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THERE ARE NO EASY COUNTEREXAMPLES TO LEGAL ANTI-POSITIVISM

Emad H. Atiq

LEGAL POSITIVISTS and anti-positivists disagree about the grounds of law. They disagree about what at the most fundamental level it is in virtue of that a rule gets to be a legal rule.

Positivism is the view that the ultimate grounds of legality are social in nature. They concern the social properties of rules: roughly, having to do with a community's attitude of acceptance towards a rule, or its acceptance by key officials. There are variations on this general theme, but positivists stand united in their commitment to instances of fundamental legality—the legality of the fundamental legal rules—being grounded exclusively in the social features of those rules. The fundamental legal rules are ones which are not themselves “derived” (in a sense that stands in need of precisification) from other legal rules. For example, according to Hart, legal systems are systems of hierarchically structured rules. There are higher-order “rules of recognition,” which legal officials accept and follow. These higher-order rules determine the conditions under which first-order rules specifying outcomes for particular situations count as law. The legality of first-order rules thus derives from rules of recognition.¹

The disagreement within the positivist camp concerns the grounding of non-fundamental legal rules—those derived from more fundamental ones. “Inclusive” positivists allow that the moral features of a derived rule may be part of the explanation for why it is law, but only if a higher-order legal rule, whose legality is grounded in its social features alone, entails the legality of the derived rule on the basis of the latter's moral features.² Imagine a jurisdiction whose legal officials have collectively adopted a general convention of enforcing whatever fine-grained rules for practical situations are morally optimal. The conventionally embraced general rule of enforcement is legal solely on account of its social features—namely, its conventionality. But the more fine-grained sit-

1 Hart, *The Concept of Law*. Cf. Austin, *The Province of Jurisprudence Determined*; Raz, *The Authority of Law*; Marmor, *Philosophy of Law*; and Shapiro, *Legality*.

2 Waluchow, *Inclusive Legal Positivism*; Coleman, *The Practice of Principle*.

uational rules (e.g., a rule dictating when promises are to be enforced against a promisor) may earn their legality partly based on their moral features. The “exclusive” positivist agrees that the higher-order rules may direct legal officials to rely on moral considerations in deciding what the law is, but denies that this means the moral features of rules *ground* instances of law, whether the legal rules in question are instances of derived or fundamental legality. These internecine disagreements among positivists can be largely ignored in what follows, but I will discuss them as they become relevant to the argument.

Anti-positivism is the view that a rule’s moral features ground its legality fundamentally. The social features of rules matter, but so does the morality of rules. For example, according to traditional varieties of anti-positivism, unless a rule is one we morally ought to obey, or is consistent with moral principles that maximally justify our social practices, the rule cannot be legal. And this fact is not itself explained by any higher-order legal rule whose legality is grounded in social conventions or anything of the sort. Law depends fundamentally on morality’s sanction.

1. THE EXTENSIONAL CHALLENGE

Positivists claim that there are straightforward counterexamples to anti-positivism involving rules that bear all the hallmarks of legality but that are not by any stretch of the imagination ones we morally ought to obey or compatible with the basic principles of justice. Among other things, the Third Reich promulgated legal rules requiring the outright exclusion and ultimate extermination of Jews and other minorities in Nazi Germany. Nazi law was genuine law. In antebellum America, the Fugitive Slave Act required the return of a runaway slave to their master. The Fugitive Slave Act, morally grotesque though it was, was *bona fide* law.³ It is easy to multiply examples of morally objectionable rules that clearly are laws of states (e.g., California had a “three-strike” rule, mandating life imprisonment based on three criminal convictions regardless of gravity). But if anti-positivism is true, these rules cannot be law. They might be conventionally followed. But their severe moral defects preclude their legality.

Nazi law, the Fugitive Slave Act, the three-strike rule in California are actual cases of law mobilized as counterexamples to anti-positivism. But there are also possible cases of law that present an extensional challenge. Consider a scenario offered by Marmor.⁴ Marmor imagines a community in which individuals sin-

3 See discussion of the Fugitive Slave Act in Dworkin, “Hard Cases” and “‘Natural’ Law Revisited”; and Shapiro, *Legality*, ch. 1.

4 Marmor, *Philosophy of Law*, ch. 2.

cerely believe that (and act as if) a rule is law: they follow it, they sanction deviations from it, they call the rule “law,” they think it is a good thing the rule is law, and so on. We can stipulate that all the external trappings of a legal system are present (there are courts, police, and a legislative body, for example). If the anti-positivist is right, it is possible for everyone in the community to be mistaken about their favored rule’s legality. After all, the rule might be immoral—say, one that demands a human sacrifice every New Year’s Eve. But, surely, the community cannot be systematically mistaken about the rule’s legality. Yet another false negative.

Anti-positivism’s perceived extensional inadequacy explains why positivism is the dominant position in legal philosophy, or at least why it is so often portrayed as such. To deny that the Nazis had law, that the Fugitive Slave Act was law, that Marmor’s hypothetical society could not possibly be in error, is counterintuitive.

Anti-positivists have offered two types of responses to this extensional challenge. The first charges the critique as question begging. To assume anti-positivism’s negative results are false negatives assumes the falsity of anti-positivism. Anti-positivism *just is* the view that an “unjust law is not law.”⁵ So, contrary to what positivists tell us, the Nazis did not have laws, the Fugitive Slave Act was not law, and communities can be systematically mistaken about their own laws.

To repeat, this is a hard position to maintain. While it would indeed be question begging to assume anti-positivism is refuted by simply pointing to these cases of apparent legality, the problem for the anti-positivist is that it is very hard to explain away (as widespread error) judgments made by a diverse range of experts and nonexperts about law.⁶ The legality of Nazi rules is intuitive. And the intuition is pre-theoretical. Individuals unexposed to the debate between positivists and anti-positivists find it natural to say that Nazi Germany had a legal system (with abhorrent legal rules). If anti-positivists can do no better than deny the legality of morally abhorrent rules without plausibly explaining why widely shared intuitions are mistaken, anti-positivism is deservedly characterized as the more counterintuitive position.

The second response, offered by most modern anti-positivists, draws on the fact that the morality of legal rules (or entire legal systems) can be influenced by

5 Aquinas, *Summa Theologiae*.

6 Finnis, *Natural Law and Natural Rights*, is sometimes interpreted as suggesting that Nazi law is only law in an analogical sense. We say Nazis had law because their rules bear resemblance to the focal genuine cases of law which are morally good rules. But this is just to deny the intuition underlying the extensional challenge: that the Nazis *had law*, not something that merely resembles law.

our social practices. A rule's legality is grounded not in its being morally obligatory. Rather, it is grounded in its compatibility with justice taking into account our social practices. For instance, Dworkin suggests that rules have the property of being law only if they "figure in or follow from the principles of justice, fairness, and procedural due process that provide the *best constructive interpretation of the community's legal practice*."⁷ Famously, Dworkin thinks that in figuring out what the law is, judges face the Herculean task of first figuring out which general principles would morally justify, as far as possible, what we do around here—that is, our social practices. His view allows that there might be aspects of our social practices that morality could never justify, that might be irredeemable from the moral point of view. But the content of the law are those rules and principles derived from social practices that are compatible with the optimific moral principles, the ones which maximally justify how we do things around here.⁸ Likewise, Greenberg holds that law is the change in our "moral obligations" driven by our social conventions.⁹

These modern refinements to anti-positivism allow law and morality to come apart. The rules we morally ought to obey *simpliciter* may be quite different from the ones we morally ought to obey in light of our social practices. The latter might be, all things considered, morally inferior, and we might have moral reason to follow them anyway because they represent the rules we have democratically elected to follow. Rawls's arguments for compromising on what is morally best in the interest of living on reasonable terms with parties who do not all share the same comprehensive moral theory provide a helpful (yet neglected) comparison to Dworkin's view and views inspired by Dworkin.¹⁰

Although modern versions of anti-positivism allow legal rules and morally optimific rules to come apart, they cannot accommodate dramatic departures

7 Dworkin, *Law's Empire*, 225 (emphasis added).

8 An anonymous reviewer suggests a better interpretation of Dworkin regards the social practices as "raw material" that is morally interpreted. Dworkin's view is indeed sometimes understood by analogy with morally interpreting a work of fiction, where the "morally best" version of Huckleberry Finn is one which portrays the events of the novel, the characters, and so on in their morally best light. But I doubt this is the best of way understanding Dworkin. Dworkin is interested in the moral facts governing what individuals should do and how these facts might be shaped by social practice. In any event, this alternative interpretation does not immunize the Dworkinian from the counterexamples, as I explain below.

9 Greenberg identifies law with our actual moral obligations that have been shaped by social practice. He self-conceives as articulating Dworkin's considered/developed view and cites personal correspondence as evidence that Dworkin agrees ("The Moral Impact Theory of Law," 1301n28).

10 Rawls, *Political Liberalism*.

of law from what is morally required.¹¹ Dworkinian anti-positivism might accommodate the occasional immoral rule as genuine law in a community, like the three-strike law of California. But it cannot accommodate Nazi law. It is entirely implausible that the morally best reconstruction of the conventions and practices of the Third Reich would recognize as law rules calling for the murder of Jews in Nazi Germany.¹² Our conventions—what we do around here—plausibly make some difference to what rules we should follow in light of the principles of justice and fairness.¹³ But they cannot make the kind of difference which would allow anti-positivists like Dworkin and Greenberg to recognize the laws of Nazi Germany as *bona fide* laws. Likewise, by no stretch of the imagination were the rules dubbed legal by judges who upheld the Fugitive Slave Act ones we had a moral obligation to obey in light of social practice.

