MORAL CHOICES, MORAL TRUTH, AND THE EIGHTH AMENDMENT

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What passes for normative scholarship in the law schools is often little more than making public the topography of the author’s mind. I suppose this practice does have a certain appeal akin to the great national fascination with reality shows these days, but it is unclear what other interests it serves than the obvious ones of getting tenure and being invited to conferences. Thus, my own scholarly efforts are directed toward propositions with truth value, and I try to leave the moralizing to others.

To be sure, there can be scholarship about normative questions that is motivated by pursuit of truth, such as many of the fine efforts of Michael Moore in laying out the landscape of normative discourse. Those works, however, are not normative (whatever motivates them) in the sense pertinent today, and thus they are outside my consideration.

Normative scholarship involving the defense or critique of normative positions could serve purposes other than moralizing or autobiography, including facilitating inquiry into the underlying factual issues. For example, the great national debate on wel-

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fare might have focused attention on how the short-term desire to ameliorate woeful living conditions might have devastating long-term effects,\(^3\) or how the desire to legitimate and express retributive feelings through the death penalty assumes accuracy and consistency in decision-making that, if not present, might have quite radical unintended effects.\(^4\) And to be fair, debates in the legal literature may filter into the public’s conscience in such a way as to have a positive educational effect, but I doubt it. The moral cast to much of our normative arguments is completely epiphenomenal. It does not matter to others what we think of welfare programs or the death penalty; what matters is their consequences. Or so, I suspect, the world at large, quite intelligently, believes. To the extent it serves useful purposes, one could entirely strip out all the moralizing references and just leave whatever underlying factual or analytical inquiry there is.

We certainly do not educate ourselves or advance knowledge with these normative debates. If we did, it would be commonplace for people to confess error in their views and revise them accordingly, but how often have you seen that occur? Or its blood cousin, a public recognition that analysis and investigation has forced the truth of a proposition upon a person that is repugnant to that individual? Virtually never.

The stability of personal preferences is especially true with respect to the particular subset of normative discourse pertinent to this Symposium—moral propositions. Indeed, what is prevalent is the opposite of reconsideration: a proposition, theory, or moral position is advanced and meets opposition,

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which in turn prompts its enthusiasts to modify its justifications rather than modify its contours, as, say, a scientist facing an anomaly might do.\(^5\) Around my own law school, for example, it is commonplace to encounter yet another defense of the unitary executive, or originalism, or a particular view of separation of powers, often prefaced, in my view highly ironically, with statements to the effect that, “previous defenses of this view have not fared considerably well, so here is another one.” What occurs to me is that perhaps the failures of the prior defenses might be explanatory of the truth or utility of the idea, but this notion seems not to be making much headway.

Rather than pursue knowledge, the objective of normative work in general, and moral reasoning in particular, seems much more directed at defending one’s prior, subjective views. The game is to never give in no matter the evidence arrayed against you—come up with the clever response, create sophisticated arguments deflecting the latest criticism.

Scholarship of this sort is tedious, providing sufficient reason in and of itself, in my subjective opinion, to ban it from constitutional discourse. When the focus shifts from moral proselytizing generally to the Supreme Court doing it specifically, an additional problem arises. Normative views are largely, and probably exclusively, subjective creations of the minds of individuals, which is precisely why normative views are so immune to change.\(^6\) I have no doubt that they form for reasons, including reasons that refer to facts in the world, but those reasons are just as surely the culmination of a person’s experiences. This sort of thing is not going to lend itself to efficient rational discourse. If moral negotiation is to occur, it will need to be done in a sustained fashion over time, in a complex and chaotic environment—in a legislature, for example, or in citizen

\(^5\) Cf. Political bias affects brain activity, study finds, MSNBC.com, Jan. 24, 2006, http://www.msnbc.msn.com/id/11009379 (discussing a study in which brain scanners revealed that political party loyalists “get quite a rush from ignoring information that’s contrary to their point of view”).

