

## On Morality and the Foundation of Jurisprudence

The definition of morality commands a succinct definition in general but varies in the particulars. Morality is *what ought to be* or *what one ought to do*, and ethics are standards to which to judge moral actions. However people's opinions differ widely on what morality really and practically means: some hold that morality is natural, some believe it to be transcendent.

Naturalism defines morality as having no fixed standards to which to judge moral actions; what is moral depends on the culture, society, or personal emotions. The term morality has no intrinsic meaning, only extrinsic, if at all. Hence, one can only interpret morality against the backdrop of a culture or emotional state, since there is no such thing as a "true" morality. For example, monogamy would be just as valid as polygamy as long as the unions effectively complete their task of raising children. Naturalism is the truly atheistic standpoint on ethics. For, as Dostoevsky pointed out, "If there is no God, everything is permissible." And yes, for the naturalist, everything *can* be permissible, as long as it works. The explanation for the phenomena of morality and conscience vary as the naturalists vary. Some explain morality as evolutionary byproducts or human instincts—instincts such as self-preservation, the herd-instinct, or preservation of the species—or even as the imposed regulations of societal institutions such as religion or government manifesting themselves in the thought patterns of the constituents.

In contrast, the transcendent view of ethics holds that there are fixed ethical standards that transcend culture, feelings, or situation. To the transcendent, those standards are true whether one likes them or not; one may follow them or transgress them, but whether they exist or not is not a question. The transcendent view generally assumes the veracity of theism. For, if there is no God, there is no reason to believe in fixed unchanging moral standards. Although there are some thinkers who attempt to dislocate the two, such a view is not generally held. The idea of natural law (distinct from naturalism) often accompanies the transcendent view

and holds that humans are generally aware of their moral state by their conscience, unless deliberately suppressed. The law is “written in their hearts” to use the words of St. Paul.

Since logic is the litmus test of truth (or in the least, it exposes fallacious thinking) let us submit these views to the informal tests of logic. Should they make any fallacies in their approach, they may be safely discredited.

A reflection on the essence of morality reveals that morals are prescriptions for human behavior, standards that individuals are obligated to obey. They are not descriptions of how humans behave. Morality stipulates *what ought to be*, not *what is*. (mores) While morality indicates laws, mores describes actual life. While morals point to standards, mores reflects behavior—what is actually going on. Since it is impossible to go from *what is* statements to *what ought to be* statements in logic, any view that attempts to synthesize the two in such a manner cannot be logically considered valid. Such a falsehood is called an Is/Ought fallacy by logicians. Naturalism fails this test, for it defines *what ought to be* in terms of *what is*. Consider the following passage:

If Naturalism is true, “I ought” is the same sort of statement as “I itch” or “I’m going to be sick.” In real life when a man says “I ought” we may reply, “Yes, You’re right. That is what you ought to do,” or else, “No. I think you are mistaken.” But in a world of Naturalists (if Naturalists really remembered their philosophy out of school) the only sensible reply would be, “Oh, are you?” All moral judgments would be statements about the speaker’s feelings, mistaken by him for statements about something else (the real moral quality of actions) which does not exist.<sup>1</sup>

Furthermore, naturalism suspends all moral judgments. Since it reduces statements of *what ought to be* to statements of *what is*—this is what the culture does, or this is how we act—naturalism implies impossible multiple standards for evaluating human behavior, effectively suspending moral judgments and rendering the term *ethics* senseless. If naturalism is true—fine. But do not plan to make any reproving statements on the Nazis, or rapists, or murderers

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<sup>1</sup> C.S. Lewis, *Miracles* (New York: Macmillan, 1960), 36

or anyone else for that matter, since their morality works just as well for them as yours does for you. However, although the main premises of naturalism is a fallacy, the positive aspects of the philosophy—such as its effectiveness at explaining the disparity of cultural values—should not be thrown out with the bathwater. The sentiments of naturalism display a high potential for good intellectual use when not misapplied. But, as far as the philosophy goes for determining moral standards, let no one be confused on its falsehood.

In contrast, the transcendent view of morality rests on the theistic assumption that there is a God who has set moral pronouncements and cares about one does. If these premises fall, so goes the transcendent view of an objective morality, and the existential forlornness of a pointless morality without God emerges. “If there is no God, everything is permissible” so goes the saying.

