

A Playful Dialogue of the Skeptic, Lady and Sir Absolutist, and the Relativist on the Exclusionary Rule and Abortion (and Human Understanding)

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[T]he framing of a theory of justice which rests on a historical, psychological, and sociological foundation and attempts to weave the multifarious strands into a coherent interpretative scheme becomes a possibility in social science.¹

In Professor Bodenheimer's internationally known and widely praised *Treatise on Justice*,² he has refused an *a priori*, absolutistic conception of justice and more generally, of "values," while demonstrating that there are indeed concrete, valuable *goals*, which, when pursued, can make human action "just" as "the means conducive to the realization of those goals."³ Bodenheimer's conception is policy-oriented, historically, psychologically, and sociologically conditioned, and hence relativistic (even though deeply committed). His conception can be distinguished from both skepticism — and its extreme, nihilism — and abstract absolutism.

The following "dialogue" is an attempt to probe the three main traditional positions — skepticism, absolutism, relativism — in light of two test cases: the case for or against the exclusionary rule, and the case for or against abortion. As playful as the dialogue is, or intends to be, it deals with conflicts of values that touch very deeply our most serious feelings and our moral, as well as legal, philosophies. I offer these pages to the Bodenheimer Symposium as a modest tribute by a

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¹ E. BODENHEIMER, *TREATISE ON JUSTICE* 39 (1967).

² *Id.*

³ *Id.* at 257.

nonphilosopher to Bodenheimer's fascinating philosophy of life, wisdom, and justice.

THE ARBITER: Now, my friends, let's test your positions when faced by hard cases of real life. A problem that has raised deep emotions and heated controversy in a number of countries, especially over the last few decades, is whether evidence obtained by a police search and seizure that violates a person's fundamental rights is admissible in court to prove a criminal prosecution against that person. To be sure there are no ambiguities in our discussion, we shall presuppose that the evidence obtained illegally is unmistakably conclusive. If admitted in court, any possible doubt about the crime or the guilt of its author would be out of the question. A second problem I want to submit to your discussion is, possibly, the hottest issue of our time: abortion. But let's start with the first.

MR. SKEPTIC: Thus you want us to take sides for one or the other of two sets of — as you would label them — “values.” On the one side there is supposedly the value of punishing the criminal action that the illegally obtained evidence proves (or, in the current jargon, of protecting the victim's rights). On the other side is the value of protecting an individual's privacy and/or educating police behavior by not permitting the court to use evidence that is the poisoned fruit of the violation of the defendant's basic rights. But, are these really values? Aren't they simply policies that, quite arbitrarily, may or may not, in a given time or place, be pursued by a particular person, group, or legal order? Certainly you are aware that the exclusionary rule was virtually unknown, both in common law and in civil law countries until our century, and is still rejected in most countries of the world, including England. Quite simply, this is a political, not a moral question. Why should you suppose that such a thing as “morality” is involved here, with all the clamor that this word, morality, raises with its simple utterance?

LADY ABSOLUTIST: I couldn't disagree more! You are dangerously confusing two very different things. What is involved here is not a question of policies; it is a question of principles. Policies are relative and, in some ways, measurable in view of their capacity to satisfy a given interest or to reach a certain goal. One policy can be balanced against another, or others. Principles, however, are unconditional, categorical. How could a judicial system lose its integrity, how could a judge soil her hands and encourage police misbehavior, indeed criminality, with the use of evidence obtained in violation of the supreme law of the land — and still be a just system, a just judge?

SIR ABSOLUTIST: Oh no! The judge has nothing to do with the way

evidence was obtained. A court exists to decide whether a crime has been committed and by whom. How the evidence was obtained out of court is a totally different problem. Was it obtained criminally? So what? The next day the judge will sit again and punish this further criminal action, the same way as he is punishing today the crime that the evidence the police obtained by illegal action proves. You ought not to confuse different roles, indeed different principles. The role of the judge — the sacred principle he has to be faithful to — is to condemn the crimes, not to prevent them — except, of course, indirectly and, so to say, *pro futuro*, through their punishment.

