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Classical Realism*

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This essay offers a systematic reconstruction of a neglected perspective on questions of moral, political, and legal theory that I will call "Classical Realism." [1] The perspective is actually part of a long tradition of theorizing about morals, law, politics, and society that includes, to greater and lesser degrees, writers like Thucydides, Machiavelli, Freud, Marx, Nietzsche, and Holmes, among others. This tradition, however, has almost vanished from the modern academy. It is the most general aim of this paper to begin a revival of Classical Realism as a serious—albeit debunking—position in normative theory. It is the more specific aim to delineate the position, assign it a pedigree, and locate it in conceptual space. Subsequent papers will tackle specific thinkers and arguments that will be sketched more lightly in the historical survey that follows here.

I. Classical Realism

By using the label "Classical Realism" I wish to reclaim for the term "realism" a meaning both older than and different from that

current in academic debates, especially in philosophy, where it names certain doctrines in semantics and metaphysics.[2] Classical Realism, by contrast, is a very different kind of position; indeed, it entails no particular semantic and metaphysical doctrines at all. Classical Realism denotes a certain hard-headed, unromantic, uncompromising attitude towards the world, which manifests itself in a brutal honesty and candor in the assessment of human motives and the portrayal of human affairs.[3] More precisely, Classical Realists accept the following three doctrines:

Naturalism: there exist certain (largely) incorrigible and generally unattractive facts about human beings and human nature.
Pragmatism: only theories which make a difference to practice are worth the effort: the effect or "practical pay-off" is the relevant measure of value in theoretical matters.
Quietism: any normative theorizing which fails to respect the limits imposed by these facts about human nature is idle and pointless; it is better to "keep quiet" about normative matters, than to theorize in ways that make no difference to practice.

Many philosophers could, of course, agree in principle with the Naturalism and the Quietism, even if Classical Realists do distinguish themselves by the extent to which they view the unattractive facts about human nature as incorrigible. What is proprietary to Classical Realism is the insertion of Pragmatism in to the mix. For now the conjunction of the three doctrines means that the aim of theory-construction must be descriptive and explanatory adequacy to the incorrigible facts, rather than normative edification or rationalization: only the former kind of theorizing will pass the pragmatic test, given the Naturalism. Indeed, what is most striking about the pantheon of Classical Realists is that they do *not* pursue the sort of justificatory or normative projects that characterize contemporary moral and political theory (in writers like Rawls, Habermas, Dworkin and many others). Realists want to understand and explain *the way things really are*, rather than engage in idle talk about how they "ought" to be. To the extent they take theory-construction to have an important normative dimension, Realists view this normative advice as circumscribed by their Naturalism. Machiavelli provides a useful illustration of the Classical Realist attitude towards normative theory.

Complaining about earlier writers who offered advice to princes, Machiavelli says, "[I]t seems to me better to concentrate on what really happens rather than on theories or speculations" (Machia-

velli 1988, XV).[4] Accordingly, Machiavelli proposes to "set aside fantasies about rulers...and consider what happens in fact" (XV). He proceeds with a point-by-point refutation of the utterly unrealistic "wisdom" of antiquity, especially in the person of Cicero (cf. Skinner 1988, xvii-xx). Thus, Machiavelli denies that generosity is a virtue (XVI); he says that "because men are excessively self-interested," it is better to be feared than loved, since fear appeals more directly to the self-interest of the subjects (XVII); he argues that a ruler should only feel bound by his promises "if all men were upright; but because they are treacherous and would not keep their promises to you, you should not consider yourself bound to keep your promises to them" (XVIII). Much of Machiavelli's advice is predicated on the supposition that "men are so naive, and so much dominated by immediate needs" that deception is both quite possible and profitable. "The common people," he says, "are impressed by appearances and results" (XVIII).

The Prince, in sum, "is passionately driven forward by a sense of what must realistically be said and done if political success is to be achieved" (Skinner 1988, xxiv). Machiavelli thinks this normative advice is constrained by the permanent facts about human nature. In his view, men are self-interested: "the end which everyone aims at...[is] glory and riches" (XXV). These facts make the normative advice of a Cicero or Seneca—the spokesmen for "classical humanism"—irrelevant at best and pernicious at worst. Cicero and Seneca, in short, fail to understand human nature, with the result that their theoretical advice fails the pragmatic test.

Classical Realism, then, stands in opposition to the dominant tradition in the modern academy, which maintains an optimistic view about the ability for normative theory to "make a difference." [5] The Realist view is deeply skeptical, in much the way the eminent political scientist Charles Lindblom has recently expressed:

> [T]here is no clear, unmistakable, demonstrated connection between...the distinguished contributions of a whole history of political philosophy and any of society's major ventures....We have to face, at one extreme, the *possibility* that the world of the 1940s and 1950s—and today's world, too—would look pretty much as it does had there never been a Plato or Aristotle or their equivalents; never a Hobbes, a Locke, a Weber, or their equivalents. (Lindblom 1997, 241–242)[6]

Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit, who is perhaps the most influential living legal scholar, has recently articulated the same basic view (to a chorus of con-

demnation, unsurprisingly, from those with a professional stake in normative theory[7]). Attacking what he calls "academic moralism" (Posner 1999, 5)—"the kind of moral theorizing nowadays considered rigorous in university circles" (*id.*)—Posner claims that such theory,

> has no prospect of improving human behavior. Knowing the moral thing to do furnishes no motive, and creates no motivation.[8] Motive and motivation have to come from outside morality. Even if this is wrong, the analytical tools employed in academic moralism—whether moral casuistry, or reasoning from the canonical texts of moral philosophy, or careful analysis, or reflective equilibrium, or some combination of these tools—are too feeble to override either narrow self-interest or [pre-existing] moral intuitions. And academic moralists have neither the rhetorical skills nor the factual knowledge that might enable them to persuade without having good methods of inquiry and analysis. As a result of its analytical, rhetorical, and factual deficiencies, academic moralism is helpless when intuitions clash or self-interest opposes, and otiose when they line up. (Posner 1999, 7)[9]

This is a bracing and polemical statement of a kind of Classical Realist skepticism about normative theory, but perhaps we can try to say more systematically and precisely what considerations would underwrite such a view.