However, the universal nature of morality suggests its transcendence. The situation is analogous to the making of maps. If two municipal cartographers dispute over whose map of Atlanta is the better map, the only sensible way to decide whose map is actually better is to compare the maps to the real Atlanta. Does not their dispute suggest there may be a real Atlanta to which their maps are referring? If they ever hope to decide whose map is better, they must consult the real city. Hence, anyone who hopes to believe one system of morals is better than another, inherently assumes there is a real morality.

Perhaps the most pertinent application of morality is in the formation of law. Law limits the power of the individual regardless of whether the individual agrees or not; it binds the citizens to obedience, or—in the case of transgression—the law’s consequences. The philosophy of naturalism translates roughly to the sentiments of positivism in legal theory. According to positivists, the only moral standards are the ones instituted by governments; thus, human rights are the creations of governments and do not exist inherently without them. These reflections in jurisprudence contrast the transcendent view of morality as the foundation for legality.

The Nuremberg trials set a decisive precedence for this legal dichotomy, and well illustrate how abstract ideas of positivism and jurisprudence effect real people. In 1945, the Allied Powers of World War II held an international court to try top Nazi officials for their atrocities and crimes against humanity. President Truman appointed Robert. H. Jackson the chief prosecuting attorney for the United States.

Jackson and the rest of the court faced a dilemma that struck at the heart of the positive/transcendent controversy. The American jurisprudence (as well as many other countries) rests on the fundamental principle that persons cannot be tried under *ex post facto* status (laws made up after the fact) and cannot be criminalized retroactively. Thus, the court had no jurisdiction under any body of law, and was, in a sense, illegal. In addition, the charges brought against the offenders had no effective meaning in terms of legal positivism. For, “if there are no natural rights, there are no human rights; if there are no human rights there cannot be any crimes against humanity.”<sup>2</sup> The Nazis were operating under perfect legality in their country; thus, the court would be powerless to condemn them if *what is legal* were the final words in true jurisprudence. This was the legal position the defense took. Had legality failed justice? Almost. But Jackson knew the answer to the question, “On what rationally consistent basis can a government declare another nation’s laws to be unjust?”<sup>3</sup> His answer was conscience. Consider his following address to the court:

“As an International Military Tribunal, it rises above the provincial and transient and seeks guidance not only from International Law<sup>4</sup> but also *from the basic principles of jurisprudence which are the assumptions of civilization.*”<sup>5</sup>

Those basic principles of jurisprudence are only logically justified by the existence of transcendent, fixed moral standards. Peter Bocchino summarizes it well:

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<sup>2</sup> Mortimer Adler, *Hases Without Have-Nots* (New York: Macmillan, 1991), 197

<sup>3</sup> Norman Geisler & Pete Bocchino, *Unshakable Foundations* (Bloomington: Bethany House Publishers, 2001), 211

<sup>4</sup> International Law was based upon the Natural Law idea discussed in the Transcendent section. Hugo Grotius, considered the “father of international law,” understood it as a rational “method for arriving at a body of propositions underlying political arrangements and the provisions of the positive [civil] laws.”

<sup>5</sup> Robert H. Jackson, *The Nuremberg Case* (New York: Cooper Square 1971), 120-22 (emphasis added)

“The only rational way positivists could condemn the Nazis as being wrong would be to acknowledge that they were *morally* wrong. But if positivists were to believe that the Nazis were immoral, then they must also admit that there exists a standard of morality beyond human governments.”<sup>6</sup>

That was the triumph of the transcendent view of morals at Nuremberg. With these ideas assumed, the tribunal was able to properly try the Nazis for true crimes against humanity despite the protests of positive critics. This historic precedence set morality as the foundation of legality. From this classical understanding of transcendent law, it follows

- That *might is not right*;
- That majorities *can be* tyrannical and unjust;
- That principles of justice and of natural right *enable us to assess* the justice of injustice of man-made laws and constitutions....
- That *justice is universal and immutable*, always the same everywhere and at all times, whether or not recognized at a given time or place;
- That positive laws *have authority as well as force*, obeyed by criminals only because of fear of punishment if caught disobeying them, but obeyed by just individuals by virtue of the authority they exercise when they prescribe just conduct;
- That there are *mala in se* as well as *mala prohibita*, that is, acts that are wrong in themselves whether or not they are prohibited by positive, man-made laws.<sup>7</sup>

These tenets summarize the jurisprudential stance of the classical understanding of natural law—written in the hearts of man—and of the belief in transcendent moral standards—eternal and immutable.

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<sup>6</sup> Bocchino, *Unshakable Foundations*, 220-221

<sup>7</sup> Adler, *Haves Without Have-Nots*, 198 (emphasis added).