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Scholars in ethics have a lot to think about all the things that they have a lot to think about. Whereas our colleagues in epistemology or metaphysics are sometimes accused (usually unjustly) of turning a blind eye towards real-world problems, we "ethicists" seem drawn, like intellectual vultures, to whatever headline issue seems appealing. The more carcasses we find, the better. Should we apologize for that, or simply become more forthcoming about what it is that we're up to?

Consider a few of the examples that entice us. As soon as medicine hints at a scarcity of transplantable organs, ethicists wonder if animals (or their organs) could benefit the patients who might otherwise eat the "donors" for breakfast. As economies cycle from bad to worse, we ask if musicians, for instance, are wronged when their work is duplicated and distributed without their receiving compensation. And as wars drag on, ethicists debate whether such conflicts can be conducted with a sense of fairness. The most popular reason to say that this tradition of seeking strife is one worth sustaining is that we are in some way making the world a better place when we make and evaluate ethical arguments.

That's not a bad way to think of it, though we're usually hard-pressed to explain just how much good we're doing. The potential is certainly there, however. Whether one starts out in theory, meta-ethics, or applied ethics, there is strong pressure to meet in the middle with a shared, if not idealistic goal. Meta-ethicists writing on the meaning of ethical terms like autonomy, for example, generally seem to accept that they are not too far distant from those who criticize actual conditions in sweatshops or talk of stakeholders. Scholars in ethical theory now seem to realize that they can only linger away from the front lines until they are shoved forward by their own pronouncements. (It's hard to avoid real-world involvement when your preferred interpretation of the Social Contract is heard amid disputes between ethnic groups or political factions.) No matter which nametags we wear, we are all implicated in the strife that we study under the title of morality, what Bernard Williams called "the peculiar institution."

Admittedly, whether we should expect to understand that institution any better than others is another important philosophical question in itself. Even
when we are asked for our advice, we can strike our listeners as arrogant if we sound too confident or skeptical about how one should live, how to evaluate a situation, or how to think of responsibility. To make matters worse, there are no guidelines in- or outside of philosophy that will reveal the proper balance between the social and intellectual aspects of our shared projects. That means that we frequently devote as much energy to deciding who has the stronger argument as we do deciding who to sit with during the discussions. Neuroethicists? Social scientists? Those epistemologists and metaphysicians?

Questions like these generate still more strife, and more opportunity to add to the Right and Wrong currently in circulation. We can try to share responsibility for our work by copying up to those outside of ethics who have been doing their own version of ethics, and look to us to keep up. How do we know when we have met a reasonable standard of relevance or truth?

Answering that requires that we set down philosophical roots, and be prepared to take on the the risks in doing ethics one way rather than another.

It requires that we look carefully at the creases that we put into the world that, by our account, already contains plenty of misfortune, disagreement, and individual dissatisfaction to keep us all busy.

Some risks are harder to miss than others. There is considerable risk in letting tradition drive us, for instance, or pretending as though we cannot control which topics we address or which causes we side with. There is another risk in sophistry and cynicism (which can go together). It is one thing to say that history of ethics does not give much basis for optimism, and another to grant that it is really the history of the world that gives even less. Because of our fascination with strife, we are in the unique position of being able to press on with what one hopes will be a blend of sensitivity, seriousness, and humility. There is some comfort in the way that we might disagree about the meaning of such terms, or the relevance of, say, humility, to a particular stance on some issue. But this is the bind we're in. If we're even half right about the world, it is strife-filled and full of promise at the same time.
Conversation with an Author:
Colin McGinn
University of Miami

Professor Colin McGinn, author of “Why I am an Atheist,” which will be published in an upcoming issue of *Theoretical & Applied Ethics* took some time off from writing to talk to us a bit about atheism, his current projects, and his writing process. The conversation went as follows:

**Managing Editor:** Professor McGinn, can you tell us a bit about the projects that you’re currently working on?

**Colin McGinn:** I’m doing something very interesting. I’m on a sabbatical year and am actually writing three books on very different topics.

**Ed.:** What are the books on?

**CM:** The first book, “The Meaning of Disgust: Life, Death, and Revulsion,” will be published by Oxford University Press. The second, on the philosophy of physics, is called “Basic Structures of Reality: Essays in Meta-Physics.” And the third book is called “Truth by Analysis: Games, Names, and Philosophy.” That book is on Metaphilosophy and why concept analysis is important.

The plan is to publish all three books simultaneously, which will be interesting because all three are on very different subjects but they’re being produced at essentially the same time.

**Ed.:** That sounds like a lot of work! Did you plan your sabbatical because you knew that you would be writing all three at the same time?

**CM:** Yes, I call it “attempting the triple.” Similar to the way gymnasts might attempt a triple somersault, or in ice-skating there’s a triple axel. It’s an athletic feat.

It’s taken a lot of hard work. I had drafts of the first two written up about six months ago, but the third book I wrote from scratch in two months, and finished yesterday. It was six months of very intensive work, a week ago I wouldn’t have had the time to talk to you.

I couldn’t have done it if I wasn’t on sabbatical. Teaching completely destroys the ability to write, your concentration is ruined because you’re focusing on so many different topics.

**Ed.:** I can imagine, you’d have to shift gears frequently! What will you do with the rest of your time off?

**CM:** I have some articles I’d like to write, though I rarely publish in the journals anymore.

**Ed.:** Can you tell us a bit about your writing process?

**CM:** Sure, I have a very systematic writing process. I often describe it to graduate students, I’ll share it with you the way I do with them.

I always produce my writing in stages. I think about it for a while first, I read up on all of the literature and just write out notes by hand. I do this until I run out of ideas on the topic. I don’t try to write any finished prose until I don’t have any more ideas in mind. Now this can take quite a while. Usually I have about twenty pages of notes with writing on both sides.

Next, I go over the notes that I have and try to pick out the main themes, things that could be chapters or sections of a paper, but at that point I don’t put them into any particular order or framework. Once I have these main points, the whole thing seems to come together pretty easily, because, by this point, I’ve thought about it a lot.

After organizing my notes this way, I write out a plan by hand. I figure out how to divide up the ideas by coming up with chapter headings and leaving space after each. Next, I insert all of the ideas under the chapter headings, in order. This is pretty easy because at that point I’ve figured out the main themes. I still don’t start to write. I think that’s the trouble a lot of people have with writing, they do it too prematurely and then they get blocked because they’re trying to think while they write. Once you have the ideas figured out, then you should start writing! That makes the writing purely physical; you don’t have to think because you’ve already done that work.

Once I have all of the ideas thought out and organized by hand, then I write out a quick draft to see how it all fits. I don’t worry about style or wording yet. I just write. Once I get to this stage I can usually type about 6-10 pages a day, single-spaced because I know what I’m going to say, there’s no pause for thinking, it’s all formulated. You say you like my writing style, and this is why.

I start the footnotes later, I’ll go over the first draft and rewrite it, improving the prose. This second draft takes almost as long as the first draft because I have to think about the style, not just presenting the ideas. When the second draft is done, then I handwrite all of the footnotes, along with ancillary points, and any creative parts. After this, I insert the footnotes and re-write the text and footnotes together, before I finish. All in all, I believe I do about two drafts of footnotes and three of the text.

Writing this way seems to work for me. Some people say they can’t think unless they write, but that seems to be a strange thing to say, the idea that you could write good
sentences while you think. I think writing while you’re still thinking might lead to confused, badly organized, and poorly formed sentences. If you take one thing at a time, you focus on each part individually, I think clear, well thought out writing arises because of this process. You shouldn’t write until you have clear and organized thoughts.

The one downside to my approach, though, is that people might find it boring. They get excited about ideas and want to start writing right away. My way might be less exciting, but it’s the repetition, thinking through the same thoughts several times, that helps you know how to say them well. You get a better end result that way, and the writing gets done.

I find the organization phase of writing most difficult, probably because it’s so important. If the thoughts are well-organized the writing seems to solve itself. I spend a lot of time working on the chapter headings leaving a lot of space under them for the material.

I discovered this method about thirty years ago, it’s been so long I can’t remember how. I remember that before I would suffer through the writing not knowing where I’d be going. You shouldn’t be half way through the writing before you figure out the ideas. I’ve refined it over the years to make it more efficient, and it works.

Ed.: Wow, that does sound like a well-thought out method. Since you seem to think a lot about the writing process, what about publishing? Do you have any advice for students who are anxious about sending their work out to journals, getting rejection letters, or putting their work out for public scrutiny?

CM: The publication process is annoying, that’s why I hardly publish in journals anymore. I’ve been rejected for bad reasons like everyone else; you get reviewers who make comments that don’t make sense. I guess there’s really no alternative but to just go through the process. One piece of advice to students who are just starting to send work off: don’t say anything too original, and defend everything that you say, it gives the referees less reason to question the work. This might make writing boring and pedestrian, but it’s important for professional reasons. You’ll still have time for your private writing, and then you can write philosophy the way that you want. Eventually you can publish that, once you’ve built up a career.

Even I still have to go through the referee process, and it can get difficult. There are cases where famous articles are rejected before they’re published. I think that happened with Quine’s article, “On What There Is.” I think it was rejected before it was finally published by Review of Metaphysics. It’s happened to me, too, with what’s probably my most famous paper, “Can we Solve the Mind/Body Problem?” It was rejected by the Journal of Philosophy, a journal that’s accepted everything else I’ve ever sent them. A lot of times, it’s probably because it was too creative I tell students that you will get letters of rejection, that’s just the way it is, the trick is to just be persistent and keep writing.

Ed.: Thanks, that’s great advice! Let’s talk a bit about Religion, the subject of your commentary for our upcoming issue. Do you think there’s a role for religion in academics? Should religion be taught? And what role should the study of religion play in scholarship?

CM: I think that there is a role for religion in academics, but probably in the history department, maybe psychology and sociology. It’s important for people to be well informed about world religions. It’s a part of our history that people should know about. I don’t think religion departments are a good idea, it’s not really a cohesive subject matter, but people should study the history of religion, even the sociological aspects of it, and the psychology of religious belief.

I was taught in England, where there was no separation of Church and State. We were taught all about the church and even had prayers every day. I wish I was taught about other religions. It’s better to learn about them all, including atheism as a point of view.

What I don’t think there’s a place for is assertions of truth about any particular religious claims in education or scholarship. In the United States, it seems that Separation of Church and State is too rigid. People think that if we allow talk about religion in the schools the Christians will come in and proselytize, there’s not a place for that. All the religions should be taught, but in an unbiased way. Did you see that poll lately that showed that atheists know more about religion than Christians do? That’s because they’re not taught, atheists know because they’re critical of it. In a way, not teaching about religion leads to a lot of ignorance about atheism and agnosticism.

People have no knowledge about religion except through the media and their own churches. Christians are just brainwashed, they don’t totally understand their beliefs. A lot of ignorance could be remedied through education. Religious ignorance is a lot like financial ignorance, if we educated students about finances they wouldn’t be so stupid about them, they wouldn’t ring up credit card debt or take out stupid mortgages. You can’t leave these things to common sense if the don’t have common sense, and the media is just a monster that pre-digests all of the information.
I think a solid foundation should be given in all religions with the proviso that atheism and agnosticism are taught, and that students are also taught about famous atheist and agnostic historical figures are taught about.

Ed.: Can you say a bit more about the place of religion?

CM: It’s important to teach and think about the history, sociology, and psychology of these belief sets. I think departments of religion aren’t designed the right way, they are kind of dubious, there’s too much association with belief. Aside from history and the others, there’s theology, that’s not about choosing one particular belief set or another. That could go under philosophy, but really there’s not much role for it because it’s just not very intellectually appealing.

Ed.: Interesting, thanks! It seems that religion also has a strong connection to morality in this sense, right? Do you think that we can ever talk about religion in a morally-neutral way?

CM: Religion has nothing to do with morality, it’s entirely independent. Plato and Socrates refuted religion as a moral foundation over 2,000 years ago, the Euthyphro problem. That’s actually why I wrote “Why I am an Atheist,” because I think that religion is a philosophically boring subject, I can’t believe that people still buy into religion. I thought that when people ask me to participate in panel discussions about atheism and religion I can just say “look at this, all of my reasons are there.” Then we can talk about more interesting philosophical questions, but people keep worrying about religion.

Appeals to religion are authoritative. Atheism’s on the right track with ethics. It’s not necessary to be an atheist to be ethical, of course, but it gets you thinking about utilitarianism and duty and things like that because there’s no authority, you have to turn to moral theories and think about which work. I guess Jesus’ teachings could even be taught as a moral theory.

“How much concern should we have for the poor?”
“What is the role of forgiveness and how far ought we take it?”

These are important questions to ask, but not because they’re religious. Most theories find no connection to god. Take Kant, for example, his theory is based on the Categorical Imperative, almost the golden rule. This shows that ethical theories don’t need to talk about god.

Ed.: That’s an interesting response, why do you think that, so often, people make the jump from a sort of ontological or cosmological belief in god to religion as a moral theory?

CM: Someone has to talk about morality, and who is going to do it? The history of religion has shown religion to have several roles. I talk about the first role of religion in my book on disgust, and that first role is in dealing with death. How do you deal with death, particularly the disposal of the body? The second role has always been in dealing with metaphysical ideas, and the third, of course, is morality. All of these ideas are very separate, of course, but they all coalesce in religion. Religion’s been around since the dawn of time, since there were no records, we can only speculate about how it arose.

It seems to have fallen to religion to discuss these things because, at the time, who else was there? It’s a cultural fact, it’s not necessary for religion to deal with morality, historically Plato and Aristotle talked about morality without a religious context. People just go to their churches and then think that’s where it comes from. Think about what Freud said, he thought religion was just a substitute for parents. Parents always tell us what’s right and wrong, they’re the authority figures, and that simply shifts to religion, Freud says. In church we even call the priest “father.” It’s a naïve way to think about religion. The psychologist who talks about moral development, Kohlberg, says that there are stages, people just get stuck and don’t use more abstract thinking.

I think one way to work on this would be to get basic ethics in high school, and teach about Kant and Mill and other basic concepts to get people thinking about ethics without that parental model.
Another thing that adds to this role is that there’s a lot of confusion between ethics and the law. The law says to obey because an authority figure tells you to obey. People get moral laws confused with the law, there’s no authority figure, they just think there is. You can never really come to understand right and wrong through religion. Religion just echoes or codifies what we think about ethics, or it doesn’t, and then you become an atheist. Think about children on the playground, when someone steals your toy, you say “hey, that’s not fair, that’s mine!” It’s the golden rule, which seems as good a rule as any, you don’t need religion to tell you about justice. People already know that we shouldn’t steal. Beliefs that we should or shouldn’t do things are epistemological beliefs, they arise from being exposed to questions about right and wrong.