We must recognize at the start that Classical Realist skepticism need *not* depend on any general skepticism about whether ideas (or reasons) make a causal difference to the course of events.[10] Hardcore physicalists (like Quine) may embrace this kind of radical skepticism, but more relaxed materialists (like Posner and Marx) need not.[11] People *may* act *for reasons*, and ideas *may* be hugely influential, and all of that is compatible with Classical Realism. Realist skepticism is directed, rather, at one or both of the following claims: (1) that *moral* ideas and reasons make a causal difference to the course of events; or, (2) that certain normative ideas *in the form of a theory* make a causal difference to the course of events. The former claim would, of course, subsume the latter: if moral ideas make no causal difference, then of course moral theories will make no causal difference. The converse does not hold, however: (2) is a weaker claim than (1), which might explain why even some contemporary moral philosophers have embraced versions of (2) (e.g., Baier 1985).

This latter, more modest skepticism does require that we specify the distinctive *form* of normative *theory*, such that normative ideas so expressed are causally inert. A "theory" in the problematic sense, I take it, aims for a systematic and explicit justifica-

tion of its normative claims. Moreover, this justification aims for a level of abstractness and comprehensiveness remote from the particularized decision-making of ordinary life. Of course, ordinary people have normative views, and these views may influence their actions. But ordinary decisions are not generally (if ever) informed by a normative *theory* in the sense at issue.

This characterization of normative theory certainly fits Posner's examples of "academic moralists" (like Dworkin and Rawls), and it also jibes with his criticism of academic moralism. For it is precisely the characteristics of academic moral theory—the drawing of fine distinctions, the mustering of careful arguments and counter-arguments, the parsing of concepts—that are supposed to explain its inefficacy for Posner: such stuff simply numbs the mind, bores the reader, and is ineffectual with respect to altering people's antecedent, basic motivations and desires.

But is Posner right? A bit of armchair sociology suggests he may well be. We do know, for example, that academic moral theory is little read, even within the academy.[12] We know that it bores many people, including students. We know that most people and most politicians are not especially smart or acute, and have trouble following a complex argument. We know that people are strongly moved by self-interest in many (perhaps most) circumstances. Given all that—who could seriously deny any of it?—it would, indeed, be surprising if academic moral theory made any difference at all to the course of events. The burden is properly placed on the proponents of the thesis that academic moral theory *matters* to make the case.

The first and less modest kind of skepticism—the one which questions whether *moral* ideas, theoretically expressed or otherwise, exert much force in the course of human affairs—is, in contrast to Posner's anti-moral theory stance, the predominant theme in the historical Classical Realists. This skepticism does share with the first, however, dependence upon Naturalism, i.e., upon the thought that there are incorrigible and unattractive facts about human nature. For both kinds of skepticism rest on the thought that *given what human beings are really like*, one should not expect moral claims or normative theory to have much impact upon them: either people are such that they won't answer to moral demands, or they are such that moral theory will not affect them. Naturalism conjoined with Pragmatism then forms the crux of Classical Realism in all its forms, since it underpins normative quietism and the conception of theory-construction as essentially descriptive and explanatory, rather than normative. It is crucial,

then, to be clear about how Classical Realists conceive of human nature and the "incorrigible facts" about human beings. Two themes run through their writings.

First, Classical Realists view human beings as essentially selfish (or self-interested), and their actions as essentially immoral or amoral. (This means, of course, that normative theories *not* in tension with self-interest may turn out to be causally efficacious.) Human beings are "selfish" in the precise sense that in acting their *primary* (though perhaps not their exclusive) motivation is that they expect an action to: (a) constitute their well-being; or (b) contribute (as a means) to their well-being. Many Classical Realists have substantive views about what agents typically take to constitute their well-being: for example, power, fame, wealth, and sexual gratification.[13] But we can also speak generally about the Classical Realist idea that in acting an agent's primary motivation is his own well-being, however exactly well-being is construed.

Of course, this egocentric view of human nature can be strengthened or weakened by placing constraints upon the notion of an agent's "well-being." For example, to what extent can an agent's well-being depend on the satisfaction of other people's desires? To the extent it can, the egocentric view of human motivation risks triviality. The Realist, then, must claim that agents are characterized by a certain "self-regardingness" (Pettit 1995, 310–312). An agent's motivations *may* take into account other people's well-being ("other-regarding desires"), but the more others' well-being is to the agent's own advantage, then the stronger the agent's motivation will be. "[P]eople's self-regarding desires," in a nutshell, "are generally stronger than their other-regarding desires" (Pettit 1995, 312).

Secondly, Classical Realists, though thinking human beings are basically selfish, also have a fairly dim view of human intelligence and capacities.[14] Most people, on the Classical Realist view, are frequently susceptible to the force of irrational wishes and desires; they are essentially gullible, naive, and perhaps even foolish; and they are easily manipulated. Humankind constitutes, in large part, what Nietzsche called the "herd," with all the bovine (or sheepish) connotations of that label. This makes for a rather unhappy combination of traits. People are largely self-serving in their behavior, yet are prone to irrational behavior and are simple-minded, easily fooled, and susceptible to being controlled and used. As a result, while people are generally motivated by selfish concerns, they can not be expected to do particularly well in satisfy-

ing even their perceived self-interest, let alone what is *really* in their interest (should that be different).

It bears emphasizing that Classical Realism does not simply amount to a blanket anti-intellectualism. Classical Realists can think "theories" are worth having, even if they think normative theories are a waste of time (or at least normative theories unconstrained by Naturalism). The aim of theory-construction for most Classical Realists is to make perspicuous the causal forces at work in the natural world, including that part of the natural world populated by human beings and their institutions. Intellectual pursuits are not the problem for Realists; idle, normative speculation is.

In the rest of this paper, I want to illustrate Classical Realism in moral, political and legal theory with three historical examples: Nietzsche's Thucydides, Marx, and the American Legal Realists.

