Ronald Dworkin articulates a view of natural law that is reflected in how judges apply the law to decide cases. This view, he argues, is different from the traditional metaphysical view of natural law, which says that what the law is must be determined by what the law ought to be. He argues that his view of natural law insists that the content of law may sometimes depend on the correct answer to some moral questions. For Dworkin, an accurate account of the nature of law involves an account of the workings of a legal system, which is reflected in how judges decide cases. Hence, his account of natural law is manifested in how judges decide cases, especially difficult cases. This view says that judges should decide hard cases by interpreting the political structure of their community. This requires them to find the best justification for their decision in principles of political morality, which provide the basis for the political and legal structure as a coherent set of laws and practices, including constitutional rules and the private laws of contract and tort. He argues that when a judge is faced with a case, the judge will have to ask questions that will help him to provide the best justification for his decision in a way that justifies the whole system. To account for what he calls full justification, he invents a mythical judge, Hercules, who has superhuman abilities to contemplate a justification of the whole system. In reality, he argues that judges can provide only partial justification for specific decisions in the context of the system.

Obviously, Dworkin rejects the idea that the process of adjudication is a mechanical process of applying the law to a set of facts: it is an interpretative process. Dworkin argues that his theory of adjudication can be appreciated by understanding how someone would interpret a story in a chain novel. In the interpretation of law, the judge must make creative decisions, but those decisions also have to be coherent with the decisions that have been made before. The decisions that represent the best interpretation must present the system in the best political light. Two factors affect the judge’s decision: one has to do with interpretative fit, and the judge must establish a threshold for himself; the other is the substantive ideals of political morality and justice.
These factors allow judges to be influenced by their natural tendencies—beliefs and circumstances—but at the same time allow their decisions to be coherent with the system or to fit the data being interpreted. In this regard, two judges may reach different interpretations because they have different views how things fit together. But there is a common factor that helps the judge: it is the issue of how to substantively promote the political moral ideals of the society with respect to rights and justice. This is a fundamental goal that all judges are trying to achieve in the relative circumstances of a case and within the context of the legal system.

Dworkin examines the issue of whether judges actually decide cases this way, and if they do whether this represents the right way to decide cases. The argument against this view is a standard argument against natural law theory. It is the argument from moral skepticism: that to rely on this model of interpretation means that judges will come up with different best decisions and there is no way to determine which of the best decisions is the objectively correct one. He distinguishes between external and internal skepticism in order to examine the kind of skepticism one adopts. Internal skepticism denies truth in the matter of interpretation but does not deny that good arguments may make one better than another. External skepticism will argue that whatever is considered the best interpretation is actually a subjective view. External skepticism is plausible only if we accept that only demonstrable propositions are true, but this idea of demonstrability is false. One can be an internal skeptic and still be able to provide arguments for a particular decision. Dworkin agrees that skepticism does threaten naturalism, in the sense that it implies that we will have to give up important human matters regarding value. But it is difficult to give them up. However, the more important issue is whether it is fair to make the decision of one judge the final one since we cannot arrive at an objectively true decision.

Dworkin addresses this issue by examining what people consider to be a fairer approach, which is conventionalism. This view says judges are allowed by convention to make and apply laws when none exists. This is better than Dworkin’s view because judges are allowed to make laws and in Dworkin’s view judges have power to assign rights that have never been legally sanctioned. Dworkin argues that these two views are similar with respect to easy cases. In hard cases, the situation is also similar because there is no existing law. However, some may argue that in difficult cases, judges may make outrageous decisions based on their convictions. If this happens, this is a problem with people in general and there is nothing in a system to
guarantee that people will not do outrageous things. But naturalism seems likely to give credence to the rights that people accept on the basis of political morality. He examines the argument by instrumentalism, that law should be an instrument of looking into the future to make society better irrespective of the past decisions important to naturalism. The instrumentalist argues that naturalism suggests that judges should not offend past decisions if such decisions are bad. Dworkin responds by saying that the issue here is broader than the original issue about the best decision and interpretation. It is not the function of a judge to improve the political order in a way that is against the accepted political morality of a society. A naturalist must accept a political order as the source of rights and his moral sense must derive from such order. Naturalism accepts the ideal that there is a perfectly just and effective system and the ideal that there is political will and a sense of justice of the community.

As you read Dworkin, consider and reflect on the following questions: What is the view of naturalism espoused by Dworkin? How is Dworkin’s view different from the traditional natural law theory? How is the process of adjudication an interpretative process and not a mechanical process? Why is skepticism not a substantial threat to naturalism? How is naturalism better than instrumentalism and conventionalism?

