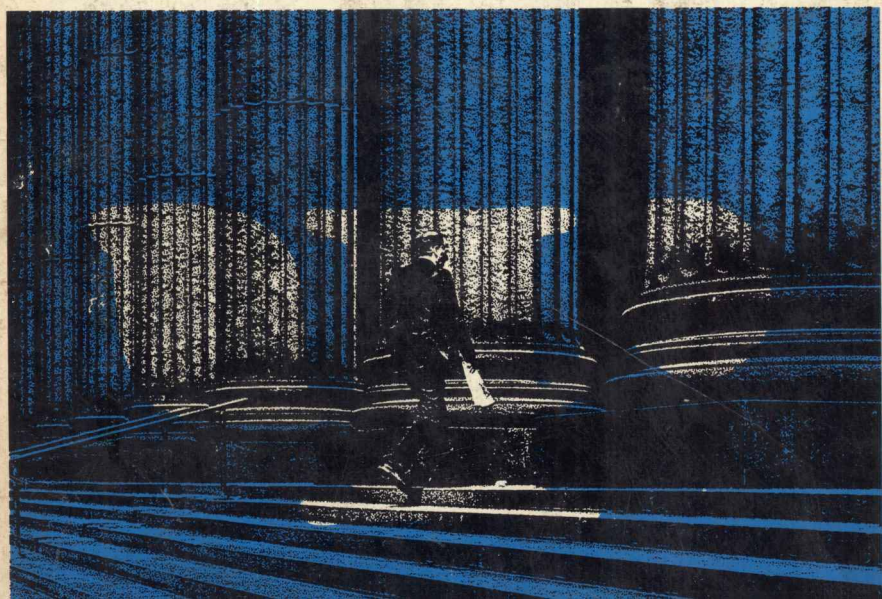


**Can Justice Survive the
Social Sciences?**

**PSYCH-
OLOGY &
LAW**

**Daniel N.
Robinson**



Psychology and Law

Can Justice Survive the Social Sciences?

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Preface

This is a small book on a vast subject. It is scarcely necessary, then, to pause to list all the issues and concepts ignored or only touched on in the following pages. I have not attempted to develop a theory of justice, nor have I set aside space to defend the one that animates judicial practice in the Western democracies. No attempt has been made at an exhaustive review of relevant case law. Indeed, I do not try to provide even a "representative" sample of the jural settings in which psychologists and psychiatrists have come to take a leading part.

What would seem now to be beyond dispute are the many and various influences the psychosocial point of view has come to have on the administration of justice, on the very concept of justice. Usually insensibly, often proudly, and sometimes reluctantly the contemporary courts have adopted this perspective and, in the process, have put their reasonings at odds with traditional formulations and defenses of justice. In part, this is the unavoidable consequence of a theory of judicature which defines the courts as "social" institutions; in part, the result of an all too innocent willingness to accept without challenge the claim that the "social sciences" are, indeed, sciences. The argument of this book is that the first of these tendencies is perilous and that the second is utterly unwarranted.

In articulating this argument, I have chosen a small number but an instructive range of jural matters now rendered contra-

dictory or incoherent by psychosocial thinking. These include the “insanity” defense, challenges to testamentary capacity, the protections afforded voluntarily and involuntarily committed patients, the position of the courts on psychological tests and on the legal standing of the defenseless. Where appropriate, I review the historical developments behind these current tendencies and attempt to show that neither history nor a careful appraisal justifies them. The picture of the modern court that emerges is of an institution increasingly so clouded in its judgment by irrelevant facts and specious theory as to be inaccessible to that body of principle to which it owes its very existence.