Ed.: Recently, Sam Harris and others have been discussing the connection between science and morality. Essentially, they argue that religion has been a set of training wheels that we no longer need, now that science is here. Do you think this scientific-morality project has more promise than traditional religion-based moral systems? Are they as mutually exclusive as Harris seems to suggest?

CM: I think Sam Harris’ idea is equally bad, I’m surprised he’d write on it. There’s just some really bad thinking in Sam Harris’s new book, I haven’t read it yet, but that’s because from what I’ve heard, it sounds terrible and wrong-headed and just bizarre. He’s trying to make science do what religion used to. His basic philosophical reason is a fallacy, it’s impossible to derive ought from is, the naturalistic fallacy, it’s a complete misconception that you can. I’m surprised Sam Harris would fall for that. A few weeks ago, Anthony Appiah nailed him for it in the New York Times¹. I have no idea why that arises in some scientists the idea is wrong, it’s been refuted, it’s hard to believe they still argue that point.

Sure, it’s good for philosophers to know about evolutionary biology, they can do the philosophy of biology, but you can’t get from that to knowing what’s right and wrong. Appiah says that Harris adopts a form of utilitarianism, now there’s a lot wrong with that theory, but it’s an ok theory, not any worse than most others. You can’t discover utilitarianism through science. Scientists might be able to find the means by which to improve human happiness, but they can’t tell you that human happiness is a good thing. Part of the problem is that many scientists are ignorant of philosophy. I think that if people who discuss either science or religion knew more about philosophy they wouldn’t be so simplistic in their thinking.

Ed.: That’s an interesting perspective. There seems to be a lot of talk about religion and morality. While we’re on the subject of atheism, what about this question: we often hear the phrase “there are no atheists in foxholes.” Commonly, people talk about what that means for atheism, but how do you think it reflects on religious belief?

CM: It reflects terribly on religion! It only talks about fear. If the best argument you can come up with for your beliefs is that people adopt them when they’re deranged, it’s not much of an argument at all. It’s not justifiable and it’s not true, thousands of people go to their graves atheists, but, even if it was true, it still wouldn’t be justified. The people they’re claiming do this are not of their right minds. You can’t take it to be a good argument. Everyone has natural weaknesses, fear is one of them.

Religion not being true is a grim fact about the world. It would be nice if it was true, I wish it was true, but it’s not. This kind of attitude just promotes wishful thinking; it’s hardly a rational way to make an argument. People do a lot of things when they’re fearful for their lives, they cry out for their mothers, what is that supposed to tell you? Religion’s a boring philosophical topic, the same old arguments are hashed and rehashed. It’s important to be clear about the issue, but it’s unimaginable that anyone still thinks religious beliefs are justified.

Ed.: Thanks Professor McGinn, it was really interesting to hear your perspective on religion! Can we shift gears and talk about one of your new book projects, on Metaphilosophy and Conceptual Analysis? I really enjoyed the first two chapters! In the book, you mention that you address traditional continental philosophers such as Heidegger and Sartre, but how does this conception of philosophy categorize contemporary continental philosophy or modern-day social theory? If philosophy is the "a priori search for essences," then what is the place of contemporary continental philosophy?

CM: You know, I don’t really know enough about them to answer. I don’t know a lot about Derrida. I think he’s probably trying to do some kind of analysis. I think Foucault was more of a historian. If they’re seeking commonality or doing some kind of synthesis, they’re analyzing concepts and identifying which are similar. That doesn’t seem so distinct from analytic philosophy, there’s synthesis going on there too. Think of Identity theories, the idea that the mind and the brain are identical, that’s synthesis. Quine is famous for refuting the analytic-synthetic distinction. Then there’s idealism, which argues that everything is mental. Analytic and Continental philosophy both do analysis and synthesis, the difference is more about style.
Ed.: Oh, I see what you mean. You talk a bit about being critical of analytic philosophy’s new trends toward experimental philosophy. Do you think the field is moving away from the method that you present as being its core? Should it try to maintain tradition? If so, do you think, given the need that public universities have funding and their focus on grants, that experimental philosophy will become a necessary evil?

CM: Actually, I come down rather hard on these things in a later chapter in the book, particularly because of how the idea promotes itself. Given society’s nature toward scientism, the title “experimental” makes people think “wow, philosophers are finally getting somewhere!” Now, when you say “a priori” they say… well, they don’t know what that means! Experimental is a term they understand, but these aren’t experimental methods. What kind of experiments? Is someone going to use an experiment to determine whether we have free will? Whether the external world exists? It’s not possible. Experimental philosophy doesn’t claim to use scientific methods, it says “don’t do concept analysis from the armchair, do empirical investigations of people’s beliefs or concepts.” Those aren’t experiments, that’s what psychology’s been doing for decades.

Any philosopher who is professional would take a new concept of some bit of new knowledge and check with a colleague to see what they think. We’re always doing informal surveys of people’s intuitions. Any responsible analytic philosopher does this, but it’s not methodologically sound in an experimental sense. The experimental philosophy people talk as if their experiments will settle philosophical questions. I’m in favor of philosophers knowing science, talking about the philosophy of science, but we don’t do science.

I can see why, for bureaucratic reasons, universities like the sound of this idea, but wait ten to fifteen years, people will start to think it’s all rubbish.

Ed.: Great perspective there. I had one final question about your book project: In the beginning of the book on Conceptual Analysis you say that philosophy is a sort of “play,” and that seems to imply that the goals of philosophy are internal to it, not external, like you may think of with work. Can you explain this a bit more? Can philosophy really be internally goal-oriented, or should it try to make a practical difference?

CM: Good question- yes, I think that philosophy is play, and that the goals of philosophy are internal to philosophy. It’s hard to explain quickly because I have a longer chapter devoted to explaining this, but I’ll talk about it briefly. It’s true, you play a game for its own sake, and the same is true of philosophy, we do it for its own sake. This goes back to Bernard Suits’ idea of Utopia, where he asks what we would do in Utopia. In Science, the goal is to acquire scientific knowledge. There are no scientific methods to dig a ditch to make a pipe. The hole won’t be made without you digging. If we could find more efficient means when engaged in labor, we would use them. So, you see, science is instrumentally valuable.

Play is different, we don’t think of play in terms of obtaining a goal external to the game. The goal in tennis, for example, is to win a tennis match. Philosophy is like tennis. If there was a machine in utopia that could solve philosophical problems for us, we wouldn’t like it. Suits argues that there would be no philosophy in utopia, only games, but I disagree. We do medical research for medical knowledge, philosophy is not the same. Philosophy is like play. Huizinga says, in Homo Ludens philosophy began with little games. The sophists told riddles, philosophy grew from that. Even now, we play logic games, verbal contests.

Ed.: Wow, that’s an interesting way to put it! But what about ethics? Doesn’t that have some instrumental value? At least applied ethics, for example, bioethics?

CM: Ethics definitely asks practical questions, and if there was a knowledge machine we might want to obtain that knowledge. In other cases, it’s not just to reach knowledge. Bioethics has a different type of goal external to philosophy: benefit people. It’s an exceptional case, it seeks to improve well-being by asking philosophical questions. A good question to ask is whether there would be bioethics in utopia? No, of course not, because there would be no illness, no need for practical ethics, it wouldn’t have the same appeal. The application of ethics might be an external goal, but the game is still played the same way, for philosophy’s sake.

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2 http://www.nytimes.com/2010/10/03/books/review/Appiah-t.html
Utilitarianism offers an effective, though controversial, way of dealing with moral situations. The principle rule in this consequentialist theory states that we should make decisions based on a cost-benefit analysis relevant to the moral problem. This rule is often used when we try to make sense of bioethical dilemmas. If the choice seems to bring with it more cost than it does benefit, then utilitarianism prescribes that we ought to make the choice that benefits the greater good.

This philosophical theory is controversial in the sense that there will usually be a majority that benefits and a minority that suffers as a result. Part of the problem lies in defining the parameters for this sort of analysis. Much attention has also been given lately to the issue of whether animals fall within the parameters for this sort of analysis. What happens when the bioethical dilemma involves not only animals or humans, but both? An especially complex dilemma arises when xenotransplantation becomes an option in medical contexts.

Organ donation has long been an important medical and moral problem in America. By convention, patients in need of an organ enter their names into a registry that matches donors with possible recipients. The patients can also rely on donations from family or friends, in which case family members or friends would donate a piece of an organ to the recipient. However, these methods are far from perfect, as many patients die before they can receive an organ. Furthermore, heart failure, the number one killer of Americans according to the CDC, makes donation even more difficult because heart donation can only occur when someone else dies before the patient who needs the transplant.

Some see promise in the practice of xenotransplantation, which involves the transplant of organ tissue or whole organs from one species to another. The usual risks are certainly present with xenotransplantation, but the benefits that patients can receive are immense. For example, xenotransplantation might greatly increase the pool of donors if medical science can utilize the tissue of pigs, which are biologically similar to human tissue. Ordinarily, for organ transplant to be successful, the donor tissue or organ must match the recipient’s ABO blood type, tissue type and/or organ size. Yet emerging biotechnologies are able to engineer pig tissue that can mimic actual human tissue. Though whole xenotransplant organs are currently in use as donor organs, xenografts applied to ailing organs can also be successful. According to the CDC, “heart, kidney and liver xenografts have been able to support human life for an extended period. It is this fact that investigators wish to exploit in clinical bridging studies.”

In light of these facts, we might imagine the following case. Ms Smith is a working, single mother of two high school age children. She has recently been suffering from a number of strange symptoms, including nausea, fatigue and loss of appetite. Ms Smith decides to go to the doctor, and upon an examination and battery of tests, is horrified to discover that her liver has a small hepatocellular carcinoma. She is starting to experience the first stage of liver failure. Ms Smith is immediately admitted into the hospital, and her name is entered into the National Liver Transplant Database. She is forced to sit and wait as doctors search for a matching donor. If she does not receive the new liver within six months, Ms Smith will die.

On one hand, xenotransplantation may seem to provide an answer in this case. If Ms Smith can receive a
xenograft, or even a full xenotransplantation of a liver, her chances of surviving could dramatically increase. The xenotransplantation could even save her life by eliminating the waiting time, and the complications that come with finding a donor, such as matching blood type and organ size. On the other hand, we must take into consideration the life of the animal which makes this transplant possible. That animal must be killed in order for the doctors to harvest the desired organ/tissue.

It is simple enough to argue that Ms Smith has a career and family to live for, while the animal in question does not. But are we justified when we sacrifice one living being for another? Who is to say that we may take a vital organ from one living thing and transplant it into another? As useful as utilitarianism is many contexts, it is unclear if it can solve this moral dilemma. There are important questions about whether animals should be considered in the utilitarian equation, and how their interests fit into the usual parameters of risk and benefit, costs, and so on. There are also questions about how the benefit that a human patient might derive can be compared to the benefits, or costs, to the animal donor.

References:


Further Reading on Xenotransplantation


Xenotransplantation: A Bioethical EvaluationDetail Only Available


Theoretical & Applied Ethics is now seeking papers and commentaries for three special issue. See Page 46 for more details:

1. Bioethics

2. Religion and Ethics

3. The Moral Thought of Bernard Williams
Is utilitarianism a useful tool when we investigate the ethical dilemmas that medical progress presents us with? It can be, but however useful utilitarianism is, no moral theory can give us conclusive answers. If we ponder ethical situations from just one theoretical point of view, we can create an additional dilemma where we must, in order to maintain the coherence and the logic of our theoretical principles, sacrifice what we really think is right out of a strange obedience to the theory itself. It might be better for everyone if in some situations we integrated different theories into our inquiry in order to avoid the crystallization of our norms and the narrowing of our perspectives.

We can see this in the case that Karlene Chi presents on xenotransplantation. Karlene does a good job of showing the limits of an inquiry that is carried on from only the utilitarian point of view. As she explains, when we try to promote the good of the majority we will nearly always have to do this to the detriment of the minority. When we think like utilitarians, the principle that guides is says that one should aim for the most good possible; that principle reveals its inadequacy, in some cases, when we look at just what this means from the minority's side.

In the context of xenotransplantation, the shortcomings of utilitarianism are revealed when we take up the perspective of the unwilling participant, the animals whose organs are harvested (to say that they are donated seems inaccurate). It would seem convenient if we could move to the other side of the fence, and inquire about the degree of consciousness that the animal has, and any rights that it might possess. But that move is difficult, to say the least, in that we have no way to enter into complete identification with the animal, at least from its point of view.

How can these difficulties shows that we need to enlarge our own point of view? The dramatic background in Chi's example has us meet Ms. Smith, a working mother who might be kept alive through xenotransplantation. With this example, we are asked to consider a patient's right to a good life. But it also asks us to remember that Ms Smith has duties as a mother and as a worker. Then there are, as Chi notes as well, the questions about the animal's right to life. It is when trying to mediate between these standpoints that Chi asks if we are "justified when we sacrifice one living being for another."

The answer to such questions is, I think, beyond the scope of utilitarianism. Again, were we to ask the theory, utilitarianism could only repeat its priority for the good of the majority. Theory has this limitation regardless of its ambition or preferences. Deontology would perhaps do little better than utilitarianism, as it might only repeat claims about the rightness of certain principles or motives. The insufficiency of both perspectives emerges because we seem to think that we must justify the killing of a living being, the animal, or that we must accept that Ms. Smith will die.

In short, the problems surrounding xenotransplantation are many. The problems associated with utilitarianism are many too, and might be better known among writers in ethics. We might better understand, even if we cannot avoid, some of the doubt which suspend our judgment about Ms. Smith, if we looked to Aristotle's idea of phronesis. This concept, rooted in Aristotle's own ethical theory, has to do with the art of practical reason. An Aristotlean will hold that even "the last principles of a moral system, when enunciated with maxim precision, will still not give definitive answers to the infinite kind of problems that arise in human life" (Luisella Battaglia, 2009). This seems especially so with utilitarianism and its capacity to weigh the lives of two very different beings. Something must be done about Ms. Smith. She deserves moral consideration, and probably has a greater right to life than the animals that might prevent her death. The problem is in showing how we can arrive at that conclusion through the application of utilitarian or any other kind of ethical theory.
While the field of bioethics is increasingly equated with medicine and healthcare, the purview of bioethics actually includes human interaction with all things biological—whether those interactions are with other humans, other sentient and non-sentient entities, even the very earth itself, since it is, after all, one of those necessary conditions for the very possibility of our existence. Much like our cohorts in medicine and healthcare, those of us currently laboring in the field of bioethics pay lip-service to the importance of developing at least a biopsychosocial—if not also environmental—perspective when addressing problems or issues. But when advocating for such an “all-things-considered” perspective we, again like our cohorts in medicine and healthcare, tend to ignore the material conditions, the biological, psychological, social and the environmental, that actually spawn and/or aggravate the complex, chronically occurring, and broadly (though often subtly) interconnected problems or issues we address. This leads to a myopia, it prevents us from being able to helping to identify the broadest range of possible solutions to the problems we focus on, or in some cases the consequences of our proposed solutions.