MS. RELATIVIST: How interesting! The skeptic tells us — “there are no values.” The absolutists say — “of course there are values, and indeed inflexible, inderogable ones”; but then they cannot agree on what the values are. How much more realistic my own position is. I say: Yes, there are values. I can even accept the distinction, although I find it of relative importance, between simple policies — tentative and provisional goals one might or might not pursue — and more fundamental principles. However, the distinction is merely one of degree. Principles, too, are rooted in history; they are man-made; they might be less subject to change than policies, yet they too are mutable. Nothing in the realm of humankind is absolute, eternal, universal, even though it might — vainly, alas — strive to be so. As put by a celebrated French writer more than one century and a half ago, the “liberty of the ancients” was unlike that of the moderns⁴ — even the most fundamental values change in time and space. And so it is with justice, which is not that empty word that both your positions, the skeptic’s and the absolutist’s, would make it out to be — although the skeptic does so openly, whereas the absolutist does so by clothing justice in meaningless generalities, invisible clothes like those of the naked emperor of the tale. The only way to give justice — and liberty, and equality, and all the other values — a real meaning, the only way to make it worth our efforts and our striving and, yes, even worth dying for, is the relativist’s way. Justice is a powerful value in our life. It is a light for our action at all its levels: the levels in which we decide as individuals, or as members of a family, of a neighborhood, of a calling, of a nation, up to the last and highest floor of the great “dome of justice,” the floor of justice for humankind. At all these levels, justice tries to provide an adequate solution to real problems of life.

⁴ The reference is to Benjamin Constant’s famous speech, *De la liberté des anciens comparée à celle des modernes*, in *IV Collection Complète des Ouvrages* 238-74 (Paris, Béchét, 1820).

MR. SKEPTIC: Suppose you are a citizen of South Africa, a white one. You belong to a white family, to a calling of whites, to the white population. Your neighbors, say the great majority of them, feel threatened by the emergence of and the pressing demands by the great mass of blacks. Your neighbors feel that the proper way to solve their — as you would call it — “problem of life” is apartheid. Would this be your “relative justice”? Or, let’s change the hypothesis — you are a German citizen under Nazi Germany, and your neighbors, and the majority of your compatriots, deeply feel that your country was treated unjustly by the “colonial,” “plutocratic” victors of World War I. If justice — your relative justice — is, as you say, trying to provide an adequate solution to real problems of life, then your justice should be to join in the “sacred national effort” to win World War II for Germany — shouldn’t it?

LADY ABSOLUTIST: There are precise rules and principles to be observed even at war, which, as demonstrated at the Nuremberg trials, were trampled upon by Nazi Germany!

MS. RELATIVIST: Once again, the two ostensibly opposite positions — the skeptic’s and the absolutist’s — go hand in hand! Because the skeptic does not believe in values, he escapes from the hard and sometimes tragic responsibility of choosing and deciding. Because the absolutists believe in absolute, pre-established, immutable values, they likewise escape from our destiny of being free, of having to choose and to choose responsibly — the heavy burden of the “cross of being human.” And they do so by referring human action to impersonal, absolute, *a priori* rules and principles. How unrealistic, how inhuman all of this seems to me. Yes, dear friends, my values are relative; they are, however, not irresponsible and arbitrary. Each of us has to conquer them, day after day. If I were in South Africa, I do hope, indeed I trust, that I would not be on the side of apartheid. If I were in Fascist Germany or Italy I do hope, I trust, that I would not be a Fascist. I do hope and trust that I would fight against apartheid and Nazism and Fascism. However, my hope and trust are not and cannot be absolute certainties. The only thing I do know is that I would be ashamed today if I should find that I were on the other side. And this belief of mine is not only a matter of feeling or intuition; it is based on rational argument as well, all the arguments which prove that the “other side” is in conflict with those social goals that give a meaning to life in our epoch. However, I also know that values are composed of many ingredients. Education and environment, camaraderie and inducements might pervert them. Still, like it or not, this is how our real world is. My philosophical attitude is rooted in real life; yours seems to me like a flight from life.

THE ARBITER: Shouldn't we return to illegally obtained evidence?

LADY ABSOLUTIST: Indeed! And I firmly maintain that it would be unworthy of any decent society to abandon the principle not to admit evidence obtained by officers that invade, in contempt of the laws and the Constitution, the sacred sphere of liberty of the person. An imperative rule of justice, indeed a categorical imperative, is to be preserved: nobody shall profit by her or his own wrong. The prosecution cannot use evidence wrongfully obtained.

