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1988]

RIGHTS-TALK

JANE B. BARON*

RICHARD K. GREENSTEIN**

THIS is an exchange about legal rights and about morality, a written conversation which was initiated in March and completed in June 1987. (Perhaps "completed" is the wrong word; discussions such as this do not—and, we believe, should not—end, but like dinner-table debates they do wind down temporarily, the participants withdrawing for a while to consider further what has been said.)

We are not the first to have this sort of discussion, face-to-face or in writing. Readers who follow the growing literature on rights will see the inevitable influences of "fancy theory" on one side and Ronald Dworkin on the other. Neither of us attempted a full-blown exposition of the traditions from which our questions and answers arose. We simply had a talk.¹

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1. Because this was a conversation, an exchange, neither of us made any effort to identify or specify "authorities" for our ideas. Both of us owe debts to numerous sources.

Jane, who is primarily a teacher of property and estates and trusts, considers herself less knowledgeable and less well-read on the subject of rights than she should be. For her, the following were particularly influential: W. FAULKNER, *The Bear*, in *GO DOWN, MOSES* 191 (1942); R. UNGER, *KNOWLEDGE AND POLITICS* (1975); Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984); Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1 (1984); Tushnet, *An Essay on Rights*, 62 *TEX. L. REV.* 1363 (1984); Westen, *The Rueful Rhetoric of "Rights,"* 33 *UCLA L. REV.* 977 (1986). When this exchange was conducted, she had not read either Michaelman, *Justification (and Justifiability) of Law in a Contradictory World*, in *JUSTIFICATION NOMOS XXVIII* 71 (J. Pennock & J. Chapman ed. 1986), or Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 *YALE L.J.* 1860 (1987), which offer visions of rights-talk that are quite different from those she then had in mind.

Rick does not want the ideas he presents to be blamed on anyone but him. However, he wishes to acknowledge the following works, in whole or in part, as particularly important to his thinking about legal rights: R. DWORKIN, *LAW'S EMPIRE* (1986); R. DWORKIN, *A MATTER OF PRINCIPLE* (1985); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); H. KELSEN, *GENERAL THEORY OF LAW AND STATE* (A. Wedberg trans. 1945); H. KELSEN, *PURE THEORY OF LAW* (M. Knight trans. 1970); Hart, *Definition and Theory in Jurisprudence*, in M. COHEN & F. COHEN, *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 84 (P. Schuchman ed. 1979); Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457 (1897).

JANE

Tell me this: why are lawyers and legal theorists (e.g., Dworkin) so interested in “rights”? In a limited sense, I understand the practical necessity to speak in terms of rights in order to sound like a lawyer. So, for example, if a woman were six weeks pregnant and the commonwealth of Pennsylvania sought to bar her from having an abortion, I as her attorney would say that under the U.S. Constitution as interpreted in *Roe v. Wade*² she has a “right” to terminate her pregnancy. When I say that, I merely use the accepted convention for explaining to judges that the particular issue before them has already been resolved in favor of my client by a higher court in a binding precedent. But how and why did “rights-talk” come to be the convention that it now is?

Take another case: A licensed practical nurse gives blood during a blood drive, and the Red Cross finds as a result of routine testing that the nurse’s blood contains the AIDS virus HTLV-3. Though not all carriers of HTLV-3 will develop AIDS, health insurance carriers will terminate the nurse’s health insurance if they learn of positive test results. On the other hand, the best available epidemiological evidence suggests that HTLV-3 carriers can transmit AIDS through contact with blood or bodily secretions, and the nurse is applying for a job in a dialysis center. Now assume that the state is considering or has already enacted legislation barring disclosure of HTLV-3 test results to anyone other than the individual tested. Can’t you hear the lawyers discussing the statute?

Lawyer #1: “Legislation like this is absolutely necessary to protect the blood donor’s right to privacy and his or her interest [another right?] in being able to obtain health insurance.”

Lawyer #2: “But what about the patient’s right to life and safe health care?”

If the conversation went on long enough, the lawyers would factor in the statistical relation between positive test results and AIDS, the nurse’s possible fraud on the insurance company (was she/he asked about AIDS on the insurance application?), the precise duties the nurse would perform at the dialysis center, the potential liability of the center if a patient were to acquire AIDS, and

2. 410 U.S. 113 (1973).

so forth. But these factors cannot be weighed or balanced; there will be something to be said on both sides. They will complicate, but not change, the colloquy set forth above. Why do we as lawyers assume that “rights” are involved? Why are we looking for “rights” to begin with?

RICK

You raise a lot of questions. Let me address two: (1) Why do people talk about rights? and (2) Is there anything real that rights-talk describes?

I’ll begin by defining what I understand rights-talk commonly to be about. When someone says, “I have a legal right to do X (e.g., to keep people I don’t want to socialize with from entering my house, or to worship God)” or “I have a legal right to have Y (e.g., to get compensation for breach of contract, or to keep the car I bought),” I understand that person to mean this: “Based on political decisions that have already been made, government officials will use coercive power to aid me in doing X or obtaining Y (or will not use their coercive power to hinder me in doing X or to take Y away from me).” These prior political decisions will normally take the form of constitutional provisions, statutes, regulations, precedents, etc.

Rights-talk, however, has a function beyond predictive speech. Rights-talk describes not only what government *will* do, but also what it *should* do. When I say that I have a legal right to X, I am not only asserting that the government will lend its assistance in assuring that I obtain X, I am also saying that it would be wrong of the government not to lend that assistance. Thus, rights-talk is prescriptive speech; it expresses principles of political morality.

Rights-talk is prescriptive in a particular way. The claim that government ought to act in a certain way is expressed in rights-talk as an obligation running to individuals, rather than to society. When I say that I have a right to X, I am not saying that the government should assist me in obtaining X because society will necessarily be better off as a result. Rather, I am saying that the government owes *me* its assistance in obtaining X, regardless of its impact on society. Thus, for example, when I say that I have a legal right to look at pornographic pictures in my home, it is no counterargument to say that society would be better off if all pornography were banned. Even if that were true, my rights claim is

that the government ought to protect my freedom to look at pornography anyway.

In sum, rights-talk serves the function of predictive and prescriptive speech. It seeks to describe what government will do as well as what it ought to do. Moreover, it prescribes in a manner that ties governmental duties to individuals; claims of rights cannot ordinarily be overcome by arguments of social utility.

Is there anything real being described by rights-talk? In the predictive sense of rights, the answer is surely yes. For the vast majority of legal controversies, I can predict the outcome (based on some assumed set of facts). For example, if I offer to pay for the delivery of the daily newspaper but fail to do so after the paper has been delivered for a year, I am confident that the government will, upon request, assist the publisher of the paper in forcing me to pay the agreed-to price. The way that we commonly make this prediction is to say that the publisher has a right to damages for breach of contract. Most cases are like that.

But what about those hard cases in which the outcome is uncertain? Regarding these cases, attorneys and litigants still make predictions concerning the outcome, and they do so in terms of rights (and one side or the other will usually be correct). Obviously, the accuracy of rights-talk in predicting the actual outcome of cases varies, but its usefulness as a way of articulating a prediction remains constant.

In short, since most cases have predictable outcomes, it makes sense to make predictions. The language of rights serves that purpose (even in that minority of cases where the outcome is debatable).