1. **What Is Naturalism?**

Everyone likes categories, and legal philosophers; like them very much. So we spend a good deal of time, not all of it profitably, labeling ourselves and the theories of law we defend. One label, however is particularly dreaded: no one wants to be called natural lawyer. Natural law insists that what this law is depends in some way on what the law should be. This seems metaphysical or at least vaguely religious. In any case it seems plainly wrong. If some theory of law is shown to be natural law theory, therefore, people can be excused if they do not attend to it much further.

In the past several years, I have tried to defend a theory about how judges should decide cases that some critics (though not all) say is a natural law theory and should be rejected for that reason. I have of course made the pious and familiar objection to this charge, that it is better to look at theories

than labels. But since labels are so much a part of our common intellectual life it is almost as silly to flee as to hurl them. If the crude description of natural law I just gave is correct, that any theory which makes the content of law sometimes depend on the correct answer to some moral question is natural law theory, then I am guilty of natural law. I am not now interested, I should add, in whether this crude characterization is historically correct, or whether it succeeds in distinguishing natural law from positivist theories of law. My present concern is rather this. Suppose this is natural law. What in the world is wrong with it?

I shall start by giving the picture of adjudication I want to defend a name, and it is a name which accepts the crude characterization. I shall call this picture naturalism. According to naturalism, judges should decide hard cases by interpreting the political structure of their community in the following, perhaps special way: by trying to find the best justification they can find, in principles of political morality, for the structure as a whole, from the most profound constitutional rules and arrangements to the details of, for example, the private law of tort or contract. Suppose the question arises for the first time, for example, whether and in what circumstances careless drivers are liable, not only for physical injuries to those whom they run down, but also for any emotional damage suffered by relatives of the victim who are watching. According to naturalism, judges should then ask the following questions of the history (including the contemporary history) of their political structure. Does the best possible justification of that history suppose a principle according to which people who are injured emotionally in this way have a right to recover damages in court? If so, what, more precisely, is that principle? Does it entail, for example, that only immediate relatives of the person physically injured have that right? Or only relatives on the scene of the accident, who might themselves have suffered physical damage?

Of course a judge who is faced with these questions in an actual case cannot undertake anything like a full justification of all parts of the constitutional arrangement, statutory system and judicial precedents that make up his "law." I had to invent a mythical judge, called Hercules, with superhuman powers in order even to contemplate what a full justification of the entire system would be like.¹ Real judges can attempt only what we might call a partial justification of the law. They can try to justify, under some set of principles, those parts of the legal background which seem to them immediately relevant, like, for example, the prior judicial decisions about recovery for various sorts of damage in automobile accidents. Nevertheless it is useful to
describe this as a partial justification—as a part of what Hercules himself would do—in order to emphasize that, according to this picture, a judge should regard the law he mines and studies as embedded in a much larger system, so that it is always relevant for him to expand his investigation by asking whether the conclusions he reaches are consistent with what he would have discovered had his study been wider.

It is obvious why this theory of adjudication invites the charge of natural law. It makes each judge’s decision about the burden of past law depend on his judgment about the best political justification of that law, and this is of course matter of political morality. Before I consider whether this provides a fatal defect in the theory, however, I must try to show how the theory might work in practice. It may help to look beyond law to other enterprises in which participants extend a discipline into the future by reexamining its past. This process is in fact characteristic of the general activity we call interpretation, which has a large place in literary criticism, history, philosophy and many other activities. Indeed, the picture of adjudication I have just sketched draws on a sense of what interpretation is like in these various activities, and I shall try to explicate the picture through an analogy to literary interpretation. I shall, however, pursue that analogy in a special context designed to minimize some of the evident differences between law and literature, and so make the comparison more illuminating.

Naturalism is a theory of adjudication not of the interpretation of novels. But naturalism supposes that common law adjudication is a chain enterprise sharing many of the features of the story we invented. According to naturalism, a judge should decide fresh cases in the spirit of a novelist in the chain writing a fresh chapter. The judge must make creative decisions, but must try to make these decisions “going on as before” rather than by starting in a new direction as if writing on a clean slate. He must read through (or have some good idea through his legal training and experience) what other judges in the past have written, not simply to discover what these other judges have said, or their state of mind when they said it, but to reach an opinion about what they have collectively done, in the way that each of our novelists formed an opinion about the collective novel so far written. Of course, the best interpretation of past judicial decisions is the interpretation that shows these in the best light, not aesthetically but politically, as coming as close to the correct ideals of a just legal system as possible. Judges in the chain of law share with the
chain novelists the imperative of interpretation, but they bring different standards of success—political rather than aesthetic—to bear on that enterprise.

...
tacit conception of that “fit” is, and of how well a particular interpretation must fit the record of judicial and other legal decisions in order to count as acceptable.

