



THE PROBLEM OF MORAL DIRIGISME:
A NEW ARGUMENT AGAINST
MORALISTIC LEGISLATION

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This Article applies a theory of rational choice to moral decision-making. In this theory, agents act primarily on local and personal knowledge to instantiate moral principles, virtues, and moral goods. The State may seek to prevent them from acting as they independently determine by prescribing or proscribing certain conduct by formal legal means. If its purpose is to ensure that people act morally or become better persons, we call this “moral dirigisme.” Our thesis is that the need to use decentralized knowledge to determine the moral status of an act makes the task of the moral dirigiste well-nigh impossible. The Article models moral agents as ideal-typical utilitarians, Kantians, or natural law adherents. We show that within each of these systems the determination of the morality of an act depends on the “particular circumstances of time and place.” Because the State’s access to knowledge of the personal and local circumstances of the actor is inferior to the knowledge available to the actor himself, the State does not possess a necessary instrument for the compulsion of morality. It does not have adequate concrete knowledge to know what is good. We conclude that the State cannot make people moral, because even when all members of society accept the same moral framework, it does not and usually cannot have the specific knowledge needed to determine the concrete manifestations of morality.

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“If there are circumstances in which the conduct I should pursue is clear to all that know my life, there will always be cases where I alone will know what I ought to do, because no one else can know the totality of factors my decisions must take into account. That is why, after we have given advice, it is reasonable to refrain from judging one who does not follow it. One who knows enough to give advice does not know enough to tell whether the advice ought to be followed...The incommunicability of the prudential judgment sets limits to governing others and provides the basic foundation of personal autonomy. An enlightened despotism therefore may be a contradiction in terms.”¹ –Yves R. Simon

“Let it be considered, too, that the present inquiry is not concerning a matter of right, if I may say so, but concerning a matter of fact.”²
–Adam Smith

I. Introduction

Ethics is not a purely abstract discipline that organizes and gives foundation to our vague moral intuitions.³ It also involves making practical judgments and choosing among alternative courses of action.⁴ Accordingly, ethical decisions share many characteristics with decision-making in realms of rational choice generally and market systems more specifically.⁵ The most important of these charac-

¹ YVES R. SIMON, *A CRITIQUE OF MORAL KNOWLEDGE* 37-8, n.8 (Ralph McInerney trans., 2002) (1934).

² ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 152 (Liberty Classics 1976) (1759).

³ Sometimes a distinction is made between morality and ethics. See, for example, G. H. Joyce, *Morality in THE CATHOLIC ENCYCLOPEDIA* (Charles G. Heibermann, Edward A. Pace, Conde' B. Pallen, J. Shahan and John J. Wynne eds., 1913), *available at*: <http://www.newadvent.org/cathen/10559a.htm> (“Morality is antecedent to ethics: it denotes those concrete activities of which ethics is the science.”) However, the distinction between morality and ethics is not observed here because our method formalizes moral decisionmaking. See also section V-d, *infra*.. It is also quite common simply to employ the terms synonymously.

⁴ For an emphasis on the practical aspect of ethics, see JOHN FINNIS, *FUNDAMENTALS OF ETHICS* 3-4 (1983) (“[E]thics is practical because my choosing and acting and living in a certain sort of way . . . is not a secondary . . . objective and side-effect of success in the intellectual enterprise; rather it is *the very object primarily envisaged* . . . [Ethics] has two formal, primary objects (objectives, goods in view); (i) truth about a certain subject-matter, and (ii) the instantiation of that truth in choices and actions.”)

⁵ Lionel Robbins was one of the first economists explicitly to recognize the general applicability of a science of rational choice:

“The ends may be noble or they may be base. They may be ‘material’ or ‘immaterial’ – if ends can be so described. But if the attainment of one set of ends involves the sacrifice of others, then it has an economic aspect The distribution of time between prayer and good works has its economic aspect equally with

teristics is the need to act upon knowledge that is available only in localized settings or contexts, is transient in nature, and may not be amenable to explicit articulation. The thesis of this Article is that recognition of these ubiquitous characteristics of ethical decision-making places very strong and narrow limits on the State's ability to dictate moral behavior, even when those under its control are in agreement with its guiding moral principles.⁶ We call the attempt or tendency to control certain kinds of moral behavior by formal legal means "moral *dirigisme*."⁷

Individuals must use their personal and local knowledge when making moral decisions. This knowledge helps satisfy empirical requirements in the application of general moral principles. These requirements appear in different ways in various moral systems. Nevertheless, in each system, knowledge of what F.A. Hayek called, in another context, the "particular circumstances of time and place"⁸ is critical to the choice of a specific action in fulfillment of a general rule, maxim, or principle. The argument here will be familiar to economists. It rests on a rough analogy with another kind of decisionmaking: "economic" or market decisionmaking. In market transactions individuals make use of personal or local knowledge in determining the prices and other terms on which they trade. By bringing the agent's knowledge of the particular circumstances of time and place to bear on his decisions, individual knowledge is mobilized for a social purpose.⁹ The price system, it is argued, tends to embody knowledge vastly superior to that of any individual to the extent that individual agents are free to act on the basis of their own knowledge. Central economic planning, on the other hand, explicitly replaces the knowledge of the individual with the allegedly superior knowledge of the central planner. What will be shown is that, even outside of market decisionmaking, in most cases, there will be a superior application of general norms when people are free to act on the basis of their own local knowledge than when a "central planner" seeks to compel moral behavior.

The knowledge problem in ethics, as well as in economics, must be both distinguished from and related to incentive problems.¹⁰ The question of the accu-

the distribution of time between orgies and slumber." LIONEL ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE, 2d ed. 25-26 (1935).

⁶ The purpose of this dictation is to increase the moral goodness of individuals or, possibly, of society as a whole (in the sense of a social structure of morally good rules). However, the object is not simply to make people *think* they are engaging in right action and thus to increase their "subjective morality." It is, rather, to compel them to do what is *objectively* right, given a particular ethical framework. It is mistaken, then, to say that people *are* moral or virtuous if they simply *believe* what they are doing is right. To actually be moral one must do what is objectively right *in the framework to which one subscribes*.

⁷ The analogy here is with the more conventional term "economic dirigisme" that is, the centralized control of economic affairs by the State.

⁸ See FRIEDRICH A. HAYEK, *The Use of Knowledge in Society*, in INDIVIDUALISM AND ECONOMIC ORDER 80 (1948).

⁹ See generally, FRIEDRICH A. HAYEK, *The Use of Knowledge in Society*, in INDIVIDUALISM AND ECONOMIC ORDER 77-91 (1948).

¹⁰ Unfortunately, Hayek does not distinguish between incentive and knowledge problems in his observations on ethical decisionmaking. "Effective" moral responsibility, for Hayek, is the joint outcome of adequate concrete (local and personal) knowledge and adequate incentives to find and act upon a solution to a moral problem. Hayek argues: "The essential condition of responsibility is that it refer to circumstances that the individual can judge, to problems that, without too much strain on the imagination, man can

racy of knowledge upon which moral agents make decisions is, for knowledge acquired as the *byproduct* of other activities, quite separate from the question of whether these agents have the incentive to act morally. We do not make the assumption that simply because agents are able to act upon relatively accurate concrete knowledge that they will do what is morally correct. They could, of course, be ignorant of basic moral norms or general rules. More importantly, however, it is possible for a variety of reasons, such as deficiency of incentives or weakness of will, to know the better yet do the worse. Nevertheless, knowledge of the better is clearly a prerequisite for doing the better. On the other hand, knowledge acquired *deliberately* for the purpose of enhancing the quality of moral decisions obviously cannot be detached from the individual's incentives to act morally.

Yet even in the case of an individual not predisposed to act morally, the local and personal character of the requisite knowledge makes it, at least *a priori*, highly unlikely that this knowledge can be acquired and correctly processed by an external authority seeking to override the individuals' decisions.

In Part One of the Article we introduce the meaning and significance of moral dirigisme. We then examine some conventional arguments against it primarily to distinguish our own theory. In Part Two we both summarize and develop the theory in detail. In Part Three we show how the knowledge problem is present in three classical systems of ethics: utilitarianism, natural law and Kantianism. Part Four first discusses the exceptional case of justice and then examines specific cases of morals laws and compulsory beneficence legislation. Part Five addresses challenges to the theory emanating from the largely illusory idea of moral absolutes and well as the idea of a "moral ecology" or public morality. In last section we draw some conclusions.

PART ONE: THEORETICAL PRELIMINARIES

II. The Meaning of Moral Dirigisme

Despite his general opposition to what we call "moral dirigisme," John Stuart Mill, in effect, described its core as "interfering with the liberty of action of any...member of a civilised community [for]... [h]is own good, either physical or moral." The moral dirigiste believes that the individual can "rightfully be compelled to do or forbear because it will be better for him to do so, because it would make him happier, because, in the opinion of others, to do so would be wise, or even right."¹¹ Mill made a fundamental distinction between this largely self-regarding behavior and other-regarding behavior, especially including behavior

make his own and whose solution he can, with good reason, consider his own concern rather than another's. . . . In order to be effective, then, responsibility must be so confined as to enable the individual to rely on his own *concrete* knowledge in deciding on the importance of the different tasks, to apply his moral principles to *circumstances he knows*, and to help to mitigate evils voluntarily." In summary, "If what we do is to be useful and effective, our objectives must be limited, adapted to the capacities of our mind and our compassions." FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 84 (1960) (emphases added).

¹¹ JOHN STUART MILL, *ON LIBERTY* 13 (Stefan Collini ed., 1989) (1859).

that causes “harm” to others. For him the boundary between moral dirigisme and legitimate coercive legislation is at the line that separates harm to oneself from harm to others.¹²

Mill’s project was to provide a normative justification for coercion, especially in the form of criminal sanctions, for certain classes of conduct. He was concerned with conduct that causes harm or offense to others, on the one hand, and conduct that causes harm to self, and harmless wrongdoing, on the other.¹³ In broad terms, Mill’s view was that criminalization of the first is justified and, to a limited extent, criminalization of offense could be justified when the offense is grievous, but that harm to self and harmless wrongdoing (moralisms) are not appropriate for criminalization.

Our project, however, is not to determine the proper scope of the criminal law. *In fact, this is not a normative inquiry at all.* It is, rather, a positive analysis of normative issues. In particular, we are interested first, in identifying certain classes of laws supported by moral arguments that incorporate certain prototypical moral purposes, and, second, in determining whether these laws can, in fact, achieve their purposes. These purposes, it must be stressed, are not ours, but those of the dirigiste. Therefore, our object is to determine whether moral dirigisme can attain its *self-imposed* goals.

Accordingly, at the outset, we must address two preliminary questions: (1) What are the characteristics of a *moral* argument in support of a prohibition or command? and (2) What kinds of specific moral purposes do dirigiste laws attempt to serve? Answers to these questions will enable us to identify the types of laws in which we are interested.

First, the difference between a moral argument for the avoidance or commission of some act and a non-moral or “pragmatic” argument is complex. We shall not go into great detail here. However, it is certainly not the case that prag-

¹² Mill states the criterion for legitimate coercion, largely in the form of criminal sanctions, as follows: “The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.” *Id.* at 13. This criterion, however, is not as straightforward as it may seem. Mill’s other-regarding behavior does not correspond neatly to the economist’s notion of “external effects.” This is because the demarcation between self and other-regarding behavior has a large normative component. Behavior can be essentially self-regarding even in the case in which, for example, others are deeply offended by the outward manifestation of an individual’s religious beliefs. No one has a duty to suppress his individuality as manifested in such core beliefs and actions for the sake of not giving offense. See, e.g., R. F. Kahn, *J. S. Mill: Ethics and Politics*, in 7 *ROUTLEDGE HISTORY OF PHILOSOPHY* 62, 68-73 (C.L. Ten ed., 1994). Autonomy of choice is a necessary element in human happiness and so it can act as a trump against the “pains” of offense. On the other hand, drunkenness, for example, although self-regarding in itself, may lead to the violation of familial obligations which is in turn other-regarding. In practice it is hard to separate drunkenness from its further effects since these often follow with extremely high probability. Thus, “the boundaries of self-regarding conduct in specific situations will be marked out on the basis of respecting the rights of others, and acknowledging corresponding duties, regarding the development of individuality.” *Id.* at 72.

¹³ These are the titles of Joel Feinberg’s four volume study: *THE MORAL LIMITS OF THE CRIMINAL LAW : HARM TO OTHERS* (1984), *OFFENSE TO OTHERS* (1985), *HARM TO SELF* (1986), *HARMLESS WRONGDOING* (1988).

matic arguments consider consequences while moral arguments, by definition, do not. Nor is it the case that moral arguments are necessarily restricted to a certain class of consequences, i.e., “moral” harms. What distinguishes the moral case “to do or forbear” is the type of reasons adduced. A moral argument is not simply of the form “If we wish to avoid harm X, we must not perform certain actions.” In this case a moral argument says, among other things, that every moral agent should (must) want to avoid this harm, whether it is self or other-regarding.¹⁴ A moral argument exhibits disinterestedness in the sense that it claims every agent must avoid the harm as a matter of principle and not simply because he or someone he cares about is the victim. Relatedly, moral arguments are stated in general terms—neither the agents nor patients can be specific, named individuals.¹⁵ Thus, moral dirigime is the use of formal legal means, usually criminal sanctions, to compel individuals or groups to avoid or perform actions, primarily to serve certain kinds of moral purposes as supported by moral arguments.¹⁶

Second, these moral arguments, which may be of many types, usually refer to moral purposes of particular kinds. These are:

- (1) Avoiding a purely moral harm or conferring a purely moral benefit to the agent;
- (2) Avoiding a purely moral harm or conferring a purely moral benefit to others;
- (3) Avoiding a moralized welfare (physical, psychological, material) harm or conferring a moralized welfare benefit to the agent;¹⁷
- (4) Conferring a moralized welfare benefit to others;

¹⁴ Subsequently, we do not restrict ourselves to consequentialist moral arguments. See *infra* at section VIII.

¹⁵ Paul Taylor summarizes a very general conception of a moral argument. It is an argument that rests on the acceptance of a norm that is: “general in form and is *intended* (by anyone who adopts it) to apply universally and disinterestedly, is *intended* to take priority over other norms and to be publicly recognized as having such priority, and is *intended* to be substantively impartial in its practical effects when applied to all cases within its specified scope.” Paul Taylor, *On Taking the Moral Point of View*, 3 *MIDWEST STUDIES IN PHILOSOPHY* 35, 38 (1978).

¹⁶ An alternative approach is to say that “judgments” of morality are not based on reason, but on the presence of a particular kind of feeling or impression – say, one of guilt or of virtue. This is roughly David Hume’s view as discussed by David Norton: “Imagine, then, that we observe a specific case of intentional killing. As a consequence of confronting this action, we . . . experience certain impressions of sensation . . . [They may] includ[e] shock or pity, but among these we can expect to find the distinctive impression of moral disapproval or disapprobation. Only if that impression arises will we determine that the killing agent and the killing action are vicious or morally evil. Moreover, we make this determination just because we have this distinctive feeling: we will not need to make use of reason in order to *infer* that moral evil has been encountered.” See the Editor’s Introduction in DAVID HUME, *A TREATISE OF HUMAN NATURE* 180 (David Fate Norton and Mary J. Norton eds, 2000). This is also the view apparently taken by Louis Kaplow and Steven Shavell, *Human Nature and the Best Consequentialist Moral System* 1 n. 1 (February 2002) (unpublished article available on Social Science Research Network, <http://ssrn.com/abstract=304384>). We do not find the Humean approach appropriate because our theory formalizes the moral decision in terms of ideal-typical philosophical systems. Our agents are thinking within an intellectual system, not simply emoting or, at least, acting as if they are.

¹⁷ A “moralized welfare benefit (harm)” is one for which a moral case or argument is being made.

(5) Avoiding a “free-floating” purely moral evil to society as a whole (a “legal moralism”).¹⁸

In a rough way, those laws that require the agent to forbear in order to avoid harm (or, rarely, to convey a benefit) are traditional morals laws. They include both “moral” and “welfare paternalism.”¹⁹ Those that require the agent to perform some positive act either to avoid harm or convey a benefit we characterize as compulsory beneficence. While it is true, however, that such laws could be based on an attempt to compel a virtue other than beneficence (for example, obedience to parents or the Church), in contemporary Western law these are not significant.

Our list requires additional clarification. First, by “moral” harm or benefit we mean a consequence that affects a person’s character or worth according to some ethical doctrine, without any substantial impact on his welfare in physical, psychological or material terms. There may be very few cases of *purely* moral harm or benefit. Second, by harm or benefit to “others” we mean to some specifically identifiable people other than the moral agent. By “to society as a whole” we mean that the claim is being made that some act or omission is an *intrinsic* evil whether particular individuals are harmed by it. Third, the terms “harms” or “benefits” involve important standard and baseline issues. Moral harm and benefit are relative to the objective or true moral interests, according to the appropriate theory, of the agent or those who are affected by his conduct. Similarly, welfare benefit or harm to the agent is relative to his true welfare interests whether he perceives them or not. Welfare benefits to others are also objective.²⁰ Harms and benefits are defined relative to the baseline of the individual’s entitlements in the (given) background system of abstract rights. Finally, this list is not meant to exhaust all of the logical possibilities but has in view the policies or laws that are or have been important in our society. The list is prototypical in the sense that each purpose is a preliminary model or ideal type. It may be adapted or combined to fit particular empirical cases.

In principle, any law can qualify as “moralistic legislation” because any legally-relevant conduct can be characterized in moral terms. It all depends on how the relevant actors see things.²¹ Furthermore, a law can be characterized in more than one way. Thus, a law forbidding shopkeepers from opening on a Sunday may have a moral or quasi-religious aspect (Sabbath observance) as well as an economic aspect (perhaps an increase in leisure time). Whether such a law is consid-

¹⁸ See JOEL FEINBERG, 4 THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 8 (1988).

¹⁹ See Gerald Dworkin, *Paternalism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2002). Available at <http://plato.stanford.edu/archives/win2002/entries/paternalism>.

²⁰ Objective does not mean the same for all people. What promotes a person’s well-being depends on his personal and external circumstances.

²¹ As Alan Hunt observes: “...[T]he moral’ dimension is not an intrinsic characteristic of the regulatory target, since there is no set of issues that are necessarily moral issues; rather the moral dimension is the result of the linkage posited between subject, object, knowledge, discourse, practices and their projected social consequences.” ALAN HUNT, GOVERNING MORALS: A SOCIAL HISTORY OF MORAL REGULATION 7 (1999).

ered a “blue law” or some form of economic legislation will depend on a judgment about its main purpose and, perhaps, the rhetoric surrounding advocacy of the law.