II. The Pedigree of Classical Realism

A. Thucydides (as understood by Nietzsche)

For Nietzsche, the story of ancient philosophy is the unhappy story of how Plato and Socratic rationalism triumphed over the Presocratics and, especially, the culture of the Sophists of the 5th century B.C.[15] For Nietzsche, Thucydides represents the high point of this period in Greek culture. In Thucydides, he says,

> that *culture of the most impartial knowledge of the world* finds its last glorious flower: that culture which had in Sophocles its poet, in Pericles its statesman, in Hippocrates its physician, in Democritus its natural philosopher; which deserves to be baptised with the name of its teachers, the Sophists.... (D 168)[16]

In Thucydides, in other words, "the culture of the Sophists, by which I mean the culture of the realists [*die Realisten-Cultur*], reaches its perfect expression" (TI X:2). The essence of Sophistic culture, for Nietzsche, is precisely its Classical Realism: "The Sophists are no more than realists....they possess the courage of all strong spirits to *know* their own immorality" (WP 429). It is, in turn, Thucydides, in his great *History of the Peloponnesian War*, who displays this courage more completely than anyone else. Thus, Nietzsche calls Thucydides,

> ...the great sum, the last revelation of that strong, severe, hard factuality which was instinctive with the older Hellenes. In the end, it is *courage* in the face of reality that distinguishes a man like Thucydides from Plato: Plato is a coward before reality, consequently he flees into the ideal; Thucydides has control of *himself*, consequently he also maintains control of things. (TI X:2)

In what, precisely, does the "courage" or "realism" of Thucydides consist? The most useful illustration is the dialogue between the Athenians and the vanquished Melians recounted in Thucydides' *History*—a dialogue that one distinguished commentator has called "the most famous example of amoral realism" (Guthrie 1971, 85). Negotiating over the terms of surrender, the Athenians address the Melians, in relevant part, as follows:

> For our part, we will not make a long speech no one would believe, full of fine moral arguments–that our empire is justified because we defeated the Persians, or that we are coming against you for an injustice you have done to us....Instead, let's work out what we can do on the basis of what both sides truly accept: we both know that decisions about justice are made in human discussions only when both sides are under equal compulsion [i.e., only among equals does right prevail over might]; but when one side is stronger, it gets as much as it can, and the weak must accept that....Nature always compels gods (we believe) and men (we are certain) to rule over anyone they can control. We did not make this law, and we were not the first to follow it; but we will take it as we found it and leave it to posterity forever, because we know that you would do the same if you had our power, and so would anyone else. (Woodruff 1993, 103, 106 (¶¶89, 105)).

Nietzsche's own commentary on this particular dialogue highlights some of the key themes of Classical Realism:

> Do you suppose perchance that these little Greek free cities, which from rage and envy would have liked to devour each other, were guided by philanthropic and righteous principles? Does one reproach Thucydides for the words he puts into the mouths of the Athenian ambassadors when they negotiated with the Melians on the question of destruction or submission? Only complete Tartuffes [i.e., Socrates and Plato] could possibly have talked of virtue in the midst of this terrible tension—or men living apart, hermits, refugees, and emigrants from reality—people who negated in order to be able to live themselves—The Sophists were Greeks: when Socrates and Plato took up the cause of virtue and justice, they were *Jews* [i.e., promulgators of Judeo-Christian, or slave, morality] or I know not what—Grote's tactics in defense of the Sophists are false: he wants to raise them to the rank of men of honor and ensigns of morality—but it was precisely their honor not to indulge in any swindle with big words and virtues. (WP 429)

Thucydides "the Realist" recognizes quite clearly that the Athenians are not moved by "philanthropic and righteous principles," that they are driven, instead, by selfish and self-aggrandizing concerns, restrained only by the limits of their own power. Socrates and Plato, by contrast, chatter irrelevantly about "virtue and justice," when, as Thucydides makes plain, virtue and justice play no role in human affairs.

Of course, the speeches Thucydides recorded are his own creations; in many cases (as with the Melian dialogue), he could not even have been present to hear them. Yet this is precisely why Thucydides is a Realist in Nietzsche's view: how he chooses to reconstruct events marks Thucydides as a Realist. As Paul Woodruff aptly observes:

> a frequent purpose of the speeches [in Thucydides' *History*] is to reveal the [true] motives of the speakers....Thucydides wants to bring the darker side of human nature to light by revealing motives such as fear that speakers would want to conceal in real life....Thucydides' speakers are made to say what Thucydides thinks they actually believe, whether they would have said those things in public or not....He shows us their speeches refracted through a lens of honesty. (Woodruff 1993, xxiii)

Thucydides, in other words, puts into the speakers' mouths their true, amoral motives, reflecting Thucydides' realistic view of human nature and human affairs, in contrast with the idealistic fantasies of a Socrates or Plato.[17] Thus, Nietzsche declares:

> my *cure* from all Platonism has always been *Thucydides*. Thucydides and, perhaps Machiavelli's *Principe* are most closely related to myself by the unconditional will not to gull oneself and to see reason in *reality*—not in "reason," still less in "morality." (TI X:2)

Thucydides the Classical Realist views humans as essentially motivated by selfish concerns—power, fear, wealth—and as creatures for whom moral considerations are at best rhetorical window-dressing, rather than a reason for action.[18] The *History of the Peloponnesian War* is a microcosm for what happens when the perennial dark facts about human nature encounter the recurring circumstances of human social existence. Nietzsche the Classical Realist, in turn, views Socrates and Plato as foolishly non-quietistic, since they promulgate theories about justice and virtue when, as Thucydides so vividly demonstrates, norms of justice and virtue play little or no role in human affairs.

Of course, as Nietzsche's earlier comments would suggest, Thucydides is not alone as a spokesman for Classical Realism in

antiquity. The Sophist Gorgias, as well as Glaucon and Thrasymachus in Plato's *Republic*, are also Realists in large measure. As Guthrie puts it, they share "an attitude of hard-headed realism or fact-facing which without passing judgment declares that the more powerful will always take advantage of the weaker, and will give the name of law and justice to whatever they lay down in their own interests" (1971, 60). The Realists, according to Guthrie, all agree with Glaucon in the *Republic* that "[s]elf-interest...is what every nature (*physis*) naturally pursues as good" (1971, 99).