\(^6\) See Robert A. Hinde, Law and the Sources of Morality, 359 PHIL. TRANSACTIONS ROYAL SOC’Y 1685, 1686–91 (2004), available at http://www.journals.royalsoc.ac.uk/content/xna817aucdf3u7q0/fulltext.pdf (discussing the formation of normative views as a result of one’s childhood experiences); Political bias affects brain activity, supra note 5 (discussing the durability of political views as a result of their inherently emotional nature).
movements. Courts issuing edicts are about the last place one would predict that moralizing would be useful or effective.\footnote{This is also the position of philosophers who argue that moralizing is a useful tool, but that it is best used in conjunction with other, more effective, tools.}

These points will seem to some as hopelessly naive philosophically and to others as virtually beside the point. The concern of philosophical naivety comes from the implicit suggestion that subjectivity can be eliminated, and maybe it cannot. But one can have more or less of it. When I am doing arithmetic sums, perhaps there is an element of subjectivity—after all, it is me choosing to do the sums—but I can choose to follow the rules or not. So, too, judges, or anyone else. The concern of irrelevance is that, like it or not, moral propositions exist (regardless of their truth value), many individuals see them as pertinent to deciding cases, and plainly in some cases requiring decision sources of law run out and invoking a moral proposition or two might be a handy way out of a difficult problem. I agree with all of this, but again one can have more or less of it.

And so, inescapably, the question becomes the role of judges generally, and Supreme Court Justices particularly. Here the evidence is pretty plain: judges are no better than the rest of us at moral reasoning. Indeed, the most disastrous decisions of the Supreme Court are highly associated with their most willful decisions—that is, decisions in which extra-legal determinations played a significant role in decision.\footnote{A majority of the Supreme Court apparently thought that it was going to defuse secessionist forces in Dred Scott v. Sandford, 60 U.S. 393 (1856), that it was going to resolve difficult political and moral questions about life and privacy in Roe v. Wade, 410 U.S. 113 (1973), that it was going to peacefully bring about an integrated society in decisions such as Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), that it was going to strike a clarion call for individual rights in Lochner v. New York, 198 U.S. 45 (1905), and so on.}

This should come as a surprise to no one for precisely the reason identified above: the judicial process is not conducive to effective moral discourse. The legislative and political processes more generally are, which seems to be a good reason to leave such matters largely to them.

But, what does “largely” mean? Haven’t I already recognized that moral questions may be ineradicable in judicial decisions even if we prefer that less rather than more attention be paid to
them? If so, aren’t I just avoiding the question? Don’t I need a general theory about whether I think moral propositions should be on the front or the back burner? Here is the one point in this Symposium at which perhaps I can provide the reader something useful to think about. The only general theory pertinent to the kinds of questions we are addressing is that, as Holmes said, no general theory is worth a damn.9 None of the endless efforts to provide general theories of judging and of legislating and of the meaning of law10 is worth a damn.

One can explain why such efforts are worthless in a single word: complexity. The objects of theorizing are complex human institutions of thousands if not millions of relevant variables that can interact in virtually an infinite number of ways. A “general theory” would have to articulate the sets of necessary and sufficient conditions for outcomes in light of all the combinations and permutations of these variables, and of course many of the variables are not dichotomous, adding yet another layer of complexity. These issues are discussed at length in my writings on evidence,11 and I will not take them up here except to give one example to make the point concrete. Computational complexity is why computers still struggle to beat the best human chess players. Even though there are only a limited number of pieces and a limited number of moves, the combinations of moves quickly spirals out of control so that cognitive devices besides computation can still affect outcomes. These cognitive devices are not reducible to rules, not yet at any rate. If they were, they could be programmed and the game between computers and humans would be over.12

The game of legislating and judging is infinitely more complex than chess. One obvious solution is to let legislatures be the source of ongoing moral debate and to direct the courts to decide which of the parties’ cases is more plausible. To be sure, plausibility may have its referents from time to time in extra-legal sources, but so long as the judicial stance is largely choosing between the parties’ presentations, its conclusions are always revisable—thus the genius of the common law.

What I am describing seems to be the best description of our actual institutions, which have produced the most astonishing civilization the world has ever seen. So, if you are into creating astonishing civilizations, you might want to pay attention to such matters.