We now turn to the *weight* of the moral argument in the overall case for moralistic legislation. When conduct is viewed as enhancing the moral status of agents or as promoting a good society, is that sufficient justification for adopting the relevant moralistic legislation? The strong form of moral dirigisme accepts that the morality of rightness of an action or omission is *sufficient justification* to compel a person to take it or omit it. This strong version is perhaps the earliest form and was expressed by Socrates in Plato’s *Republic*:

...[I]t’s better for everyone to be ruled by what is divine and wise. Ideally he will have his own divine and wise element within himself, but failing that it will be imposed on him from outside so that as far as possible we may all be equal, and all friends, since we are all under the guidance of the same commander....It is clearly the aim...both of the law, which is the ally of all the inhabitants of the city, and of our own governance of our children. We don’t allow them to be free until we have established a regime in them, as in a city.²²

As philosophers in this tradition would later argue, man’s natural end is to pursue virtue and the purpose of the state is to ensure that he does so.

A weaker form of moral dirigisme, favored by Thomas Aquinas, has a *prima facie* character. As a first approximation, the king ought, “by his laws and orders, punishments and rewards...restrain the men subject to him from wickedness and induce them to virtuous deeds.”²³ This, however, is to be supplemented by prudential qualifications or limitations. Human law, according to Aquinas, “does not lay upon the multitude of imperfect men the burdens of those who are already virtuous.”²⁴ Such considerations as the futility of a prohibition or its productiveness of other, perhaps more serious, wrongs are entirely appropriate and may override the *prima facie* rule. “[H]uman laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain.”²⁵

A further development of the Thomistic form of moral dirigisme has been more recently advanced by Robert P. George in *Making Men Moral* in which he recognizes limitations based on the diversity of moral goods and the moral value of free choice, as well as the aforementioned prudential limitations. The State may “legitimately proscribe *only* the fairly small number of acts and practices that are

²² PLATO, THE REPUBLIC 310-11 (G.R.F. Ferrari ed., Tom Griffith trans., 2000).

²³ ST. THOMAS AQUINAS, ON KINGSHIP 120 (Gerald B. Phelan trans., 1949).

²⁴ 2 THOMAS AQUINAS, SUMMA THEOLOGICA 1018 (Fathers of the English Dominican Province trans., 1948) (1266-77).

²⁵ *Id.*

incompatible with *any* morally good life.”²⁶ Despite the reduction of the domain of permissible prohibitions that this entails, George does not seem to appreciate the radical knowledge problems involved in adhering even to his limited form of moral dirigisme.²⁷

III. Conventional Arguments Against Moral Dirigime

It is convenient to classify some of the conventional arguments against moral dirigisme according to the degree to which they approximate the ethical knowledge problem we are seeking to describe. Those least connected with the knowledge problem are based on either the direct or opportunity costs of morals enforcement. For example, suppression of the trade in various drugs or in sexual activity is often associated with violence, black markets and disease. If the cost of these effects is very high, the legal enforcement of drug or sexual morality may be, on the whole, unacceptable.²⁸ Even if the direct cost of legal enforcement is low, the opportunity cost may be high. In those areas, for example, where the moral standard is too high or difficult for most people to meet,²⁹ limited enforcement resources may be more productively used in other areas where people are on the margin of appropriate behavior.³⁰ A related argument is that where the private or informal enforcement of moral norms can be accomplished relatively cheaply, the State should not intervene.³¹

A second group of arguments against moral dirigisme can be classified as those based on the insufficiency of external acts without intention. These arguments are not to be confused with free-will arguments that we eschew here.³² David Hume, for example, argued that what the agent directly approves of, in a moral sense, is the state of mind or desire to produce “natural [nonmoral or pre-moral] good” in himself or in those with whom he has commerce. The external actions per se or the beneficial consequences the actions tend to produce are simply “signs” of evidence of the internal state. This state alone has moral merit.³³ Furthermore, Immanuel Kant distinguishes between “duties of right” (justice) and the “duties of virtue.” The former can be enforced by external sanctions because

²⁶ ROBERT P. GEORGE, *MAKING MEN MORAL* 40 (1993) (emphases added).

²⁷ We have more to say about George’s form of moral dirigisme in section XIV, *infra*.

²⁸ See ROBERT P. GEORGE *The Concept of Public Morality* in *THE CLASH OF ORTHODOXIES: LAW, RELIGION AND MORALITY IN CRISIS* 107-08 (2001).

²⁹ See THOMAS AQUINAS, 2 *SUMMA THEOLOGICA* 1018 (Fathers of the English Dominican Province trans., 1948) (1266-77).

³⁰ Economists express this idea by saying that it may be optimal to spend little on punishment when the elasticity (responsiveness) of the activity to legal penalties is low. See Gary S. Becker, *Crime and Punishment: An Economic Approach* in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 23 (Gary S. Becker and William M. Landes eds., 1974).

³¹ See Robert Cooter, *Normative Failure Theory of Law*, 82 *CORNELL L. REV.* 947, 971 (1997).

³² See generally, *THE OXFORD HANDBOOK OF FREE WILL* (Robert Kane ed., 2002).

³³ “’Tis evident, that when we praise any actions, we regard only the motives that produc’d them, and consider the actions as signs or indications of certain principles in the mind and temper. The external performance has no merit. We must look within to find the moral quality. This we cannot do directly; and therefore fix our attention on actions, as on external signs. But these actions are still consider’d as signs; and the ultimate object of our praise and approbation is the motive, that produc’d them.” DAVID HUME, *A TREATISE OF HUMAN NATURE* 307 (David Fate Norton & Mary J. Norton eds., 2000).

their purpose is simply to ensure the external freedom of all. But the latter are concerned ultimately with a state of mind or the agent's adoption of certain moral rules. Critical to the duties of virtue is the agreement between, in Kant's terms, the *subjective* maxim (or principle) upon which the agent acts and the rational moral law.³⁴ The agent's subjective maxim, however, is always and only within his control. In neither Hume's general perspective nor Kant's perspective on virtue, then, can legal coercion of external acts make man or society moral.

The final class of arguments against moral dirigisme are those emanating from the set of views known as "moral pluralism." This class most closely approximates the ethical knowledge problem we are describing. Pluralism claims that among individuals and within a single individual there are conflicting moral and nonmoral values.³⁵ There are also conflicting ways to produce coherent choices or orderings among those values. None is inherently more reasonable than others. The relevant moral decisions are context-dependent. The context is often one of differing *interpretations* of primary (universal) values or of different *conceptions* of the good life.³⁶ Since there is no definitive resolution of these conflicts, enforcing or imposing any one value or set of values is arbitrary. This pluralistic argument differs from ours insofar as pluralism stresses the conflicts of values and differing interpretations of basic physiological and psychological "needs," while our view stresses the contingent factual issues or requirements in the application of values *even when the values themselves are not in conflict*.

PART TWO: THE THEORY

IV. Summary of the Theory

This section summarizes our theoretical framework by breaking it down into nine propositions or statements. This will make it easier for the reader to relate the various parts of the Article to each other and to evaluate the logical connections in the overall argument. As a summary, it is meant to be short and assertive rather than comprehensive and demonstrative.

³⁴ "Duties of virtue cannot be subject to external lawgiving simply because they have to do with an end which (or the having of which) is also a duty. No external lawgiving can bring about someone's setting an end for himself (because this is an internal act of the mind), although it may prescribe external actions that lead to an end without the subject making it his end." IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 31 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1785).

³⁵ "Moral pluralism is the view that values, obligations, virtues, ideals, or fundamental moral principles are inherently diverse and cannot be reconciled into one harmonious scheme of morality.... And values can be incompatible between cultures, between groups in the same culture, between persons, and even within the same person." Virginia Held, *Moral Pluralism*, in 2 *THE ENCYCLOPEDIA OF ETHICS* 1138 (Lawrence C. Becker & Charlotte B. Becker eds., 2d ed. 2001).

³⁶ "The primary concern of pluralism is with the relation on which these values [whose realization would make life good] stand in relation to each other; the identity of the values is of interest to pluralist, *qua* pluralists, only insofar as it is relevant to understanding their relations.... Pluralists may disagree with each other and agree with non-pluralists about the identity of the values that warrant our allegiance." JOHN KEKES, *THE MORALITY OF PLURALISM* 9 (1993).

1. Moral choice is not among abstract principles, generic moral goods or virtues but among concrete actions at the margin. Thus, agents do not choose, for example, all instances of beneficence over all manifestations of honesty or vice versa, even when the moral language is one of absolutes.
2. To apply (instantiate) moral principles to (in) particular decisions requires factual knowledge about the state of the world in which the decisions are made, the actions of other individuals, and the interrelated decisions of the agent.
3. The knowledge is concrete, often transient, partial and imperfect. It is relevant to specific decisions at a particular time and place.
4. The knowledge is both deliberately acquired and acquired as a by-product of other useful activity. To the extent that agents have the desire to act morally, they will have the incentive to acquire relevant knowledge and to make use of knowledge already acquired.
5. This knowledge is very often, though not always, unverifiable by external parties or potential enforcers of morality.
6. Given the unverifiability of much of the relevant knowledge, if the State is to enforce morality it must do so with specific prohibitions (or positive commands) that are applicable regardless of (many of) the particular circumstances. This is because of the high enforcement costs associated with ascertaining “unverifiable” conditions.
7. Because of the relative insensitivity of moralistic legislation to “exceptions” or inapplicability based on particular circumstances, agents will have little incentive to discover morally-relevant particular knowledge or to utilize that which they already possess in making the decisions required by the law.
8. Hence, the decisions agents make, in areas covered by moralistic legislation, will not *actually* be moral (except by chance) because they will not take account of the relevant particular circumstances of time and place.
9. This “ethical knowledge problem” (or, from a policy perspective, barrier to effective moral dirigisme) exists across a wide variety of moral philosophies or frameworks. Thus, we suggest, it is a characteristic of ethical action *as such* and not simply of some particular conceptions of it.

V. A Theory of Ethical Decision-Making

A. The General Need for Local Knowledge in Moral Decision-Making

As a species of pure decision-making, moral action requires spatio-temporal knowledge reflecting the contextual nature of all decisions and actions. Any action aims at changing the future state of affairs relative to what it would be in the absence of the action. In a general sense, it aims at some consequence that will be affected by local circumstances. This is easily understood in the context of consequentialist ethics, but even applies in the case of deontological (duty-based) ethics. We shall see this further below. The general idea is that an action “exhibiting” a virtue or following a rule is affected by local circumstances insofar as these *define* or characterize the action. Honesty, for example, is dependent on the local meaning of words, the context of the communication, the expectations of the hearer, and so forth.³⁷

The acquisition of relevant knowledge, however, does not necessarily imply the determinacy of moral decisions (although this may be the case in certain forms of utilitarianism). In the Thomistic analysis of rational, voluntary human action, for example, the choices agents make are not rigorously determined by the general or abstract goods that constitute human flourishing (or the “good” for man). The specific actions that ought to be undertaken are informed by the natural law in conjunction with the *knowledge* of the particular circumstances of time and place. But even here this is not a deductive exercise; the decision depends on the application of practical reason—a form of reasoning that does not yield necessary truths.³⁸ We shall have more to say on this below.

B. Kinds of Knowledge

This section develops an analysis of different kinds of empirical knowledge relevant to (moral) decision-making. Our ultimate purpose is to ascertain the degree to which this knowledge is verifiable by those who seek to act as external enforcers of moral norms. We develop briefly a theoretical account of dispersed or decentralized knowledge.³⁹

³⁷ Steven Shavell argues that in contrast to legal rules a “moral[] rule cannot be too detailed and nuanced in character . . . A moral rule against lying [for example] that incorporated too many and too complicated categories of exception would be difficult for children to learn and might challenge the intellect of many . . . If the rule against lying did include numerous exceptions depending on circumstances, a person might have to stop and ponder whether or not to tell the truth; he would not, as often he must, instantly know the answer to his moral obligation.” Steven Shavell, *Law versus Morality as Regulators of Conduct*, 4 AM. L. & ECON. REV. 227, 234–35 (2002). This view, putting aside ambiguities associated with the use of words like “too detailed,” would be plausible if all morally relevant knowledge had to be acquired explicitly and held explicitly. But this is not true. See sec. VI-b, *infra*. Furthermore, it is *prima facie* implausible once we recognize that children learn the complex grammars of various languages at an extremely young age.

³⁸ See JOHN BOWLIN, CONTINGENCY AND FORTUNE IN AQUINAS’S ETHICS 58–60 (1999).

³⁹ See ALFRED SCHUTZ & THOMAS LUCKMAN, THE STRUCTURES OF THE LIFE-WORLD 304–18 (Richard M. Zaner & H. Tristram Engelhardt, Jr. trans., Northwestern Univ. Press 1973) (1953) (offering a phenomenological approach to the issue of decentralized social knowledge).

Knowledge in any complex society is decentralized in at least two senses. It can be *local*, that is, available only to individuals in a certain geographical location (“the man on the spot”) or by virtue of their specific activity. It can also be *personal* in the sense that such knowledge is of the objective or subjective states of the acting individual. In moral action focused on beneficence, for example, the first is exemplified by knowledge of the material or psychological condition of a relative or co-worker. The second is exemplified by knowledge of one’s own resources or motives.

Local or personal knowledge can be, in turn, held in two ways. The first is *explicitly* or as knowledge capable, at least in principle, of articulation in propositional form to one’s self or to other agents. This articulation and communication is generally costly. On the other hand, the knowledge can be held *tacitly* insofar as it cannot be stated in propositional form and hence is not communicable to others in a direct way. Such knowledge is communicated, if at all, implicitly⁴⁰ through personal relationships.

In the case of local knowledge, an individual may have a “sense” of the external situation as when, for example, a benefactor knows that a poor friend has the psychological capacity or will to become self-supporting after a period of financial assistance. Alternatively, the agent may know explicitly that a potential recipient of charitable assistance is willing to undergo training to learn a marketable trade. In the case of personal knowledge, for example, an individual may simply *act* in accordance with a prudent concern for his own physical well-being. On the other hand, he may know explicitly what his mental health requires, including his need for relaxation and diversity of activities.

The means by which local and personal knowledge, whether tacit or explicit, is acquired can shed light on the problem of external ascertainability. This is because the typical means of acquisition are not available to the State as it attempts to determine (and then enforce) moral behavior. To see this, consider that morally relevant empirical knowledge is acquired in three ways. First, it may be deliberately acquired as the individual focuses on specific facts made relevant by general moral rules or aims. These rules or aims determine his framework of fact acquisition. Second, it may be undeliberately acquired as the byproduct of local social or economic interactions quite apart from any effort to behave morally. Finally, it may be undeliberately acquired but as the result of moral action. This would be a case of implicit or tacit learning of the appropriate factual circumstances in which

⁴⁰ Much applied knowledge and skills are of this type. Knowledge of how to ride a bicycle and swim are good examples. Simply handing a student the mathematical formulae for keeping balance on a bicycle or keeping afloat is ineffective in teaching the skill. See MICHAEL POLANYI, *The Logic of Tacit Inference*, in KNOWING AND BEING 144 (Marjorie Green ed., 1969). See also H.M. Collins, *What is Tacit Knowledge?*, in THE PRACTICE TURN IN CONTEMPORARY THEORY 107–19 (Theodore R. Schatzki, Karin Knorr Cetina & Eike von Savigny eds., 2001) (discussing this point in the context of the spread of knowledge in a scientific community).

a rule is to be applied.⁴¹ All these means are *presumptively* unavailable to potential external morals enforcers.

Before concluding this section, it should be noted that there are circumstances in which decentralized knowledge may be ascertainable (either tacitly or explicitly) by external enforcers of morality. In general, this will be at a level fairly close to the individual decision-makers themselves. For example, family members or friends may possess knowledge of an individual's "character" — his propensity to benefit, in the long run, by temporary financial assistance. Their knowledge may contain explicitly-held elements, but, more likely, they will have a general impression of him and his likely future. Commercial interactors may be in a good position to ascertain the reliability of individuals, their motives, their propensity for opportunistic dealing, and so forth. When "local" enforcers of morality have a great deal of relevant empirical knowledge, the case for external pressure or, perhaps, coercion is stronger.⁴² To the extent that we are concerned with the knowledge issues alone, then there "should" be external enforcement when the knowledge of the enforcers is high and individual incentives to act morally are low. This is the extreme case when it is possible to "make" men moral.⁴³

C. The Explicit Rules Heuristic

We agree with Gilbert Ryle that moral action is not a matter of "avowing maxims and then putting them into practice."⁴⁴ It is useful, nevertheless, artificially to construct the dichotomy between maxims, rules, principles, on the one hand, and their application in positive moral action, on the other. This is useful because it grants to the proponents of various forms of moral dirigisme the argument that there is a type of moral knowledge that a central authority can, in fact,

⁴¹ We defer until later the question of whether rules, aims, or principles are held tacitly or explicitly. See section V-C, *infra*.

⁴² Steven Shavell analyzes the factors that determine the optimal domains of morality and law in the enforcement of "moral" rules. In this analysis, the knowledge available to parties other than the moral agents themselves is viewed as one important factor. In some cases the knowledge available to the moral agent will be so superior to all others that, *ceteris paribus*, internal or self-enforcement of rules is optimal. In a second category of cases, external non-governmental enforcers will have sufficiently good knowledge relative to the State that they will be the primary enforcers of moral behavior. In a third category, moral agents and the external enforcers may have knowledge advantages relative to the law only in certain respects (e.g., the precise level of harm a broken promise engenders). Shavell, however, treats the knowledge issues as one among a number of factors, such as the size of the private gain and the social losses due to immoral behavior, that determine or ought to determine the relative advantages of enforcement methods. Our analysis, on the other hand, treats sufficient local and personal knowledge as a missing *necessary* condition for the appropriate legal enforcement of morals. See Shavell, *supra* note 37, at 238–40.

⁴³ Louis Kaplow and Steven Shavell argue that moral rules must be "sufficiently simple (in particular, not requiring information available only to the actor) that other members of society can do their part in enforcing the moral system." Kaplow and Shavell, *supra* note 16, at 12. It is unclear what degree of simplicity they have in mind. Nevertheless, the social (that is, nongovernmental) enforcers of morality are not society-at-large but those who are close to the moral agent — for example, spouses, relatives, friends, and coworkers. What is known to them need not be known to more distant others or to the State. So the social enforcement of moral rules and their complexity are not necessarily in conflict.

