

COLLECTED ESSAYS IN LAW

Michael Moore

Objectivity in
Ethics and Law



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Ethics and Law

ASHGATE
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Series Editor's Preface

Collected Essays in Law makes available some of the most important work of scholars who have made a major contribution to the study of law. Each volume brings together a selection of writings by a leading authority on a particular subject. The series gives authors an opportunity to present and comment on what they regard as their most important work in a specific area. Within their chosen subject area, the collections aim to give a comprehensive coverage of the authors' research. Care is taken to include essays and articles which are less readily accessible and to give the reader a picture of the development of the authors' work and an indication of research in progress.



Michael Moore currently holds the Charles R. Walgreen Jr. University Chair at the University of Illinois, the first such University-wide Chair in the history of the University. He is also appointed as a Professor of Law in the College of Law and Professor of Philosophy in the College of Liberal Arts and Sciences. He directs the Law and Philosophy Program at the University and is Editor in Chief of the Kluwer journal, *Law and Philosophy*, edited at Illinois and published in The Netherlands.

After practicing law in San Francisco for several years, he began his teaching career in 1969 as an instructor at the School of Law (Boalt Hall) of the University of California at Berkeley. He eventually was a Visiting Professor, and then Professor of Law, at UC-Berkeley. He has also held faculty positions at: Harvard University (where he was a Senior Fellow in charge of the Law and Humanities Program); the University of Kansas (where he was Associate Professor of Law); the University of Southern California (where he held the Robert Kingsley Chair in Law); Stanford University (where he was a Visiting Professor of Law); the University of Iowa (where he was both the Mason Ladd Distinguished Visiting Professor of Law and a Visiting Professor of Medicine); the University of Virginia (where he was the William Minor Lile Distinguished Visiting Professor of Law); the University of Pennsylvania (where he held the Leon Meltzer Chair in Law, was Professor of Philosophy, and was the Co-Director of the Institute for Law and Philosophy); the University of San Diego (where he held the Warren Distinguished Chair and was Co-Director of the Institute for Law and Philosophy); the University of California, Irvine Campus (where he was a Resident Fellow at the Humanities Research Institute); and the Australian National University in Canberra (where he was a Visiting Fellow in the Research School of the Social Sciences).

He was born in Portland, Oregon, raised in Eugene, Oregon, and received his degrees from the University of Oregon (A.B.) and from Harvard University (J.D., and S.J.D. in legal philosophy). He is married to the current Dean of the College of Law of the University of Illinois, Heidi Hurd, and has four children, Samantha, Ellen, Aidan and Gillian. The three youngest children live with him and his wife on a horse farm on the banks of the Sangamon River outside Champaign.

Introduction

The title of this volume indicates the dual nature of its topics: objectivity of moral judgment, and objectivity of legal judgment. These are distinct topics, however much they are related.

The objectivity of moral judgment is the less technical, more familiar of the two topics. Just about everyone has views about whether moral judgments are objective. Positions that philosophers more technically define as naturalist-realism, non-naturalist realism, religious-based realism, subjectivism, relativism, or skepticism find common expression in the popular attitudes with which moral judgments are made or assessed.

This well-nigh universal existence of meta-ethical belief stems from the widely shared sense that the objectivity of morals *matters*. The question matters both to our personal lives and to issues of institutional design (as I explore in part I of essay 1 and in part II of essay 2). Most fundamentally, our moral beliefs are about the ideals by which we regulate our lives; a deep existential nausea yawns before us if we can regard these ideals as no more than our personal tastes or preferences.

On the other hand, the issue of objectivity does not matter in the way promoted by certain religious views. As I explore towards the end of essay 3, the objectivity of morals cannot give us 'the meaning of life' in the popular understanding of that phrase. Various religions offer to provide such meaning, but on even the most objective view of morals, morality does not.

