

## ON RESTORING THE PRIMACY OF POLITICS TO ETHICS

My title is intended to provoke. Surely all decent people want politicians to behave in an ethical manner—not to lie, cheat, or steal. What I have in mind, however, is the tendency of contemporary academic writers on political theory, ethics, and jurisprudence to suppose, in the words of the renowned liberal thinker Isaiah Berlin, “that political theory is a branch of moral philosophy, which starts from the discovery, or application, of moral notions in the sphere of political relations.”<sup>1</sup> Anticipating Berlin, the English socialist writer L. T. Hobhouse similarly held in his 1922 book *Elements of Social Justice* that “Politics must be subordinate to Ethics.”<sup>2</sup>

This assumption—which stands in stark contrast to Aristotle’s representation of ethics as *part* of political science, rather than vice versa—was taken for granted by the two most influential American liberal theorists of the past generation, the egalitarian redistributionist John Rawls and his libertarian colleague Robert Nozick. In Nozick’s words, “Moral philosophy sets the background for, and boundaries of, political philosophy.”<sup>3</sup> For his part, Rawls, in developing his celebrated “theory of justice,” began by describing the ostensible decisions of a group of hypothetical decision-makers who have been deprived of practically all the distinguishing char-

acteristics of human beings, so as to guarantee that the principles they develop would be acceptable from “a moral point of view.” Principles arrived at from that viewpoint are then articulated in a “four-stage sequence” in which constitution-makers, legislators, and ordinary citizens are to apply those principles in such a way as to guarantee that their decisions reflect the primacy of “moral” constraints over merely prudential ones.<sup>4</sup>

What is wrong with this view? Potentially, it constitutes an open-ended invitation for ethical and jurisprudential theorists, following the mandate of Immanuel Kant, to “lay down the law for politics,” with little regard for practical political reality, which for Aristotle is the domain of prudence rather than ethical “theorizing.” Practically speaking, the assumption that politics should be subordinate to ethics underlies the way that activist judges now conceive of their role as the Constitution’s interpreters, issuing directives on controversial issues like capital punishment and gay marriage that reflect what they believe

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is their superior moral insight. Judicial review has become the avenue for what the political theorist Michael Walzer calls “the philosophical conquest of politics.”<sup>5</sup>

The notion that philosophy can potentially “conquer” or supply decisive guidance for politics ultimately derives from the intellectual revolution generated by Machiavelli and his successors, which aimed to overcome man’s subjection to Fortune by establishing rational political regimes founded on a scientific analysis of the most fundamental human passions. Yet in its original form, the modern transformation of political philosophy was far from aiming at the subordination of politics to abstract moral theories. To the contrary, the doctrine of natural rights enunciated by Hobbes and Locke and reiterated in the Declaration of Independence was intended, like Machiavelli’s teaching, to provide (in Leo Strauss’s words) a “low but solid” foundation for political life, deriving the moral standards to guide political life from the more benign passions that already move the multitude of human beings, notably the desire for self-preservation. The modern liberal prescription for the design of political institutions was based on the principle that, as David Hume (echoing Machiavelli) put it, “every man must be supposed a knave”<sup>6</sup>—not because all human beings are knaves but because it is safest to design government in such a way that even if a knave should come to power, his ambitions will be checked (thanks to such institutional features embodied in the American Constitution as the separation of powers, checks and balances, and the encouragement of the honest pursuit of commercial gain).

It was Kant who first enunciated the goal of subordinating political practice to the rules of morality, conceived of as universal laws derived from pure reason. In *Perpetual Peace* (1795–96) he distin-

guished between the “moral politician,” who chooses his political principles on the basis of their consonance with morality, and the mere “political moralist,” who forges morality in such a way as to make it conform to his own advantage.<sup>7</sup> Yet Kant did not rely on advances in the morality of human intentions to actualize his vision of a future world without war or injustice. Rather, anticipating the liberal doctrines of early twentieth-century thinkers like John Maynard Keynes (who forecast that the First World War would end within a month as the parties found it economically impossible to continue), Kant maintained that the progress of international commerce and enlightenment would bring an end to war as the consequence of people’s growing awareness of their enlightened self-interest. Indeed, with respect to domestic governance, Kant went so far as to claim that “the problem of organizing the state can be solved for a race of devils, if only they are intelligent.”<sup>8</sup> Thus, Kant balanced his “idealistic” moral teaching with a coldly “realistic” account of political life that went beyond the American Founders in claiming that rightly designed republican institutions, depending *solely* on the balancing of interests, could do without *any* degree of virtue in the people or their governors. Although his demand for perpetual peace was utopian, Kant’s prescriptions for legitimate domestic government were not very different from those of the Founders: he also advocated a republican form in which the individual rights to life, liberty, and property were firmly secured.

