

## JUSTICE FOR HEDGEHOGS TO DEBATE\*

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### I. CARLOS NINO

I'd like to add on to my fifteen minutes, a few minutes to speak about Carlos Nino because, as I understand it, this is a meeting in his honor.

I met him when I came to Argentina with some other philosophers, I think at an invitation arranged by Carlos, and I found him the most extraordinary man, to be so gifted, and prolific and original, in legal philosophy and moral philosophy, really prolific and extremely interesting, and at the same time to be so committed to the achievement of democracy in this country, [of an] unflagging dedication; and I have nothing but admiration for him. And when I heard of his sadly, ridiculously early death, I was saddened, and when I arrived here, three days ago, I was saddened again because he was not here.

But the memory that I would like to share with you is about a different quality, it's about courage. When I was here, all those years ago, Carlos invited me to his house for a drink and a meal. We drove up to his house in his car and when we got out he pointed across the street, and there was a rather frightening looking Ford Falcon. I didn't even know what a Ford Falcon was but he showed it to me. It looked like an ordinary, not very

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attractive American car, and he said "that has history attached to it", and then, someone got out of the car. When we arrived and we were crossing the street to go to his house, someone got out of the car, opened the boot or the trunk of the car and took out a rifle and held it up practically in his face, and put the rifle back into the car, and Carlos said to me "that's meant to frighten me, but it doesn't". And I very much admire that moment.

## II. JUSTICE FOR HEDGEHOGS

I'm going to try to summarize this rather large book. The book, I think, is an illustration of a style of doing philosophy, which I wrote about some time ago. I called it an "inside out" rather than an "outside in" method of philosophy. That is, I started my career after I finished being a lawyer (that didn't take long); I started my career with a central interest in human rights and political philosophy, and I thought that it would be necessary to concentrate, and not deal with very abstract philosophical issues. But to concentrate on the practical issues, I wanted to write articles in what we call "popular journals" (though the *New York Review* is perhaps not quite a popular journal, it still has a very wide circulation).

But as I began to work on these issues, academically, I soon discovered that you couldn't avoid the abstract issues because the difficulties that you encounter thinking about what ought to be done about abortion or affirmative action. As soon as you began to reflect about this you saw the importance, the crucial fossil of philosophical issues, baring on what you took first to be a very practical issue. And that's what happened in the writing of this book. I wanted, finally, to go in the other direction. I wanted finally to say "now [that] I've thought about all these issues, now I'm going to try and present a philosophical position and then, at the end, point out the political implications of that philosophical position". It's true that a great deal of this book is an attempt to synthesize what I had studied in this inside out way for a long time. But in writing the book, I found that even more reflection on mainstream general philosophical issues was necessary, and so a good part of this book is my first attempt. In this summary I'm going to try and emphasize that process, and emphasize the general philosophical issues that might not seem at first sight connected to practical questions of politics but which, in my view, turn out to be very central.

### III. SKEPTICISM

The book has five parts and I'll just mention what I take to be the most important, and in some cases the newest, of the thesis that I'm going to defend. The first one, I take to be extremely crucial, is directed against skepticism. I want to reject the idea that in morality and politics and ethics, skepticism is the natural or default position. Many philosophers have argued against moral positions, against moral claims by saying "moral claims can't be true or false, they just represent our feelings, our own subjective reaction, and that is demonstrated by the fact that people disagree about moral issues; they can't prove one position or the other, people who believe one thing can't convince the other person and, therefore, morality is not an objective matter."

The mistake, I believe, or so I argue in the first part, is not to realize that skepticism is itself a moral position. If I say "employers owe medical care to their employees" and someone else says "nonsense, that's just your opinion, you can't prove that", I want to reply "well, I see you have a different opinion; your opinion is that employers do not owe health care to their employees and that is as much a moral opinion as the opinion that I set out, and if you argue against my opinion by saying "well, people disagree", I will reply "yes, and people disagree about your moral position, for example, I disagree with it".

It's very important, I think, to establish that there is no such thing as a morally neutral kind of skepticism. There is a discipline, philosophers like to say "we study meta-ethics and we draw our conclusions about subjectivism and skepticism from an independent philosophical meta-ethical position". In the first part of the book I argue that that is terminally confused; one confusion after another.

### IV. INTERPRETATION

In the second part of the book, I take up the question of how we should think about moral issues. I argue that there is a kind of intellectual activity which we ought to recognize as interpretation in general. Interpretation is different from explanation. I try and illustrate the difference in part II by talking about interpretation in art. I consider, for example: what would make one interpretation of a very complex poem by, for example Yeates, better, sounder, more accurate, than another interpretation. I won't try and

summarize the theory now, it's rather complex. But I offer that general account because I want to introduce another idea. First, that the analysis of moral concepts (justice, liberty, law) is interpretation. These concepts, the root concepts through which we conduct our political reflection and our political debates, are interpretive concepts. We can't analyze them in some neutral way by distinguishing between what the concept means just as a matter of semantics, and what the truth is; what the concept of justice is or what the concept of law is, on the one hand, and on the other hand, which institutions are just, if our judges should decide cases. There isn't any such distinction. A theory of what the concept means is a substantive moral theory.

