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LIBERAL POLITICAL THEORY AND THE RULE OF LAW

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Abstract:

The efforts of liberal political theorists like John Rawls and Ronald Dworkin to identify principles and rights based on moral truth as authoritative bases for law and politics ignore the insight of Hume and other conservative theorists that the moral possibilities of human nature generally are limited and are in turn limiting on what can be accomplished, from a moral point of view, through law and politics.

Key Words: liberalism, conservatism, David Hume, Ronald Dworkin, John Rawls, legal theory, political theory, moral theory, rule of law

Liberal Political Theory and the Rule of Law

I. MORALISTIC THEORIES OF LAW AND POLITICS

Moralistic theories are often distinguished by the assumptions that political decisions should be shaped primarily by moral considerations and that politics is a suitable instrument for the direct pursuit of moral ideals. At base, a moralistic political theory will rest on some claimed moral truths. It is frequently assumed in these theories that a straightforward pursuit of those ideals will produce social progress, if not eventual human perfection. They tend to assume that whatever is best is both possible and obligatory.

Alternatively, the non-moralistic approaches tend to be more realistic or practical in outlook. Whatever moral ideals the authors may privately or publicly espouse, they are apt to be skeptical of the possibility of realizing those ideals on a social scale through political or government activity. Rather, they will be sensitive to the law of unanticipated consequences, the view that deliberate attempts to implement particular ideals will have unwanted long range consequences, the most significant of which may very well be contradictory to the stated ideal. These theorists begin, not with moral principles, but with empirical views about what kinds of improvements are possible in this world.

My thesis will be that moralistic political theories in general, and contemporary liberal theories in particular, implicitly assume congruence between that which is morally desirable and that which is humanly possible. This amounts to an empirical assumption about mankind which is far more optimistic than much of the western tradition of political theory has been willing to entertain. It is true enough that every generation has had its romantics and utopians who have

made such assumptions. But twentieth century liberalism derives at least in part from a ferocious utilitarian tradition which was in its pre-J. S. Mill versions free from any such sentimental views.¹

Perhaps it is the case that the enthusiasm for socialism which prevailed among political romantics in the first half of this century has influenced liberal thinkers to step over and share the "high ground." But as our experience with the political experiments of this century continue to temper this enthusiasm, we might come increasingly to wonder about this step and to reconsider the sober conclusions of the eighteenth century writers, whose republican visions were more severely circumscribed by their realistic assessment of what is possible for societies of men governed by men.

There will be some liberal theorists who will protest that I misunderstand their enterprise. They candidly see themselves as doing nothing more than clarifying a set of moral intuitions and ways of speaking about things, without any commitments to real world feasibility. I think that is an honest and defensible position, though it obviously stands convicted of irrelevance by its own self-description. Its usefulness in political discourse would be hard to defend.

But most liberal writers do think their theories are relevant for practical legal and political decision making. Ackerman and Dworkin are obvious examples. But John Rawls offers the stronger and more interesting case. I will mostly limit my critical comments to his work.

II. RAWLS' MORALISTIC LIBERALISM

From the beginning Rawls was clear that rational intuitionism could only offer half a

¹For a fascinating contemporary defense of this view, see J. Stephen, Liberty, Equality, Fraternity (1873).

concept of justice. But his primary complaint against it was that it had no methodology for establishing priorities among the plurality of ethical principles it endorses.² The point of Kantian constructivism is to establish priorities among these intuitively derived principles. The theory of justice was designed as "a theory of the moral sentiments . . . setting out the principles governing our moral powers." "Our considered judgments in reflective equilibrium" are the facts against which proposed principles are to be evaluated.³

Following Rawls, many liberal theorists of the last decade or so have been inclined to assume that their methods enable them to explore ethical truths of universal validity, that somehow political theory is being linked up with transcendent truths. And in a world that was losing confidence in its fundamental beliefs, this was indeed an appealing position to hold.