To understand the origins of the more recent project of subordinating political life to the dictates of moral philosophy, it is helpful to fast-forward to the late 1950s, when the British scholar Peter Laslett famously announced the “death” of political philosophy in the English-speaking

world. The doctrine then recently regnant among writers on analytic philosophy—logical positivism or “emotivism,” according to which propositions about morality or justice have no assessable “truth value,” but simply express their authors’ personal feelings—seemed to deny the possibility of philosophical ethics and hence of political philosophy. The latter, according to Laslett, was simply an “extension” of the former. By way of illustration, Laslett cited T. D. Weldon’s *Vocabulary of Politics*, one of the few British philosophical works to address political subjects at all during the 1950s. Weldon’s book dismissed the very questions addressed by traditional political philosophy as meaningless, since they were not posed in such a fashion as to generate “empirically testable answers.”<sup>9</sup>

A complaint somewhat parallel to Laslett’s pronouncement (which he paradoxically issued in the preface to a collection of essays devoted to political philosophy) was offered a few years later by another British philosophical scholar, Mary Warnock. Recent generations of English moral philosophers, she observed, had failed “to commit themselves to any moral opinions” but limited themselves to analyzing the logic of moral discourse.<sup>10</sup> In other words, both political and moral philosophy, if there still were such disciplines, seemed to lack any practical relevance.

Contrary to Laslett, however, the evaporation of political philosophy as a substantive enterprise in the English-speaking world long antedated the rise of logical positivism and its successor, analytic or “ordinary-language” philosophy. In 1886, Friedrich Nietzsche commented acerbically in *Beyond Good and Evil* on the failure of the British moral philosophers of his own time to see morality as a *problem*. Instead of acknowledging the debatability of moral categories, those writers all “knew” in advance the moral conclusions

they wanted to arrive at, and were simply debating which “theory”—utilitarianism, appeals to the “moral sense,” or Kantian idealism, for instance—would best support them:

Ultimately they all want *English* morality to be proved right—because this serves humanity best, or “the general utility,” or “the happiness of the greatest number”—no, the happiness of *England*. With all their powers they want to prove to themselves that the striving for English happiness—I mean for comfort and fashion (and at best a seat in Parliament)—is at the same time also the right way to virtue; indeed that whatever virtue has existed in the world so far must have consisted in such striving.<sup>11</sup>

The problem with English moral philosophy, in Nietzsche’s view, was not only that it expressed a merely bourgeois outlook, but that it regarded bourgeois morality—in contrast with such serious alternatives as those of the aristocratic warrior or the Christian ascetic—as the only possible (true) morality. This characteristic could be seen in British philosophy as far back as the mid- to late eighteenth century: the era of Hume, Adam Smith’s *Theory of Moral Sentiments*, and the Scottish “moral sense” theorists. Although writers like Hume, Smith, and Adam Ferguson certainly made solid, substantive observations about politics and economics—just as John Stuart Mill did a century later—their writings on ethics were largely concerned with locating the source of an agreed-upon morality—sympathy, a moral sense, utility—rather than addressing moral issues as such.

Arguably, this agreement on the principles of morality could be seen as evidence

of the health of the British polity in the wake of the Glorious Revolution of 1688, which issued in an increasing acceptance of the principles of religious toleration and representative government, along with the pacific pursuit of economic growth. Yet it became problematic from the standpoint not only of Nietzsche but of mid-twentieth-century, professedly liberal or “radical” philosophical scholars who were perhaps inspired by his example to seek a more publicly influential role for themselves.