Marmor's challenge also still stands. It remains possible for an entire community to treat a set of rules as law that are not the morally best rules for the community to follow given its habits, conventions, and practices. And if it is impossible for an entire community to be mistaken about its accepted laws, then modern versions of anti-positivism are just as vulnerable to Marmor's extensional challenge.

2. THE NORMATIVITY OF ABHORRENT LEGALITY

Morally grotesque legal rules may be counterexamples to parochial forms of anti-positivism. But they are not necessarily counterexamples to anti-positivism. Anti-positivism in the most general sense is just the view that the fundamental grounds of law include moral facts: a rule's being law is partly grounded in its moral properties. In addition to what I have called *optimific* moral properties—

- 11 Alexy, "Legal Certainty and Correctness": "Not every injustice, but to be sure extreme injustice is not law" (444–45).
- 12 The Dworkinian denies the legality of Nazi rules. Even if we construe Hercules as engaged in a kind of moralistic interpretation of the social practices of Nazi Germany, it is entirely implausible that there is a morally best or redemptive story of Nazi Germany, a society where the socially embraced rules call for genocide. And even if there were one, it would not sanction the legality of the genocidal rules. Dworkin's Herculean judge is certainly willing to dismiss large numbers of judges in the United States as straightforwardly wrong about the law, e.g., judges who upheld the Fugitive Slave Act, because they failed to recognize the legality of the principles which would morally justify (as much as possible) what we do around here, consistency with which is a condition on the legality of any rule (Dworkin, "Hard Cases" and "The Law of the Slave-Catchers"). So, the counterexamples apply with full force.
- 13 On the moral significance of conventions generally, see Mavrodes, "Conventions and the Morality of War."

being morally best, being what ought to be done, being required by the principles of justice, and so on—there are moral properties that come in degrees, like the property of being morally good *to some degree*, or the property of being supported by *a* moral reason. Correspondingly, there are moral facts involving such weak or gradable properties, like the fact of a rule's being such that there is some moral reason to follow it.

Traditionally, anti-positivists have attempted to ground law in the optimific moral properties of rules. A rule's being law is grounded in its being the morally best rule to follow, or in its being consistent with moral principles that maximally justify community conventions. But gradable moral properties can serve as possible grounds of law. Arguments for anti-positivism properly understood support this possibility, as I explain shortly. So long as a rule's legality can be grounded in the existence of some moral reason to follow it, the anti-positivist can accommodate the legality of any rule recognized as clearly legal by the positivist. For if a rule is law and its legality is consistent with positivism, then the rule is conventionally followed or accepted in the community by key officials.¹⁴ And (I argue) if a rule is widely accepted, then quite plausibly there is always some moral reason for agents to follow it, albeit a very weak reason.

Consider the rules of the Third Reich. The fact that morally grotesque rules involving state-sanctioned terror were widely accepted and enforced against persons entails some extremely weak and easily missed moral reasons for persons to obey them. There are, for example, reasons of self-protection. Deviating from conventionally embraced rules renders individuals vulnerable to sanction. The reasons of self-interest that individuals have for obedience are, I submit, moral reasons. While self-interest can be amoral or even *immoral* when an agent is disproportionately sensitive to her own interests to the exclusion of others, concern for one's self can also be perfectly ethical, insofar as every person's interests matter from the impartial point of view.

While positivists sometimes acknowledge the existence of normative reasons to follow conventionally embraced rules, they neglect the moral character of such reasons and the conceptual possibilities they open up for anti-positivists.¹⁵ Admittedly, the moral character of reasons to protect and promote one's

14 As I explain below, even rules derived from higher-order rules of recognition enjoy a kind of acceptance by legal officials, given a plausible view of what it is for legal officials to follow or be committed to a higher-order legal rule. However, the "easy" counterexamples I have discussed in this paper and am primarily interested in disarming involve rules that are widely embraced, and not just by a handful of legal officials.

15 Raz, *The Authority of Law*; Marmor, *Philosophy of Law*; Shapiro, *Legality*.

interests is not obvious. Neither is it uncontroversial.¹⁶ Yet the arguments in favor of the proposition seem to me to be overwhelmingly plausible, even if it remains true that not *all* prudential reasons are moral reasons, and that not all cases of self-regarding action involve responsiveness to moral reasons.

One argument for the moral nature of the relevant class of reasons appeals to the character of an agent's motives for self-protection. The connection between motivational experience and evaluative facts is widely recognized. For example, the ethical intuitionist takes motivational and affective experience to involve direct perception of *bona fide* evaluative facts.¹⁷ While not just any motivation could possibly constitute awareness of moral facts, it is awfully tempting to think that the evaluative facts made manifest by agent-neutral empathic motivation—involving desires that are both “impartial” and “welfarist”—are moral in nature. A desire is impartial if it does not turn on (is not sensitive to) the identities of agents.¹⁸ If a desire is welfarist, then it favors states of affairs which contribute to individual well-being. If this is right, then there can be moral reasons to promote one's own interests because it is possible to be impartially concerned about one's own pains and pleasures. This form of concern involves seeing the pains as worth diminishing not because they are one's own. It involves seeing the pains as repellent and the pleasures as attractive in an “identity-independent” way.¹⁹ An identity-independent or impartial desire to diminish or avoid pains (especially the pains one is intimately acquainted with) involves appreciating (or judging) a paradigmatic moral truth: it seems to me that there is *moral* reason to avoid the pain, insofar as I am able to. This reason invites us to show similar concern for the pains of others and may serve as a normative foundation for a broader (and more recognizably moral) concern for general welfare.²⁰

16 Reasons of self-interest are often contrasted with other-regarding moral reasons. The former lack the obligatory or “deontic” force of more familiar varieties of moral reasons (Raz, *Engaging Reasons*; Little and McNamara, “For Better or Worse”). But this contrast does not show that the reasons of self-interest are a nonmoral species of reasons. See Munoz, “All Reasons Are Moral,” which argues that the contrast in felt “oomph” can be explained in terms of an absence of countervailing reasons in the case of deontic moral reasons, along with the concept of a moral prerogative. In any event, the central issue is not whether the reasons are moral (though they are), but whether they are genuinely normative (which they are as well). For meta-normative background, see notes 20 and 30 below.

17 Cf. Johnston, “The Authority of Affect.”

18 Hare, *The Language of Morals*; Atiq, “Supervenience, Repeatability, and Expressivism.”

19 Are some forms of partial concern moral (e.g., concern for Helen just because she is Helen)? I doubt it. Partiality is at best morally permissible. But I do not defend that claim here. The above argument relies on a modest assumption: moral reasons are *at least* those reasons appreciable from an impartial welfarist motivational perspective.

20 Here and elsewhere in the paper I draw on a connection between desire-like attitudes and

The moral reasons of self-protection are reasons to follow even Nazi laws. But it would be perverse to overstate the case. While there may be some (non-decisive) moral reason to follow a rule that causes extreme harm to others, that reason is vastly outweighed by competing considerations that militate against obedience.²¹ So, a German citizen might have had overwhelming moral reason to resist the laws of Nazi Germany, but this would not diminish the moral fact that she had some (albeit very weak) moral reasons, having to do with the good of self-protection (impartially construed), for following Nazi rules.²²

evaluative judgment. This connection has been emphasized by (among others) quasi-realist expressivists (cf. Blackburn, *Spreading the Word*; Gibbard, *Thinking How to Live*), a group to which I belong; and ethical intuitionists of the sort who treat all (most?) desire and affect as normative “seemings” or perceptions of *bona fide* value (cf. Johnston, “The Authority of Affect,” and, on one interpretation, Scanlon, *What We Owe to Each Other*). As a quasi-realist, I take normative judgements to be wholly constituted by desire-like attitudes. We use normative language to express these attitudes, and our linguistic practice guarantees the existence of real normative properties (as well as normative truths, propositions, and so on; cf. Schiffer, *The Things We Mean*; Thomasson, *Ontology Made Easy*). It seems plausible that there are phenomenally (and otherwise) distinguishable varieties of noncognitive attitudes (cf. Johnston, “The Authority of Affect”), and that there are distinct varieties of normative properties and facts corresponding to these different ways of being motivated, with moral facts associated, at a minimum, with empathic motivation. The quasi-realist basis for thinking this is the fact that we can introduce normative predicates in our language based on fine-grained distinctions between desire-types and their expression (consider the *legal* ought versus the *moral* ought); and there are properties corresponding to these predicates for the usual “easy” ontological reasons (cf. Schiffer, *The Things We Mean*). I realize this is extremely breezy. But the paper is not intended as general metaphysics and meta-normative theory. I say all this merely as theoretical background for the normative claims and arguments I am making (arguments one need not be a quasi-realist to accept).