A case in point: bioethicists continue to stress the importance of autonomy while, at the same time, we fail to point out how basic economic and political arrangements actually set the framework for any meaningful understanding of autonomy to occur. Take, for example, the increasing availability of insurance-subsidized IVF in the US, a nation where the official poverty rate in 2009 was 14.3 percent (20.7% for children under 18 years of age), and where the percentage of people without health insurance coverage increased from 15.4 percent to 16.7 percent over the same period.\(^1\) What does autonomy effectively mean for the couple seeking IVF? For the child in poverty? For the person without health insurance? They all live in the same country, under much the same social or political arrangements, arrangements that have helped to create and now perpetuate the ability of some to fulfill not only their basic needs, along with their wants and desires. Yet at the same time, many of their basic needs will go unmet.

Loosely paraphrasing John Dewey, we might ask how a country that hoists the banner of the ideal, autonomy in this instance, can march in the direction of continual disregard concerning not only such basic inequities, but also such pressing issues as over-population, pollution on a global scale, global warming, the likely extinction of various flora and fauna. All of these things drastically impinge on the long-term robust autonomy of all for what might be the very short-term benefit of a select few.\(^2\)

Autonomy has rightly become the backbone of discussions in bioethics in the US. But we might now initiate meaningful discussion about what that autonomy means and how best to secure it. This would move us past the thought that autonomy is an abstract ideal, and towards the idea that it can reveal a reality lived, not just by some, but every biologically, psychologically, socially and environmentally situated self.

Notes:
\(^1\) Available at: [http://www.census.gov/newsroom/releases/archives/income_wealth/cb10-144.html](http://www.census.gov/newsroom/releases/archives/income_wealth/cb10-144.html); most recently accessed: 4 October 2010.

Contemporary metaethics has, in part, grown out of attempts to understand the logical relation between moral judgments and purely factual judgments. Whatever we may conclude about whether moral judgments represent the facts and therefore are ‘truth-apt,’ there is something special about them that generate two puzzles, one noticed by David Hume, the other by G. E. Moore. Here I’ll suggest that the solutions to both puzzles resides in the normativity of moral judgments, a distinctive feature that’s absent in purely factual judgments. In saying that a judgment might have ‘normativity’ I have in mind something akin to what J. L. Austin called ‘illocutionary force’: the power that moral judgments have to prescribe that certain actions ought (or ought not) to be done, or to endorse (or criticize) something as having features that deserve praise (or blame).

The first puzzle, the Humean one, arises from the apparent impossibility of deducing a judgment’s Ought-force from purely factual judgments, often called ‘Is-sentences.’ This logical gap between Is and Ought seems to affect any piece of moral reasoning, even arguments that include Ought-sentences among their premises. Moral arguments often have a general moral principle as a premise, which is a generalization about what one ought or not to do, or what counts as right or wrong, good or bad. An example would be the principle that an action with both good and bad effects is justified, provided that the agents are doing their best to bring about the good results, and to avoid the bad that are foreseen but unintended.

This is the so-called Principle of Double-effect. But since a principle of this sort is an Ought-judgment, if there is an Is/Ought gap of the kind that troubled Hume, how can it be deduced from Is-premises alone? That is, any argument offered to deduce a moral principle from Is-sentences alone would seem to lack entailment, which amounts to our saying that the argument could have true premises and a false conclusion. It would be possible to accept such an argument’s premises and reject its conclusion without logical contradiction. Consider the following argument:

Premise: Punishing those who most people think are guilty of a certain crime increases the total amount of pleasure for those aware of the crime.

Conclusion: Punishing those who most people think are guilty of a certain crime is always morally right.

Assuming that there is a clear divide between fact and norm, the premise comes out as an Is-premise. After all, whether or not punishment increases the total amount of pleasure for those aware of the crime amounts to a claim about the facts. All the while, the conclusion seems to be an Ought. To say that an action is morally right is to at least say that it deserves praise, and perhaps that it ought to be performed. Could the premise be accepted and conclusion rejected without contradiction? If that is possible, it would generate the Humean puzzle, namely, that of explaining why Ought-judgments cannot be deduced from Is-judgments alone. To show that this puzzle does arise, we can imagine Betty, who is not only a hedonistic consequentialist but also a transitionalist about justice. Given her hedonistic consequentialism, Betty believes that an action is right only if it produces, for those affected by it, more overall pleasure or less overall pain than an alternative action would. Therefore, for a punishment to be right, the increase in pleasure that it produces for the aggrieved populace must be greater than the pain it involves. As a transitionalist, Betty thinks that, for the sake of national reconciliation in a country formerly ruled by a despotic regime, some criminals of the deposed regime should be permitted to go unpunished in the interests of facilitating national concord and democracy. Given her hedonistic consequentialism, this leniency, she thinks, would produce a greater increase of pleasure in the world on the whole than the punishment of a handful of despots and their henchmen. Betty holds, for example, that not all of the members of the military responsible for brutal crimes in Latin America, under the dictatorships of the 1970s, ought to be punished. Punishing them, she believes, would undermine the subsequent efforts to reinstall democracy in the region.
Two Puzzles in Metaethics

The rationale for Betty's view is, of course, that in the current political climate the punishment of the guilty might reignite violence. So, after calculating increases and decreases of pleasure on the whole, Betty accepts the argument's premise: punishing those who most people think are guilty of crimes increases the total amount of pleasure for those aware of the crime. But she wants to reject its conclusion, since she thinks that on the whole, the increase in total amount of pleasure in the world would be greater without punishment in some cases. Those who disagree with Betty could muster a number of reasons against her views; retributivists in particular could present a box-car load of objections. Yet the one thing they cannot do is charge that Betty's position is contradictory.

The Humean puzzle could be regarded as part of a larger, Moorean puzzle that arises when some moral and some purely factual expressions are taken to have the same content. Mooreans agree that there is an Is/Ought gap, so that no Is-judgment could entail an Ought-judgment. But they do not argue for the existence of that Gap. They offer instead the Open Question Argument (OQA) for their view that no moral sentence or term could be equivalent in content to purely factual sentences and terms. Mooreans thus attempt to refute content naturalism, which is the doctrine that some such sentences and terms are equivalent in content.

A content naturalist may claim, for example, that the moral term ‘good’ is content-equivalent to the descriptive expression ‘increases happiness in the world.’ OQA charges that if this is so, then the question, ‘Granted, this action increases happiness in the world, but is it good?’ would be closed, meaning that it would make no sense to ask it, since it would be precisely equivalent to ‘Granted, this action increases happiness in the world, but does it increase happiness in the world?’ Yet the question is open, that is, it does seem to make sense to ask it. Therefore, ‘good’ is not synonymous with ‘increasing happiness in the world.’ Moreover, according to OQA, the steps of the argument could be iterated for any other purported content-naturalist equivalence, showing that no moral expressions are synonymous with purely descriptive expressions.

Naturalism is thus taken to be refuted, except that there is now consensus that a Moorean strategy along these lines fails to refute all versions of ‘ethical naturalism,’ a broad set of metaethical doctrines that attempt to account for moral value by invoking only natural, and even physical, phenomena. Some naturalists claim that there is content-equivalence between moral and factual expressions, for instance. But for others, the equivalence is restricted to the referents of moral and the factual expressions. These naturalists may, for example, claim that ‘good’ and ‘increasing happiness in the world’ refer to the same natural property, as do ‘heat’ and ‘molecular motion.’ Although this type of metaphysical naturalism is unaffected by OQA, the argument has force against content naturalism, a doctrine that has its supporters today.

Content naturalists commonly dismiss OQA by invoking some common objections to it. Prominent among these objections is W. K. Frankena’s, that the argument begs the question. Other objections are that OQA invites the paradox of analysis, or that it makes what is at best a calculated guess when it claims that its steps could be iterated for any purported naturalistic equivalence of moral and descriptive terms. In spite of such objections, the argument has had a persistent appeal as a refutation of content naturalism. And there is no denying that it raises a puzzle about moral judgments that, like Hume’s Is/Ought gap, can be resolved only by pointing to their normativity: a special force in moral judgments that purely descriptive judgments lack.

I submit that normativity accounts for both the reason why Ought-conclusions resist derivation from Is-premises alone (Hume’s claim), and the reason moral terms and sentences are not content-equivalent to purely descriptive terms and sentences (Moore’s claim). Whether one accepts all the conclusions that Humeans and Mooreans attempt to draw from their arguments, there is no denying that each of these lines of reasoning has shaped the current landscape in metaethics. Nor is there any doubt that lurking behind both lines of reasoning is the semantic phenomenon of normativity.

Notes
3. G. E. Moore 1903, chapter 1, 12.
5. For Frankena, OQA’s contention that naturalistic equivalences are open questions is viciously circular. See his “The Naturalistic Fallacy,” *Mind* 48, 192 (1939): 464-77.
7. S. Nuccetelli and G. Seay “What’s Right with the Open Question Argument?” (pp. 261-82 in Themes from G. E. Moore).
Cognitivism and Prescriptivity

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Abstract Arguing from a cognitivist position of strong moral realism, this paper explains the prescriptive aspect of moral reality by comparing the human experience of perception and response to material objects with our experience of perception and response to moral prescriptivity. By drawing a distinction between statements about facts and facts themselves, and by illustrating how the human experience of morality is one of many competing demands for attention, it also shows that moral realism is not defeated by the existence of conflicting moral theories or the experience of moral disagreement or uncertainty.

Introduction

An explanation of the experience of moral prescriptivity is essential for any theory of ethics to be complete. I will argue that it is possible for a cognitive approach to moral realism to provide a defensible explanation of this experience by presenting my own idea to explain the prescriptivity of moral action. I assert that the “normative pull” exists as a human response to a quality inherent in a moral act, similar to the way the cones in the eye respond to the quality of the reflected light that we experience as color inherent in an object, or the nerves in the fingertips respond to the temperature or smoothness inherent in the surface of an object. This approach is consistent with the cognitivist position, and it offers a defensible explanation of the phenomenology of moral prescriptivity. I will also show that moral realism is not defeated by the existence of conflicting moral theories or the experience of moral disagreement between agents or by individual uncertainty.

There are many ways to approach a discussion of ethics, the study of which actions humans judge to be good or bad, right or wrong, and how those judgments impact the way we ought to behave in our dealings with others. Normative ethics deals with which rules, or guiding moral principles, we adopt on an individual or a societal basis. It is on the normative level that the majority of ethical discourse takes place. However, once we move past normative considerations and enter the world of meta-ethical theory, there are some basic questions that need to be addressed independently of their impact on our behavior.

Perhaps the most basic of these questions is: Are morals real? This question asks whether morality exists in the world, independently of human action, with an objective reality, against which moral claims can be compared in order to determine the validity of the claim. A second question is: How do we know? The means by which we perceive the presence (or seeming presence) of morality needs to be identified. A third question is: What are the clues? We must distinguish what exactly we perceive that leads us to the concept of morality in the first place. After all, if morals are real, then they seem to be real in a different way than a tree or a rock or a chair is real; they are perhaps real in a different way than gravity or numbers are real. I realize that the reality of trees, rocks, chairs, gravity and numbers can also be subject to doubt. Of course, the fact that these things can be doubted is a point in common with moral reality. However, the issue I am addressing here is not whether anything is real, but rather the way in which something could be considered to be real.

Moral action is what one ought to do. Morality is generally described as a property of an action, but not just any action. For example, it is typically considered a moral question whether one ought to lie to one’s parents, but not a moral question whether one ought to put one’s elbows on the table at a formal dinner. What is the difference between the two acts? What is it that we perceive about actions that places them in the moral realm or not? I believe these three questions are fundamental to meta-ethical inquiry. Realism and skepticism are two positions in response to the first question, ‘Are morals real?’ Realism answers in the affirmative; skepticism answers in the negative.

Cognitivism and Non-Cognitivism

Cognitivism and non-cognitivism are two general ways to approach the second question, ‘How do we verify the truth-value of moral claims?’ Although there are many camps, each differing on particular explanations of their position, the realists, or those who believe in an objective moral reality, tend to be represented by both cognitivists and non-
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cognitivists. A cognitive approach to moral realism identifies thinking, cognition, and a formulation of logical inferences as the means of moral perception in order to determine the truth-value of moral claims. An example of a non-cognitive moral realist position would be intuitionism, the theory that “identifies ethical propositions as objectively true or false, different in content from any empirical or other kind of judgment, and known by a special faculty ‘intuition,’” (Blackburn, 2005, p. 190).

The non-realists (skeptics), or those who seek other explanations for the moral experience, are typically referred to as non-cognitivists (or error-theorists, a subset of non-cognitivism). The skeptic’s “non-cognitive” label is not because they refrain from thinking, cognition or formulation of logical inferences to reach their conclusions, but because they maintain that since there is no objective moral reality, moral claims cannot be evaluated from a cognitive perspective, and in fact have no truth-value at all.

Prescriptivity

In response to the third question, ‘what are the clues?’ it is difficult to deny the prescriptive aspect, the compelling nature of the moral experience. Prescriptivity is “the moral force felt/experienced by moral beings in the presence of moral judgments and concepts, the normative force of the ought.”1 It is a defining feature of what we perceive as a moral experience. A failure to perceive prescriptivity typically indicates an absence of moral content, at least from the perspective of the individual involved. From a cognitivist position, an act with “moral content” references objective moral reality, against which, moral judgments about the act can be verified. From a non-cognitive position, the term “moral content” would have no meaning other than an imprecise reference to the moral relevance of the act as it relates to internal psychological attitudes.

In the presence of an act with moral content, or an act with accepted moral relevance, from a claim that “X is good,” it seems to follow naturally that one ought to do X, or at least allow others to do X. Conversely, if one has claimed, “X is bad,” it follows naturally that one ought to refrain from doing or permitting X. In fact, it is through observing our response to the prescriptivity of the act that we form our judgment claim. Whether this “normative force” is a function of objective moral reality or is a function of the psychology of the individual, providing an explanation of prescriptivity is an important task for any meta-ethical theory. A failure to do so would considerably weaken a theory.

Non-cognitive meta-ethical theories, which deny the reality of moral facts, typically point to the psychological make up of the moral agent, or to societal expectations, to explain this pull. They assert that moral disagreements are evidence that statements of moral judgment are nothing more than personal expressions of emotion or conditioning, rather than verifiable statements about objective facts of the world. For instance, in Ethics Inventing Right and Wrong John Mackie (1977) states that the claim “This action is right’ means ‘I approve of this action’” (p. 17). In this way, Mackie explains prescriptivity as a non-cognitive response to an action that aligns with the inner attitude of the agent. The verification of the claim is now dependent upon the alignment of the claim with the agent’s actual attitude rather then upon alignment of the claim with an external, objective moral reality.