What about the reality underlying rights-talk in its prescriptive dimension? This question ultimately merges with the larger question whether moral statements refer to anything real. Asking whether the government ought to safeguard my freedom to look at pornography in my home is the same type of question as whether people ought to lie. Since I believe that moral statements generally make sense (I think, for example, that statements like "slavery is wrong" and "torturing innocents is wrong" are correct statements), I believe that statements about political morality (how government ought to act) can also make sense (i.e., be correct or incorrect, rather than be incoherent).

I suggested above that rights-talk comprises prescriptive statements of a particular sort. The statement, "I have a right to X," does not merely assert that the government has a duty to help

me obtain X, but that its duty is to me as an individual, rather than to society in general. In other words, I am not simply a beneficiary of obligations that government has to benefit the community as a whole; my claim is that the government ought to help me obtain X whether doing so is good for the community or not.

What is the reality that this kind of statement refers to? Is there any reason to think that I truly have a claim to government action apart from claims of society generally? Perhaps, paradoxically, the answer to this question lies in an understanding of community values—specifically as they are explicated by conventional political theory. If society generally understands the individual to be the basic social unit, then the legitimacy of government action will stem from the individual, and claims of the individual to government action will be seen as separate from and prior to the claims of the society generally. If, on the other hand, the community is understood to be the basic social unit, then the welfare of the community will be the measure of the legitimacy of government action, while individual benefits will be derivative.

My sense is that this society's political theory is mixed: Sometimes we see the community as primary (particularly regarding legislation), and sometimes we see the individual as primary (particularly regarding adjudication). Even in the Constitution, some powers are given to government which involve sacrificing individual interests for the good of society, while some interests of individuals are protected against encroachment even when society might arguably benefit from encroachment.

On the whole, however, we seem to be a society that places a special emphasis on the interests of individuals in our political theory. I take this to be the result of the western humanist tradition filtered through our own peculiar national history with its emphasis on individual freedom, enterprise, etc. Thus, the notion of rights has a reality for us that it would not have for a society that places a greater primary value on community and fraternity. (I have heard, for instance, that Canada differs from us in this way. Marxist and socialist political theories suggest other examples.)

Now, as for your hypothetical legal argument concerning proposed legislation barring disclosure of the results of AIDS tests: The dialogue you imagine taking place between the lawyers representing various interests, while common, is the kind of conversation that gives rights-talk a bad name. It seems clear to me that this question doesn't involve rights at all. There is no past

political decision or principle of political morality that entitles either side to a particular resolution of the issue. The state is free to enact or fail to enact the proposed legislation. The decisive factor is not anyone's rights, but the benefit of such legislation to society (taking into consideration such factors as our concern for public health, our respect for the privacy of individuals, etc.).

But suppose that the legislation passes, and a laboratory then threatens to disclose publicly the results of a positive test. The nurse would no doubt rush to court to prevent the disclosure. What would she say? She would say that she had a *right* under the recently enacted legislation to an injunction barring public disclosure of the test results. What would she mean by that? First, she would be predicting that the court, after considering the facts and legal arguments in the case, *will* issue the requested injunction. Second, she would be asserting that based on the recent legislation, the court *ought* to issue the requested injunction. Third, she would be asserting that the court's duty to issue the injunction is hers to claim *as an individual* notwithstanding whether disclosure in her case would in the balance benefit the public.

Does any of this make sense?

JANE

Your first answer to my "why rights-talk?" question is that rights-talk is predictive. And it clearly does seem so in my "easy" abortion case and your "easy" contract case. Yet something nags at me, even before I get to the "hard" cases you concede are out there.

Whatever is nagging at me derives from my experience teaching first-year law students, who live in a limbo between "being" lawyers and "being" (mere) citizens. (I know that this is an odd and nonsensical formulation. I use it to capture a perceived or felt distinction between people who would plausibly claim expertise about law and people who wouldn't imagine themselves to be experts.) If you asked a first-year law student on his or her first day of class about your newspaper delivery hypothetical ("Rick offered to pay for delivery of newspapers; *The Picayune Intelligence*³ delivered them, and now Rick is refusing to pay. If the publisher sues, what will the outcome be?"), I venture to guess that the student—knowing nothing about offer, acceptance, consideration,

3. The name was inspired by an identically named newspaper in the television cartoon series, "Rocky and His Friends."

damages, precedent, etc.—might answer that the publisher will prevail because the latter has a “right” to be paid for the work he performed. Now is the student’s answer fairly understood as a predictive statement?

Clearly it’s not predictive in the sense it would be from a “lawyer’s” mouth, for the student has not yet “learned” about contracts; the student cannot yet plausibly claim expertise. Perhaps any citizen can predict the result of an “easy” contract case; one doesn’t have to be a lawyer to hear about or have experience of the enforcement of contracts. But if the student is predicting in this “lay” or “experiential” sense, why is the prediction cast in terms of rights? Why not say, “Based on my experience in business, or things I’ve read, this sounds like the sort of thing for which courts give relief all the time?” Or why not say, “It wouldn’t be fair to allow Rick to walk away without paying?”

You might remind me, in answer to these questions, that rights-talk has what you called a prescriptive dimension: when the student responds that the publisher has a right to be paid, at least part of what the student means is that the publisher ought to be paid and the government ought to make sure Rick pays him. Well, I don’t disagree with that as a description of the function of rights-talk. But I find the description both incomplete and problematic.

I find it incomplete because it fails to take account of what I will call the emotive element of rights-talk. Somehow the claim that Rick ought to do X or that the government ought to do Y carries (or is thought to carry) a larger emotional wallop when expressed in terms of rights. I think that is why one hears the kind of “bad name” rights-talk I hypothesized in connection with the AIDS tests. Years after Hohfeld elaborated the distinction between rights, powers, immunities and privileges,⁴ people go on misusing the term “rights.” And I think they do so not just because they haven’t read or heard of articles written more than fifty years ago, but because the term “rights” has an emotional power that people don’t want to let go of. You and Dworkin and Rawls and countless others will write persuasively and convincingly about the proper application of the term, but isn’t it significant that lawyers and (mere) citizens alike refuse to confine their usage to your carefully-defined limits?

I said that I found your description of rights-talk not just in-

4. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-58 (1913).

complete but also problematic. The “problem” I have with the notion of rights-talk as prescriptive in the sense you suggest is this: If, when people talk about rights, they are “really” talking about what individuals or the government *ought* to do, why don’t they say so? Why don’t people talk about “oughts” instead of “rights”?

The answer, I suspect, is that “oughts” feel more controversial as a subject of discussion than “rights.” Again, I don’t disagree that what you call moral statements can “make sense;” indeed, I imagine that few would argue that slavery is right. But I find it irksome that the “sense” or “nonsense” of moral statements is so rarely addressed directly. As Unger has pointed out, part of our political culture (if not our political morality) is that values are solely individual choices and, as such, are not capable of being judged by others.⁵ (Mere) citizens and lawyers alike seem to assume further that since agreement on values can be neither presumed nor compelled, values also cannot be *discussed*. The latter assumption does not follow from the former; yet the constant and continued preference for resorting to rights rather than oughts reflects how deeply it has become entrenched. Moreover, the more we talk about rights and not about oughts, the less appropriate “oughts-talk” seems; in this sense rights-talk only further reinforces and entrenches the notion that values should not be discussed. To summarize, rights-talk both mirrors and helps create a feeling that moral choices (or, to be less grandiloquent, value judgments) are not and should not be debated openly.