⁴⁴ GILBERT RYLE, THE CONCEPT OF MIND 46 (1949).

have.⁴⁵ This is *general* moral knowledge – the kind that transcends the particular concrete (non-moral, but morally-relevant) circumstances of time and place. Thus it is possible for central authorities to share the moral maxims, principles or rules of the agents but still not be able, concretely, to compel appropriate behavior.

D. Ideal Typical Constructions: Moral Types

To give form and definite content to the ethical knowledge problem, we use the method of ideal typical constructs. This means we *model* moral agents as either consequentialists (mainly, utilitarians), Kantians, or natural-law agents, primarily, or as moral absolutists or moral ecologists, secondarily.⁴⁶ Such agents apply or embody their respective moral philosophy or framework to or in the concrete circumstances they face. Their decisions are a joint application of a certain theory and their perception of the facts the theory determines as relevant. As we have indicated above, for heuristic reasons, we shall assume that agents explicitly hold a moral philosophy but either explicitly or implicitly know the facts.⁴⁷

Suppose, however, that the moral know-how of the actual or real-world agents amounts to following and applying rules from different, and possibly inconsistent, ethical systems. Should we not examine the decentralized knowledge problem in the amalgamated moral “system” the individuals follow? In the absence of extensive survey or other sociological data describing this (or these) system(s) it is impossible to do so.⁴⁸ But it may also be unnecessary for the particular problem we wish to investigate. This is the problem of the need for decentralized knowledge in the application of moral rules. All we wish to demonstrate is that agents require knowledge, much of which is unavailable to others, to make what is, *by their standards*, appropriate moral decisions. These agents may sometimes or in some respects be Kantians or utilitarians, etc. If the unobservable knowledge requirement appears in *all* of these frameworks of moral action, we have made a strong case that real-world agents also face this requirement.

⁴⁵ Consequently, our purpose is heuristic and analytical, i.e., to structure an argument, rather than to make an empirical claim.

⁴⁶ The first-listed types of moral agents are primary in the sense that they refer to fundamental ethical philosophies. Those secondarily listed (moral absolutists and moral ecologists) are usually embedded in one of the fundamental philosophies, such as natural law theories or Kantianism.

⁴⁷ This modeling technique amounts to assuming a “reflective equilibrium,” that is, the congruence of general principles with intuitive judgments about specific cases. See *Reflective Equilibrium*, in THE OXFORD COMPANION TO PHILOSOPHY 753 (Ted Honderich ed., 1995).

⁴⁸ “[W]e cannot extend our inquiry to cover all of the grounds on which men, even educated men, actually make decisions, or it will degenerate into a catalogue of superstitions.” FRANK HYNEMAN KNIGHT, RISK, UNCERTAINTY, AND PROFIT 229 (1921). See also Max Weber, *Ideal Types*, in PHILOSOPHIES OF HISTORY: FROM ENLIGHTENMENT TO POSTMODERNITY 212 (Robert M. Burns & Hugh Rayment-Pickard eds., 2000) (“[T]hose ‘ideas’ which govern the behavior of the population of a certain epoch i.e., which are concretely influential in determining their conduct, can, if a somewhat complicated construct is involved, be formulated precisely only in the form of an ideal type, since empirically it exists in the minds of an indefinite and constantly changing mass of individuals and assume in their minds the most multifarious nuances of form and content, clarity and meaning.”)

E. The Incentives to Acquire Knowledge

Table I below summarizes our discussion of the types of knowledge, their modes of being possessed and potentially communicated, and their manner of acquisition.⁴⁹ The Table has six cells, corresponding to the categories we have introduced. There are three columns and in each column there are two possibilities. In principle, any triplet consisting of one of the two characteristics in each column is possible.⁵⁰ Nevertheless, some combinations are more interesting and likely than others. We consider two.

TYPE OF KNOWLEDGE	MODE OF POSSESSION	MODE OF ACQUISITION
personal	tacit	undeliberate
local	explicit	deliberate

TABLE 1

First, there is personal and local knowledge that is explicitly possessed (communicated) and deliberately acquired. To understand the nature of the agent's incentives in this case, we need simply to apply a form of the economic theory of search. People will acquire such knowledge by assigning (imagining) an expected value to a marginal unit of time devoted to search. This value is in part the result of an agent's conception of the importance of adhering to a certain moral rule or fulfilling a certain obligation. On the other hand, the agent will also experience costs by engaging in the search for relevant facts. These can be in the form of non-moral goods foregone or the foregone opportunity of attaining other moral goods due to contingent conflicts.

Second, there is personal and local knowledge that is tacitly possessed and undeliberately acquired. We suggest that even in this case agents have a broadly-conceived incentive to acquire it. While, by definition, they do not deliberately search for this kind of knowledge, they can be open to it in varying degrees. People have a tendency to notice or be alert to knowledge that is, in one way or another, useful to them.⁵¹ The more important acting morally is to an individual, the more likely he is to notice those facts that are relevant to the implementation of moral rules, obligations or maxims. This form of alertness (to the extent it is tacit)

⁴⁹ We are assuming that if knowledge is tacitly possessed, it must be tacitly communicated. And if explicitly possessed, it must be explicitly communicated.

⁵⁰ Thus, for example, knowledge may be local, tacitly possessed and potentially communicated, and deliberately acquired.

is likely to be embedded in certain types of actions in particular kinds of situations. It will be observed as the agents doing the “right thing” in concrete circumstances even if they cannot tell us how or why.⁵² Nevertheless, it is true that some relevant knowledge in this category will be a *complete* byproduct of social and economic intercourse. From the narrow point of view of the agent’s moral action, its acquisition will be pure luck.

It should be added that what we have said about acquiring relevant knowledge also applies, with the appropriate changes, to the *utilization* of already acquired knowledge. For example, agents will search for opportunities to utilize this knowledge in ways that minimize some combination, depending on their preferences, of moral and non-moral opportunity costs.

We are now in a position to draw several conclusions. First, the incentive deliberately to acquire and utilize morally relevant factual knowledge operates in tandem with the incentive to act morally. Second, this does not imply that the agents will acquire the socially optimal amount of relevant knowledge. This is, in part, due to less than optimal incentives to behave in accordance with the moral law even as the individual sees it.⁵³ However, this suboptimality is not important for our purposes. Third, what is important is (a) individuals have a greater incentive to acquire accurate relevant knowledge, without purpose of evasion or opportunism, when the problems are “their own” than when they are not and (b) individual agents are in a better position to acquire that knowledge than is the State. Insofar as individuals are the better gatherers of morally relevant knowledge than the State, as we argue, our thesis is supported.

F. Interdependence in Ethical Decisions

The purpose of this section is to demonstrate that ethical decisionmaking requires something more than taking dispersed, but objective, facts into consideration. It also requires the coordination of (1) the expectations of agents and patients and (2) the various ethical decisions in relation to each other.

The first form of coordination has been alluded to before. It requires mutual understanding with respect to the meaning of actions. Do individuals expect the agent to tell the literal truth about the pleasantness of the evening at the close of the dinner party? Or do they simply expect to hear some expressions of good will? Without common expectations, it is difficult, perhaps impossible, to determine what lying or truth-telling is in a specific context. There is also another, deeper form of mutual understanding. A benefactor may make a donation to a poor person with the expectation that the latter will use the money to become self-

⁵¹ Israel Kirzner argues that this is a postulate of the Austrian School of Economics. See, ISRAEL M. KIRZNER, *Entrepreneurial Discovery*, in *THE DRIVING FORCE OF THE MARKET: ESSAYS IN AUSTRIAN ECONOMICS* 17 (2000).

⁵² See ARTHUR REBER, *IMPLICIT LEARNING AND TACIT KNOWLEDGE* 13-14 (1993) and FRIEDRICH A. HAYEK, *Rules, Perception and Intelligibility*, in *STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS* 45, 56 (1967).

⁵³ We mean optimal from the point of view of the rest of society. Others, for example, will want us to be more honest than we would be absent social pressure (or at least we hypothesize).

supporting. If the beneficiary shares this expectation and has a resolve to “get on his feet” then the moral expectations of the parties are, in this sense, coordinated. The parties find it in their mutual interest to adjust their actions to ensure this kind of coordination.

The second form of coordination is the mutual adjustment of the agent’s ethical decisions to each other.⁵⁴ Ethical decisions of the agent may conflict for purely contingent reasons.⁵⁵ To revert to our previous example, a dinner party guest who had a bad time cannot be both truthful and kind to his host when it expected that he will tell him the literal truth about his evening. The moral agent can decide to be honest or kind, but not both. So a decision to lie must be understood in the context of a decision to be kind, or to be unkind in the context of honesty. The decisions are thus interdependent. Another related aspect of the mutual adjustment of ethical decisions involves tradeoffs in the pursuit of the good or, at a minimum, some basis for the resolution of contingent moral conflicts. In a consequentialist framework, there will inevitably be tradeoffs between honesty and beneficence in the maximization of pre-moral goodness. Each decision has an opportunity cost and the ultimate goal of the moral agent is to maximize the value of the consequences.⁵⁶ In a natural law or eudaimonistic framework, the moral agent must balance the satisfaction of various basic or primary goods.⁵⁷ Thus, for example, prudence will limit work satisfaction in pursuit of health. Again, the moral decisions of the actors must be understood in the context of other moral aims and decisions. In a Kantian deontological framework, the pursuit of one maxim is limited by the other maxims. So, for example, lying for the purpose of making the host feel good (or even to save a life) is impermissible. Beneficence must be pursued without violating the maxim of honesty. The failure to be beneficent must be understood in the context of the application of an ordinarily unrelated ethical rule.

PART THREE: CONFRONTING THE THEORY WITH CLASSICAL MORAL SYSTEMS

We now turn to the more detailed study of the classical moral systems with the central purpose of demonstrating the importance of local and personal knowledge requirements in the instantiation of moral action. We assume that each

⁵⁴ We do not explore the question of the appropriate balance between moral and non-moral choices.

⁵⁵ Ethical decisions may also conflict because of inconsistent principles. This does not concern us here because our method of ideal typical constructs excludes this possibility.

⁵⁶ Robert Goodin makes the argument in terms of the moral agent’s competing interests: “[T]he good involved in furthering one person’s interests can come into conflict with other moral goods, and B’s responsibility for protecting A’s interests is therefore always susceptible to being overridden by B’s other moral responsibilities. These may be responsibilities for B to protect the interests of some other person C. They may be responsibilities for B to protect interests of his own... Finally, these may be moral responsibilities connected with moral ideals rather than with anyone’s interests... Each individual will thus need to balance one set of responsibilities against others.” ROBERT E. GOODIN, PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES 118–19 (1985).

⁵⁷ We are putting to the side for the moment those variants of natural law that stress “moral absolutes.” See sections XI, XII, XIII, *infra*. But even in these approaches not every rule is an absolute. See JOHN FINNIS, MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH 1 (1991) (Moral absolutes “though relatively few . . . are decisively important for conscience, conduct and civilization.”).

moral agent behaves in accordance with one of these frameworks or theories. Thus, individuals can be utilitarians, Kantians, or natural law adherents. For heuristic reasons it is convenient to assume that all individuals in a particular society adhere to the same ethical philosophy; they all make ethical decisions within the same theoretical framework. This enables us to isolate the decentralized concrete knowledge problem from the problem of knowing the correct moral framework. So, even in a society where there is universal agreement at the level of ethical theory, there will still be a barrier to the central direction of moral action. If, however, we were to be more realistic, then we would have to admit that actual moral codes have elements of the various philosophies combined or that some agents may tend more toward one framework or another. Nevertheless, insofar as there are decentralized concrete knowledge problems in each of the ethical frameworks discussed, and these capture the essence of most actual moral codes, then for a hybrid framework, as we have previously said, there is a strong presumption that it too will have such problems.

VI. Consequentialism and Utilitarianism

Every moral theory has two components: first, a view of what is good or valuable (i.e., a theory of the *good*); and, second, a view of how individuals and institutions should respond to the good (i.e., a theory of the *right*).⁵⁸ While consequentialist theories do not exhibit unanimity of thought regarding the nature of the good, they do command agreement regarding the appropriate response to the good. This response is to promote the good generally throughout society. To see more clearly what this implies, consider the following illustration. It is allowable, or more likely required, from a consequentialist perspective, that an individual lie if that is the only way to promote the good or designated value. The lie itself, or more generally, the dishonoring of the good by one's actions, is not of primary importance. If the contribution of a lie in producing the overall good is greater than the contribution to the good made by the agent telling the truth, then the lie is a perfectly moral act. This is to be contrasted to the anti-consequentialist view that "at least some values call to be honoured whether or not they are thereby promoted . . . [A]ctions [should] exemplify a designated value, even if this makes for a lesser realization of the value overall."⁵⁹

Utilitarianism is the most highly developed of the modern consequentialist approaches to ethics. The literature is vast and the variations on the basic theme are considerable. Nevertheless, there are enough common themes and methods of analysis that interesting generalizations are possible. Utilitarianism specifies the good or designated-value that our broad treatment of consequentialism leaves open. The "good" that utilitarians pursue is "utility—variously defined as "pleasure," "happiness," "preference satisfaction." or more recently, as "welfare interests."⁶⁰ It is obligatory to choose that course of action that produces, or is expected

⁵⁸ Philip Pettit, *Consequentialism*, in A COMPANION TO ETHICS 230 (Peter Singer ed., 1991).

⁵⁹ *Id.* at 231.

⁶⁰ Robert Goodin, *Utility and the Good*, in A COMPANION TO ETHICS 242–44 (Peter Singer ed., 1991).

to produce, the greatest surplus of pleasure over pain or the greatest amount of preference satisfaction, and so forth, of all available alternatives.⁶¹

The utilitarian appears to be in the convenient, but ultimately untenable, position of comparing a myriad of different goals according to a single metric. Thus the utilitarian philosopher need not decide which goods are worth pursuing; *he* need not have a specific theory of the good. It suffices that individuals have goals or desire certain experiences and goods, and that the "social good" consists of an aggregation of these for individuals. The main subject of controversy has been whether the pleasures (pains), happiness, preference satisfactions, or welfare interests can be aggregated across individuals. The aggregation of individual utilities requires two kinds of knowledge that are important from our perspective. First, in order to calculate the hedonic or otherwise-cardinal utility for each individual, the moral agent must know the local and personal circumstances, as well as the courses of action, that constitute the relevant alternatives. Consider that taking a drug may yield more preference satisfaction to a given individual when there is an outbreak of influenza (local conditions) and when the individual is in poor health (personal conditions) than otherwise. So, if the measurement of individual utility is possible, it is, at best, a contextual enterprise or, as economists say, it is "state dependent."⁶² A second kind of knowledge is necessary in order to trade off these individual utilities against one another. We must know how characteristics of the potential beneficiary affect his capacity to experience pleasure or satisfaction *relative to others*. Since we cannot really hope to know this, the analysis typically involves the acceptance of a "similarity postulate," that is, "the *assumption* that, once proper allowance has been made for the *empirically given* differences in taste, education, etc. between me and another person, then it is reasonable to assume that our basic psychological reactions to any given alternative will be otherwise much the same."⁶³ The function of the similarity postulate is to reduce, by assumption, the differences among persons in their capacity to enjoy to certain objectively measurable quantities, and thereby to evade this knowledge problem.

In the final analysis, the interpersonal comparison of utilities must be reduced to *intrapersonal* comparisons: How would I rank experiences if I were in the same objective conditions as another person? To do the job required, the comparing individual must be able to envision himself in a variety of objective local and personal circumstances (perhaps different from what he has ever experienced) and rank his hedonic states accordingly. Assuming the meaningfulness of such rankings of the projected hedonic states of other individuals, by a *given* individual, there is scant reason to suppose that there will be agreement across the different comparing-individuals about these rankings. If there are disagreements, there is nothing in utilitarian moral theory that can settle them. The "social utility maxi-

⁶¹ See *Utilitarianism*, in THE OXFORD COMPANION TO PHILOSOPHY 890 (Ted Honderich ed., 1995).

⁶² This is admitted by some utilitarians, even if it is not satisfactorily handled by them. See, e.g., John Harsanyi, *Morality and the Theory of Rational Behavior*, in UTILITARIANISM AND BEYOND 50 (Amartya Sen and Bernard Williams eds., 1982).

⁶³ *Id.* (emphases added).

num” achieved by utilitarian agents would be an aggregate comprised of inconsistent valuations.

Aside from these fundamental difficulties, a utilitarian would have, at the very least, to recognize that simply as a matter of application of the framework, moral calculations will be more accurate the better his access to local knowledge. “It is easier to know what people *nearby* need, and how best we can help... .”⁶⁴

Jeremy Bentham, in his later work, perceived difficulties for the dirigiste program arising out of the limitations of local and personal knowledge. In *Deontology* he wrote:

What is good for another cannot be estimated by the person intending to do the good, but by the person only to whom it is intended to be done. The purpose of another may be to increase my happiness, but of that happiness I alone am the keeper and the judge...Refrain, then, from doing good to any man against his will, or even without his consent... .⁶⁵

To the extent that the benefactor cannot know the utility of the potential beneficiary, the act in question, in Bentham’s eyes, is not truly beneficence:

If the notion of serving a man not in the way in which he wishes to be served but in the way he ought to be served or in the way it is best for him to served be carried to a certain length, this is tyranny self-regarding affection, not an act of beneficence for the gratification of the sympathetic or social affection.⁶⁶

In part because of the knowledge problems discussed above, some utilitarians advocate a form known as “rule-utilitarianism.” Although it is a minority approach within the school, it is important for our purposes to consider it.⁶⁷ Rule-utilitarianism focuses on the rule or a cluster of rules as the unit of evaluation. Thus, “the rightness or wrongness of an action is to be judged by the goodness or badness of the consequences of a rule that everyone should perform the action in like circumstances.”⁶⁸

It may seem that the rule-variant substantially reduces the local and personal knowledge problems associated with the application of this philosophy. To the extent that the unit of evaluation is a rule, the agent will simply need confidence that the rule produces consequences that, over a wide variety of cases, are better, or at least as good as the other available rules. He need not know the con-

⁶⁴ See Goodin, *supra* note 63, at 246 (emphasis added).

⁶⁵ HENRY HAZLITT, *THE FOUNDATIONS OF MORALITY* 89 (1964).

⁶⁶ JEREMY BENTHAM, *DEONTOLOGY; TOGETHER WITH A TABLE OF THE SPRINGS OF ACTION; AND THE ARTICLE ON UTILITARIANISM* 279 (Amnon Goldworth ed., 1983).