Cognitive Explanation of Prescriptivity

Cognitivists, on the other hand must account for prescriptivity in a way that is consistent with their assertion that moral facts are real, that they are a function of the way the world is, as opposed to some internal feature of the agent. To show how this can be done, let’s begin with two ideas. First, Richard Werner (1983) posits that moral facts exist, that is, that moral judgments are statements that are either true or false because they actually assert something verifiable about the world (p. 653). Expanding on Werner, Jonathan Dancy (1986) encourages us to adopt a strong version of realism, in which moral facts are not dependent on the possibility of human response, but rather exist independently of human experience (p.167). Second, because moral statements assert something verifiable about a reality that exists independently of human experience, we can use a process parallel to scientific method to verify a moral claim.

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1 This wording is borrowed from Christina M. Bellon.
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To test these ideas, we will proceed by adopting Dancy’s strong version of reality, that the external world is real, and exists independently of human experience, and apply the scientific method to some material fact, such as the shape and color of the stapler on my desk. Scientists have postulated theories to explain the phenomenon of color and how we come to experience it. Bare facts of the matter do not have truth-values; they simply are what they are. According to our initial assumption of strong realism, the shape and color of the stapler are what they are – they are the bare facts of the matter independent of any observation or verification. The question of whether the color of the stapler is true or false never arises because truth-values do not pertain to bare facts.

But statements, or theories about these facts, do have truth-values. For instance, one scientific theory may state that color is “a visual attribute of things that results from the light they emit or transmit or reflect” (WordNet, 2010). Another scientific theory may state that color is a function of the mood of the observer. Current scientific definition assigns one of these statements a truth-value of T, the other a truth-value of F. It is possible, though unlikely from our current perspective, that future testing may prove both theories to be false. The object, on the other hand, continues to be the color that it is. If I look at a black stapler and make an inaccurate observation that the stapler is red, then it is my statement that has a truth-value – not the color of the stapler. According to this line of thinking, theories are either true or false - they either align with reality or they do not. Whether statements and theories are true or false, they have no impact on the fact of the matter, or the way things actually are.

We can identify the shape and color of the stapler by applying the scientific method: observation of the perceived material facts, development of scientific theory regarding those facts, followed by repeatable and verifiable confirmation that our theory matches the facts. We can also simply observe the shape and color with our senses of sight and touch, lacking any knowledge or understanding of the underlying theory explaining the phenomena. However, assuming the position of a realist who accepts the independent objective reality of the world, the stapler’s shape and color would not change even if there were no possibility of anyone observing it, nor would it if we were developing incorrect theories about it or observing it through distorting glasses.

In the same way that we look to our sensory experiences for evidence of an external objective material reality, we can look to our prescriptive experiences for evidence of an external objective moral reality. As an example, consider the moral claim, ‘murder is wrong’. This claim purports to be in alignment with a moral fact. (It is not my project here to prove the existence of moral facts. I am assuming Dancy’s “strong real” position on the independent objective existence of moral facts, and simply looking at how that might explain prescriptivity.) According to Werner, we can establish the existence of moral facts through observing evidence p. 655), and according to Dancy, a wrong act will still be wrong even if no one could possibly observe it (p. 168). It will also be wrong even if we mistakenly judge it to be right.

This is an important aspect of moral realism: a mistaken theory about a moral fact, even if universally accepted, is not to be confused with the moral fact itself. As Marcus Singer (1970) so aptly put it, “no one . . . has the power to make his own. . . moral opinions true or rational, though he might be able to get them accepted by a sizable segment of society” (p. 260). How, then, does the existence of an independent objective moral fact explain the human desire to stop an act of murder? We typically are not content to observe a murder passively, as we are content to observe the shape and color of the stapler. We are driven to intercede, to prevent, to punish.

Of course, there are always examples of cases in which observers of a particularly heinous act fail to intercede. The 1964 murder of Catherine Genovese, in which 38 witnesses allegedly failed to come to her aid or call for help comes instantly to mind. However, it was the bystander behavior, the fact that prescriptivity was ignored, that makes this case so memorable. The same year, there were 25 murders every day in the United States, but because of the failure of prescriptivity, it is the Kitty Genovese case that we

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2 Throughout this paper, I focus on ‘statements’ of moral judgment rather than on moral ‘beliefs’. The reason for this is to keep the focus of verifiability on the external world of objective moral reality rather than on the internal psychology of the agent. Whether or not a statement “X is good” conforms to the internal belief of the speaker is irrelevant to the moral realist’s goal of ascertaining the veracity of the statement, which is considered to be a verifiable judgment of an act rather than an expression of an attitude. Of course, a case of a knowingly false statement of moral judgment would perhaps become its own moral act, the judgment of which would then be subject to verification.
remember. This illuminates the importance of prescriptivity in our recognition of moral content, and strengthens the claim that prescriptivity has a source external to the agent.

I propose that the experience of prescriptivity is in fact the “sensation” we perceive in the presence of a moral event. Our experience of prescriptivity is the evidence that Werner requires to establish the existence of moral fact. We recognize moral facts through our perception of prescriptivity, as we recognize red through our perception of color. When in the presence of an object with light reflecting in a certain way, we see red; we have a visual experience of what we call red. In a similar way, when in the presence of an act with moral content, that is, an act which references objective moral reality to verify moral claims about that act, most people feel compelled to act; we have a prescriptive experience of the normative pull of the ought, though bystander behavior seems to suggest otherwise.

I believe it is a mistake to interpret bystander behavior as evidence against the reality of prescriptivity. The very fact that we have a concept of, and a term for, bystander behavior indicates that this is aberrant behavior. No one calls a failure to respond to a car passing on the street “bystander behavior” because on most occasions there is no moral content in the passing of a car. For the passing of a car to have moral content, something more would be required, such as pedestrians knowingly being put in danger. A failure to see color is considered to be a failure of perception (we call this ‘color blindness’)– it does not indicate an absence of colorful objects. However, bystander behavior is not a failure of perception, it is a failure of appropriate response. When questioned later, witnesses who fail to respond in moral situations typically do not deny being aware of the prescriptive aspects; they know something wrong is going on and they do take action; the action they take is to override the prescriptive aspect of the moral event and choose not to intervene. This behavior is illustrated by the famous quote from one of the Genovese witnesses, “I didn’t want to get involved” (Rasenberger, 2004). Failure to respond in the expected manner does not indicate an absence of moral content. (I will discuss explanations of failures of prescriptivity to produce uniform responses in the section on objections and response.)

One might think that prescriptivity would require the presence of an observer, or moral agent, but does it? Obviously, someone would have to observe the act in order to be aware that a moral act is being committed, but that is also true of the shape and color of the stapler. Our awareness is not necessary for the existence of the moral fact any more than it is necessary for the existence of the stapler. The shape and color are qualities of the stapler. Prescriptivity is a quality of a moral act. Just as when we perceive red with our sense of sight, our rods and cones respond in a particular way, and when we perceive smoothness with our sense of touch, our nerves respond in a particular way, so too, when we perceive morality with our experience of prescriptivity, we are moved to take action in a particular way.

Of course, we do not all perceive or respond to the world in the same way. In people with typical vision, the perception of color does not vary from individual to individual, though different individuals’ responses to color may cover a wide range. One individual may fail to notice the red of a rose, while another may be inspired to paint a masterpiece. However, when an individual does perceive a color differently, say seeing red as grey, this is a result of faulty faculties of perception. In the same way, the experience of and response to prescriptivity will vary amongst individuals depending upon the state of their moral perception and individual personality. In the case of normal moral perception, one person may be compelled to rush to the rescue, while another may be compelled to call for help. At the very least, we are moved to formulate a moral claim, a judgment about the act. However, a case of failure to perceive moral content at all, rather than indicating the absence of moral content, can be explained as a failure of perception. In a similar way in which a color-blind individual fails to perceive color, an individual can fail to perceive prescriptivity. (I will discuss explanations of failure of perception in the next section.) The variations in the perception of and the reaction to color does not lead the scientist to deny the objective reality of the light interacting on an object, nor need the variation of perception of and reaction to prescriptivity necessarily lead the philosopher to deny the objective reality of moral content. Although we have not yet identified the specific faculty with which we perceive prescriptivity, we nevertheless acknowledge the experience.
Cognitivism and Prescriptivity

I suggest for now we use the word *consciousness* to refer to that faculty. Prescriptivity is a property of objective moral facts. It exists in the fact of the matter externally, like color, and we experience it through consciousness as prescriptivity in accordance with our individual characteristics. A direct correlation can then be drawn to the material world (Werner, 655): A type of fact exists in the world, such as a material fact or a moral fact. A statement is made about that fact, expressed as a scientific theory or a moral judgment. Again, these statements can be true or false, but this does not impact the fact itself. There is an occurrence, or example of this type of fact, such as a rock or an act of murder. These occurrences have properties, such as color or prescriptivity. Through our faculties of sight or consciousness we perceive an experience of color or prescriptivity.

**Objections and Response**

To re-cap, we would say that the cognitivist answers the meta-ethical questions as follows: Are morals real? Yes. How do we know? With our consciousness. What do we perceive? Prescriptivity. John Mackie presents two powerful arguments in defense of his claim that there are no objective moral values. His “argument for queerness” directly attacks the idea that prescriptivity can be perceivable in a similar way as color or texture. His “argument from disagreement” undermines the notion that consciousness is a reliable means to perceive moral content. I will look at both of these arguments in turn. Mackie’s argument for queerness states, “if there were objective values, then they would be . . . of a very strange sort, utterly different from anything else in the universe.”(p.38) He goes on to say that “Indeed, the best move for the moral objectivist is not to evade this issue, but to look for companions in guilt”(p. 39). He is right. One could argue against the queerness of grammar, or the queerness of math, or the queerness of gravity, or the queerness of matter. These things are all very queer, but that does not defeat them as subjects of inquiry or inclusion in our ontology. As Shepski (2008) points out, “Obviously we should not reject the existence of a putative object solely because its existence, or something about it, is currently unexplained. None of our sciences can at present be considered ‘complete’, but we do not for this reason reject them or the entities they posit” (p.8).

It is fair to ask how strong moral realism stands up to Mackie’s argument from disagreement. Mackie quotes Henry Sidgwick in saying that for morality “to . . . have an objective existence: it must be an object of knowledge and as such the same for all minds” (p. 24). Although Sidgwick views this as an indication that moral reality can be known, Mackie points to the seeming non-uniformity of moral knowledge to challenge moral realism. Why is there the problem of moral disagreement when there is seeming agreement over the properties of some material objects? Why do some people experience an overwhelming impulse to intercede in, say, rape or murder, while others see no wrong, or even speak out in support of the same act? Why do our moral judgments, expressed as the laws of our land, elicit so much debate? This, I believe, is where societal or situational conditioning comes into play.

According to my theory, prescriptivity exists on two levels: as an objective property inherent in a moral act, perceived through consciousness in the experience of an individual, and as the human action taken in response to the perception of prescriptivity. It is through our perception of prescriptivity that
individuals become aware of moral content, and through human response that we can observe the effects of prescriptivity in others. Although moral content is objective and independent of human experience, failure of prescriptivity can occur on two levels as well: as a failure of perception, or as a failure of response.

Like going blind by staring at the sun, or losing one’s taste by overexposure to a single flavor, our perception can become desensitized to the truth about moral facts through centuries of custom or habit, or through trauma. We are familiar with the effects of situational trauma on our ability to perceive the prescriptivity inherent in moral content, and it is exemplified in our literature:

“Blood and destruction shall be so in us
And dreadful objects so familiar That mothers shall but smile when they behold
Their infants quartered with the hands of war;
All pity choked with custom of fell deeds”
(Shakespeare, Julius Ceasar, Act III, scene I)

The mothers described in this passage exhibit a complete loss of moral perception, as indicated by their smiling response to the horrific death of their own children. This perceptual loss is a result of prolonged exposure to the situational trauma of war.

A current example of the failure of moral perception is the phenomenon of child soldiers in Africa. These children, who are traumatized at an early age and forced to spend their lives in combat, have had their ability to perceive moral content destroyed. When “some boys who looked to be around 12 decapitated a 15-year-old girl and played ‘catch’ with the head,” (Maslen, 2002) it is not a case of a difference of morality, but rather a total breakdown in functional perception. To say that there is no objective moral reality is to find this type of behavior interesting, but not disturbing; worthy perhaps of study, but not intervention. However, even skeptics are disturbed when observing such acts. The fact that we are disturbed by this behavior and moved to intercede suggests that the origin of prescriptivity is in the act itself, not in the relative merit of theories about that act.

But when perception is not damaged, why do we respond differently to acts supposedly involving moral content? Why does one group label homosexual relationships immoral and another group defend such relationships? I return here to the idea that a theory about a moral concept may be false without impacting the independent objective fact of the matter. I also return to Mackie’s statement, “‘This action is right’ means I approve of this action’” (p. 17). Mackie is not wrong in stating that humans are driven by their internal attitudes and desires. However, humans are also complex and intelligent. We recognize that a more powerful argument is a more persuasive argument. We recognize the power inherent in moral prescriptivity, and therefore we co-opt moral authority in order to strengthen our arguments in favor of our personal preferences. If a behavior makes us feel personally uncomfortable, it is much more powerful to claim that said behavior is immoral.

I believe that Mackie has mistakenly identified this drive to change the behavior of others to conform to our comfort level as the moral experience of prescriptivity, and therefore he defines the prescriptive experience as a purely internal personal one. He is not wrong to say that what we call moral claims are statements of personal attitude. He is wrong, however, to say that all moral claims are nothing but statements of personal attitude.

But how are the two experiences different? The difference is in the focus of the experience. Prescriptivity is externally focused; it manifests as a drive to intercede for the good of others. Though we are called upon to act, the origin and the conclusion of the “ought” are external to ourselves. On the other hand, our personal preferences are internally focused; they manifest as a drive to interfere with others for the good of ourselves. Moral prescriptivity, when followed to its farthest expression, does not consider our personal comfort and often takes us into dangerous territory. Our most difficult ethical dilemmas are those in which we are asked to risk our own well being for the safety of strangers. On the other hand, the protester against gay marriage is trying to create a society in which he will feel more comfortable, regardless of the impact on the lives of others.
Cognitivism and Prescriptivity

It is the impersonal, objective aspect of prescriptivity that accounts for the variety of response that is observed from culture to culture, and from individual to individual. It accounts for the occasional failure of response that we see in cases of bystander behavior. Humans are self-interested persons with multiple factors competing for their attention at all times. Prescriptivity is only one of those factors. It must compete with economic demands, physical ability, social pressure, and psychological makeup to name but a few.