- 21 I take this to be a case of normative outweighing and not defeat. If the severe moral defects of a rule defeat any reason to follow the rule, then there are not any reasons to follow morally abhorrent rules. I submit that the force of the reasons of self-protection to follow abhorrent rules remains appreciable from a motivational point of view of impartial empathy. One’s own pains do not lose their disvalue—and the impulse to stop or prevent the pain does not diminish—in the light of the pains of others. The self-protective impulse is overcome, in the virtuous, by a stronger impulse to do justice and act impartially in the interests of all. But it is not extinguished. This is apparent from the fact that it seems appropriate for the virtuous to sympathize with their own suffering, even as they engage in acts of self-sacrifice supported by the weight of their reasons. Contrast a case of genuine normative defeat: the moral reason to promote someone’s pleasure is extinguished by their acting wrongfully, given plausible desert-based normative principles. The wrongdoer’s pleasure no longer presents as appealing in the light of serious wrongdoing.
- 22 An anonymous referee suggests a society of lunatics with suitably bizarre conventions may prove challenging for my view. The relevant rules may be widely accepted, and yet it would not be in anyone’s prudential self-interest to follow them. I suspect even bizarre but conventionally embraced rules will generate extremely weak moral reasons for some agents to

Accordingly, Nazi law is not an example that is *per se* inconsistent with anti-positivism. If there is a viable version of anti-positivism on which instances of abhorrent legality are partly grounded in weak moral reasons for obedience, it would avoid the counterexample. And we will see in a moment that there is indeed a viable view which takes this form. The point for present purposes is simply to identify the relevant moral facts in which the legality of morally abhorrent rules might be grounded. (If the emerging strain of anti-positivism appears too watered down to be interesting, such concerns should be set aside for the time being. I explain in section 3 why this particular grounding claim is entailed by a promising general theory of law that is consistent with the principle motivations for being an anti-positivist, that captures the unity of the concept of law, and that explains how the social and moral characteristics of rules work together to ground their legality. The present aim is simply to clarify the scope of the alleged counterexamples.)

Consider Marmor's hypothetical. Marmor suggests that anti-positivism entails that a community might be systematically mistaken in its treatment of rules as law. But anti-positivism does not entail this. The force of the hypothetical turns on the assumption that moral properties that ground law according to the anti-positivist must always be optimific. If the legality of rules is always grounded in their moral optimality (whether relativized to social practice or not), it is possible for law and people's treatment of a rule as law to come apart. But so long as we have gradable moral properties in the picture, we see that a rule that the community treats as law is guaranteed to have some moral property: the property of being good to follow to some degree. And so, an anti-positivist willing to ground some instances of legality in weak moral reasons may agree with Marmor about the impossibility of error, while disagreeing about its explanation.

Why does conventional acceptance of a rule's legality entail some normative reasons, moral or otherwise, to follow the rule, even if there is no moral obligation? As before, the widespread acceptance of a rule entails a prudential interest in following it, which ensures the existence of some moral reasons for obedience. Moreover, acceptance of a rule arguably involves having a desire or pro-attitude toward following it.²³ While by no means uncontroversial, it is a viable ethical position that there is always *some* reason to perform an action whenever one

follow them (see discussion below concerning reasons grounded in subjective attachments). But it is also worth noting that the legality of such fanciful rules is less obvious than the primary cases discussed. In section 4, I discuss what makes for an "easy" counterexample to anti-positivism.

23 Woods, "The Authority of Formality."

desires it.²⁴ The overwhelming weight of reasons that speak against the satisfaction of certain perverse desires should not be confused with the state of there being *no reason whatsoever* (moral or otherwise) for satisfying them. There are other, related, reasons for following conventionally accepted rules of a broadly “Humean” variety, which derive from an agent’s attachment to tradition or conventional ways of doing things—a desire to keep doing how we do things around here.²⁵

It bears emphasizing that the moral (and broadly normative) facts that, I am suggesting, might ground morally grotesque legal rules are limited in scope. The claim is not that *every* agent subject to a legal rule has reasons to follow the rule. The identified reasons for following abhorrent rules will not apply to agents who can break laws without consequence or those who fail to have any attachment or professional commitment to conventionally embraced rules. Anti-positivists do not need to ground every legal rule in perfectly general moral or normative facts. The best arguments for anti-positivism, we shall see in a moment, are compatible with the legality of some rules being partly grounded in minimalistic moral features and particularistic normative truths (the existence of *some* reasons for *some* agents to follow the relevant rules).

I have said nothing so far about instances of “derived” legality that are not themselves conventionally embraced. Positivists maintain that the higher-order rules (of recognition or otherwise) need to be conventionally accepted in order to be legal. But perhaps the rules derived from the rule of recognition can be

24 There are different ways of getting to the result that whenever you have a desire to ϕ , you have some reason to ϕ . One way is to be a kind of hedonist (or desire-satisfaction theorist) who embraces a first-order normative view concerning what there is reason to do—namely, to satisfy one’s desires. This kind of view does not necessarily explain why there are those reasons (cf. Williams, “Internal and External Reasons”). Another route to the conditional claim involves embracing an analytic or reductive claim about what it is for there to be a reason to do something. This kind of Humean holds that what it is for some consideration to be a reason for you to do something is (roughly) for it to explain why doing it would satisfy your desires (cf. Schroeder, “The Humean Theory of Reasons”). Scanlon’s discussion of the distinction is helpful (see Scanlon, *Being Realistic about Reasons*). For present purposes, I can remain neutral between these two views, though I accept only the first-order substantive claim, which I take to be supported by the many instances in which an agent’s desires to ϕ and reasons to ϕ co-travel. Thanks to an anonymous reviewer for pushing me to make this explicit.

25 The appeal of etiquette norms seems to be a function of this mode of concern. These reasons (e.g., to doff one’s hat in certain social situations) are, as before, appreciable from a motivational perspective which involves concern for conventions or respecting how we do things around here. For a systematic treatment of the normativity of formal accepted standards, see Woods, “The Authority of Formality.”

forgotten, or widely ignored, or even widely ridiculed, and yet remain legal.²⁶ Could a morally defective rule derived from a forgotten statute not serve as an easy counterexample to anti-positivism, since there are no normative reasons to follow such a rule that might be derived from its conventionality (or its moral optimality)?

There are two observations to make about forgotten, morally suboptimal, derived rules. First, there appear to be weak normative reasons for some agents to follow even these rules. The normative reasons for following such rules may be entirely parasitic on the normative reasons for following the higher-order rules of a legal system, which are accepted in the community by, at the very least, its legal officials. We can represent rules as functions which take circumstances to actions or outcomes, with higher-order rules specifying outcomes in terms of other rules. On a plausible view of *what it is* to follow a rule or be guided by it, following a rule involves adopting a practical stance of being willing to bring about the outcome specified by the rule in the relevant circumstance insofar as the outcome's realization depends on one's practical attitudes.²⁷ Let us grant that acceptance of a higher-order rule by the judges of a legal community generates, at a minimum, desire-based "Humean" reasons for judges to follow it. But then there are instrumental reasons for these judges to follow the derived rules. Following the derived rules is the outcome the higher-order rules of recognition and enforcement call for. Even if the derived rule has as little to do with a judge's actual situation as a rule requiring companies to make their prospectuses available to investors, the judge can follow it in the relevant sense, where this might involve being willing to enforce the rule, or being willing to obey it in the (counterfactual) circumstance of owning a company.²⁸

26 I credit an anonymous reviewer for the objection.

27 There is no forcing the positivist to accept my account of what it is for officials to "accept" the rule of recognition. But I think any plausible version of positivism will take the shape I have described. A view according to which all it is to accept a rule of recognition is to adopt a way of talking (a way of using the term "law") seems to me to miss an enormous amount of what it is to be a judge (or a legal official) who has taken an oath of fidelity to law. It is notable that positivists have been less than transparent in their account of the nature of rules and rule-following. E.g., Hart declares "the idea of a rule" is one "without which we cannot hope to elucidate even the most elementary forms of law," but takes rules as primitive (*The Concept of Law*, 8, 82–86). He tells us what necessarily follows from their existence, what makes a rule a social rule, and so on. But he does not give us an account of their general nature. So, it is reasonable for me to make some assumptions here (and I make them in good faith: they reflect my considered view on the nature of rules and rule-following).

28 Cf. Gibbard's contingency plans (*Thinking How to Live*). This explains why even so-called power-conferring rules are ones which can be followed by judges who accept them indirectly. Following a power-conferring rule does not require exercising the power it confers.

Admittedly, the derivative (or instrumental) reasons for following a derived rule will be especially weak in some cases, when there are not independent moral reasons or reasons having to do with the rule's wider acceptance in the community which militate directly in favor of following the rule. The example of a morally suboptimal rule derived from forgotten statutes nicely illustrates this. But—and this is the second notable fact about this general class of rules—the legality of forgotten statutes is not straightforward (later I explain what makes for an “easy” counterexample to anti-positivism). Judges often question the legal relevance of forgotten statutes, or old cases that no one cites anymore, treating the rules derived from them as possessing a kind of degenerate legality. For example, under the doctrine of “desuetude,” the legality of statutes and doctrines can lapse due to neglect. One of the most ancient maxims of the common law, *cessante rationae legis, cessat at ipsa lex*, underpins this doctrine: “the reason for a law is the soul of the law, and if the reason for a law has changed the law is changed.”²⁹ Accordingly, even positivists should feel some pressure to accommodate or explain why the relevant class of rules represents cases of marginal legality at best.

One way to follow a power-conferring rule is to help confer the power when the rule calls for it. E.g., a power-conferring rule of the common law of contracts says: “if someone makes a promise backed by ‘consideration’ (where this is roughly a matter of the promise being induced in the right sort of way), the promisee has the power to enforce it.” This rule confers a power on the promisee to enforce the promise in court. Judges follow this rule. The promisee takes advantage of it. I realize that there is some pressure from Hart (*The Concept of Law*) and others (and *contra* Austin, *The Province of Jurisprudence Determined*, and Kelsen, *Pure Theory of Law*) to construe power-conferring rules as not being “directed at officials.” The debate seems to me to misconstrue the nature of rules. Rules do not “direct” themselves to individuals. There are just different ways for different individuals to follow a rule. Power-conferring rules should be construed as calling for an outcome where an agent is treated in certain specified ways by others and perhaps herself. What does it mean to follow such a rule practically? The answer depends on how we flesh out the outcome and on who is doing the following. There is no reason to think the outcome cannot require officials (among others) to act in certain ways with respect to the agent (e.g., enforce a promise made to the empowered agent).