Well, assuming I am correct that rights-talk is not a very open, honest or direct way of talking about oughts, is that so bad? I approach that question by asking what might happen if we replaced rights-talk with oughts-talk. If Unger has correctly described how and what we think about values, we would discover through oughts-talk that people disagree about oughts. If we discovered that sort of disagreement, how would we justify the “prescriptive” element of rights? Why should any individual be subject (via “rights”) to values and value judgments she did not choose? And if, on the other hand, you have correctly described how and what we think about values, we would discover through oughts-talk that people agree about oughts. If we discovered that sort of agreement, how would we explain our past reluctance to

5. R. UNGER, *supra* note 1, at 78-81.

talk about oughts directly? Have we been seeking (via “rights”) to avoid a controversy that isn’t there?

My point is that we don’t *know* what we, as a society, think about values—whether we share them or not, whether we can or should try to build consensus about them or not. Nor do I think that rights-talk, even in its prescriptive aspect, helps us much in moving toward that knowledge. And the reason is that, due to the emotive element of rights-talk, the predictive and prescriptive functions of rights-talk have a funny way of collapsing. The hypothetical colloquy with which I began exemplifies this phenomenon. Each lawyer, it is true, is “articulating a prediction” about whether the legislature will enact the statute and whether the statute will be upheld against (constitutional?) challenge; and each lawyer is also making a prescriptive statement about whether the legislature ought to enact the statute and whether the courts ought to uphold it. But the lawyers’ invocation of “rights” in support of their respective claims serves the emotive function of suggesting that the predictive and prescriptive issues have already been resolved. Lawyer #1’s argument is not that the legislature *will* and *should* enact the statute, but that the legislature, in effect, *must* enact it; lawyer #2’s response is not that the legislature *won’t* and *shouldn’t* enact the statute, but that it *cannot* do so. In other words, the terms of the argument on both sides imply that the debate has *already been* resolved, and that the lawyers merely have differing apprehensions of what the resolution was. Rights-talk tends to be utilized, in my (limited) experience, to invoke a sense of closure; “trumps” is a good metaphor (though Dworkin undoubtedly uses the word for a different purpose)⁶ because in law, as in bridge, the call to rights seems just another way of saying, “Ah, gotcha!”

So here’s where I come out: You would like to cabin the term “rights” to relatively narrow situations in which we can say, in a sense, “we know what the outcome will and should be.” I question whether the term will stay in the box to which you want to relegate it. Lawyers and (mere) citizens seem unable to resist the urge to extend “rights” to instances that do not fit your stated criteria, and they extend rights-talk this way in an apparent effort to forestall and foreclose open discussion of values.

Or perhaps you’ve got a better explanation of why we hear so much “bad-name” rights-talk?

6. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 85 (1978).

RICK

When your “mere citizen” says that *The Picayune Intelligence* has a “right” to a judgment for damages, I understand that statement to be predictive and prescriptive in the sense outlined in my previous response. I agree with you that the citizen is not doing this based on a technical knowledge of the law. The lawyer’s predictive and prescriptive statements come from an analysis of prior political decisions—constitutional provisions, statutes, precedents, administrative regulations, etc.—whereas the citizen’s statements come from assumptions about what the law is.

That in itself doesn’t seem problematic. There is no reason that an understanding of the law (and thus an understanding about what legal institutions will and ought to do) should not come from life experience in addition to or instead of professional study. After all, if, as you seem to believe, the law consists of value judgments, those value judgments probably do not represent simply the personal views of various professional legal actors, but the views of society (or at least of a substantial segment of society)—views with which the mere citizen should be conversant.

If I understand your position, you do not really disagree with any of that. Rather, you seem to be troubled by the prescriptive dimension of rights-talk—specifically, you understand rights-talk to be a disguised and, on some level, a dishonest form of “oughts-talk.” I must confess that I am not certain that I fully grasp the distinction that you see between oughts-talk and rights-talk, but let me try.

Rights-talk, you say, “tends to be utilized . . . to invoke a sense of closure.” It is used to suggest “that the predictive and prescriptive issues have already been resolved”—not that the court or legislature *will* or *should* act in a certain way, but that it *must* act in that way. By contrast, I take it that you understand oughts-talk as open, suggestive, inviting of dialogue. Thus, to make a prescriptive statement like “the court *ought* to grant *The Picayune Intelligence* compensatory damages,” is to state a position that invites debate on the part of anyone holding an opposing position. But if one says, “the *Picayune Intelligence* has a *right* to recover damages,” one is purporting to assert a settled moral fact about the world.

I hope I have not caricatured or mischaracterized your distinction between oughts-talk and rights-talk. But having set up

this target, I shall proceed to shoot at it because the distinction that I have just described troubles me in several respects. First of all, I disagree that when I make an assertion about rights I am making a “must” statement, rather than an “ought” statement. To say that the court *must* award *The Picayune Intelligence* damages is to assert that it has no choice. That is obviously never true. The court always has the choice of awarding or not awarding damages. It is not logically inconsistent to say, “*The Picayune Intelligence* has a right to compensatory damages, but the court violated that right by refusing to award them.” That, in essence, is what we say when we believe that a court has decided a case wrongly: The court failed to do what it *should* have done; the court refused to act in accordance with the *rights* of the parties.

Secondly, if someone says, “the court *ought* to award *The Picayune Intelligence* damages,” he usually is not stating a position that he regards as open to debate. On the contrary, he is saying that it would be *wrong* for the court not to award damages. Put another way, he is asserting that it is the court’s *duty* to award damages to *The Picayune Intelligence*. In short, oughts-talk might be thought of as “duties-talk.” Duties-talk and rights-talk, as Hohfeld teaches us (you invoked his name first), are correlative.⁷ To say the court has a *duty* to award damages to *The Picayune Intelligence* is translatable into the statement that *The Picayune Intelligence* has a *right* to damages. Thus, oughts-talk and rights-talk carry the same prescriptive message: that something should be done (because there is a duty/because there is a right). Both forms of expression seek to announce a moral fact. Neither way of expressing that fact necessarily invites debate or discussion. In short, both oughts-talk and rights-talk invoke the same “sense of closure” for purposes of argument.

My third point addresses what I believe is really behind your distinction between oughts-talk and rights-talk—namely, the belief that prescriptive statements are not statements of fact at all and that the “emotive” quality of rights-talk obscures this. You cite Unger for the proposition that “part of our political culture (if not our political morality) is that values are solely individual choices and, as such, are not capable of being judged by others.” I believe that Unger, in this regard, does not describe any “part of our political culture” that I am familiar with. It is an important

7. Hohfeld, *supra* note 4, at 30-32. Hohfeld’s concept of the correlation between rights and duties is typically applied to the relationship between parties. The text applies this concept to the relationship between a party and the court.

part of our political culture that an individual may think what she wants, may say what she wants (within some limitations), and may do what she wants (within some limitations). This is not because values are matters of subjective choice that “are not capable of being judged by others,” but because the crucial values of our political culture include respect for an individual’s autonomy and dignity *even when that individual is wrong*.

Dworkin makes this point rather more elegantly. After arguing that the “constitutive morality” of liberal political thought “is a theory of equality that requires official neutrality amongst theories of what is valuable in life,” he goes on to explain:

That argument will provoke a variety of objections. It might be said that liberalism so conceived rests on skepticism about theories of the good [But] [l]iberalism cannot be based on skepticism. Its constitutive morality provides that human beings must be treated as equals by their government, not because there is no right and wrong in political morality, but because that is what is right.⁸

This understanding of values seems to me to characterize our common political rhetoric. When we say that American Nazis have the right to communicate their values, that is not the same as saying that their values are not capable of being judged. On the contrary, we are saying that political morality requires that they be allowed to communicate those values even though those values are wrong. We announce this by saying that Nazis have a legal right to speak freely, and we mean both that we do not expect governmental institutions to hinder their speech (prediction) and that it would be wrong for government to do so (prescription).

