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The fragility of rightness. Adjudication and the primacy of practice

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"Ethical theory is essentially a moral invention… I will argue that the structures known as ethical theories are more threats to moral sanity and balance than instruments for their attainment." [556]

"Theory typically uses the assumption that we probably have too many ethical ideas [...]. Our major practical problem now is actually that we have not too many but too few, and we need to cherish as many as we can."[557]

8 Justice without rails. An anti-theoretical critique and a quasi-phenomenological proposal

1 Introduction

So far the argument can be taken as an internal critique on a stabilizing approach to adjudication. This chapter offers a more fundamental or -if you like- external critique on the attempt to secure the moral quality of adjudication by means of normative moral theory. It does not zoom in on another substantial theory of justice as potential explanatory and justificatory ground for law and adjudication. It rather takes issue with the reliance of a stabilizing approach on normative moral theory as such. Thereto I will first expound the central points of critique that anti-theorists have on normative theories of morality in general (2). Next, I will assess the validity of this critique (3). Then I will present the central features of a quasi-phenomenological approach to justice as an answer to the questions what remains of 'justice' when we give up normative theories of justice and what this entails for an account of moral quality of adjudication (4). Subsequently, I discuss how this quasi-phenomenological approach can account for social critique, moral progress and what role it does allow for theories of political morality (5). The chapter ends with a conclusion (6).

2 Normative theory under attack

This section expounds an anti-theoretical critique on normative theories of political morality, more generally on any attempt to account for moral quality in practice by means of a normative theory. It aims to grasp the kernel of the critique of the 'anti-theorists' within practical philosophy, roughly to be divided into neo-Aristotelians and followers of the later Wittgenstein. The anti-theoretical tradition includes such thinkers as

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[556] As cited in: Louden, 'Virtue Ethics and Anti-theory', 2.

[557] Williams, *Ethics and the Limits of Philosophy*, 117.

Peter Winch, Elisabeth Anscombe, Annette Bayer, Iris Murdoch, Cora Diamond, John MacDowell, David Wiggins, Stanley Cavell, Bernard Williams, Michael Oakeshott, Raymond Geuss and others.

It is important to note that the anti-theoretical critique is content-neutral. It does not target any specific substantial moral values, but takes issue with any kind of attempt to put practice under the sway of a normative moral theory, criticizing "all kinds of theoretical or systematizing normative efforts in moral philosophy."[558] The anti-theoretical critique boils down to the claim that giving primacy to theory in practice, as normative theories tend to do, is inefficient, harmful and also dishonest.

The inefficiency critique engages the idea that normative moral theories are unfit to realize substantial aspirations in practice -whatever these aspirations are- because the central elements of theory, i.e. explicit normative principles and rules, are inadequate for this purpose. Principles that are generated by theoretical reason are considered to be too vague and too indeterminate to have sufficient practical force. That is, these principles are constituted by what Bernard Williams has qualified 'thin concepts' - "the most general expressions used in ethical discussion."[559] Characteristically, thin concepts (such as 'right' or 'basic liberties') contain little empirical content; the conditions of their application are only to a limited degree part of these concepts themselves.[560] Therefore the application of these concepts is not so much guided by the 'world', but rather by interpretative choices of the people using them. Because of their 'thinness', according to the anti-theorist these constitutive concepts are unfit to constrain and guide practice.[561] Their application will be the result of an "opaque aggregation of actions and forces".[562] It will be the outcome of "an interpretive act, which situates them within their relevant cultural institutions and moral practices."[563]

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[558] Hämäläinen, Nora, 'Is Moral Theory Harmful in Practice? Relocating Anti-theory in Contemporary Ethics', *Ethical Theory and Moral Practice* 12, 5 (2009), 541.

[559] Williams, *Ethics and the Limits of Philosophy*, 128. I introduced this notion in chapter three.

[560] Cf. Ibid., 141.

[561] Cf. Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 47.

[562] Ibid., 28.

[563] Louden, 'Virtue Ethics and Anti-theory', 100.

Hence, in spite of their aspirations normative moral principles will 'produce' an amalgam of 'specifications' that cannot be reduced to these principles. These specifications do not have a morality tracking property to which they can be reduced. So, strictly speaking the notions of 'specification' and 'application' even lose their meaning, because what counts as specification or application is not determined by the theory. Paradoxically, the principles will allow for outcomes that cannot be reduced to theory itself. With these principles as normative guidance, practice will nonetheless determine the content of morality, only seemingly covered by theory.[564] In brief: because of their 'thinness' normative principles of morality are not well-suited to offer the kind of guidance on which theorists rely.[565]

Even if normative principles were more specific or if we came up with very clear action guiding rules this would not change the inefficiency critique of the anti-theorists. Anti-theorists hold that if rules are to guide a practice, they must be intimately linked to and embedded in concrete practices. Otherwise they cannot sensibly have any practical role.

Stanley Cavell describes practices as "a matter of our sharing routes of interest and feeling, modes of response, sense of humour and of significance and of fulfilment, of what is outrageous, of what is similar to what else, what a rebuke, what forgiveness, of when an utterance is an assertion, when an appeal, when an explanation -all the whirl of organism Wittgenstein calls "forms of life".[566]

Now, according to the anti-theorists these 'forms of life' can never be codified, formally explicated and precisely spelled out. The inefficiency argument therefore also points to a category mistake made by theorists: their reliance on the practical role

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[564] Ibid.

[565] Of course, not all normative moral theories place equal emphasis on their normative potential for practice. It is however the case that moral theorists agree that moral theory "must be able to offer some sort of guidance concerning what to do and how to live [..]." Cf. ———, *Morality and Moral Theory. A Reappraisal and Reaffirmation*, 135.

[566] Cavell, Stanley, *Must We Mean What We Say?* (New York: Charles Scribner's Sons, 1969), 52. McDowell also cites this phrase in his 'Virtue and Reason'. Cf. McDowell, John, 'Virtue and Reason', in *Mind, Value and Reality*, ed. McDowell, John (Cambridge US: Harvard University Press 1998), 60.

of theory is "incompatible with various features of moral practices."[567] They falsely assume that thought (as produced by theory) and practice relate as a premise and a conclusion as if the former offers the rails that keeps the latter moving in the right direction.[568] They mistake features of theoretical premises with practical norms. Abstract principles or rules are simply unsuited to function as 'rails' that keep a practice on track. So far the argument of inefficiency.