Georgetown
February 1980

D. N. R.

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Psychology and Law

1 Justice, Morals, and Science

1. Principles of Justice

The subtitle of this work has a provocative ring, but it is not intended as a veiled polemic against the social sciences. Rather, it might be read as if the question were "Can leopards survive on a vegetarian diet?" or "Can dental health flourish in the presence of sweets?" To ask whether justice can survive the social sciences is merely to acknowledge certain incompatibilities between the sorts of things produced by the social sciences and the sorts of considerations that have served historically as the foundation of systems of justice. The question is a serious one and is not by any means rhetorical, for in the balance of this book I will attempt to defend what finally is a negative answer. But before the effects psychology, psychiatry, and related disciplines have had on the processes of justice can be considered, it is necessary to examine, if only briefly, those traditional principles of justice now threatened by the social sciences.

The literature devoted to justice as an abstract principle is so vast and vexed that no brief treatment can even pose as a summary. It is, therefore, not my purpose here to review the history of the subject or to provide an exhaustive list of arguments favoring this or that theory of justice. Instead, I will note only those relatively persistent ideas that surface throughout the history of thought when writers come to grips with both the idea and the problem of justice. The subject is particularly vulnerable to use-

less and confusing pedantries, but to strip discussion of all philosophical elements is to reduce it to nothing more than a wrangle over opinions. The balance between scholarly purity and appeals to the general intelligence is not easy to strike where fundamental issues are involved, so I begin with apologies to both the specialist and the layman.

If we examine periods unburdened by developed and reasoned systems of justice, we find one or another version of the so-called law of the jungle. Such an expression immediately excites images of brutality and callousness and usually evokes pity and contempt from the civilized quarters of the modern world. Yet we must remain mindful that the essential nature of an animal is not completely determined by the environment in which that animal is found. Thus, in placing man in the setting of a jungle, we do not by that fact convert him into a beast. Indeed, with strikingly few exceptions, every record we have of man in society—including the most primitive societies—establishes what can only be called a basic *moral* nature. I do not suggest here that this nature expresses itself invariantly such that anywhere we find human aggregates we will discover the workings of exactly the same moral dictates. This, I believe, is a defensible claim, but it is not the one I am making here. I have not referred to *the* basic moral nature, but to *a* basic moral nature, and one that distinguishes all human communities observed to date from all nonhuman communities observed to date.

Perhaps the reader's first reaction on confronting this claim is to offer any number of observations and experiments flowing from "sociobiology" tending to prove that altruism, territorial claims, bartering, maternal care, hierarchic chains of authority within groups, and many other seemingly "moral" phenomena can be found among many species of animals. Of course, we did not need a new science to bring such things to our attention. Thoughtful observers since antiquity have noticed these features of nonhuman societies, and many of them, long before Darwin, proposed that these same features constituted something of a model or fundament or primordium by which to understand the developed moral systems of man. However, when we examine the concept of morality and strive to understand what we ordinarily mean by a "moral nature," we begin to see how irrelevant the ethological data are. We accept that there is a connection between

a person's conduct and his moral sense, but we also recognize that the two are not the same. In every instance in which we seek to assign a moral value to an action, we consider not only the consequences of the action but the intentions of the actor. What sets moral actions apart from mere responses is that they are only understandable in terms of ulterior motivations that have "good" or "evil" as a goal. This is what separates the emotional and the moral elements of, for example, "maternal" behavior. The woman who cares for a child merely because she loves it is driven by motives that are exclusively self-regarding. The woman who cares for a child she doesn't love—one she doesn't even know—and is doing so simply on the grounds that she judges such care to be right and the withholding of such care to be wrong is driven by moral considerations which, properly understood, are not motives at all. A motive, from the very etymology of the word, pertains to a condition or state or stimulus that impels one to act. To remove all possibilities for action is to remove the very grounds of motivation. It is for this reason that we can distinguish between a desire (or hope) on the one hand and a motive on the other. We can say, for example, that Smith desires to live forever, but it would be a corruption of language to say that he is motivated to live forever. The two become associated only to the extent that some hopes can be realized through action, and it is these hopes that lead to states of motivation. A man watches his house burning to the ground and knows that his terrier is caught within it. There is, in fact, nothing he can do to save her. He wishes that this were not the case, but it is a wish to which no relevant behavior attaches.

