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THE THEORIST AND THE MAN

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It is nearly impossible for me to accept the fact that I first met Harry Wellington by phone. I had been a student at the Yale Law School for three years and somehow slipped through without having encountered Harry as a teacher along the way. In the spring of 1978, I found myself on the faculty at the University of Chicago, teaching contracts and commercial law. One spring afternoon I walked back up to my office on the fourth floor, and found on my desk a telephone message from Dean Wellington at the Yale Law School. I returned the call. Harry told me that he and his colleagues had voted to invite me to come and spend a visiting year with them in New Haven. I crumpled the message and threw it in the wastepaper basket. The next morning, thinking better of it, and realizing that this call might actually in the fullness of time prove to be *the* call, I retrieved the yellow message slip from my wastebasket and smoothed it out. Today it sits in a frame on my desk at Yale.

I arrived in New Haven that fall and Harry took me under his wing. Barbara Black earlier referred to Harry as a caring and solicitous mother. That fall I was one of his chicks, and he made sure that my anxiety level remained within manageable limits. Harry said wonderfully reassuring things to me. Whether they were true or false I really don't know, but they kept me calm and I was grateful for that then, and grateful in the years that followed for his extraordinary encouragement of me and my work.

Harry always urged me to follow my own lead. "Do what you have a passionate interest in doing," he said, "and everything will work out." That was a liberating message and it helped to set me free to think and write, and to discover what I actually believed about the subjects that intrigued me.

Harry liberated me in another respect as well. Often, after joining the Yale faculty, I would run into Harry, in the hallway or the faculty lounge. I knew, of course, that he was a busy Dean. But we frequently fell into conversation—about John Rawls' *Theory of Justice*, or Henry

* This is an edited version of remarks given at a symposium in honor of Harry Wellington at New York Law School on November 4th, 2000.

James' view of the imagination, or whatever happened to be on our minds. For twenty minutes or so, we would lose ourselves in ambling talk and afterwards I would think to myself, "How can this man take time out from his job to indulge a junior colleague in frivolous conversation of this kind?"

But as time went by, I realized that Harry's intellectualism, his love of ideas, his love of that meandering sort of talk that doesn't begin anywhere in particular, or lead anywhere in particular, wasn't, for Harry, relief from his job. It was at the very core of the work he did as Dean of the Yale Law School. I came in time to understand that Harry's passion for the life of the mind, and his protective love of it, wasn't a personal indulgence, unrelated to his deanship. It was what made Harry a great Dean at Yale and what has made him a great Dean here as well. And when I became the Dean of the Yale Law School and came to sit in the office that Harry had occupied before me, his example liberated me to think that I could continue to indulge my own intellectual passions in the same way he had, without counting my indulgence as a frivolity or vacation from my job, but as the heart of the job itself.

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I have been asked to say something about Harry Wellington as a constitutional theorist. The theorist and the man are, of course, one and the same, and to understand the first it is important to keep certain basic biographical facts about the second in view. There are two in particular that I would emphasize.

First, Harry was—as a number of speakers today have noted—a teacher of contract law before he became a teacher of constitutional law, and this surely helps to explain his emphasis on the continuity of common law and constitutional adjudication. This is, in fact, one of the most striking and significant features of Harry's theory of constitutional decision making. In his 1990 book, *Interpreting the Constitution*,[1] Harry first criticizes several other theories of constitutional interpretation and then comes to his own favored alternative, which he labels the common law method. Harry understands, of course, the special features of constitutional adjudication, but at every turn he emphasizes the similarity of this branch of judging to its common law counterpart—in contrast to the approach of many other constitutional schol-

1. HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION (Yale Univ. Press 1990).

ars, who typically conceive the problems of constitutional adjudication as if they formed a world apart.

The second biographical fact about Harry that we should keep in mind is that he was a student at the Harvard Law School before becoming a member of the faculty at Yale. As a consequence, Harry came to Yale steeped in the legal process school of thought, which flourished at the Harvard Law School in the 1950s and 1960s. When Harry joined the Yale faculty, Yale was still dominated by legal realism, exemplified by figures like Grant Gilmore, Charles Black, and others. Harry's own constitutional jurisprudence can best be understood, I believe, as arising out of the encounter between these two intellectual traditions, the Harvard legal process school, to which Harry had been introduced as a student, and the legal realism he encountered when he moved to New Haven in 1956.