A. Inadequate Modifications of the Methodology

But the illusion of universality and transcendence has already worn thin. To his credit, Rawls himself has led the way to recantation on this score. Yielding to persistent and often sympathetic criticism,⁴ Rawls explained in his 1980 Dewey lectures that his theory of justice must be seen as an articulation of the ideal for modern democratic societies only, and not a transcendent ideal toward which all societies should strive. The theory should not be regarded as an expression of universal moral truth. And there are no moral facts.⁵

²J. Rawls, A Theory of Justice 41 (1971).

³Id. at 51.

⁴See, e.g., M. Walzer, Spheres of Justice (1983) and M. Sandel, The Limits of Liberalism (1976).

⁵J. Rawls, Kantian Constructivism in Moral Theory, 77 J. Phil. 515, at 518-19 and 534 (1980).

Some critics of liberalism will no doubt gleefully seize on these concessions as admissions from the leading liberal theorist that liberalism is nothing more than the ideology of bourgeois capitalist society. But those are not the kinds of criticisms which interest me. Rather, I want to inquire whether this bold new move on Rawls' part does anything to overcome the objection that liberal theory merely assumes a congruence between the morally desirable and the humanly possible. By accepting the relativist stance, Rawls does make his endorsement of pluralism more credible. But it does not seem to be the case that he has gone far enough to satisfy the Humean complaint.

This can be explained in a straightforward way by recalling how this connection was handled originally in his theory of justice. Rawls assumed from the beginning that the participants in the original position, by assuming the obligation to live under the scheme they chose, would come up with a set of ethical principles that would continue to attract support naturally in an actual well-ordered society. This device was also supposed to ensure the continuity of the political system. This assumption seems to have two problems:

First, if there is such a set of naturally attractive principles which we can agree on outside the constraints of the veil of ignorance in full knowledge of our interests, what was the original position necessary for in the first place? Of course, the procedure used by imagining an original position is designed to establish priority between ethical principles in a way which intuitionism could not. But by imagining such an idealized state to be free of any knowledge of individual interests Rawls suggests that somehow such knowledge would corrupt the principle-selection process. Yet in the end Rawls has assumed that the principles which will be selected in that process will continue to be naturally attractive and therefore generally supported even after we

know our individual interests. This seems only to be possible because of an assumed congruence between the morally desirable and the possible.

B. The Implicit Theory of Human Nature

Second, if we try to support the assumption by providing an argument, we quickly discover that we must attribute to men generally a rather generous allotment of rationality and altruism. In other words, we must assume an excessively positive view of human nature. We need to be willing to say that individuals who are in advantageous positions due to natural talent, wealth, or positions of power or authority, will be persuaded to use their influence to support rules designed to promote the greater good of the community over the long run and will restrain themselves from seeking rule changes to profit themselves at the expense of others. And indeed, if we believed that all men were like Jack Rawls in real life, we might quickly be persuaded to agree.

But who among us really believes this? Where is the political party that has been able to fulfill its idealistic electioneering rhetoric after gaining political power and to resist demands from its own supporters to promote their interests through the powers of government? Rawls may be thought to finesse this objection by his blanket provision in the original position that the principles and facts of general psychology will be known to the participants. But Rawls assumes again that the nature of these facts will have no consequences for his theory. Whatever the facts of human nature, his principles of justice will emerge from the deliberations. In other words, Rawls implicitly takes either the position that the empirical facts of human nature are irrelevant to his theory or the position that the empirical facts pose no problems. The consequence is that his theory risks irrelevance in a society determined in every respect not by ethical truths but by

the empirical facts of human nature.

In the Dewey lectures, Rawls explicitly acknowledged that through the encouragement of Norman Daniels he had finally come to see that his "conception of the person" is a moral ideal distinct from a theory of human nature.⁶ However, he still wants to insist that because of his requirement that it must be possible for people to honor the ideal selected in the original position, "the feasible ideals of the person are limited by the capacities of human nature and the requirements of social life."⁷ It is clear that Rawls does now accept the logical connection I am urging between the ideal and the possible, and in that he distinguishes himself from many contemporary theorists. But he has not faced up to the fact that his "assumption that full autonomy is a feasible ideal" implicitly drags in the optimistic theory of human nature.