An explanation of the transformed ambitions of Anglo-American philosophical writers starting in the middle of the last century was offered by Brian Barry in the preface to the 1990 edition of his *Political Argument*, originally published in 1965. Contrary to Laslett, Barry argued, the near-disappearance of political philosophy from British academic circles by the mid-1950s was due not to the dominance of logical positivism (which was already being supplanted by ordinary-language philosophy) but rather to the prevalence among British philosophical writers of a “boring” utilitarianism. Utilitarianism—the doctrine that political institutions and public policies should be assessed by the degree to which they achieve the Benthamite goal of “the greatest happiness for the greatest number”—is boring, according to Barry, because once that goal has been postulated all that remains is to determine “the most efficacious means to that end.” Such calculations turn on determinations best made by social scientists rather than “philosophers.” Hence, a restoration in the interest and status of political philosophy depended, Barry concluded, “on a decline in the appeal of utilitarianism.”<sup>12</sup>

In reality, however, the obstacle to the sort of political philosophy that Barry wanted to engender was much greater than the acceptance of a particular doctrine like utilitarianism. All of the great

political philosophers had articulated moral teachings that had some connection to the common good—which need not be defined in narrowly and illusorily precise Benthamite terms. This meant, however, that their prescriptions about the aim or end of political life were inextricably connected to their teachings about the best means of advancing it. As political scientist Stephen Elkin has recently observed, abstract accounts of political justice are of little or no value when severed from consideration of how (and how far) they might practically be achieved.<sup>13</sup>

It is this severance that Rawls and his fellow practitioners of “analytic” political philosophy required for their enterprise. Neither Rawls nor Nozick nor Barry engages in any systematic consideration of the substantive problems of political life such as is found in the classic works of political philosophy and writings like the *Federalist Papers* or Lincoln’s greatest speeches. Instead, they rely on what Barry calls “analytical politics,” in which “the complex reality” of actual political situations is “simplif[ied]” by selecting certain of their aspects and then constructing a “model” reflecting them. Barry believed that such a technique would be far more likely “to advance the sum of human knowledge” than “to spend one’s working life rolling the classics round the tongue like old brandy,” i. e., studying the great philosophic works of the past as a guide to understanding the present.<sup>14</sup>

It is highly doubtful that treatises of the sort advocated by Barry, which attempt to reduce the complexity of political life to one or a few simple principles, have in fact “advanced” our understanding so much as contributed to the ideologization of academic political thinking. While Barry downplayed the idea that his setting aside of the greatest writings of the past encouraged a “temporal chauvinism” of

the dominant prejudices of contemporary academics, this dismissal of the past is just what was promoted. Rawls, in particular, repeatedly acknowledged that his “theory of justice” was intended to systematize the beliefs that an unidentified “we” found intuitively appealing; in his later writings, he was compelled to admit that the “we” in question were simply contemporary left-liberals. Nozick’s libertarianism similarly appealed, at the other end of the American political spectrum, to those who wanted to “justify” property rights and oppose redistributive taxation—even though they conveniently overlooked Nozick’s “principle of rectification,” which held that no existing property holdings were just unless they could be shown (most implausibly) to derive from a historically unbroken series of voluntary exchanges.

Ironically but not surprisingly, the very parochialism of Rawls’s doctrine heightened its appeal to liberal law professors. As one such professor, Richard Parker of Rutgers, explained in a 1979 essay, Rawls’s *Theory* was enthusiastically received by lawyers as a “reaffirmation” of the “constitutional and personal values” they already held. Unlike philosophical scholars who might quibble over whether Rawls had actually demonstrated his claims, Parker observed that lawyers, already agreeing with Rawls, were more interested in getting to work “translat[ing] Rawls’s conception of justice into principles of constitutional law” and then applying them. Parker had no reservation about reading Rawlsian principles into the Constitution, since by his account that document “must be interpreted to give expression to our own [that is, present-day lawyers’] best vision” of justice.<sup>15</sup>