When persons are described as having a moral nature, what is usually meant is not merely that they are driven to act or not act in this or that situation, but that they have a certain class of desires or wishes which, in practical terms, may or may not ever be satisfied; desires or wishes for which there may be no possible means of fulfillment; furthermore, these desires or wishes have as their objective a state of affairs which, if brought into being, they would call "good." Still another qualification is required since what I have said thus far could well apply to, for example, the wish to have pudding and the judgment that were such pudding forthcoming, the resulting state of affairs would be "good." The added qualification is that of *universalization*. It is this qualifica-

tion that adds to the desire, or to the wish, the belief that the state of affairs in question would be good for all persons and for all time, past and present. Again, I am not weighing the moral worth of any given desire or wish, nor am I at this point arguing that any given desire or wish is common to all moral beings—only that all moral desires or wishes must be “universals” as a condition of their being moral. This, however, is not the same as saying that no genuinely moral desire is immune to qualification. To say, for example that

I wish for all persons that they be wealthy, excepting those who prefer to be poor

is to utter a universal wish, and to qualify it with still another universal, i.e., that universal class of persons “who prefer to be poor.” The point is that moral desires are universalized even in their exceptions. The exclusions do not diminish the domain of the goal; they only identify that universal class for which the goal is desired. Thus, the exceptions in moral wishes are not exceptions to the rule but declarations as to the class of entities to which the rule is applicable, and the effect of such declarations is generally to call for a reformulation and simplification of the rule. Thus,

I wish for all persons that they be wealthy, excepting those who prefer to be poor

is reformulated as

I wish for all persons that they have the wealth that they would choose for themselves.

These considerations bring before us what has always been treated as the essence of morals, the concept of *ought*. That is, to desire that *X* prevail or obtain or come into being with respect to all *Y*'s, and to believe that if this were to be the case it would be good, is finally to insist that *X* ought to be or ought to happen. It is of the utmost importance to recognize the difference between having a wish and believing that it ought to be fulfilled universally. Wishes can spring from emotion and subside as quickly as they appear. There are, after all, rash wishes. In any number of circumstances, persons find themselves wishing for an outcome which, even at the time of the wish, they acknowledge ought not

to occur. It is in just such circumstances that the party harboring the desire faces the consequences of the universalization of that desire—a confrontation that quickly converts wish to whim and strips it of its moral dimension.

Perhaps the reader at this point will recognize the absence of an important qualification of the assertion that, “to desire that X prevail . . . is finally to insist that X ought to be or ought to happen.” It surely would not follow from Smith’s desire that the legions of the dead arise from their crypts that they *ought* to, even if Smith were convinced that such an occurrence would be “good.” But as we shall see when we are further into the analysis of morals and in later chapters, the moral realm is an island in that vast sea of non-moral transactions called the physical universe. No one is *morally* responsible for events which are governed completely by the laws of science. No one is obliged to do that which is physically impossible. Thus, it is part of moral sensibility and moral discourse to distinguish between those universalized desiderata accessible to human intervention and those falling beyond the perimeter of possible human involvement. To the extent that human cleverness can neutralize the laws of nature or deflect them, moral discourse may become enlarged by scientific or technological advances. Accordingly, if it became possible to revivify the dead and restore them to human life, the moral dimension would be engaged, for it then would be plausible to claim that such actions *ought* to be taken. But just as it is contradictory to claim that a person “ought” to have done that which physical necessity prevents, it is contradictory to assign moral worth to events proceeding according to nothing but the laws of science. The qualification, then, is this: To insist that X *ought* to happen—that is, that it is morally *right* that X happen—X must be drawn from the domain of occurrences in which human agency is or could be determinative.