Obviously the implications of that distinction have not yet had sufficient opportunity to work themselves out in the theory. Nor is it likely that Rawls foresees how radical those implications will be for his and for all other moralistic approaches to political theory.

Another way of putting my main point would be to assert that Rawls wants to eat his cake and have it too. He wants the clarity and ethical purity of abstract deductions made in an imagined contrary-to-fact thought experiment. And he wants the results to be practical guides in the messy real world in which we live. The move from one to the other is supposedly accomplished by certain "requirements" put on the deliberations in the thought experiment, i.e., that they take into account the general facts of human psychology. But there is a further implicit assumption that somehow those facts will be compatible with the implementation of justice.

⁶Id. at 534.

⁷Id.

This can be demonstrated simply by reflecting on this question: Could the principles of justice produced in Rawls' scheme appeal consistently to real political actors if the general facts of psychology were as Hume describes them? Because it could not, we see that Rawls implicitly assumes a more positive theory of human nature which describes men as rational beings with few insuperable moral or intellectual imperfections. If that empirical assumption is justified, there is no basis for arguing that liberal theory is irrelevant.

III. THE CONSERVATIVE THEORY

If the assumption is not justified, and if Hume's assessment of human nature is more nearly correct, then liberal theory has limited force, and serves mostly as an heuristic device to help us sharpen our powers of understanding and to help us develop moral critiques of the world in which we live. There is certainly no harm in understanding better what we find wrong with our world if we can remember the very considerable practical difficulties that confront our efforts to overcome those shortcomings.

That most liberal theorists overlook this implicit assumption is the major point of my paper. The next obvious question to take up is whether this assumption is justified. This question has motivated people like Hume to write long histories of England or Rome or the Peloponnesian Wars. I would speculate that in a straightforward discussion of the conservative theses on human nature that most liberal theorists would be inclined largely to agree that from an empirical, social science point of view, it is safer to say of mankind generally that altruism is limited, and that the intellectual faculties and the quality of beliefs held are far from adequate for dependably objective, wise and just governance, regardless of who is in power. So why do they assume a more optimistic view in their theories?

Because liberals continue to succeed in avoiding discussion of human nature, it is difficult to demonstrate that they have a doctrine on the subject. It is abundantly clear to liberals and everyone else that conservatism features such a doctrine,⁸ and that for conservatives, this doctrine is what stands in the way of their accepting liberal proposals. Is it not self-evident that if this conservative doctrine contradicts liberalism, that liberalism must implicitly feature a contrary doctrine? A few liberals may occasionally indulge the all-too-human desire to feel morally superior by telling themselves that conservatives actually prefer a world in which inequality and injustice prevail. But this can hardly be convincing to the fair-minded. Liberals and conservatives largely share the same individualist values with respect to liberty and equality. But their empirical beliefs about what is possible divide them on matters of policy. The shared individualism and other values however lead external critics to lump them all together in what is often referred to as the liberal or individualist tradition.⁹

IV. A GRAMMAR FOR POLITICAL THEORY

Before proceeding further, I must clarify that I do see great value in the kind of theoretical work that Rawls and other moralistic theorists are doing. But to make the limited nature of my complaint more clear, I will need to sketch a preliminary grammar for political theory. It should be obvious to us that we use political theories for different purposes in different contexts. But we frequently neglect to notice that the assumptions entailed in the variety of political theories may limit the contexts in which they will be useful. In other words, not every legitimate political

⁸A. Quinton, The Politics of Imperfection 14 (1978). In the T. S. Eliot lectures, Quinton chose to spell out the tradition of conservative thought in similar terms.

⁹See, e.g., Marxist critiques or R. Unger, Knowledge and Politics (1974).

theory will be applicable to every situation where some political theory is needed.