Moral facts, because they are properties of actions, are more complex than material facts. Our response to prescriptivity is informed, in some cases distorted, by the historically and habitually accepted practices of our family, our community, and our society, which are also responding to multiple additional factors. The experience of internal moral conflict can be explained by a lack of alignment between a moral fact, which exists independently, an accepted moral judgment, which may be in error, and our perception, which may be desensitized by trauma or distorted by societal conditioning. None of this human conflict and disagreement, however, reflects on the reality of a moral fact and its property of prescriptivity.

Conclusion

I have presented an argument in favor of a cognitive approach to moral realism that I believe provides defensible answers to the fundamental metaethical questions, “Are morals real? How do we know? and What are the clues?” If my thesis is correct, there are a number of questions raised by the prospect of an independent objective moral reality. For instance, we now need to define the parameters of a moral act, explain how moral reality can be independent of human experience, determine the relationship between moral acts and objective moral reality, explicate the role of the moral agent. These issues address the nature of reality, where morality fits into that reality, and the human relationship to that reality. These issues are the very core of philosophical inquiry. I believe that a necessary starting point is to focus on the disentanglement of verifiable moral claims, (or claims about actual moral content) from the self-serving statements of preference in which individuals and societies have co-opted moral authority in order to increase the power of their position to serve their own ends.

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Prescriptivity: Cognitivism or Intuitionism

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Although many problems in philosophy are contentious and can generate heated debate, there is perhaps something particularly worrisome about the variety of positions staked out by different camps in the debate over moral realism. That variety makes it hard to keep track of who believes what, only generating more heat and confusion. In her paper, Carol Radkins provides a helpful taxonomy of these positions on the basis of three questions.

First, Radkins asks, Are morals real? Those who answer No she calls skeptics. Michael Smith, who has written quite a bit on the subject, divides these skeptics into the categories of the irrealists and the moral nihilists (402). Irrealists deny the reality of moral claims, but believe that we can still talk about them. Moral nihilists contend that moral claims are nonsense. In opposition to the skeptics are the realists.

Radkins’ second question is how we can verify moral facts. On one hand are the non-cognitivists, such as W.D. Ross and H.A. Prichard. They answer that we must rely on intuition. There is also a newer non-cognitivist “post-intuitionist tradition” that includes writers like Thomas Nagel and John McDowell (Dancy, 417). Cognitivists, on the other hand, believe that there are moral facts (they are realists in that sense), and that we can verify their existence.

The last question for Radkins, then, is how we know there are these facts. Radkins’ contribution to the debate is here. She argues that we know there are moral facts because of our experience of prescriptivity in moral actions. As I read her paper, however, Radkins would also like to go somewhat beyond this. She seems intent on showing that moral realism can explain the phenomenon of our experience of prescriptivity. In short, her argument is,

(1) We have an experience of prescriptivity.
(2) This experience can be explained by moral realism.
(3) Therefore, there is some reason to believe that moral realism is true.

The experience of prescriptivity, she argues, is akin to our experience of color, temperature, or hardness when we observe a physical object; likewise, we experience prescriptivity when we observe a moral act. Radkins contends that this prescriptivity is an experience of oughtness, a recognition that the action is right or wrong. Accordingly, we would realize, through our experience, that we ought to do or ought not do something. Rejecting the non-cognitivist approach, Radkins argues that one must use “thinking, cognition, and a formulation of logical inferences as the means of moral perception in order to determine the truth-value of moral claims.” Yet throughout her paper she describes prescriptivity as though it is something grasped through experience. Radkins never explains what the cognitive thought process is. She calls that process “consciousness,” and leaves it undefined. Also left undefined is what is to count as a moral action. And it is here that I have reservations about whether Radkins successfully defends her thesis.

What does it mean to “experience prescriptivity”? Since Radkins does not define “moral act” or give any distinguishing characteristics, it is difficult to know when I am supposed to experience prescriptivity or when I am not. She states that we would not (and should not) denounce “a failure to respond to a car passing on the street” because it is not a moral action, but that’s not true. If it flies by twenty miles over the speed limit in a neighborhood, I will think, with justification, “He’s going too fast. That’s not right.” It is
true that when the driver passes by going the speed limit, I might not think about the situation. If asked, I might say, “There’s no problem. He’s doing what he’s allowed to do.”

The point, in other words, is that the judgment, “That’s wrong,” can come very quickly without cognitive thought, but the judgment, “There was nothing wrong with that,” is also so obvious that there is not even the conscious thought that something moral just happened (the driver made the right decision to drive the speed limit). Yet both cases illustrate actions that fall within morality because one violated morality, and the other did not.

In one sense, every human action can fall into the realm of morality. Even getting up in the morning and arriving at work on time is a moral act because it fulfills a contract (promise) made between the employer and employee. Certainly, there are people who consciously think about their moral obligations to an employer, but when first asked why it is so important to get to work on time, many people might reply not that they have a moral obligation, but that they simply don’t want to get fired. They would in that sense be thinking of a hypothetical practical imperative, not a moral one. Only after a kind of Socratic cross-examination will some people say, “Well, it’s only fair to get paid for actually doing the work. It would be wrong to cheat my boss out of a full day’s work.” In fairness, I do not take Radkins to say that every action should produce an experience of prescriptivity. At the same time, she has not made it clear which actions would qualify.

One more concern that I have is with the vagueness of “consciousness” in Radkins’ argument. Despite rejecting intuitionism and stressing the importance of cognitive processes in understanding moral claims, Radkins provides no description of what those processes might be. How do we experience this prescriptivity? Granted, it might be beyond the scope of the paper to fully explain and defend it, but some brief explanation is necessary. Without it, “consciousness” begins to sound like intuitionism, which she identifies as a non-cognitivist approach, and has rejected as an answer to her question about how we can know that moral facts are real.

Radkins is right to argue that showing we have an experience of prescriptivity is one step towards being able to show that moral realism is true. It certainly seems that we have an experience that looks like prescriptivity. For example, when the speeding car races by, we say "He should slow down!" Likewise, when we hear of outrageous behavior, we might say, "There ought to be a law against that!" The latter statement might be taken as an explicit form of prescriptivity. The behavior could strike as so wrong that we should explicitly state, as a community, that it is not allowed.

But to make the case more convincing, Radkins needs to show that such a reaction involves a cognitive process, not just an emotional reaction of disgust, anger, and so on. A robust definition of consciousness might therefore strengthen her position. One specific question that Radkins must address is whether conscious reasoning should lead to the prescription or a conscious thought process can follow the reaction? In other words, is the experience of prescriptivity immediate or mediated through conscious thought? Returning to the example of the speeding car, we could ask whether a person sees the car and immediately thinks, "That’s wrong!" and then explain why. Or the sequence might be different, in that I first see a car speeding, and then think, "The car is speeding. This is a neighborhood with small children playing. Since someone could get hurt, drivers should not speed, as that one is." In short, this would call on Radkins to show that prescriptivity is cognitive (the result of a reasoning process) rather than intuitive (immediate awareness of the fact).

References

Further Reading
Abstract

Contemporary just war theorists claim that it is unethical to target non-combatants such as civilians because non-combatants are neutral and innocent. I sketch out the specifics of this argument, revealing its feudal-era roots, and then argue that it does not apply to citizens within liberal political theory and liberal societies. Liberal political theory is fundamentally premised on the idea that the citizens of a particular society consent to and authorize the actions their sovereign makes. This, I hold, strips them of any neutrality or innocence they could claim to have with respect to the decision of their sovereign to go to war.

Introduction

Contemporary just war theorists argue that attacking non-combatants is unethical. Non-combatants, they claim, ought to be immune from attack because non-combatants are not substantively involved enough in violent conflicts to warrant being targeted. The most prominent contemporary justifications for this view converge around two main concepts: neutrality and innocence. Non-combatants, such as civilians, are depicted as functionally neutral with respect to the armed conflict that is surrounding them; and, they are depicted as innocent insofar as they do not decide to go to war or decide how a war is fought. In this paper, I argue that the neutrality/innocence justification (NIJ) for non-combatant immunity does not apply to citizens within liberal political theory and functioning liberal states. Because liberal theory is fundamentally premised on the claim that legitimate governments are those to which individuals consent, individuals within liberal political states do not possess the innocence and neutrality necessary to make them ethically immune from attack.

Within the historical development of arguments for non-combatant immunity, the NIJ is first articulated in the Middle Ages. Leaders of the Peace of God Movement, writing in the 10th century, “forbade all acts of warfare or vengeance against clerics, pilgrims, merchants, Jews, women, and peasants” (Bellamy 31). The motivation for these novel wartime prescriptions was the "increasingly violent nature of feudalism towards the defenseless and the Church especially” (Bellamy 31). The unifying properties that the immune groups shared in were innocence and neutrality. No group on the list participated in the decision to make war, nor the mechanics of warfare itself.

After the Peace of God Movement, other Middle Age scholars expanded upon their list of immune groups, and Thomas Aquinas finalized the articulation of the NIJ. Writing three centuries after the scholars of the Peace of God Movement, Aquinas argued that justice in war requires a “complete prohibition on killing the innocent” (Bellamy 40). In making his argument, Aquinas completed the logic of the Middle Age scholars that came before him. Instead of iterating larger and larger lists of immune people, he considered what traits the listed groups had in common -- neutrality and innocence -- and argued that all who share in those traits ought to be immune from attack.

Contemporary just war theorists still provide the NIJ for non-combatant immunity developed by Middle Age scholars even though the feudal political institutions that the NIJ was constructed as a response to no longer exist. Brian Orend writes that terrorist attacks aimed at non-combatants “is always an impermissible tactic, since it involves the deliberate killing of innocent civilians” (Orend 70). Nicholas Fotion writes “Only certain people should be attacked intentionally. [...] Those who should not be attacked include children, old people, mothers, secretaries, musicians, medical personnel and so on” (Fotion 116). Alex Bellamy gives seven reasons why non-combatant should be immune from targeted attacks, the first two of which are “non-combatants have committed no wrong” and “they are not participating in the fighting” (Bellamy 132). James Turner Johnson writes “what noncombatants do not do -- participate in the making of war -- means that they should not have war made against them, whatever their beliefs,
ethnicity, religion, or sympathies” (Johnson 87). Finally, Michael Walzer argues that non-combatants are “innocent people, a term of art which means that they have done nothing, and are doing nothing, that entails the loss of their rights” (Walzer 146).

In addition to their positive affirmations of the NIJ, the only significant modification to the principle of non-combatant immunity made by contemporary scholars further illustrates their reliance on the NIJ. Specifically, contemporary scholars such as Fotion and Walzer argue that there ought to be some non-combatants that are legitimate targets of attack. Specific examples of these non-immune non-combatants include bomb factory workers, munitions truckers, and generally people whose social role involves a contribution to the war effort (Fotion 116; Walzer 160-175). This is clearly an appeal to the generally accepted NIJ. Workers in bomb factories, it is argued, cease to be neutral and thus, the arguments of the NIJ do not apply to them. This demonstrates that the generally accepted contemporary framework for non-combatant immunity debates is the NIJ first worked out in the Middle Ages; even disputes about the particular application of non-combatant immunity terminate with appeals to neutrality and innocence.

Inapplicability

There appears to be a significant error in assuming that the NIJ actually applies to citizens in modern liberal societies. Initially, the NIJ was used as an argument to grant ethical immunity to the subjects of feudal systems. It was the the specific role of peasants, women, and others within feudal society that mandated that they be immune from targeted attacks. Wars of the feudal era were largely between unelected feudal lords and were mainly conducted by mercenary armies.

The subjects of feudal systems did not decide to go to war, did not elect the feudal lord that made those decisions, and were not involved in the conduct of wars themselves. These subjects, because of the way feudal society worked, were genuinely neutral and innocent. The NIJ undeniably applied to them. However, the role of citizens within ideal liberal theory and within modern liberal societies is significantly different from the role of the subjects in feudal societies. The role of the citizen in liberal society, both in theory and application, is a role which involves active consent to the decisions of the sovereign. Such a role strips liberal citizens of their neutrality and innocence, and therefore makes the arguments of the NIJ for non-combatant immunity inapplicable to them.

One of the cornerstones of liberal political theory is its novel depiction of individuals within society as active citizens, instead of merely subjects. The justness of government actions, laws, and the structure of society is derived in liberal theory, not from the dictates of a divine king or some other arbitrary ruler, but from the active -- even if hypothetical -- consent of all of the individuals within society. This holds true across the spectrum of liberal thinkers, from Hobbes to Rawls.

Hobbes’ social contract theory appeals to the hypothetical consent of rational self-interested individuals to justify the legitimacy of government actions. For Hobbes, the individuals in a society are authors of “every thing their representative saith, or doth in their name” (Hobbes 132). The stream of authority begins with citizens and terminates in the sovereign’s actions. According to Hobbes, the authorization is given at the hypothetical start of the society by consenting to the social contract, but nonetheless, the authorization is present at all times and always comes from the individual citizens. Thus, the individuals are not neutral or separated from the actions of their sovereign like subjects of a feudal system; instead, individuals are the initial source of all of the actions. Hobbes himself recognizes that the logical consequence of this is that the participants “[own] all the actions the representer doth,” meaning they are responsible, non-neutral, and non-innocent (Hobbes 124).

Locke’s social contract provides a similar account of the authorization of government actions. For Locke, when individuals hypothetically enter into the social contract, they consent to transfer the “Executive Power they had in the State of Nature, into the hands of the society” (Locke 353). Locke further clarifies what he believes to be the root of authority and legitimate government when he defines the
specific roles of government. He writes that the “Legislative [...] is the supreme power of the Commonwealth” precisely because the individuals within society placed the power there through consent (Locke 356). Locke continues, saying that no other decisions or laws constructed by any other body can be legitimate because in such a case “the law could not have that, which is absolutely necessary to it being a law, the consent of the society” (Locke 356).

Locke takes further pains to justify sovereign actions as consent-based when he sketches out his picture of tacit consent. Locke argues that simply “enjoy[ing] any part of the Land” of a state entails consent to the sovereign and the content of the social contract (Locke 348). This clarification allows Locke to claim that all citizens are consenting to sovereign actions even if they never formally entered into a contract to do so. Finally, Locke makes it undeniably clear that he views consent to the basis of all legitimate government actions when he denounces the right of a state to possess arbitrary power (Locke 357). Legitimate exercise of power, within Locke’s theory, must flow from the consent and authorization of individuals within society.