In short, statements about values are statements about the real world. When someone says that the court ought to award damages to *The Picayune Intelligence*, that statement may be correct or incorrect. But it is not to be understood as an assertion about the speaker’s opinion; it is made as an assertion of a truth about the world—of a moral fact.

If all this is true, then the conceptual distinction between oughts-talk and rights-talk collapses. Both involve prescriptive statements. That is to say, both involve statements about moral

8. R. DWORKIN, A MATTER OF PRINCIPLE 203 (1985).

truths and, therefore, invoke the same “sense of closure.” In other words, oughts-talk and rights-talk are two ways of saying the same thing; they are, to return to Hohfeld, correlative.⁹

Having said all this, I do not disagree with your observation that rights-talk has an emotive quality that is different from that of oughts-talk (“a larger emotional wallop”). What I do disagree with—as I have tried to explain above—is the idea that oughts-talk is prescriptive, whereas rights-talk is dogmatic, and that this accounts for the difference in emotional power between the two.

What, then, does account for the peculiar “emotive element” of rights-talk? I have tried to distinguish between rights-talk and goals-talk. I suggested that both are ways of making predictive and prescriptive assertions about the way that political institutions act, the former in terms of the individual and the latter in terms of society.

Dworkin has offered a three-fold categorization of political theories: those based on goals, duties, and rights.¹⁰ Fascism and socialism are examples of goal-based political theories; theocratic societies (e.g., Iran) exemplify duty-based systems; and the liberalism of writers like Locke, Rawles, and Dworkin is rooted in rights-based political ideas. I suppose it is obvious that each of these types of political theories carries with it an idiosyncratic political rhetoric, including a special vocabulary for making predictive and normative statements about political institutions.

Rights-talk grounds its assertions about the actions of political institutions in terms of entitlements of individuals while goals-talk grounds such assertions in terms of what best serves specified social goals. Duties-talk grounds its assertions in terms of transcendence: Duties flow from some extra-individual source—Divinity (e.g., the Ten Commandments), Reason (e.g., Kant’s categorical imperative), etc.

I suggested earlier that rights-talk appeals to us in a way that goals-talk does not because, although society and its goals are important in the prevailing political philosophy, we primarily see things in individualistic terms. Similarly, I think that what you call oughts-talk (and I have been calling duties-talk) lacks the emotional power of rights-talk within our political culture because, however much respect we pay to traditional transcendent sources of duties, we remain committed primarily to the politics of the individual.

9. Hohfeld, *supra* note 4, at 30-32.

10. R. DWORKIN, *supra* note 6, at 169-73.

This commitment to individualism and the concomitant appeal of rights-talk seem to me to be historically contingent (as I argued in my last response). A different history might have resulted in our finding goals-talk or duties-talk especially appealing. But the point is that rights-talk, goals-talk, and duties-talk—despite the different anchors for these diverse languages in political theory—all serve the same function: to make predictive/prescriptive statements about the actions of political institutions.

But I still have not responded to the central question you raised: If rights-talk is an apt device for making predictive and normative assertions, why all the “bad name” uses of rights-talk? I suppose that rights-talk can be used inappropriately for the same reasons that all language can be used inappropriately.

One explanation for the misuse of language is ignorance. During the 1960's, some called Lyndon Johnson a fascist even though (whatever his faults may have been) he was not a fascist. One obvious explanation for this misapplication of the term “fascist” was ignorance about its true meaning. Similarly, an explanation for the misuse of rights-talk (for example, in the hypothetical debate about the legislation concerning disclosure of the AIDS test results) is that the speaker simply is mistaken about what rights are or about what rights he or she has.

A second explanation for the misuse of language is the detachability of what you call the emotive element. Thus, the epithet “fascist” evokes all sorts of angry and fearful emotions in the speaker and hearer. Undoubtedly, some people intentionally misapplied (in a substantive sense) the term to Lyndon Johnson in order to call forth the emotions that the speaker deemed appropriate for a discussion of Johnson. Similarly, rights-talk has in addition to its substantive content (prediction and prescription) an emotive dimension that, I suggested above, comes from its rootedness in the exaltation of the individual over and against society, God, reason, etc. Accordingly, there is a rhetorical use of rights-talk that does not seriously purport to predict and prescribe, but instead simply communicates a defiant exclamation of the centrality and inviolability of the individual.

An example of all this: legislation has been introduced in the Pennsylvania General Assembly to require that all girls and women seeking abortions be required to receive information about the procedure and its effects. Its sponsor (identified as an opponent of abortion) justified the bill, in part, on the ground that the

person seeking the abortion “has a right to know.” This seems to me a display of an astonishing ignorance about the meaning of “right” or a willful (and cynical) disregard of that meaning in order to capitalize on its emotive dimension or both. This is the sort of thing that gives rights-talk a “bad name.”

JANE

I am struck by the extent to which words connote different things to different people. This is hardly an earthshaking observation, but I make it even at the risk of seeming foolish because I think it bears on our disagreement. Indeed, it bears on whether we disagree or not.

If oughts-talk were just “duties-talk,” I would agree that there would be little to recommend the former over the latter, that both would involve that sense of closure I mentioned. And I suppose you are correct that sometimes we use oughts-talk to express (uncontroversial) duties, as when in an interaction between a little boy named Zachary and a baby named Deborah we say, “Zach, you ought not to step on Deborah’s head,” or when we say to a gun-toting criminal, “You ought not to murder that victim.”

Yet I did not *mean* to use oughts-talk in that sense; I *did* “understand oughts-talk to be open, suggestive, inviting of dialogue.” Even if it is true that moral statements can “make sense,” there are situations in which a decision-maker (individual/legislature/corporate body/whatever) will be unable to ascertain what moral statement to make. To state the obvious and risk seeming foolish again, sometimes we don’t know, morally, what to do. Say, for example, that two close friends make contradictory or inconsistent requests of me (as where a husband and a wife during marital conflict both seek my advice and ask that I not speak to the other), or say that my job and my family make irreconcilable demands on my time. I might go to you (a friend) and ask, “What ought I to do?” A legislator facing my initial AIDS hypothetical might do the same.

In circumstances such as these, the “ought” in the question “what ought I to do?” does not connote (to me, now as I write nor as I ask you for advice) a duty in the Hohfeldian sense. Rather, I want to do the “right” thing (my “duty”?), but I have a sense that there are many “right” and “wrong” things I could do and that a course of conduct that seems “right” from one perspective will seem “wrong” from another. And it has been my experience (indeed, my experience with you) that when I ask such

questions, I do invite—and receive—debate and discussion. Moreover, even if after such discussion I elect to do one thing and not another, the issue won't feel closed for me. If one of the friends, or my family, or the nurse later is hurt, I might reconsider my election or, if it's too late, decide I made the wrong choice. And the next time a similar situation arose I would remain uncertain as to the "right" thing to do.

That is what I meant to invoke when I asked about oughts-talk: confusion about the good, debate over how to find it, and uneasiness when action is taken in its name. Perhaps you could persuade me, though, that what I have so awkwardly described is "really" just duties-talk anyway. But (this is what I really want to know) why would you want to? My objection to "rights-talk" (or duties-talk) is precisely that it tends to try and reduce and simplify and answer questions that somehow manage to remain morally complicated, even after they've been "answered."