As James Stoner of Louisiana State University has demonstrated, the considerable powers originally assigned to the American judiciary by the Founders

presuppose the broad principles of liberal political philosophy set forth by Locke and Montesquieu *and* the common-law tradition inherited from England. Only on the basis of common-law assumptions about the role of the judiciary in articulating the community’s standard of justice, he argues, does Hamilton’s case for judicial review in *Federalist* No. 78 (refuting the Anti-Federalist Brutus’s case that it would amount to judicial supremacy) hold water.<sup>16</sup> What particularly distinguishes the common-law method of reasoning is its empirical character: reasoning gradually *from* particular cases *to* broader principles, rather than the other way around. Not only does this approach respect the people’s right to self-government, which the conception of judicial review espoused by Parker and more prominent theorists of an activist judiciary does not; it recognizes the need to leave room for the exercise of prudence by the more overtly political branches of government (a need acknowledged by Chief Justice Marshall in his holding in *Marbury v. Madison* that “political questions” lie beyond the judiciary’s proper authority to resolve).

Neither common-law judges nor the great liberal political philosophers thought that the political realm could be subsumed under particular theoretical doctrines about morality. Hence, Locke’s teaching, reflected in the Declaration of Independence, lays out only a certain broad statement of the purpose of legitimate government—to secure men’s rights to life, liberty, and property—and an account of the sort of political institutions necessary to achieve that purpose (a separation of powers between legislature and executive, combined with regular elections of at least the former).

To think that considerations of political prudence—determining the particular policies most appropriate to securing the

legitimate ends of Constitutional government—can or should be subordinated to “theories” of morality is one of the great academic and jurisprudential delusions of our time. It enables individuals whose schooling is limited to analyses of “moral” argumentation to claim a comprehensive authority that flies in the face of the original, consciously political, tradition. And it encourages judges not only to rewrite our Constitution but to announce, in the words of Justice Anthony Kennedy in *Planned Parenthood v. Casey*, that the American people’s very right to call themselves a self-governing people requires them to defer to the Supreme Court’s authority to “speak before all others for their constitutional ideals.” Criticism of judicial activism on behalf of a supposedly “living” constitution is necessary but not sufficient to remedy these tendencies. We must also challenge the authority of the “moral theorists” in philosophy departments and law faculties who equip our judges with their sense of supreme righteousness.

- 1 Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 120.
- 2 L. T. Hobhouse, *Elements of Social Justice* (London: G. Allen and Unwin, 1922), 4.
- 3 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 6.
- 4 See John Rawls, *A Theory of Justice* (Cambridge: The Belknap Press of Harvard Uni-

- versity Press, 1971), ch. 3 and pp. 104, 195–201.
- 5 Michael Walzer, “Flight from Philosophy,” review of Benjamin Barber, *The Conquest of Politics*, in *New York Review of Books*, February 2, 1989, 43.
- 6 David Hume, “Of the Independency of Parliament,” in *Essays Moral, Political, and Literary*, ed. Eugene Miller (Indianapolis: Liberty Classics, 1985), 42; Niccolò Machiavelli, *Discourses on Livy*, I.3 (first sentence).
- 7 Immanuel Kant, “Perpetual Peace,” in *Political Writings*, 2nd ed., ed. Hans Reiss, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), 117–18.
- 8 *Ibid.*, 112.
- 9 Peter Laslett, ed., *Philosophy, Politics, and Society* (New York: Macmillan, 1956), vii.
- 10 Warnock, *Ethics Since 1900* (Oxford: Oxford University Press, 1960), 144.
- 11 Friedrich Nietzsche, *Beyond Good and Evil*, trans. Walter Kaufmann (New York: Vintage Books, 1966), sec. 228, 157.
- 12 Brian Barry, *Political Argument* (Berkeley: University of California Press, 1990), xxiv, xxxv, xxxvi–xxxviii.
- 13 See Stephen Elkin, *Reconstructing the Commercial Republic: Constitutional Design after Madison* (Chicago: University of Chicago Press, 2006), 251–53.
- 14 *Ibid.*, 290n.
- 15 Richard Parker, “The Jurisprudential Uses of John Rawls,” in *Nomos XX: Constitutionalism*, ed. J. R. Pennock and J. W. Chapman (New York: New York University Press, 1979), 270–79.
- 16 See James Stoner, *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (Lawrence, KS: University Press of Kansas, 1992).