Rousseau also depicts individuals within society as active citizens. For Rousseau, the social contract is stated as follows: “Each of us puts in common his person and all his power under the supreme direction of the general will; and in return each member becomes an indivisible part of the whole” (Rousseau 164). Rousseau’s theory more thoroughly commits individuals to an active role in society, for it not only requires the consent of individuals to enter into the society, but also the ongoing participation of individuals in the decisions of the state. Rousseau’s distinction between citizen and subject is one of the clearest articulations of the way authority in liberal political theory works. Rousseau writes that the people in a state “are called individually citizens, inasmuch as they participate in the sovereign power, and subjects, inasmuch as they are subjected to the laws of the State” (Rousseau 164). For Rousseau and other liberal theorists, sovereign action derives its authority from the individuals of society and consequently individuals in society are bound to the consequences of sovereign actions. Citizens thus are not neutral towards, nor innocent of the actions their sovereign makes.

Even modern liberal theorists, such as John Rawls, rely upon the consent of individuals to justify the actions of states. Rawls holds that a just society is one whose basic structure would be chosen by rational self-interested people behind a veil of ignorance (Rawls 12).

From this basic premise he derives principles which he argues people behind a veil of ignorance would adopt. Regardless of the principles he ends up constructing, the basic premise of his theory of justice is the basic premise of liberal theories in general: authority, social structures, and sovereign decisions are legitimate because they are rooted in the consent of individuals. In the case of Rawls, it is hypothetical consent derived in a hypothetical thought experiment, but it is consent nonetheless.

In ideal liberal theory, citizens themselves are the source of all governmental actions in one form or another. This is a unifying principle of what makes a liberal theory a liberal theory, at least for the contractarians. The conclusion then that citizens within liberal societies are not covered under the NIJ follows in a fairly straightforward fashion. If a government decides to go to war, that decision only comes about as a result of the citizens authorizing the government to do so. The citizenry’s role in the war is as the originator of the action.
towards war. This might happen electorally or it might happen by consenting to a societal structure that allows wars to be waged. Regardless of which one happens to be the case, the citizens are necessarily participating in the process of waging war. Thus, the citizens are not innocent of the decision to pursue war, for it is they who are authorizing the decision; and, the citizens are not neutral towards the war effort because it is their actions (consent) that causes the war to occur. Because the citizens are non-neutral and non-innocent, the NIJ cannot apply.

Perhaps a hypothetical case will better clarify how liberal theory requires this conclusion. Let us say that the prime minister of the liberal democratic country Foo declares war on some other country. The prime minister of Foo was duly elected and thus the war is considered a legitimate exercise of sovereign authority. In this case, liberal theory holds that the citizens of Foo authorize the war in two ways. First, the citizens of Foo authorize the war because they consent to the basic structure of society that permits the prime minister to declare war. Second, by electing the prime minister into office, the citizens of Foo provided a more specific instance of consent and authorization when casting their votes. Had the citizenry of Foo not consented to a society that makes declaring war possible, or had they consented to a society that makes declaring war harder, then the war could not have occurred. Because the citizens of Foo did neither and consented to the present society instead as well as voted in the current prime minister, they can be considered authors of the war and are entirely responsible for it.

This conclusion holds no matter what kind of liberal society is in question. Consent-based governance is the essence of liberalism; as a result, liberal political theory requires that all actions of the state come from the citizenry, and that citizens must subject themselves to the consequences of those actions. It is precisely the presupposition that citizens are non-neutral and non-innocent that drives the mechanics of governmental legitimacy in a liberal state. Consequently, when a war is waged, the citizens of the society waging it are an indispensable part of the decision-making process. The claim that the citizens in such a society ought to be immune from attack for the same reason that feudal peasants ought to be immune from attack -- the NIJ – does not follow.

The inapplicability of the NIJ to liberal citizens not only holds in ideal theory and hypothetical examples, but also holds in existing liberal societies. Citizens of liberal societies such as the United States of America, the United Kingdom, and Spain really do participate in the actions their governments make. They elect representatives according to platforms and other metrics, and agree to authorize the policies those legitimately elected representatives make. The role of the citizen is not a bystander, but as an active agent in the decisions of the sovereign. Citizens can and do affect the policies pursued by the state which ought to make them culpable for those policies, even when those policies include war.

The circumstances surrounding the Madrid train bombings of 2004 illustrate how citizens in a liberal society occupy non-neutral, non-innocent roles in the execution of war. Spain is a liberal democracy whose government is run using a parliamentary system. The citizens directly elect the representatives in the Spanish parliament and those representatives form policies and take positions that are supposed to reflect the will of the population. In short, the Spanish government acts by the authority and consent of its citizen population in a fashion which makes it a real world application of liberal political theory. Thus, it should follow that when the popularly elected Spanish government decided to participate in a war of aggression against Iraq, that decision ultimately derived its authority from the citizens of Spain themselves. Thus retaliatory attacks against the authors of the invasion should be considered justified self-defense and not an attack against innocent or neutral bystanders.

The Madrid train bombings were arguably just such an attack. On March 11, 2004, ten bombs were set off on commuter trains in Madrid which killed 191 people and injured at least 1,800 more (“Timeline: Madrid Investigation”). Three days after the attack on March 14, a videotape was released by Al Qaeda which claimed responsibility for the attack and said that it had been carried out as retaliation for Spain’s involvement in the Iraq War (“Timeline: Madrid Investigations”). On the
very same day as the tape’s release, Spain held its parliamentary elections and the Spanish Socialist Party secured a “surprise victory” (“Timeline: Madrid Investigation”). Of particular importance here is that the man set to become prime minister in a Socialist Party victory, Jose Zapatero, ran on a platform of withdrawal from Iraq and after being elected did precisely that (“Spain PM”). While multiple explanations for this electoral upset have been offered, one dominant and plausible explanation is that Spanish voters switched their vote in response to the bombings and the tape.

The specific series of events of the Madrid attacks makes them an especially compelling example of citizens participating in society in a way to further war involvement that would otherwise not occur. Not only were the citizens causing the war to begin due to the way liberal theory constructs consent and authority, but according to Sigma Dos polling information, the citizens of Spain were also ready to re-elect the very same government that got the country into Iraq and that sought to continue the war (“Elecciones Generales”). Seven days before the bombings, the sitting government held a 6.2 point lead in the polls. The day after the bombings, that lead narrowed to 0.7 points, and on election day, the sitting government was defeated by 5 points (“Elecciones Generales”). This represented a 11.2 point swing from a pro-war candidate to an anti-war candidate. To claim then that the citizens were neutral or innocent in this case would be on its face absurd. Through a simple vote, they were able to decide to continue a war or end a war and the polling trends suggest that as a collective whole, they intended to choose continuation until the bombings occurred. Under the prevailing theory that immunity is to be granted solely on the basis of neutrality and innocence, it would seem to follow that these citizens -- lacking such traits -- were ethical targets of attack.

Objections and Alternatives

An intuitive objection to this analysis is that not all victims of the attacks or similar attacks that might take place elsewhere support the war. Those who do not support the war, it might be argued, do not deserve to be targets of attack. This objection misunderstands the nature of a liberal society and especially the nature of electoral governance. In a liberal society, individuals authorize a war legitimately waged by the sovereign if they authorize the basic structure of society that allows that war to occur. If we allow that majority rule should dictate policies, then at a deeper level, we are authorizing and consenting to a popular war to which we may claim personal opposition. Or at least, that is what liberal theory requires of citizens. To object to this conclusion is to object to the fundamental idea of liberal political theory: citizens who consent to the structure of society are subject to the consequences of that structure. That is not to say that there are not valid reasons to object to liberalism’s view of consent; however, any objection to this portrait of consent is an objection to liberal political theory itself, not just this application of it.

It might be further objected that there is an obvious gap between the extent to which different citizens really further a war effort. For instance a pro-war activist surely does more to further a war than a pacifist working in a grocery store. To understand why this objection fails, it is necessary first to recognize the binary nature of non-combatant immunity. Someone either ought to be immune or ought to not be immune; there is no possibility of a sliding scale. The NIJ holds that those who are neutral and innocent ought to be immune and those who are not neutral and innocent ought to not be immune. In the case of liberal societies, all citizens fall into the latter camp because of their role as citizen, not their specific occupational role in society. One might categorize these non-immune citizens further by occupation, separating those who are extra deserving of an attack from those who are less deserving. But any taxonomy that is derived from such an effort should be considered a subset of the larger set called citizens, and it is belonging to that set which dictates non-immunity.

Lastly, it might be objected that a person who consents to the structure of a liberal democracy at war does so, not because they support the war necessarily, but because they prefer the current structure over some other structure or a civil war. I argue that when making the calculation to prefer to existing structure, there should be the understanding that consenting to the structure of a
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liberal democracy means simultaneously consenting to the consequences of the policies that structure leads to. The consequence of a war policy is openness to attack. If it is determined that such a consequence is almost never worth contending with, then perhaps war should almost never be pursued. Additionally, it might suit a society that did not want to be open to attack to require higher margins of support for a war policy to pass or take some other measure to make war less likely to occur. If the basic structure of society is set up in a way that makes warring easy, then those who consent to that structure are culpable for that choice.

Although I hold that the NIJ is inapplicable to liberal citizens, that does not necessarily mean there are no other ethical justifications to fill its role. While I do not intend to provide an exhaustive analysis of other potential approaches to non-combatant immunity, a quick survey of the most likely alternatives shows that they also have their problems. For example, various schools of utilitarian thought might be used to construct different immunity principles. An act-utilitarian would only be able to argue for immunity if allowing an attack on civilians in a specific case would cause more suffering than it alleviated. In some cases, this would not actually lead to a requirement of immunity because it is possible that an attack on the civilians of a country might cause that country to pull out of a war (as with Spain), and save more lives overall. Some act-utilitarians might value the lives of their fellow citizens over the lives of others and consequently view an attack on their own civilians as always outweighing the lives lost from other countries.

However, these utilitarians would have no grounds to argue for a universal non-combatant immunity principle because they could not expect other countries to avoid targeting civilians if doing so saved the lives of more of their own citizens. Rule-utilitarians might have slightly firmer ground putting forth an immunity principle by arguing that as a general rule, allowing direct attacks on civilians will lead to more suffering than forbidding them. But this is debatable, as it seems that if we stipulate that going to war requires opening up the civilian population to direct attack, we would decrease the willingness of liberal states to pursue war which would have a net positive effect. Additionally, it is hard to determine whether civilian attacks in general would cause wars to end more quickly or not, leaving a rule-utilitarian approach unable to yield a certain answer.

Another alternative would be to simply say that only those with very direct involvement in the war itself ought to be ethical targets for attack. However, this standard seems arbitrary and functionally amounts to protecting the same class of people the NIJ is supposed to protect but without replacing the NIJ with some other ethical justification. Its arbitrariness is evident in that it is not immediately clear what would make a soldier or a bomb maker any more morally culpable than a citizen whose voting preferences caused them to go to war. Does the reluctant conscript soldier really bear more moral responsibility for the war than the hawkish political activist at home that stirs up pro-war sentiment?

The only practical alternative that might plausibly immunize the same class of people the NIJ attempts to is a defense of immunity on the basis of international law. Since most states have contracted to avoid civilian targets in the process of warfare, then it could be argued that is unethical for states to breach their international agreements. This defense is radically different from the NIJ because it does not declare that citizens are inherently immune, just that we have agreed to treat them as such and that such an agreement carries normative force. Despite being the best candidate to replace the NIJ, even this approach experiences problems accounting for the behavior of states that have not signed on to international agreements and non-state actors.

Looming behind the search for alternatives is the question of whether we should even try to find a way to conclude that non-combatants ought to be immune from attack. Perhaps, there is no legitimate justification for holding such a view. Prior to the Middle Ages, ancient civilizations like Greece had codes of conduct for war that permitted the killing of non-combatants (Bellamy 16). It was only with the Middle Ages that non-combatant immunity, contrived as a response to the very specific conditions of feudal society, was initially justified. There is no reason we should immediately think that, absent the exact conditions of feudal society, non-combatant
immunity must still hold. At minimum, we should not think, as many just war scholars do, that if it does hold, it should hold for the same reasons that it holds in feudal societies.

**Conclusion**

Ultimately, I have not tried to provide a definitive conclusion on whether non-combatant immunity is salvageable or deserves to be salvaged. Rather, I aim only to point out that the way it is currently justified does not hold up for citizens of liberal societies. In the feudal era, immunizing non-combatants on the basis of innocence and neutrality logically worked because they were actually innocent and neutral. Decisions made by feudal lords or divine monarchs did not receive their authority from the subjects of those societies and the subjects played no role in setting foreign policy agenda. However, liberal political theory significantly altered the role of individuals in society, transforming them from passive subjects to active citizens. Liberal political theories, across the spectrum, hold universally that citizens consent and authorize the actions of their government and that such consent and authority is the root of governmental legitimacy. Thus, when a government chooses war, that decision emanates from the consent of the citizenry, making any citizen claims of neutrality and innocence false. Other alternative theories of immunity might offer a way out. But as the theory stands, the overwhelming majority of contemporary scholars justify ethical immunity by appealing to innocence and neutrality, traits which it is hard to see how citizens in a liberal society could possess.

**References**


In "Rethinking Non-Combatant Immunity," Matthew Bruenig develops two themes in moral and political philosophy, both of which might benefit from a brief introduction. The first of these themes comes out of the tradition of just war theory. Suppose two countries, X and Y, are at war with one another. Now, just war theory has been primarily concerned with the questions about the situations in which it is permissible for the combatants, that is, the regular military forces, of X and Y to attack one another. In general, just war theory has held that it is not permissible for either side to attack non-combatants. It is true, of course, that there are exceptions to this rule. For example, many just war theorists hold that the non-combatants who are voluntarily engaged in directly supporting their country's war efforts are, at least while so engaged, legitimate targets of attack. But the point to note is that cases of this sort are exceptions to the rule. Bruenig calls this the "neutrality/innocence justification" for non-combatant immunity or "NIJ." The second theme in Bruenig's paper concerns the legitimacy of liberal governments. As Bruenig points out, many moral philosophers and political theorists contend that the consent of the governed is essential to the legitimacy of any liberal polity. To be sure, consent is understood in different ways by different authors. Some authors favor explicit consent. Others favor implicit consent, and still others favor hypothetical consent. Nevertheless, consent of one kind or another does appeal central to liberalism. In his paper, Bruenig brings these themes together in a novel and interesting manner by asking whether NIJ has a place within the context of liberal political thought. His answer is that it does not. Instead, NIJ, Bruenig argues, "does not apply to citizens within ideal liberal political theory and functioning liberal states" (pg. 1). We can call this the "Liberal Non-Immunity Thesis." Why think the Liberal Non-Immunity Thesis is correct? Bruenig's argument is worth quoting at length: "The subjects of feudal systems [about whom NIJ was first explicitly formulated] did not decide to go to war, did not elect the feudal lord that made those decisions, and were not involved in the conduct of wars themselves. These subjects, because of the way feudal society worked, were genuinely neutral and innocent. The NIJ undeniably applied to them" (p. 4). But matters are apparently different when it comes to the subjects of liberal polities. On that issue, Bruenig contends that "The role of the citizen in liberal society, both in theory and application, is a role which involves active consent to the decisions of the sovereign. Such a role strips liberal citizens of their neutrality and innocence, and therefore makes the arguments of the NIJ for non-combatant immunity inapplicable to them" (p. 4). In short, Bruenig would extend non-combatant immunity only to those who have not, or cannot, consent to being governed. The citizens of a liberal state can, and do, consent to being governed. Therefore, non-combatant immunity does not extend to such citizens.² This position seems to me to raise a few
questions. To a large extent, the plausibility of the Liberal Non-Immunity Thesis turns on the matter of how we understand the concept of consent. While it is often impractical to make explicit all of the rules, conditions, etc. that govern the use of the concept of consent, it does not follow that these rules, conditions, etc. do not hold. For example, consider Alice, whose 5-year-old daughter Barbara has an infected appendix. Suppose Alice gives her consent to Camilla, Barbara's physician, to perform an appendectomy. Can one conclude that Alice thereby consents to allowing Camilla to perform this procedure by any means she might choose? Certainly, Camilla would be acting wrongly if she performed the appendectomy on Barbara without the use of anesthetic. Yet would Alice's consent thereby open her up to a warranted claim about responsibility for Barbara's misdeeds?