So, there are normative reasons to follow power-conferring rules: at the very least, some agents (e.g., judges and other officials) have some reason to follow the rules, for the reasons I give in the case of “derived” rules. A juridical commitment to the rule of recognition which recognizes the power-conferring rules as law entails some degree of commitment to the derived rule. But in standard (easier) cases of legality, there will be independent non-instrumental normative reasons to follow the derived power-conferring rules, e.g., that the rule promotes general welfare, or because the rule is widely followed in the community. Thanks to an anonymous reviewer for pushing me to make my view on power-conferring rules explicit.

29 *Milborn's Case*, 7 Coke 7a (K.B. 1609).

The claims I have made about the moral and broadly normative reasons agents have to follow the wide range of morally defective rules we encounter in legal systems are consistent with a robustly objectivist metaethics and a non-relativistic normative ethics.³⁰ There is no need for the anti-positivist to think that moral facts, like the fact that there is a moral reason to follow rules widely accepted and obeyed in order to promote one's own interests, are themselves fully grounded in social facts. The social facts would then fully explain the legality of rules *and* their relevant moral features. The anti-positivist can instead treat the moral facts as irreducible. That there is a moral reason to follow a conventionally embraced rule might be partly grounded in non-moral facts, like the rule's conventionality. But it is also grounded in a pure moral fact: the moral principle that *if* following a rule promotes your interests, then there is some moral reason to follow it.³¹ It is this latter moral fact that is part of the explanation for the legality of rules and is not itself grounded in a social fact. And as far as first-order ethical commitments go, thinking that there are reasons to satisfy desires or moral reasons of self-protection does not entail denying the possibility of a wider range of objective goods that come apart from the desires and interests of agents.³²

30 An anonymous reviewer invites an account of the difference between robust and "thin" (or merely "formal") normativity, and asks whether the reasons I have identified for following legal rules are robustly normative. This is a subtle issue. But as far as I understand the thin/robust distinction, I take the reasons I have identified to be metaphysically robust—as robust, at any rate, as moral reasons. The reasons of self-protection and reasons to follow conventions just because one cares about conventionality are determinates of a single determinable (reasons). They are as irreducibly real as moral reasons to promote aggregate well-being, and our ontology must make room for them. One interesting distinction in the realm of reasons is not the thin/robust distinction (or a distinction concerning the nature of normativity), but the fact that some reasons reflect moral concerns and others do not. The moral character of a reason appears to be a function of the motivations necessary to appreciate the force of the reason (nonnormatively described, e.g., impartial, and welfarist motivation, in the precise sense I gave earlier). And moral reasons have a unique grip on some of us, where this is a descriptive psychological claim. That is the only sense in which the nonmoral reasons are not "robust." Talk of robust normativity may be an oblique way of talking not about the metaphysics of normativity, but about our special sensitivity to moral reasons, and the fact that we assess other schemes of value against moral standards.

31 Scanlon, *What We Owe to Each Other*, 36–40.

32 Ethical objectivists sometimes deny that reasons to do as one desires are *grounded* in facts about our desires, which is compatible with my view. Scanlon, *What We Owe to Each Other*, ch. 1, e.g., suggests that all cases of desires seeming to give us reasons are really cases where the reason is grounded in some non-motivational fact (e.g., the prospective pleasure to be gained from satisfying the desire). For my purposes, all I need is the plausible conditional claim that whenever (or, at least, typically when) one has a desire to ϕ , one has some reason to ϕ . It is true that my view rules out an extreme ethical objectivism on which even this

3. INCLUSIVE ANTI-POSITIVISM

There are moral and broadly normative reasons for various agents to follow rules whose legality presents an extensional challenge for anti-positivism. The next step in a defense of anti-positivism is an account of why an anti-positivist might plausibly hold that the identified normative facts ground the relevant instances of legality. The aim is not to systematically defend the resulting strain of anti-positivism. It is to state the view's defining commitments with sufficient clarity to show that there is no obvious reason why it could not be true, and to make a *prima facie* case for it in terms of the central motivations for being an anti-positivist—enough of a case, at any rate, to secure the logical point that there is a viable strain of anti-positivism which avoids the most famous objection to anti-positivism.

I will begin by stating the general position, writing as if it is true to make exposition easier, before motivating it and handling objections. A helpful concept with which to start is that of an evaluative perspective marked by special solicitude for conventional ways of doing things but also moral concern.³³ Such “mixed” evaluative perspectives are very familiar. We occupy such a perspective when, for example, we weigh our subjective attachments (say, special concern for a loved one, or for one's life projects) against impartial, other-regarding moral considerations in determining whether a course of action is justified relative to the totality of our values.³⁴ Enculturation in the legal professions is a way of becoming acquainted with a distinctive way of caring, a distinctively juridical sense of what is valuable, involving high respect for conventionality (a commitment to conventional ways of doing things for convention's sake) as well as moral concern (e.g., a commitment to general welfare, self-protection, and so on).

This juridical mode of concern may appear fetishistic from the moral point of view. It involves, among other things, caring about tradition and the way we do things around here as though it mattered intrinsically. But that does not make the values that the juridical evaluative perspective makes visible “as if” or “imposter” values. The values are, at worst, morally bad.³⁵ And, as I emphasize below,

conditional claim is false. But perfect neutrality on all ethical matters can hardly be foisted on anti-positivists.

33 Williams famously offers an account of normative reasons in terms of what he calls an agent's “subjective motivational set”—the totality of the agent's commitments, desires, goals, etc.—allowing motivational changes based on sound deliberation (“Internal and External Reasons”). I intend the notion of an evaluative perspective to be very close to Williams's notion of a subjective motivational set.

34 Williams, *Moral Luck*.

35 On the normativity of moral versus nonmoral value, see notes 13 and 22 above.

what I am calling the juridical evaluative point of view is not entirely fetishistic—it is partly constituted by recognizably moral values, involving, for example, concern for general well-being.

Consider a normative property of rules defined in terms of this evaluative perspective: that of a rule's *being normatively well supported to a high enough degree*, where what counts as a relevant normative reason favoring the rule is based on the evaluative perspective in question, involving concern for the social and moral characteristics of rules.³⁶ *Being normatively well supported to a high enough degree* is a threshold normative property. If a rule meets the justificatory threshold, it does so in virtue of the *sum* of social and moral considerations favoring a rule, not a precise blend. In some cases, a rule will meet the relevant threshold despite weak moral support. When a rule is strongly conventional, its strong "social support," which consists in the normative reasons legal officials and others have to follow the rule *just because* it is conventional (because of their attitude of rule acceptance and commitment to following conventions), can be understood as compensating for its extremely weak moral support.³⁷ Not in a moral sense. But in the special normative sense I am suggesting reflects the distinctive evaluative perspective under consideration.³⁸ The robust or optimistic moral features

- 36 I intend "normative reason" and the favoring relation here in roughly the same sense as Scanlon when he speaks of "considerations counting in favor" (*What We Owe to Each Other*).
- 37 We should distinguish the social property of being conventionally embraced from the normative reason to follow the rule that is (normatively) grounded in this social property (what I am calling "social support"). There are normative reasons that are not grounded in the social property but that depend in a different sense on the social property: e.g., the moral reasons I highlighted earlier (of impartial self-protection, among others). A rule's conventionality does not matter intrinsically relative to these moral reasons. What matters intrinsically is the good of self-protection. As discussed in section 2, the relevant social facts also entail (where this entailment has a normative flavor) desire-based "Humean" reasons to follow a rule, relative to which the rule's conventionality is intrinsically normatively relevant. The latter are reasons one would be sensitive to were one particularly concerned with respecting conventions for convention's sake (as legal actors often are, perhaps because of internalized professional obligations). Legality is a function of the sum of these various types of supporting considerations for following a rule, which may bear differently on different agents.
- 38 If one values respecting conventions highly enough, moral considerations never trump institutional support. Just because moral considerations are relevant from the legal evaluative point of view, this does not mean they have their usual peremptory force. No doubt the legal evaluative perspective may be criticizable from the moral point of view. It may be morally perverse. But that is true of most evaluative perspectives that are not exclusively concerned with morality. And there may be moral reasons of a rule-consequentialist sort which favor some agents cultivating this form of concern, and a corresponding sensitivity to the relevant reasons.

of certain rules can similarly compensate for their weak social acceptance (in the terminal case, acceptance by a single moral agent). In other words, a morally optimistic principle may meet the relevant threshold of being sufficiently favored despite its weak social acceptance in the community.

There is a viable strain of anti-positivism which identifies the property of *being law* with the aforementioned normative property of rules (*being normatively well supported to a high enough degree*) and that promises to be counterexample proof. The property identification entails a general grounding thesis:

General Grounding Claim: Given any legal rule, the rule's legality is grounded in whatever normative reasons there are for agents to follow the rule (where the range of relevant normative reasons is defined in terms of the juridical evaluative perspective).