A. The Citizen as Moral Individual

Take the case of citizens trying to decide how to vote. Clearly any theory that will help them clarify their values and ethical principles will be of great assistance. Belief in theories of rights or of ethical truth provides essential self-imposed constraints on individual pursuit of self-interest. As citizens, each person must try to act to further what he or she believes to be morally correct behavior and relationships. Each must judge his or her own case in such efforts. Conscience is the appropriate guide.

B. The Legislator

Similarly, theories of rights or of the good may limit the range of possible proposals that a legislator will be able to support. A legislator must act for the common good. But moral considerations are not easily separated out in such deliberations. Like the citizen, the legislator needs to be sensitive to conscience, both his own and those of his constituents. (Note that in each of these first two, a multiplicity of theories can produce a desirable tendency toward self-restraint. Community-wide adherence to or endorsement of a single theory may be unnecessary.)

C. The Judge

The situation of the judiciary is really quite different. For the judge cannot postpone decisions while looking for a social consensus to emerge. Nor can he choose to impose his own theories of rights on a population through interpretation of the law as Dworkin and others recommend. He must apply the law of the land as he finds it, or resign if the law is sufficiently repugnant to his own beliefs. As a judge he acts in a role which separates him from his personal

interests and values. He is the custodian of neutral rules which have been developed through other authoritative processes. To act otherwise would make him a revolutionary. In a pluralist democratic society, it is the business of the legislature to hammer out the compromises and definitions of rights which will have legal force. No judge can speak for a society as a whole or for some supposedly correct account of ethical truth on these matters when they have not been previously resolved through the legislative process. To attribute such divinations to the logically necessary principles underlying the political system is to misunderstand pluralist democracy.

1. Dworkin's liberalism.

Dworkin's attempt to make the judge into a legislator responsible to a true theory of rights ignores the problem of human nature. For if men are in fact capable of regularly and reliably drawing correct logical inferences from a true and comprehensive theory of rights without being affected either by interests or idiosyncratic perspective, then giving judges such a responsibility would not destabilize the legal system. But stability of legal expectations is one of the essential products of a good legal system. And if one's judgment of men precludes in any way the above described possibility, a different approach to judging needs to be found. One key to that approach has been the development of legislatures as bodies which are not expected to deduce laws from a single true theory of rights, but to forge legal rules which are mutually acceptable given the range of theories of rights held by the citizenry. Because there are a range of political theories being served by the laws as negotiated through legislatures, it is a *prima facie* error to instruct a judge to construe a law in terms of a single true theory of rights which he must divine behind the political and legal system he serves. To so instruct a judge is to reject the basic political constitution which recognizes fundamental lack of agreement on theories of rights and

implements the desire of individual citizens as a body to establish a political and legal community which can serve them well in the absence of such an authoritatively true theory.

Dworkin might choose to respond to such a criticism and argue that in spite of our perceived disagreements, there must at some level of abstraction actually be agreement on a true theory which minimally sets out the rights we do all expect. But this cannot work because it moves in the wrong direction to find the agreement. And it is not really the case that he can admit that the strength of his theory of rights rests on agreement anyway. He wants it to be simply true.

2. The rule of law

It would seem then that the correct direction to move is to a discussion of principles of rule of law which do not provide a thick theory of rights, but which do set up norms by which judges and others can criticize and elaborate legislation in a regime built on the recognition of disagreement about some fundamental matters.

Nor does the fact that we individually believe in some theory of rights or justice mean that we will know which policies will produce the best results as measured by the standards set forth in our theory. For to the extent that we are truly concerned with justice, it is the long range and the full range of results that interests us. One does not need to live much beyond the juvenile years to discover that many high-minded projects turn sour and make things worse in terms of the very ideals that inspired them. So we need something more than ideals or ethical truth in our political theory if it is to help us cope with the uncertainties of the political world.

D. The Founder

For that reason it is helpful to shift finally to the perspective of constitution writers, who

of all political actors are most required to take the practical long range consequences into account. From their perspective the relevance of empirical assumptions about what kinds of rules will produce what kinds of behavior are determinative. Human nature is a crucial issue. It must have logical priority.