My own interest in the issue of objectivity of moral judgment tracks these remarks. I began life – and doubtlessly shall end it – firmly rejecting all forms of theism. That left me with Dostoevsky's challenge in *The Brothers Karamazov*, 'without God, everything is permitted'. That challenge, together with a heavy immersion in Nietzsche at an early age, defined my first self-consciously adopted meta-ethical stance. The oft-repeated slogan of which, during my undergraduate years, was that 'morality is mere expediency'. This ancient skepticism – roughly that of Glaucon in *The Republic* – doesn't live well. In one phase it produces a life of sensualism and selfishness, and in another, slightly deeper phase, a life of merely one-handed commitments. Thus, the search for some more objective basis for moral judgment.

The kind of moral objectivity that seems worth worrying about is an instance of the general view known in philosophy as metaphysical realism. Precisely what that means I explore in part I of essay 2 that follows. Technicalities aside, this is generally the kind of objectivity presupposed in

ordinary worries about the objectivity of morality. People want their moral judgments to be *true*, they want such truths to correspond to certain facts, they want those facts actually to exist, they want such values' existence not to be a mere product of human invention and projection.

I have thus written the essays that follow around objectivity in the sense given by metaphysical realism about morality. I do this, despite the recognition that there are other senses of objectivity, both in general and as applied to moral judgments. Thus, we have Jules Coleman and Brian Leiter's 'modest objectivity' (by which they mean only the judgment of an epistemically idealized judge) and their 'minimal objectivity' (by which they mean only inter-subjective agreement),¹ John McDowell's secondary property-kind of objectivity (where it is uniformity of human response that makes values 'objective'),² Ronald Dworkin³ and Nicos Stavropoulos⁴ 'quietist' kind of objectivity (about which, apparently, very little can be said, except that the objectivity of each domain is a notion specific to that domain and to be sustained by argument internal to that domain), various styles of proceduralist objectivity (where one necessarily does the right thing if one does it the right way, to quote Lon Fuller⁵), etc. My own general take on these other notions of objectivity is that they are largely consolatory in motivation: they are devised by those theorists who despair of defending the objectivity of morality in the metaphysically realist sense and then seek consolation in some weaker notion of objectivity that morality (on their skeptical view) has a hope of possessing. I fear that we cannot be consoled by any such weaker notions of objectivity, however, for it is the

¹ Jules Coleman and Brian Leiter, 'Determinacy, Objectivity, and Authority', *University of Pennsylvania Law Review*, Vol. 142 (1993), pp. 549–637, reprinted in Andrei Marmor, ed., *Interpretation in Law* (Oxford: Oxford University Press, 1995).

² John McDowell, 'Values and Secondary Qualities', in G. Sayre-McCord, ed., *Essays on Moral Realism* (Ithaca: Cornell University Press, 1988). Philip Pettit has also promoted this dispositional view of objectivity in ethics. See his 'Embracing Objectivity in Ethics', in B. Leiter, ed., *Objectivity in Law and Morals* (Cambridge: Cambridge University Press, 2001). David Sosa seeks to answer such a view of objectivity in his 'Pathetic Ethics', also in B. Leiter, *supra*.

³ Ronald Dworkin, 'Objectivity and Truth: You'd Better Believe It', *Philosophy and Public Affairs*, Vol. 25 (1996), pp. 87–139.

⁴ Nicos Stavropoulos, *Objectivity in Law* (Oxford: Clarendon Press, 1996).

⁵ Lon Fuller, 'What the Law Schools Can Contribute to the Making of Lawyers', *Journal of Legal Education*, Vol. 1 (1948), pp. 189–204, at p. 204. A more sophisticated but still proceduralist notion of objectivity may be found in Christine Korsgaard, *The Sources of Normativity* (Cambridge: Cambridge University Press, 1996), p. 35. Also procedural in character is Postema's notion of objectivity in terms of vindication by public reasoning processes. See his 'Objectivity Fit for Law', in B. Leiter, ed., *Objectivity in Law and Morals* (Cambridge: Cambridge University Press, 2001).

metaphysically realist notion that has the attitudinal implications noted earlier.