Next there is the harm critique. Anti-theorists hold that putting practices and society under the reign of normative moral theory is harmful for the kind of substantive ethical concepts that concrete agents need for practices to be of a certain quality.[569] They assert that because of the reductive power of moral principles and because of the effort of systematisation that normative moral theory requires, a range of substantive concepts will be marginalized. That is, substantive ethical concepts that do not harmonize well with these normative moral principles are rejected as indications of arbitrary or even immoral beings and doings.[570] And, in so far these concept do fit in, they lose their immediate authority: they are to be understood as 'allowed for' or 'permitted', rather than as valuable in their own right. The considerations and responses based on these concepts are to be understood as mere preferences and hence their normative force is weakened. And because moral theories by themselves do not and cannot offer any substantial ethical thought in return, Bernard Williams has come to the notorious phrase that "[r]eflection characteristically disturbs, unseats, or replaces those traditional concepts; [..] we reach the notably un-Socratic conclusion that, in ethics, reflection can destroy knowledge."[571] This is problematic, as the "rationalized values may be hard to live with and to handle", according to

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[567] Clarke, Stanley G., 'Anti-Theory in Ethics', *American Philosophical Quarterly* 24, 3 (1987), 238.

[568] Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 24. For the image of the 'rails' see: McDowell, 'Virtue and Reason', 61; McDowell, John, 'Non-Cognitivism and Rule-Following', in *Mind, Value and Reality*, ed. McDowell, John (Cambridge US: Harvard University Press 1998), 203.

[569] Clarke, 'Anti-Theory in Ethics', 240-241.

[570] Ibid.

[571] Williams, *Ethics and the Limits of Philosophy*, 148.

Williams.[572] So, as it reduces local knowledge, anti-theorists hold that normative moral theory distorts the ethical reality of a practice.[573]

Normative moral theory is also seen as harmful for practice because it takes (theoretical) reflection as the central moral capacity over other kinds of moral sensibilities that agents may have. Nora Hämäläinen paraphrases this critique as follows: "any attempts to theorize, or systematize, our understanding is bound to distort the actual moral competence which we rely on in practical moral thought and action."[574] Theoretical reflection takes up "psychological space" and will change people's moral outlook.[575] Consequently, we lose a range of dimensions in our moral landscape and hence also dimensions of moral evaluation, as only the capacities required for the application of normative theory are assumed to be relevant for evaluating the moral worth of agents. By focusing on principles and rules that are to guide actions of agents, moral theory wrongly ignores a variety of other ways of doing and being as relevant for the evaluation of practices. As Iris Murdoch says, moral theory leaves aside "the inner monologue and its like, but also overt manifestations of personal attitudes, speculations, or visions of life such as might find expression in talk not immediately directed to the solution of specific moral problems." [576]

In addition, part of this anti-theorist harm critique is that moral theory is harmful for the practice of philosophy itself. According to anti-theorists focusing on moral theory leads to a form of blindness for what moral life and moral thought are like.[577] 'Real' moral issues or the interesting aspects of moral life will in any case disappear from

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[572] Williams, Bernard, *Philosophy as a Humanistic Discipline*, ed. Moore, A.W. (Princeton: Princeton University Press, 2008), 163.

[573] Clarke, Stanley G. and Simpson, Evan, 'Introduction', in *Anti-theory in Ethics and Moral Conservatism*, ed. Clarke, Stanley G. and Simpson, Evan (New York: State University of New York Press, 1989), 23.

[574] Hämäläinen, 'Is Moral Theory Harmful in Practice? Relocating Anti-theory in Contemporary Ethics', 541.

[575] Williams, *Ethics and the Limits of Philosophy*, 171.

[576] Cf. Murdoch, Iris, 'Vision and Choice', in *Existentialists and Mystics: Writings on Philosophy and Literature*, ed. Conradi, Peter (Harmondsworth: Penguin Books, 1997), 78-82.

[577] Diamond, Cora, 'Losing Your Concepts', *Ethics* 98, 2 (1988), 263.

philosophical discussions.[578] By focusing so much on normative moral theory, practical philosophy gives a very poor and limited picture of moral thought. Cora Diamond has put this point as follows: "ideas about life which are not ideas about rightness, goodness, or virtue enter our moral thought in many ways, and [..] moral theory, which characteristically ignores such features of moral thought, thus gives a distorted picture of that thought."[579]

Arguably part of the previous critique is that anti-theorists reject the way moral theory deals with moral conflicts. Normative moral theories typically dismantle such conflicts as only prima facie conflicts or ignore them as negligible incidents that violate the demands of theory, including its principle of non-contradiction. Anti-theorists by contrast see genuine moral conflicts as inherent to any kind of practice. They strongly reject the idea that for any apparent conflict "either one of the conflicting ought statements is not true or the two statements do not really enjoin incompatible actions."[580] Moral values are not like propositions that can be qualified as either right or wrong. Anti-theorists hold that to have any meaning at all, these values must be understood as having a 'contour'. This contour is a local and contextual elaboration of the central concern.[581] Precisely because such values are always historically and socially mediated, they can perfectly and coherently conflict. Practice by itself does not order (the meaning of) these values into a seamless web, so to say. Stuart Hampshire even claims "there must always be moral conflicts which cannot, given the nature of morality, be resolved by any constant and generally

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[578] Cf. Williams, Bernard, *Morality. An Introduction to Ethics* (Cambridge: Cambridge University Press, 1972), xvii.

[579] Diamond, Cora, 'How Many Legs? ', in *Value and Understanding: Essays for Peter Winch*, ed. Gaita, Raimond (New York: Routledge, 1990), 170. In a similar vein Iris Murdoch states: "[W]e have suffered a general loss of concepts, the loss of a moral and political vocabulary". Cf. Murdoch, Iris, 'Against Dryness', in *Existentialists and Mystics: Writings on Philosophy and Literature*, ed. Conradi, Peter (Harmondsworth: Penguin Books, 1997), 290.

[580] Clarke and Simpson, 'Introduction', 13.