Take your example of the American Nazis. A federal court of appeals held that they could march in Skokie,¹¹ so they must have a "right" to communicate their values (it sure is easier to predict the outcome after the case has been decided, isn't it?), and we can explain that "right" morally by saying that it is right for government to treat human beings as equals, i.e., morally there is a duty to allow communication of wrong values. Why do I feel vaguely nauseated? I guess only soft-hearted intellectuals wonder about the Holocaust survivors' "equality." You will say (no doubt correctly) that the "equality" to which I refer is not the same "equality" Dworkin discussed; you could define or explain "equality" to exclude the soft-hearted concern that I have. Again, why bother? If I came to you and said, "Hey, I've got an idea: I could go to a neighborhood full of concentration camp survivors and shout the insults by which they were tormented years ago. Ought I to do that?" Wouldn't you say that I shouldn't; wouldn't you at least want to talk to me about it? Well, of course, I'm not the government, and "rights-talk," you earlier explained, predicts and prescribes government action. So assume that I came to you and said, "a bunch of people are about to go chant Nazi insults in a neighborhood full of concentration camp survivors, and I have the power to stop them. Ought I to do so?" Wouldn't we have

11. *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978) (United States Supreme Court denies certiorari to United States Court of Appeals for the Seventh Circuit's decision declaring unconstitutional village's attempt to prevent rally and dissemination of literature by National Socialist Party of America).

the kind of debate and discussion I described earlier about my friends? (With whom should I side? Is there some way everyone's interest could be accommodated? If I wanted to remain neutral, how could I do that? Will my "neutrality" be misperceived and hurt someone?) Why should it be any different when the "state" (a mere reification?) is the one with the power to stop the march?

If you prove to me (after all, you've got the opinion as evidence) that the Nazis have a right to march in Skokie, I will still ask, "why?" And if you answer that it is because "political morality requires that they be allowed to communicate [their] values even if those values are wrong," I will just ask, "why?" again. And if you (moving to yet another level of abstraction) begin to describe our "commitment to individualism," I'll still ask, "why?" and if you tell me about historical contingency, I'll say, "oh, now we know why we find this sort of argument appealing, but does that make it correct?"

Maybe it's a simple case of girl meets boy, Carol Gilligan¹² meets Ronald Dworkin, and they (we) are speaking in different voices? If the Nazis are planning to march on Thursday, then sometime before Thursday the court must decide whether they can march on Thursday or not. Would it be incorrect to understand a decision one way or the other as the same sort of questionable, provisional, uneasy choice as I might make to talk to one friend and not the other during the marital crisis? Why shouldn't we open up the questions of why we "expect" government to do or not do certain things and of why we say it is "right" or "wrong" for government to act in various ways?

RICK

I guess it isn't surprising that our discussion of rights should quickly turn to the question of values since (as I gather we agree) an essential dimension of rights-talk is prescriptive. But I am puzzled by the nature of our disagreement about values. Or rather, I am uncertain about whether we really disagree at all. Specifically, it seems to me that you attack several ideas attributed to me that I simply do not believe, and if I can clear away these suspected misconceptions, then perhaps some common ground might appear.

I believe that statements about values are statements about the world, not simply statements about opinion, preference or

12. See C. GILLIGAN, *IN A DIFFERENT VOICE* (1982).

taste. If I say that I like chocolate ice cream better than rum raisin, I do not mean by that that chocolate is *in fact* better, only that I personally prefer it. If I die tomorrow and no longer have preferences for anything, that will be the end of the matter.

But when I say that torturing innocents is wrong, I am reporting more than my opinion that it is wrong or my personal preference not to torture innocents. I mean that torturing innocents is wrong *as a matter of fact*. If I die tomorrow and cease to have opinions or preferences altogether, torturing innocents will still be wrong.

In short, I believe that statements about values are assertions about the moral reality just as statements about objects and motion are assertions about the physical reality. But you seem to think that I, therefore, must also believe that statements about values are “uncontroversial.” I believe no such thing.

Questions about values span a broad range from the easy (for example, whether torturing innocents is wrong) to the excruciatingly hard (for example, whether the government should have stopped the Nazis from marching through Skokie). Accordingly, the answers that we reach range from the clear to the controversial.

But it is one thing to say that the answer to a moral question is controversial and quite another thing to say that there is no correct answer. When we talk about the physical dimension of our world, we do not normally think that difficult questions are nonsense and controversial answers are merely matters of opinion. The shape of the earth used to be a matter of great dispute, and the answers given generated great controversy. It did not follow that there was no correct answer to the question, “What is the shape of the earth?” Or that the answer, “the earth is flat,” was merely a matter of opinion that was “not capable of being judged by others.”

Today, if I ask how large the universe is, I assume that I will have asked a similarly difficult question. The answers given by scientists are no doubt controversial. Indeed, it may be that although we can infer possible answers from data, it is and always will be technologically impossible to be certain about the correctness of any of the proffered answers. It does not follow from the inability to ascertain an answer that there is no correct answer to the question, “how large is the universe?”

The same seems to me to be true about questions and answers concerning the moral dimension of our world. I believe

that torturing innocents is wrong and that the government should have ordered the Nazis not to march in Skokie. I believe that the first conclusion is obvious, but that the second is highly controversial. Nevertheless, I believe that both are true statements about the real world. (I should add that while I am certain about the truth of the first conclusion, I am more tentative about the second. This is a function of the difficulty of the moral questions raised by Skokie.)

In short, I share your sense of “confusion” and “uneasiness” about many moral questions. And I share the sense that the answers we reach often seem “provisional” and “uncertain”—the sense that “sometimes we don’t know, morally, what to do,” that we are “unable to ascertain what moral statement to make.” But I also believe that the answers we give—however hotly debatable they seem and however uncertain we feel about them—are either correct or incorrect as matters of fact. Indeed, if we did not believe that, why would there be so much controversy? Why would each of us care so much about the answers that other people offer?

Another idea you seem to attribute to me is that if I believe that a value judgment is an assertion about the world, then I must believe that a question about values has one, and only one, answer. This collides with your “sense that there are many ‘right’ and ‘wrong’ things I could do” under given circumstances. I have the same sense sometimes.

Questions about physical reality might have more than one correct answer (for example, “How do I get from my house to the law school?”). Similarly, the answer to the moral question, “What should I do?” might be: “There are a number of morally permissible courses of action.”

Even more troubling is the moral dilemma for which there is no morally “pure” option. Suppose I know that my wife Claudia has committed some horrible crime. What should I do? As I analyze the situation, my relationship to Claudia obligates me to keep quiet and protect her; my relationship to my community obligates me to turn her in. Each of the only two courses of action open to me simultaneously fulfills one moral obligation and violates another. There is no way out.

But none of this, it seems to me, casts doubt on my basic point that moral statements are assertions about the world. If I ask, “what should I do?” then the answer—whether there is one

morally permissible actions or several or no morally permissible actions at all—purports to be a true statement about reality.

A third idea that I think you attribute to me, although less expressly articulated, underlies, I suspect, much of what troubles you about my position on values: namely that statements about value are rationally demonstrable. I do not believe this.