B. Marx

Marx may, at first, seem an unlikely candidate for membership in the pantheon of Classical Realists, since he is often thought to deny that there is any such thing as "human nature." For example, in the *Theses on Feuerbach* he sounds a familiar theme when he asserts that "men are products of circumstances and upbringing" (Tucker 1978, 144), while in *The Communist Manifesto* he derides the German socialists for claiming to speak for "the interests of Human Nature, of Man in general, who belongs to no class, has no reality, who exists only in the misty realm of philosophical fantasy" (Tucker 1978, 494).

Remarks like these, however, are misleading. Marx does want to argue, to be sure, that many features of human behavior that are chalked up to an invariant human nature by the forces of reaction are, in truth, the artifacts of socio-economic circumstances, and thus are malleable. Yet one can think conservatives are wrong about human nature, while still thinking, as Marx does, that there is an essential, unchanging human nature that conservatives have simply overlooked.[19]

Yet this may not help in the present context. For Marx held, famously, that the putatively "selfish" nature of human beings is a socio-economic artifact, not an enduring feature of the human condition. Thus, in a typical passage from *The Communist Manifesto*, Marx writes that:

> The bourgeoisie, wherever it has got the upper hand, has put an end to all feudal, patriarchal, idyllic relations. It has pitilessly torn asunder the motley feudal ties that bound man to his "natural superiors," and has left remaining no other nexus between man and man than naked self-interest, than callous "cash payment." It has drowned the most heavenly ecstasies of religious fervour, of chivalrous enthusiasm, of philistine sentimentalism, in the icy water of egotistical calculation. (Tucker 1978, 475)

One might, of course, simply repudiate this Marxist skepticism that "self-interest" and other "ugly" human character traits are deep facts about human nature. Perhaps Freud is right, and Marx wrong, about what is "natural" and what is mere "social construct" when it comes to the familiar, unattractive features of human social existence?[20] A more modest rejoinder, however, will suffice here: even if selfishness is not a permanent feature of human nature, it remains a permanent feature of human beings in capitalist society. Since capitalism remains dominant—indeed, will, by Marx's own theory, remain dominant for the foreseeable future[21]—Marx can agree with the Classical Realist appraisal of human beings in every respect except one: human beings must necessarily and always be this way.

Indeed, beyond this one issue, the points of affinity between Marx and Classical Realism are manifold. The standard Marxist refrains that, "The ideas of the ruling class are in every epoch the ruling ideas" (*The German Ideology*; Tucker 1978, 172) and that, "Law, morality, religion are to [the proletariat] so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests" (*The Communist Manifesto*; Tucker 1978, 482) are simply modern translations of the Sophistic view "that the more powerful will always take advantage of the weaker, and will give the name of law and justice to whatever they lay down in their own interests" (Guthrie 1971, 60). Like Thucydides, Marx is also skeptical of self-serving explanations that agents proffer for their behavior. In fact, he endlessly derides non-realistic historians for taking actors and events at face value:

> Whilst in ordinary life every shopkeeper is very well able to distinguish between what somebody professes to be and what he really is, our historians have not yet won even this trivial insight. They take every epoch at its word and believe that everything it says and imagines about itself is true. (*German Ideology*; Tucker 1978, 175)

But in fact what people profess is a mere ideology, behind which lurks the real selfish interests of a particular class:

> For each new class which puts itself in the place of one ruling before it, is compelled, merely in order to carry through its aim, to represent its interest as the common interest of all the members of society, that is, expressed in ideal form: it has to give its ideas the form of universality, and represent them as the only rational, universally valid ones. (Tucker 1978, 174)

This is the essence of "ideology" on Marx's view—to present the (selfish) interests of a particular class as really being in the

general interest.[22] Like Thucydides the Classical Realist historian, Marx would pull back the veils to expose the real motives of the ruling class and their ideological spokesmen.[23]

Perhaps the most striking affinity between Marx and Classical Realism concerns the Pragmatism and Quietism they share. For Marx's theoretical efforts are not spent in *justifying* communism (as, e.g., morally desirable or just): there is no analogue in the Marxian corpus to the Rawlsian defense of a liberal theory of justice. Rather, Marx tries to construct an adequate descriptive and explanatory account of human society and history that will have practical pay-offs in political organizing and revolutionary activity. (In this sense, Marx is the quintessential pragmatist: the value of any theory is measured by the difference it makes to practice.[24]) Making arguments about the "injustice" or "immorality" of capitalism has no practical value for Marx.[25] The ruling classes will not give up their privileges because philosophers show them that they are violating some putatively timeless moral precept, whether it be the Difference Principle, the Categorical Imperative or the principle of utility.[26] On normative matters, then, Marx keeps quiet—not in the sense that he has no normative beliefs, but rather in the sense that, *qua* theorist, he thinks there is no point in developing a philosophical account and defense of those beliefs. Thus, in *The German Ideology*, Marx says that "real, positive science begins" with,

> the representation of the practical activity, of the practical process of development of men....When reality is depicted, philosophy as an independent branch of knowledge loses its medium of existence. (Tucker 1978, 155)

For Marx, like the modern Quinean naturalist,[27] philosophy collapses into a certain sort of descriptive/explanatory theory of the kind typical in the empirical sciences. Theoretical accounts of justice play no role in theory-construction so understood.[28]

Marx's Classical Realism is most vivid when contrasted with the views of the currently most influential member of the quasi-Marxist Frankfurt School, Jürgen Habermas. I say "quasi-Marxist" not only because of the familiar fact that the early Frankfurt School breaks with Marx over a variety of issues (e.g., the revolutionary potential of the working classes).[29] Habermas represents, in a profound way, a complete betrayal of Marx's conception of philosophy. For at the center of Habermas's writings, there has been precisely a set of *normative* and "purely *scholastic*" [30] questions, indistinguishable in kind from the questions that have occupied all the great bourgeois moral philosophers from Kant to Rawls.[31]

Through "the ideal speech situation" (in his early work) and "communicative ethics" (in his later work), Habermas tries to *justify* a particular normative perspective on questions of right action and just social ordering.[32] One can well imagine what Marx, the Classical Realist, would have thought of such efforts. Recall, for example, Marx's complaint about the German socialists who present themselves as advancing "the requirements of truth; not the interests of the proletariat, but the interests of Human Nature, of Man in general, who belongs to no class, has no reality, who exists only in the misty realm of philosophical fantasy" (*The Communist Manifesto*; Tucker 1978, 494). Marx might just as well have been referring to the Habermas who thinks that "truth" in moral and social matters would be fixed by consensus in a situation of open and rational argument among free and equal persons. The revival of *normative* theory within critical theory marks a decisive turn away from the whole (realistic) spirit of Marx's own work.