From this general grounding thesis, more particular grounding claims follow, including that instances of morally abhorrent legality (the Fugitive Slave Act) are partly grounded in what weak moral reasons agents have to obey the rules, together with normative reasons derived from a juridical commitment to following a convention for convention's sake. If a rule surpasses the threshold level of normative support, this fact will always be grounded in whatever normative reasons agents have for following the rule, whether they derive from an attachment to conventions, or the self-protective interests of persons, or general welfare. Compare: the fact that the square is over forty percent blue is grounded in facts concerning the square's blueness—every inch of blueness grounds the threshold fact. Accordingly, a defense of inclusive anti-positivism turns on a defense of the general grounding thesis (and the property identification), not particular grounding claims, concerning, for example, the legality of the Fugitive Slave Act.

A defense of the general grounding thesis does not need to be based on brute intuition, or rational insight into the nature of law, or anything so remarkable. Inclusive anti-positivism's core commitments can be motivated by appeal to considerations of theoretical power and adequacy. It is notable, first, that the view, with its defining commitments clarified, does not show any signs of obvious error or internal incoherence. Second, it amounts to a position on legality that is clearly distinguished from positivism. Positivism and inclusive anti-positivism differ in their first-order implications concerning which rules are law; in their second-order explanations concerning why the relevant rules are law; and in their take on the essence or nature of the property of legality. According to inclusive anti-positivism, the concept of law is the concept of an objective normative similarity across rules which possess a variable mix of social and moral properties. The relevant similarity consists in the normative well-supportedness

of these rules relative to the values characteristic of a distinctive (if vaguely defined) juridical evaluative perspective.³⁹ Positivists rarely make their views concerning the nature of the legal property explicit. But no positivist, as far as I can tell, construes the property of legality as essentially identical to a *bona fide* normative property.

The explanatory differences are related to this essentialist difference. The least controversial instances of legality are ones involving legal rules that are both conventionally embraced and morally optimific. These rules are law, according to the inclusive anti-positivist, because they clearly surpass the threshold of normative well-supportedness. By contrast, the positivist claims these rules are law just because they are conventionally embraced or because they are derived from rules of recognition that are conventionally embraced.

The views differ extensionally. There exists a possible jurisdiction where a morally optimific principle—say, a principle banning the torture of animals in factory farms—enjoys very little conventional support. Furthermore, the principle cannot be derived from any conventionally embraced rule of recognition in the jurisdiction. The inclusive anti-positivist declares the principle (marginally) legal, whereas the positivist, whether inclusive or exclusive, denies the principle's legality.⁴⁰

In addition to being sharply distinguished from both inclusive and exclusive varieties of positivism, inclusive anti-positivism seems eminently defensible based on the types of considerations which motivate anti-positivism generally. There is considerable irony in the fact that the best arguments for anti-positivism turn out to be extensional. Although rarely characterized as such, the classic arguments which appeal to judicial behavior emphasize an extensional inadequacy of positivism.⁴¹ Judges routinely classify rules that enjoy strong moral support as law even if there is not a widespread convention within the jurisdiction of following the rule.⁴² And they appear to be doing so on conceptual grounds alone,

39 I am intentionally vague about several aspects of the juridical evaluative perspective, including the precise relationship between social and moral support. We should not aspire for greater determinacy in our account of a concept than its nature warrants. As I explain below, the imprecision has an explanatory upshot.

40 I discuss whether this extensional difference generates an “easy” counterexample in section 4.

41 Dworkin, “The Model of Rules” and “Hard Cases”; Radbruch, “Vorschule der Rechtsphilosophie.”

42 Additionally, judges justify broader interpretive methodologies by appeal to moral considerations, and not as an indirect means of identifying the socially embraced methodology for interpreting law (Dworkin, *Law's Empire*). For positivist rejoinders, see Raz, *The Authority of Law*, ch. 9, and Waluchow, *Inclusive Legal Positivism*. We do not have to assume that Dwor-

because there is no obvious social convention within jurisdictions which authorizes such behavior by judges. For instance, Dworkin provides various examples of common law judges invoking general moral principles as law, and without citing custom, including, for example, the principle that “courts will not permit themselves to be used as instruments of inequity and injustice.”⁴³ Dworkin argues that, in determining the content and application of these principles, judges view themselves as figuring out the law, but the content of these principles cannot be grounded in conventionally embraced rules.

In fact, judges do not simply make first-order judgments ascribing legality to morally optimistic rules. They make second-order judgments about why these rules are legal—judgments that are *prima facie* incompatible with positivism. For example, in the famous contracts case of *Bailey v. West*, the court explains that a benefactor who voluntarily confers a benefit without the explicit consent of the beneficiary is sometimes owed remuneration where the obligation is grounded in a “law of natural immutable justice.” The court does not say that the reason why the relevant principle of justice concerning fair compensation is law is that it is socially treated as such, or that there is a convention of treating basic principles of justice as law, or that the rule is derived from conventionally embraced rules. Judges describe natural justice as a fundamental source of law.⁴⁴ Taking the phenomenon at face value, judges treat the legality of morally optimistic principles as not needing to be further explained in terms of conventions or anything social. It is easy to multiply similar examples.⁴⁵

If we take judicial intuitions about the legality of rules seriously, positivism seems falsified by the existence of morally well-supported rules that are recognized as law simply because they are morally well supported. Positivists have offered various responses to this extensional challenge, none of which seem to

kin prevails over his critics (though I think he does) in order to show that inclusive anti-positivism of the sort developed in this section can be motivated based on considerations that have traditionally inspired anti-positivists.

43 Dworkin, “The Model of Rules,” 20–25.

44 E.g., see *Hammond v. Allen*, 2 Sumn. 387; 11 F. Cas. 382 (1836). See also Blackstone, *Commentaries on the Laws of England*, vol. 1, 69–70.

45 A systematic catalog of all relevant cases illustrating this phenomenon is reserved for future work. A quick search of all state and federal US cases and pre-1777 English reports for uses of “laws of natural justice” (and various equivalents) returns 1,115 hits. A search for “moral law” or “natural law” returns 4,184 hits. And a search for “principles of justice” returns over 10,000 hits. The evidence is not limited to common law or modern jurisdictions. There are examples across history; for example, from pre-Christian Rome. Pomeroy, *A Treatise on Equity Jurisprudence*, sec. 8, describes pre-Christian Roman magistrates who treated the stoic theory of morality as an original source of law, discovered and not invented. Pomeroy, it is worth emphasizing, has no anti-positivist axe to grind.

me to be very plausible. One response, favored by inclusive positivists, insists on a social conventional explanation for why judges recognize morally optimific principles as law.⁴⁶ There is a conventionally embraced rule of recognition, we are told, in the relevant jurisdictions that calls on judges to recognize morally optimific principles as law. But as a matter of social fact it is highly controversial whether the conventionally embraced rule of recognition in common law jurisdictions licenses the move from the moral optimality of a rule to its legality. We must distinguish behavioral regularities from conventions. Judicial willingness to classify moral principles as law may be a regularity. But it is not self-conscious (social) rule following—a fact apparent from considerable disagreement among judges about whether local custom authorizes appeals to morality in the discovery of law. Judges sympathetic to positivism describe such conduct by their peers as “judicial usurpation” of the administration of morality.⁴⁷ Meanwhile, judges friendly to the “laws of natural justice” acknowledge the disagreement and deem their peers mistaken, not about the conventions in place in the jurisdiction but about law’s conceptual connection to morality. The (inclusive) positivist’s account of the practice in terms of a rule of recognition embraced by legal officials is rendered, at a minimum, doubtful in light of such disagreement.

Furthermore, the inclusive positivist’s response to the challenge runs up against the second-order explanations these judges give for why morally optimific rules can be law, explanations which suggest a fundamental conceptual identification of law with morality, not an indirect or derivative legality. So, the positivist owes us an explanation for why interpreters of law are mistaken. Positivism entails a significant error theory concerning experts to whom our community defers on questions of law.

Positivists sometimes charge judges as engaged in a kind of pretense or outright deception. We are told judges friendly to the “laws of justice” are engaged in law-making but are pretending to discover preexisting law. But an uncharitable explanation seems implausible in the case of, say, pre-Christian Roman magistrates who deemed the stoic theory of morality a source of Roman law, discovered and not invented.⁴⁸ If these judges had any political reasons to lie about the grounds of law, those reasons are not obvious.⁴⁹ In any event, uncharitable interpretation should be a kind of fallback option, if there is no better theory of

46 Waluchow, *Inclusive Legal Positivism*.

47 See, e.g., *Orr v. Quimby*, 51 N.H. 590, 646 (1874).

48 Pomeroy, *A Treatise on Equity Jurisprudence*, sec. 8.

49 Dworkin makes a similar point about common law judges (*Law’s Empire*). For a positivist response, see Marmor, *Philosophy of Law*, 90. The implausibility of an explanation which appeals to juridical fraud seems especially apparent in the case of ancient legal societies.

the nature of our legal concept that can vindicate the judgments of legal experts. Fortunately, a theory which avoids this kind of undermotivated lack of charity is in the offing.

Anti-positivists have undermined the force of the juridical considerations by declining to follow the extensional logic where it leads. As noted, anti-positivists have tended to dismiss or altogether ignore judicial willingness to classify morally abhorrent but strongly conventional rules as law. A truly extensionally adequate theory of law, one that takes seriously the extensional intuitions of experts, would be consistent not just with their willingness to classify on conceptual grounds alone strongly moral but weakly conventional principles as law, but also abhorrent laws like the Fugitive Slave Act.