SIR ABSOLUTIST: Trash! The prosecutor is simply the representative of society. Society is doing no wrong in punishing the crimes. Society is not to be held responsible for the illegal action of a police officer.

MR. SKEPTIC (turning to Lady Absolutist): What if the illegal search leads to the discovery of an extremely dangerous group of criminals — criminals able, let's suppose, to build a series of miniature atomic bombs, and they are going to blow up New York tomorrow, Paris the next day, and more to come? You are playing with values — what about bombs?

MS. RELATIVIST: Although I do not share your skeptical approach, I think you have a good point here. And, as a matter of fact, it seems as though the trend in positive legal systems has been toward a relativistic, not an absolutistic — not even a skeptic, however! — approach. The American system, after some rather absolutistic *démarches*, especially in the 1960s and 1970s, seems to have moved toward adopting a less radical solution which allows for evaluating the *gravity* of the police behavior, their bad or good faith as to the illegality of the search or seizure.⁵ Thus, the result is no longer an absolute and unconditional triumph of one value or set of values — privacy, and/or the “integrity” of the judicial process, and/or deterring the police — against anything else. In Continental European countries, too, the exclusion, which has also been a post-World War II development, and indeed a healthy one in my view, originally was very radical, even more so, in many ways, than in the United States. For the European exclusion extended, and still extends, not only to criminal but also to civil proceedings, and to evidence illegally obtained by private persons, not only by governmental officers. However, a European kind of relativism, based on a so-called principle of proportionality or *Verhältnismässigkeitsprinzip* — let me take a breath for a second! — has gradually prevailed. This means that the “gravity” of the two factual situations: the illegal invasion into another's privacy and the crime or other wrong behavior which was ille-

⁵ See, e.g., *United States v. Leon*, 468 U.S. 897 (1984), in which the United States Supreme Court recognized a good faith exception to the exclusionary rule.

gally discovered, shall be balanced by the judge. For instance, in a criminal case decided by the federal supreme court of Germany in 1964,⁶ some private letters and diaries that the public prosecutor obtained illegally were not admitted into evidence. The court stated: “[e]veryone must be free to record for himself sensations as he likes without the feeling that such notations will be used [by him] in an unauthorized way.”⁷ However, the court also examined “to what extent and under what legal requirement such a sphere of protection [of the ‘value of privacy’], which contains a constitutional prohibition against the utilization of evidence, must be recognized in a criminal proceeding.”⁸ And, in this examination it stated that: “the purpose of the clarification and investigation of criminal acts is certainly a matter of extreme importance, but it is not and cannot be always and under all circumstances the predominant interest of the State.”⁹ When shall the value of protecting privacy — and the “free development of the personality” — be subordinated to that “matter of extreme importance”? Here is the answer of the German court:

The need for a prohibition against utilization [of evidence illegally obtained] can be ascertained, moreover, only after a careful weighing of the personal, constitutionally guaranteed interests in the protection of one’s privacy on one hand, and the interest of the State in the prosecution of criminal justice on the other. . . . The principle of proportionality in the determination of the admissibility of measures of criminal prosecution has been developed and is quite clear in the decisions of the Federal Constitutional Court. . . . [T]he higher interest must be determined. . . . [T]he balancing must be made in considering the interest in criminal prosecution in the light of the importance of the fundamental rights, whereby *the gravity of the crime committed* . . . must be taken into consideration.¹⁰

SIR ABSOLUTIST: This balancing affair seems rather troublesome and dangerous, doesn’t it? Why should we trust the judges to do such things? Isn’t this a way to arbitrariness, and the worst sort of arbitrariness at that — the judicial one? How much better is the British House of Lords decision — total rejection of the so-called exclusionary rule!¹¹

MS. RELATIVIST: Can there be any decision, judicial or otherwise,

⁶ See the English translation of the case in M. CAPPELLETTI & W. COHEN, *COMPARATIVE CONSTITUTIONAL LAW* 500-05 (1979).

⁷ *Id.* at 503.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 504-05.