A central question of the legal process school concerned the competencies of different lawmaking bodies. Legislators, administrative agencies, courts and other institutions all contribute to the process of making law broadly understood. But what special contributions to this process are these different institutions best equipped to make, and how should the labor of lawmaking be divided among them?

The central question of legal realism is a different one. The realists of the 1930s had debunked the idea that judges are perfectly constrained in their work by a set of antecedently existing and unambiguously directive rules, which we naïvely call the law. The realists demonstrated in hundreds of interesting and persuasive ways, that the law is filled with ambiguities and gaps that invite—indeed, require—judicial invention and creativity. The realists showed that the law is made, not found—that it is a product, from top to bottom, of judicial invention.

But this, of course, raised a fundamental question. If judges make the law and do not merely find it, what is to constrain them in their creativity? Unless we are prepared to abandon the fundamental proposition that ours is a system of laws and not of men, those who embrace legal realism must explain what prevents judges from deciding cases according to their own personal preferences, philosophies and the like.

In Harry's celebrated 1973 *Yale Law Journal* article, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*,[2] these two questions—the legal process question of how to identify the special competency of different lawmaking institutions, and the realist question of how to specify the constraints on judging—are both very much at the center of Harry's argument, and his artful elaboration of the distinction between policies and principles is, I think, an attempt to answer both questions at once. In this article, Harry is still preoccupied, to a considerable degree, with the issues his Harvard professors had been so concerned to address, as well as the issues most on the minds of his realist colleagues at Yale.

By the time we come to Harry's 1990 book, *Interpreting the Constitution*, however, the realist question has moved to the center of his field of attention, and though the question of institutional competency has not disappeared entirely, it has receded into the background.

Interpreting the Constitution seeks to analyze the strengths and weaknesses of the various theories that have been offered to explain why the Justices of the Supreme Court are not at liberty to decide cases as they wish, in the way that certain—extreme—versions of legal realism might suggest they are. Harry first considers two prominent and influential theories of constitutional interpretation, the theory of "originalism," and John Hart Ely's theory of "representation reinforcement." Both of these theories Harry believes—rightly, I think—to be motivated by the ambition to meet the realist challenge: to show that the Justices of the Supreme Court are constrained in their decision making and are not free to act on their own personal preferences and philosophies when these conflict—under the first theory—with the original intention of the framers, or—under the second theory—with the results of a genuinely open and representative system of democratic legislation. Harry offers a fair and thoughtful account of both approaches and shows, convincingly to my mind, that neither can meet the task its defenders have set for themselves—the task of developing a compelling account of judicial constraint. Harry does not reject this goal—it is his goal too—but he does insist that neither originalism nor Ely's theory of representation reinforcement can reach it.

A better approach—a third and superior account of the sources of constraint in constitutional adjudication—can be built, Harry says,

2. Harry Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

upon what he calls the common law method of adjudication, and it is to the explication and defense of this method that the last and most important part of Harry's book is devoted. Harry's account of the common law method of constitutional adjudication is complex and I want to concentrate on just one aspect of it—in my view, the most original and interesting one.

Justices of the Supreme Court work from many different sources of law—from statutes, prior court decisions, and the like. But in addition to all of these familiar sources of law, the Justices also draw on something else, on what Harry calls our "public morality." Public morality is that complex of attitudes and beliefs and morally animated habits of mind that form the backdrop to most legislation and to the great political dramas that generate a fair bit of the business of the Supreme Court of the United States. In answering the questions put to them, Harry argues, the Justices of the Supreme Court properly look to this public morality as one legitimate source of law. They draw upon it; they treat it as a source of inspiration and validation for the positions they take; it is one of the things they properly take into account. Our public morality also constrains the Justices in their decision making because it is not a morality of their own invention. It is not the same as their own personal morality, but something separate and distinct from it. And because it is distinct—because it can be assessed, surveyed, reviewed and even criticized as a feature of the moral world that exists independently of the Justices' own first-personal moral ideals—it serves as a constraint on their deliberations and judgments, so long, at least, as they continue to regard it as a legitimate source of law.

The idea of a public morality, as Harry would be the first to recognize, is an ambiguous concept, and its invocation raises many questions of a fundamental kind. But from Harry's own account of it, I think we can say, without much difficulty, that our public morality has at least two distinctive features.

The first is that it is rarely, if ever, absolutely settled, comprehensive and clear. It is always somewhat muddled and contested—even if there is a prevailing view which might be said to represent the dominant public morality of the day. From our public morality, there will always be dissenters, even in the name of the principles that govern and animate this morality itself.