1. The eighteenth century American example.

The American founding fathers were equipped simultaneously with theories of rights and with theories of human nature, and the institutions they designed were influenced by both. But the key for my purposes lies in their very deliberate and considered recognition of the dominant role of a theory of human nature. Like most eighteenth century thinkers they shared the diagnosis of David Hume that human beings armed with political power tend to be exploitative and self-interested and that any regime that would produce peace and liberty must have some means of compensating for these unfortunate statistical tendencies.¹⁰ The great discovery claimed by these eighteenth century theorists was that the compensating devices need not be repressive, that is, that institutions could be designed which would harness the self-interested behavior of ambitious people to the public good.¹¹ The product of their reflections has been one of the most effective instruments ever devised for achieving the very values that Rawls and other liberal theorists are recommending.

2. Hume's theory of human nature

Hume's theory of human nature was clearly the key for James Madison and others of that

¹⁰A. Lovejoy, Reflections on Human Nature (1961) substantially refutes the contrary view made popular by the progressive historian, Carl Becker.

¹¹This is the persistent theme of Madison's essays in The Federalist and of John Adams in several works.

founding generation. I will draw on one of its more recent formulations in the following summary.¹² Eighteenth century conservatives drew on their study of history and the experience of their own lives to conclude that most men are corruptible, and that given sufficient opportunity they will take advantage of one another and will even choose to become tyrants if tempted by unlimited power and gain. This is not the Calvinist view that men are by nature depraved. Rather, the Humean view arises from empirical observations, however informal, and therefore, admits the possibility of frequent and significant exceptions. These theorists recognize the everyday altruistic acts of countless people. But they also see a persistent, widespread, and incurable selfishness which sometimes occurs as covetousness and the desire for glory, all of which taken as a package tend to shape men's lives and constantly threaten the welfare and stability of society as a whole.

To justify a pursuit of the liberal vision of a just society through politics, one must go beyond a faith that human nature is ultimately perfectible through manipulation of the social environment. One must also have a great faith in the ability of men to make correct political judgments and in their ability to get control of all the relevant information for the making of such judgments. Hume and his sympathizers are inclined to be dubious on both these grounds as well. They find human judgments to be intrinsically fallible, and see the range of critical information as so complex and incomplete and inaccessible that no single decision maker or group could possibly control all of the necessary information to make a reliably correct decision, even were they able to manipulate all of the data correctly. So it is that these skeptics are armed not only

¹²My presentation here follows the general formulations in J. Lucas, The Principles of Politics (1966).

with one, but with three pessimistic conclusions about human reality that incline them to regard the moralistic theorists' dreams as chimera.

I should stress again that this view does not seem to deny that there are many people who are routinely benevolent in their actions. It is merely a recognition of the weaknesses of men which can come out in unpredictable ways making life without effective community conflict resolution processes unattractive.

V. INDIVIDUALISM AND MAN'S SOCIAL NATURE

Much has been made in recent years of the claim that liberalism fails to recognize the social construction of the individual. My discussion of human nature requires some comment on this point. In defense of the liberal individualist stance it must be said that there are certain radical senses in which man is an individual, and they are important for politics. Plato seemed to be getting at this in the Republic with his thought experiment of the community of pains and pleasures.¹³ That imaginary community failed, according to Socrates' description, precisely because its organizing principles attempted to deny that individuals had radically separate bodies which could not sense the same pains and pleasures that others were sensing. We can further see that all appeals to reason assume the individual is an independent center of reflection and decision making to which arguments must be addressed. Our minds and our bodies, though inherited from other people in important ways, mark us off radically from those around us. We are inescapably individuals.

But we are also radically social beings in many ways. And there is really no reason why political theory cannot simultaneously recognize the social nature of man, as demonstrated by

¹³Plato, Republic V, at 462a-465e.

facts of culture and language, family life and child nurture, and social and economic interdependence. To the extent a political theory is unable to accommodate this aspect of our character, however, it can only claim the status of a thought experiment. It can only be useful in helping us to understand the implications of our moral intuitions.