This helps us to explain why two naturalist judges might reach different interpretations of past judicial decisions about accidents, for example. They might hold different conceptions of “fit” or “best fit,” so that, for instance, one thinks that an interpretation provides an acceptable fit only if it is supported by the opinions of judges in prior cases, while the other thinks it is sufficient, to satisfy the dimension of fit, that an interpretation fit the actual decisions these judges reached even if it finds no echo in their opinions. This difference might be enough to explain, for example, why one judge could accept an “economic” interpretation of the accident cases—that the point of negligence law is to reduce the overall social costs of accidents—while another judge, who also found that interpretation politically congenial, would feel bound by his beliefs about the requirement of fit to reject it.

Any naturalist judge’s working approach to interpretation will recognize this distinction between two “dimensions” of interpretations of the prior law, and so we might think of such a theory as falling into two parts. One part refines and develops the idea that an interpretation must fit the data it interprets. This part takes up positions on questions like the following. How many decisions (roughly) can an interpretation set aside as mistakes, and still count as an interpretation of the string of decisions that includes those “mistakes?” How far is an interpretation better if it is more consistent with later rather than earlier past decisions? How far and in what way must a good interpretation fit the opinions judges write as well as the decisions they make? How far must it take account of popular morality contemporary with the decisions it offers to interpret? A second part of any judge’s tacit theory of interpretation, however, will be quite independent of these “formal” issues. It will contain the substantive ideals of political morality on which he relies in deciding whether any putative interpretation is to be preferred because it shows legal practice to be better as a matter of substantive justice. Of course, if any working approach to interpretation has these two parts, then it must also have principles that combine or adjudicate between them.

This account of the main structure of a working theory of interpretation has heuristic appeal. It provides judges, and others who interpret the law, with a model they might use in identifying the approach they have been
using, and self-consciously to inspect and improve that model. A thoughtful judge might establish for himself, for example, a rough “threshold” of fit which any interpretation of data must meet in order to be “acceptable” on the dimension of fit, and then suppose that if more than one interpretation of some part of the law meets this threshold, the choice among these should be made, not through further and more precise comparisons between the two along that dimension, but by choosing the interpretation which is “substantively” better, that is, which better promotes the political ideals he thinks correct. Such a judge might say, for example, that since both the foreseeability and the area-of-physical-risk interpretations rise above the threshold of fit with the emotional damage cases I mentioned earlier, foreseeability is better as an interpretation because it better accords with the “natural” rights of people injured in accidents.

Let me recapitulate. Interpretation is not a mechanical process. Nevertheless, judges can form working styles of interpretation, adequate for routine cases, and ready for refinement when cases are not routine. These working styles will include what I called formal features. They will set out, impressionistically, an account of fit, and may characterize a threshold of fit an interpretation must achieve in order to be eligible. But they will also contain a substantive part, formed from the judge’s background political morality, or rather that part of his background morality which has become articulate in the course of his career. Sometimes this heuristic distinction between fit and substantive justice, as dimensions of a successful interpretation, will itself seem problematic, and a judge will be forced to elaborate that distinction by reflecting further on the full set of the substantive and procedural political rights of citizens a just legal system must respect and serve. In this way any truly hard case develops as well as engages a judge’s style of adjudication.

2. IS IT DELUSION?

I have been describing naturalism as a theory about how judges should decide cases. It is of course a further question whether American (or any other) judges actually do decide cases that way. I shall not pursue that further question now. Instead, I want to consider certain arguments that I expect will be made against naturalism simply as a recommendation. In fact, many of the classical objections to “natural law” theories are objections to such theo-
ries as models for, rather than descriptions of, judicial practice. I shall begin with what might be called the skeptical attack.

I put my description of naturalism in what might be called a subjective mode. I described the question which, according to naturalism, judges should put to themselves and answer from their own convictions. Someone is bound to object that, although each judge can answer these questions for himself, different judges will give different answers, and no single answer can be said to be objectively right. “There are as many different ‘best’ interpretations as there are interpreters,” he will say, “because no one can offer any argument in favor of one interpretation over another, except that it strikes him as the best, and it will strike some other interpreter as the worst. No doubt judges (as well as many other people) would deny this. They think their opinions can have some objective standing, that they can be either true or false. But this is delusion merely.”

What response can naturalism, as I have described it, make to this skeptical challenge? We must begin by asking what kind of skepticism is in play. I have in mind a distinction which, once again, might be easier to state if we return to a literary analogy. Suppose we are studying Hamlet and the question is put by some critic whether, before the play begins, Hamlet and Ophelia have been lovers. This is a question of interpretation, and two critics who disagree might present arguments trying to show why the play is, all things considered, more valuable as a work of art on one or the other understanding about Hamlet and Ophelia. But plainly a third position is possible. Someone might argue that it makes no difference to the importance or value of the play which of these assumptions is made about the lovers, because the play’s importance lies in a humanistic vision of life and fate, not in any detail of plot or character whose reading would be affected by either assumption. This third position argues that the right answer to this particular question of interpretation is only that there is no right answer; that there is no “best” interpretation of the sexual relationship between Hamlet and Ophelia, only “different” interpretations, because neither interpretation would make the play more or less valuable as a work of art. This might strike you (it does me) as exactly the right position to take on this particular issue. It is, in a sense, a skeptical position, because it denies “truth” both to the proposition that Hamlet slept with Ophelia, and to the apparently contrary proposition that he did not. But if this is skepticism, it is what [we] might call internal skepticism. It does not challenge the idea that good arguments can in principle be found for one interpretation of Hamlet rather than another. On the
contrary it relies on an interpretive argument—that the value of the play lies in a dimension that does not intersect the sexual question—in order to reach its “skeptical” position on that question.