Inclusive anti-positivism promises to be consistent with both strands of judicial behavior. According to the inclusive anti-positivist, judges will recognize as law morally optimific but weakly conventional rules as well as strongly conventional but weakly moral rules, because these two types of rules represent different ways of meeting the normative threshold of being sufficiently worth following from the juridical evaluative perspective, where conventions matter greatly but so does the morality of rules. This seems to me to be the main virtue of the strain of anti-positivism I have described: it achieves a better extensional fit than positivism as well as traditional versions of anti-positivism, without devolving into a gerrymandered theory of law.

This brings us to a second theoretical virtue: the view captures and explains the unity of our concept of law. The inclusive anti-positivist does not purchase extensional adequacy at the disjunctivist's price of saying legality is sometimes wholly grounded in social properties and in other cases wholly grounded in optimific moral properties. This would be implausible because, in general, non-disjunctive phenomena do not have as independent full grounds two entirely distinct types of facts. Social/empirical facts about a rule's conventionality and moral facts about a rule's being morally favored are intuitively quite different propositions.⁵⁰ A non-disjunctive type of fact cannot be both wholly grounded in B-facts and wholly grounded in C-facts, when B-facts and C-facts are entirely dissimilar. The disjunctivist might try to defend her claims on semantic grounds, arguing that the term "law" is polysemous: we use it to refer to two very different kinds of phenomena. But if "law" were like the English word "bank," we would expect to find some natural language that disambiguates the two senses by giving them different names (like "berge" and "banque" in French). We do not find

50 Moore, *Principia Ethica*.

this disambiguation in the case of “law.” On the contrary, we find that the variety of legal rules exhibits an appearance of unity.⁵¹

Inclusive anti-positivism vindicates this appearance. The concept of law is the concept of an objective similarity class. It is the concept of a normative similarity possessed by a set of rules, appreciable from an evaluative perspective requiring enculturation in the legal profession. Relatedly, it is always a combination of moral and social properties of rules that grounds their legality, although the mix might differ in individual cases, just as an object’s redness can be grounded in its being one of a range of determinate shades of red, with variable hue, chroma, and brightness. Another helpful comparison may be found in what Kovacs calls “aggregative cluster concepts” like “is bigger than,” which combines volume, length, and mass but without a precise trade-off function.⁵² The analogy with redness and other properties which give rise to an objective similarity or natural unity is intended very seriously. A theory of law is attractive to the extent that it identifies legality with a property that can serve a useful theoretical role on account of its nature and that can explain how the moral and social characteristics of rules work together in generating law. Legality, as construed by inclusive anti-positivism, is just such a property. It is the *bona fide* normative property of rules one would be sensitive to were one’s evaluative perspective marked by a uniquely high solicitude for conventional ways of doing things but also recognizably moral values.

Inclusive anti-positivism incorporates a large part of the content of morality into law. One of the principal motivations for being an anti-positivist is the possibility of a moral critique and improvement of law from an *internal-to-law* perspective. It is always possible to morally criticize a system of rules from the external point of view. One might morally object to the rules of Monopoly because they encourage acquisitiveness. It is quite another thing to critique a system of rules using its own rules. The inclusive anti-positivist can say that while morally abhorrent rules were law in Nazi Germany, so was a rule requiring respect for human dignity, even though it was not recognized as such. The rule had enough morally going for it that it arguably met the legal normative threshold.⁵³ Had

51 Hart, *The Concept of Law*, ch. 1. To be sure, many of our concepts are revealed to be gerymandered or defective upon investigation. But the appearance of unity should be taken seriously as a theoretical starting point. Its vindication constitutes a theoretical virtue.

52 Kovacs, “The Deflationary Theory of Ontological Dependence.”

53 I am intentionally vague about several aspects of the relationship between social and moral support: e.g., how the supportive reasons are individually weighted (how much social support matters compared to moral support in the additive function which determines whether the legal normative threshold is reached) and the precise threshold of normative well-supportedness that suffices for legality. I have not taken a stand on these issues because, for one,

it been recognized as law by Nazi jurists, there might have been greater official resistance against the Third Reich. (That the laws of a regime can conflict is of course a commonplace.)

The significance of a robust incorporation of morality into law is hard to overstate. Consider the perspective of a conscientious judge concerned with abiding by her distinctively *legal* duties. Such a judge will not rule against the law, unless authorized by law to do so. If inclusive anti-positivism of the form I have described is true, it remains possible for a judge to comply with her legal duties while striking down morally abhorrent laws for conflict with other laws that are morally optimal even if weakly conventional. An account of law's nature which secures on conceptual grounds alone a moral critique of law that is, at the same time, a legal critique is a view worth taking seriously.⁵⁴

It is true that even the positivist can secure an internal-to-practice moral critique of a legal system, provided the right sort of conventional rules are in place.⁵⁵ But the availability of such a critique, given positivism, is socially contingent. The existence of the relevant conventionally embraced legal rules in modern jurisdictions which license moral critique is controversial. And the anti-positivist's central intuition is that it is an *essential* feature of legal systems that they render moral critique and improvement of law by jurists lawful. To put it differently, the lawfulness of such a critique in any jurisdiction seems intuitive before we learn anything about what conventions are in place in the jurisdiction.

The above remarks are not intended as a substitute for a full-fledged argument for inclusive anti-positivism. We have secured, however, the beginnings of an argument at the very least. Inclusive anti-positivism's extensional power (its compatibility with the judgments of experts concerning the laws of a community), its consistency with the apparent unity of the concept of law, its compatibility with a moral critique of law that is at the same time a legal critique, suggests a

I do not have a refined enough sense of the juridical evaluative perspective. But the more important reason for embracing vagueness is that it results in an explanatorily powerful theory of law. The vague, imprecise nature of the juridical evaluative perspective delivers a nice account of why we encounter disagreement at the normative margins, but convergence at the core—that is, agreement about the legality of rules that are both conventional and morally optimal. The phenomenon of concepts/properties constituted by imprecise functions is utterly familiar. That is the point of analogizing with “is bigger than” and “red.” Legality is of a piece with other determinables with vague natures which nevertheless exhibit a natural unity.

54 This is not just wishful thinking. Arguably, judges behave as though an internal-to-law moral critique is possible, and not because a convention authorizes such behavior (Dworkin, “Hard Cases”; Atiq, “Legal Obligation and Its Limits”).

55 Thanks to an anonymous reviewer for the objection.

plausible form of anti-positivism worthy of serious consideration. I suspect that the case for inclusive anti-positivism is even stronger than I have had occasion to explore here.⁵⁶ But my present aim has been a modest one, limited to framing and illuminating a novel hypothesis in the theory of legality in a way that shows that a bit of orthodoxy in legal philosophy concerning one of the most powerful objections to anti-positivism is mistaken. Anti-positivism is not *per se* vulnerable to easy counterexamples from the positivist.

4. WHAT ABOUT FALSE POSITIVES?

There are two kinds of counterexamples one can mobilize against a view. There are false negatives—cases of manifest legality that the view cannot capture. But there might also be false positives—rules that the view entails *are* law but that do not appear to be. Even if I am right that inclusive anti-positivism is invulnerable to extensional challenges based on false negatives, perhaps grounds for an extensional challenge remain. Is it not obvious that a rule requiring respect for human dignity failed to be law in Nazi Germany?

The focus on false negatives is well motivated. An extensional challenge based on the denial of the legality of weakly conventional yet morally optimistic moral principles would be far less compelling than a challenge based on the legality of Nazi rules. Everyone agrees that the legality of rules is often obscure. Interpreters of law often struggle with the evidence to determine what the law is on hard legal questions.⁵⁷ The obscurity of law explains failures to appreciate the legality of rules.⁵⁸ By contrast, it is much harder to explain away persistent positive intuitions of a rule's legality. The property of being law is not the kind to be mistakenly detected by a large number of reasonable interpreters of law. It

56 The imprecise nature of the juridical evaluative perspective may explain why we encounter disagreement with respect to cases of law involving rules which score highly in terms of social support but not moral support and vice versa, as well as general agreement about the legality of rules which enjoy both forms of normative support. Everyone agrees about the legality of rules that are both strongly conventional and morally optimal, because these rules easily surpass the threshold of normative support required for legality. Cases of marginal legality are more likely to inspire disagreement.

57 Dworkin, "Hard Cases."

58 The inclusive anti-positivist can explain why the legality of morally optimistic (but weakly conventional rules) might be obscure. The legality of rules is a function of their meeting a vague normative threshold. It is harder to recognize the legality of rules that just barely meet the threshold because they score well along a single evaluative dimension. If morally optimistic but barely conventional rules are law, they are marginal cases of legality at best.

is hard to see, in other words, why there would be persistent illusory manifestations of legality.

There is another difference between the positive and negative extensional challenge. The mere fact that inclusive anti-positivism offers a different account of law's extension than positivism is hardly a problem. The problem arises if the positivist can mobilize theory-neutral intuitions of legality against the anti-positivist. That is what makes the false negatives so damning. Legal theorists who have thought long and hard about the legality of rules independently of the philosophical debate strongly judge that the Nazis had a legal system, and that the Fugitive Slave Act was law. So, to have a viable theory, anti-positivists should worry about accommodating these cases.