In this section of the book I also make a claim which is (it would be an understatement to say controversial) that the leading philosophical concepts, including the concept of truth, are also interpretive concepts. A theory of truth is a moral theory about when we ought to react to evidence in a certain way. So the second part of the book makes a very broad claim. It's a claim that I found required, again, by starting with very practical issues and just seeing how the correct approach to these issues required a study of the most abstract philosophical issues, those that might at first sight seem furthest from ethics and morality.

## V. ETHICS

In the next part of the book, I take up ethics. I have been for long time following Bernard Williams, who introduced the terminology. I have distinguished between questions of ethics, by which I mean question about how to lead a successful life, from questions of morality, which are questions about what we owe to other people.

I begin with ethics (and Marcelo summarized this very eloquently yesterday) and with the idea of dignity. To me dignity has two aspects. The first part of dignity is a sense of self respect. Your dignity requires that you think it important that you make some success of your life, not because you happen to want to make a success but, the other way round, you recognize you want to lead a successful life because you recognize a cosmic responsibility to do that. I can't prove that to you. I think it's a good interpretation of how at least most of you lead your lives, though it might sound unfamiliar to you. The second part of dignity is this: one person has got to assume responsibility for each life and that's the person whose life it is. I

suggest in that part and in the rest of the book that we ought to approach the interpretation of concepts of morality and concepts of political morality as asking for the solution to simultaneous equations, to find some interpretation of what we owe others by way of aid, of when we harm others, of when we have obligations, of what political rights are, of what liberty is, equality and law. We ought to seek an interpretation of each of these ideas that respects both parts of dignity –both parts which at first sight seem to pull in opposite directions–. It seems that the first principle of dignity, that everyone's life is of intrinsic importance, pushes us towards equality as a political idea. But it seems that the second principle of dignity, which requires people to take individual responsibility for their own lives resisting any attempt by government to hold them, to usurp that responsibility, that seems to push in the direction of liberty. Therefore, the correct account, in my view, of liberty and equality must be one that shows the two virtues not only compatible but each drawn from the other, because only in that way could we achieve solutions to the problem, to the conceptual problem, that fully respect individual dignity.

Most of the latter part of the book is an attempt to produce theories for all of these concepts: justice, liberty, democracy, law, justice; an attempt to produce conceptions of these which solve the simultaneous equations of dignity, truly respect the dignity of people one by one, and that also serve as good interpretations of our political practice.

How far I succeed in this can luckily only be judged by you, once you've read the book. Thank you.

## VI. DEBATE

### VI.A. Law's Completeness and Consistency

Q (Prof. Eugenio Bulygin) – In more than one occasion you insisted that the law, law probably integrated with these moral principles and so on and subject to best light interpretation, always has an answer, a right answer to every question and to every legal problem. Does this idea mean that law, with its principles and so on, is always complete and consistent, that there are no situations where the law is silent, doesn't give any answer? There are no situations where the law gives more than one answer? This is my question.

A – You state my case very well, and I take it that your question is

"how could any possibly believe that?" (*Laughs*) I don't think I've ever said that in every case there is a right answer. And if you include the possibility of the law being in conflict on some issue, then I have to say I don't rule out the case we encountered in mathematics, for example, where there really are right answers. I don't rule out the case where the right answer is "there is a conflict, there is contradiction". I don't think that it can often be the case; indeed I never encountered that. I don't know anyone else who has either. If you think about the solution to a legal problem as the best interpretation of the legal material, the best account of what the political community has done by way of legislation, what is done by the way of precedent, what the Constitution says, what the history of the Constitution has been, if you understand that what is required of you is the best interpretation of all of that material, then the idea that there wouldn't be a best interpretation becomes very strange. The appeal of the idea (that's a very popular idea) that sometimes there is no right answer, [that] we just have to acknowledge the law is silent on the subject, the appeal of that idea I think comes from what I described as a fallacy, and what I attempted to identify as a fallacy in the first part of the book, and that is that skepticism which says "no, there isn't really one right answer", is the default position, that is, the position that you fall back on if no other argument seems compelling to everyone. And, of course, the history of legal philosophy is full of that. People say "some lawyers think this, some lawyers think that, therefore, there is no right answer". Very puzzling confusion, I think. No, it doesn't mean that because that there is your view that in some cases there is no right answer is itself a theory, which is an interpretation of all the vast legal material, and that interpretation is as much candidate to be the best interpretation, and is as subject to the objection "well, people don't agree", as any more positive theory of what the right answer is. We are all in the same boat. The one reason why my view might seem so paradoxical is a failure to distinguish between two important ideas: one is uncertainty and the other is indeterminacy. Indeterminacy is the view that there isn't any right answer. Uncertainty is the view that I don't know what the right answer is. I don't even know whether there is a right answer. Uncertainty is the real default position. We think, and think and think, and you decide, "honestly, I can not see any daylight between the two rival readings of the law". If I can't see any daylight I should announce that I'm uncertain about what the right answer is. But if I go on to say there is no right answer, I'm no longer resting on uncertainty, I am saying I know the best interpretation of the

legal material, I've resolved the issue in my own mind: the best interpretation produces conflict, or produces gaps in the law, or produces silence on particular questions. You need an argument. You need an argument to why that's the best interpretation. Given the enormous amount of material available for legal interpretation, I find it very implausible that that would be the best interpretation. If you have only a very small amount of data, perhaps; but if you have a century of legislation, precedent, administrative agencies, the rulings, I find it extremely improbable that you could make a case that would say "the best interpretation is some kind of a tie". Now, I know that doesn't convince you, because you and I have discussed this question before. But that's the best I can do. (*Laughs*)