I am reminded of Joseph Singer's wonderful aphorism: "What protects us against Nazism is not the belief that reason can prove that it is wrong. What protects us is outrage."¹³ Singer is probably right about that, but then he proceeds to draw the wrong conclusion. He thinks that because a value judgment is not rationally provable, it is, therefore, not a statement about the world, but merely a matter of opinion or preference. That simply does not follow. I am not sure whether I can rationally prove that torturing innocents is wrong or that I have an obligation not to do anything that would hurt Claudia, but I do not, therefore, think that those statements are simply opinion.

Reason/logic/rationality is one tool for comprehending the real world. There are many others (intuition, empathy, inspiration, revelation, faith, to name a few of the more common ones). Indeed, outside the realm of moral values, we commonly make nonrational judgments about the world. For example, I often "know" Claudia's moods. Suppose I tell a stranger one day that Claudia is worried and the stranger asks me to prove it. What would I do? I could explain the behavior that leads me to the judgment that Claudia is worried. But since the stranger does not "know" Claudia as I do, my explanation might make no sense. My "knowledge" derives from empathy, and reason cannot help me "prove" the truth of my judgment about her mood to one who does not share that empathy. Does that mean that my conclusion is not a statement about reality, that it is neither correct nor incorrect?

Aesthetic judgments are also nonrational; they cannot be scientifically "proved." Nonetheless, if I assert that "College Daze" is a greater play than "King Lear," the expected (and appropriate) response is not, "Oh well, that is his opinion, and it can't be judged." The proper response is, "He is wrong," because I am wrong.

Many (most?) of the truths we know about this world do not come from reason. Indeed, the injection of reason often obscures

13. Singer, *supra* note 1, at 55.

these truths and confuses our perception. The following passage from Faulkner's *The Bear* expresses this perfectly: "And I know what you will say now: That if truth is one thing to me and another thing to you, how will we choose which is truth? You dont [sic] need to choose. The heart already knows."¹⁴ In sum, it is not true that because I believe that value judgments are not simply reports about personal opinions and preferences, but rather are statements about the real world, that I also believe that the answers to questions about values are uncontroversial simple and rationally demonstrable. The truth is that I agree with you that the answers to moral questions are often controversial complex and nonrational. But I still think that the answers that one offers are either correct or incorrect and not merely matters of subjective taste.

At this point, I am tempted to try to relate all this back to legal rights. But it would probably make more sense to stop and ask whether I have correctly identified your concerns and whether anything I have said addresses them.

JANE

Now you have me at a definite disadvantage because I know even less about moral philosophy than I do about rights. As to the former, I truly am a "mere" citizen, and you may tutor me if you like. Indeed, all I have for you at this point is a bunch of questions. Many of them anticipate the connection between your beliefs about values and your beliefs about rights; as I am just guessing about the connection, the questions may be silly, irrelevant or both. Nonetheless, I am willing to risk foolishness again.

Not being a moral philosopher, it is tough to say whether I agree or disagree with your assertion that "statements about values are statements about the world." Then again, your assertion suggests that my agreement or disagreement is irrelevant. Your assertion is, after all, a statement about values, and if it "makes sense"/"is correct," then it makes no more sense to speak of agreement with it than it does to speak of "agreeing" that $2 + 2 = 4$. You (and I) are either wrong or right. That's all.

Yet it is worth noting, preparatory to conceding your assertion for the sake of asking questions about it, that I did ask myself whether I agreed or not. Statements about values may be statements about reality, but they are not always experienced that way.

14. W. FAULKNER, *supra* note 1, at 260.

I suppose there are many ways to “test” statements about values—are they logical? are they consistent with other statements? do they lead to absurd conclusions?—but my first “test” of your assertion was whether it conformed to my experiences of moral questions.

So, for example, I took the notion that some questions of value are easy, like “killing innocents is wrong.” Sure, says I to myself, I wouldn’t blast some guy walking down the street just because I didn’t like his sheepdog. But that seemed too trivial, too facile, so I began to wonder what I would do if by blasting that guy I could save a million lives or something (I am an ordinary American citizen who has been drafted and sent to Europe during World War II; up walks a soldier in the German army who is himself an ordinary German citizen (like me!)), and the easy question suddenly got hard: Is he innocent? Is killing innocents wrong? May I do a wrong thing for a right goal? Etc.

I know that I made a mistake here, moving down the range from the easy to the hard. Or maybe I didn’t make a mistake at all, but just proved you right, since the dog case was easy and the soldier case hard. But what strikes me as interesting about my little “testing” process was less the conclusions I reached but the questions I asked: I looked at your assertion and wanted to know not if it was true but if it was helpful.

All of which says only that I have trouble dealing with moral statements in the abstract. You are welcome to treat this difficulty as a character flaw. (I won’t be offended—I’ve plenty of others.) In any event, it is undoubtedly the source of my main questions.

Take a morally “controversial” case, like the Nazis marching in Skokie. If the answers in such a case are, as you say, “debatable” and “uncertain,” what difference does it make that they may also be “correct or incorrect as matters of fact?” Reality may “be” one way or another (so that one can make “true” statements about it), but on the Tuesday before the Thursday on which the march is scheduled, how do I decide what to do? Or, rather, on the Tuesday before the Thursday, how does it help me to know that the answer I reach will be a true or false statement about reality? And if the reality (the “true” reality? the “real” reality?) of the outcome (its truth or falsity) is not rationally demonstrable, why is it important to believe that my decision will or will not be a “true statement about reality?”

I suppose these questions collapse into one: why is it important to distinguish between a question with no answer and a ques-

tion with an answer we can never know? Yes, the heart “knows” many things that reason cannot prove; we act on the basis of the heart’s knowing all the time. Yet Faulkner does not say, and I do not believe, that when we so act, we imagine that the heart’s truth is the truth that is correct “as a matter of fact.” Rather, it’s the only truth available. Indeed, the passage you quote (a passage with which, as you know, I do agree) is partly a meditation on Keats’ *Ode on a Grecian Urn*; the urn, described both as a “Cold Pastoral” and “a friend to man,” leaves this equivocal message: “‘Beauty is truth, truth beauty,—that is all/Ye know on earth, and all ye need to know.’”¹⁵ We who, alas, live only on earth do not trouble to discern whether the answers we seek but cannot find are unknowable or merely unknown to us. At the moment we must act, the only reality that concerns us is our confusion about what is right. Why does it matter that in some ideal or abstract world there might be “really” right answers?

RICK

Suppose you really believed that moral questions have no answers. Why would you ask the questions? Normally we don’t ask questions that we believe have no answers. Indeed, the reason we ask questions is that we think it is somehow important to try to answer them.

I know that you ask moral questions. (I have heard you ask them.) I know that you take moral questions seriously. (I have heard you struggle with them.) Why do you ask? Why do you struggle?

When you ask, “What should I do?” don’t you think that answering that question is important? Don’t you think that getting it right is crucial? Don’t you worry that you might make a mistake, that you might do the wrong thing? Wouldn’t it be absurd to worry about the answer to a question that has no answer? Wouldn’t such a question literally be nonsense?

If you really believed that responses to moral questions are not really answers, but simply reports of the responder’s personal tastes and preferences, would you condemn those responses? I like chocolate ice cream better than rum raisin, but I don’t condemn someone who eats rum raisin ice cream because it is merely a matter of personal taste. I believe that torturing innocents is

15. Keats, *Ode on a Grecian Urn*, in *ENGLISH ROMANTIC WRITERS* 1185, 1186 (D. Perkins ed. 1967).

wrong, and I condemn someone who tortures innocents because it is not merely a matter of personal taste.