C. American Legal Realism

The American Legal Realists of the 1920s and 1930s chose their name precisely for the reasons that Classical Realists earn theirs: the Legal Realists wanted to tell it like it *really* is, especially with respect to judicial decision-making. These themes are sounded in Oliver Wendell Holmes, Jr.'s seminal paper on "The Path of the Law" (Holmes 1897)[33] which introduces ideas that would become, thirty years later, central to the legal theory characteristic of American Legal Realism.[34] Holmes, the proto-Realist, wastes no time telling his audience that the object of legal study is neither moral truth or justice, nor abstract principles or logical systems, but rather "the prediction of the incidence of the public force through the instrumentality of the courts" (Holmes 1897, 457). The student of the law must know "what the courts will do in fact" (461) which requires that one "look straight through all the dramatic incidents [in order] to discern the true basis for prophecy" (475). This "true basis" demands neither an understanding of morality—for law is one thing, and morality another—nor even much of legal logic ("You can give any conclusion a logical form" (466)). Instead, it requires recognizing that every decision represents a "half conscious battle on the question of legislative policy" (467). For Holmes, "the man of the future," will be "the master of economics" (469) in part because economics will anchor prediction in the way Holmes's realistic perspective demands. Economics, in

Posner's words, provides "the key to an accurate description of what the judges are up to" (Posner 1990, 360). Of course, "such a mode of looking at the matter [may] stink[] in the nostrils of those who think it advantageous to get as much ethics into the law as they can" (Holmes 1897, 462). But this is of no concern to Holmes the hard-headed realist. We can imagine Holmes agreeing with Nietzsche in ridiculing those who "indulge in any swindle with big [moral] words and virtues" (WP 429), when all that is required is a willingness to confront the facts squarely. For Holmes, that meant the facts about what the courts really do.[35]

Holmes similarly anticipates the Legal Realists in his approach to normative theorizing about courts.[36] Although he speaks of the judge's "duty of weighing considerations of social advantage" (Holmes 1897, 467), he quickly makes clear that as normative advice it does not amount to much, for this is what courts do anyway! "The duty is inevitable," says Holmes, so telling judges that they "ought" to weigh social advantage only amounts to the modest suggestion that they do openly what they do anyway, albeit "inarticulate[ly], and often unconscious[ly]" (Holmes 1897, 467). Normative theory, at least in "The Path of the Law," takes a back seat to the practical task of making a systematic, empirical study of the real grounds of decision. We need to explain and describe judicial decision-making, rather than tell judges what they "ought" to do.

This type of normative quietism is prominent in the later Legal Realists. Jerome Frank, for example, commenting on what he called "Cadi justice" (essentially, justice by personal predilection), remarked that, "[t]he true question...is not whether we should 'revert' to [it], but whether (a) we have ever abandoned it and (b) we can ever pass beyond it" (Frank 1931, 31). Advocating a "'reversion to Cadi justice'...is as meaningless as [advocating] a 'reversion to mortality' or a 'return to breathing'" (31), because, according to Frank, "the personal element is unavoidable in judicial decisions" (25).

A more interesting example of normative quietism in Legal Realism is Karl Llewellyn's work on Article 2 of the Uniform Commercial Code. For drafting a Code is, of course, an explicitly normative enterprise, one a Realist, on my construal, shouldn't be able to undertake. In fact, though, Llewellyn uses Article 2 to tell judges that what they *ought* to do in commercial disputes is precisely what his *descriptive* theory claims they largely do already, namely enforce the norms of the prevailing commercial culture (or mercantile practice) in which the dispute arose.[37] Thus,

for example, the Code imposes an obligation of "good faith" in all contractual dealings (§1-203) which means "the observance of reasonable commercial standards of fair dealing in the trade" (§2-103). But for a court, then, to enforce the rule requiring "good faith" is just for that court to enforce the relevant norms of commercial culture! The reliance of Article 2 throughout on norms of "good faith" and "reasonableness" is a constant invitation to the judge to do what he would, on the Realist theory, do anyway.

The Quietism of Holmes and the Legal Realists contrasts markedly with the *normative* ambitions of contemporary jurisprudents like Ronald Dworkin. Dworkin, of course, claims descriptive adequacy for his theory, at least with respect to the underlying logic of what it is judges are doing.[38] But it is not always clear that lawyers or judges find Dworkin's "description" of what they are doing recognizable.[39] And when Dworkin himself comes to actually discuss substantive legal issues—e.g., abortion, affirmative action, and the like—he seems to be doing something quite different from what lawyers do.[40] Certainly, Dworkin's most famous claim, that even "hard cases" have right answers, has won little acceptance among either academics or judges.[41] Rather than merely advising judges to do explicitly what they already do—as Holmes does—Dworkin wants to reform their practice in line with a philosophically superior theory of adjudication and political legitimacy. But such an undertaking, according to Realism, is an irrelevant undertaking.

Indeed, Quietist complaints about Dworkin are not merely speculative. There are empirical reasons for thinking his normative theory of how judges should decide cases really has been an idle exercise. Although Dworkin has been the most famous figure in Anglo-American jurisprudence for more than a quarter-century, he has been cited only *seven* times in U.S. Supreme Court opinions during this time–and only *once*, remarkably, in the majority (and even then, on a quite minor point).[42] This is surely striking, if defeasible, evidence that thirty years of telling courts how they *ought* to decide cases has made little difference to the practice of the courts.