¹¹ The allusion is to the House of Lords’ decision in *Regina v. Sang*, 2 All E.R. 1222 (1979).

with no discretion of some kind and degree?

LADY ABSOLUTIST: The House of Lords simply demonstrated, and not for the first time, its insensitivity to the moral aspects of law.¹² How much more sophisticated is the American system, and as I learn, the Continental European system as well, in their understanding that law cannot be separated from morality, and that the integrity of the legal process, most particularly the judicial, has to be preserved, cost what it may.

MS. RELATIVIST: Still, as I tried to demonstrate, both the American and the Continental European solutions are on the relativist's, not the absolutist's side!

LADY ABSOLUTIST: Maybe. However, you would not be able to relativize so easily the case of abortion. The value of the woman's privacy was solemnly discovered and affirmed by the United States Supreme Court in 1973. Our freedom as women to have control over our bodies, one aspect of our sexual equality, at long last has been proclaimed. And so, I understand, it is for Austria and France and elsewhere.

SIR ABSOLUTIST: Sin! The absolute value is life, not sexual freedom, lust, libido! You are trying to sanctify the worst and most massive of all holocausts in human history!

MR. SKEPTIC: Life as a value: how beautifully nonsensical! We are counting the millions of enemies who would die under our atomic bombs, and we build more bombs because the count is not yet satisfying enough. Is this valuing life, or rather death? Life can be a value — if you want to use that word — or the opposite of a value, depending on your perspective. Alexander, Caesar, Napoleon, Stalin — did they give a damn for their soldiers' lives, except as far as they were needed for their victory? "*L'objet de la guerre, c'est la victoire,*" as good old Montesquieu said¹³ — and it's not to save lives. History, my friends, has proven we are but hopeless, lightless, valueless grains of dust in a hopeless, lightless, valueless universe. How can life be a value, an absolute value? Aren't we here, all of us, only to die?

LADY AND SIR ABSOLUTIST (in one voice): Sin, sin!

MS. RELATIVIST: Here all of you are ending up again: the skeptic, with his nihilism which brings him to affirm his own version of an absolute truth: the Triumph of Death and the Nothing; and the absolutists, condemning such truth by means of their own apodictic affirmation of another Truth, no less absolute: the Woman's Life and Free-

¹² See the comment by Graham Hughes, *We Try Harder*, in THE NEW YORK REVIEW OF BOOKS, Mar. 14, 1985, at 17.

¹³ MONTESQUIEU, DE L'ESPRIT DES LOIS 11-13 (R. Derathé, 1973).

dom, or, the Fetus' Life. What about seeing these values, too, in the framework of the real world to which they belong? Life might well be a "grain of dust" in the absolutistic perspectives of the All, or the Nothing. Yet it is our life, mine and yours, and it is all we have, and we cannot help but to strive to dignify and preserve it, both as individuals and groups and, again, at the top floor, as humankind; even though, yes, we know it is but a Faustian attempt, a Utopian effort to "stop the fleeting moment" — and this is true for me and for you and for all, for this is what we are: we are time and space, not a Timeless Infinite.

LADY AND SIR ABSOLUTISTS (in one Voice): How tragic! And, how inconsistent! Shouldn't your relativism rather lead you to accept the relativity of your convictions as well? Shouldn't you admit the possibility, at least, that there is a future — a Bright Future in God?

MR. SKEPTIC: God?! There we are! How irrational. If there is a God, why should he care for dust?

MS. RELATIVIST (turning to the Absolutists): How right you are — for once. Yes, this is my profession of faith. When the matter is "beyond our own world," then I do refrain. God? "My brain is too small for affirming Thee, but also for denying Thee." I simply do not know. But here the issue is one of morality, not theology. And morality can exist even without God.

THE ARBITER: Once again, shouldn't we return to the topic of our discussion?

MR. SKEPTIC: Abortion? It is no topic for me. No topic for a discourse on "morality" or "justice." No "case study" in moral philosophy. It is, purely and simply, the political choice of a legislator, and the practical choice, case by case, of the person or persons involved.

LADY ABSOLUTIST: But, I repeat, this is not what we can learn from the American Court. . . .