There are stronger senses of objectivity that I do not want to dismiss in this way. These are the senses that demand *more* of morality than that metaphysical realism be true of it. I refer to those who add an epistemological requirement onto the metaphysical requirements for 'objectivity'. One might think, for example, that both morality and law are essentially action-guiding, and derive from this a requirement of epistemic accessibility by those whose actions are to be so guided. Judy Thomson, for example, defines moral objectivity as the thesis that 'it is possible to find out about some moral sentences that they are true',⁶ and analogously, Kent Greenawalt argues that a legal answer 'can be (objectively) correct only if the crucial "best reasons" are generally accessible'.⁷

These epistemic add-ons to the metaphysically realist notion of objectivity cannot be written off as consolation prizes for those who have already lost the title match. Nonetheless, in the essays that follow I do not pursue these epistemological enquiries. Enough for the day to examine the metaphysical questions (which are in any event primary over the epistemological question).

The thesis of the essays that follow is that morality is objective in the metaphysically realist sense of the word. In the first essay the argument for that thesis is largely negative, *viz*, that there are no good arguments showing that moral judgments are not objective. In the essay I catalogue the leading reasons people give for doubting that moral judgments are objective. Some of these reasons are so poor that I reject them on their face. Others, however, I subject to what the late John Rawls once (*i.e.* in his pre-constructivist days) called the 'parallel argument': apply each reason to our judgments of everyday and scientific fact; if that reason has as much force against scientific facts as against moral facts, and yet one is not a convinced skeptic about scientific facts, then one should not be a skeptic about moral facts either.

Admittedly, the argument is inconclusive against the dedicated skeptic; for he is a skeptic about both moral and scientific fact. In essay 2 I seek to give more positive argument for the objectivity of moral judgment. This is done from the naturalist perspective known as 'inference to the best explanation'. The argument for morality's objectivity is that the existence of moral qualities is part of the best explanation for a range of other phenomenon that for these purposes we may take unproblematically to exist.

⁶ Gilbert Harman and Judith Jarvis Thomson, *Moral Relativism and Moral Objectivity* (Oxford: Blackwell, 1996), p. 68.

⁷ Kent Greenawalt, *Law and Objectivity* (New York: Oxford University Press, 1992), p. 234.

Essay 3 takes something of a detour from the course of the argument thus far. In this essay I explore the theological implications of morality's objectivity. My conclusion is that there are none, that a commitment to ethical objectivity in no way requires (or is even helped by) a commitment to theism. I seek to establish this conclusion by re-examining certain of the skeptical arguments against morality first examined in essay 1, and asking of each such argument whether answering it on behalf of the moral objectivist would be aided by the theistic postulate. In each case I conclude that the God hypothesis is not only not necessary to sustain the objectivist conclusion, but that it does not even help.

The second topic addressed in these essays is the objectivity of legal judgment. As I said earlier, this is not the same topic as the first, the objectivity of moral judgment, although the two topics are related. It is not the same topic because legal judgments are not to be identified, simpliciter, with moral judgments. There are theories of law that would make this identification, but my own natural law view is not this pure. On the view I summarize in essay 4, the truth conditions of legal judgments include, but are not exhausted by, the truth conditions of certain moral judgments. Other, non-moral facts enter into the truth conditions of legal judgments, which is why legal judgments might not be objective even if moral judgments were.

Nonetheless, there is an intimate relationship between the two topics. I use the same, metaphysically realist sense of objectivity for both topics. That is, I enquire whether legal judgments are true in the sense that they correspond to certain sorts of facts that exist in the world independently of whether we believe them to exist or not. Moreover, the truth-makers of legal judgments are partly moral qualities and entities, as was just discussed. Thus, part of what accounts for the objectivity of legal judgments is the objectivity of moral judgments.

Indeed, this is a crucial part. As I discuss at the close of part II of essay 5, the other truth-makers of legal judgments – historical facts, institutional facts, semantic facts, etc. – are insufficient to make legal judgments objective. It is only because of the role of moral facts as partly constitutive of legal judgments that those latter judgments can be objective. In a word, moral objectivity is *necessary* for legal objectivity.