## VI.B. Truth and Moral Skepticism

Q (Prof. Martín Farrell) – Prof. Dworkin, you wrote in your book and you talked again today against moral skepticism, but explicitly in your book you accept the two main tenets of moral skepticism: first, there is no truth by correspondence in morality, and secondly, the truth by coherence is a necessary condition but not a sufficient one. Of course, you employ the word "truth" in your book and you have every right to do it, but you use "truth" in a very different sense. A proposition is true when it is supported by the best arguments or the most reasonable arguments, but this is not the sense of truth meaning by skepticism. So, I'm a moral skeptic and I have no quarrel with your position. It seems to me, that you're employing the sense with another meaning and you're not refuting moral skepticism, but your tenet is perfectly compatible with it.

A - Thank you, very interesting suggestion. As I said in my summary, I think an actually quite central, crucial part of my overall argument is a theory of truth, and I have a chapter, or part of a chapter in which I argue that truth is an interpretive concept. The "coherence theory of truth" which you mentioned, the "correspondence theory of truth" which you mentioned, are two interpretations of the idea we use very freely. Somebody says "affirmative action is unfair" and another person says "that's not true", and we understand exactly what's happening. The question is how are we to understand what truth actually means in these cases. In the case of science, it's a very popular view that we understand truth when we say "a proposition is true if it matches reality, if it corresponds to reality". Nobody has ever been able (it's part of the popularity of that theory) to make much

sense of it. It's not, by any means, a clear account of what truth means even in science, but it's very popular and people are working to try and explain in what way a word can correspond to a collection of molecules, and these are very serious problems.

When we come to a different domain, our ideas about what makes a proposition true ought to be sensitive to the requirements of that domain. We couldn't use a "correspondence theory of truth" for ethics or morality because there is nothing to correspond to. I had some fun in this book because I talk about "morons", meaning moral particles that act the way electrons and protons might, and it is a kind of joke that I keep repeating probably too often. But you couldn't make sense of a "correspondence theory of morality" without making the mistake that Hume warned us against, by saying [that] there is no description of facts from which we can extract a moral proposition.

So, once we accept that truth is an interpretative concept, we need an interpretation of truth that fits the way we conceive morality. And I believe that the idea of interpretation gives us the sense of truth. As Bernard Williams said in his book *"Truth and Truthfulness"*, when we come to offer a theory of truth, we shouldn't think of truth alone, we should think of the family of virtues into which truth fits. So, we think of truth from these: sincerity, accuracy, responsibility and the other nest of words. We try to understand truth as part of an entire family of concepts of which we have to make sense, we have to interpret each in the light of the others. And when we do that, yes, we have a theory of truth which is not on the list of a metaphysics or epistemological text. There you see correspondence, coherence, you see another much more popular theory of truth which is called "minimalist" or "detachability theory of truth". These are all candidates for a theory of truth. They may or may not suit different enterprises. They don't (any of them) suit morality. We need to do a fresh interpretation. If we take the alternative and say "because none of these accounts truth that make sense in science or might make sense in science, don't fit morality, there is no truth in morality". In my opinion, that's bad philosophy. You have to look at the enterprises of morality, enterprises in which truth figures centrally and try to interpret the idea to see if you can. So I accept your suggestion that the account of truth I've developed is not recognizable in the list of familiar understandings of truth. That doesn't rule it out.



## **VI.C. Grotius and the Nature and Content of International Law**

Q (Prof. Andrés Rosler) – I’d like to cash in on the opportunity you’re giving us to go back to your talk of yesterday, if I may. If I remember well, you argued that – your talk was given in the spirit of Grotius, that there is a Grotian ring to it. But I’m not quite sure whether that’s what you really mean in the following sense, perhaps my question would be what you mean by Grotian in this sense, and by the spirit of Grotius, and I’d like to add two short points. The first one is, when it comes to the nature of international law, I think Grotius is actually well known for defending a positivist reading of the nature of international law. He claims that the source of international law is actually conventional and, on the other hand, when it comes to the content of international law, Grotius is also, I think, well known for defending a sovereign system of states, which of course they do apply principles of natural law or morality, but perhaps we are wrong in reading Grotius in this sense. Actually, it is Hobbes the one who claims that, when it comes to the nature of international law, is nothing but principles of natural law. And by that he’s also taking to claim that there is no international law, it’s quite the contrary, but that’s a different ball game altogether. So, what [do] you mean by the spirit of Grotius, and the Grotian ring to your position on the nature and content of international law?