Contrast the position of someone who says that no one interpretation of any work of art could ever succeed in showing it to be either really better or really worse, because there is not and cannot be any such thing as “value” in art at all. He means that there is something very wrong with the enterprise of interpretation (at least as I have described it) as a whole, not simply with particular issues or arguments within it. Of course he may have arguments for his position, or think he has; but these will not be arguments that, like the arguments of the internal skeptic, explicitly assume a positive theory of the value of art in general or of a particular work of art. They will be a priori, philosophical arguments attempting to show that the very idea of value in art is a deep mistake, that people who say they find a work of art “good” or “valuable” are not describing any objective property, but only expressing their own subjective reaction. This is external skepticism about art, and about interpretation in art.

If a lawyer says that no one interpretation of a legal record can be “objectively” the correct interpretation, he might have external skepticism in mind. He might mean that if two judges disagree about the “correct” interpretation of the emotional damages cases, because they hold different theories of what a just law of negligence would be like, their disagreement is for that reason alone merely “subjective,” and neither side can be “objectively” right. I cannot consider, in this essay, the various arguments that philosophers have offered for external skepticism about political morality. The best of these arguments rely on a general thesis of philosophy that might be called the “demonstrability hypothesis.” This holds that no proposition can be true unless the means exist, at least in principle, to demonstrate its truth through arguments to every one who understands the language and is rational. If the demonstrability hypothesis is correct, the external skepticism is right about a great many human enterprises and activities; perhaps about all of them, including the activities we call scientific. I know of no good reason to accept the demonstrability hypothesis (it is at least an embarrassment that this hypothesis cannot itself be demonstrated in the sense if requires) and I am not myself an external skeptic. But rather than pursue the question of the demonstrability hypothesis, I shall change the subject.

Suppose you are an external skeptic about justice and other aspect of political morality. What follows about the question of how judges should
decide cases? About whether naturalism is better than other (more conservative or more radical) theories of adjudication? You might think it follow that you should take no further interest in these questions at all. If so, I have some sympathy with your view. After all, you believe, on what you take to be impressive philosophical grounds, that no way of deciding cases at law can really be thought to be any better than any other, and that no way of interpreting legal practice can be preferred to any other on rational grounds. The “correct” theory what judges should do is only a matter of what judges feel like doing, or of what they believe will advance political causes to which they happen to be drawn. The “correct” interpretation of legal practice is only a matter of reading legal history so that it appeals to you, or so that you can use it in your own political interests. . . .

External skepticism is not a position within an enterprise, but about an enterprise. It does not tell us to stop making the kinds of arguments we are disposed to make and accept and act on within morality or politics, but only to change our beliefs about what we are doing when we act this way. So external skeptics about political morality will still have opinions and make arguments about justice; they will simply understand, in their philosophical moments, that when they do this they are not discovering timeless and objective truths. . . .

But this does not itself provide any argument in favor of other opinions about the best interpretation. In particular, it does not provide any argument in favor of the internally skeptical opinion that no interpretation of the accident cases is best.

Of course your external skepticism leaves you free to take up that internally skeptical position if you believe you have good internal arguments for it. Suppose you are trying to decide whether the best interpretation of the emotional damage cases lies in the principle that people in the area of physical risk may recover for emotional damage, or the broader principle that anyone whose emotional damage was foreseeable may recover. After the most diligent search and reflection asking yourself exactly the questions naturalism poses, you may find that the case for neither of these interpretations seems to you any stronger than the case for the other. I think this is very unlikely, but that is beside the present point, which is only that it is possible. You would be internally skeptical, in this way, about any uniquely “correct” interpretation of this group of cases; but you would have supplied an affirmative argument, beginning in your naturalistic theory, for that internally skeptical conclusion. It would not have mattered whether you were an exter-
nal skeptic, who nevertheless “played the game” as a naturalist, or an external “believer” who thought that naturalism was stitched into the fabric of the universe. You would have reached the same internally skeptical conclusion, on these assumed beliefs and facts, in either case.