It is much harder to build a theory-neutral case against the anti-positivist based on the alleged false positives. Judges unexposed to the positivism/anti-positivism debate act as if moral principles are law. Even some positivists (inclusive positivists) agree that morally optimific principles can be (and in many jurisdictions are) law. They just have a different account of why, fundamentally, they are law—namely, in terms of an alleged convention within the jurisdiction allowing judges to treat morally optimific principles as law. The case where inclusive positivism and inclusive anti-positivism deliver incompatible verdicts concerns morally optimific (yet weakly social) rules in a jurisdiction where no widely accepted convention exists of treating morally optimific principles as law. And it is implausible that *this* extensional dispute can be resolved on pre-theoretical grounds alone. The case is too contested, independently of philosophical argument, for it to be decided based on the deliverances of pre-theoretical intuition. This is not a decisive showing that the inclusive anti-positivist is right about the case. It is a decisive showing, I submit, that there are no easy counter-examples to legal anti-positivism.⁵⁹

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REFERENCES

- Alexy, Robert. "Legal Certainty and Correctness." *Ratio Juris* 28, no. 4 (December 2015): 441–51.
- Aquinas, Thomas. *The Summa Theologiae of St. Thomas Aquinas*. 2nd and rev. ed. Translated by Fathers of the English Dominican Province, 1920.
- Atiq, Emad H. "Legal Obligation and Its Limits." *Law and Philosophy* 38, no. 2 (2019): 109–47.
- . "Supervenience, Repeatability, and Expressivism." *Noûs* (forthcoming). Published ahead of print, April 1, 2019. <https://doi.org/10.1111/nous.12284>.
- Austin, John. *The Province of Jurisprudence Determined*. Cambridge: Cambridge University Press, 1995.
- Blackburn, Simon. *Spreading the Word*. Oxford: Oxford University Press, 1984.
- Blackstone, William. *Commentaries on the Laws of England*, vol. 1. Oxford: Clarendon Press, 1765.
- Coleman, Jules. *The Practice of Principle*. Oxford: Oxford University Press, 2001.
- Dworkin, Ronald. "Hard Cases." *Harvard Law Review* 88, no. 6 (April 1975): 1057–1109.
- . "The Law of the Slave-Catchers." *Times Literary Supplement*, December 5, 1975.
- . *Law's Empire*. Cambridge, MA: Harvard University Press, 1986.
- . "The Model of Rules." *The University of Chicago Law Review* 35, no. 1 (1967): 14–46.
- . "'Natural' Law Revisited." *University of Florida Law Review* 34, no. 2 (1982): 165.
- Finnis, John. *Natural Law and Natural Rights*. Oxford: Oxford University Press, 1980.
- Gibbard, Allan. *Thinking How to Live*. Cambridge, MA: Harvard University Press, 2003.
- Greenberg, Mark. "The Moral Impact Theory of Law." *Yale Law Journal* 123, no. 5 (March 2014): 1118–1625.
- Hare, R. M. *The Language of Morals*. Oxford: Clarendon Press, 1952.
- Hart, H. L. A. *The Concept of Law*. 2nd ed. Oxford: Clarendon Press, 1994.
- Johnston, Mark. "The Authority of Affect." *Philosophy and Phenomenological Research* 63, no. 1 (July 2001): 181–214.
- Kelsen, Hans. *Pure Theory of Law*. 2nd ed. Berkeley, CA: University of California Press, 1960.
- Kovacs, David Mark. "The Deflationary Theory of Ontological Dependence." *The Philosophical Quarterly* 68, no. 272 (July 2018): 481–502.

- Little, Margaret Olivia, and Coleen McNamara. "For Better or Worse: Commentatory Reasons and Latitude." In *Oxford Studies in Normative Ethics*, vol. 7, edited by Mark C. Timmons, 138–60. Oxford: Oxford University Press, 2017.
- Marmor, Andrei. *Philosophy of Law*. Princeton: Princeton University Press, 2011.
- . *Social Conventions*. Princeton: Princeton University Press, 2009.
- Mavrodes, George I. "Conventions and the Morality of War." *Philosophy and Public Affairs* 4, no. 2 (Winter 1975): 117–31.
- Moore, G. E. *Principia Ethica*. Cambridge: Cambridge University Press, 1962.
- Muñoz, Daniel. "All Reasons Are Moral." Unpublished manuscript.
- Pomeroy, John Norton. *A Treatise on Equity Jurisprudence*. San Francisco: Bancroft-Whitney Company, 1907.
- Radbruch, Gustav. "Vorschule der Rechtsphilosophie." In *Gesamtausgabe*, edited by Arthur Kaufman. Heidelberg: C. F. Müller Verlag, 1990.
- Rawls, John. *Political Liberalism*. New York: Columbia University Press, 1993.
- Raz, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford: Oxford University Press, 1979.
- . *Engaging Reasons: On the Theory of Value and Action*. Oxford: Oxford University Press, 1999.
- Rosen, Gideon. "Metaphysical Dependence: Grounding and Reduction." In *Modality: Metaphysics, Logic, and Epistemology*, edited by Bob Hale and Aviv Hoffmann, 109–36. Oxford: Oxford University Press, 2010.
- Scanlon, T. M. *Being Realistic about Reasons*. Oxford: Oxford University Press, 2014.
- . *What We Owe to Each Other*. Cambridge, MA: Harvard University Press, 1998.
- Schiffer, Stephen. *The Things We Mean*. Oxford: Oxford University Press, 2003.
- Schroeder, Mark. "The Humean Theory of Reasons." In *Oxford Studies in Metaethics*, vol. 2, edited by Russ Shafer-Landau, 195–219. Oxford: Oxford University Press, 2007.
- Shapiro, Scott. *Legality*. Cambridge, MA: Harvard University Press, 2011.
- Thomasson, Amie L. *Ontology Made Easy*. Oxford: Oxford University Press, 2014.
- Waluchow, W. J. *Inclusive Legal Positivism*. Oxford: Clarendon Press, 1994.
- Williams, Bernard. "Internal and External Reasons." In *Rational Action*, edited by Ross Harrison, 101–13. Cambridge: Cambridge University Press, 1979.
- . *Moral Luck*. Cambridge: Cambridge University Press, 1981.
- Woods, Jack. "The Authority of Formality." In *Oxford Studies in Metaethics*, vol. 13, edited by Russ Shafer-Landau, 207–29. Oxford: Oxford University Press, 2018.

JUDICIAL CORPORAL PUNISHMENT

Ole Martin Moen

PUNISHMENTS have an air of paradox to them. In a typical case, we punish a criminal because they have inflicted a serious harm onto another, for example by committing robbery, battery, rape, or arson. In contrast to the clearly helpful responses that are provided by hospitals, domestic violence shelters, and fire departments, however, the responses that we call *punishments*, and that are provided by justice departments, do not aim at alleviating harms that have previously been inflicted. Rather, they aim at inflicting further harms, this time onto the perpetrator of the crime.

That a punishment is intended to inflict harm, at least temporarily, onto the person who is punished is arguably a necessary condition for an action to qualify as a punishment in the first place. If we sentence a man to forced rehabilitation, this might well be unpleasant for him, but unless the unpleasantness is part of what we aim for, then we are not trying to punish him—and in that case we might just as well try to make the rehabilitation comfortable. Admittedly, we often seek simultaneously *both* to rehabilitate *and* to punish; we might, for example, want to help a convicted spousal abuser to become better at controlling his anger, but because he beat his wife so violently, we also want him to suffer a bit along the way to rehabilitation. In that case, what we do counts both as rehabilitation and as punishment.

Why punish? There are, famously, two classical justifications of punishment. According to the retributivist justification some people *deserve* to be punished: they have done something wrong and they ought to pay for it so that justice will be restored, or come closer to being restored. The wife beater in the above example, we might think, deserves to suffer because of the suffering that he inflicted on his wife. The other classical justification, the consequentialist justification, does not depend on desert, but on the punishment being expected to discourage the convict himself and/or others from committing similar crimes in the future and, perhaps, to discourage private revenge. Contrary to the retributivist justification, which is backwards looking, the consequentialist justification is forward-looking. (Notice that incapacitation and rehabilitation, although

they might be aims of incarceration, are not here taken to be aims of *punishment*. More on this below.)

In this paper I will not take sides in the debate about the ethical justification of punishment. For all I argue here, retributivism might be right, consequentialism might be right, or some other theory—perhaps a hybrid theory—might be right.¹ I shall assume, however, that *some* justification of punishment is sound, such that in at least some cases we are justified in punishing at least some people for at least some of their actions.²

If we accept that we are sometimes justified in punishing, we must answer a number of questions before we can put a punishment regimen into practice:

1. Which actions should be punishable?
2. How severe should the various punishments be?
3. Which method(s) of punishment should be used?

Most normative discussions about punishment are concerned with the first and the second question. The third question, the question of method, is seldom debated other than in relation to capital punishment. Outside of that debate, it is often assumed that the range of permissible methods is restricted to incarceration, fines, and service to society.

In this paper I ask if judicial corporal punishment might also be justifiable. More specifically, and for the sake of giving the discussion an unambiguous target, I shall consider the method of judicial caning that is used in Singapore. A crucial feature of this punishment method is that it is very painful, yet it involves only very small long-term health risks. The upper limit of strokes in Singapore is twenty-four; it is carried out on the buttocks; the convict wears protective gear to avoid damage to spine and kidneys; and a medical doctor oversees the process. The punishments take place inside prisons, never in public.³ When I speak of caning in what follows, I refer to caning as it is carried out in Singapore.