Even our sociality tends to individuality. Each man and woman possesses a body and a mind which constitute a permanent boundary between that individual and all others. No other individual can ever think or feel exactly what any given individual thinks and feels. Each individual experiences the world from a unique perspective that cannot be shared fully by anyone else. Throughout life, each individual must necessarily make countless choices, usually within a context of rules and understandings provided by the larger group, which choices over time define the character of the individual chooser. With the passage of time, individuality grows out of sociality and becomes increasingly pronounced.¹⁴

In a world of scarcity, where opportunity costs force constant choosing, individuality inevitably generates conflicts of interest and of view. But conflicts threaten group affiliation. And rationality suggests that routinized conflict resolution mechanisms might regulate the effects of individuality and make group affiliation an enduring possibility. These mechanisms are so crucial that it is more important for them to function regularly than that they be always accurate or fair.

VI. LAW INDEPENDENT OF ETHICS

This account of human nature leads conservative thinkers among others to look to law rather than ethics for authoritative direction. Although this is not the place to develop this

¹⁴See S. Letwin, The Gentleman in Trollope: Individuality and Moral Conduct 63 (1982).

alternative view, a brief sketch of its outlines might elucidate my critique of contemporary liberalism. At the very least it might explain why the critic need not feel like he or she is driving over a cliff in rejecting the moralists' direct link between political theory and ethics.

The idea of a neutral social mechanism for resolving disputes is the idea of law. Coercion is a necessary adjunct to law to make it credible. But coercion is not the essential characteristic of the law. Its essential characteristic is that of facilitating individual action and choices by establishing a stable set of legitimate expectations for individual conduct and by assuring all individuals of predictable, neutral and orderly mechanisms for resolving conflicts that may arise while pursuing their own ends.

But human nature constitutes an additional threat to this process of law in that the process can only be administered by men, who necessarily have their own interests and weaknesses, which in turn have the potential to interfere with the neutrality of the legal process or to reduce its predictability. The law addresses these issues in various ways, primarily by specifying in advance the means of identifying future administrators of the law and the rules by which future conflicts will be resolved.

Because the interests of individuals often lead them to join groups whose interests are similar, factions naturally emerge in a society of law and sometimes subvert the legal process for their own advantage. The dangers of anarchy are reduced by law, but not eliminated. Rather, they are organized at a higher level.

By founding the state on our needs we can explain it fully in terms of the purposes and choices of individuals. Although it may well be true that there are moral theories that could be developed as fundamental justifications of the state, that approach is not necessary. And the

advantage of taking this minimalist approach is that the locus of purposes and objectives for human action is clearly with the individual, the family and the voluntary association of individuals. Men may be seeking the highest moral achievements on either the individual or social level. But those pursuits are essentially private. The state is merely their facilitator. Virtue remains private in a fundamental way.

Furthermore, had we chosen to develop a rationale for the state out of a particular moral theory, the resulting state would have to be one in which that moral theory was authoritative. It would inevitably be accorded legal status. And morality, in effect, would be nationalized. Individual differences of moral view could not enjoy equal legal standing, because there would be a national norm. And any individual choices or pursuits not in conformity with the authoritative moral point of view would be subject to regulation, or even extirpation.

VII. PLURALISM AND THE RULE OF LAW

One reason the approach through law does not require an undergirding moral theory is that the idea of law has within it certain implicit norms or principles that are quasi-moral in function, if not in character.¹⁵ These norms will provide metalegal standards or criteria against which both the rules and the procedures of a legal system may be evaluated without bowing either to the interests or the moral theories of any particular faction.

A. Law and Morality

The relationship between morality and the law is therefore not so much logical in character as causal. The law is not derived logically from accepted true moral principles. Rather, it is established by legislatures that come to agreement on public rules that are shaped by interests

¹⁵See L. Fuller, The Morality of Law (rev. ed. 1969).

and by views about right and wrong. In this political process, people or groups holding different fundamental moral or religious views are brought into agreement precisely because the laws do not need to articulate or be tied to fundamental moral truths. Because they only need agree on consequences and policies, divergent moral points of view can be marshalled in support of a single piece of legislation.