I don't believe the questions you ask are matters of fancy moral philosophy; I think they are matters of everyday experience. We are always distinguishing between questions that we believe have answers and those we believe have none. We worry about the former and not the latter.

We may believe that it will never be possible to know for sure how large the universe is or whether Franklin Roosevelt really knew that the Japanese were planning to attack Pearl Harbor before it happened, but we believe that those questions have answers and that it is important to try to figure out what the answers are.

But we don't ask, let alone worry about, questions that have no answers. Indeed, they aren't really questions at all, just words strung together to sound like questions. (Is it wise to gyre and gimble in the wabe? Do radiators do it better?) Nothing is at stake when a "question" that has no answer is posed.

But a lot seems to be at stake when a moral question is asked. You ask moral questions. You take them seriously. You struggle over the answers that you and others give to them. Would you do all that if you believed that answers did not exist?

JANE

Yes, I ask moral questions, struggle with them, take them seriously, and I *don't* believe they have answers. At any rate, not answers I'll ever know. Or maybe I believe they *do* have answers, but not answers I can ever know.

You see, (you keep resisting this point, but I'll make it again anyway) when I face a moral question, I don't face it to get an answer, but because I have to act, to do something (or not do something). I personally tend to be less concerned with getting a "right" answer than with doing the best I can. Which is not to say that anything goes. ("Gee, given the fact that I have the flu, the best thing under the circumstances is to avert my eyes from that innocent victim being tortured and take a nap instead.") Rather, doing "the best I can" has to do with facing up to the moral ambiguity in the situation before me (violence is wrong/but the cause is just/is my potential victim the perpetrator of the wrong or an unwilling participant in it?/am I capable of remedying the wrong?/if I try to act and fail will I make things worse?/etc., etc.,

etc.) and dealing with its complexity. I will grow, change, mature in the process—which is one of the reasons I think it's important to ask and struggle with moral questions—but I won't get an answer, and I won't even seek one. When I act (because I must), I do so with a sense of hope (that I've really done my best) and regret (over all the possible courses I may have wrongly chosen not to follow) and fear (that the outcome will be, despite my efforts, horrible).

You seem to think that because I believe moral questions don't have answers we can know I must consequently believe that the answers to moral questions are matters of taste or preference. I don't (and I venture to say neither does Unger, but let's put him aside). If, responding to a moral problem, I acted in a given way, and you said, "I don't think you ought to have done that," I would not say, "It's none of your business," or "Who are you to criticize?" (or, even, "It's my right to do as I please.") I would say, "Why?" And we would have a discussion, perhaps a debate. If I thereupon altered my conduct, it would be with renewed senses of hope, regret and fear; I would feel no closer to "the" answer. If I did not alter my conduct, I'd be just as unsure who was right.

Yes, I ask questions to which I believe there are no answers (or knowable answers) all the time. I believe that asking, despite the fact that there is no answer, is what makes my asking part of a moral process. I don't need the reward of a "right" answer, or even the hope of one. But I do need the discussion and debate, internally and with others: Do I understand why the situation I'm facing is complicated? Is there an aspect I've not considered? Is the course I've adopted the best I can do or merely the easiest? Does it matter that others agree that my course is the best I can do? Why do I feel so uneasy? In other words, I believe that it is important to try to answer moral questions even though I believe moral questions do not have (right) answers we can know.

RICK

Let me try to clear up an apparent misunderstanding. You say: "You seem to think that because I believe moral questions don't have answers we can know I must consequently believe that answers to moral questions are matters of taste or preference." That is precisely what I do *not* think. I take very seriously the difference between questions that have no answers and questions that "don't have answers we can know." If I ask a question that I

believe has an answer, I do not believe that it deals with a matter of taste or preference; I believe it demands that I try to figure out the answer even if I can never “know” the answer (i.e., even if I can never be certain that I have got it right).

The idea that a question has a right answer even if it cannot be known with certainty does not strike me as odd. We live with this every day. I gave some exotic examples last time (the size of the universe, what did FDR know and when did he know it). Here is a more mundane instance: I want to know the fastest driving route from my house to the law school. Over time I have answered this question differently as I have become more familiar with the local geography. Each time I am more confident that I have answered the question correctly. Am I now certain that I know the right answer? No. Will I ever be absolutely certain that I know the right answer? Probably not. Does that mean the question has no correct answer? Of course not. Some route or routes qualify as the “fastest,” whether I correctly discover it (them) or not.

Moral questions seem to me something like that. Some questions appear easy. I answer them quickly, do not change my answer, and feel fairly confident (albeit not absolutely certain) that I have it right. (E.g., torturing innocents is wrong.) Some questions appear hard (e.g., Skokie). I answer them slowly, I change my answer repeatedly over time as I think about it, talk to others, test my answer against answers I have given to other moral questions, and so forth. Each time I answer I feel more confident that I am right, but I am still not and probably never will be certain. Do I therefore think that these questions have no answers? No. That is why I worry about them so much. It seems important to figure out what the answer is.

Having said all this, I seriously think that despite your feeling that the notion of “right answers” is unhelpful, we do not really disagree about the nature of moral questions. Rather, I think each of us stubbornly clings to different vocabularies to express the same beliefs.

You take the moral question, “What should I do?” seriously. So do I. But whereas you say that you are concerned “with doing the best [you] can,” I say that I want to correctly answer the question.

You believe that moral questions are difficult. So do I. But whereas you speak of acting “with a sense of hope . . . and regret

. . . and fear," I say that I am often uncertain whether I have answered the questions correctly.

You believe that it is important to "face[] up to the moral ambiguity of a situation . . . and deal [] with its complexity." So do I. But whereas your response to this ambiguity and complexity is to say, "I won't get an answer, and I won't even seek one," my response is to say that sometimes the correct answer is that there are many moral actions and sometimes the correct answer is that there is no moral act possible.

You believe in dialogue and debate, internally and with others. So do I. But whereas you conclude that you therefore "don't need the reward of a 'right' answer, or even a hope of one," I say that dialogue and debate are how I try to figure out the right answer.

Sometimes even you can't resist the language of "right" and "wrong" answers. You say, "When I act (because I must) I do so with . . . regret (over all the possible courses I may have wrongly chosen not to follow) . . ." Aren't courses "*wrongly* chosen not to follow" the *right* courses?

You clearly believe that some answers to moral questions are better than others (hence your agonizing over the answers). Am I really saying something different when I translate "better" into "more correct?"

Since we both take moral questions seriously, since we both believe it is important to try to answer them, since we both believe that moral questions can be excruciatingly difficult and that we may never feel certain about the answers we give—since we both agree about these things, do we really disagree about anything important?

JANE

Perhaps not; yet the words one uses may matter (the medium is the message?), and so I want to make one small claim for my vocabulary. I hope that in doing so I'll help you see the source of the question with which I began this whole exchange.

If I were to grant you that moral questions have "right" or "correct" answers, then when I seek but do not find those answers—because they cannot be known, or whatever—I have failed. I'm talking about a nuance here, a feeling. You say that wanting "to do the best one can" and wanting "to correctly answer [a] question" mean the same thing. Yes and no. Both

phrases convey an absence of complete or final resolution. (I was glad to see you say that you feel only fairly confident of the right answers to even easy moral questions.) Yet your phrase suggests the *unattained* possibility of such a resolution, whereas mine suggests that such a resolution is *unattainable*.