It is possible, of course, that even without citing Dworkin, the Court might have adopted his distinctive way of thinking about legal problems. But even this seems, manifestly, not to have been the case. Over the quarter-century that Dworkin has been one of the leading defenders of "noninterpretivist" approaches to the Constitution—those approaches which defend the propriety of finding Constitutional rights beyond the history, structure, and text

of the document itself[43]—the Court has gradually repudiated this entire approach to reading the Constitution, culminating with its 1986 decision in *Bowers v. Hardwick*.[44] Dworkin's rise to academic prominence, in short, has coincided exactly with the decline of his favored approach to Constitutional interpretation. Surely this fact supports the Quietist suspicion that certain types of normative theorizing are idle exercises, that "styles" of Constitutional interpretation (and the political consequences that flow from them) rise and fall for reasons that have *nothing* to do with the arguments of philosophers.

III: Concluding Thoughts

One might worry, to be sure, that the Classical Realist critique of normative theory presupposes an unrealistic time frame in which to register influence or impact.[45] Perhaps it is not thirty years, but a century that we must look at; perhaps it is not particular citations, but the gradual shaping of an *enabling ethos* which becomes the historical consciousness of a later period and, in turn, affects decisions and actions. Understood this way, of course, the claim of normative theorizing to have "made a difference" gets much harder to assess.[46] The fact that we speak of an "idea whose time has come" does not mean that its time has come because of the labor of moral philosophers. How are we, over the course of a century or two, to disentangle the causal mechanisms at work? If Marx or Braudel is right, can we expect anything more from normative theory than that it should make a difference *only in virtue of favorable material circumstances making the time ripe*? Do Lockean *arguments* influence the American framing, or is it that historical circumstances create a receptivity to some general ideas, for which Locke and his arguments provide "authority"? There are difficult questions here of social and historical causation, but the power of broadly materialistic explanations of phenomena across almost all domains might suggest that the Classical Realist is right to be skeptical about the claimed causal efficacy of moral norms or normative theory.[47]

Of course, it remains open to normative theorists to repudiate the pragmatic criterion of the Classical Realists, and certainly no argument has been given for thinking that practical cash-value should be a constraint on philosophical reflection. What bears emphasizing, however, is that there is an important tradition of normative thought which takes it for granted that Pragmatism,

in the sense defined earlier, *is* a constraint on theory, and which thus approaches the phenomena of human moral and social life not with the goal of finding post-hoc rationalizations for our normative commitments, but rather with the aim of laying bare the actual causal structure of the world, including the normative commitments we find in it.

Notes

*Thanks to Richard Posner for comments on the penultimate draft, to Paul Woodruff for useful discussion about Thucydides and Nietzsche, and to the audience members at the University of Toronto Legal Theory Workshop for their helpful comments and questions regarding an earlier version of some of this material. I am especially grateful to Arthur Ripstein for saving me from several errors.

1. I took a briefer, and less satisfactory, stab at the same enterprise in Leiter (2000), but the characterization of Classical Realism there now strikes me as problematic in respects I try to rectify here.
2. For a representative treatment of "realism" in current philosophy, see Railton (1996); for a somewhat different (though related) approach, see Pettit (2001).
3. One area in which the "realist" label has retained this kind of meaning is international affairs. See, e.g., Morgenthau (1967, 4–8); Forde (1995).
4. I take no position in this essay on the difficult interpretive question of whether the later Machiavelli of *The Discourses* is also a Classical Realist in my sense.
5. If the rationale for normative theory is only to achieve a certain reflective, albeit impotent, understanding of our normative talk, then the Classical Realist has no particular quarrel with normative theory (though he might not think it a kind of understanding worth having). Of course, it would be surprising if those who commit their lives to developing theories about what *ought* to be done, in fact entertained no hope of determining what *is* done.
6. I am grateful to Calvin Johnson for calling this article to my attention.
7. See, e.g., Dworkin (1998) and Nussbaum (1998). Dworkin's criticisms of Posner's uses of evolutionary theory, however, do strike me as correct. Posner sometimes comes close to running afoul of his own Classical Realist scruples.
8. Although Posner does not discuss the issue, he is, in fact, taking a position here on a controversial thesis in moral theory, namely externalism, which denies that there is any intrinsic connection between knowledge of the moral rightness of an action and an agent's motivation to perform it. Kantians deny externalism, while Humeans affirm it. I am inclined to think that the Humeans (and, *a fortiori*, Posner) are rather *clearly* right (certainly empirically, but also conceptually), but such an affirmation will merely strike Kantians as dogmatic.
9. Posner is well-aware that professional moral philosophers frequently claim influence for academic moral theory, but, as he notes, no empirical evidence

is ever adduced on behalf of these sanctimonious platitudes. See Posner (1999, 25 and n. 27) (discussing such claims by the moral philosophers Samuel Scheffler and J.B. Schneewind).

10. Dworkin simply caricatures Posner's view when he objects, "no doubt many people are never moved by the logic of a moral argument, even once in their lives, but it is absurd to suppose that no one ever is" (Dworkin 2000, 51). But nothing in Posner's view, or that of Classical Realism, requires maintaining that the argument of moral philosophers has never influenced *anyone*; the claim is that moral arguments make no difference to *the course of events*, which is, of course, compatible with their influencing persons on occasion. Indeed, it seems bizarre for Dworkin to lambaste Posner for his "a priori psychological dogma" (*id.*) regarding the influence of moral philosophy, given that Posner's claim, like Marx's related claim (see below), is manifestly *a posteriori*: where, one wonders, is the evidence for the great influence of the arguments of moral philosophers?
11. Materialists need only hold that ideas are causally efficacious *only in virtue of* opportune material circumstances. Thus, preaching communism in the fourteenth-century would be inefficacious because the level of material development is inadequate to support communism. By contrast, Marx believed (falsely as it turns out) that the level of material development was sufficiently high in the nineteenth century as to make the *idea* of communism, suitably promulgated, causally efficacious (but not causally sufficient) in bringing about the demise of capitalism.
12. The lone exception might be Rawls (1971), though it is unclear whether that distinguished work is widely *read* or just widely *referred to* for a few simple ideas. Indeed, one suspects the power of Rawls may be more a function of his pithy, memorable, metaphoric ideas—the difference principle, the veil of ignorance, the original position, overlapping consensus, and so forth—than his elaborate argumentative apparatus which purportedly generates these ideas. (I am grateful to Richard Posner on these points.)
13. President Clinton's recent address to the U.N. General Assembly (September 21, 1999) begins on a relevant Realist note: "the 20th century has been deeply scarred by enduring human failures, by greed and lust for power." The Classical Realist might add: not *only* the 20th century!
14. It is in this regard that economic theories, predicated as they are on rational actor models, depart from Classical Realism. Behavioral law and economics, in turn, may be understood as an attempt to bring Classical Realist concerns to bear on economic analysis. See generally, Jolls, Sunstein & Thaler (1998). Unfortunately, it seems more likely that the behavioral turn will simply accelerate the fading credibility of economics. On the latter, see Leiter (2000, 303–310).
15. E.g., "The real philosophers of Greece are those before Socrates" (WP 437); "for the whole phenomenon Plato I would sooner use the harsh phrase 'higher swindle'" (TI X:2). A note on citation format to Nietzsche: I cite to Nietzsche's texts by their standard English-language acronyms: *Dawn* (D), *The Gay Science* (GS), *Thus Spoke Zarathustra* (Z), *Beyond Good and Evil* (BGE), *On the Genealogy of Morality* (GM), *Twilight of the Idols* (TI), *The Antichrist*