A – Thank you very much. In some famous Humphrey Bogart film, I’ve forgotten which one or which character says it, but someone says, I think to the policeman: “but you’ve arrested all the wrong people” and he says with a smile “I was misinformed”. And that may be the explanation of my account of Grotius. Perhaps I was misinformed. I have colleagues at NYU, international lawyers, who described Grotius to me in that terms that I used and gave me various things to read and from those I took the view that Grotius thought that international law begins in the requirements of states, that it’s not just a matter of what states consent to. But I have to say, I’m not wedded to that interpretation. I appeal to Grotius in an attempt to say that my theories are not so original after all; they were once popular. And perhaps I’m wrong in that. I don’t think so because my memory of what I read about Grotius is not what you summarize. But if it is, I correct by withdrawing the name Grotius and keeping everything else the same.

## VI.D. Hume's Principle and Moral Epistemology

Q (Prof. Horacio Spector) – Professor, I have a question concerning part I of *Justice for Hedgehogs*. On page 44 you say that Hume's principle is both a principle of moral-epistemology and that it is obviously true for you. Now, I think that there is an inconsistency in your assertion that Hume's principle is a principle of moral-epistemology because, after all, the whole argument in part I of your book is that there are no principles of moral-epistemology or principles of external meta-ethics so I had to conclude that when you say that Hume's principle is a principle of moral-epistemology you are referring to other people's opinions. So it seems to me that in your own viewpoint you should say that Hume's principle is a normative principle or a principle of morality. Now, if it is a principle of morality, and in some way it comes from an interpretation of our moral practice, then it's obvious to me that it is not obviously true, because for instance it is not obvious that you cannot state the fact that you are watching a child starving as a self-sufficient case for the moral claim that that's something bad and that you should do something about that. So, as a normative principle, it's very controversial.

Now, and I finish, if you really abandon the general claim that there are no principles of moral epistemology, and after all there is one external second order question, which is precisely Hume's principle, then in that case it's not obvious to me either that the principle justifies your claim about the independence of morality from philosophical argument in moral philosophy. And the case seems to be very clear because even if Hume said (which is also very controversial) that you cannot infer an "ought statement" from an easy statement, or at least that you should give an explanation why you are allowed to draw that conclusion, it's obvious and evident to me that he never thought about permissions, let alone moral permissions, so it seems very evident at the same time that you can't take a factual claim as a case for rejecting an "ought claim" which means as a case for grounding a permission. Now, after all, this is very widely accepted in moral philosophy. For instance, Kant said that the fact that some action is factually impossible, for instance a doctor cannot for factual reasons save a patient's life, then if that's factually impossible, then you have a case for rejecting the ought, which means that after all it is –although very sadly – permitting the doctor not to save that patient, because that's factually impossible.

Now if you, and I finish with this, if you take the different principle

that the factual claim can reject oughts and found permissions then, after all, external skepticism seems to be reasonable. That's why I think there is something which seems to me wrong, and either way I'd like some clarification on that. Thanks.

A – That was what we call a very “meaty” question: a lot in it. I'll start by saying that I didn't mean to say “there's no such thing as moral epistemology”. On the contrary, in a chapter devoted to moral responsibility, I say –I think– that moral responsibility is a moral epistemology. This goes back to the question about truth, that is, if you take epistemology to be the study of when we are entitled to claim knowledge or justify belief, then I say the scientific epistemology fits only science. For morality we need a moral epistemology. Moral epistemology is a theory of moral responsibility, a theory of what you ought to have done by way of reflection before you should treat yourself as justified in holding a moral position. I believe that's an epistemology, it's just not a scientific epistemology. As we want to have a different conception of truth for different domains, so we should have a different conception of epistemology. So I plead guilty to say Hume's principle is a piece of moral epistemology. I also accept what you then said, that it's a moral principle, because every theory of moral responsibility itself rests on a moral theory. You can't get out of morality, that's what I mean by the independence of morality. That is for many people an objection. There's no way to get outside of morality to test it from the outside. No, I don't think there is. There is incidentally no way to get outside mathematics to test it from the outside. An so forth. So on the question of classification I don't think what I say about Hume's principle is in any way inconsistent with the rest of what I say, though you may continue to think otherwise.

Now, on the question of the substance of Hume's principle, you say you see a baby being tortured and you say “that is obviously wrong, and I have a moral responsibility to try to stop it”. Now, the classical explanation of that, of course, that's a phenomenological fact, that is just how you respond. You don't then say “now, let me see whether there's a moral premise of the form ‘if someone is suffering and I can do something about it’”. As Bernard Williams once said in a different context, “if you thought you should check the major premise, you have one thought too many”. Phenomenology is absolutely as you say, but the reconstruction of it must presuppose a more general moral theory, innate in all of us, probably hard-wired into us. But still, a major premise. And the way you contest that is

to imagine some real monster. The world has known real monsters in the last century. Imagine a real monster who confronts this situation and says to you "no, I don't accept the implication, there's a baby screaming, how amusing". And you say to him "that's intolerable", and he says to you "why?", and I believe you would be tempted at this point to propose a more general moral theory about the nature of evil, I would think. In any event, I think Hume is right, I don't think that you could make a construction that didn't assume that.

Here's another way to put the point. Baby is crying, you feel you have to respond immediately, that it's a moral imperative. But you find on reflection that you don't believe [in] any general principle that says you ought to respond to harm in front of you. You may have to correct your initial impulse. That's enough on Hume's principle.