[581] Williams, 'Liberalism and Loss', 94.

accepted method of reasoning. There is no rational path that leads from these conflicts to harmony and to an assured solution [...]".[582]

For anti-theorists the categorical attempt to resolve moral conflicts through theory thus necessarily boils down to merely nominally redirecting certain concerns. It is nothing but a way of redefining certain words, while leaving the underlying concerns unaddressed.[583]

Against this background I now come to the final anti-theoretical critique: normative moral theory falsely brings 'good news' about the world and by doing so it is dishonest.[584] Anti-theorists understand normative moral theory as a project that alienates people from the real character of the practices they live in, because they give too optimistic an understanding of it. Moral theory, in the words of Raymond Guess "doesn't make much sense as a contribution to understanding or dealing with the social and political world".[585] The gaps, edgy fringes, contingencies, arbitrariness and the painful losses that these practices show, are falsely portrayed as something that can be overcome or solved. Anti-theorists hold that this troublesome phenomenology can never be exhaustively "corrected by a more coherent, unitary perspective".[586] To nonetheless put these practices under the lens of a normative moral theory is for anti-theorists a rather evasive way to deal with their inherent troublesome nature. Normative moral theory boils down to a "consoling myth" which has its cause in "the inability to endure the vertigo" that comes with relinquishing a reliance on the normative force of explicit principles and rules.[587]

Anti-theorists thus hold that instead of using the philosophical viewpoint to seemingly dismantle or solve the troublesome phenomenology of practice, philosophy should

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[582] Hampshire, Stuart, 'Morality and Conflict', in *Anti-theory in Ethics and Moral Conservatism*, ed. Clarke, Stanley G. and Simpson, Evan (New York: State University of New York Press, 1989), 148. See also: Williams, 'Liberalism and Loss', 95.

[583] Williams, 'Liberalism and Loss', 94.

[584] Cf. ———, 'The Women of Trachis. Fiction, Pessimism, Ethics', 43.

[585] Geuss, *Outside Ethics*, 31.

[586] Hämäläinen, 'Is Moral Theory Harmful in Practice? Relocating Anti-theory in Contemporary Ethics', 549.

[587] Wiggins, David, 'Deliberation and Practical Reason', in *Essays on Aristotle's Ethics*, ed. Rorty, Amélie O. (Berkeley: University of California Press, 1980), 237.

come up with a more honest account of moral quality in practice.[588] Not in the least because in trying to get control over the practical world, normative moral theory is not only pervasive, but paradoxically it also increases the likelihood that practice will in fact be determined precisely by the kind of arbitrary factors of which it aims to mitigate the influence.[589]

So, on the basis of this discussion we can conclude that the anti-theoretical critique offers external support for the internal critique on Rawls' and Nussbaum's normative theories of political morality that was elaborated in the previous chapters. Indeed, this critique boiled down to the claim that in the end neither of these theories can realize their own aspirations and may also be harmful for practice, i.e. leading to genuine moral loss. So conceived, because of its reliance on a normative theory of political morality a stabilizing approach to adjudication may proved to be ineffective as regards the realisation of its own moral goals. Above that it may threaten the moral quality of adjudication and offer all too rosy, false picture of the moral nature of adjudication.

3 The dispute between anti-theorists and theorists

Before we definitely reject normative moral theory and connected to this also a stabilizing approach to adjudication, fairness demands that we address the replies a theorist might have on the anti-theoretical charges.[590]

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[588] Clarke and Simpson, 'Introduction', 23.

[589] Raymond Geuss made the observation that the country that Rawls had in mind when elaborating his theory - the United States of America - has become increasingly unequal since he introduced his theory. For Geuss this is not to say that the central institutions of the United States should work harder to comply with Rawlsian justice. Rather it reveals that the strategy of normative theories of political morality is wrong. Cf. Geuss, *Outside Ethics*, 36.

[590] Here it must be noted that the debate between theorists and anti-theorists cannot be reduced to the debate on ideal and non-ideal theory. Although there is an overlap between the concerns that are put afore in both debates, I think it is useful to distinguish them, most of all because the notion of ideals *per se* does not sufficiently cover the concerns that anti-theorists have. Their concerns are first and foremost about the influence of theory on practice and not necessarily about the status of the ideals that theories hold. That is, 'ideal' in 'ideal theory' by itself does not sufficiently explain the reasons why anti-theorists hold that theory may be irrelevant or harmful. See for illuminating contributions to the debate on ideal versus non-

As to the anti-theorists' charge that normative moral theory is inefficient because of its use of abstract and general normative principles and rules, a theorist could respond that these are the only resources left because in modern pluriform societies "shared understandings of lesser generality have broken down."[591] If practices were to be regulated by more substantial moral viewpoints this would lead to social conflicts and to violations of the demand for respect for citizen's conceptions of the good.[592]

In addition, a theorist could stress that he is not committed to the naïve belief that principles of justice do apply themselves. A good theorist is well aware that even the best normative moral theory depends on the capacity of 'judgment', on what Kant has qualified a 'middle term'.[593] A theorist can fully agree with the assertion that "many rules or principles are formulated in too coarse-grained a fashion to capture the relevant moral detail in a particular situation and thus require something beyond the rule itself to apply them adequately to the particular situation."[594] He can even admit that, overall, theorists have paid insufficient attention to the importance of this capacity of 'judgment' and add to this that there is no inherent obstacle for normative moral theory to acknowledge the relevance of judgment.

So he may hold that the mere fact that a normative moral theory depends on agents who know how to bridge the gap between abstract principles and rules and the concrete case at hand, is insufficient a reason to claim that such theories are inefficient. All the more so because a theorist will rely on the fact that overall moral

theory: Simmons, A., 'Ideal and Nonideal Theory ', *Philosohy and Public Affairs* 38, 1 (2010); Valentini, Laura, 'On the Apparent Paradox of Ideal Theory', *The Journal of Political Philosophy* 17, 3 (2009); Robeyns, Ingrid, 'Ideal Theory in Theory and Practice', (Nijmegen: Radboud University Nijmegen, 2007); Celikates, Robin, 'At Best Irrelevant, at Worst Ideological? Ideal Theory and the Case of Civil Disobedience', (Amsterdam: University of Amsterdam, 2011).

[591] Rawls, *Political Liberalism*, 46; Rawls, John, 'Social Unity and Primary Goods', in *Utilitarianism and Beyond*, ed. Williams, Bernard and Sen, Amartya (Cambridge: Cambridge University Press, 1982), 161.

[592] Rawls, *Political Liberalism*, 46; ———, 'Social Unity and Primary Goods', 161.

[593] Kant states this point as follows: "[..] to a concept of the understanding, which contains a rule, must be added an act of judgment by which a practitioner distinguishes whether or not something is a case of the rule;[..]". Cf. Kant, *Practical Philosophy*, 279.

[594] Blum, Lawrence, 'Moral Perception and Particularity', *Ethics* 101, 4 (1991), 701.

agents do possess this capacity of judgment. So far the replies of the theorist to the inefficiency argument.