What is, then, the threat that external skepticism poses to naturalism? It is potentially very threatening indeed, not only to naturalism, but to all its rival theories of adjudication as well. It may persuade you to try to have nothing to do with morality or legal theory at all, though I do not think you will succeed in giving up these immensely important human activities. If this very great threat fails (as it seems to have failed for almost all external skeptics) then no influence remains. For in whatever spirit you do enter any of these enterprises—however firmly your fingers may be crossed—the full range of positions within the enterprise is open to you on equal terms. If you end in some internally skeptical position of some sort, this will be because of the internal power of the arguments that drove you there, not because of your external skeptical credentials.

We must now consider another possibility. The skeptical attack upon naturalism may in fact consist, not in the external skepticism I have been discussing, but in some global form of internal skepticism. I just conceded the possibility that we might find reason for internal skepticism about the best interpretation of some particular body of law. Suppose we had reasons to be internally skeptical about the best interpretation of any and all parts of the law? It is hard to imagine the plausible arguments that would bring us to that conclusion, but not hard to imagine how someone with bizarre views might be brought to it. Suppose one holds that all morality rests on God’s will, and had just decided that there is no God. Or he believes that only spontaneous and unreflective decisions can have moral value, and that no judicial decision can either be spontaneous or encourage spontaneity. These would be arguments not rejecting the idea or sense of morality, as in the case of external skepticism, but employing what the author takes to be the best conception of morality in service of a wholesale internally skeptical position. If this position were in fact the right view to take up about political morality, then it would always be wrong to suppose that one interpretation of past judicial decisions was better than another, at least in cases when both passed the threshold test of fit. Naturalism would therefore be a silly theory to recommend to judges. So the threat of [internal] skepticism, it materializes, is in fact much greater than the threat of external skepticism. But (as the examples I chose may have suggested) I cannot think of any plausible arguments
for global internal skepticism about political morality.

Of course, nothing in this short discussion disputes the claim, which is plainly true, that different judges hold different political moralities, and will therefore disagree about the best justification of the past. Or the claim, equally true, that there will be no way for any side in such disagreements to prove that it is right and its opponents wrong. The demonstrability thesis (as I said) argues from these undeniable facts to general external skepticism. But even if we reject that thesis, as I do, the bare fact of disagreement may be thought to support an independent challenge of naturalism, which does not depend on either external or internal skepticism. For it may be said that whether or not there is an objectively right answer to the question of justification, it is unfair that the answer of one judge be accepted as final when he has no way to prove, as against those who disagree, that his position is better. This is part of the argument from democracy to which we must now turn.

3. Is It Undemocratic?

So if we are to reject naturalism, in favor of some other positive theory of adjudication, this cannot be by virtue of any general appeal to external skepticism as a philosophical doctrine. We need arguments of substantive political morality showing why naturalism is unwise or unjust. In the remaining sections of the essay I shall consider certain arguments, that I have either heard or invented, to that effect. Of course arguments against naturalism must compare it, unfavorably, with some other theory, and arguments that might be effective in the context of one such comparison would be self-defeating in another.

I shall consider, first, the arguments that might be made against naturalism from the standpoint of what I believe is a more positivist theory of adjudication, though nothing turns on whether this theory is properly called positivism. Someone might propose, as an alternative to naturalism, that judges should decide cases in the following way. First, they should identify the persons or institutions which are authorized to make law by the social conventions of their community. Next, they should check the record of history to see whether any such persons or institutions have laid down a rule of law whose language unambiguously covers the case at hand. If so, they should decide that case by applying that rule. If not—if history shows that no rule has been laid down deciding the case either way—then they should create the best rule for the future, and apply it retrospectively. The rule they thus create would then become, for later judges, part of the record endorsed by
convention, so that later judges facing the same issue could then find, in that
decision, language settling the matter for them. We might call this theory of
adjudication “conventionalism.”

Some people are drawn to conventionalism over naturalism, because
they think the former is more democratic. It argues that people only have the
rights, in court, that legislators and judges, whom convention recognizes to
have legislative power, have already decided to give them. Naturalism, on
the other hand, assigns judges the power to draw from judicial history rights
that no official institution has ever sanctioned before, and to do so on no
stronger argument than that the past is seen in a better light, according to the
conviction of the judges, if these rights are presupposed. This seems the
antithesis of what democracy requires.

But this argument mistakes the cases in which a conventionalist and a
naturalist are likely to disagree. Conventionalist judges can dispose of cases
at the first stage, by copying the decisions already made by elected officials,
only in those cases in which some statute exactly in point unambiguously dic-
tates a particular result. Any conscientious naturalist is very likely to make
exactly the same decisions in those “simple” cases, so conventionalism can-
not be more democratic because it decides these differently. The two styles of
adjudication will normally recommend different decisions only when some
fresh judicial judgment is required which goes beyond what the legislature
has unarguably said, either because the statute in play is open to different
interpretations, or because no particular statute is in play at all. But in these
“hard” cases the deference between the two theories of adjudication cannot be
that one defers to the legislature’s judgment while the other challenges that
judgment. Because, by hypothesis, there is no legislative judgment that can
be treated in either of these ways. Conventionalism argues that the judge
must, in these “hard” cases, choose the rule of decision which best promotes
the good society as he conceives it. It is hardly more democratic for judges to
rely on their own convictions about the best design of the future than to rely
instead on their convictions about the best interpretation of the past.