Perhaps the phrases suggest those meanings only to me; perhaps I'm being over-sensitive. I think we agree that moral inquiry is a form of striving, of trying. You focus on what we are striving and trying for, and I focus on the striving and trying itself. Neither of us is indifferent either to the process (of striving) or the outcome (the "right?" answer). But we have different emphases.

Which brings me (thank Heaven!) to why I asked about the general interest people seem to take in "rights." Lawsuits must be decided: we've set up a judicial system and told people they must forswear the use of force and take their quarrels to court instead. We *could* understand that when courts decide cases they do not always—and perhaps cannot—finally resolve the underlying moral questions raised by or through the lawsuits. This sort of understanding might suggest that legal questions and moral questions are inseparable (the same?), that we *must* discuss and debate moral questions explicitly in the course of conducting and deciding lawsuits, and that we will have as much striving and trying to do after the case is decided as we did before.

But I don't think we have this sort of understanding. Or if we do, we try our best to ignore it. We treat decided cases as if they were final resolutions; we argue as if the new, undecided cases before us have in fact already been resolved by prior cases; we talk about "rights." Perhaps we do so, as you suggested earlier, because we are ignorant or because we intend to misuse the emotive element of rights-talk.

Ignorance and bad intent are tough qualities to combat. Perhaps any vocabulary is corruptable, can be misunderstood and manipulated. I for one would like to see us move away from a vocabulary that is already so freighted with incomprehension and misuse. Do you see, now, why rather than trying to give moral content to—to re-define—"rights," I seek to get away from the term altogether? Is it vain to hope that we might understand what law is or does better if we discussed and debated moral questions in so many words rather than in the encrusted vocabulary of "rights?"

RICK

We seem to agree that at the core of legal controversies are moral questions. I understand the overarching moral question in this context to be: What should the government do with its coercive power? (Should it, for example, force me to keep the promise I made to *The Picayune Intelligence* to pay for my newspapers?)

I understand your objection to rights-talk to be that every legal controversy is an occasion to wrestle anew with the moral questions that bear on how the government should use its coercive power. We should never cease to utilize these occasions to struggle with the questions because we can never be satisfied with the answers we give; we must constantly reevaluate our positions. Rights-talk, you feel, has characteristics that inhibit that ongoing moral debate. Those characteristics are that rights-talk presupposes that right answers to these questions exist and that it frequently offers past political decisions (statutes, precedents, etc.) as the embodiment of those right answers. In other words, instead of inviting debate over the essential moral questions in legal controversies, rights-talk cuts off debate by insisting that the questions have already been conclusively answered.

Assuming that this characterization of your position is accurate, there is much about it with which I agree. Rights-talk does presuppose right answers in the way that we have been discussing in our last several exchanges. Furthermore, rights-talk does invoke past political decisions as providing those answers. (Indeed, as I suggested in the beginning, the predictive function of rights-talk derives its power from reliance on past political decisions.) But all this does not cut off debate and reevaluation; it requires it.

First of all, invoking past decisions (precedent, for example), does not avoid the issue of values in adjudication; it expresses a crucial value: that like cases ought to be treated alike. An important response to the question of what government should do is this: if government has treated an individual a certain way in a certain situation, then it should treat other individuals in the same situation in the same way, even, in many instances, if the original decision was wrong. That is an important moral value concerning government and its use of power.

Furthermore, legal arguments about precedents focus on whether those precedents are distinguishable. These are essentially moral arguments. They focus on factual differences between precedents and the instant case and debate whether those

factual differences are morally significant, that is, whether the factual differences indicate that the values justifying governmental action in the past should not apply (at least in the same way) to the present.

Moreover, sometimes courts refuse to abide by past political decisions. They strike down statutes; they overrule precedents. These cases present a moral dilemma, because here the courts conclude that those past decisions were wrong in such a way that correcting the misapplication of values is more important than following the contending moral principle of treating similarly situated people alike.

All of this involves moral debate. The significance of rights-talk is that it reaffirms our cultural concern for the individual by couching the debate in terms of personal entitlement. When *The Picayune Intelligence* insists that it has a legal right to a judgment for the amount of the unpaid bill, it is saying that it, like any litigant, is entitled to be treated the right way by the government (court) and that the right thing to do in this case is to make me pay what I promised.

Every legal controversy is an occasion to reconsider the values that tell us how we should live together in a community and what role the government's coercive power should play. Rights-talk does not inhibit that debate. On the contrary, when two litigants make conflicting claims about rights in a case—when they clash over what precedents say, whether they apply, whether they should be followed—the judge (if she has integrity, if he is conscientious) has no choice but to resolve the conflict, to enter the debate, to reconsider the moral questions that lie at the heart of the controversy.

JANE

I think the bottom line is that I'm more cynical, less trusting, than you are. Yes, "every legal controversy is an occasion to reconsider the values that tell us how we should live together in a community," and yes, the conscientious judge must enter the debate over "the moral questions that lie at the heart of the controversy." It follows that decisions to apply, distinguish, or abandon precedents necessarily present moral questions. I wish I could believe that judges, lawyers, and (mere) citizens actually understand litigation in general and "rights" litigation in particular in that way.

Long ago the Legal Realists presented their devastating cri-

tique of “legal” reasoning, exposing the inability of concepts and precedents to define or apply themselves.¹⁶ Ever since, we law professors have “taught” realism, infusing our case presentations with large doses of skepticism and “policy” (whatever *that* is). Yet—without going into all the “because” and “despite” that might qualify what follows—we and our students somehow still believe in “thinking like lawyers.” If old habits die hard, then perhaps old mystiques are immortal.

In classrooms and in courtrooms we distinguish cases. We argue whether a discovered distinction makes a difference. Is our debate a moral one? Sure. Do we see it as a moral inquiry at the time? I just don’t think so.

Back in the dawn of time, when I was a first-year law student, one of my fellow students was struggling to distinguish a case in class. The professor, obviously unimpressed with what he was hearing, remarked, “You can always distinguish two cases, Mr. X; they tend, for example, to have different names at the top.”

The pedagogical cruelty of the professor’s statement is obvious. But there was a subtler, more insidious message, too. Some distinctions just don’t count, are not worthy of being paid attention to, ever. The “good” law student sees the implication right away: some distinctions *do* count and *must* be paid attention to. Thus we who “think like lawyers” come to “know” two apparently real and exclusive categories: distinctions that *are* distinctions and distinctions that *are not*.

Now it may be that the “good” student/lawyer, who has by definition I suppose learned her lessons well, will be able to generate distinctions that can plausibly be placed in the first category, distinctions that “count,” in almost every case and so come to see the moral component of distinguishability arguments. But does this happen? For one thing, there tends to be an equally “good” student/lawyer on the other side, arguing that what appears to be a distinction is not a “real” distinction in this particular case. Though their debate may “really” be about the moral significance of factual differences, they treat it and think about it as if it were a debate about categorization, just as my professor did. Morality gets subsumed in, swallowed by, craft; in using our accustomed vocabulary, we lose sight of what we are talking about.

And that’s my problem with “rights-talk” (and, indeed, “lawyers’-talk” generally): all the things that are not spoken. We de-

16. See, e.g., Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

bate whether two cases are really “like” cases, forgetting that we might debate whether like cases “really” ought to be treated alike. We debate which categories to put facts into, forgetting to debate the definitions of the categories themselves.

Oh, you are right (that ugly word again), it doesn’t have to be that way. A lot is at stake in every decision; we have only to recognize it. My fear is that the terms in which we have come to speak point us not towards but away from why we came to converse in the first place.