I think that none of these replies will be convincing for an anti-theorist. As to the first reply: without any additional argument, it is a non-sequitur to put it that, compared to more substantive viewpoints, a more abstract or general account will lead to respect for agents with divergent conceptions of the good. That is, precisely because normative principles of morality cannot apply themselves and application will always be the result of an act of interpretation that is determined by all kinds of social factors and personal contingencies of the agent, the alleged 'troublesome' controversies are likely to return on the level of 'application'. Thus, respect for citizens is not yet secured by the generality of principles. This respect may well be 'violated' on the level of application through the 'judgments' of the agents who apply said principles. Neither will the theorist's acknowledgment that 'judgment' is needed to bridge the gap between theory and practice suffice to rebut the anti-theorist's critique that normative moral theories allow for arbitrary outcomes. In order for a theorist to rebut this critique he must show that the capacity of judgment that he relies upon is indeed a 'theory-tracking' capacity and that agents in general will possess such a faculty. What is more, even if the theorist would succeed in producing these complementary arguments, the anti-theorist may object that said capacity of judgment cannot yet explain how agents with the task of applying a normative theory will be able to discern the relevant facts, i.e. the facts for which theory has a normative bearing.[595] This ability cannot coherently be taken to be part of the capacity of judgment (when conceived of as the capacity to 'bridge the gap' between principles and a concrete case), as it logically must come prior to any kind of principles or rules.[596] Also and again, an anti-theorist holds that practice cannot coherently be understood as if it was continuous with theory, neither 'at bottom' nor indirectly.[597] According to

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[595] Ibid., 711-712.

[596] Cf. Ibid.

[597] Hence, for an anti-theorist Barbara Herman's 'rules of salience' -that she deems an indispensible amendment to any kind of moral theory that aims to account for its practical force- is an incoherent notion in so far these rules point to explicable and codifiable rules. Cf. Herman, Barbara, 'The Practice of Moral Judgment ', *Journal of Philosophy* 87 (1985), 418-436.

anti-theorists theory and practice belong to two heterogeneous fields. So an anti-theorists will be likely to reject the theorist's interpretation of 'judgment', because it suggests an incoherent view of practice, i.e. a view of practices and agents as moving on 'rails' that are provided by codifiable moral principles and rules.

Next, to the critique that normative moral theory is harmful for moral practice as well as for philosophy, a theorist will probably reply that it is unfounded for the simple reason that the charge is all about bad theory. A theorist may argue that this critique does not affect *good* moral theory, because good theory precisely seeks to accommodate the kind of moral judgments that anti-theorists are so keen to protect. A theorist can state, as Robert Louden has put it, that *good* moral theory anchors its normative concerns "in existing moral practices and attitudes, so that the theorist does not suddenly appear from nowhere to 'tell us what to do'."[598]

The theorist can in addition refer to John Rawls' 'reflective equilibrium' as the prototype procedure of normative moral theory, of which the very point is to accommodate a wide range of substantive moral views.[599] This procedure only excludes judgments that violate the basic requirements of morality itself.

A theorist may in addition assert that theory is not merely 'friendly' to and accommodating for existing moral thought, but also makes it more stable. Theory provides the 'why' for the 'that' and on that account can explain why ordinary thought is not merely allowed to exist, but even "morally ought to exist."[600] A theorist holds that this kind of articulation is particularly valuable in times of insecurity and crises. Theory may thus be seen as "ordinary moral thought pressed further", rather than as a threat to it.[601]

The same goes for the charge that normative theory is harmful for philosophy itself. A theorist may argue that normative moral theory does not reduce the content of philosophy to a well-confined set of abstract concepts. Far from it: through procedures such as the 'reflective equilibrium' philosophy is fully in touch with and sensitive to ordinary moral thought, or so the theorist's response could be.

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[598] Louden, *Morality and Moral Theory. A Reappraisal and Reaffirmation*, 136.

[599] Cf. Rawls, John, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 18-19.

[600] Louden, *Morality and Moral Theory. A Reappraisal and Reaffirmation*, 136.

[601] See in this regard for instance: Gibbard, Allan, 'Why Theorize How to Live with Each Other?', *Philosophy and Phenomenological Research* 55, 2 (1995), 37.

For an anti-theorist these replies probably do not go to the heart of their critique either. For one thing, the kind of 'ordinary thought' as it is taken into account by normative moral theory already suggests a high level of reflection. In this regard an anti-theorist could point to Rawls' description of the judgments that his theory aims to accommodate. These are judgements that are typically made under the conditions of the 'original position', which means that all immediate and embedded considerations stemming from a locally situated or personal perspective are excluded.[602] These judgments can hardly be conceived as 'ordinary moral thought', as they must be "duly pruned and adjusted considered judgements".[603]

Also, the theorist's replies do not tackle the anti-theoretical point that theory and hence systematization will impoverish the moral landscape because they distort "situationally bound considerations."[604] According to anti-theorists conceptual loss not only occurs because certain immediate substantive concepts do not survive the critical scrutiny of normative moral theory, but also because such a theory asks from agents to take a reflective point of view of a particular kind, i.e. to step back and detach themselves from their actual commitments. Even if theory would permit certain commitments and relations, these are not seen as required. They are regarded as the mere expressions of subjective preferences of the agents involved and this will change their meaning. For an anti-theorist normative theory by definition reduces the moral richness of practices.[605]

Moreover and related, the theorist's replies do not address the anti-theorist's charge that normative moral theory is harmful for practice because its focus is exclusively on the competences of agents to apply a theory: not on other ways of being and doing that uphold the moral quality of practice.

Next, to the anti-theorist's charge that normative moral theory offers a conceptually mistaken picture of moral conflicts, a theorist can reply that he does not deny that troublesome conflicts between moral values will arise in practices that are guided by theory. A theorist can wholeheartedly admit that, for instance, a normative theory of

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[602] Rawls, *A Theory of Justice*, 17-18.

[603] Ibid.

[604] Hämäläinen, 'Is Moral Theory Harmful in Practice? Relocating Anti-theory in Contemporary Ethics', 546.