So the argument from democracy in favor of conventionalism over natu-
ralism seems to come to nothing. Be we should consider one possible coun-
terargument. I have been assuming that conventionalism and naturalism will
designate the same cases as “easy,” that is, as cases in which no fresh judg-
ment is required by the judge. But perhaps a naturalist has more room than a
conventionalist to deny that an apparently “easy” case really is. Consider the
following example. Since naturalism encourages a judge to rely on his own
convictions about which interpretation shows the past in the best light, it permits outrageous political convictions to generate outrageous judicial decisions. Suppose a naturalist judge believes that majority will is tyranny. He believes that our political institutions should be arranged so that statutes are enforced only when they have been enacted by a two-thirds vote. He acknowledges that he cannot apply this principle unless it provides an acceptable fit with past practice, but he sets the threshold of fit low enough, in perfect good faith, so as to be able conscientiously to claim that all counterexamples (all cases in which statutes passed by a bare majority have been enforced by the courts) are “mistakes.”

This is no doubt possible. Nothing in the design of naturalism insures that a judge with silly or mad opinions will not be appointed; but nothing in the design of conventionalism insures that either: and conventionalism will not prevent him from reaching preposterous decisions once appointed. A conventionalist judge needs a concept of convention. He must decide, for example, whether it is a convention of our society that the Constitution should be followed, and nothing in the structure of conventionalism can insure that a judge will in fact reach the correct answer to that question. No theory of adjudication can guarantee that only sensible decisions will be reached by judges who embrace that theory. We can protect ourselves from madness or gross stupidity only by independent procedures governing how judges are to be appointed, how their decisions may be appealed and reversed, and how they may be removed from of office if this should appear necessary.

But it may now be said that naturalism would encourage anti-democratic decisions from judges who hold, not mad, but plausible and even attractive political convictions, and who deploy perfectly sensible theories about how much of the past an interpretation must fit. For naturalism leaves no doctrine or practice immune from reexamination. We may use an earlier example as an illustration. Suppose a firm line of cases has rejected the idea that clients may sue lawyers who are negligent. Conventionalism is then committed (so it might be said) to continuing that doctrine until it is reversed by legislation, which seems the democratic solution. But naturalism encourages judges to put this line of cases in a wider context, and ask whether the rule refusing recovery against negligent lawyers would not itself be rejected by the best justification of the rest of the law, which allows recovery for negligent injury of almost every other kind. So a naturalist might be led to overrule these cases, which a conventionalist would leave for the legislature to review.
So both in the case of precedent and legislation a competent naturalist judge might find certain cases hard, and amenable to the command of imaginative reinterpretation, which a conventionalist must concede to be easy even when the obvious answer is unattractive. So perhaps naturalism would sometimes produce “novel” decisions by sensible judges that conventionalism would discourage. But is it right to say that naturalism is for this reason less “democratic.” A minimally competent naturalist judge would begin his argument by recognizing, indeed, insisting, that our political system is a democracy; he would continue by arguing that democracy, properly understood, is best served by a coherent rather than an unprincipled private law of negligence, and by an institution of legislation that is sensitive rather than obdurate to changes in popular morality. So the disagreement between naturalism and conventionalism about which cases are really “easy” is not a disagreement between those who oppose and those who respect democracy; it is rather the more familiar disagreement about what democracy really is. When the disagreement is seen in this light, it is far from apparent that the naturalist has the worst of the argument. In the next section, I shall argue that naturalism respects, better than its rivals, a right that has seemed to many people crucial to the idea of democracy, which is the right each person has to be treated, by his government, as an equal.

4. IS IT CRAZY?

We must turn now to the arguments that might be made against naturalism, not from the standpoint of conventionalism, but from the different direction of a more radical theory I shall call instrumentalism. This theory encourages judges always to look to the future: to try to make the community as good and wise and just a community as it can be, with no essential regard to what it has been until now. Of course, instrumentalist judges will differ, among themselves, about the correct model of the good community. Some will define this in almost exclusively economic terms. They will think that a rich community is for that reason a good community. Others will take a more utilitarian line, and emphasize the importance of personal and political rights, and will therefore provide, in their account of the good society, that certain fundamental interests of individuals like liberty of conscience or a decent standard of living, be respected at the cost of general wealth or average happiness.