⁶⁷ See *Utilitarianism*, in *THE OXFORD COMPANION TO PHILOSOPHY* 892 (Ted Honderich ed., 1995). (“[M]ost present-day utilitarians accept direct [or act-] consequentialism...”).

⁶⁸ J.J.C. Smart, *An Outline of a Theory of Utilitarian Ethics*, in *UTILITARIANISM FOR AND AGAINST* 9 (J.J.C. Smart & Bernard Williams eds., 1973).

sequences of his particular act in its concrete context. Thus, it would seem, by its very nature, rule-utilitarianism circumvents the problem of knowing the particular circumstances of time and place. However, this would be largely true only if the set of rules were given to the utilitarian from outside the system. Then the only issue would be whether the circumstances contemplated by the rule are present in the particular case. If the circumstances are very broadly described in the rule, then the knowledge problem would be reduced correspondingly.⁶⁹

The fundamental difficulty is that rule-utilitarianism is wedded to the utilitarian standard of goodness and its prime directive of right conduct—to “maximize utility.” The rule-utilitarian, not being a rule fetishist, must be on the lookout for utility-enhancing exceptions or modifications to any given rule. These exceptions come from a finer parsing of the conditions set out in the original rule induced by greater knowledge of the consequences of following the rule under different circumstances. Since utilitarians are under an obligation to do their best, they must always seek greater knowledge and thus better and more particularistic rules. This means that even the rule-utilitarian is a better utilitarian, and hence better moral agent, the greater his knowledge of the particular circumstances of time and place.

As a consequence, if an agent breaks a rule created by the rule-utilitarian dirigiste, there is no way of knowing whether he has broken the rule because he does not have adequate incentives to be moral or because he has superior knowledge of what the moral course of action is. Indeed, a rule-utilitarian agent must be encouraged to explore other, possibly better rules for the type of situation in which he finds himself. This may involve a process of trial and error. In any event, all rules must be held tentatively until a more finely-parsed or particularistic rule can be discovered. Without access to the agent’s knowledge, the dirigiste does not know whether to encourage or discourage rule breaking.

VII. Natural Law

To some, it may appear that natural law theories of ethics are non-consequentialist, if not stridently anti-consequentialist, and therefore unlikely to require contingent local and personal knowledge for their application. This impression is fostered by misinterpretation of statements like those of Cicero: “True law is right reason, consonant with nature, spread through all people. It is constant and eternal... .”⁷⁰ Nevertheless, in the context of a long tradition, natural law “was not generally understood to be a fixed unalterable set of rules which could be simply applied to human conduct or society irrespective of the circumstances.”⁷¹ An important distinction was made between unalterable fundamental principles (the “primary principles”) and their application at a particular place and time (the “sec-

⁶⁹ The more detailed or particularistic the circumstances, the more rule-utilitarianism begins to resemble act-utilitarianism.

⁷⁰ MARCUS TULLIUS CICERO, *On the Commonwealth*, in *ON THE COMMONWEALTH AND ON THE LAWS* 71 (James E.G. Zetzel ed., 1999).

⁷¹ Stephen Buckle, *Natural Law*, in *A COMPANION TO ETHICS* 166 (Peter Singer ed., 1991).

ondary principles").⁷² More specifically, it would be quite wrong to classify natural-law ethics as non-consequentialist because consequences do matter, albeit a different set of consequences from that which concerns the utilitarian, for example.

Let us begin our analysis by dividing consideration of the natural law into the principles operative at the level of individual life and those operative at the level of society as a whole. These are clearly interrelated because society is obviously composed of individuals and, as we shall see, the individual needs the rest of society for his full development.

Each individual has a natural inclination toward "happiness," by which is meant the flourishing appropriate to himself as a rational creature. The "good" for man consists of some general goods like physical existence, wealth, health, and knowledge of the truth. These are objective goods and not the subjective goods of a utilitarian calculus of pleasure (pain) or want satisfaction. Despite their "objectivity" they are not independent of context. A good is good *for* someone in particular spatio-temporal circumstances. It is both "agent-relative" and dependent on local and contingent facts. It advances the *truly* good for an individual, but that is not determinable apart from the context of who he is and where he is.⁷³ Thus, the contents of the good are not determined by natural law with deductive certainty, but by practical reason in the uncertain circumstances in which the individual finds himself. "But in matters of action, truth or practical rectitude is not the same for all, as to matters of detail, but only as to the same general principles..."⁷⁴ There is no algorithm by which we can combine particular circumstances with the natural law framework and get a single, determinate implication for action. Accordingly, the individual naturally tends toward his own good, but is not compelled by the natural law to pursue, say, health in any particular way at any given time. In fact, he may not pursue it at all in a certain situation where other goods, like the pursuit of truth, may be in conflict. (Consider the great philosopher who compromises his physical health to complete his magnum opus.) The pursuit of moral goods is a "holistic" process whereby conflicts are resolved and balance is established.⁷⁵ Practical deliberation, as we have seen, depends on an intelligent grasp of particulars which cannot be superseded by rules.⁷⁶ Accordingly, the pursuit of goods requires attention to consequences and necessarily to local knowledge.

Individual flourishing is comprised not only of certain goods, but also of the pursuit or practice of virtues. Virtues, like goods, are contextual. What does a virtue mean in a concrete situation? How is it to be *traded off* against other conflicting virtues? The return of goods to their owner, though generically virtuous, is not

⁷² *Id.* at 165-66.

⁷³ See Douglas Rasmussen, *Human Flourishing and the Appeal to Human Nature*, 16 SOC. PHIL. AND POL'Y 3; 6-10 (1999).

⁷⁴ THOMAS AQUINAS, 2 SUMMA THEOLOGICA 1011 (Fathers of the English Dominican Province trans., 1948) (1266-77).

⁷⁵ BOWLIN, *supra* note 38, at 73.

⁷⁶ See SARAH BROADIE, *ETHICS WITH ARISTOTLE* 203 (1991).

an instantiation of moral behavior when it is known that those goods, say guns, will be used for an evil purpose.⁷⁷ The single-minded pursuit of beneficence to a blind, homeless stranger may not be moral under certain circumstances. The requirements for companionship and financial assistance of an injured friend may in a world of scarce time and other resources conflict with helping a stranger.⁷⁸ The resolution of these problems depends on the particular circumstances of time and place, including the personal resources, talents and projects of the moral agent.

At the level of the relevant community, the natural law affirms the idea of a social good. Consider for example the oft-quoted statement of Thomas Aquinas that law is “an ordinance of reason for the common good.”⁷⁹ But what can this “common good” be in light of the contextual nature of the good for individuals? Is there a common moral good for man on earth? There are admittedly two major traditions that deal with this issue. The older one by far is represented by such thinkers as Aristotle and Aquinas. For each of them, in different senses, the common good consists in the right actions of each and all. Accordingly, the state has an obligation to provide the appropriate institutions for the encouragement or promotion of the good and of virtue. It is “for the sake of good actions, and not for the sake of social life, that political associations must be considered to exist.”⁸⁰ Thus there is a substantive, objective common good for all men by virtue of their generic humanity. Aristotle was clear that coercion could be used to promote this good, while Aquinas in principle agreed, but was worried about the prudence of doing so in particular circumstances. It is against this tradition that we have been arguing.

There is a second strain of thought, more modern and we believe, consistent with the contextual nature of human flourishing. This perspective reached a high level of development in the work of the seventeenth-century philosopher, Samuel Pufendorf. On his view, the precepts of natural law “have a clear utility” directed toward the establishment of “sociality” or what we would today call social cooperation.⁸¹ Human beings are not capable of developing their talents, potential, abilities, or of practicing virtue in isolation. They need both positive assistance and protection from malefactors that association with other human beings affords. But Pufendorf was aware that “the Good can only be defined intersubjectively, as the beneficial outcome of Actions affecting different Persons in society. The needs and wants of those persons change [as we consider the different persons] and therefore the morality that seeks to maximize the Good must alter itself in line with those changes.”⁸² Therefore, this assistance and protection must have the quality of a *means* to the different ends legitimately pursued by various individuals. We all have a common interest in sociality. In an important sense there-

⁷⁷ See, e.g., BOWLIN, *supra* note 38, at 63; W.T. JONES, *THE MEDIEVAL MIND* 262 (1969) (2 A HISTORY OF WESTERN PHILOSOPHY).

⁷⁸ BOWLIN, *supra* note 38, at 71.

⁷⁹ AQUINAS, *supra* note 77, at 995.

⁸⁰ ARISTOTLE, *THE POLITICS OF ARISTOTLE* 120 (Ernest Barker ed. and trans., 1946).

⁸¹ SAMUEL PUFENDORF, *ON THE DUTY OF MAN AND CITIZEN* 36 (Michael Silverthorne trans., 1991) (1673).

⁸² T.J. HOCHSTRASSER, *NATURAL LAW THEORIES IN THE EARLY ENLIGHTENMENT* 100 (2000).

fore, Aristotle was wrong to say that the polis exists “for the sake of good actions, and *not* for the sake of social life.”⁸³ *There is a deep epistemic problem in determining good actions for others, whereas sociability (social cooperation) is a means of obviating that problem.*

The common good cannot be advanced directly, but through the means or structure provided by society, each individual can more effectively attain his material and moral ends. F. Uberwerg outlined the logic of Pufendorf’s argument:

His interpretation of natural law is essentially defined in relation to Grotius and Hobbes, in that he takes over from the former the principle of sociability, from the latter the interests of the individual, and unites them in the principle that sociability lies in the interest of every individual.⁸⁴

Accordingly, Pufendorf makes the connection between natural law and the promotion of sociability quite strong:

[T]he fundamental natural law is: everyman ought to do as much as he can to cultivate and preserve sociability. Since he who wills the end wills also the means which are indispensable to achieving that end, it follows that all that necessarily and normally makes for sociability is understood to be prescribed by natural law. All that disturbs or violates sociability is understood as forbidden.⁸⁵

This perspective reconciles the contextual and empirical nature of human flourishing and the existence of a common good for all men by virtue of their humanity. Viewed negatively, it sets “limits on the ways in which each of us could properly pursue our own personal aims.”⁸⁶ Viewed positively or negatively, it demonstrates that natural law ethics grapples with the knowledge problem in ethical behavior not by prescribing concrete ends, but in the Pufendorf variant, by specifying the means by which individuals can potentially fulfill their natural, generic ends more effectively. The actual *solution* to the knowledge problem, as in the determination of concrete ends in the particular circumstances of time and place, is found by the individual who is in possession of local knowledge and is able to cooperate with others for the most effective utilization of that knowledge.

VIII. Kantianism

Kant’s system of ethics and the modern moral theories which emanate from it are generally understood to be non-consequentialist. In this view, Kantian ethics is a duty-based philosophy and as such may be thought to be without a knowledge problem. For example, if moral agents have a duty simply to tell the truth regardless of the consequences, then the particular circumstances of time and

⁸³ ARISTOTLE, *supra* note 80, at 120 (emphasis added).

⁸⁴ See HOCHSTRASSER, *supra* note 85, at 98.

⁸⁵ PUFENDORF, *supra* note 84, at 35-36.

⁸⁶ THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 520 (Robert Audi ed., 1995)(entry for “natural law”).

place in which this duty is satisfied would seem to have no role in ethical decisionmaking.⁸⁷ Yet if moral agents' actions are supposed to "honor" a certain value (e.g., truth telling) then they must know whether in a specific context the value is indeed exhibited by the action.⁸⁸ Does the "truth" mean something different when your hosts ask you if you enjoyed the dinner party and take your answer at an appropriate discount from what it means when the police want to know where the escaped convicts are? Suppose that we have duty to be loyal or to be humble. Which acts exhibit these traits? Is the broad or narrow social context relevant? The meaning of an action is dependent on contingent facts and our local and personal knowledge of them.

Moreover, any action is *defined* by its actual or intended consequences. "To act is to make a difference to the course of events, and what the act is, is determined by what difference."⁸⁹ For example, telling a lie is not immoral because the actor "dislikes" the consequences of deceiving another person. For Kant, it is because lying violates the moral law in the form of the respect we owe all human beings as autonomous ends-in-themselves. A person is treated as mere means to someone else's ends when he is deceived. Accordingly, the consequences of deception are essential to what the particular act of lying *is*. An individual would not be used against his will were he not actually deceived. Analogous arguments could also be made for the importance of consequences in such other violations of morality as theft and murder. So in Kant's ethics consequences are not ignored. It is simply that while consequences are important to the definition of our acts, they are not the *ground* of our moral obligation. "We must not judge the action to be right or wrong according as we like or dislike the consequences. . . . A good man aims at consequences *because* of the law; he does not obey the law merely because of the consequences."⁹⁰

A more comprehensive understanding of the issue can be derived from analyzing our two primary duties according to Kant: the duty to pursue (1) our own perfection and (2) the happiness of others (beneficence).⁹¹ In order to fulfill these general duties, that is to determine which specific actions are in accord with them, we must have personal and local knowledge. In the first case, the individual must know what his "faculties," "capacities," or "natural dispositions" are. These may not be fully known to him, but he is likely to know many things no one else does. This is knowledge of a personal kind. Furthermore, "*capacities* [are] for furthering ends set forth by reason."⁹² In other words, these are capacities for action and hence for the attainment of ends, of consequences. Since these consequences are in particular and individual lives, knowledge of local circumstances is critical.

⁸⁷ See, e.g., Immanuel Kant, *On a Supposed Right to Lie from Philanthropy*, in PRACTICAL PHILOSOPHY 611-15 (Mary J. Gregor ed. & trans., 1996).

⁸⁸ Philip Pettit, *Consequentialism*, in A COMPANION TO ETHICS 233 (Peter Singer ed., 1991).

⁸⁹ R.M. HARE, SORTING OUT ETHICS 164 (1997).

⁹⁰ H.J. PATON, THE CATEGORICAL IMPERATIVE: A STUDY IN KANT'S MORAL PHILOSOPHY 76 (1948) (emphasis added).

⁹¹ BRUCE AUNE, KANT'S THEORY OF MORALS 174 (1979).

⁹² KANT, *supra* note 34, at 154.

In the second case, to promote the happiness of another person we must have particular knowledge of him at a given time and place so that we can determine what actually is in his interest. A benefactor must try to understand the concept of happiness held by the potential beneficiary and to “benefit [the latter] only in accordance with *his* concepts of happiness.”⁹³ Although this is so, “it is open to me to refuse them many things that *they* think will make them happy but that I do not.”⁹⁴ True beneficence makes an effort to enter into the other person’s world—his plans, his projects—not simply to give him whatever he thinks he needs or simply wants, but actually to benefit him in his circumstances.

The ethical knowledge problem in Kantianism runs even more deeply. Kant struggled with the resolution of conflicts of moral obligations or in his terms, with conflicting grounds of moral obligation. In his later work he argued that the solution was to be found in limiting “one maxim of duty by another.”⁹⁵ The duty, for example, to help mankind in general is limited by the similar duty to one’s parents. Nevertheless, it is not a simple matter that any duty to one’s parents takes precedence over any and all duties to mankind. How exactly such a decision is to be made (and in a world of scarce resources, it must be made) is beyond the scope of analysis here. It is, however, sufficient to say two things. First, the tradeoff between these duties is not perfectly determined by Kantian moral *theory*. Unlike the simpler forms of utilitarianism, there is no algorithm we can apply which in the presence of perfect local and personal knowledge will yield a determinate outcome. Second, although theory will not determine the result perfectly, concrete circumstances will be relevant to the resolution of ethical conflicts and hence will partly determine the outcome. This is the case even on what Mary Gregor calls a “rigoristic” interpretation of Kant’s idea that agents have a certain moral “latitude” in fulfilling imperfect duties; in this interpretation latitude is not a license for a genuinely arbitrary decision.⁹⁶ “The latitude would be present only because moral philosophy cannot admit sufficient *empirical knowledge of the situation in which we find ourselves* and hence cannot know how much we are capable of doing toward the end and whether an opposing ground of obligation is present which overrides the necessity of acting toward the end here and now or limits the extent to which we must act.”⁹⁷ Thus, the use of means efficiently adapted to the local situation to fulfill an obligation to help our parents may enable us also to satisfy the otherwise-conflicting obligation to assist a beggar in the street. Furthermore, we are permitted to weigh the grounds of different duties when they do conflict. Surely weighing will make use of the factual details of each situation like the degree of seriousness of the needs of our parents and the strangers, as well as the status relationship between those in need and us. While the seriousness of the one does not relieve us altogether of the obligation to satisfy the other, it may relieve us of that obligation in the existing particular circumstances of time and place.

⁹³ *Id.* at 203.

⁹⁴ *Id.* at 151.

⁹⁵ MARY J. GREGOR, LAWS OF FREEDOM 104 (1963).

⁹⁶ *Id.* at 95-122.

⁹⁷ *Id.* at 104-05 (emphasis added).

Even moral decisions that appear “arbitrary” are more correctly viewed as dependent on subjective or personal circumstances. While we do not have a “duty” to pursue our own happiness, we do have a moral right to do so and this will reduce the resources we make available to fulfill our duty to help others. According to Gregor, Kant argues, for example, “that we have no obligation to sacrifice ‘our true needs’, those satisfactions which are essential to our happiness, in order to promote the well-being of others . . . [a]nd as for what constitutes our true needs, this depends largely on ‘our own way of feeling.’”⁹⁸

Simply put, what we are saying is that while Kantian ethics is duty-based, the application of its general maxims requires the particular knowledge of time and place.

PART FOUR: APPLICATIONS TO SPECIFIC LEGISLATION

The previous Part demonstrated the importance of personal and local knowledge in the broad application of classical moral systems. It showed that to be moral or virtuous in any of the major frameworks requires an adjustment of general principles to this knowledge. Sometimes the knowledge is of nonmoral facts, both about oneself and the outside world, while other times, it consists of moral facts, that is, facts about the rest of one’s moral behavior.⁹⁹ This Part deals with the legal manifestation of dirigiste ideas, some of which can be seen to emanate from aspects of the classical systems. This should not be surprising because the systems formalize and extend features of positive (everyday) morality. We ought not to expect, however, an explicit grounding of the laws in any particular philosophy, although some laws may fit more naturally into one framework rather than another. Without claiming to be exhaustive, we evaluate moral arguments in favor of these laws. Our primary aim is to show that these general proscriptions or prescriptions will not be justified generally, or across the board, by a moral system.¹⁰⁰ The practical implication of this is that, even if the laws are strictly obeyed, they will not make people moral. The commands of the law, understandably, must ignore critical pieces of personal and local knowledge insofar as they do not permit the individual to adjust his behavior to these facts.