[605] Clarke and Simpson, 'Introduction', 23.

political morality will "exclude some ways of life that realize in special ways certain fundamental values".[606] His claim is just that conflicts between moral values are only *apparent* conflicts, meaning that they are soluble from a moral point of view. By this a theorist does not mean to deny that the losses that result deserve our attention, he only means that from a moral point of view these conflicts can exhaustively be resolved and that as a consequence their resolution does not end up in a genuine moral loss or wrongdoing.[607]

This reply will not convince the anti-theorist either. It again falsely suggests that conflicts between values can be treated as conflicting propositions or conflicts of beliefs, which because of the requirement of 'non-contradiction' can be resolved by means of theory. But as in the end moral conflicts are about genuine commitments, according to an anti-theorist they cannot be 'dismantled' or resolved up by the mere intervention of theory.[608] To hold otherwise is to deny the moral facts of life. So, "[w]hy then should moral theorists -Kantians, utilitarians, deontologists, contractarians- look for an underlying harmony and unity behind the facts of moral experience?", the anti-theorist will rhetorically asks.[609]

Finally, to the anti-theorists' critique that normative moral theories are overly hopeful and even dishonest about the moral potential of practice, theorists could offer the following reply. Anti-theorist wrongly have it that to rely on normative moral theory is tantamount to having the naïve belief that in a particular practice everybody will be happy and all interests will be met.[610] Normative moral theory is simply premised on the idea that it makes sense to strive for the realisation of a moral ideal and to shape our social world according to our aspirations. This striving in itself is not to deny that

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[606] Rawls, *Political Liberalism*, 197.

[607] ———, *A Theory of Justice*, 155. See for this kind of reply also: Herman, 'The Practice of Moral Judgment ', 422. Louden even claims that normative moral theories can indeed accommodate for the fact of genuine moral conflicts. However, he does not explain how these genuine conflicts can be reconciled with the principle of non-contradiction that seems operative in his conception of theory. Cf. Louden, *Morality and Moral Theory. A Reappraisal and Reaffirmation*, 131-132.

[608] Williams, 'Liberalism and Loss', 95.

[609] Hampshire, 'Morality and Conflict', 151.

[610] Rawls, *A Theory of Justice*, 85.

the social world evidently depends on the workings of fortune and of evil stepmother nature.[611] But this kind of striving and trust is to be preferred to maintaining the fatalistic stance of the anti-theorists that practice is in essence beyond human control.[612]

For an anti-theorist this reply probably hinges on the fallacy of false alternatives, as it suggests that there is nothing between on the one hand embracing normative moral theory and on the other fatalism about human aspirations. In any case, the theorist's reply is not yet an argument to show that normative moral theory is indeed an adequate instrument to realize moral aspirations. Nor does this reply give us reason to give up on the possibility that there are other, more viable ways to secure moral quality in practice.

What should we make of this reconstruction of the debate between theorists and anti-theorists? Of course, the debate is not settled and we need to continue to explore both views as regard the value of normative moral theory, but I think that the confrontation so far suffices for our purposes. It allows us to safely conclude that the burden of proof regarding the practical role of normative moral theory lies with the theorist. His replies to the anti-theoretical charges do in any case not offer convincing reasons to do rely on normative moral theory in our account for moral quality of adjudication. Rather, we may indeed agree with Hämäläinen that "[i]t is not the anti-theorist who is building her empire on intellectual quicksand. What is really loosely grounded here is the work of the theorist, who thinks that tradition and actual moral conditions can be set aside when looking for the ideal ones."[613]

The next section is a prelude to the second part of the book in which I propose an approach to adjudication that gives primacy to practice rather than to theory.

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[611] ———, *A Theory of Justice*, 76.

[612] Cf. Rawls as quoted in: Weithman, 'John Rawls and the Task of Political Philosophy', 369. See also: Rawls, *A Theory of Justice*, 88.

[613] Hämäläinen, 'Is Moral Theory Harmful in Practice? Relocating Anti-theory in Contemporary Ethics', 543.

4 Justice without rails. A quasi-phenomenological approach

4.1 Three dimensions of justice

Giving up on normative moral theory and hence on the attempt to account for the moral quality of the central institutions in society -adjudication included- may lead to the concern that we open the door to nihilism or scepticism, that is to the idea that 'anything goes' where the quality of these institutions is concerned. Although understandable, there is no ground for this concern.

This section discusses a preliminary and tentative sketch of how we can approach the moral quality of said institutions under the heading of 'justice', without relying on the aspirations of normative theories of political morality. This quasi-phenomenological approach to justice must be seen as an attempt to offer a 'realistic philosophy', one that aims to stay close to the phenomenology (the 'what-they-are-like-ness') of the central institutional practices in society.[614] Only in the second part of the book will I develop the *fragility of rightness* as an elaboration of this approach for the institution of adjudication.

To set the stage it is useful to distinguish between the notions of a 'just person', a 'just state of affairs' and a 'just society as a whole'.[615] These notions are intimately linked. We have seen that normative theories of justice such as those of John Rawls and Martha Nussbaum typically deduce the first two notions from the third. Whether a certain policy, law, social practice or state of affairs is just depends on their compatibility with the principles of justice, i.e. with a description of (an ideal of a) society as a whole. Similarly, a citizen or public official is just in a derivate way, namely to the extent that he complies with said principles.[616] As Rawls has put it, one can be a just person "[..] only by acting on the principles of right and justice as having first priority."[617]

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[614] Cf. Guignon, Charles, 'Williams and the Phenomenological tradition', in *Reading Bernard Williams*, ed. Callcut, Daniel (New York: Routledge, 2009), 166; Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 165.

[615] Cf. Wiggins, David, 'Neo-Aristotelian Reflections on Justice', *Mind* 113, 451 (2004), 487-490.

[616] Cf. Annas, Julia, *The Morality of Happiness* (Oxford: Oxford University Press, 1993), 292.

[617] Rawls, *A Theory of Justice*, 503.

A quasi-phenomenological approach, by contrast, takes the notion of a just person as prior to that of a just state of affairs and of a just society, however without downgrading the importance of the latter.[618] Generally speaking, a just state of affairs is what a just person sees as the situation in which citizens receive their due. To quote David Wiggins: a just person can for instance discern "the need for the act that restores to Peter Peter's proper portion; the need for an act that restores Paul to the condition where he was before he suffered the injury or loss that he suffered [..]."[619] These 'needs' appear to the just person as 'practical necessities', so to say, and if they are satisfied, the situation at hand is just.[620]

As said, giving primacy to practice does not entail giving up on the notion of justice as a virtue of society as a whole. However, compared to normative theories of justice it fundamentally differs both in its form and in its content. In a quasi-phenomenological approach this notion can at most be an inconclusive attempt to discursively express the active understandings of justice as it actually figures in all the 'spheres of justice' that are prominent in society. As we shall see below, precisely because primacy is given to practice such an articulation cannot exhaustively represent the demands of justice, as they exist for all the different and heterogeneous spheres.[621] In a quasi-phenomenological approach justice is "not susceptible to full, finite or a more than partial articulation", as David Wiggins says.[622] Neither will this idea of a just society 'guide' the decision-making of the authoritative officials. In

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[618] The notion of a just person as it is used here draws on Aristotle's account of justice as "complete excellence, only not without qualification but in relation to another person." Cf. Aristotle, 'Nichomachean Ethics', 1129b26-27. See also: Annas, *The Morality of Happiness*, 316.