Now, on permissions, Kant said "ought implies can" – and you gave a good illustration of Kant's principle. What is the status, what kind of a judgment is the judgment "ought implies can"? It's not a conceptual claim, it's not analytically true, it's a moral judgment. And it's a moral judgment that many people over time have rejected. Oedipus could not have known that the man he slayed at the crossroads was his own father. Still, he put his own eyes out, out of a sense of moral guilt. He did not say to the Thebans "ought implies can, so I'm guiltless". We do, most of us most of the time, accept the Kantian view. We don't feel guilt for something we don't think we should feel guilt when we couldn't have done anything about it. And that is not a universally held view, it's certainly a moral view.

The bus – here's another example. The bus driver, driving a school bus, through no fault of his own, the breaks fail, and several children are killed. He spends the rest of his life baring a sense of regret merging into guilt, though he couldn't have done anything about it. That's also a part of the phenomenology.

So I think that "ought implies can" is a moral principle, it's a general moral principle, it helps confirm Hume's law. Because we rely on it to validate more specific moral claims like "the bus driver shouldn't feel guilty".

## **VI.E. Feeling as a criterion for correction**

Q (Prof. Guibourg) – I would like to understand this simple point: The criterion to tell correct behavior from an incorrect one is then just our feeling?

A – No, it's not just our feelings. It is: if we're correct in our feelings, it is the correctness of our feelings; it's the truth of what these feelings reflect. Because we have to distinguish indeterminacy from uncertainty, because skepticism or subjectivism is not a default. If in my best judgment torturing prisoners in Guantanamo Bay is wrong, that is, I think about it and my best judgment is that it's wrong to do what the United States government did, if I'm right, then it's wrong, then it was wrong. But it's not wrong because I made the judgment. It's wrong if my judgment is correct. So it's not just my feelings that make it wrong; it's the case, the adequacy of the argument that I have that makes it wrong.

I think I want to repeat that I regard one of the main claims of part I of the book to answer the question or the suggestion that if we can't prove something to the satisfaction of everyone, then we should be skeptical about it and say "well, it's just a matter of my feelings". I don't think that's a different simple philosophical position, it's a very popular philosophical position, so I hope people read Part I of my book.

## **VI.F. Physicalism**

Q (Tamara Tenenbaum) – I apologize if my question is too philosophical or technical or something, but I wanted to know if you have any idea, if you have given some thought of what kind of physicalist story fits with your account. Because I think one of the many problems of everyone who tries to be... I think you should choose some variety of non reductive physicalism (Dworkin: I'm sorry, I'm having trouble understanding). I'd like to know what kind of physicalist story, philosophically speaking, you embrace, or you think fits with your theory, because you reject supervenience in the book, right? You seem to reject it, Davidsonian supervenience. And I didn't find much about Putnam either, just in the footnotes. I think you reject that too. You also reject intuitionism, and you just spoke against some sort of reductive emotivism or something, in the last answer. So, have you given some thought about that? Because it's a problem, if you're going to defend the independence of value or something like that. How are you going to make that fit?

A – It fits with physicalism as a separate domain, it is not at all physicalist. Let's say we abbreviate and we suppose that physics is about the physical world and psychology is about the mental world. I do not believe that we can reduce the mental world to the physical world. I'm not a belie-

ver in that reduction. I don't believe that we can reduce the mathematical world to the physical. I'm not a believer in nominalism in mathematics. And now to your point, I don't believe we can reduce value to physics. I think we need to use another technical word, I'll probably get into trouble as with epistemology. But if we want an ontology, a general theory of what there is, of what exists, then we have to recognize different domains. And what exists includes atoms, ideas, numbers, and moral obligations. These are all things that exist. They don't exist in the same way, you can't restate a mathematical proposition as one about molecules. But they all exist. Our ontology must be driven by our conviction, not the other way around. We can't say we are physicalists, therefore we have to fit everything into physics. You might – I mean, there was a time, in Germany in the 19th Century, when it went the other way. Ideas are the only real thing, and therefore we have to fit the physical world into the psychological world. I don't see why any of that is necessary. I think we first decide what is true, and then we see how we should arrange our ontology to match our convictions.

### **VI.G. Ethical Independence and the Seatbelt Case**

Q (Ezequiel Spector) – Prof. Dworkin, I have a question about what you call ethical independence. On the one hand, you claim that a law can violate ethical independence in virtue of the foundational character of the decisions that this law inhabits. On the other hand, you claim that if the government obligates people to wear seatbelts, that government doesn't violate ethical independence because you say seatbelt convictions are not foundational. However, as you claim in the book, it is empirically possible that there is a person who thinks that a life that runs danger is more attractive. You admit that but you continue claiming that seatbelt convictions are not foundational. So, I wonder what the definition of "foundational" is. Most people don't have seatbelt convictions, but the definition of "foundational" cannot depend on the majority opinion. Maybe "foundational" means relevant, but in that case, that definition arbitrarily excludes certain convictions such as seatbelt convictions.