Second, our public morality is fluid. It is not fixed, once and for all. It changes. It is mobile. It is transformed and self-transforming. It is a living thing, which reacts to stimuli of one sort or another, includ-

ing those stimuli we call decisions of the Supreme Court of the United States. Hence, there is a dynamic relationship between Supreme Court decision-making and our public morality, which forms one of the sources of law to which the Justices of the Supreme Court appeal in justifying and legitimating the decisions they make. Our public morality changes in response to the very decisions that purport to interpret or apply it, and which appeal to it as a source of law.

If we stop at this point and reflect on what I've just said about public morality—on what Harry says about it in his book—the following question is, I think, bound to arise. Assuming that our public morality lacks uniformity, that it is subject to debate and dispute, any appeal to it must of necessity have to be an interpretation of it. Any account of what our public morality is must give weight to certain things, pick out certain elements and put others in the background or discount them as being less weighty or significant; any such account must, in short, be an interpretative assessment of our public morality. But how is such an interpretation to be framed and defended, and from what source do the convictions and principles that guide it derive? Can they derive from any source other than the personal morality of the judge whose interpretation it is?

Furthermore, if we accept the proposition—which seems reasonable—that the relationship between public morality and the Supreme Court's interpretations of it is a dynamic one, and that public morality reacts against and sometimes confirms but also sometimes repudiates these interpretations, how is a Justice of the Supreme Court to know when his or her interpretation is off the mark? If the interpretation has been made in good faith, and in the belief that one is interpreting a feature of the world, not just reporting one's own moral beliefs, how is a Justice to distinguish a failed interpretation from an interpretation that gets it just right?

The last two chapters of Harry's book are devoted to a discussion of failed interpretations, and to what Harry calls the "politically indigestible" decision—a wonderfully apt phrase. These are the decisions that just won't go down, that the body politic refuses to digest. But how do you know when you've struck an indigestible note? Is not the distinction between a mistake, on the one hand, and a public morality that is slowly—but perhaps only very slowly—moving to incorporate your right reading of it itself also a function of one's own personal moral convictions and beliefs? And if it is impossible to get away from one's own personal morality in deciding which interpretation of our

public morality is the best one in the first place, then will it not be equally impossible to get away from one's own personal morality in deciding when one has made a mistake?

Having said this, it might seem as if the appeal to a public morality, which was meant to answer the realist's challenge by establishing an independent source of constraint in Supreme Court decision-making, was in danger of collapsing back into the personal morality of the Justice appealing to it, and, with that, of confirming the depth of the realist predicament rather than resolving it. Indeed, I think we see a collapse along just these lines in Ronald Dworkin's philosophy of constitutional adjudication, whose hero is Hercules, a judge whose public morality is in the end indistinguishable from the very best statement that Hercules is able to make of his own personal morality, the two being only different ways of describing the very same thing.

Harry's book, by contrast, is informed by the deep belief—by the faith—that this collapse is neither necessary nor desirable. Harry believes that a judge can appeal meaningfully to public morality as a source of law in constitutional adjudication, while recognizing that this appeal is always an interpretive exercise which involves some reliance, perhaps even a considerable reliance, on the personal values of the judge doing the interpreting. But despite this complex interplay of public and private values, Harry insists that the distinction between public and personal morality is an intelligible one, and vitally important to the creative but constrained work of judging.

This is Harry's faith. I confess it is my faith too. And if it is objected that Harry has not given us the final and authoritative philosophical defense of this faith, I think it may be enough to reply that no one has, or is likely to any time soon.

But whatever Harry might say in defense of his faith, we can perhaps discover its source in a third biographical fact about the man—in his relationship with Felix Frankfurter, for whom Harry clerked in 1955 and whose ideas made a lasting impression on Harry's thinking. Felix Frankfurter believed in judicial restraint. This was the principle of continuity that linked his opinions from the New Deal period to those of the Cold War. And Frankfurter's principle of restraint—which is largely missing from Ronald Dworkin's theory of constitutional interpretation—is the source, I believe, of Harry's conviction that the public mortality to which the Justices of the Supreme Court must always appeal in the most important cases they decide is not just the personal morality of the Justices writ large, but an independent

fact to which the Justices must defer, whatever their own moral convictions may be, and which therefore acts as a brake or restraint on their freedom to interpret the Constitution according to their own beliefs. It is the source of the Frankfurterian faith that Harry brought with him to Yale in 1956 and which remains, to this day, the inspiration for his response to the realist challenge he met when he arrived there.