The essays on legal objectivity proceed in the following way. Essay 4 summarizes a considerable amount of my earlier work arguing for there being a relation between law and morality. More specifically, essay 4 examines two kinds of propositions of law, general propositions expressive of rules and principles, and singular propositions decisive of particular cases. I conclude of both such propositions that they can be true only if certain moral propositions are true.

Essay 5 focuses on singular legal propositions – the kind of propositions decisive of disputed law cases – and asks whether and in what

sense such propositions could be true. In the essay, I attempt to clarify the vague, 'what is truth?', sort of question; I examine the view that there is no need, use, or perhaps even sense for a theory of truth of legal propositions; I clarify and then reject the skeptical views that singular legal propositions are either not capable of being true or false or, while they are capable of bearing a truth value, that value is always, 'false'; and I examine and reject the constructivist view of truth according to which propositions are made true by us as we make judgments about law, and not by the world as it is.

Essay 6 approaches the objectivity of legal judgment more directly, leaving the semantic approach (via truth) for the more direct approach (via ontology). The question asked is what sorts of things might be legal truth makers. Taking the two legal examples developed in essay 4 as the point of departure, I ask how we should classify the variety of items making such legal propositions true. Six possibilities are distinguished. One of these purports to refuse sense to such questions of ontology. (I call this the 'ostrich position', because it refuses to look at the ontological question.) Two of these are metaphysically realist positions about legal kinds, distinguished by the naturalist versus non-naturalist sort of things legal kinds might be. The remaining three possibilities are anti-realist in character. They are the skeptical view, the Peircean view, and the secondary property view.

All six of these possibilities are developed vis-à-vis legal kinds by paying attention to how such possibilities have been developed about moral qualities and mental states in philosophy. In this way I seek to make legal philosophy less parochial vis-à-vis philosophy generally. Ethics and the philosophy of mind have developed these six possibilities in great detail, and I seek to utilize this literature in canvassing like possibilities for law.

I ultimately argue for a kind of reductionist naturalism about legal kinds. In a nutshell, legal kinds are blends of historical, semantic, causal, and moral facts. The blend is of a form I call functional kinds, which are kinds of instrumental goods. Ultimately, the hope is to eliminate the air of mystery that surrounds the existence of legal entities like corporations and legal relations like liability and rights.

There has developed some secondary literature in response to these articles, or to related articles by me.⁸ These criticisms are the tip of the

⁸ See, e.g., Jeremy Waldron, 'The Irrelevance of Moral Objectivity', in R. George, ed., *Natural Law Theories* (Oxford: Oxford University Press, 1992); Waldron, 'Moral Truth and Judicial Review', *The American Journal of Jurisprudence*, Vol. 43 (1998), pp. 75–97; Steven D. Smith, 'Natural Law and Contemporary Moral Thought: A Guide from the Perplexed', *The American Journal of Jurisprudence*, Vol. 42 (1997), pp. 299–330; Charles Taliaferro, 'God's Natural Laws', and J.L.A. Garcia, "'Deus sive Natura': Must Natural Lawyers Choose?", both in R. George, ed., *Natural Law, Liberalism, and Morality* (Oxford: Oxford University Press, 1996); Michael Huemer, 'Naturalism and the Problem of Moral Knowledge', *Southern Journal of Philosophy*,

iceberg of what might be said in response to my kind of metaphysical realism about morality and law. Like other central philosophical issues, this one shows no sign of consensus being reached or some knock-down demonstration being discovered. This might make one cynical about the possibility of doing this kind of philosophy. Unlike natural science, there seems to be little prospect of closure on these kinds of philosophical issues. This dispirits a number of people. Even life-long, quite accomplished philosophers sometimes become tired as they face this prospect.