A – Thank you, very interesting question. I probably did not take enough care to define "foundational", but the idea I have in mind is that people who have a self-conscious sense of personality, a sense of how they want their lives to go, what is important in those lives, when we reconceive people's convictions about how they live in that way, then we can say some

things are more important than others to that project. There are convictions about religion, for example. They really are fundamental; you can't imagine not living in accordance with that. Now, other views are peripheral, they are ephemeral, they are just something of the moment. But they don't fit into a more general scheme. I agree with you and I think I did say in the book that for some people a life of daredevil is the only fulfilling life. They jump out of airplanes with parachutes, they climb very dangerous mountains where you have to hit nails into the mountain in order to get up or down. There are people perhaps who regard putting on a seatbelt is self-betrayal. So the question is: what should the response be to these people? There are two points I think one might make. The first is that these people are so few that equal concern for them does not require the expense that would be involved in having a general seatbelt law but exemptions for them. And you imagine a trial in which they were invited to testify as to their daredevil quality. It would just be unreasonable to expect government to try to administrate a program like that. The second point to make which I think is necessary is that people who are injured in automobile accidents injure everyone in the community. The external cost both to the economy, in their absence from the workplace, and, worse, in the medical expenses that are incurred in taking care of them, particularly in a country like this one in which medical care is paid for out of the general tax revenues, it would be wrong to say "the government doesn't have to rely on what I take to be a forbidden justification, it doesn't have to say "your conception of a good life is wrong", it has only to say "it would be unfair to the community to ask the community to bear the cost of this particular [and] very unusual preference of yours". So I think it passes the test of ethical independence.

#### **VI.H. Responsibility to Protect (R2P)**

Q – If you don't mind, I'd like to come to yesterday's conference and make sure I understood you correctly on one point. You talked about the duty of the state to protect its own legitimacy and you also talked about the duty to litigate. My question is: what, in your opinion, grounds this duty? And my second question is: do you see a connection or a nexus with the so called "duty or responsibility of the state to protect"?

A – Yes, thank you. What I tried to suggest yesterday begins in the idea that it is a central concern, should be a central concern, of people who exercise coercive power, police, guns, armies over other people, to protect

their moral title to do so. Of course, anarchists think government is always immoral because nothing can justify the use of force, particularly collective force, against an individual, so they reject most of government. But, if you don't accept that view and government, generally, obviously, does not accept that view, then a government should try always to improve its moral title to govern. If it believes that it is shown to the government that it is violating human rights, for example by discriminating against one race or group, then it has a duty, flowing from the fact that it exercises collective power, to improve its right to remove a stain on its legitimacy. So that is a background assumption that I make, it's a general assumption of political morality. Now, the key point in the argument I offered is that the legitimacy of each particular state depends in part on the international understandings that bestow rights to govern on particular territory and limit the power of government to address issues on other territories. We have that understanding. The only way we could give up that international arrangement is by moving to one world government, which is not going to happen... can't happen. Therefore, if we identify a problem touching legitimacy, a stain on legitimacy, inherent in the international understanding, then we, each nation, have a duty to mitigate that so far as we can, to take steps, just as we have a duty to do it domestically by stopping discrimination, so we have a duty internationally to improve the international system, to remove the difficulty it poses on our own domestic legitimacy. And that seems to me to be only the beginning of an explanation of the need for, and the character of, international law. International law is what gets created when states recognize their duty to mitigate the injury that the international understanding, the Westphalian system, poses to people. Now, one of the threats (I mentioned this but your question invites me to say more) to legitimacy created by the international system is this: people the world over feel a moral responsibility of rescue. If we see [that] people in the Sudan or in Libya or in a hundred other places, are victims of very serious denials of human rights and they suffer their disease, their hunger, where a tsunami take place and people are dying in great masses and their own government is unable to feed them, [to] get food to them, as in Asia; we feel we have a moral responsibility to help, but we can't, because the international understanding allows the government of Burma to say "we refuse to accept any food sent from abroad, we won't distribute it, we're immune from your help". Now, I regard that as a problem, and international law ought to respond to it. The doctrine that you mentioned, sometimes called R2P



- responsibility to protect - was endorsed by a convention in Canada some years ago, and then endorsed in principle around the world, including in a meeting of the United Nations Committee. That is an example of what I meant yesterday by the impact of salience. Once that has happened, then it focuses the general amorphous duty to mitigate in a particular direction. So we ought to respond in the spirit of the convention called R2P and the right way to respond is to accept that the General Assembly of the United Nations by majority of votes, can authorize protection of people in other countries. I'm sorry, it's a long way to answer, but that's the assumption.

## **VI.I. What is the Law and What it Should Be**

Q - You want to differentiate two different questions: what a law is and what the law should be, and you also say that these different questions can receive different answers. But, what I don't understand very well because according to your account of law, an answer to "what law is" presupposes an answer to "what law should be".

A – Thank you. I'll try to answer you this way: What the law is and what law should be are both moral questions but they are different kinds of moral questions. I think of law as based in interpretation of a nation's political practices and past decisions. It might very well be that it is impossible to interpret this tradition in what you and I would think is the best moral light. We think –I'll give you perhaps a rather complex example. I think that the law in the United States should be that each school child gets the benefit of the same amount of money spent on his or her education. That is what the law should be in my view. But it is absolutely plain, given various decisions by the Supreme Court, that I could not interpret, even trying to make the best interpretation, I could not interpret the law of the United States as including that requirement.