How does this all map onto the assertion by the majority of the Court in *Roper v. Simmons*\(^{13}\) that the Justices had to make their own personal moral judgments about the propriety of aspects of capital punishment?\(^{14}\) There is no obvious need to rely on the personal views of the Justices and there are very good reasons not to. There may be sources of law that had not “run out of power” in the context of the Eighth Amendment, but assume to the contrary and thus that something like “evolving standards of decency”\(^ {15}\) is an appropriate gap filler. Still, “evolving standards” can be widely-held conventions rather than the subjective moral beliefs of the individual Justices,\(^{16}\) even if determining what “widespread” means involves a subjective component. Obviously, such a determination might be influenced by a Justice’s moral views, but the significance of the subjective beliefs can be reduced. And the decision does not have to be in terms of hard descriptions of those evolving no-

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14. *Id.* at 564.
15. *Id.* at 561 (citing *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)).
16. Compare *id.* at 573 (finding it wrong to allow capital punishment for juveniles with maturity and culpability equivalent to adults because it would open the door to the possibility “that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death”), *with id.* at 608 (Scalia, J., dissenting) (“I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court . . . .”).
tions, but instead in terms of what may be inferred from the presentations of the parties—which, in short, is the more plausible case.

Approaching decision-making in this manner has many consequences, although whether they are advantages will depend upon your own interests. Most consequences such as those having to do with democratic processes and the like are matters that have been discussed at length in the literature, and need no extended treatment here. Such decision-making has the further advantage, less discussed, of leaving decision open to whatever arguments might be advanced in the future rather than constraining that future by guesses concerning the moral temperaments of the Justices.

Of course, in light of personal interests, some might think this an unappealing prescription, largely because they reject the truth of one of the propositions upon which I am operating; namely, that moral views are radically subjective reflections of experience and do not correspond to mind-independent entities in the necessary sense—in short, that moral propositions do not possess truth value in that sense. If one thought that moral propositions do possess truth value, the problem of governing might appear to be eased considerably, for obviously one should join in the grand pursuit of truth, justice, and the American way. There are two difficulties. First, that moral propositions possess truth value in the right way is obviously false. Second, even if it were true, there is an insurmountable epistemological gap of knowing when one has arrived at the truth. One way to understand the history of the twentieth century, in fact, is as one large example of how deadly these difficulties are. A few words on both and then I will close.

I cannot do more than give a flavor of why moral propositions do not have truth value in the right sense. The best defense of the opposite view is put forth by Michael Moore in his article *Moral Reality Revisited.* The Reader’s Digest version of his ar-

17. *Id.* at 565 (noting that in the fifteen years preceding its decision, five states had abandoned the death penalty for juveniles, thereby indicating a trend in the national consensus).

18. See, e.g., Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge,* 64 VA. L. REV. 1 (1978) (discussing some of the merits and demerits of a judicial decision-making process that relies solely on the parties to present the relevant information).

Argument is that he asks you to compare two propositions: (1) it is true that it is wrong for two boys to douse a cat with gasoline and light it on fire for their own amusement; and (2) it is true that protons exist. Professor Moore engages in an extended argument to show that the truth of the moral proposition is the best explanation of the evidence of your reaction to the burning cat, just as the truth of the proposition that protons exist is the best explanation of centuries of scientific progress in the physical sciences.  

Professor Moore is an avowed empiricist, but there are two striking empirical problems with this claim. First, there is no convincing demonstration that the obvious alternative hypothesis about moral propositions—that they are conventions that reflect background and experience—is not an equally good or better explanation. By contrast, many theories of matter have been advanced as substitutes for the standard atomic model, and they have been disverified one by one over the centuries.

This leads to the second empirical problem. Faced with competing theories, a true empiricist would construct a test to differentiate them, and nowhere in the hundreds of pages written in defense of the truth of moral propositions that I have read is such a program ever advanced. The defenses are all rhetoric. This is all the more striking because such tests could easily be constructed. If it is the moral truth that it is wrong to inflict unneccessary suffering on animals that causes a sense that the boys' actions were wrong, then this should be universal, and people everywhere should have the same reaction, just like protons behave identically everywhere scientific experiments are done. We can test this by polling a random selection of humans from across the planet. Were we to do so, I predict the results would not confirm the hypothesis. In large portions of the planet, the inhabitants would be supremely indifferent to boys burning cats.

