.” But she adds that if the woman desiring the abortion was raped or a victim of incest, “one [could] argue that even ‘chopping up’ is a permissible response to a pregnancy resulting from such violent aggression.” One can argue anything, but this would be a particularly bad argument, since the aggressor is the rapist, not the fetus. Imagine that A shoves B, an innocent bystander, into C, injuring C. Would C be privileged to retaliate against B? Is that really arguable? If that’s where moral philosophy leads, we can do without moral philosophy.

Nussbaum claims that I gave too short shrift to Judith Jarvis Thomson’s well-known argument for a right to abortion. I thought I had said enough to show that it was a thoroughly bad argument. But since Nussbaum wants amplification, let me give it. The analogy on which Thomson’s argument turns fails for the following reasons. First, we have no reliable intuitions concerning a hypothetical case that is so far outside our experience. Second, a woman normally is not

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118 Nussbaum, supra note 90, at 1788 n.57. I am likewise not, as Dworkin thinks I may be, a postmodernist science skeptic, see Dworkin, supra note 2, at 1719 n.6, another careless charge, in view of the emphasis in the Lectures on my commitment to scientific theory. Noonan is closer to the mark in describing me as one who “worship[s]” “the scientific method or Science,” though that’s a bit extreme in the other direction. Noonan, supra note 80, at 1768.

119 Nussbaum, supra note 90, at 1793. She’s correct, however, that not all academic moralists fall into either the secular-liberal or religious-conservative camp, though most do, and Nussbaum’s own writings contain no trace of religiosity, even though she classifies herself in her Response as religious-liberal. I should have qualified my discussion accordingly. It is typical of the style of academic disputation illustrated by Nussbaum’s Response that she should cite this trivial failure of qualification as one of numerous “examples” of the “sheer casualness and inaccuracy of Posner’s treatment [of academic philosophy].” Id. at 1782. No other examples are given. Her comparison of my Lectures to an undergraduate paper, see id. at 1779, is in the same vein of schoolmasterish censure.

120 Id. at 1797.

121 Id. at 1779.

122 Recall that Thomson analogizes a woman forced to carry her fetus to term to 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. See Judith Jarvis Thomson, A Defense of Abortion, 1 PHIL. & PUB. AFF. 47, 48–49 (1971).
immobilized by being pregnant. Third, the fetus is not a stranger to its mother. The law punishes a mother’s neglect of her child even if the child was the product of a rape; Thomson does not suggest that she disapproves of such punishment or thinks it anomalous that the parents do not have equivalent legal duties to other people’s children. Fourth, it is not obvious that the law should not impose a general duty to rescue strangers when the rescue can be effected without mortal peril to the rescuer. The laws of many European countries impose such duties, and the objections to imposing them are of a practical character unrelated to any moral right not to be a good Samaritan. Fifth, as Nussbaum recognizes, the abortion doctor doesn’t merely pull the plug on the fetus. In a first-trimester abortion, he uses surgical instruments or a suction pump to remove the fetus from the uterus. In a second-trimester abortion, he uses surgical instruments to remove the fetus or injects a chemical that either kills the fetus in order to induce premature labor or just induces premature labor. Whatever the method and whatever the stage of the pregnancy, the doctor is employing force for the purpose and with the effect of killing the fetus. And although the killing is a byproduct of the procedure rather than its ultimate goal, the same is true when a child kills his parents in order to inherit their money. The surgical procedure used in second-trimester abortion routinely includes the crushing of the fetus’s cranium, and even in first-trimester abortion the fetus is sometimes removed piece-meal, with “the fragments [then] reassembled to see if the fetus is essentially complete,” because any fetal tissue remaining in the uterus could cause infection. In the rare third-trimester abortion, the doctor kills the fetus either by injecting a chemical into its heart or by drilling a hole in its cranium and removing its spinal fluid through the hole.