The moral question "what should the law be" is open ended, it doesn't say anything of which institution would have the responsibility to create the law to make it that way. What the law is? If I say something is the law, then I say that this is a right which people are entitled to have enforced, right now, on their demand through the use of the state's coercive power. The moral question "what should the law be in an ideal world?" is to me obviously different from the question of what are people entitled to have enforced right here and now through the coercive power of the government. That's the difference between what the law is and what the law should be.

## VI.J. Responsibility in Contexts of Inequality

Q (Prof. Roberto Gargarella) – Let me ask you a question myself. I'm sorry because I will change the subject completely. I wanted to ask you about something you touched just a little bit in your book, which is, I think, very relevant for countries like Argentina or Brazil, which has to do with the connection between responsibility and inequality. You say a little in a couple of paragraphs but if you could elaborate a little bit more to help us to think about crime committed by people coming from rotten social backgrounds. I guess your view is that in some occasions we may discount the responsibility in view of the injustices they suffer. I don't know if that is correct but that is a very important point. So, it's not assuming a position like Judge Blackmun assumed at one point saying in a way, touching on "the capacity of these people", but you wanted to say we have to take into account the injustice they are suffering. So, if you could elaborate a little bit on that and, also, in the face of some of these injustices, just to take an example you knew when you were in Brazil, imagine the occupation of empty state land by an extremely disadvantaged group, as an interpretation of law would you call that a violation of law in the first place?

A – Thank you! I love questions that say "I would like you to talk for a while", but the problem is, you then have to stop me. What I meant in the discussion that you have in mind was governed by the general topic of that chapter, and the chapter is a chapter on the old philosophical problem of free will. I was anxious first to say that people who come from deprived backgrounds and are more likely to be antisocial, or to be thieves, do not suffer from lack of free will. It is sometimes argued that they do. There was an infamous case in Florida in which somebody was accused of... I think it was murder, and his defense was "I didn't have free will, because my mind was taken over by watching television programs in which murders were regularly committed, so my free will was taken over because I was programmed by these television programs".

The first thing I wanted to say is that that is an extremely bad argument. We do not lose free will because we grow up or live in circumstances in which our motives are different and our motives arise out of injustice. People who come from very deprived backgrounds, have beliefs about what they are entitled to, and have needs, and have motives that people from middle class backgrounds do not have. But that's not a problem of

their free will, they are free as we are or as anybody to assess a situation and act in a courtroom.

Is that the end of the story? I want to say no, that's not the end of the story. We have to be conscious when we ask how responsible they are; not just of whether they had free will, of whether they were automatons directed by terrible motives. We have to take into account the fact that they had different needs and motives, and we have to accept that in an unjust society we share part of the blame for the differences. So, they're not insane, they don't lack free will, but they are entitled to the benefit often of reduced sentences, and sometimes -in very rare cases- of acquittal on the ground that when you distribute the fault, the fault from what they did, is in good part the fault of the economic system, the social system that we created.

I don't know if anyone here has ever heard of an American lawyer, long dead, named Clarence Darrow. He was the most famous criminal lawyer in America, and he was hired to defend two boys, very rich boys, in Chicago, who kidnapped another boy and killed him for fun. They'd read Nietzsche, they said, and Nietzsche inspired them, and Clarence Darrow made the famous argument that even in the case of these rich boys, society should assume part of the blame, because the unjust economic system allowed these boys of such privileged backgrounds as to make them think that they were Superman, that they were a Nietzschean Superman. I always think of that argument as a reverse coin of the normal kind of argument, and I think Darrow's argument was wrong, but that's the kind of argument we should be making, nothing to do with free will or insanity.

## **VI.K. Abortion**

Q (Prof. Marcelo Alegre) - These last weeks the debate on abortion started in the Argentine Congress. I want to ask you if you please could try to illuminate our discussion, so, if you could briefly tell us your philosophical take on the issue. But also, and specially I will ask you to take into account the experience of the last 40 years of America, how can that experience of what has happened since *Roe v. Wade* to now can help us to better deal with this controversial problem.

A – Good, I'm happy for the opportunity to speak on a contemporary political issue. In my view, the question of abortion has got to involve two stages of thinking. A first stage is a question of whether an early fetus is a person with rights of its own, a person with interests and rights of its

own. Sometimes it's said government shouldn't make that decision: it's a religious decision, it's a metaphysical decision - government should not make that decision. In my opinion government must make that decision. The government may not take the position that, in the United States, the states can decide whether a fetus has interests and rights of his own. The question is whether a fetus is a constitutional person, that is, somebody who the Supreme Court, the Courts, the legislature, have a moral duty to protect from murder.