At a less practical level, there is something that further differentiates mere wishes from moral “oughts.” The entire realm of desire is, in principle, available to our experiences. That is, even those wishes that cannot possibly be satisfied (e.g., that all persons live forever) can be conceived of as experiences. We can imagine living in a world in which no one ever dies, and we can imagine this world in terms of a collection of facts that prove immortality. In principle, therefore, no wish or desire is utterly

destitute of empirical or experiential content. A world in which everyone is happy is, among other considerations, a world in which everyone truthfully claims to be happy; in which no one ever says he is unhappy; perhaps in which no one even looks unhappy. In other words, were the world of our universalized wishes to come into being, we would recognize it. But "ought," on the other hand, has none of these properties in principle or in practice. There is nothing of an empirical or experiential nature by which we can distinguish what "ought" to be. The domain of perception is the domain of mere material existence, the domain of "is." But the domain of "ought" has no material reference and cannot, therefore, be confirmed by observation. Nonetheless, we all know what it means when someone says that he wishes for this or that state of affairs because this is the way things ought to be. He is saying, in the ageless language of moral discourse, that it is right that things be this way and wrong that they be some other way. And it is just this consideration that renders the conduct of animals irrelevant to moral discourse, for there is nothing in the conduct of animals that reveals evidence of a universalized desire based upon belief in what ought or ought not to be. A dog will chase another away from a bone. This proves that dog *A* can chase dog *B*. We now teach dog *A* not to tear up newspaper. We then present the spectacle of dogs *B*, *C*, *D* . . . *K* chewing newspapers. Has dog *A* universalized the injunction against such behavior? Is there evidence on the part of dog *A* to suggest not only that he has learned that he must not chew newspaper but that he ought not? If such questions seem to be unanswerable—and, indeed, they are—then the behavior in question is simply irrelevant to moral discourse, which is discourse not merely about what is but about what ought to be in all instances.

Let there be no confusion between the analysis I have set forth up to this point and that famous "categorical imperative" advanced nearly two centuries ago by Kant. Kant defined the imperative illustratively thus: *So act that the maxim of your action be instituted as a universal law of nature*. This surely addresses an aspect of morality, but not that feature of it that common sense most readily apprehends. J. S. Mill was the most influential of an army of critics judging Kant's categorical imperative to be a justification for acts of unconscionable barbarousness. Examined at a superficial level, the Kantian principle would

seem to contend that, were there a malign and misanthropic felon who wished that all persons behaved themselves according to his own felonious maxims, the terms of the categorical imperative would be honored. This, of course, was not Kant's position, nor is it a position that can be validly drawn from Kant's analysis of morals. To read such possibilities into it is akin to interpreting "Do unto others as Ye would have them do unto you" as licensing masochists to cause others to suffer. But of course what Jesus was teaching with his law was rooted in our sense of right and wrong, something that proceeds from that very sense. That is, given that we know what is right and what is wrong, we must treat others rightly and we must not wrong them, just as we would not choose to be wronged by them. The injunction, therefore, pertains to the universalization of desire, not to the content of the desire. This is also true of Kant's "imperative." As a catch phrase or bromide, all the categorical imperative asserts is that moral propositions are universal in their extension. It does not attempt to classify all behaviors according to their moral worth. But I am persuaded that at the level of actual persons coming to grips with the problems of social life, it is just this classification that forms an inextricable element of genuinely moral wishes. Such wishes proceed from a classification of right and wrong, good and evil. And since nothing in perception qua perception can provide grounds for such classifications, it would appear doubtful to the point of impossibility that the moral categories are learned.