IX. The Exceptional Virtue of Justice

Before we proceed to examples of moralistic legislation, it is important to eliminate a possible source of misunderstanding. Our thesis is that the State will not be successful in attaining certain kinds of moral goals by compulsion. We have not argued that all laws that have as their purpose the advancement of *any* moral

⁹⁸ *Id.* at 105.

⁹⁹ As we have seen, the knowledge individuals have of these circumstances may be explicit or tacit and deliberately or not deliberately acquired. See Section -V-b, *supra*.

¹⁰⁰ This is similar to the point made by David Richards: “Where public attitudes about morality are, in fact, demonstrably not justified by underlying moral principles, laws expressing such attitudes are morally arbitrary and should be found to violate minimal standards of constitutional due process.” See DAVID A.J. RICHARDS, *SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND*

goals will fail to achieve them. Our list of the types of imposed moral ends that constitute moral dirigisme excludes, most notably, “justice.” In its restricted Smithian-Humean sense:

“[t]he most sacred laws of justice . . . are the laws which guard the life and person of our neighbour; the next are those which guard his property and possessions; and the last of all are those which guard what are called his personal rights, or what is due to him from the promises of others.”¹⁰¹

Adam Smith calls this “commutative justice” to distinguish it from more encompassing ideas of justice that include, for example, individual or collective beneficence. An important distinction between justice and beneficence is rooted in the ancient idea that the former is a moral duty of perfect obligation while the latter is a moral duty of imperfect obligation. On the basis of some very general principles, the duties deriving from justice are relatively determinate in time, place, person, and manner of implementation. Therefore, the law can enforce these obligations in a relatively cost-effective and definite manner. On the other hand, duties of beneficence, whether individual or collective, are contingent on “so many particulars to be considered in our own circumstances and abilities, and the state of mankind and the world, that we cannot but be in some uncertainty” as to their appropriate determination.¹⁰² The imperfect obligation of beneficence is, for Smith, dependent “on circumstances that are usually too complex for codification.”¹⁰³

While Smith refers to the perfect obligations of justice as rules that are “precise,” and “accurate,” these descriptions may cause some confusion.¹⁰⁴ A better characterization would be to say, as Hume does, that justice consists of “general rules.”¹⁰⁵ Generality means that its commands are invariant across a wide range of particular circumstances.¹⁰⁶ For example, in this view and in the traditional common law, the relevant legal description of the circumstances involving a breach of contractual obligation does not include, by and large, the character of the parties, the nature of the goods exchanged, or the price at which they are exchanged. Furthermore, the return of property is demanded by justice even if the owner is a “miser, or a seditious bigot”¹⁰⁷ Therefore, justice suppresses many facts relating to the particular circumstances of time and place. Compared to beneficence, it is less sensitive to local and personal circumstances.

The second important characteristic of justice is that it is rule-like. Its requirements are predictable given knowledge of the relatively few facts—and their

OVERCRIMINALIZATION 96 (1982). However, our analysis *explicitly* allows the public to embrace different ethical frameworks.

¹⁰¹ ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 163 (Edwin G. West ed., 1976) (1759).

¹⁰² RICHARD PRICE, *A REVIEW OF THE PRINCIPAL QUESTIONS IN MORALS* 121 (1948) (1787).

¹⁰³ ATHOL FITZGIBBONS, *ADAM SMITH’S SYSTEM OF LIBERTY, WEALTH, AND VIRTUE: THE MORAL AND POLITICAL FOUNDATIONS OF THE WEALTH OF NATIONS* 112 (1995).

¹⁰⁴ ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 289-90 (Edwin G. West ed., 1976) (1759).

¹⁰⁵ DAVID HUME, *A TREATISE OF HUMAN NATURE* 341 (David Fate Norton and Mary J. Norton eds., 2000) (1740).

¹⁰⁶ *Id.*

objective character—that relevantly describe the situation at issue. This implies, among other things, that external parties can know what the requirements of justice are in particular circumstances. Thus, it is possible to impose them on parties at reasonable cost and, most importantly, to do so in a way that reflects the moral requirements of justice.

For Hume, Smith, and us, a society or an individual can be “made” just in this restricted sense without encountering significant epistemic problems in the process. External enforcers can know what is just and unjust behavior on the part of individuals. They can also know, in a general sense, what legal rules and institutions will reflect moral rules of just interpersonal interaction.

While the fundamental difference between the set of moral aims included in our dirigiste list and those that constitute justice lies in their degree of sensitivity to personal and local circumstances, use of general terms like “morality,” “moral purposes,” and “virtues” may obfuscate this difference. However, our analysis shows that the application of justice is epistemically more economical than is the instantiation of most other moral goods, attributes, or virtues. Justice provides a set of relatively stable expectations that constitute a framework in which agents can pursue, if they choose, the more epistemically-demanding virtues. In the sections that follow, we discuss laws that attempt directly to compel agents to engage in more morally praiseworthy behavior beyond simple justice.

X. Illustrations of Moral Dirigisme

We divide our examples of moralistic legislation into two categories: (1) laws that prohibit individual or group behavior that is considered immoral and (2) laws that compel some individuals to aid others for reasons that are largely moral in nature. The first are largely traditional “morals offenses” or “morals laws” while the latter comprise what we call “compulsory beneficence.”

A. Traditional Morals Laws: An Introduction

Traditional morals laws seek to punish immoral character traits and immoral conduct that produce “harm” in a very broad sense of the word. The harms alleged are, and have been historically, quite diverse. While distinct, they are not mutually exclusive because more than one harm can be associated with a specific trait or behavior. There are at least five:

1. Intrinsic Purely Moral Harm to the Agent. This, unlike those that follow, is not, properly speaking, a consequence of a trait or behavior but part of its characterization.¹⁰⁸ Vagrancy, in the sense of not having “a settled home but drift[ing] from one place to another, normally having

¹⁰⁷ *Id* at 319.

¹⁰⁸ See Markus Dirk Dubber, *Morals Offenses*, in THE OXFORD COMPANION TO AMERICAN LAW 567 (Kermit L. Hall ed., 2002).

no regular means of support,"¹⁰⁹ is an example of a crime that has come close to one with intrinsic purely moral harm. While it is usually associated with disorderliness, it is likely that, in itself, "disorderliness" is little more than an expression of disapproval for unconventional behavior or traits.¹¹⁰ The law seeks to raise the moral character of those exhibiting these traits.

2. The Purely Moral Harm of Bad Example. This is a negative externality corresponding to the above intrinsic moral harm. In other words, a behavior (or trait) of some individuals, characterized as immoral, may have the effect of leading others to similar behavior. This is because the behavior has an attractive aspect that others can see and by which they may be tempted. Public drunkenness, street solicitation by prostitutes, and open homosexuality are examples of behavior criminalized, in part, because of this harm.
3. Moral Nuisance. This is the offense taken by those who believe others are engaging in immoral behavior.¹¹¹ Typically, at least since the early eighteenth century, the law has emphasized the enforcement of laws against "public vice," that is, to immoralities committed in public view.¹¹² Obviously, public vice is more likely to produce offense than immoral acts committed in private. When the acts are committed in public they constitute "offense to others."¹¹³ Examples of behavior or traits prohibited on this basis are "lewd and disorderly behavior" and violations of the Sabbath, including Sunday drinking and shopping. These are also instances of poor moral example. Sometimes the acts are offensive simply by virtue of their publicness, like public sexual intercourse between a married couple or public defecation. When the acts are committed only in private they are "free-floating," purely moral evils.¹¹⁴ An example is consensual homosexual acts among adults in private.
4. Ulterior Harms. These are secondary effects of primary conduct that even those who do not believe the latter is immoral would find offensive or harmful. The secondary effects are typically actions that would be prohibited in themselves. An example is operating a house of prostitution that is closely associated with unsanitary conditions, noise,

¹⁰⁹ See "Vagrancy" in THE OXFORD COMPANION TO LAW 1270 (David M. Walker ed., 1980).

¹¹⁰ We have more to say about vagrancy below.

¹¹¹ This has been pointed out by Markus Dubber: "Morals offenses are 'offenses against public sensibilities.' They offend and annoy; they are moral nuisances. And as nuisances, the argument goes, they need to be abated not only to prevent offense to the public, but also to ensure the survival of the moral community." Dubber, *supra* note 112 at 568 (Kermit L. Hall ed., 2002).

¹¹² See generally, ALAN HUNT, GOVERNING MORALS: A SOCIAL HISTORY OF MORAL REGULATION 34-41 (1999).

¹¹³ For a detailed examination see JOEL FEINBERG, 2 THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS (1985).

¹¹⁴ See JOEL FEINBERG, 4 THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 8 (1988).

and even rape. Laws treating prostitution as a private or public nuisance especially make use of this connection with secondary harms.

5. **Breach of Duty Harms.** This refers to those violations of specific duties or status obligations that are associated with primary immorality. An example is a drunken parent who spends his money on alcohol and does not support his children.

While each of these harms are used to buttress the case for prohibiting immoral behavior, only the first two and free-floating moral nuisances can be classified as self-regarding in Mill's framework. Ulterior and breach of duty harms are clearly other-regarding because they go beyond the zone of the justified expression of individuality so critical to Mill's idea of freedom.¹¹⁵ Thus the arguments in favor of traditional morals laws frequently go beyond the prohibition of self-regarding behavior and, to that extent, the laws are not *purely* morals laws.

1. Vagrancy

Vagrancy ordinances, now largely viewed as unconstitutionally vague,¹¹⁶ are instructive as a form of morals legislation that, at its core, attacks certain character traits. Vagrancy is a manifestation of idleness. Consider some of the defining characteristics of vagrancy described by the voided Jacksonville, Florida ordinance. Vagrants are deemed to be:

persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business . . . persons able to work but habitually living upon the earnings of wives or minor children . . .¹¹⁷

In Millian terms this is self-regarding behavior, although it may be associated, in some cases, with behavior that is other-regarding. The moral vice exhibited by vagrancy, in the above quotation, is the perceived failure to embody "respectable" values, to be a productive member of society, and to fulfill the traditional roles of father or husband. It has formed the core of the moralization of the poor and the distinction between industrious and idle poor.¹¹⁸ Nevertheless, the moral quality of the acts or omissions comprising vagrancy is dependent on the particular circumstances in which the agent finds himself. A person may be habitually "wandering or strolling" because he is an insomniac trying to get tired or because he is looking at the stars and thinking deep thoughts. A man who lives upon the earnings of his wife may be a pillar of the community who has a rich wife. A person

¹¹⁵ The case of "offense" is not entirely straightforward. Clearly, some offenses (sexual intercourse in public) are other-regarding according to Mill, while others (public practice of one's religion) are not. See the general discussion in JOEL FEINBERG, 1 MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS 25-49 (1985).

¹¹⁶ *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

¹¹⁷ Jacksonville Ordinance Code 26-57, cited in *Papachristou*, 405 U.S. at 156 n.1.

¹¹⁸ See ALAN HUNT, *GOVERNING MORALS: A SOCIAL HISTORY OF MORAL Regulation* 62; 64 (1999).

who neglects his business and spends his time where alcohol is served may be a member of a country club.¹¹⁹

The neglect of particular circumstances is especially evident in the conception of the “habitual loafer.” This is a person who “idles...[his] time away, typically by aimless wandering or loitering.”¹²⁰ Now what should he be doing instead? Presumably, he should be working or engaging in serious tasks such as shopping, transporting children to school, doing the laundry or perhaps reading the classics of world literature. A virtuous person may do all or some of these things some of the time, but he need not. The ancient Greeks had a word for people who just walked about without a destination, talking: *peripatētikói* (peripetetics).¹²¹ These were members of Aristotle’s school of philosophy who roamed about discussing things. Today there are doubtless individuals who “loaf” because they are troubled, confused, or trying, however imperfectly, to work out their problems of character. None of this is necessarily or presumptively inconsistent with a virtuous life. Whether it is or not depends on the context (local circumstances) and the meaning of the action (personal circumstances).

The case for vagrancy laws, however, has historically gone beyond the character traits discussed above to include possible moral nuisances. The association of idleness with vice¹²² means that anti-vagrancy is also anti-gambling, prostitution, drunkenness, lewdness—all of which may manifest themselves in public and give offense to many people. In the limiting case of vagrancy as a pure catch-all, its morality is completely derivative of the morality of these other forms of behavior. Furthermore, many of these behaviors produce ulterior harms such as theft, rape, or unsanitary conditions. It is sometimes argued that vagrancy laws provide flexibility¹²³ such that the police can nip nascent ulterior harms in the bud.¹²⁴ All of these associations make an overall evaluation of vagrancy laws difficult since it is not clear which behavior is being targeted.

Vagrancy, however, as an independent ground of morals legislation, rather than as a mechanism for a preemptive strike against conventional crimes or as a catch-all for other morals offenses, disregards morally-relevant circumstances of time and place. As we have seen, character traits are virtuous or vicious only in a specific context.¹²⁵

¹¹⁹ See *Papachristou*, 405 U.S. at 164 for the above observations and a very clear exposition of the contextual nature of idleness.

¹²⁰ See NEW OXFORD AMERICAN DICTIONARY 999 (Elisabeth J. Jewell and Frank Abate eds., 2001).

¹²¹ See THE OXFORD DICTIONARY OF ETYMOLOGY 669 (C.T. Onions ed., 1966).

¹²² See ALAN HUNT, GOVERNING MORALS: A SOCIAL HISTORY OF MORAL REGULATION 62 (1999).

¹²³ Or “arbitrariness”: See *Papachristou*, 405 U.S. at 171 (“the scheme [of vagrancy ordinances] permits and encourages an arbitrary and discriminatory enforcement of the law.”).

¹²⁴ “A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals is too precarious for a rule of law.” *Papachristou*, 405 U.S. at 171.

¹²⁵ Historically, especially from the fourteenth through seventeenth centuries, but also to some degree into the nineteenth century, vagrancy legislation served social and economic functions, such as preventing the poor from migrating to other areas or attempting to control wages by preventing labor from

2. Prostitution

The criminalization of prostitution has been directed toward the correction of a “public vice” or in the service of public morality rather than as an attempt to prevent illicit sexual relations per se. In other words, the State is interested in “bawdy houses,” “houses of ill repute,” “street walkers,” etc. because of the publicness of these and because of the effect they might have on public morals.¹²⁶ Prostitution in its various public manifestations was viewed as a public (or sometimes private) nuisance. The negative impact on public morals, rather than any tangible ulterior harms, constitutes the core of the offense. Prostitutes and houses of prostitution were “disorderly.” In practice, this meant a number of things including the corruption of public morals, destruction of female innocence, and upsetting established male-female status roles.¹²⁷ Therefore, the attempt to prohibit prostitution has been an endeavor, not so much to make individual men moral, but to make society moral; that is, to ensure the moral atmosphere of public life.¹²⁸

If public morality is to be actual rather than simply an illusion or façade, it must be (1) reducible to the moral behavior of individuals and (2) directed to the attainment of the least bad or second-best outcome in view of individual preferences as they really are, not as they should be. Laws related to the prohibition of prostitution tend to be broadly applied to sexual behavior of a commercial, or simply public, nature. They ignore the specific circumstances of time and place relevant to the likely alternative behaviors in the presence of such legal proscriptions. The even worse moral offenses likely to be committed in the presence of effective prohibition of prostitution are the center of attention in the writings of Augustine and Thomas Aquinas.

Both Augustine and Aquinas believed that prostitution should be legally tolerated.¹²⁹ Their argument is not fundamentally based on the direct enforcement costs of prohibition, although they may be considerable. They believed that prostitution produced certain social goods or advantages in a world of imperfect men. For example, both married and unmarried men would be less likely to have sexual intercourse with the wives of other men or with virgins who were marriageable. The existence of prostitutes reduces the evil and social harm that lust might oth-

shopping around. In this respect, vagrancy laws might be viewed only partly as morals legislation, but mainly as legislation designed to alter economic conditions. See Arthur H. Sherry, *Vagrants, Rogues and Vagabonds – Old Concepts in Need of Revision*, 48 CAL. L. REV. 557, 560-61 (1960).

¹²⁶ This hypothesis has empirical support. In nineteenth-century America, stress was placed on a bad reputation alone, irrespective of any criminal act, in convicting people of various disorderly offenses. See, e.g., WILLIAM NOVAK, *THE PEOPLE’S WELFARE* 157-171 (1996). Support can also be found by analysis of the Societies for the Reformation of Manners [SRM] in England in the late and early eighteenth centuries which, through a large system of informers, were alert to immoral behavior that took place in “public” spaces. In general, the “SRM were decidedly less interested in individual or personal immorality; their target was public vice, their goal community virtue and orderliness.” See ALAN HUNT, *GOVERNING MORALS: A SOCIAL HISTORY OF MORAL REGULATION* 39 (1999).

¹²⁷ See WILLIAM NOVAK, *THE PEOPLE’S WELFARE* 164-67 (1996); ALAN HUNT, *GOVERNING MORALS: A SOCIAL HISTORY OF MORAL REGULATION* 134 (1999).

¹²⁸ See section on moral ecology, *infra*.

¹²⁹ See RICHARDS, *supra* note 100, at 89-90.

erwise produce. In an imperfect world, the common good is sometimes furthered if evil is not prohibited.¹³⁰ From the perspective of human law, men are not made *more* virtuous if prostitution is prohibited. In fact, they are likely to be made *less* virtuous and that, in an important sense, the common morality of the community would deteriorate. *Given* the imperfection of men in regard to the vice of lust, prostitution may be the least bad social outlet. Obviously, however, the actual consequences for the morality of individuals of the legal toleration of prostitution depend on their particular internal circumstances (such as the ability to withstand lustful urges) and external circumstances (such as their opportunities for sexual contact).

The above arguments do not deal, however, with the individual or private morality of prostitution. Immanuel Kant, for example, condemned prostitution in uncompromising terms.¹³¹ Nevertheless, the reasons proffered for this moral conclusion implicitly hinge on contingent facts about the agent's internal and external circumstances, as well as facts about social meaning. If we put to one side Kant's expressions of revulsion against human sexuality *per se*,¹³² we can begin to sort out the relevant factual assumptions in his arguments against commercialized sexual services.

The fundamental ethical premise underlying Kant's position is his Formula for the Dignity of Persons: "Act so that you treat humanity, whether in your own person or in that of any other, always as a end and never as a means only."¹³³ This is closely related to Kant's view of personhood, specifically, of the moral personality.¹³⁴ If we grant Kant's premise that it is *always* wrong to treat others or ourselves as a means only, we can conclude that prostitution is a violation of the moral law if either or both buyer and seller treat each other as means only. This conclusion depends on two general premises, one empirical and the other ethical, as pointed out by David Richards. Paraphrasing Richards, we can summarize the argument in this way:

- (1) Prostitution is the sale or alienation of the body, that is, both parties treat the body as a means to income or pleasure without complete commitment.