Perhaps I should too. Why I have not is not due to some unusual optimism on my part that the definitive solution is just around the corner. Nor am I simply more patient than some of my fellow philosophers. Although I share the wish that I had proofs anyone with a lick of understanding could not resist, I know that I do not. Still, I have little doubt that morality is objective, that law is related to that objective morality, and that because of that connection law is objective too. These are not reason-less judgments, even though the reasons I deploy in support of them are far from any demonstration properly characterized as a 'proof'. A satisfying certainty in philosophy is possible despite the lack of such proofs and despite the prospect of prolonged and sophisticated disagreement with one's own views. Hopefully such certainty in the face of less than conclusive reasons is not a symptom of stubborn pig-headedness but rather, a sign of philosophical maturity.

Vol. 38 (2000), pp. 575–597; Dennis Patterson, 'Normativity and Objectivity in Law', *William and Mary Law Review*, Vol. 43 (2001), pp. 325–363; Dennis Patterson, *Truth and Law*, Chap. 3 (1996); Raymond Belloti, *Justifying Law*, Chap. 2 (1992); Andrei Marmor, *Interpretation and Legal Theory*, pp. 85–102, 124–154 (Oxford: Oxford University Press, 1992); Brian Leiter, 'Naturalism in Legal Philosophy', *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/lawphil-naturalism/> (2003); Graham Walker, *Moral Foundations of Constitutional Thought* (Princeton: Princeton University Press, 1990); James E. Fleming, 'The Natural Rights-Based Justification for Judicial Review', *Fordham Law Review*, Vol. 69 (2001), pp. 2119–2130; Brian Bix, 'Michael Moore's Realist Approach to Law', *University of Pennsylvania Law Review*, Vol. 140 (1992), pp. 1293–1331; Stephen Munzer, 'Realistic Limits on Realist Interpretation', *Southern California Law Review*, Vol. 58 (1985), pp. 459–475; Sanford Levinson, 'What Do Lawyers Know (And What Do They Do With Their Knowledge)? Comments on Schauer and Moore', *Southern California Law Review*, Vol. 58 (1985), pp. 441–458; Jules Coleman and Brian Leiter, 'Determinacy, Objectivity', *supra*; Nicos Stavropoulos, *Objectivity in Law*, *supra*. See also Ori Simchin, 'Metasemantics and Objectivity', and my reply, 'Can Objectivity be Grounded in Semantics?', both forthcoming in the conference proceedings of the International Congress on Problems in the Contemporary Philosophy of Law, Mexico City, 2003.

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PART ONE

ETHICS

[1]

Moral Reality

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* Robert Kingsley Professor of Law, University of Southern California Law Center. This article was presented at a colloquium of the Program of Jurisprudence and Social Policy, School of Law (Boalt Hall), University of California, Berkeley, to a faculty workshop at the University of Southern California Law Center, and to a faculty reading group in the philosophy of law at the University of California at Los Angeles. The author thanks the participants in these meetings for their many helpful comments, particularly John Borgo, Tom Grey, Barbara Herman, Martin Levine, Herbert Morris, and Deborah Rhode. Thanks also go to Amy Forbes, David Vieweg, and Jan Zager for their help with the research.

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All I can say is this: it looks as if we are all we have. . . . Only if ethics was something unspeakable by us, could law be unnatural, and therefore unchallengeable. As things now stand, everything is up for grabs.

Nevertheless:

Napalming babies is bad.

Starving the poor is wicked.

Buying and selling each other is depraved.

Those who stood up to and died resisting Hitler, Stalin, Amin, and Pol Pot—and General Custer too—have earned salvation.

Those who acquiesced deserve to be damned.

There is in the world such a thing as evil.

[All together now:] Sez who?

God help us.¹

—Arthur Leff, 1979

INTRODUCTION: MORAL SKEPTICISM AND LEGAL REASONING

An article with a title like "Moral Reality" should doubtlessly begin with that phrase. Such a phrase conjures up images of a kind of Aurora Borealis, but without the lights, and an article about such

1. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249.