An instrumentalist judge will see himself or herself as an officer of government charged with contributing to the good society according to his or
her conception of what that is. Of course, a sensible instrumentalist judge will acknowledge the importance of institutional factors as either an obstacle or opportunity in this enterprise. He will understand, in particular, that the rules he fashions must work together with the rules provided by other institutions and other officials, so that he is constrained by what we might call consistency in strategy. If the legislature and other judges have laid down rules in the past that he is powerless to overrule, for example, he must not create rules of his own which, operating alongside those established rules, would produce chaos. For that would make the community worse not better off through his efforts. But instrumentalism denies that judges should be constrained by the past in any less pragmatic way than that. It denies, in particular, that they should also seek consistency in principle, by making their decisions conform to the best interpretation, as the naturalist conceives this, of the past. Naturalism insists that the past should be allowed to cast a shadow over the future beyond the pragmatic requirements of strategy. Instrumentalism condemns this as irrational.

If we want to sustain naturalism as against instrumentalism, we must argue that the fact that a given principle figures in the best justification of legal practice as a whole provides a reason for extending that principle into the future, and we must not rely on that very claim in making our case for it. But how can we then argue the case? What can we say to the instrumentalist who claims, reasonably enough, that two mistakes are worse than one?

The naturalist might begin his reply by noticing that the dispute now in play is wider than simply a dispute about how judges should decide cases. Naturalism assumes and instrumentalism denies at the members of a community can have rights and duties against one another and against the community as such, just by virtue of the political history of the community. That they can have rights and duties they would not have if that history had been different. But this is the idea familiar not only to lawyers but to our general political rhetoric. Politicians say that America is a democracy, and therefore that certain things ought and ought not to be done. Or that America respects the rule of law, and therefore that Congress should not enact certain laws.

We should give a name to the idea behind this rhetoric. Let us say that the set of political rights people have just by virtue of the political history of their community constitutes the “political order” of the community. Naturalism recognizes that communities have political orders, and offers an account...
of what a political order is. A community’s political order is provided by the principles assumed in the best interpretation (in the sense we have been using) of its concrete political structures, practices and decisions. Naturalism supposes that people have a right to have this order enforced, in court, on demand. It is not true that every rule of law a legislature or court adopts is part of the political order, properly understood. The best interpretation of the order as a whole may show this particular rule inconsistent with the rest, and so a “mistake” that should be ignore in stating what the order really is. But if it is indeed part of the genuine political order, properly understood, that people suffering emotional injury are entitled to damages against the tortfeasor, then someone who has suffered such damage is for that reason entitled to a judicial order to that effect.

Of course naturalism is a theory about judicial rights, that is, about the rights people have to win [lawsuits]. It takes no position about how far the political order furnishes or constrains the rights people have to particular legislation in their favor, or their rights to revolt or otherwise to establish a very different political order. If the political order includes a constitution which, properly interpreted, disables the legislature from changing the present order in certain ways, then people do have judicial rights, under this order, that the courts not enforce legislation which contradicts these commands. But naturalism, as such, leaves the legislature otherwise free to improve the present order, both in detail and, if appropriate, radically. The idea, that people have an abstract judicial right to the enforcement of the present order, imposes a kind of conservatism on politics; but this is a conservatism imposed on adjudication alone.

Instrumentalism challenges not simply naturalism’s conception of a political order, but the concept of a political order itself. It denies the fact that political history that has taken a certain form can ever be the ground of a genuine right or duty at least against a court. This is the upshot of the instrumentalist’s thesis that there are no judicial rights by virtue of the judicial past. He believes that a judge is never obliged, by the nature of the past, to work against the best solution for the future. The instrumentalist argues that the idea that judges are constrained in this way is irrational. Of course he recognizes each society has a distinctive politic past, and concedes that most people believe their rights and duties are, at least in some ways, a function of the past. But the instrumentalist holds that this opinion is silly.

Now what arguments does the naturalist have available in reply? We might begin by considering one familiar argument a naturalist might be
tempted to make, though only to reject it. Someone might argue that judges should never attempt to change the political order because this would require them to make judgments of political morality which ought to be left to the peoples’ elected representatives. So judges should accept the popular idea of a political order, and enforce that order as history presents it to them, for that reason. This is like the (bad) argument we supposed a conventionalist might make against naturalism; in any case it is not an argument a naturalist can make against instrumentalism because, according to naturalism, a judge must make decisions of political morality in order to decide what the political order property construed, really is. We labored that point in our description of how a naturalist judge would go about deciding which interpretation of the past was the best interpretation. There is, for the naturalist, a crucial distinction between interpreting and improving the political order of the community, but these are of activities which engage the judge’s moral sense.