20. Id. at 2511–13.

21. See, e.g., Bryan R. Wilson, Morality in the evolution of the modern societal system, 36 Brit. J. Soc. 315, 318 (1985) (explaining that although “moral demands were represented as ‘human nature’” by earlier societies, they were later understood to be the products of attempts to normalize societally developed conventions).

22. See, e.g., Richard Willing, Courts asked to consider culture, USA Today, May 25, 2004, at A03 (discussing practices of animal sacrifice that are common and legal in some countries but considered animal cruelty in the United States).

Another test: the proposition that causing unnecessary suffering of animals is bad must generalize, just like the properties of protons are general. Protons don’t change whether locked in an atom of water or copper. Now, quickly think of all the cases of unnecessary suffering inflicted on animals that are perfectly acceptable to large swaths of humanity: bullfighting, cockfighting, dogfighting, peoplefighting, hunting and fishing in all their manifestations, rodeos, zoos, medical experiments on animals.\textsuperscript{24} What happened to the truth of the moral proposition? Press the matter further. Consider all the suffering that goes on in our nation’s slaughterhouses,\textsuperscript{25} yet none of us needs to eat meat; we would probably be better off without it. None of us needs leather shoes or belts or coats. Aren’t we killing all these animals, and breeding them under horrendous conditions, for our enjoyment? Again, where is the moral proposition? Perhaps it is asleep somewhere, bored, like me, by all this moralizing that people are doing.

As I say, I very much doubt that I will convince anyone committed to the truth of moral propositions merely by asking them to be serious about their commitments to empiricism. They will respond that they are quite serious about both, and will advance arguments that all the cases I have identified of unnecessary cruelty to animals are just cases of people acting wrongly. All those billions of people are just wrong, wrong, wrong! Fine, and now the epistemological problem: How do we know that? How do we know whose intuitions to tap into to determine the contours of this quite elusive set of true moral propositions?

Now, look at the history of the twentieth century through the lens of individuals who were confident they were in possession of truth. What was the result? Mass slaughter of over a hundred million people in wars fought over truth, and massive and deliber-

\textsuperscript{24} See, e.g., Alan Cowell, \textit{Hooked Fish Feel Pain, British Scientists Say, Roiling the Waters}, N.Y. TIMES, May 6, 2003, at A14 (noting research indicating that fish “feel pain when hooked” and discussing the rebuttal from the “pro-fishing lobby”); Doug Simpson, \textit{Cockfighting’s Last Stand}, WASH. POST, Apr. 15, 2007, at A12 (discussing the move in Louisiana to ban cockfighting despite the sport’s ability to draw a crowd of hundreds, “not unlike the typical high school football crowd”); Doug Simpson, \textit{Illegal Dogfighting Increasing in U.S.}, WASH. POST, Jan. 25, 2004, at A05 (noting the growing popularity of dogfighting even though it is banned in all 50 states and classified as a felony in 47 states).

ately induced starvation to the same end. And this is not the only century in which battles over truth devastated humanity. The religious wars in Europe are another example. And so on.

What is the lesson to be learned from this? It seems that, unless you are in favor of mass killings, we need to cabin and confine those who make claims to access to moral truth. We need to keep such people from the levers of power, and especially from the institutions of organized force. We need to create ways to permit moral negotiation to proceed that can generate largely acceptable outcomes in substantial part because those outcomes are always revisable in ways responsive to the interests of the citizenry, and so on—all those platitudes of liberal democratic theory, in short. And we should insist that all governmental actors, judges included, behave with a little epistemological modesty—no, actually, they should behave with a lot of epistemological modesty. Judges in particular should so behave precisely because of their insulation from the political process. In my humble, subjective opinion, a judge who, like the Justices in Roper, asserts that it is really up to the judges in light of their own subjective beliefs to decide important questions, and the rest of us be damned, commit impeachable offenses no different from a President who subverts the constitutional order. To be sure, there may be only a difference of degree between the arrogance of Justice Kennedy and those who concurred with him in Roper, and the judge who agonizingly sees no way out of the box of decision but to invoke a moral proposition, but it is precisely the difference between arrogance and agony that you and I, the citizens of the country, should patrol in the judiciary.