(A), *Ecce Homo* (EH), *The Will to Power* (WP). Translations, with minor emendations, are by Walter Kaufmann and/or R.J. Hollingdale; for purposes of emendations, I rely on the Colli/Montinari edition of the *Sämtliche Werke*. Roman numerals refer to major chapters or divisions in Nietzsche's works; Arabic numerals refer to sections, not pages.

16. Cf. WP 428 (a note of 1888): "The Greek culture of the Sophists had developed out of all the Greek instincts; it belongs to the culture of the Periclean age as necessarily as Plato does *not*; it has its predecessors in Heraclitus, Democritus, in the scientific types of the old philosophy; it finds its expression in, e.g., the high culture of Thucydides...."
17. Of course, on one prevalent understanding of Plato, he too accepts that humans are self-interested, and tries to show them simply that "justice" and "virtue" are in their self-interest. The Realist might object that this identification of morality with self-interest is so implausible as to be no different from preaching "justice" and "virtue" quite apart from any appeal to self-interest.
18. Cf. Guthrie (1971, 85): "It is remarkable how seldom even [Thucydides'] orators, aiming at persuasion, see any point in appealing to considerations of right, justice or other normally accepted moral standards: it is taken for granted that only an appeal to self-interest is likely to succeed."
19. See the discussion in Cohen (1978, 151) and Wood (1980, 17–24).
20. The classic expression of this view is Freud (1961). Freud's embrace of the Classical Realist's Quietistic Thesis is strikingly explicit in the concluding pages of this seminal work:

> [I]t is very far from my intention to express an opinion upon the value of human civilization....One thing only do I know for certain and that is that man's judgments of value follow directly his wishes for happiness—that, accordingly, they are an attempt to support his illusions with arguments....I have not the courage to rise up before my fellow-men as a prophet, and I bow to their reproach that I can offer them no consolation: for at bottom that is what they are all demanding—the wildest revolutionaries no less passionately than the most virtuous believers. (Freud 1961, 103, 104)

21. The party line of the capitalist media in recent years, at least in the U.S., has been that the collapse of the Soviet Union constitutes a "refutation" of Marx, assigning him to the "dustbin of history". But this is obviously silly. It is quite clear that the conditions for communist revolution that Marx explicitly sets out—that capitalism have produced the maximal development of the forces of production, reduced the great mass of humanity to a condition of poverty, destroyed all the hitherto-existing national, ethnic, and religious identities, and exhausted all the potential markets for goods (see *The Communist Manifesto*, in Tucker (1978, 475–483, 488))—were not satisfied in 1917, nor have they been satisfied even today. Nonetheless, it seems equally clear that current global economic tendencies and trends point precisely towards the conditions that Marx wrongly thought were around the corner in

the mid-19th-century. (Even the seemingly resilient national, ethnic and religious chauvinisms that have captured the headlines from the former Yugoslavia, Iran, and Rwanda (among other places) must be set against a backdrop of the gradual triumph of American pop culture over much of the globe, and the resulting homogenization of attitudes and values; no doubt the market will have similar effects in the aforementioned retrograde countries in due course.) In this regard, Marx was quite prescient in his understanding of the logic of capitalism, though his timing was badly off. It remains, in turn, an open empirical question whether the realization of these conditions will bring about the triumph of communism and an open empirical question whether selfishness will turn out to be a permanent feature of human nature or a mere socio-economic artifact of a particular era.

22. On the different possible senses of "ideology," see Geuss (1981, 13–14). Marx's usage is what Geuss calls an ideology in the "epistemic" sense.
23. One might also argue that Marx shares the Classical Realists' view that human beings are naive, gullible, and easily misled insofar as he thinks that the vast majority of people who embrace bourgeois morals, law, and religion have been badly duped about their own interests. But this aspect of Classical Realism is probably more vivid in the early writers of the Frankfurt School—like Theodor Adorno and Herbert Marcuse—who no longer share Marx's optimism about the revolutionary potential of the working classes, and have a far more contemptuous view of the intelligence and revolutionary capacities of ordinary persons.
24. This, in a nutshell, is one of the central themes of the *Theses on Feuerbach*, esp. Theses II, VIII, and XI. For a related understanding of pragmatism, in a more contemporary idiom, see Johnston (1993).
25. As one commentator aptly puts Marx's view: "The moralist turns out to be little help to a revolution and to be positively pernicious if many people take up her useless activity" (Brudney 1998, 324). Oddly, Brudney later claims that "if...any radical theory is to help change social conditions it needs a relatively explicit account of the good society" (*id.* at 353). No defense of this utterly unMarxian claim is given.
26. Thus, Marx derides the Young Hegelians and Feuerbach for wanting "merely to produce a correct [philosophical] consciousness about an *existing* fact; whereas for the real communist it is a question of overthrowing the existing state of things" (*German Ideology*, in Tucker (1978, 167–168)). This Marxist criticism is, ironically, apt with respect to parts of the Critical Legal Studies literature. See the discussion in Leiter (1997, 383–384).