[619] Wiggins, 'Neo-Aristotelian Reflections on Justice', 489.

[620] Here I follow Bernard Williams in his interpretation of practical necessity. See: Williams, Bernard, 'Practical Necessity', in *Moral Luck: Philosophical Papers 1973-1980* (Cambridge: Cambridge University Press, 1981). 777

[621] In this regard Wiggins states: "It may appear that the fulfilment of this sum of citizenly obligations, expectations and concerns, lacking the formal beauty of some larger configurations in social geometry or the basic structure of a well-ordered society, is nothing very uplifting or magnificent. But it is nothing dispensable either." Wiggins, 'Neo-Aristotelian Reflections on Justice', 490.

[622] Ibid., 486.

understanding their responsibilities they cannot rely on such a viewpoint to determine how to respond to the concrete situations at hand.

4.2 Empty situational justice? On thick and thin concepts

Of course, if the notion of a just person is to have any substantive meaning the predicate 'just' must refer to a set of qualities that enable such a person to recognize what is needed if citizens are to receive their due. These qualities by themselves are not sufficient either, at least not if we want to steer clear of subjectivism or empty situational versions of justice. For these qualities to lead to any kind of moral knowledge we need to relate them in one way or another to the external world.

In order to meet this requirement a quasi-phenomenological approach to justice stresses the importance of the availability of 'thick', or 'entangled' value concepts in public institutional practices, but also in background practices such as family life and education.[623] It is through the internalisation of these concepts that just agents can bring the right concerns to bear on concrete situations.

We saw before that thick concepts characteristically contain considerable descriptive content. Other than thin value concepts such as 'right' and 'good', thick value concepts encompass the conditions of their application to a large(r) degree. Therefore, whether they apply is largely a matter of 'fact', not of choice and as a consequence they can be applied in a relatively direct, immediate way. Thick value concepts, as Bernard Williams has famously put it, are "world-guided".[624] They have a 'contour', a culturally and locally determined elaboration of the central concern that the concept aims to address and that is beyond the control of an individual agent.[625]

In addition to their descriptive content, it is also characteristic for these thick or entangled value concepts that they come with an evaluative dimension. Their application entails a 'pro or con' attitude towards the object so described.[626] If a thick value concept applies, one does not need to separately add an evaluation, nor can this very valuation be 'peeled' off from the description "so as to stand as independently

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[623] See for a description of thick concepts: Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays*, 34-45; Williams, *Ethics and the Limits of Philosophy*, 129, 140.

[624] Williams, *Ethics and the Limits of Philosophy*, 141.

[625] ———, 'Liberalism and Loss', 94.

[626] Cf. Dancy, Jonathan, 'In Defence of Thick Concepts', *Midwest Studies In Philosophy* 20, 1 (1995), 263.

comprehensible."[627] These concepts tell something about the world and at the same time imply a valuation.[628]

At this point it is important to note that the 'world guidedness' of value concepts is not to deny the possibility of disagreement regarding their application. Disagreements about the application of such concepts can and will occur. But what stands out is that such disagreements cannot be resolved by rigorous and abstract reasoning. In case of serious disagreement, at best a detailed and convincing characterisation of the situation at issue may bring an agent to change his view. In the words of McDowell: "[t]he explanatory capacity that certifies the special object of an evaluation as real, that certifies certain responses to them as rational, would need to be exactly as creative and case specific as the capacity to discern these objects themselves."[629] If disagreement nonetheless continues, silence or the acknowledgement of loss and difference will sometimes be the only recourses to 'settle' the matter. In the end the only thing left for a just agent is to say: 'this is how I see it'.[630]

Which thick value concepts a just person brings to bear on a situation will depend on what Michael Walzer has qualified as the particular 'sphere of justice' in which this person operates.[631] In the literature divergent examples are given of thick value concepts, such as cruel, courageous, adulterous, rude, (dis)honest, inconsiderate, loyal, destructive, inelegant, beautiful, lie, vulgar, and gauche.[632] However, for an account of justice we do need more specific institutional value concepts in addition to

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[627] Ibid.

[628] Cf. Williams, *Ethics and the Limits of Philosophy*, 141; Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays*, 37.

[629] McDowell, John, 'Values and Secondary Qualities ', in *Mind, Value and Reality*, ed. McDowell, John (Cambridge US: Harvard University Press 1998), 149.

[630] Not being able to provide an exhaustive explanation for a particular decision can in a quasi-phenomenological approach to justice be seen as an expression of rationality rather than as an indication of a lack of it.

[631] Walzer, Michael, *Spheres of Justice. A Defence of Pluralism and Equality* (Oxford: Oxford University Press, 1983). See for an insightful discussion of how best to understand these 'spheres of justice': Trappenburg, Margot, 'In Defence of Pure Pluralism: Two Readings of Walzer's Spheres of Justice ', *The Journal of Political Philosophy* 8, 3 (2000).

[632] Cf. Williams, *Ethics and the Limits of Philosophy*, 129,140. Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays*, 35.

such 'background' concepts. Which thick concepts play a role will thus depend on which social goods the particular sphere of justice or institutional practice seeks to produce, regulate or guarantee, be it for instance healthcare, fair trial, education or social welfare. These social goods themselves also function as 'thick concepts'. They are descriptive, but in a concrete setting they at the same time suggest a whole range of self-explanatory concerns and rationales and concrete courses for action.[633] What it means for citizens to receive 'their due' in a particular sphere of justice will depend on "what the goods mean, what parts they play, how they are created, and how they are valued, among those same men and women."[634]

What is more, the very qualities that make for a 'just' agent are also 'thick concepts', and these will also depend on the particular sphere of justice that is at stake. The concepts that describe such qualities contain considerable factual content and more or less directly invoke a pro- or con- attitude. For instance, in the practice of health care we may find thick value concepts that refer to qualities of a person, such as 'a quack', 'a butcher', 'irresponsible', 'impertinent', 'sexist', 'discrete' and 'rough'.[635] In the practice of lawyers where legal assistance is the social good to be produced, we may find concepts like 'go-getter', 'shady', 'botching', 'brave', 'convincing' and 'discrete'.[636]As these examples show, such thick concepts are indeed intimately linked to the social good of a particular sphere of justice.

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[633] Oakley, Justin and Cocking, Dean, *Virtue Ethics and Professional Roles* (Cambridge: Cambridge University Press, 2001), 86.