¹³⁰ Aquinas formulated a general principle in this respect: "[I]t sometimes happens that the greatest harm comes to a community if an evil is prevented, and so positive law sometimes permits something as an exception lest the community suffer greater disadvantage, not because it is just that the thing permitted be done." THOMAS AQUINAS, ON EVIL 402 (Richard Regan trans., Brian Davies ed., 2003) (1275 - 1280).

¹³¹ See IMMANUEL KANT, LECTURES ON ETHICS 157 (Peter Heath and J. B. Schneewind eds., Peter Heath trans., 1997) ("Human beings have no right . . . to hand themselves over for profit, as things for another's use in satisfying the sexual impulse; for in that case their humanity is in danger of being used by anyone as a thing, an instrument for the satisfaction of inclination Nothing is more vile than to take money for yielding to another so that his inclination may be satisfied and to let one's own person out for hire.").

¹³² *Id.* at 377-79.

¹³³ See IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 96 (H.J. Paton trans., 1964).

¹³⁴ See RICHARDS, *supra* note 104, at 109 (1982); see generally, ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY 193-211 (1989).

(2) The alienation of the body alienates the moral personality.¹³⁵

Thus, Kant concludes, since alienation of the moral personality is always wrong, prostitution is always wrong.

However, both of these premises are *prima facie* incorrect. First, prostitution is generally the sale of sexual *services*. It is no more slavery than any other transaction of labor. Second, the moral personality, in Kant's theory, lies in our ability to choose our own ends in accordance with reason. This ability is not compromised by prostitution unless it is an "irrational" choice. That conclusion would either be question begging or it would be a matter of prudential judgment. In either case, Kant's claim of the universal or intrinsic immorality of prostitution must fail. Prostitution would be immoral, then, only if engaged in imprudently; that is, if the parties leave themselves open to a significant risk of disease or if there will be fatherless children who do not receive proper care, and so forth. These factors rest on the particular circumstances of time and place.¹³⁶

3. Health Paternalism

Our definition of moral dirigisme includes laws to prohibit individuals from engaging in actions detrimental to their own health. The moralization of health is not of recent origin; it can be traced both to the classical and early Christian philosophers.¹³⁷ Temperance, in the sense of moderation in the use of food, alcohol and in the enjoyment of sex is one of the cardinal moral virtues.¹³⁸ The current *Catechism of the Catholic Church* views the "reasonable" maintenance of health as a moral obligation.¹³⁹

Historically, the move to sanction legally the "abuse" of various sources of pleasure, particularly alcohol, sexual relations, and drugs, usually occurs when the abuse is associated with the commission of ordinary crimes as well as with the behavior of classes deemed not respectable.¹⁴⁰ To a certain extent, cigarette smoking modifies the pattern. Here the ulterior harms are largely the effects of second-hand smoke and the increased burdens on public healthcare budgets. Nevertheless, the core moral offense in all of these cases is the individual's harm to himself.

¹³⁵ This is not the same as Richards's "The person and the body are the same." RICHARDS, *supra* note 104, at 109. Strictly speaking, this more expansive premise is not required for the conclusion.

¹³⁶ Kant explicitly, but mistakenly, rejects this view. See IMMANUEL KANT, LECTURES ON ETHICS 157 (Peter Heath and J.B. Schneewind eds., Peter Heath trans., 1997).

¹³⁷ See Diana Fritz Cates, *The Virtue of Temperance*, in THE ETHICS OF AQUINAS 321 (Stephen J. Pope ed., 2002).

¹³⁸ See CATECHISM OF THE CATHOLIC CHURCH 495-6 (2nd ed., 1997). ("Four virtues play a pivotal role and accordingly are called 'cardinal'; all the others are grouped around them. They are prudence, justice, fortitude, and temperance.")

¹³⁹ *Id.* at 610. ("Life and physical health are precious gifts entrusted to us by God. We must take reasonable care of them, taking into account the needs of others and the common good.")

¹⁴⁰ See, generally, David T. Courtwright, *Morality, Religion and Drug Use*, in MORALITY AND HEALTH 237-42 (Allan M. Brandt & Paul Rosin eds., 1997).

And the core argument is that individuals should not be allowed recklessly to injure themselves.¹⁴¹

The key moral terms are “excess” and “abuse.” These can be defined only relative to a normative standard. In Aquinas, for example, one very important part of the standard is preservation of the individual and the species.¹⁴² Simply promoting the longest possible physical life, however, would be an inappropriate standard. In the broad Aristotelian-Thomist tradition, all moral virtues have the function of moderating the enjoyment of basic goods such as health, wealth, honor, justice, intellectual ability, pleasure, and intellectual and artistic pursuits.¹⁴³ Ultimately, this is necessary so that the individual can have a balanced and satisfying life through the enjoyment of an appropriate amount of these goods.¹⁴⁴ This amount, determined by prudence, is at the “mean” *relative to the individual*, between excess and deficiency.¹⁴⁵ Excess may impose burdens directly, such as a drunken hangover, but also indirectly in terms of the other basic goods lost to the individual, such as the intellectual activity he cannot pursue while drunk or hung-over. These determinations are highly individual and relative to individual talents, tolerance for alcohol, and other particular internal or external circumstances.¹⁴⁶

Health paternalism as manifested in legislation, on the other hand, takes a one-size-fits-all approach. It seeks to impose an external, not individually-tailored, standard by which excess or abuse can be ascertained. This is often necessitated by cost of enforcement or the limited knowledge constraints inherent in legislation. Nevertheless, this characteristic means that paternalistic legislation cannot make men moral.

¹⁴¹ Thus, in a sense “victimless crimes” have victims. See Andrew Karman, *Victimless Crime*, in THE OXFORD COMPANION TO AMERICAN LAW 818 (Kermit L. Hall ed., 2002). (“The contention that wagering, commercialized sex, and drug taking are victimless can provoke a number of distinct policy responses... [One] interventionist response arose from...[the] motivation - that members of a compassionate society are indeed ‘their brother’s keepers.’ This paternalistic outlook argues that nonparticipants should not stand idly by as self-destructive adults engage in reckless risk-taking, but should try to save them from destroying themselves.”).

¹⁴² See THOMAS AQUINAS, 3 SUMMA THEOLOGICA, 1763 (Fathers of the English Dominican Province trans., 1948) (1266-77).

¹⁴³ See ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 64 (George A. Kennedy trans., 1991).

¹⁴⁴ Thus the moral virtues and the appropriate enjoyment of goods are two sides of the same coin. See DOUGLAS DEN UYL, THE VIRTUE OF PRUDENCE 206-08 (1991).

¹⁴⁵ See ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS 101-02 (J.A.K. Thomson trans., revised by Hugh Tredennick, 1976). (“I call the mean in relation to the thing whatever is equidistant from the extremes, which is one and the same for everybody; but I call mean in relation to us that which is neither excessive nor deficient, and this is not one and the same for all. ...So virtue is a purposive disposition, lying in a mean that is relative to us and determined by a rational principle, and by that which a prudent man would use to determine it.”)

¹⁴⁶ This does not mean that the decision of the individual is “subjective” in the sense of an arbitrary decision. See YVES SIMON, THE DEFINITION OF MORAL VIRTUE 106 (Vukan Kuic, ed., 1986). (“The mean has to be relative to us, because it is we and nobody else who have to decide what to do in a given situation. . . . It is we who have to decide, but that does not make our decision unqualifiedly subjective. For if we have practical wisdom [prudence], we shall determine what is to be done, and do it, on the basis of a rational principle and *objectively with regard to the circumstances.*” (emphasis added)).

The vast and rapidly increasing legal restrictions on smoking¹⁴⁷ do not leave any room for the view that cigarette smoking, in moderation, might have benefits of some kind that offset its risks and harms to the individual's health. It may seem reasonable to infer from legislative and standard medical attitudes that the moral optimum with respect to smoking is zero. There seems to be no recognition that health is not an absolute moral value. Recall, however, the Aristotelian view that the good life is one that is comprised of many generic goods and moral virtues. While at a purely abstract level all of the goods and virtues are compatible with each other, this is not necessarily the case when the individual instantiates these in the context of his life.¹⁴⁸

There is evidence that cigarette smoking has distinct psychological and cognitive benefits relative to a no-smoking baseline.¹⁴⁹ These are not to be confused with the "benefits" of avoiding nicotine withdrawal by continuing to smoke. The cognitive benefits include "increased concentration, recall, selective attention, productivity, as well as speed, reaction time, and vigilance. Furthermore, it has been demonstrated that smoking diminishes stress, aggressive responses, and reactions to auditory annoyances."¹⁵⁰ How valuable these benefits are to the prudent individual depends on the internal and external circumstances of his life: for example, his talents, interests, and practical constraints.¹⁵¹ The instantiation of the basic generic goods and virtues in a person's life arises out of a process of matching these to, or situating them in, his circumstances. Thus, an individual may find that smoking increases his concentration and thereby enhances the excellence of his writing or art. Similarly, increased concentration and vigilance due to smoking may enhance prudence which in turn modulates an individual's fear, thus enhancing the attainment of courage. In these situations, the individual is trading off some greater probability of health and long life against an increase in other goods or virtues.¹⁵² Note, however, that this is a tradeoff at the margin. He is not giving up the pursuit of health altogether for the sake of one good or virtue. All the generic goods are compatible in some degree but there is no universally correct degree.¹⁵³

¹⁴⁷ See, e.g., Lawrence Gostin, *The Legal Regulation of Smoking (and Smokers): Public Health of Secular Morality?*, in *MORALITY AND HEALTH* 331 (Allan M. Brandt & Paul Rosin eds., 1997).

¹⁴⁸ DEN UYL, *supra* note 148, at 168 (1991).

¹⁴⁹ See J.R. Hughes, *Distinguishing Withdrawal Relief and Direct Effects of Smoking*, in 104 *PSYCHOPHARMACOLOGY* 409 (1991).

¹⁵⁰ Raquel R. Scheitrum & Emmanuel Akillas, *Effects of Personality Style, Anxiety, and Depression on Reported Reasons for Smoking*, in 7 *J. OF APPLIED BIOBEHAVIORAL RESEARCH* 57 (2002) (citations omitted).

¹⁵¹ Den Uyl calls this the individual's "nexus." See DEN UYL, *supra* note 148, at 170 (1991). ("A nexus . . . is that set of habits, endowments, circumstances, talents, interests, histories, beliefs, and the like which *descriptively* characterize an individual and which he brings to a new situation.").

¹⁵² In the admittedly special case of a man making sacrifices for the sake of good friends or country, Aristotle says, "For he [the man of good character] would rather have intense pleasure for a short time than quiet pleasure for a long time: rather live finely [morally] for one year than indifferently for many; rather do one great and glorious deed than many petty ones." See ARISTOTLE, *supra* note 145, at 302-03.

¹⁵³ Additional individuating circumstances may include the age at which one starts smoking (most smoking-related diseases take years to develop), the presence of diseases like depression and schizophrenia (the symptoms of which may be alleviated by smoking), and, more controversially, the number of cigarettes smoked per day. The problem of any single standard was amusingly presented in a rather dated

4. Hate or Bias Crimes

There have been many attempts at justification of bias crime laws, including the claim that bias crimes spread fear throughout a specific community. From here the inference is made that they have a greater negative impact on society as a whole than the same crime committed without bias. Nevertheless, two persistent and related moral rationales for the increased punishment associated with such crimes are first, the greater blameworthiness of the perpetrators and second, the need to send a message to the public about the inherent evil of discriminatory *motivation*, quite apart from the ulterior harm of underlying criminal acts.¹⁵⁴ Thus, the *incremental* punishment is for an attitude, a state of mind or even a character trait deemed immoral. Bias crimes single out “bias” as opposed to “greed, power, lust, spite, desire to dominate and pure sadism” as worse reasons for the requisite criminal intent in the underlying behavior.¹⁵⁵ This class of motives is being punished because of its greater immorality. In effect then, bias crime legislation embodies a certain formal hierarchy of moral values. The hierarchy is purely “formal” because it is independent of context, that is, the particular circumstances of time and place. It is hard to conceive, however, of any plausible hierarchy in which bias, independent of context, is *always* worse than greed, power, etc. as a motivation for crime.

5. Sodomy Laws and *Lawrence v. Texas*

In *Lawrence v. Texas*,¹⁵⁶ the U.S. Supreme Court struck down all state sodomy laws as a violation of the liberty interest of individuals protected by the Due Process Clause of the Fourteenth Amendment to the Constitution. The Court struck down a Texas statute that applied only to homosexuals as well as, in overruling *Bowers v. Hardwick*,¹⁵⁷ a Georgia statute that applied to both homosexuals

story by the moral philosopher Yves Simon. See SIMON, *supra* note 146, at 129. The following is taken from a lecture given at the University of Chicago in the fall quarter, 1957:

I read recently in Time magazine, in the “Religion” section, how some theologians hold that as long as you do not smoke three packs of cigarettes a day, there is no sin involved. I find that absolutely ludicrous. It is true that, if you consume three packs a day, you may face a problem not only of health and temperance but also of justice in the use of wealth. ... But what I do not understand is how anyone can even pretend to deal with such a contingent matter by offering a specific, uniform, quantitative advice to millions of readers. How much a person smokes depends [or should depend] on an infinite variety of circumstances. Thus if you have an examination next week, and if smoking helps you to concentrate, or at least keeps you awake, exceeding your usual quota may even be a matter of justice toward your parents who paid for your tuition and expect you to do your best in school. Again, it is not that there are no objective standards of temperance, or courage, or justice; it is only that there is no single standard for all.

¹⁵⁴ JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 79–81, 90 (1998).

¹⁵⁵ *Id.* at 80. Criminal law requires that acts be accompanied by an appropriate state of mind (criminal intent); hate or bias crime legislation goes to the motives or rationale underlying the intent. In other words, the criminal *intends* to kill a black person *because* he hates black people and not, for example, because the person betrayed his confidence. Bias crime legislation does not change the underlying definition of a crime.

¹⁵⁶ 539 U.S. 558 (2003).

¹⁵⁷ 478 U.S. 186 (1986).

and heterosexuals. Obviously, this decision is first and foremost a statement and interpretation of Constitutional law. However, we consider it from a moral perspective. Underlying the decision is an appreciation of the idea that moral goods cannot be defined primarily by physical behavior. In criticizing *Bowers*, the Court said:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said that marriage is simply about the right to have sexual intercourse.¹⁵⁸

For human beings, sexual behavior has meaning: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."¹⁵⁹ The precise content of this meaning varies with the particular circumstances of time and place. The State, however, is not entitled to supply this meaning.¹⁶⁰ The laws in *Bowers* and in *Lawrence* "purport to do no more than prohibit a particular sexual act."¹⁶¹ In effect, and insofar as these are *morals* laws, however, the State is supplying a moral meaning equivalent to the least valuable form that persons engaged in such behavior might intend, such as casual sex with strangers or sex with a prostitute.¹⁶² All of a type of behavior is characterized by a particular least-good instantiation. This is a perversion of the use of time and place considerations in the determination of the moral character of an action.

On the other hand, in an effort to reconcile the Court's decision with *Eisenstadt v. Baird*,¹⁶³ which protects the privacy of unmarried heterosexual sex, some proponents of upholding the Texas law used the inverse of the least-good argument. The amicus brief filed by the Family Research Council, for example, argued:

Physically similar sexual acts [that is, sodomy] between married persons are constitutionally protected. Physically similar acts between unmarried persons of different sexes occur within relations

¹⁵⁸ *Lawrence*, 539 U.S. at 567.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* For example, the Georgia statute read: "A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." GA. CODE ANN. § 16-6-2 (1984). The Texas statute defined deviate sexual intercourse as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." TEX. PENAL CODE § 21.01 (1) (2002).

¹⁶² See Stephen Macedo, *Against the Old Sexual Morality and of the New Natural Law*, in NATURAL LAW, LIBERALISM, AND MORALITY 27, 35 (Robert P. George ed., 1996). Here, Macedo is criticizing an argument by John Finnis, but the criticism is more generally applicable. See *infra* note 169.

¹⁶³ 405 U.S. 438 (1972).

which Texas may wish to encourage, either as valuable in themselves, or because they could mature into marriage, or both.¹⁶⁴

Thus, heterosexual sodomy is to be (or can be) judged by its “best” instantiation, that which leads to marriage, while homosexual sodomy is to be judged by its “worst” instantiation, that which is promiscuous or masturbatory.¹⁶⁵ The Council is implicitly conceding that sexual behavior is to be judged by its deeper meaning. There is no way to ascertain meaning except by reference to the local and personal knowledge (intentions) of the agents. The statutes, however, completely abstract from meaning or context. They seek to moralize physical behavior when, however, moral acts are acts of meaning.¹⁶⁶

B. Compulsory Beneficence Laws: An Introduction

Duties of beneficence are duties to enhance the well-being of one or more persons whose current condition is the result of something other than the wrongful actions of the potential benefactor. Therefore, we do not distinguish cases in which people are living lives of “average” well-being with the potential of improvement, or who have had a low level of well-being due to a birth defect or a slow acting disease acquired later in life from those in which people have been subject to a sudden misfortune requiring urgent assistance (as in most Good Samaritan legislation). A duty to convey a benefit or prevent harm caused by nature or other human beings is, in our framework, a duty of beneficence.¹⁶⁷ The baseline for beneficence is a person’s current position or likely future position where there is no violation of any other duty (that is, other than the putative duty of beneficence) by the potential benefactor to that person.¹⁶⁸

The following two sections discuss the Americans with Disabilities Act and the Good Samaritan Principle as examples of compulsory beneficence.

¹⁶⁴ See Brief Amicus Curiae for the Family Research Council and Focus on the Family at 3, *Lawrence v. Texas*, 539 U.S. 558 (2003) (emphasis added). The prior sentence elaborates this idea: “The critical difference . . . is not the raw physical behavior but the relationships: same -sex deviate acts can never occur within marriage, during an engagement to marry, during a courtship prior to engagement, or within any relationship that could ever lead to marriage.” *Id.* at 3. .