By this account, morality is intimately involved in the making and changing of law. But it is never through acknowledgment of an official moral theory that is legally binding or that occupies some special constitutional status. Rather, the moral views of the citizenry must work themselves out in the political process through legislative compromises. Sometimes severe differences of moral principle make such compromises difficult or impossible as with the abortion issue. But even in such cases, the issue of moral differences is firmly restricted to the domain of politics. Resolution can only come through political resolution. And thus the pluralist integrity of the society is preserved.

B. The Contemporary Moralistic Alternative

Strong challenges to this view have been raised in recent years by legal philosophers. In particular, Ronald Dworkin has argued that both laws and constitutions are necessarily rooted in political and moral principles.¹⁶ In the case of western liberal democracies, Dworkin finds the principle of equality lurking behind everything else, and he therefore accords to it fundamental status. When all else fails, judges are correctly instructed to invoke this moral principle in the decision of hard cases. The same is true of rights in general on Dworkin's view. They are grounded in moral principles and are more binding on judges than any legislative statute. It has

¹⁶See R. Dworkin, Taking Rights Seriously (1977).

been my claim that this approach, like some of its predecessors, constitutes an attempt to nationalize morality and to institute an official moral doctrine as legally binding on all. And many issues that should be resolved through the give and take of political discourse, are urged on our judges as if they were simply questions of law. Dworkin is candid that his reason for taking this approach is that the judges, particularly of the American variety, have shown themselves to be much more interested in social reform than are the cumbersome legislatures.¹⁷ So he is attracted to the advantages of having small judicial bodies make the hard social decisions and prod the rest of society along more sharply in the way we should be going.

VII. SUMMARY

To this point I have argued that any political theory that claims to be useful as a guide in actual political decision making at any level must make assumptions about human nature which will determine how much distance there must be between the moral ideal and the politically possible. I have noted that Rawls' attempts to give flesh to his account of political feasibility run aground on this issue, and that he has not yet recognized the need to be more specific about a theory of human nature, and that in the absence of such a discussion, he has implicitly assumed an unlikely and romantic version of such a theory. I have further argued that when this need is taken seriously that it is difficult not to accede to the model used by David Hume over two centuries ago. And finally, I have claimed that starting with human nature rather than with the moral ideal tends to render moralistic political theories largely irrelevant or at least to relegate them to a secondary kind of role. For to the extent we want our theoretical work to have social relevance, we must always start with a clear view of what is possible. And if the Humean model

¹⁷R. Dworkin, Political Judges and the Rule of Law 282 (1980).

of human nature is correct, moral principles are not reasonably available to us as principles of politics and government. Rather, in a world where men are not yet angels and in which they hold to conflicting fundamental ideas about the good or the right, rule of law is the highest mode of association available in civil society. It may be inadequate in many ways from the standpoint of our ideals. But it is the only normative structure which is responsive to those ideals while taking full account of the limitations of human nature and the diversity of moral beliefs.

My major finding in this exercise has been that contemporary liberal theories of law and politics tend to be moralistic in the sense that they assume a natural congruence between what is right and what is possible. Whether contemporary theorists recognize it or not, this amounts to an unwarranted and crucial assumption about human nature that has rarely been taken seriously by political philosophers when considered on its own merits. I have suggested further that although there is a place for moralistic theories in the everyday political discourse of citizens and legislators, that they provide an inadequate perspective for judges and constitution writers. These need the corrective of Hume's observations about human nature. I have also sketched in broad strokes some of the key elements of such a theory of human nature, emphasizing the limited character of man's altruism, reason, and knowledge on the one hand and the radically social and individual aspects of his nature on the other. Indeed, legal theory and political theory need to go hand in hand. But the moralistic approach to this union which characterizes most contemporary liberal efforts fails to appreciate the necessity of locating theory firmly in a sober view of the possible before recommending it as a guide for practitioners of law or politics.