[634] Walzer, Michael, 'Spheres of Justice. An Exchange', *The New York Review of Books*, July 21 (1983).

[635] These concepts are of course intimately linked to the character of health-care, to the kind of relation between a doctor and his patient that is considered desirable.

[636] I have chosen these words because they came up in conversations I had with lawyers about the value concepts they thought to be dominant in their practice. The concepts mentioned refer to the relatively antagonistic and discursive character of being a lawyer, which in turn can be understood through the concept of fair trial as one of the social goods that is produced by the legal professions. Of course, social-juridical-ethical research is needed to establish which thick concepts actually figure in relevant institutional practices.

So, in a quasi-phenomenological approach justice as a state of affairs differs according to context and cannot be reduced to one articulate set of principles.[637] In the end an amalgam of thick values that also include the qualities of actual agents makes up the moral quality of the main institutions in society. It is for this reason that this approach holds that these thick value concepts must be cherished and protected from influences that threaten them.[638] Of course, in this regard it will be far from easy to distinguish between influences that can lead to improvement and progress on the one hand and influences that are disturbing and 'threatening' on the other.[639]

Note that cherishing thick value concepts should emphatically not be confused with a nostalgic longing for a homogeneous and unreflective political order.[640] This not in the least because modern societies are de facto characterized by a high level of self-consciousness and individualism. In such a society, one that is, as Bernard Williams

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[637] So conceived, we can take Rawls' four-stage sequence rather as a formal description of regulatory levels on which different, heterogeneous notions of justice are operative and not so much as an expression of one coherent ideal of justice to be realized on different levels of generality.

[638] Cf. Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 49. One might for instance assess procedural rules that are meant to regulate public institutions on the basis of their 'threatening' potential for value concepts.

[639] For instance, one might criticize the New Public Managerism in the domain of health-care as threatening to shared understandings of what makes this practice good, while at the same time and on the basis of 'local knowledge' holding that cost-benefit analyses that were absent in the past should play a more dominant role. This point is also clearly made by Oakley and Cocking: "[..] where efficiency in one's allocation of health-care resources is a value that results from the application of a plausible notion of justice to health-care practice, then it would be excessive for a doctor to regard his being *governed* by the side-constraint of efficiency as redefining his practice as something other than medicine. Nevertheless, were efficiency -or some other value external to medicine - to become an overriding guiding ideal for a doctor in the way he used his skills, there would be real question about whether this doctor had now ceased to 'practice medicine' [..]". Cf. Oakley and Cocking, *Virtue Ethics and Professional Roles*, 87.

[640] Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 43.

has put it, "self-conscious about its own origins and potentialities, we shall have less temptation to assume that it is a satisfactorily functioning whole [..]."[641]

In this regard we must bear in mind that a focus on thick value concepts and the underlying critique on normative theories of political morality does not boil down to a categorical rejection of 'thinner' concepts, as they figure in abstract principles and rules.[642] Their exact role can, however, neither be a priori determined nor assumed. It depends on the constituents of the particular sphere of justice concerned. For instance, it will among others depend on the level of generality of the regulation, as well as on the kinds of social goods that are at stake in a particular institution. As to the former: the more general and regulatory the task of the institution, the more an appeal to and deployment of general and abstract concepts may be appropriate. On a more concrete level a just state of affairs will to a larger degree be determined by a range of thicker value concepts, concepts that more directly address the concrete concerns and needs of concrete citizens.[643]

Also, in domains in which state-power is most directly exercised, thin concepts may function as valuable instruments for the practice of political legitimation. This is for instance the case for law and adjudication. Precisely because of their potential coercive character they are bound to the requirements of the rule of law, which as a minimum demand generality, publicity and articulateness of the exercise of state power.[644] In these domains thin concepts are of use to publicly defend exercises of state power. But their use is then a way of answering a political need, rather than a

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[641] Ibid., 37.

[642] For instance laid down in a constitution, legislation, rules of policy and codes of professional ethics.

[643] Here I draw on Bernard Williams' proposal for a "kind of ethical federation, with denser considerations being deployed at more local levels, and "thinner", more procedural, notions applying at higher levels [..]." Cf. Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 50.

[644] Cf. Tamanaha, 'A Concise Guide to the Rule of Law', 3.

demand of public rationality itself.[645] In these particular 'spheres of justice' there is a political -not a moral or a necessarily overriding- argument for their use.[646] Nonetheless, having rejected normative theories of political morality, of course the question does arise what remains of political legitimacy within a quasi-phenomenological approach to justice. In any case, within this approach the demand for political legitimacy cannot be met through the concept of a just society as a whole. Justice will not offer each and every citizen the same 'reason' why they should accept the particular burdens of the society they live in. Here I follow Bernard Williams where he states that "we must thus think in terms of a structure (notably in contrast to the aims of traditional ethical theory) of public justification that did not try to justify what it was doing to everybody, or every possible person; it would justify it, so far as possible, within its own ethical constituency."[647] The demand of political legitimacy, if it can be guaranteed at all, can only be honoured in the particular spheres of justice, on a piecemeal and bottom up basis and in an embedded and inherently limited way: through the quality of the features and relations that constitute each sphere.[648] Consequently, in order to fully grasp how political legitimacy might work within a quasi-phenomenological approach to justice we also need to zoom in on these specific spheres.

5 Social critique, moral progress and the (remaining practical) role of philosophy
We should bear in mind that giving up on an articulate viewpoint that grasps all that is morally relevant for determining citizens' legitimate claims, is not tantamount to relinquishing the possibility of social critique or of moral progress of public institutions. Social critique, moral progress and reflection in general do not require

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[645] Cf. Williams, *Ethics and the Limits of Philosophy*, 18;Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 48-49.

[646] Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 48.

[647] Ibid., 49.

[648] See for an illuminating critique on abstract notions of reciprocity and a proposal for a more embedded way of understanding this principle: Pessers, D.W.J.M., 'Liefde, Wederkerigheid en Recht. Een Interdisciplinair Onderzoek naar het Wederkerigheidsbeginsel', (Amsterdam: University of Amsterdam, 1999).