The precise medical technique is unimportant, although it is a commentary on the quality of the abortion debate that the supporters of abortion rights never talk about what abortion actually involves, while the opponents never talk about the compelling reasons that women and girls frequently have for deciding to have an abortion. What is important for the present discussion is that abortion is killing rather

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than letting die. So, because opponents of abortion consider the fetus a full-fledged human being — and Thomson grants them their premise for the sake of argument — they consider the abortion doctor and the woman who hires him to be murderers. The moral position of these prolifers is 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; action and inaction often carry a different moral valence even when their consequences are similar.

This effort to amplify my criticisms of Thomson will not satisfy Nussbaum, for she insists that I provide “a sustained critique of the arguments of the ‘academic moralists’ (and . . . of the major historical figures whose views they advance),” as well as “a scrutiny of major cases in which philosophical views are generally thought to have changed public or private morality, showing that the received view of philosophical influence is inaccurate.” Though the phraseology is that of an assignment to a Ph.D. candidate, this is the lawyer’s trick (demonstrating, to be sure, that Nussbaum has benefited from her affiliation with a law school) of trying to defeat an opponent not with evidence, but by putting on him a crushing burden of proof; it would take a lifetime and more to prove the case against academic moralism to Nussbaum’s satisfaction. The first half of her challenge (providing the “sustained critique”), moreover, asks me to play on her turf, engaging with the normative moral philosophers on their terms, whereas my principal argument is that those are the wrong terms for judges and others seeking guidance on how to act. In this respect her tactic resembles Dworkin’s rhetorical stratagem of insisting that the only permissible, indeed the only possible, criticism of moral theory is itself a moral argument.

I end this Reply by referring to a recent work of moral philosophy by Michele Moody-Adams, who has a deeper awareness of the problematic nature of normative moral philosophy than does Dworkin, Fried, or Nussbaum. Moody-Adams is a card-carrying academic moralist. Yet she rejects the idea that moral philosophy can be thought the problem-solving equal of science, criticizes moral philosophers for “attempt[ing] to turn moral problems into philosophical puzzles,” and warns that “[t]he results may make good or even great philosophy, but they will prove unsatisfactory as a form of moral inquiry.” She finds “no reason to think that the process of moral inquiry might eventually result in ‘convergence’ on some one theory,” says that

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127 Nussbaum, supra note 90, at 1777.
129 See id. at 1.
130 See id. at 132–33.
131 Id. at 136.
132 Id. at 143.
“Philosophy is not authoritative in moral argument[,] nor is it even *primus inter pares,*”1 regards the sort of disagreement that Rawls and Nozick have over the nature of justice as simply unresolvable,134 rejects “[t]he notion that the proper task of moral philosophy is to validate systematic moral conceptions,”135 and, in short, acknowledges that “[m]oral theories do not, indeed cannot, solve moral problems.”136 Although she applauds moral philosophy’s “tendency to encourage self-scrutiny”137 by inculcating “standards of reasonableness in argument” and related analytic skills, she undercuts this encomium by saying that “evidence of moral expertise is displayed in reliably living a moral life, and there is absolutely no evidence that moral philosophers do this better than — or even as well as — non-philosophers.”138 The only examples she gives in support of her not yet extinguished faith in moral inquiry by philosophers are of nonacademic moral entrepreneurship, such as civil rights demonstrations in the early 1960s. It’s as if she thinks that moral inquiry as it should be conducted by philosophers has not yet begun, that the discipline is still in the ground-clearing stage, the stage in which fallacies are uprooted and wrong turns signposted. I think she’s right. But twenty-five hundred years is a long time to be standing at the starting gate, waiting for the race to begin.

133 Id. at 176.
134 See id. at 133, 141–42. It leads to the standoff that Hilary Putnam calls “respectful contempt.” HILARY PUTNAM, REASON, TRUTH AND HISTORY 165–66 (1981); cf. LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 239–40 (1987) (arguing that Rawls’s and Nozick’s theories both fail as general theories of justice, because there is no agreed theoretical basis for defining their limits).
135 MOODY-ADAMS, supra note 128, at 184.
136 Id. at 173.
137 Id. at 170.
138 Id. at 175.