I have my doubts whether, by consenting to X, one ipso facto consents to X's being done in a manner whatsoever. It certainly does not appear to extend to doing X in a way that is illegal, unethical, gratuitously painful, or even violent. This seems no less true when we turn from personal cases to political cases. By using U.S. highways and paying my federal taxes, do I give consent to my government's treatment of prisoners being held in Guantanamo Bay or to its discrimination against homosexual men and women?

Suppose, as is true, that I actively oppose such behavior. Can I reasonably be accused of self-contradiction because of this fact? Do I consent to the very thing I protest? Could I still be blamed for my government's actions in such cases? Would it be appropriate for others to protest these unjust actions of the government in front of my house or to organize a boycott against my business simply because I am a citizen of a liberal polity which engages in unjust actions?

I am inclined to answer these questions in the negative. Consent may be a necessary condition for the legitimacy of a liberal polity, but it is not a sufficient condition for the legitimacy of all of its actions. Moreover, the citizens of such a polity are not responsible for a government's illegitimate actions unless they have a realistic chance of preventing them. And if such citizens are not responsible, it is unclear how they can lose their right not to be attacked, in war or otherwise. Such thoughts raise problems for the Liberal Non-Immunity Thesis that Bruenig describes.

Notes
1. Note that non-combatant immunity would still presumably extend to those who are too young to consent, those who are not mentally competent to consent, etc. The brief nature of these comments do not provide me with room to discuss these cases in any depth, so I ignore them here.
ABSTRACT: One of the most pressing ethical issues of the 21st century concerns how digital media will be distributed in an age where unprecedented connectivity allows unlimited reproduction of copyrighted material. The proliferation of software piracy has raised a serious challenge to the notion of intellectual property that underpins the groundwork of copyright law. In this paper, I provide an alternate framework for understanding intellectual property according to Immanuel Kant’s theory of possession, as found in The Metaphysics of Morals. In so doing, I hope to show that a concept of intellectual property is still a viable means to address ownership in the digital age.

Introduction

With the exponential proliferation of internet access in the past decade, new challenges have emerged for ethical and judicial doctrines that were formulated before information could be transferred with such ease. One of the most contentious issues of the information age has been that of how intellectual property rights should now function in an increasingly interconnected world. Filesharing and software pirating are testing our notions of what constitutes property and what rights and freedoms govern our concept of ownership. It can be argued that the possibilities created by the information age have made the idea of intellectual property obsolete, and that the traditional understanding of the theoretical justification for property has proven itself to be fundamentally flawed. Against this view, I argue that Immanuel Kant’s theory of possession, as he articulates in The Metaphysics of Morals, can be applied to the controversy surrounding intellectual property in order to reassert a notion of intellectual property that is compatible with technological advances that challenge previously established property rights.

As information sharing technology has advanced, it has allowed a massive increase in the ability of individuals to copy recorded media and disseminate it with negligible cost and little to no fear of being caught or reprimanded. In this context, digital music and video has been most commonly disseminated through internet piracy, the illegal sharing and distribution of copyrighted material. Beyond audio and video files, any medium that can be digitized can be replicated infinitely and distributed easily across the world. It seems that there is a direct, causal relationship between the spread of information technology and the capability to copy and distributed copyrighted material. Edwin Hettinger elaborates: “As a result of both vastly improved information-handling technologies and the larger role information is playing in our society, owners of intellectual property are more frequently faced with what they call "piracy" or information theft.”

The notion of intellectual property, as it is understood in modern jurisprudence, carries with it an assumed object of possession. Just as possessing a corporeal object such as an apple or a book requires the empirical existence of that particular object, to possess an object of intellect requires that there be a non-physical object that can be owned by an individual. The ambiguous existence of these “intellectual objects” is often the first stumbling point for an attempt to craft a robust theory of intellectual property rights. Although the concepts that underpin copyright and intellectual property norms are centuries old, some still find it difficult to attach a seemingly empirical concept such as possession to a purely intellectual object, an object that cannot be perceived or held. Further complicating intellectual property jurisprudence is the fact that possession of an intellectual object seems to not directly contradict another’s possession or use of the same object. Hettinger explains the problem of nonexclusivity for intellectual objects: “These objects are nonexclusive: they can be at many places at once and are not consumed by their use … The possession or use of an intellectual object by one...

person does not preclude others from possessing or using it as well.”2 As such, traditional notions of possession that account only for corporeal objects that cannot be easily divided and shared seem insufficient to contend with the existence of intellectual objects such as digital music, video and software.

Kant’s Theory of Possession

It is here that a careful analysis and application of Kant’s theory of possession, as found in The Metaphysics of Morals, can be applied. To adequately interrogate Kant’s theory, however, it is necessary to trace it to its origin within his analysis of the Doctrine of Right. With this doctrine, in distinction from the Doctrine of Virtue, Kant seeks to investigate how the freedom of one individual can exist in accordance with the freedom of all other rational individuals. While virtue concerns the moral character of the maxim behind an agent’s actions, Kant’s view of the notion of right is concerned with the relation between the actions taken by rational individuals, and is not concerned about the intention of those actions so much as their ability to coexist with the actions of other individuals. Kant writes, “All duties are either duties of right (officia iuris), that is, duties for which external lawgiving is possible, or duties of virtue (officia virtutis s. ethica), for which external lawgiving is not possible.”3 Although, according to Kant, morality must be self-legislated, rightness is contingent on the existence of others, and is thus an external lawgiving that limits my freedom in light of the existence of others who are due the same freedom.

As such, Kant formulates the universal principle of right: “Any action is right if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.”4 This formula seeks to maximize freedom of choice for each individual, insofar as such individual freedom is consistent with an equal distribution of freedom to all rational actors. Superficially, this principle seems to mirror the Categorical Imperative as Kant describes it in the Groundwork of the Metaphysics of Morals. We apply the Categorical Imperative by hypothetically universalizing the maxim behind an action, and determining if such a universalized maxim could be consistent with itself and with other maxims. While the Categorical Imperative determines the moral worth of a given action based on its internal maxim, the universal principle of right legislates purely externally, deriving the limits of individual freedom from the existence of other actors who are due the same freedom.

Thus while the Categorical Imperative legislates according to moral law that is founded internally, and is in no way contingent on other individuals, the universal principle of right draws its power to command from the fact that we live in a world populated by other rational agents.

As a result, Kant asserts that coercion of one individual is justified in protecting the freedom of another individual. Because rights are externally derived, they are not limitless claims to absolute freedom; rather, they must be able to provide the same degree of freedom to all other rational individuals. The only way to accomplish this, according to Kant, is to sometimes use coercion. He elaborates:

… if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a hindering of a hindrance to freedom) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with right by the principle of contradiction an authorization to coerce someone who infringes on it.5

If the use of coercion is justified to protect the freedom of other individuals, then obligations can be placed on other individuals in order to assure that the rights I am due are protected.

This becomes essential not only for the principle of rightful action itself, but later for Kant’s complete theory of possession, which will eventually define possession as an obligation placed on others to not take

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2 Ibid. p. 34
4 Ibid. p. 24-5
what is mine. Kant’s theory of possession begins with a working definition of possession: “That is rightfully mine (meum iuris) with which I am so connected that another’s use of it without my consent would wrong me.” The implication of this view of possession is that it demands the existence of an object to be possessed, but does not directly derive that object from experience. Kant writes:

Whoever wants to assert that he has a thing as his own must be in possession of an object, since otherwise he could not be wronged by another’s use of it without his consent. For if something outside this object which is not connected with it by rights affects it, it would not be able to affect himself (the subject) and do him any wrong. According to this analysis, there is room in Kant’s theory of possession for a notion of intellectual property as possession of a purely intellectual object that doesn’t derive entirely from empirical existence; this opens up the possibility of forming a coherent theory of possession that can account for non-tangible, digital objects.

Kant continues on this thread, asserting next that there are two possible forms that possession can take: intellectual or empirical. He writes:

… the expression ‘an object is external to me’ can mean either that it is an object merely distinct from me (the subject) or else that it is also to be found in another location (postitus) in space or time. Only if it is taken in the first sense can possession be thought of as rational possession; if taken in the second sense it would have to be called empirical possession. Empirical possession, as its name implies, is defined as the physical holding of an object, of possession by virtue of an object’s physical presence in relation to my body. Intellectual possession, as a corollary, would be a form of possession that is not contingent on an object’s physical presence in relation to the individual who possesses it. I possess this pen merely empirically when, upon placing it on a desk and leaving the room, any other individual can pick it up and be said to legitimately possess it. I own the same pen intellectually when the fact that I’ve carelessly left it on a desk and exited the room does not confer upon another the right to take it. The distinction between the two concepts stems from what injunction is placed on another individual vis-à-vis my proximity to the object. Once again, intellectual possession opens up the possibility of possession of a purely intellectual object, while a notion of ownership derived from a theory of empirical possession would be unable to contend with an object that can’t be physically held.

From here, Kant next moves to reject empirical possession as a basis for a rigorous theory of ownership. A theory of property can’t be coherent if my act of holding a corporeal object is the only basis I have for declaring that object mine; if I set down an object I possess, it shouldn’t immediately become up for grabs. Furthermore, a theory of possession that limits ownership to simply what I physically hold would be redundant with the universal principle of right. I am already protected from the sort of bodily intrusion that would be involved if someone were to wrest an object from my grasp by the fact that all rational individuals are held to the principle of respecting the freedom of others in light of their own freedom. As such, a coherent theory of the foundations of rightful possession must be derived from a notion of intellectual possession.

An object can be said to mine, therefore, if I can place it down and walk away from it, and still be assured that others would be wrong to take it. Kant writes:

So the concept to which the concept of a right is directly applied is not that of holding (detentio), which is an empirical way of thinking of possession, but rather the concept of having, in which abstraction is made from all spatial and temporal conditions and the object is thought of only as under my control.
Here, Kant’s theory demonstrates a radical aspect that allows it to operate in novel ways two centuries after he proposed it. Because he establishes that a theory of possession must be premised exclusively on the concept of intellectual possession in order to be coherent, he is positing a metaphysical aspect of possession that presupposes the existence of a property of a given object that is beyond its physical existence, which allows an individual to possess it. This extra-physical character of the object to be possessed is a critical component of a theory of possession that can contend with the possession of digital objects, as it is only possible to possess these objects intellectually; if there is no metaphysically prior character of an object that allows it to be possessed, then it would impossible to posit ownership of any form of recorded media. Once again, Kant’s theory seems to support the possibility of a purely intellectual object that is required for a viable theory of possession that can contend with the notion of intellectual property.

The Book as Recorded Discourse

Kant further affirms the notion that an object doesn’t have to be empirical in order to be possessed later in The Metaphysics of Morals, in his analysis on how the author of a book creates a discourse that is represented to the reader through the physical object of the printed, bound book itself. A book, for Kant, “is a writing … which represents a discourse that someone delivers to the public by visible linguistic signs.”10 As a representation of a discourse on the part of the author, the book transcends the corporeality of its empirical existence, and demands the existence of an intellectual object that can’t be simplified to mere written words on a page. This mirrors Kant’s earlier analysis that posits an extra-physical character of tangible objects, which allows them to be possessed. In this case, the object has a particular characteristic, as Kant understands a book to have a unique character in that they are the written record of a unique discourse created by the author.

In much the same vein, I would argue that the same analysis can be applied to other recorded media (including recorded music, spoken word, and film) that were not technologically possible in Kant’s time, but function identically to how he understands a book. In all these cases, the author uses the recording medium itself (the words on the page, the grooves on a record, the frames of a film) in order to represent a discourse to an audience, which implies an intellectual object that goes beyond the empirical recording itself. The key distinguishing characteristic that links each of these forms of discourse is the existence of an original discourse that is expressed through the medium of a physical object, and in this way Kant’s understanding of the means by which a discourse is expressed in a book can be modernized in order to include other forms of recorded media.

In light of this understanding of a discourse represented by an author within a book, Kant specifically examines the problem of unauthorized publishing of an

10Ibid. p. 42
10Ibid. p. 71
author’s written work that is directly pertinent in connecting his theory to the modern problem of filesharing and media piracy that has come about because of advances in information sharing technologies. He writes, “Why does unauthorized publishing, which strikes one even at first glance as unjust, still have an appearance of being rightful? Because on the one hand a book is a corporeal artifact (opus mechanicum) that can be reproduced … On the other hand a book is also a mere discourse of the publisher to the public, which the publisher may not repeat publicly without having a mandate from the author to do so.”11 Kant holds that since a book (or, in this extended analysis, any recorded media) has a dual character as both a corporeal object as well as a represented discourse, it can be unclear how the right of the owner of the physical book to do what he pleases with his property can be reconciled with the author’s claim to possess the discourse represented by the book as the intellectual counterpart to the physical object of the book itself.

Regardless of how this difficulty is resolved, what is essential in this analysis is the that in order for this dilemma to exist, there must be both a physical and non-physical object present within a recorded work, implying the existence of an intellectual object whose ownership must be understood according to a theory of possession that can account for intellectual property. This analysis also serves to overcome the problem of the nonexclusivity of recorded media in an age where digital files can be distributed freely. Even though files can be divided infinitely and copied from computer to computer in mere seconds, the intellectual object that is represented by those individual copies remains unitary, and the exclusive property of the author. While each file is nonexclusive and can be copied virtually without cost, the represented discourse of the author cannot be used by another individual without interfering with the author’s ability to use that object.