(the form of) normative moral theory.[649] Irrationalities within public institutions can for instance be detected by means of the qualities of agents as well as by invoking thick ethical values concepts. However, compared to practices that are guided by a normative moral theory such irrationalities are understood differently. They are primarily understood as a form of self-deception, self-rationalisation or social deceit. Their identification demands an inquiry that is rather detailed and substantive, and schematic considerations based on philosophical theory will not suffice for this purpose. It requires a 'stepping forward', an understanding of the conditions under which the perception or judgment has come about. The 'stepping back' that normative moral theories imply certainly does not fit here.[650] Michael Walzer has put this as follows: "[..] critics commonly don't, and certainly needn't, invent the principles they apply; they don't have to step outside the world they ordinarily inhabit. They appeal to internal principles, already known, comprehensible to, somehow remembered by, the people they hope to convince."[651]

So, a quasi-phenomenological approach understands social critique as well as moral progress as expression of said thick value concepts and of the moral sensibilities of the agents participating in public institutional practices, and not of the normative force of an 'external' and detached all-encompassing perspective. This implies that in case of social conflicts one's opponents are not to be treated as 'bad reasoners' or as citizens that are unreasonable or simply mistaken. Such conflicts are to be understood as conflicts between 'opponents', conflicts that potentially lead to political decisions that come with genuine 'losers' and hence also lead to reasonable resentment on the part of the losers.[652]

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[649] Bernard Williams has put this point as follows: "What we are left with, if we reject foundationalism, is not an inactive or functionalist conservatism that has to take ethical ideas as they stand." Cf. Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 37. He thus disagrees with Robert. B. Louden who holds that moral theories are necessary for effective criticism. Cf. Louden, *Morality and Moral Theory. A Reappraisal and Reaffirmation*, 148.

[650] Cf. McDowell, 'Values and Secondary Qualities ', 149.

[651] Walzer, 'Spheres of Justice. An Exchange'.

[652] Cf. Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 13.

Finally, a quasi-phenomenological does assign a practical role to philosophy. Philosophy as a discipline that is, if anything, discursive, explicit and analytical can play a role in developing and explaining shared understandings of justice that are present in different spheres of society. Philosophy can offer "a nucleus of ideas or notions that at once reflect and enlighten practical reflection."[653] By these articulations it can help to conceptually 'anchor' these practices and make them more stable. Also, philosophy can assist in getting the right problems on the table. It can offer conceptual tools "to help particular people understand and define, and thus being able to deal with, certain problems."[654] For instance, philosophy can try to further our understanding of certain recurring social conflicts. As to its more critical role philosophy can, in the words of Raymond Geuss, "demonstrate the dependence of certain beliefs or desires on the continued existence of particular configurations of power that would otherwise remain hidden."[655]

Actual *theories* of justice as specific creations of philosophy are also still of (practical) value, but not as exhaustive normative viewpoints and not in the role they assign to themselves in relation to practice. These theories, the Capability Approach of Martha Nussbaum among them, can offer vocabularies and procedures through which certain lines of thought can be further pursued and explored. As such they are in themselves valuable reflective practices.

Also, precisely because of their abstract and systematic character theories of political morality can through what we may call 'the effect of estrangement' shed new light on -for instance- certain widely accepted doctrines and interpretations that play a role in institutional practices.[656] Because of this effect of estrangement these theories may cause agents of justice to 'perceive' differently and get new insights. However and again, this is not the same as to assign any normative task to these theories. Neither should they be considered to offer an adequate, actual understanding of a political

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[653] Wiggins, 'Neo-Aristotelian Reflections on Justice', 486.

[654] Geuss, *Philosophy and Real Politics*, 44.

[655] Ibid., 55. See for this point also: Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 37.

[656] Cf. Nussbaum, 'Why Practice Needs Ethical Theory. Particularism, Principles and Bad Behaviour'. See also: Hämäläinen, 'Is Moral Theory Harmful in Practice? Relocating Anti-theory in Contemporary Ethics'.

order. In the words of Hämäläinen: "we should resist the temptation to consider theories as pictures, even temporary pictures, of reality."[657]

In any case and as will probably be clear by now, within a quasi-phenomenological approach to justice philosophy does not necessarily bring 'good news' about society and its central public institutions where their moral potential is concerned. At most it offers what may be called 'realistic hope': moral aspirations can be accounted for, but at the same time a quasi-phenomenological approach acknowledges that the nature of practice both inherently and contingently limits the extent to which these aspirations can be realized. This approach does not obscure the troublesome character of public institutional practices as normative moral philosophy often does. It does not turn a blind eye to the fact that necessity and change can actually quash, annul or render obsolete what we are most committed to in our political order. The aim of a quasi-phenomenological approach is to enable citizens and officials "to grasp the truth and not perish from it" where the moral quality and potential of their practices is concerned.[658]

6 Conclusion

The last four chapters offered an introduction to and an internal criticism on (specific) normative theories of justice and their claims and aspirations as part of our assessment of the validity of a stabilizing approach to adjudication. The first line of argument in this chapter presented an anti-theoretical and thus external criticism on normative moral theory in general. The idea is that normative theories of justice in general and those of John Rawls and Martha Nussbaum as species by definition cannot live up to their aspirations. In addition it has been argued that we have serious reasons to hold that normative theory is an inefficient, harmful and evasive way of trying to secure moral quality in practice and to understand the troublesome phenomenology of institutional practices. On the basis of both this internal and external criticism we concluded that a stabilizing approach to adjudication is not tenable, precisely because of its reliance on normative moral theory in accounting for the moral quality of adjudication. The second line of argument in this chapter boiled down to a proposal

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[657] Hämäläinen, 'Is Moral Theory Harmful in Practice? Relocating Anti-theory in Contemporary Ethics', 548.

[658] Williams, 'The Women of Trachis. Fiction, Pessimism, Ethics', 52.

for an alternative, quasi-phenomenological approach to justice, one that gives primacy to practice.

In this approach a just state of affairs is a derivative of the notion of a just person and it also depends on the presence of thick value concepts. Justice as a state of affairs in which citizens receive their due will inherently have different meanings in different 'spheres of justice', because these domains are constituted by 'distinctive moral experiences'. These experiences will among others depend on the level of generality of the regulations at issue, as well as on the kinds of social goods or interests at stake and the extent to which a direct exercise of state-power is involved.[659]

In a quasi-phenomenological only limited explication of the notion of a just society is possible, as this notion hinges on the actual spheres of justice which cannot be understood as the practical implications of abstract principles. This has consequences for how to satisfy the demand of political legitimacy for the workings of concrete public institutions: this must among others be done on a bottom up and piece-meal basis. In addition, it was established that a quasi-phenomenological approach to justice can account for moral progress and social critique, and also for some practical tasks of philosophy -theory included.

In the next part of this book I will present the *fragility of rightness* as a specification of a quasi-phenomenological approach to justice for one sphere of justice, i.e. for the domain of adjudication.

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[659] Hawthorn, ed., *Bernard Williams. In the Beginning was the Deed. Realism and Moralism in Political Argument*, 49.