I don't think that the argument that an early fetus is a person with rights, doesn't matter if we call him a person. The key question is whether we should recognize it is having a right to live. I think the answer to that question must be "no", because a creature doesn't have interests before it has sentience, that is, before it can feel and feel pain. According to some theories a creature doesn't have interests until it has a kind of self-consciousness, which comes later. That's a difficult theory because of its implication for animals who never have, or so we think, self-consciousness. But at least in the case of sentience, that is, the ability to feel pain, I think it extremely implausible - and so did the Supreme Court - to suppose that something that can't feel, that have no sense of himself, even at the level of feeling pain, has interest. We may have an interest in it, but it has no interest of its own and, obviously, the question can be debated back and forth for longer, but I simply report my own view on this question. It's the view of the Supreme Court, it is also the view, I must say, of many of the opponents of abortion in the United States, because they argue that the question of whether abortion should be prohibited is a question best left to democratic decision. If a fetus is a person with interests and rights of its own, you can't leave that question to democratic decision any more than you can leave the question of whether Jews or Muslims have rights and interests of their own - can't have a situation where the majority can say no. I add that only to say that not many people actually think that a fetus has rights in its own. Polls even among Catholics say that most Catholics think that a pregnancy that begins in a rape should be permitted to be terminated and, of course, that would be wrong if a fetus was a person, a constitutional person. I should say that there are people that do hold the view, they are a small number but they do hold the view, that even a woman who was raped or even a woman who will die if the pregnancy is continued, has no right to an abortion, but they are very few. Now, the question is - which I regard as the interesting question, if you believe that, is the debate over?

Is that the end of the story? And in the book "Life's Dominion" I argued that that is not the end of the story, because even if a fetus is not a person with its own rights, it is something that we might regard as something of enormous value. Indeed, I would go so far as to say that human life at any stage should be regarded as sacred. So, I can very well understand the view, did I hold the view that a woman who has an abortion for frivolous reasons (there are stories of women who have abortions because they have a trip planned to Europe and they don't want the trip to Europe spoiled by their pregnancy), I think they fail to understand something very important: their values are entirely wrong, in my view. I take the opposite view about a teenage mother, a 13 or 14 year old living in great poverty, no prospect of being economically able to raise, no identified or at least identifiable father. It seems to me that respect for life at that point switches to a concern for her life. I do think, therefore, that there are issues about value that remain even after we say a fetus has no rights of its own. There are good ways to respect human life, and bad ways.

Now, the third stage: who gets to make that decision? Earlier in our discussion today, someone mentioned the right to ethical independence. I think the right to ethical independence, which traces back to my account of dignity. Dignity requires that we make decisions that reflect our view of what's important about human life, issues that don't involve the rights of others but do involve questions of respect, questions about whether we should lead our lives, the only ones we have, simply trying to acquire money, which is a rotten version of what human life is for. I think those have to be allowed, even when we know they are going to make mistakes, those decisions have got to be allowed to be made by the person whose life is in question. And now you see the conclusion I draw: the abortion decision is a foundational decision that reflects a person's sense of how and why human life is important. People must be free to make bad decisions. In the case of the woman planning her trip to Europe, very bad decisions, those belong to the individual, it is not to the collective to make those decisions.

Now, finally, [the] American experience. We have had since 1973 a lot of experience. It's gone in two ways. First, the question has not gone away. Decided by, I think a 72' decision of the Supreme Court... I'm sorry, in 1973...many people thought once the Court had spoken, people would accept the decision. Not at all. There is continuing pressure. The continuing pressure calls for legislation State by State. There is now a great temptation all around the country of the states where the antiabortion sentiment

is most lively, to adopt statutes challenging the decision of the Supreme Court hoping that the Supreme Court, which is now much more conservative—very, in fact, right wing—, will finally reverse *Roe v. Wade*.

So I tell you this history to suggest that the issue, people have not accepted the decision of the Supreme Court as final, neither have the justices. Three of them keep saying “we wait for a chance”. I hope it’s only three.

There’s another side to the story. Abortions have decreased in the United States steadily, the number of abortions, and that is because sex education, another thing that conservatives dislike, has become much more sophisticated and general. The freedom to have an abortion has come along with responsibility. [There are] many fewer teenage pregnancies than there used to be. And I believe these are connected phenomena, a general shift. If we had a national vote on abortion, the present law would be confirmed by large. The general opinion in America, like the general opinion about gay marriage and various other issues, is shifting demographically because young people have different attitudes and, as they grow older, there are more of them. But in the case of contraception and abortion, the shift has been dramatic. So if *Roe v. Wade* was repelled and the states were free, all the red states would ban abortion and all the blue states...I shouldn’t do this in terms of colors. All the states that border the Atlantic and Pacific Ocean would reject any prohibition of abortion and a great many of the states in between would accept it. But all the polls indicate that the general opinion in the country as a whole is permissive.

Now comes the question that I think puzzled a great deal of political scientists: would, it, therefore, have been better for the Supreme Court not to make its decision in 1973 but to let the demography and to let the increased sophistication be reflected in state legislatures so that democracy would have produced the right answer? Many people who are in favor of abortion rights think that would have been better. I don’t, for two reasons. First, or question number one: I worry about all the women from 1973 until some future date which will depend upon the states, all the women who would not have had enough money to take themselves to a coastal State. I said that abortions are down as a total number; what is also down, obviously, are deaths from illegal abortions. That was a very serious problem in the ghettos and pockets of poverty. Teenage girls couldn’t face being pregnant. Their friends knew where to go and some of them ended up dead on an operating table or two weeks later of sepsis. I’m always troubled by the argument “you should let things take their course; better to have them

democratically settled over a long term". This is still the American story, because of course you have one legislature. But I don't like those stories because it treats individuals -in this case poor women- as pawns, expendable for the sake of a purer form of democratic theory. In spite of the horrors of the present Supreme Court I still believe in it. There are some issues that are legal issues because they are issues about the rights of the minority at risk, not to be trusted to the majority in power.