The author of a discourse initially possesses a monopoly on the distribution of that discourse; this is the cornerstone of the contemporary understanding of how copyright functions. By selling this work in a marketplace, the author is entered into a kind of tacit contract: a price-equivalence relation relationship is established, wherein the author permits the transfer of a copy of this discourse to others at an agreed-upon price. To distribute a copy of this work without the author having received compensation would then be equivalent to a breach of this contract, in two ways. First, it denies the author profits that they are contractually obligated to receive. Second, and more troubling, unauthorized duplication violates the author’s original monopoly on the distribution of their work, as in this scenario they have not agreed to allow the object’s distribution without cost. Both of these factors constitute a disruption of the author’s usefulness of an object that is rightfully theirs. As Kant explains, “something external is mine if I would be wronged by being disturbed in my use of it even though I am not in possession of it.”12 As only one person can claim ownership of an intellectual object that is represented by a recording, a conflict in ownership exists when a file is copied without its author’s consent, and a coherent theory of possession must exist that can adjudicate this conflict.

Possession in a Social Context

Kant next develops another essential facet of his theory of possession, namely that possession doesn’t operate exclusively on and through the possessed object itself, but rather as a relationship between myself as the owner and all other rational individuals. He elaborates:

Here practical reason requires us to think of possession apart from possession of this object of my choice in appearance (holding it), to think of it not in terms of empirical concepts but of concepts of the understanding, those that can contain a priori conditions of empirical concepts. Upon this is based the validity of such a concept of possession (possessio noumenon), as a giving of law that holds for everyone; for such lawgiving is involved in the expression ‘this external object is mine,’ since by it an obligation is laid upon all others, which they would not otherwise have, to refrain from using the object.13

11Ibid. p. 72
Here, Kant’s insight situates possession as distinct from traditional notions of ownership in which the imperative against taking others’ possessions derives from the object itself; for Kant, possession is a matter of restricting the actions of others against what is mine, of placing an obligation on others not to take what I declare as my own.

This theory of possession is clearly supported by the universal principle of right, in that it seeks to place an obligation on all individuals in order to maximize their freedom (to own objects) while also ensuring equal freedom for all other individuals. This coercion is justified by the external nature of the protection of rights, since they can only be derived through a relationship with others. Indeed, Kant takes this notion a step forward, and establishes that possession can only take place within a scheme of civil cooperation in which all rational actors are mutually obligated to respect the property of others. Kant argues, “By my unilateral choice I cannot bind another to refrain from using a thing, an obligation he would not otherwise have; hence I can do this only through the united choice of all who possess it in common.”

**Possession of Intellectual Property**

According to Kant, if a person were to inhabit a completely solipsistic reality where there were no other individuals to challenge his possession of the objects of that world, he could not be said to own anything. Only within a social context can possession, understood as a placing of obligation upon others to not use what is mine, exist; I can’t place obligations on people who aren’t there. The implication of this aspect of Kant’s theory of possession on the notion of intellectual property is to displace possession away from an understanding that is founded on the object of possession itself, but rather to an understanding that makes it a function of a social relation within a scheme of cooperation. This opens up yet another avenue for compatibility between Kant’s theory of possession and a notion of intellectual property; if possession isn’t derived from an object itself, then the problem of a purely intellectual object isn’t a viable objection to restrictions on unauthorized copying and distribution of another individual’s work.

Together with Kant’s understanding of the nature of a book (and, by extension, other recorded media), these aspects of his theory of possession may solve the problem, as found in other theories of intellectual property, of the nonexclusivity of intellectual objects. If books and other recorded media can be understood as representations of an original discourse on the part of the author, it is possible that an idea, although it lacks corporeal existence, can be treated as an object for the purposes of a theory of possession. This can then be combined with Kant’s analysis that shows the true character of property as the placing of an obligation on other individuals not to use what is mine, which is derived from a purely intellectual notion of possession, and as such is compatible with having an idea as an object of possession.

Finally, since ownership can only exist within a scheme of cooperation between rational individuals, my claim to my own possessions can only be viable if I also accept the reciprocal obligation to respect the boundaries of the possessions of others. This founds an obligation on my part, deriving directly from the universal principle of right, to treat the intellectual objects of others with the same respect I would have for all other objects that are not mine. As such, the challenges posed for intellectual property jurisprudence by increased information technology to copy and distribute recorded media can perhaps find some relief through Kant’s theory of possession, which is wholly compatible with notions of intellectual property and provides a framework in which individuals are obligated to treat intellectual objects with the same respect they reserve for physical property.
The Social Construction of Intellectual Property
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New technologies allow us to copy and redistribute electronic books, music, and pictures repeatedly, with little effort, and usually with no legal consequence. In his paper, Chris Lucibella worries that this means that we are beginning to lose our grip on what it means to own intellectual property in the digital age. As a bulwark against this, he turns to Immanuel Kant’s practical philosophy, and in particular Kant’s theory of possession, which he claims can explain the theoretical basis of owning non-material things.

In the United States, our conception of property ownership is perhaps most informed by John Locke, who says that unowned things become mine when I mix my labor with them. This theory of original acquisition is most clearly illustrated with regard to material stuff, the gathering of apples, plowing of a field, or the building of a house. But there is in principle no reason that we could not use it to account for intellectual property. The originator of an idea would own it because she created it and it would not exist without her.

When we are talking about a physical book, record, or photograph, ownership of these things makes sense according to the traditional model. An author's idea is contained in the book. A person or company has the right to produce it, and no one else can reproduce it without the permission of the copyright holder. But if there never is any physical thing that is owned, only electronic signals, which no longer even have to be stored in a particular place, but can “exist” in cloud storage, with electronic data spanning over multiple servers, it can seem unclear what it means to say that anyone has exclusive rights to it. There is no persisting object that is shared. In other words, with the advent of media that are entirely electronic, there is no thing with which the author has mixed his or her labor.

Although Lucibella does not mention Locke in his paper, his assumption seems to be that Kant can explain the ownership of intellectual objects in a way that the more traditional, rights-based approach does not. Kant’s key claim is that a person is wronged if her possessions are used without her consent. Lucibella then draws on Kant’s distinction between the book as a physical thing and the discourse that is represented in the book to make the case that property ownership extends not only to the artifact but to the ideas behind it. Lucibella is right to claim that a Kantian framework can justify the ownership of non-objects. It is also true that such a justification is necessary if a theory of intellectual property is to get off the ground.

Ultimately, Lucibella’s paper rests on a distinction between ownership of the medium and ownership of the ideas/discourse behind the medium. He is saying that consumers can own the medium but not the discourse; the discourse is owned by the author or the company with whom the author has contracted. The more difficult question, however, is what counts as discourse, or what kinds of things can be owned.

Lucibella’s distinction going to be hard to maintain in any case, but we an extreme example perhaps best reveals the difficulties of picking out discourse as a discrete object of ownership. Consider John Cage’s famous composition 4’33,” in which the musicians refrain from playing their instruments for the entire four minutes and thirty-three seconds of the
piece. Cage was attempting to show that any sounds, even the sounds we often ignore in our everyday lives, may constitute music. CDs of 4'33” abound. The discs are sold and copied, and not every recording is the same. Partly, this is because when people play one of the CDs, they hear incidental sounds from the audience as they listen.

The question then is what the discourse is in this case. Does Cage own the silence (and occasional coughs from the audience), or does he own the aesthetic purpose of the silence? Is the intent of the artist equivalent to the idea? Philosophers of language and literary theorists alike tend to reject that conception of meaning, as committing what W. K. Wimsatt and Monroe Beardsley call the “intentional fallacy.” The idea would be that the words themselves and their meaning in a linguistic community, not the author’s intent, determine what a given work is saying.

But if the public determines what the art is saying, and in the case of 4'33” the audience literally creates the art by doing things like shifting in their chairs and opening their programs, then how could the artist claim exclusive possession of it, especially in performance? It seems clear that there are property rights at issue, but such rights cannot depend on a contrived distinction between discourse and medium. There is no thing called discourse that is somehow behind and separate from the medium, and distinct from its recognition and interpretation in a particular social and historical context. In the end, then, I worry that Lucibella has not gone far enough in dislodging us from the Lockean assumption that there must be some thing out there (the “idea”) with which I have mixed my labor.

That is, Lucibella seems committed to what he calls “the existence of an intellectual object” in order to justify intellectual property rights. Kant’s theory is more innovative than that. Unlike Locke, Kant claims that original acquisition does not establish rightful ownership. Conclusive possession becomes possible only when there is a coercive system established under a law to which citizens have rationally consented. For Kant, ownership is thus a social phenomenon that depends on recognition by others.

Lucibella would I think grant this much. However, if Kant is right, then the ownership of material things and ideas is not supplemented with but replaced by our holding each other to account in certain ways, for example, by blaming someone for copying and distributing a recording of 4'33.” It is difficult to conceive of intellectual property ownership if we assume that only objects, physical or “non-physical,” can be owned.¹ The possibility of easy technological reproduction has shown us that possession can be defined entirely by social expectations. We expect people to act in certain ways in relating to and communicating with others, and violating these expectations is blameworthy.

Although the community may define its standards of behavior with regard to some object, it need not do so, even when it comes to possession. Possession has to do with the conditions under which we can justifiably perform some action. That is, the question becomes whether we need someone's consent to do something (such as copy a digital file), with or without some persisting object. The object, in a conventional sense of that term, may have been lost with the advent of electronic media, and that may reveal that the object never mattered.

Notes

¹ Lucibella refers to Anon-physical objects “objects” that cannot be perceived, “non-tangible . . . objects, non-empirical objects, ideas as objects, and (most frequently) “intellectual objects.” This language is particularly out of place in the context of a Kantian analysis of possession, given Kant=s definition of Gegenstand. For Kant, an object is a discrete set of sensible intuitions as they appear to us in space and time, and subject to the categories (Critique of Pure Reason, trans. and ed. Paul Guyer and Allen W. Wood [Cambridge: Cambridge University Press, 1998], A92/B124-A93/B126). Objects are what our empirical judgments are about. Therefore, an intellectual, non-physical, or non-empirical object is an oxymoron for Kant.
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Justice...Since Plato Conference

December 4th 2010
9AM-5PM
Montclair State University

With this conference, we will explore problems related to the theory and applications of justice. Submissions are welcome on a range of issues related to justice, but we are most interested in papers that link the Classical notions of fairness, virtue, and responsibility to contemporary problems. We are also interested in work that shows how theoretical constructs can help resolve practical issues associated with justice in teaching, and in academia in general. Papers might address, for instance, justice in the classroom, affirmative action, employment trends, or the scholar's obligations to town and campus. Scholars who are exploring inter-disciplinary (e.g., political science and philosophy) applications of justice are also encouraged to submit their papers.

Papers should be roughly 12 pages long. Each conference participant will have approximately 20 minutes to present the paper, with time set aside for Q&A afterwards. Submissions should be e-mailed as *.pdf or *.doc attachment, double-spaced, with an abstract of 250 words maximum. Send your papers to the Conference Organizer: SocietyForMoralInquiry@gmail.com. If you are interested in serving as a commentator or session chair, please contact the conference organizer about this as well. The deadline for submissions is November 20th, 2010. This conference is sponsored by the Society for Moral Inquiry, at Montclair State University. For more details, go to blogs.montclair.edu/smi/calls-for-papers/

Please indicate in your proposal whether you would like for the paper to be considered for publication in the Society’s journal, Theoretical & Applied Ethics. Papers can be submitted for consideration in the journal’s usual submission process, or for inclusion in the journal’s upcoming special issues, which will have an emphasis on Bioethics and Ethics and Religion.
The Society for Moral Inquiry at Montclair State University is seeking submissions for Ethics@MSU, an undergraduate conference on Ethics and ethical issues. This conference will be held on the campus of Montclair State University, on Friday, December 3rd, 2010 at 3 PM. Submissions should be original, scholarly papers written on any area of Ethics. Papers can address cross-over areas between Ethics and other branches of philosophy, such as philosophy of mind, epistemology, social philosophy, and metaphysics. Papers can also be historical (e.g., "Ethics in Plato’s Early Thought") or they can be problem-oriented (e.g., "The Ethics of Internet Privacy"). Ideally, paper submissions should be approx. 10 pages long, and speakers should plan on having 20 minutes to present their work. Submissions will be judged on the basis of relevance and writing quality, and authors whose work is selected will be notified via email. The conference will be followed by a banquet, on campus, and all participants (audience and speakers) are invited to attend.

The deadline for submissions is November 15th, 2010.

**Submission Instructions**

1. Submissions must be made via email. Send these to Dr. Chris Herrera, director of the Society for Moral Inquiry, at SocietyForMoralInquiry@gmail.com.

2. Authors do not need to be philosophy majors. The conference is open to all undergraduate and graduate students. Please list your academic affiliation.

3. Attach your submission in [lastname].pdf format. Do not submit your paper in Microsoft Word format.

4. Authors should delete their names from their papers, so that the selection committee can evaluate these "blind."

5. When you submit your paper, please indicate in your email whether you would be interested in serving as a commentator on another author’s paper.

6. Please indicate in your proposal whether you would like for the paper to be considered for publication in the Society’s journal, *Theoretical & Applied Ethics*. Papers can be submitted for consideration in the journal’s usual submission process, or for inclusion in the journal’s upcoming special issues, which will have an emphasis on *Bioethics* and *Ethics and Religion*.

For more information, please see the journal’s website at: [www.theoreticalandappliedethics.com](http://www.theoreticalandappliedethics.com)

If you need additional details about the conference, contact Chris Herrera, Philosophy Department, Montclair State University.
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**Bioethics:** Papers or Commentaries on any area of bioethics, including Medical Ethics, Ecological Ethics, and Mental Health Ethics

**Ethics and Religion:** Writing on ethical issues in religion, atheism, or religious tradition in a secular world.

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About the Journal:

*Theoretical & Applied Ethics* is an e-journal designed to help showcase the most exciting work in philosophical ethics. *Theoretical & Applied Ethics* is published by the Society for Moral Inquiry (SMI), which takes its inspiration from the work of late 20th century thinkers Bernard Williams and J. L. Mackie and aims to advance the study of ethical problems from within the skeptical positions outlined by these two visionaries. In addition, SMI aims to promote education and research, guided by the belief that public engagement with philosophy can inform debates in medicine, science, sport, law, and social policy.

The journal is published three times a year, Fall, Spring, and Summer. The journal is particularly interested in interdisciplinary approaches in ethics, and papers that link ethics with other areas of philosophy, such as metaphysics or epistemology. Papers submitted to the journal are peer-reviewed by editorial advisors, each of whom holds a Ph.D. in his or her specialty. The advisors will evaluate submitted papers "blind," that is, without knowledge of the authors' identity. These advisors, and the Editors, will work closely with authors to ensure suitability of content and style, ensuring that published papers represent current trends in fields such as medical ethics, business ethics, ethical theory, meta-ethics, as well as philosophy of law, science, sport, and business.