Is morality, then, an "instinct"? Let us recall those genial moralists of eighteenth-century England who would base all morals on our "native sentiments" and would thus root all moral sanctions in our feelings. On this account, moral desires are universal only to the extent that all human beings become possessed of very much the same sentiments when they confront, for example, suffering in others, the torture of animals, an insult to their own character, and the like. But apart from the fact that it would be hazardous to propose a biological mechanism by which such "instincts" might come into being, we have the more difficult, indeed the insuperable, problem of being unable to account for just what we set out to explain: our sense of right and wrong. There is nothing in the mere sight of blood that makes the causal element "wrong," for some blood is shed in surgery. As has been noted, the moral weight attaching to any outcome is as-

signed only after the intentions of the actor have been assessed. Accordingly, the data of perception are never sufficient to establish moral judgments or even to elicit them. Nor would it help much to increase our instinctual baggage by adding "an instinct toward good intentions," for what is salient about moral nature is the ingredient of desire in company with the belief that the object of desire is good. Since our genetic composition is constant and our scheme of desires changing, it would appear that we do not have a gene for every wish. Alas, we cannot have a gene for any wish! But if our moral nature is not the gift of instinct and, as has been shown, cannot be provided by perception, what other source is there? Do not learning and heredity exhaust the possibilities?

Even if these two processes exhausted all the possibilities we have conjured up, they would not, of course, necessarily exhaust all the possibilities. After all, it is really enough to show that there cannot be a gene for wishes and to show further that "right" and "wrong" cannot be conveyed by the evidence of the senses to show that both an environmentalistic and a hereditarian account are insufficient. We do not have as an added burden the task of settling the matter once and for all in order for our refutation of other explanations to be valid. At the present time and with cheery candor, we must simply admit that the origin of our sense of right and wrong cannot be identified with unchallengable precision. Neither, for that matter, can we identify the origin of our very consciousness, although we have discovered several of the biological conditions that must be satisfied if there is to be any evidence of consciousness. Note, however, that there can be consciousness in the absence of all evidence of it—except, of course, the private evidence person X has that he is conscious. In the same way, we can identify one of the conditions necessary for the existence of a sense of right and wrong: there must be a personal and, perhaps, forever private awareness on the part of the actor that he has acted on the basis of an intention. We do not refer to accidents or mistakes as right or wrong, but as fortunate, unfortunate, lamentable, etc. We only think we have done something wrong when we know that we intended to do it and were aware of the consequences or likely consequences when we did it. Our sense of right and wrong, therefore, arises out of our ability to weigh what has never happened in the history of the universe—namely, the future. There is, we see, both a logical and a psy-

chological connection between man as an intending being and thought as temporally indeterminative. It is just this aspect of thought that removes it from the context in which both feeling and experience occur. Experience is a function of events occurring in time and space; feeling, of events occurring within the body now. All experience refers to the present, as all feeling refers to the body. Thought, however, can refer to the future, to what is in fact impossible, to what has never occurred and never could occur. Thought is, in this regard, purely propositional. It is not "abstract" in the sense that it evades reality but in the sense that it can propose realities different from that which bathes the senses or excites the viscera. It may be argued, then, that to the extent that morality attaches to intention, and to the extent that intentions are by their nature future-referential and, finally, to the extent that futures can only be proposed—and neither felt nor sensed—all morality entails a rational being. If it were shown that other beings—such as monkeys or ducks—satisfied all these conditions, these other beings would, of course, be numbered among the earth's moral beings, but their inclusion would not vitiate anything said here. The important point is not that man is the only being whom we know to qualify in these respects, but that man does qualify in these respects.

I have set out in this chapter to comment on principles of justice, and I have gone on to discuss what is ordinarily taken to be the character of morals because only a moral being can articulate and comprehend principles of justice. However, what I have called genuinely moral desires are not identical to principles of justice, for the former are held by particular persons and are conceivable in a universe containing only one such person, whereas principles of justice pertain to the transactions taking place between at least two distinguishable beings. That a system of justice emerges from the genuinely moral desires of persons is indisputable, but the system is something different from these desires—something different from even the public expression of these desires. In their purely practical manifestations, the principles of justice make the developed morality of a society's most rational members obligatory by anchoring to it the common moral reasonings of the citizenry. The force of law is identical to the power of enforcement, but the force of justice is the force of logic, that instrument by which rational beings persuade one