For much the same reason the naturalist cannot use another familiar argument often made in favor of judicial conservatism. It is sometimes said that judges do great damage to social efficiency when they surprise litigants by changing established rules of law. Once again this is an argument that a conventionalist might be tempted to employ against naturalism. But it is unavailable to naturalism because nothing insures that a naturalist judge’s interpretation of the past will not prove surprising. A naturalist is chaffed with discovering and enforcing the best interpretation of his community’s political structure and past decisions, but the interpretation he believes best may be (as we saw in the example of Cardozo’s decision in McPherson v. Buick) interpretation that has occurred to no one else. In any case, the argument is a bad argument against instrumentalism for a different reason. This argument supposes that a novel decision, such as an instrumentalist might make, will in fact be unwise, pragmatically, for the future. But if this is really so, then an instrumentalist is ready to take that into account in deciding which decision will be best for the future. We noticed that an instrumentalist will look to the past, not as a source of rights, but strategically, to discover whether his judgment will in fact have the beneficial effects on the future he supposes. If disregarding some established line of precedent will actually diminish efficiency, because it will discourage people from counting on established rules of law in planning their affairs, then this is exactly the kind of strategic consideration instrumentalism stands ready to acknowledge.

A naturalist must find his defense of naturalism—of his idea that the standing political order is a source of judicial rights—elsewhere. He must
meet the instrumentalist’s challenge directly, by showing why people can have genuine political rights just by virtue of the actual political history of their community, and why these rights hold with special force in litigation. Can we find such an argument for naturalism? We might begin by stipulating a general requirement of justice in government. Any government must treat its citizens as equals, as equally entitled to concern and respect. Of course this general requirement is very abstract. Different people—and different societies—will have different views of what it is to treat people as equals. But we can nevertheless speak of a general duty of government to treat its citizens this way, and derive from this two distinct and more concrete responsibilities. The first is the responsibility, in creating a political order, to respect whatever underlying moral and political rights citizens may have in the name of genuine equality. The second is the obligation to extend whatever political order it does create equally and consistently to everyone.

These obligations are distinct because they can be fulfilled or violated independently. A society may develop a conception of justice that we, as critics of that society, reject. In its pursuit of efficiency or other collective goals, it may violate rights we think people have as individuals, but it may nevertheless enforce that conception consistently and, in that sense, fairly, allowing to everyone the resources, opportunities, and protections each is entitled to have under the theory it has adopted. It may, on the other hand, put in place an admirable political order; it may adopt a general scheme of principles and institutions, which we, as critics, approve as exactly what justice requires; but it may nevertheless fail to enforce and scheme consistently, so that some people do not have the resources and opportunities the public order requires them to have.

Once we recognize both the fact and the independence of these two rights, we see how it is possible that a government might commit the following special form of injustice. It might deny to some people a right it has, but need not have, extended to others.

THE TWO IDEALS

Perhaps you will allow me a summary of this last part of my argument. Our political system admits of two ideals; it is imperfect in two ways. It stands in the shadow of an external ideal, which is the ideal of a perfectly just and effective system. This is the challenge it offers to legislation, and, beyond that, to the political will and sense of justice of the community which has the
standing power to make it better, closer to the external ideal of what a politi-
cal system should be. But unless it is a very bad political system it stands
also in the shadow of a different, internal ideal, which is the ideal of itself
made pure. This is the challenge it offers to adjudication: the challenge of
making the standards that govern our collective lives articulate, coherent and
effective. Naturalism insists on the difference between the two ideals, and
makes that difference the nerve of the rule of law.

People will disagree about what the internal ideal of our order is like,
perhaps just as much as they disagree about the external ideal our order
should pursue. Indeed they will disagree about the former precisely because
they disagree about the latter. So no one will have any guarantee that if he
should come to court, those who judge him according to naturalism will
reach the result that he himself thought was the best interpretation of our
order when he acted. That is inevitable in any community which recognizes
what is plainly true: that people have rights beyond the rights convention-
alisn recognizes, that is, that they have rights beyond the strict and narrow
limits within which everyone agrees what these rights are. But naturalism at
least takes the actual political order, properly interpreted, as the common
standard, so that citizens are encourage to put to themselves the same ques-
tions that officials who adjudicate their disputes will ask in judging them. No
doubt this practice will cause surprise and disappointment, even despair. No
doubt it will produce injustice. Its virtue is that it seems less vulnerable, in
all these respects, than available alternatives for bringing the rule of princi-
ple to an imperfect world.

We can, as a community, strive towards these two ideals at the same
time, though through different institutions and practice. We embrace the two
ideals as an agenda for sustained and continuing debate. We have no hope—
and indeed no wish—that the debate will end. We understand that the deci-
sion of political officials must be accepted, from time to time. But we insist
that this is only because someone’s decisions must be accepted and not
because these decisions come guaranteed for accuracy. We know that the
quality of the debate is itself, quite apart from any agreement it might pro-
duce, something that makes ourselves and our community better. This is the
image we should have of politics and of our lives in politics. Our courts play
a distinct, sovereign and indispensable role in this image. They are the forum
of the second ideal.
ENDNOTES