¹⁶⁵ See John Finnis, *Is Natural Law Theory Compatible With Limited Government?*, in *NATURAL LAW, LIBERALISM, AND MORALITY* 1, 15 (Robert P. George ed., 1996). The argument is unambiguous: “So [homosexuals’] genital acts together cannot do what they may hope and imagine . . . Reality is known in judgment, not in emotion, and in reality, whatever the generous hopes and dreams with which some same-sex partners may surround their genital sexual acts, these acts cannot express or do more than is expressed or done if two strangers engage in such activity to give each other pleasure, or a prostitute gives pleasure to a client in return for money, or (say) a man masturbates to give himself a fantasy of more human relationships after a grueling day on the assembly line.” *Id.*

¹⁶⁶ The outlawing of physical acts per se would make sense from the standpoint of the individual’s own morality if they were always and everywhere immoral. *But see* Part Five, *infra*.

¹⁶⁷ For a discussion of the duty to prevent harm as distinct from the duty to confer a benefit, see Liam Murphy, *Beneficence, Law and Liberty: The Case of Required Rescue*, *GEO L.J.* 605, 627-30 (2002).

¹⁶⁸ This is also the criterion for the absence of a duty to rescue as proposed by Lord Macaulay. THOMAS BABINGTON MACAULAY, *Notes on the Indian Penal Code*, in *MISCELLANEOUS WORKS OF LORD MACAULAY* 253-54 (Lady Trevelyan ed., 1880).

1. Americans with Disabilities Act

The Americans with Disabilities Act of 1990 (ADA) prohibits discrimination against “qualified individual[s] with disabilities.”¹⁶⁹ The Act covers both applicants for positions and current employees. It includes both physical and mental impairments that substantially limit major life activities such as seeing, hearing, speaking, walking, learning, performing manual tasks, and so forth, in fairly open-ended fashion. Employers must “reasonably” accommodate these disabilities before determining whether the person is qualified for the job at issue. Thus, if a person confined to a wheel chair could perform the job of receptionist just as well as those without a walking disability if an inexpensive ramp were built to allow access to the office, then he would be considered qualified under the Act.

There are two major rationales for the ADA, each of which has important moralistic aspects. The first is the idea that the ADA is part of welfare reform and the second is that it is an anti-discrimination law for the disabled.

a) The ADA as Welfare Reform Legislation

As welfare reform, the central idea is that the ADA is a less expensive method of conveying benefits to the disabled than traditional welfare legislation. This was certainly the way the legislation was sold to President George H.W. Bush and to Republicans in general. From an economic perspective, the burden of redistribution can be reduced by increased production on the part of the disabled. In other words, the cost of the traditional transfer is the foregone opportunity of this production. But the opportunity cost to society as a whole is the *net* marginal product of the worker – net of the accommodation costs. As long as some disabled persons become employed because of the Act and stop receiving transfer payments, they are reducing the cost of their “welfare” by their net marginal product. Whether this is a significant savings depends on the number of people going off transfer payments. Nevertheless, there are other less obvious costs aside from the direct costs of accommodation. We discuss them in the next section.

The possible cost-reducing aspect of the ADA should not blind us to the ultimate fact that it was promoted as a less costly form of *welfare*, that is, of providing benefits to those in need. In our framework, this is still compulsory beneficence legislation.

b) Reducing Patterns of Subordination and Discrimination

Another moralistic rationale for the Act is as an extension of anti-discrimination legislation for the disabled. In effect, this means helping the disabled to live more fulfilling lives, with more options and possibilities to be productive. The ADA may also have the consequence of changing attitudes toward the disabled, for example, in increasing the level of respect shown to them. The current state of affairs, according to some who hold this view, consists of a pattern of subordination and discrimination that may, to a certain unknown extent, be self-

¹⁶⁹ 42 U.S.C. §§ 12101, 12111 (1990).

reinforcing. The disabled are viewed as unproductive, and by internalizing this view, they tend to perform less well than they are actually able. Employers simply take this level of productivity as given. Furthermore, even aside from self-reinforcing factors, a “rational discrimination” against the disabled, that is, one based on their true, lower productivity, still traps them in a framework of subordination. Employers have, it is claimed, a moral obligation to weaken this social framework or pattern.¹⁷⁰

The elimination or reduction of the pattern of subordination may be viewed as a moral obligation of beneficence.¹⁷¹ “We” have an obligation to make life better for the disabled. The “we” are not so much employers but consumers, owners of other factors of production (including workers, who supply their labor), and owners of capital upon whom the costs of nondiscrimination fall.¹⁷² The law compels them, in effect, to forfeit a certain part of their potential income, or in the

¹⁷⁰ This seems to be the thrust of Samuel Bagenstos’s view: “[T]he well-entrenched prohibition of rational discrimination [in racial and other areas] is best justified as resting on the notion that employers who have a choice between participating in a subordinating system and working (at reasonable cost) against such a system have a *moral obligation* to respond in a way that reduces subordination. [Disability] accommodation rests on the same notion.” Samuel Bagenstos, “*Rational Discrimination, Accommodation and the Politics of (Disability) Civil Rights*,” 89 VA. L. REV. 825, 838 (2003) (emphasis added). And, again, “[a]lthough antidiscrimination law is plainly moralistic, its moralism inheres not in an effort to punish individuals who act on bad thoughts, but on the large-scale project of eliminating subordination and segregation and of enforcing a principle of equal membership in society.” *Id.* at 839.

¹⁷¹ There is a technical point about whether the obligation is one of beneficence or of justice. Mark Kelman argues that the reasonable accommodation requirement of the ADA is not a strong “entitlement” but a “colorable ‘claim’ on social resources that competes with a variety of other claims on such resources.” See Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 834 (2001). It is a distributive claim because, in effect, the baseline in a market setting is the *net* marginal value contribution that workers make in the context of their employment. It is fair to judge all potential employees by the same standard. *Id.* at 835, 837. This is consistent with our analysis.

For an opposing point of view, that the obligation is one of justice, see, Bagenstos, *supra* note 174 at 862. (“For if a distribution reflecting intentional discrimination is unjust and hence an improper baseline for determining whether redistribution has occurred, why can we not say the same thing about a distribution reflecting the creation of institutions inaccessible to people with disabilities (i.e., one reflecting the lack of accommodation)? By this account accommodation requirements (like antidiscrimination requirements) simply restore a just distribution; they do not ‘redistribute.’”).

¹⁷² The ADA requires that, for the qualified disabled, the wage equal the gross marginal product of labor rather than the net marginal product. In effect, the law places a tax equal to the accommodation costs on disabled labor. Normally, if a tax is imposed on a factor of production, the quantity demanded will fall as firms substitute away from the taxed factor. The ADA, however, makes this substitution effect illegal. This is because the firm is not supposed to treat accommodated labor any differently from non-accommodated labor with respect to wages, hiring, or firing. Therefore, the firm will experience losses on the marginal units of disabled labor. The losses incurred will induce the firm to reduce total output by more than it would in the case of a simple tax with no prohibition against substitution. From this output effect, there will be a decline in the demand for all factors of production: capital, nondisabled labor, and disabled labor. In summary, the overall effects will be: (1) a rise in the price of the product (assuming all firms in the industry are affected by the ADA tax); (2) a fall in output that is larger than if substitution were permitted; and (3) a decline in demand and price of disabled labor and other inputs. From this analysis, it is clear, at least in general terms, where the burdens of the ADA’s compulsory beneficence lie. Consumers will pay higher prices and nondisabled labor and the owners of other inputs will receive lower remuneration. However, some disabled labor will also be unemployed who otherwise would have had jobs at lower “discriminatory” wages. It is suggested by Thomas DeLeire that the latter have been the “less- experienced and less-skilled workers with mental disabilities, which generally are more difficult to accommodate than physical disabilities.” See Thomas DeLeire, *The Unintended Consequences of the Americans with Disabilities Act*, 23 REGULATION 21, 24 (2000).

case of consumers to pay higher prices, to benefit the qualified disabled. The Act also imposes burdens on the unlucky disabled who will become unemployed because of cutbacks in the output of affected firms.

Obviously, the Act makes no exceptions for those non-disabled who have heavy family financial obligations, those who give significant resources to the poor, those who behave beneficently toward the disabled outside of the employment context, those who make employment accommodation to disabled not qualified under the Act, and especially the unemployed-qualified disabled the Act is ostensibly designed to help.¹⁷³ Thus, the Act cannot make reasonable accommodation to either the internal or external morally-relevant facts of the moral agents.

2. The Good Samaritan Principle

The Good Samaritan Principle can be understood, especially from a utilitarian perspective, as a manifestation of a general principle of beneficence. Accordingly, there is no need to restrict it to emergency rescue situations or to those of low costs to the rescuer-benefactor.¹⁷⁴ As a moral principle, it can be stated rather broadly:

Individuals have a moral duty to provide positive assistance to strangers whenever the costs to them of doing so are less than the benefits to the stranger.

This “optimizing principle”¹⁷⁵ is a straightforward implication of the “Benthamite” maxim: Everybody is “to count for one, nobody for more than one,” combined with the utilitarian imperative to maximize the “happiness” of society.¹⁷⁶

The concrete knowledge problems inherent in trying to follow this version of the Principle are enormous. First, the benefactor must have knowledge of what, in fact, would benefit the stranger in the short or long run and in the conditions in which he finds him. Secondly, the benefactor has a problem of moral balance. There are other “demands” for beneficence, the attainment of other moral goods, or the instantiation of other virtues. A law that attempted to compel this form of beneficence in specific cases as they arose would not survive the knowledge-test. The dirigiste could not know what is truly moral in the circumstances. He would

¹⁷³ Some of the disabled persons will be unemployed as a result of the Act and so they bear some of the costs of beneficence to the other disabled. Since the former tend to be the more severely disabled, see note 172, *supra*, it seems unjust, by the standard adopted in the Act, to require them to be beneficent to the more abled.

¹⁷⁴ Indeed, the low-cost restriction is not present in the original version in the New Testament. In this story, the Samaritan came across a man who had been mistreated by robbers and he “bandaged his wounds, having poured oil and wine on them. Then he put him on his own animal, brought him to an inn, and took care of him. The next day he took out two denarii, gave them to the innkeeper, and said, ‘Take care of him; and when I come back, I will repay you whatever more you spend.’” *Luke 10:29, 34-36*, THE NEW OXFORD ANNOTATED BIBLE (3d ed. (2001) (New Revised Standard Version)).

¹⁷⁵ See the discussion in Murphy, *supra* note 167, at 650-52.

¹⁷⁶ Actually, the Benthamite maxim is due to Mill. See JOHN STUART MILL, UTILITARIANISM AND OTHER ESSAYS 336 (Alan Ryan ed., 1986).

simply compel agents to engage in certain objectively-defined behaviors irrespective of the agent's personal and local knowledge.

The optimizing Good Samaritan Principle can be restricted along a number of dimensions. Each of these restrictions is likely to ease the knowledge problem. They are: (1) the range of persons taken into the purview of beneficence; (2) the scope of situations in which potential beneficiaries require assistance; and (3) the depth or amount of assistance benefactors are required to render. The broad utilitarian version does not restrict the range to those who just happen to be nearby; presumably the agents have some cost-justified obligation to look for persons in need. It also does not restrict its scope to those in urgent or emergency need. Finally, it does not specify a maximum of assistance so long as the costs to the benefactor are lower than the gains to the beneficiary.

Consider now the Good Samaritan Principle as it normally manifests itself in legislation. These laws are normally restricted across the three dimensions. The range comprises those persons who happen to be in the view of the potential benefactor-rescuer. The scope is limited to one in which emergency or urgent aid is needed. The depth of assistance is constrained both by the utilitarian cost-benefit principle and by a "low" maximum level of costs to the benefactor.

Each of these restrictions reduces the knowledge problem in this form of compulsory beneficence. If we are not required to look for people in need, we are less likely to misidentify the existence of cases of need. If we are only required to deal with emergencies, we are more likely to be in a position to know the cause and remedy of the problem (for example, the child is drowning in a pool and so it is obvious that his immediate need is for lifeguard services). Finally, and most importantly, the pecuniary and time expenditure, as well as the risk to life and limb, incurred by the potential rescuer must be low. This ensures that no major sacrifice of other moral goods or instantiations of other moral virtues is likely to be suffered. So the agent's internal moral balance reflecting the appreciation of his unique circumstances is not substantially threatened.

Good Samaritan laws, restricted in the ways we have discussed, are not *in themselves* subject to the very significant knowledge problems that generally arise in compelling virtue. The knowledge objections to moral dirigisme in this case are likely to be weak. Nevertheless, there are two further related considerations. First, the restricted form of the Good Samaritan Principle is likely to be followed whether or not there is legislation. The social and moral incentives for low-cost rescue are great: praise, blame, feelings of virtue and of guilt. No one wants to be characterized by his own conscience or by others as a "moral monster."¹⁷⁷ Accordingly, in itself, it is not an important case of moral dirigisme when such laws exist. Second, and more importantly, the assertion of a legally-enforceable Good Samaritan Principle, even of a relatively restricted form, might lay the groundwork for the growth of such duties beyond the cases where knowledge problems are small.

¹⁷⁷ For a discussion, see Murphy, *supra* note 167, at 608.

This is because the barriers between more restricted and less restricted Good Samaritan duties are porous. The continuity in the various dimensions of range, scope, and depth, create the possibility of a slippery slope.¹⁷⁸ This continuity has been amply illustrated by the nineteenth-century essayist, lawyer, and historian, Thomas

Babington Macaulay. Range brings up the matter of proximity to the potential beneficiary which is a continuous variable. Scope refers to the degree of urgency in the need experienced – again a continuous variable. Finally, the depth of assistance or cost that the Samaritan is expected to sustain is also continuous.¹⁷⁹

In conclusion, restricted Good Samaritan laws will usually prove superfluous; their “unrestricted” form runs afoul of important local and personal knowledge requirements; and the restricted form has some tendency to expand through a slippery slope process. Accordingly, from the perspective of this Article, it seems best to avoid imposing such duties in law.

PART FIVE: CHALLENGES TO THE THEORY

XI. Moral Absolutes

A fundamental challenge to the perspective we have advanced here is the strand of moral thinking, based on the natural law approach of Thomas Aquinas, that takes the view there are moral proscriptions of an absolute nature. In other words, it is argued that there are a relatively small number of actions that are always and everywhere immoral.¹⁸⁰ It may seem that, on this view, there is no ethical knowledge problem. The concrete circumstances of time and place must be irrelevant if indeed certain acts ought never to be done. This conclusion, however, would be mistaken.

The issues are complex but it seems possible to isolate four factors that make absolute proscriptions only “relatively-absolute.”¹⁸¹ These are:

- 1) Moral absolutes are defined in terms of acts and not mere behaviors;
- 2) The moral quality of acts are affected by the empirical context in which they take place;

¹⁷⁸ See, generally, Mario J. Rizzo & Douglas Glen Whitman, *The Camel's Nose is in the Tent: Rules, Theories and Slippery Slopes*, in 51 UCLA L. REV. 539, 557-60 (2003).

¹⁷⁹ See MACAULAY, *supra* note 172, at 253-55. It is interesting to note here that at one point in his life, Macaulay was “impoverished by his devotion to philanthropy.” See the entry “Macaulay, Thomas Babington, 1st Baron Macaulay”, in CAMBRIDGE BIOGRAPHICAL DICTIONARY 982 (Magnus Magnusson, KBE, ed., 1990).

¹⁸⁰ See Finnis, *supra* note 57, at 1-9.

¹⁸¹ See FRANK H. KNIGHT, *The Rights of Man and Natural Law*, in 2 SELECTED ESSAYS BY FRANK H. KNIGHT 239 (Ross B. Emmett ed., 1999).

- 3) Certain acts have foreseeable, but unintended, bad consequences. Whether these are morally acceptable is a matter of personal, but not arbitrary, judgment. A judgment of acceptability may make evil consequences permissible;
- 4) Certain acts are impermissible because they run counter to the basic goods that all people must pursue. However, the greater the degree of individuation permitted in the pursuit of basic goods, the greater the variety of acceptable lifestyles.

First, it is important to recognize that the proscriptions of moral absolutists are against acts and not physically-described behaviors. All action involves intentions, both intended outcomes and, *ipso facto*, intended means. Thus, for example, it is not possible to evaluate a decision to obtain a hysterectomy as such. To make a moral evaluation we must situate the physical behavior of removing the uterus in the context of a plan. Suppose cancer is present in the uterus and the agent wishes to have her uterus removed to stop the cancer from spreading. The immediate or proximate object of her decision is to stop the cancer. This is her direct intention. The further fact that she is now unable to become pregnant and that the procreative function of her sexuality is impeded does not render her act immoral.¹⁸² It is a foreseeable and accepted, but not directly intended, outcome. The same physical behavior – removal of a uterus – is a different act if cancer is not present because the proximate intention of the agent must be different. In this case, the immediate intention (the object) of removing the uterus may be impeding procreation. If so, the act is correctly described as sterilization. In the first case, the act is more appropriately described as removing or stopping the spread of cancer.

In this framework the kind of action a behavior is depends on the particular circumstances of time and place. What the actor directly intends is crucial to the true description of the action, and her intentions are only indirectly related to the objective circumstances in which the decision takes place, that is, the presence of cancer and the likelihood of halting its spread. Thus, there are two categories of relevant personal or local facts: first, and primarily, those relating to what the actor means by the decision; and, second, the outward facts of the particular situation. We have seen how the first category consists of a subjective decision. The second is also susceptible to a personal judgment. Even where cancer has been shown objectively to be present, a woman can directly intend sterilization, especially if in the judgment she accepts that she has little likelihood of stopping the spread of the disease.

For our purposes the important question is whether these facts are likely to be available to a central moral decisionmaker? If agents are to be compelled to make choices that are objectively right, given the absolutist perspective, the compeller must have the appropriate knowledge of the agent's choice-act. This, however, is not objective in the sense of, for example, the verifiable consequences of

¹⁸² We are assuming here, of course, that to intend directly to impede the procreative function is immoral.

behavior or simply the observable physical conditions in which the behavior is initiated. It involves the direct intentions of the actors and their assessment of outward conditions.¹⁸³

Second, the conditions antecedent to an act can affect its moral quality. Consider the prohibition against adultery which, at a certain level, is fairly clear. There are, of course, issues regarding the validity of a particular marriage. Putting those aside, suppose that a husband has been lost in a war.¹⁸⁴ He is missing in action and presumed dead by the military authorities. So his wife remarries. But now rumors surface that the previous husband is still alive. Must the woman and her new husband immediately separate? Assuming that they are of good will and want honestly to do the right thing, how much credence should they place in these rumors? There isn't a single right answer to these questions because the degree of confidence one "should" have in rumors is not determined by logic or deduction but by prudence. To a certain, perhaps large extent, this is a "subjective disposition"¹⁸⁵—a disposition built up over time by individual practice and experience in moral decisionmaking coupled with a general desire to make honest decisions. So there is a range of appropriate moral decisions depending on particular local and personal circumstances.