MS. RELATIVIST: Oh no, My Lady. If you believe that in *Roe v. Wade*¹⁴ the United States Supreme Court espoused your absolutistic approach — the absolute triumph of the woman's privacy — then you are wrong indeed. On the contrary, even in that decision the Court adopted a relativistic approach, insofar as it accepted that after "viability" — which, at the time of the decision, appeared to coincide roughly with the end of the second trimester of pregnancy — there might be, and the legislatures of the states might affirm and protect, a right to life of the fetus, even though not a right capable of prevailing over the mother's right to life and health.

¹⁴ 410 U.S. 113 (1973).

SIR ABSOLUTIST: Isn't it correct, though, that in 1975 a better advised court, the Constitutional Court of Germany,¹⁵ followed ten years later, as I am told, by the Constitutional Court of Spain,¹⁶ proclaimed instead the absolute right to life of the fetus, at any time during pregnancy?

MS. RELATIVIST: Not really. Even the — admittedly, more dogmatic — Court of Germany has accepted relativism on, at least, two counts. First, it has recognized that there is a period of two weeks from conception — the “pre-nidation” period — during which there is no life yet to be protected. Second, it has left the doors wide open to “indications” — that is, serious reasons — for abortion during the following pregnancy period. And, as a matter of fact, a statute was enacted after the German Court decision¹⁷ which allows an abortion at any time for medical reasons — to safeguard the life or prevent grave impairment of the physical or mental health of the woman. Also, within twenty-two weeks from conception, it permits abortion for eugenic reasons — when the unborn child appears irreversibly damaged. And within twelve weeks, abortion is permitted for “social” reasons — a very broad allowance! — and also if pregnancy resulted from rape.

SIR ABSOLUTIST: And the German Court did not strike down this statute, as it had done with the previous one in 1975? Too bad!

LADY ABSOLUTIST: Rather, very very good, I would say! Perhaps the merit, however, is to be given to those pro-abortionists who bombed the German Court soon after its anti-abortion decision of February 1975? The Court did not dare repeat itself! . . .

SIR ABSOLUTIST: Boo! Let's rather hope similar but opposite results will be obtained from the bombing of abortion clinics in America! I am, of course, personally appalled by violence, but those white-painted slaughterhouses! . . .

THE ARBITER: Any conclusions at this point?

MR. SKEPTIC: Let me repeat. What is at stake here are not moral issues, not “values.” Values, for that matter, are but emotions, sheer personal preferences. As a Danish philosopher said: To invoke values is like “banging on the table”!¹⁸

¹⁵ See an English translation in M. CAPPELLETTI & W. COHEN, *supra* note 6, at 586-605.

¹⁶ Decision of 11 April 1985, in 119 BOLETÍN OFICIAL DEL ESTADO 10 (suplemento, 18 May 1985).

¹⁷ On the German statute of 18 May 1976, see M. CAPPELLETTI & W. COHEN, *supra* note 6, at 605-06.

¹⁸ See A. ROSS, *ON LAW AND JUSTICE* 274-75 (1959).

LADY ABSOLUTIST: Not at all! What is involved here is a very serious matter of principles. If the positive law of one country or another does not comply with them, it's bad law.

SIR ABSOLUTIST: This time you are absolutely right, Madam!

MS. RELATIVIST: Yeah, she is right — except that your “principle,” since it pretends to be absolute, eternal, universal, is doomed to be empty, and each of you fill it up with absolutely opposite contents. And so your less sophisticated, less — how to say? — discursive proselytes on either side feel absolutely justified to drop the bombs — on both, the German pro-life Court and the American abortion clinics . . . and even to shoot at the American judge who drafted the 1973 abortion decision, what's his name?

THE ARBITER: Harry Blackmun.

MS. RELATIVIST: Justice Blackmun, yes.

THE ARBITER: Enough with shooting and bombing! It's time to have a drink; and to talk of nice peaceful things. The weather, for instance. Look — spring in the air!

MS. RELATIVIST: Spring in the air?! Why should I?

MR. SKEPTIC: Bombs?! Weather?! Nonsense!

LADY AND SIR ABSOLUTIST (in one voice): Drinks?! How sinful!

THE ARBITER (mumbling to himself): A test case on abortion, evidence, justice, morality? For sure this was a test case, but on a Pirandellian lack of human communication and understanding! (Raising the glass but still speaking only for himself): Cheers!