    The irrelevance of the arguments of moral and political philosophers to social change has sometimes been noted by such philosophers. See, e.g., Nagel (1979, xii) ("Moral judgment and moral theory certainly apply to public questions, but they are notably ineffective"). The Classical Realist explanation for this is straightforward: the great "herd" of humanity is too driven by selfish concerns and too uninterested (or unable) to understand moral argument for the labor of moral philosophers to make any difference.

    Indeed, the often breathtaking moral illiteracy and self-serving pettiness of people is made vivid in the newspapers every day. Thus, a randomly

chosen issue of *The New York Times* (January 8, 1997) reports that wealthy whites in a suburb of Johannesburg, South Africa, are refusing to pay their new, higher property taxes. The *Times* explains:

> [M]any of the whites here feel blameless for apartheid. They say that they never voted for the National Party, which devised and carried out South Africa's repressive racial policies when it headed a white minority government, and that they were active in various charities. For instance, [one wealthy white woman] says that she used to make peanut butter cookies for poor black children in Pretoria and that her husband's firm sponsors an adult literacy course for domestic servants. (p. A4)

Everything in my own experience suggests that these (no doubt) "educated" South Africans are the norm, not the exception, in the quality of their moral calculus.

27. On Quinean naturalism, see Leiter (1997a, 288–294; 1997b, 1746–1748; 1998). For a useful characterization of Quine for my purposes here, see especially, Kim (1994).
28. Notice that this interpretation is compatible with the possibility that Marx is a tacit (sophisticated) utilitarian, a view favored by contemporary analytical Marxists like Richard Boyd and Peter Railton. My point is not that Marx did not have what might fairly be called *moral* views, but rather that he did not view the construction of a moral *theory* as a worthwhile or necessary undertaking.
29. For a useful, but somewhat polemical account of the differences, see Kolakowski (1978, 341–343).
30. *Theses on Feuerbach*, in Tucker (1978, 144).
31. So, e.g., Roemer (1986, 99) betrays his lack of understanding of Marx's Classical Realism—or at least analytical Marxism's betrayal of that Realism—when he says "it is not at all clear how analytical Marxists will differ from non-Marxist philosophers like Ronald Dworkin, John Rawls, and Amartya Sen." To be sure, analytical Marxists correctly repudiate Marx's lunatic commitment to "dialectical" methodology, but it is not only that that sets Marx's whole approach apart from that of non-Realist normative theorists like Dworkin, Rawls, and Sen.
32. For description and criticism of the earlier versions of the normative argument, see Geuss (1981, 55–75) and Lukes (1982). Contrary to some defenders of Habermas, it does not seem to me that these critiques are deflected by the shifts in thinking of the later Habermas.
33. I make no claim here about the extent to which the rest of the Holmesian corpus is consistent with the Classical Realist themes sounded in this essay, or in his correspondence.
34. For a brief overview of the main themes of the Realist movement, see Leiter (1999).
35. I confess it is not clear to me how this aspect of Holmes's Classical Realism is to be squared with the concluding pages of Holmes (1897). Holmes may simply have shared another feature with the later Legal Realists: a tendency to say inconsistent things. Interestingly, though, Holmes explicitly admired *exactly* the same features in Thucydides as did Nietzsche: "I am struck [in

the dialogues of Thucydides]...by the absence of our notion of manners. They say what they think with no polite veils....I like the absence of the hypocritic Christian unction. They say outright that of course the crowd that has the force means to have the top–and everybody understands it" (Posner 1992, 60).

36. On this issue, see in particular Leiter (1996a, 276–278).
37. For the descriptive theory of the "Sociological Wing" of Realism, see Leiter (1996a, 272–275). For a more detailed discussion—one that supports the quietism I emphasize here—see White (1994).
38. See Dworkin (1986, 265); cf. the discussion in Leiter (1996b, 255–258).
39. See, e.g., Noonan (1986); see also Ely (1980, 56–60).
40. All of this is, admittedly, *defeasible* evidence as to the descriptive adequacy of Dworkin's theory.
41. See, e.g., Posner (1990, 233).
42. The majority cite comes in *Board of Pardons v. Allen*, 482 U.S. 369, 375 (1987). One citation, in a concurring opinion, is on a bioethical issue addressed in Dworkin (1996), one unrelated to his general jurisprudential views. See *Washington v. Glucksberg,* 521 U.S. 702, 747 (1997). The other citations, all in dissent, appear in: *Hewitt v. Helms*, 459 U.S. 460, 485 (1983); *Delaware v. Van Arsdall*, 475 U.S. 673, 698 (1986); *Young v. Community Nutrition Institute*, 476 U.S. 974, 988 (1986); *Webster v. Reproductive Health Services*, 492 U.S. 490, 541 (1989); *Planned Parenthood v. Casey*, 505 U.S. 833, 914 (1992). The citations to Dworkin in the dissents in *Casey, Webster,* and *Van Arsdall* are all a bit more substantive than in *Allen.* But in none of these cases could the Court, by any stretch of the imagination, be described as embracing Dworkin's theory of adjudication.
43. Dworkin has, rightly it seems to me, criticized the "noninterpretivist" label as question-begging (Dworkin 1985). This does not alter the fact that Dworkin's interpretive methodology is quite different from that of John Hart Ely or Antonin Scalia or Henry Monaghan.
44. 478 U.S. 186 (1986).
45. I am grateful to Maurice Leiter for a forceful articulation of this point, from which I borrow in the text.
46. Understood this way, the point is also of no help to Dworkin, who clearly expresses but one aspect of an enabling ethos created by others—e.g., Kant and Locke and Rousseau. And perhaps even these latter writers are mere expressions of an "ethos" whose sources are not at all philosophical—as, for example, Nietzsche argues in the *Genealogy.*
47. The moral explanations literature by moral realists suggests that normative claims do figure in the best explanations of phenomena. But the examples adduced by moral realists do not bear much scrutiny; see the discussion and critique in Leiter (2001b.)

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