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COMMENT ON "THE NYLON CURTAIN: AMERICA'S NATIONAL BORDER AND THE FREE FLOW OF IDEAS"

MICHAEL J. PERRY*

When I accepted the invitation to comment on Professor Burt Neuborne's essay,¹ I had not yet read it. Now that I have read the essay, I am somewhat at a loss for what to say. I have rarely been in such agreement with something I have been asked to comment on. So, my comment cannot take the form of identifying major or even minor points of disagreement. I shall proceed, then, less by commenting on Professor Neuborne's wonderful essay than by relating it, very briefly, to some issues of current and deep concern to me.

Two large inquiries engage me these days. The first is constitutional theory, concerning the nature and limits of judicial authority in resolving constitutional issues and, more broadly, the nature and limits of constitutional adjudication and interpretation. My second inquiry grows out of the first, and indeed subsumes it. I call it "Pluralism and the Problem of Moral Knowledge." This Comment provides neither the time nor the place to discuss the details of that inquiry,² but I do want to relate a small portion of it to Professor Neuborne's essay.

Debate rages in contemporary intellectual circles, and beyond, about whether there are any interests, other than biological ones, common to all or virtually all members of the human species. Some thinkers—sometimes called "moral relativists"—suggest that there are none. Consider the principal implication of that position. If there are no common human interests, then we cannot choose among competing ways of life based on what way or ways of life

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1. Neuborne & Shapiro, *The Nylon Curtain: America's National Border and The Free Flow of Ideas*, 26 WM. & MARY L. REV. 719 (1985).

2. For some thoughts emerging from this inquiry, see Perry, *Taking Neither Rights-Talk nor the "Critique of Rights" Too Seriously*, 62 TEX. L. REV. 1405 (1984); Perry, *Some Notes on Absolutism, Consequentialism, and Incommensurability*, 80 NW. U.L. REV. ____ (1985) (forthcoming).

better satisfy common human needs. If there are no common human interests, then all we can say about the Soviet system of government, for example, is that it is unAmerican.

Are there any common interests? That is a difficult question, of course, and obviously beyond the scope of this brief Comment. I shall nevertheless put something on the table for conversation. Virtually every human being is committed to her own well-being. This is not all she is committed to, but it follows that virtually every human being is committed to, *and in that sense has an interest in*, whatever is constitutive of or a prerequisite to her well-being, including that which she may not presently understand to be constitutive of or a prerequisite to her well-being. In particular, virtually every human being has an interest in whatever personal capacities and social and political conditions are prerequisites to her well-being.

I want to mention one capacity and set of conditions that seem to me essential to virtually anyone's well-being: the capacity for self-critical rationality and the conditions that permit its exercise. Anyone can be mistaken as to one's particular interests. A capacity critically to evaluate what one believes about one's interests is a virtually necessary (but not a sufficient) condition of correcting such mistakes. Because correcting such mistakes is, in turn, a virtually necessary (but not a sufficient) condition of achieving well-being, one has an interest in that capacity, which we might call self-critical rationality. And, correspondingly, one has an interest in social and political conditions that facilitate rather than impede the exercise of self-critical rationality. Those two allied interests are, I submit, common human interests. Any way of life that frustrates those interests is, on that score at least, less fit for human beings than any way of life that satisfies those interests.

The legislative and executive practices admirably described by Burt Neuborne clearly frustrate our common human interest in fostering social and political conditions that facilitate rather than impede the exercise of self-critical rationality. And what could be clearer, than that there is simply no adequate justification for those practices?

That brings me to the second matter I want to raise—the ques-

tion of the proper judicial role. In my book³ and, more recently, in an essay on constitutional interpretation,⁴ I have defended an activist role for the judiciary in resolving constitutional issues concerning human rights. This is not the place to recapitulate the details of that defense. Suffice it to say that in the cases Professor Neuborne has persuasively criticized in his essay, the judiciary, and in particular the Supreme Court of the United States, has failed to fulfill its role as a significant part of our national conscience. The Court has failed to tell Congress and the President that they have been unfaithful to "that for which we stand." Sadly, the Court has failed to do all it can to insure that government officials with authoritarian if not totalitarian inclinations do not subvert the commitment of our political-moral tradition to a way of life that facilitates, rather than impedes, the exercise of self-critical rationality.

I said at the beginning that I am very much in agreement with what Professor Neuborne has said in his essay. What we are saying essentially amounts to the same thing: Our political community—the United States of America—stands proudly, though not unfaithfully, for the ideal of self-critical rationality. It does so because it realizes that however well we may be doing, or think we are doing, we can always do better. In too many cases, the Supreme Court has failed to play its important role in helping us carry on with that struggle. As Americans and, more fundamentally, as human beings, we are all the poorer for that failure.

3. M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* (1982).

4. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551 (1985).