Third, an act may be "absolutely" prohibited when its good or morally neutral proximate intention is not sufficiently important to warrant the foreseeable, but unintended, evil consequences. Simply because these consequences are not directly intended, it does not follow that the agent can ignore them. They must be minimized as when an individual uses force to repel force.¹⁸⁶ Whether this action is properly described as self-defense will depend, in part, on the degree of discrimination the agent uses in the application of force. If he uses far more than is necessary, it will be implausible to argue that the action has a moral object. Similarly, if the likelihood that an action of force will save the agent is reasonably expected to be very low, then a sufficiently grave reason for causing an evil will not

¹⁸³ Consider the formulation of an advocate of this view, Pope John-Paul II:

"The morality of the human act depends primarily and fundamentally on the 'object' rationally chosen by the deliberate will . . . In order to be able to grasp the object of an act which specifies the act morally, it is therefore necessary to place oneself in the perspective of the acting person . . . By the object of a given moral act, then, one cannot mean a process or an event of the merely physical order, to be assessed on its ability to bring about a given state of affairs in the outside world. Rather, that object is the proximate end of a deliberate decision which determines the act of willing on the part of the acting person." Pope John-Paul II, *Encyclical Veritatis Splendor* ch. II, Part IV, ¶ 78 (1993), available at http://www.vatican.va/edocs/ENG0222/_P8.HTM (emphases added).

This is quoted more fully in GERMAIN GRISEZ & JOSEPH BOYLE, *Response to Our Critics and Our Collaborators*, in *NATURAL LAW AND MORAL INQUIRY: ETHICS, METAPHYSICS AND POLITICS IN THE WORK OF GERMAIN GRISEZ* 221–22 (Robert P. George ed., 1998). Importantly, Grisez and Boyle immediately add, "This analysis makes it clear that the exceptionless moral norms that the Church teaches (and we defend) are not the 'merely behavioral norms' that proportionalists posit as the target of their attack on moral absolutes." *Id.* at 222.

¹⁸⁴ This example is taken from *The Definition of Moral Virtue*, SIMON, *supra* note 146, at 109-10.

¹⁸⁵ *Id.* at 111.

¹⁸⁶ See Aquinas, *supra* note 146, at 1465 .

be present. Individual judgment in awareness of local and personal facts will be determinative in such cases. In the last forty years, some writers in the Roman Catholic tradition have become even more explicit about the importance of balancing good and bad effects. Peter Knauer, for example, has argued that even an evil means may be tolerated if there is a proportionately good effect to counterbalance it. In these cases the agent's "moral intention" goes only to the good and not the evil.¹⁸⁷

The final factor responsible for the real contingency of moral absolutes is the agent-contextuality of the pre-moral goods that individuals do and should seek to attain. Natural law theories usually posit a limited number of such goods, such as life, friendship, knowledge and play.¹⁸⁸ These goods are viewed as basic or constitutive of human flourishing rather than as instrumental toward it. In some accounts each of these basic goods must be respected in every act.¹⁸⁹ Of course, this can produce problems of conflict to which mental gymnastics must be applied. The critical and related problem is the degree of individual flexibility or variation permitted in the concrete instantiation of basic goods. For example, if procreation is a value for human beings generically, must it be a value for all human beings and in every act that metaphysically may be related to it? The Roman Catholic Church teaches that non-coital sexual relations between married individuals are "counter-life" even where the woman is physically unable to conceive due to age.¹⁹⁰ Such activities, it is argued, do not demonstrate respect for the basic good of life. Natural law principles, however, cannot generate a universally correct set of individuated basic goods against which acts can be determined to embody respect for basic goods. The fundamental idea of flourishing, as we have seen above, is agent-specific.¹⁹¹ There is significant diversity in the specific characteristics of human beings due to personal variations and differences in culture. The more the natural-law agent accepts individuated basic goods, the more moral absolutes will be actual-agent specific or in our terminology, contingent on the particular circumstances of time and place.

XII. Unhinged Absolutes

Before concluding our theoretical discussion of moral absolutes, let us consider a world in which people simply believe in absolutes, absolutely. In other words, they accept strict prohibitions or very specific positive commands not embedded in any general framework or philosophy. In this case, it may seem that the "wobble room" identified and discussed above would not be present. A person might accept in these as a matter of moral culture or religious faith. In a society of

¹⁸⁷ See CHRISTOPHER KACZOR, PROPORTIONALISM AND NATURAL LAW TRADITION 32 (2000).

¹⁸⁸ See Stephen Buckle, *Natural Law*, in THE BLACKWELL COMPANION TO ETHICS 170-71 (Peter Singer ed., 1991).

¹⁸⁹ *Id.* at 171.

¹⁹⁰ POPE PAUL VI, ENCYCLICAL HUMANAE VITAE, Chap. I, para.11 (1968), available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_ene_25071968_humanae-vitae_en.html

¹⁹¹ If the agent is not the concrete individual acting in particular circumstances, then which characteristics, potentials and dispositions must the natural law agent embody?

such people, can legislation make them moral? To answer this question, let us consider three important sets of factors.

1. The level of abstraction characteristic of the prohibition or command is highly relevant. If, for example, people are absolutely commanded to be beneficent, the precise form this takes is still subject to particular circumstances. At the very least, this would have to be the case when there are two or more absolute commands that may come into conflict with each other in a particular context. Instantiations of honesty and beneficence may sometimes conflict, even if these virtues do not conflict generically.
2. The roles of faith and reason or argument are often not entirely separate, but are intertwined. In the ethics writings of Thomas Aquinas, for example, the positions of the Roman Catholic Church are interpreted and argued for within the framework of his neo-Aristotelian natural law philosophy. Aquinas does not consider it sufficient to issue dicta on moral questions. Human reason and revelation are ultimately compatible because they stem from the same source: divine intelligence.¹⁹² Thus, insofar as agents engage in Thomistic moral reasoning (or act as if they do), the apparent exceptions to moral absolutes discussed in the previous section¹⁹³ would continue to have relevance to persons of faith.
3. People often do not really hold moral absolutes, absolutely. Therefore, compulsion will not make them moral by the moral framework that is actually held in a society. In this respect we must consider what people say and what they do.

(a) *What People Say*: American Catholics, for example, by large majorities say that “artificial” birth control and abortion to save the life of the mother are morally justified.¹⁹⁴ So Catholics, whom one might expect to hold absolutes, absolutely, do not. Their actual moral system is

¹⁹² This point is emphasized by Servais-Théodore Pinckaers: “Thomas does not separate the two principles sources, revelation and reason, theology and philosophy, as would be done later. On the contrary, one can see in him a very close collaboration in the use of authorities between the content of faith and reason, the Gospel and Aristotle. While discerning perfectly the difference between these two different kinds of light, Thomas endeavors to show their convergence, which rests on a fundamental harmony There exists, therefore, a close coordination between theological and philosophical sources in Thomas’s moral works. It is based upon the fundamental harmony between revelation and reason, each of which, according to its own level and its own method, flows from divine truth.” Servais-Théodore Pinckaers, O.P., *The Sources of the Ethics of St. Thomas Aquinas* (Mary Thomas Noble, O.P. trans.) in *THE ETHICS OF AQUINAS* (Stephen J. Pope ed., 2002).

¹⁹³ See *supra.*, section XI.

¹⁹⁴ In the U.S. 61% of Catholics disagree with the Church’s teaching on contraception and 87% believe that abortion is morally acceptable if the pregnancy poses a serious threat to the woman’s health.) See the compilation of surveys in *Catholics for Free Choice, A WORLD VIEW: CATHOLIC ATTITUDES ON SEXUAL BEHAVIOR AND REPRODUCTIVE HEALTH 12, 17* (2004), available at <http://www.catholicsforchoice.org/activepubs/sexandr/worldview2004.pdf>.

more like what we have described above: principles accommodated to time and place considerations.

(b) *What People Do*: Moral systems, especially including the moral absolutes held, often change when people are confronted with the costs or consequences of their decisions. This is particularly the case during periods of social and economic transition. Changes in behavior may be characterized as violations of moral rules due to weakness or they may be characterized as changes in the moral rules themselves. There is no simple way to distinguish these.¹⁹⁵ Some possibilities of distinguishing rest on whether such deviations are widespread, violators feel guilty, informed moral authorities begin to change their preachments, and so forth. The point for our purposes is that the de facto violation of any absolute may mark the beginning of a change in the moral system adhered to by the agents. Thus, “[m]any of those who believe that homosexual acts should not be criminalized do not see themselves as being lax about the immorality of homosexuality; they simply do not think it is immoral at all.”¹⁹⁶ Under these circumstances, moral dirigisme may simply be retarding moral evolution and not creating a better or more virtuous society.

In summary, the possible existence of moral absolutes does not require any major adjustment to our thesis that moral behavior requires, in general, detailed attention and adaptation to the particular circumstances of time and place.

XIII. Moral Absolutes: The Case of Sodomy

There is no doubt that the Supreme Court’s decision in *Lawrence v. Texas*¹⁹⁷ is important both from the perspective of the statutes it invalidated and for the future of morals laws and moralistic legislation as they are related to sexuality. Many of those who argued for upholding sodomy laws believe that homosexual sodomy is always and everywhere immoral.¹⁹⁸ They appear to base that position, insofar as it can be distinguished from one exclusively founded on Biblical injunctions that they *choose* to accept¹⁹⁹, on the general idea that homosexual acts are unable to participate either actually or potentially in the objective good of marriage.²⁰⁰ Marriage is defined, in this account, as the *type* of relationship that is in-

¹⁹⁵ This a Wittgensteinian point. See, e.g., BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 149, n.17 (2d ed. 1999).

¹⁹⁶ *Id.* at 149.

¹⁹⁷ 539 U.S. 558 (2003).

¹⁹⁸ See, e.g. FINNIS, *supra* note 57, at 8-9 (1991).

¹⁹⁹ Some Biblical injunctions enjoy widespread acceptance, while others are ignored or downplayed. Frank Knight provides one reason: “[T]he Christian who thinks he believes that certain things are right because they are ordered or sanctioned by the divine will as revealed in the Bible (or by his church), actually believes these things to be divinely ordered because on other grounds he believes them to be right and good, and because he believes on other grounds that the teachings of his religion ordain what is good.” See FRANK H. KNIGHT, *Liberalism and Christianity*, in THE ECONOMIC ORDER AND RELIGION 33-34 (Frank H. Knight and Thornton Merriam eds., 1945).

²⁰⁰ See FINNIS, *supra* note 165 at 15.

trinsically related to the procreation and rearing of children. So homosexual acts, in effect, are choices against a basic, universal, and objective good.

The argument has three constituent ideas: (1) A decision against a basic good is being made; (2) It is never moral directly to tradeoff one basic good against another; and (3) A relationship may be justified completely at the generic level, that is, it may be morally justified because it is of the same type as another, but not justified because it is of a different type. Each of these constituents ignores morally-relevant circumstances of time and place.

The first argument confuses generic goods with their instantiation in time and place. For many people, procreation is not possible: for example, for the sterile and the old. Thus, they are not trading off a real possibility. Furthermore, for homosexual persons procreative acts may not be a good at all. And simply to engage in these acts and to feign marriage for the sake of a common or universal good does not seem advisable.²⁰¹ Therefore, no choice against a good is being made under these particular circumstances of time and place.

Second, a choice against one good for another good is not immoral under any reasonable interpretation of the natural law. In fact, it is inevitable in a world of conflicts and scarcity.²⁰² Consider, for example, the case in which a heterosexual married couple decides not to choose against procreation and leaves all of their sexual acts open to it. Under normal conditions, they will have many children and this will put stress on other aspects of their marriage. Other goods, like opportunities for mutual growth, friendship, intimacy and, possibly, the full education of the children, will have to be sacrificed. Prudence demands a careful consideration of the facts of each case in order to achieve a balance of goods.

The third argument may be an elaborate form of question begging. To define "marriage" as a type of relationship open to procreation is, at best, to mistake a temporal category for an analytical or moral category. Does a sterile marriage properly belong to the category of an intimate sexual relationship intended to be long lasting that is open to procreation? The word "open" is being used in a value-laden or, perhaps, metaphysical way that *presupposes* the answer to what type of relationship sterile marriage is. (It is certainly not being used in any physical sense.) If this is the case, then to exclude all homosexual relations from the same category as sterile marriage is also question begging. When the circumstances of time and place are considered, it will be seen that sterile or advanced age marriage

²⁰¹ See, e.g., Richard Sparks, What the Church Teaches about Homosexuality, CATHOLIC UPDATE (July, 1999). Available at <http://www.americancatholic.org/Newsletter/CU/ac0799.asp> ("[T]he Church calls all homosexual persons, like their single heterosexual counterparts, to be chaste, that is, sexually appropriate for their uncommitted, unmarried state in life.").

²⁰² See, for example, the criticism of absolutism from an "economic" point of view in KNIGHT, *supra* note 199, at 52 ("The moral problem is one of right balance between conflicting values, valid goods, not one of choosing the good instead of the bad or choosing 'either' one 'or' another of opposed standards or norms.").

are no more open to procreation than same sex relationships. Either both are sodomy or neither are.

XIV. The Moral Ecology

John Finnis and Robert George have each put forward minimalist forms of moral dirigisme.²⁰³ In these approaches, the State does not seek to proscribe vices and prescribe virtues for the sake of the morality of the coerced agents. It coerces individuals primarily to create a good public morality, that is, a social structure conducive to virtue and hostile to vice. To be more specific, we consider George's concept of "public morality."²⁰⁴ Reduced to its essentials, the publicness of good moral behavior is comprised of three factors: preventing bad example that might affect the unthinking, educating people about moral right and wrong, and preserving (creating) a good social environment free of immoral temptations.²⁰⁵ The social benefit is independent of whether the directly targeted individuals abstain from immoral behavior solely because of legal sanctions. They are not the intended beneficiaries of the public good. The beneficiaries are people who generally desire to act morally, but who might be overwhelmed by bad example, moral ignorance, or temptations to do otherwise. Relatedly, they may be confused or discouraged by the breakdown of a shared moral and social consensus about the nature of "objective" moral goods or institutions, such as marriage. This could lead them to undervalue or misconstrue such goods.

The public-morality view is completely derivative of the proper identification of immoral and moral actions. Thus, to create a good moral ecology with all of its putative advantages, it is necessary to determine what actually damages or helps the moral framework of society. Since morality can be instantiated only relative to particular circumstances of time and place, the Finnis-George moral dirigiste must solve the knowledge problem before a favorable public morality is created.

George recognizes that there are a plurality of ways to attain basic moral goods and exhibit virtue. Nevertheless, both he and Finnis believe that there are a number of actions that are always and everywhere immoral and thus are not consistent with any conception of the morally good life.²⁰⁶ Among these are homosexual activity, the production, sale, and use of pornography, prostitution, and drug abuse. Thus, if consensual homosexual activity in private is legal (as it is now), those who are not now engaging in such activity may think it is morally acceptable

²⁰³ See ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (1993); FINNIS, *supra* note 165, at 1-26 (Robert P. George ed., 1996).

²⁰⁴ See, generally, ROBERT P. GEORGE, *The Concept of Public Morality*, in *THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS* 93-109 (2001).

²⁰⁵ George adds a fourth aspect: "...preventing the (further) self-corruption which follows from acting out a choice to indulge in immoral conduct." See GEORGE, *supra* note 203, at 1 (1993). This is inconsistent with an emphasis solely on public morality and constitutes a small area of disagreement with John Finnis. For a discussion of their disagreement, see Robert P. George, *Forum on Public Morality: The Concept of Public Morality*, 45 AM. J. JURIS. 17, 28-31 (2000).

²⁰⁶ See GEORGE, *supra* note 203, at 38-40; 191-192 (1993).

and so people will be miseducated while others will be given a bad example that they may follow without much thought or be tempted to have homosexual relations. Further, since pornography tends to demean the sexual act according to George, then its circulation will portray bad role models and give people, especially the young, the idea that such depicted acts are morally acceptable.²⁰⁷ In both the above cases, as some people will indulge in these intrinsic evils, the social consensus about the purpose of sexuality and the nature of the institution of marriage will dissolve. This will cause doubts about what is expected of people in relationships and thus people will lose the security and moral good of marriage.

If, however, we are correct that moral absolutes, the sense of concrete proscriptions and prescriptions that are invariant with respect to particular circumstances, do not exist in any of the major ethical frameworks, then the idea of a general public morality is deeply problematic. If “good” public morality teaches people that reading pornography is always and everywhere immoral then we suggest the wrong lesson is being taught. Furthermore, costs would be imposed upon those individuals who in fact are engaging in moral behavior in their particular circumstances. They would be coerced by the State into attaining a lesser good or engaging in immoral conduct. In addition, to the extent that individuals’ particular circumstances are known to families, neighbors, associates, and others, they would be giving bad example by providing a warped illustration of the use of prudence to make moral decisions. Instead of making it easier to pursue virtue or avoid vice, the moral ecology would be filled with misinformation and perverse incentives.

Conclusion

This Article makes two separable contributions. First, we apply a rational choice theory with a strong emphasis on decentralized knowledge to moral decisionmaking. This approach stresses the importance of tacit, as well as explicit, local and personal knowledge in the application of moral principles to concrete actions. We also show that particular moral decisions are adjusted to the other moral, as well as nonmoral, decisions of the agent.

Second, we apply this technique of analysis to the problem of moral dirigisme, or the attempt to make the actions of people moral through coercion. We show that the attempt founders on the phenomenon of decentralized social knowledge. Moral decisions require the particular knowledge of time and place that is usually available only to the individual decisionmaker. This knowledge is often the byproduct of local economic and social relations; other times it is specifically sought after by those who have the incentive to be moral in the context of problems they have made their own. Equally important, as mentioned above, is the ineradicably personal, but not arbitrary, reconciliation or integration of individual moral decisions. In a world of scarce resources, including the time of the agent, the good or virtuous life is one in which particular decisions form a whole that conduces either to utility, flourishing, or the establishment of a kingdom of rational

²⁰⁷ GEORGE, *supra* note 204, at 93.

ends. Each of the classical moral systems, in its own way, requires local and personal knowledge for the effective pursuit of morality. The unavailability of this knowledge to the dirigiste condemns his plans for the moral improvement of humanity to moral incoherence and irrationality. Central planning is chaotic in the moral as well as in the economic world.