I shall argue that if incarceration is a justifiable method of punishment, then so is this type of judicial corporal punishment. Although this is an unpopular position, a small number of contemporary academics defend (or tentatively defend) certain forms of corporal punishment. Among criminologists, Graeme Newman defends electroshock by appeal to a retributive theory of punishment, and Peter Moskos makes the case that convicts should be given the option to

- 1 I shall remain agnostic on the question of whether my thesis is compatible with a communicative theory of punishment. See Duff, *Punishment, Communication, and Community*.
- 2 For a strong case against punishment, see Boonin, *The Problem of Punishment*.
- 3 World Corporal Punishment Research, “Judicial Caning in Singapore, Malaysia and Brunei.”

choose corporal punishment as an alternative to incarceration.⁴ Among philosophers, David Benatar defends the corporal punishment of children, and Geoffrey Scarre defends, on utilitarian grounds, corporal punishment both in schools and in the judicial system.⁵ My argument for the judicial use of corporal punishment in this paper lies closest to Scarre's, but I do not tie my argument to utilitarianism, and while Scarre discusses historical and conceptual issues in greater detail than I do here, I investigate how corporal punishment relates to other forms of state violence, to incapacitation and rehabilitation, and to what we know about cognitive biases.

The most elaborate critique of corporal punishment is Patrick Lenta's *Corporal Punishment: A Philosophical Assessment*.⁶ Lenta is primarily concerned with criticizing the corporal punishment of children, but he also advances a number of arguments against its judicial use.

Since I discuss many arguments in this paper, I will be able to address some of them only rather briefly. By systematizing the debate and providing a bird's-eye perspective on (what I take to be) the strongest arguments both for and against judicial corporal punishment, I hope to show that in spite of its downsides—which are real and should be taken very seriously—the overall case in favor of using this punishment method is strong. I also hope to show, by way of example, that by giving corporal punishment serious consideration we will be in a position to think more clearly and honestly about what we are doing when we punish.

I start by discussing what I call the naive objections to corporal punishment. I then present six central advantages of corporal punishment (compared to incarceration) before I consider a number of better objections.

1. THE NAIVE OBJECTIONS

A straightforward objection to judicial corporal punishment, including judicial caning, is that it harms convicts, and that this gives us reason, perhaps sufficient reason, to reject it. The first premise of this argument, that caning harms convicts, is certainly true. Caning makes convicts much worse off at the time when it happens and, in many cases, also worse off in the future. The fact that a particular method of punishment harms the person who is punished, however, cannot by itself constitute an objection in a debate about which method of punishment we should use, because *all* punishments aim at inflicting some form of harm. To

4 Newman, *Just and Painful*; Moskos, *In Defense of Flogging*.

5 Benatar, "Corporal Punishment"; Scarre, "Corporal Punishment."

6 Lenta, *Corporal Punishment*.

reject a punishment method simply by appeal to the fact that it harms the person who is punished is therefore not to reject one punishment method among others, but rather, to reject the very idea of punishment. The objection is therefore naive in the sense that it does not take adequately into account that if we accept that we should sometimes punish, we accept that we should sometimes intentionally cause harm, at least temporarily.

According to another variant of the objection, corporal punishment should be rejected, not simply on the grounds that it is harmful, but on the grounds that it is *too* harmful. On this view, the pain that convicts feel when caned is so excruciating that it is impermissible. This is a better objection. This objection is also naive, however, since it seems that many variants of corporal punishment are overall less harmful than many variants of widely accepted punishments, such as incarceration. In making this point, Moskos asks us to consider what one should choose if one had to choose either five years in prison or ten lashes with a whip.⁷ Although ten lashes would be very bad, so surely would five years in prison. If I were confronted by this choice, I would almost certainly choose the ten lashes. If you have the same priorities, then it seems that you also judge ten lashes to be a lesser harm overall than five years in prison. But if that is your view, and you simultaneously think that five years in prison is sometimes a justifiable punishment, then you cannot reject ten lashes simply by saying that it is too harmful. You would need other arguments in order to reject this type of punishment. (If ten lashes and five years does not convince you, subtract lashes and add years until you reach the point at which you would prefer the lashes. Then ask yourself if the corresponding number of years is a punishment that you think states may rightfully impose.)

A lesson that we can learn from considering these two objections is that the question of punishment *method* (question three above) is different from the question of punishment *severity* (question two above). Many corporal punishments, for example those involving just one or two lashes, are clearly less severe overall than long-term prison sentences. It is important to keep in mind, moreover, that when we consider whether judicial corporal punishment can be justified, we should not just consider the most extreme versions (such as extreme beatings that render the victim incapacitated for weeks, months, or life), just like when we consider incarceration, we should not just consider imprisonment for life under terrible conditions. If we argue only against the most severe variants of a punishment method, we leave open the question of whether less severe variants might nevertheless be justified.

Just as the question of method is distinct from the question of severity, the

⁷ Moskos, *In Defense of Flogging*, 9.

question of method is also distinct from the question of which actions should be punishable (i.e., question one above). In some countries, criticizing the government can lead to corporal punishment. In 2014 Raif Badawi was sentenced to 1,000 lashes as a punishment for “insulting Islam” by blogging about human rights issues in Saudi Arabia. I, a cautious supporter of judicial corporal punishment, believe that I can criticize Saudi Arabia’s treatment of Badawi as harshly as anyone. My criticism, however, would not simply be that what Saudi Arabia did is wrong because it inflicted a corporal punishment, since on my view, the fact that a punishment is a corporal punishment is insufficient to reject it. The problem, I would say, is that Badawi was given a very severe punishment for doing something that should not be a punishable offense at all. Had he been imprisoned for life for the same actions, it could have been equally (or perhaps even more) appalling.

In what follows I shall not consider merciless beatings for criticizing an authoritarian state. Hopefully, we all agree that that is wrong, so there is little reason to debate it. What I shall consider is caning as a punishment for crimes that should (presumably) be punishable offenses anyway, such as rape, assault, robbery, and corruption.

2. SIX ADVANTAGES OF CORPORAL PUNISHMENT

What considerations count in favor of judicial corporal punishment? One advantage of corporal punishment, which has been pointed out by Newman, is that it “punishes the offender, and only the offender, for the offense. Prison in contrast punishes innocent people, such as the offender’s family, by depriving it of his or her support.”⁸

Since the collateral damage from incarceration is vast, this is a significant comparative advantage. Every year thousands of children have their families broken apart because a parent is incarcerated, and many of these children must relocate due to financial difficulties or be turned over to foster care. In many cases, incarceration also deprives other dependents, such as the convict’s spouse or parents, of a caregiver.⁹ Here corporal punishment has an advantage. Although it is certainly distressing to know that a family member receives corporal punishment, the family need not be broken up for more than a few days, and since the convict will almost always be able to return to normal life again soon, the punishment is much less likely to bring financial ruin.

Some children of convicts ought to be turned over to foster care. It is difficult

8 Newman, *Just and Painful*, 8.

9 Parke and Clarke-Stewart, “From Prison to Home.”

to deny, however, that it is better if this decision can be made separately and is not a consequence of the very method of punishment.

A second and related advantage is that corporal punishment does not destroy the social and economic networks that convicts depend upon for successful reintegration into society after they have served their sentence. Many convicts lose their work, families, and relationships as a result of imprisonment, which in turn can make it difficult for them to reintegrate into society after release and comparatively more tempting to return to crime. Corporal punishments, which concentrate the punishment into a short time frame, make this much less of a problem.

Admittedly, some convicts have no work and no dependents, and some benefit from being isolated from a criminal environment. My thesis in this paper, however, is that corporal punishment is *sometimes* justified, not that incarceration is *never* justified. I certainly acknowledge that in some cases, incarceration is the better option.

A third advantage is that corporal punishment does not cause convicts to socialize over long stretches of time with other convicts. In prison this is virtually unavoidable, which is unfortunate insofar as we want to discourage convicts from returning to crime after they are released, and insofar as forming relationships with other convicts is criminogenic.¹⁰

A fourth advantage is that, arguably, corporal punishment is fairer than incarceration. Today, inmates that are physically intimidating will often be safer in prison than less intimidating inmates, who are more likely to be extorted, abused, and raped. Human Rights Watch estimates that, *in sum*, approximately 140,000 prison inmates are raped in the United States every year.¹¹ Transgender inmates are particularly vulnerable to both sexual and nonsexual violence.¹² We also know that inmates that are convicted of certain types of crimes, especially sexual offenses involving children, tend to be treated very badly in prison.¹³ Even if we think that child sex offenders deserve harsh punishment, we should codify that into our laws and not let the severity of their punishments depend on morally arbitrary factors such as who the convict's co-inmates are and how intimidating they are compared to the convict. It could be argued that the obvious response to this problem is to work to improve the safety of prison inmates. I agree that we ought to do that, but until or unless we succeed, corporal punishment is nevertheless advantageous in this respect.

10 For a detailed discussion of this point, see Scarre, "Corporal Punishment"; and Moskos, *In Defense of Flogging*.

11 Mariner, *No Escape*.

12 Edney, "To Keep Me Safe from Harm?"

13 Trammell and Chenault, "We Have to Take These Guys Out."

A fifth advantage is that corporal punishment is likely to have a stronger deterrent effect than incarceration per unit of harm that is inflicted on the convict. One reason for this is that the deterrent effect of incarceration is small.¹⁴ Due to the lack of research on corporal punishment, comparisons are bound to be speculative, but a few things should be noted.¹⁵ First, we know from Daniel Kahneman's work on cognitive biases that people tend to judge the value of a future outcome based on prototypical instances of the outcome, while systematically failing to give sufficient weight to quantitative aspects, such as duration.¹⁶ Insofar as duration neglect applies to deterrence, we should expect to get a greater deterrence effect in return for each unit of harm that we inflict the greater the extent to which the harshness of the punishment is conveyed in the prototype. In that case, caning is likely to have a stronger deterrent effect than incarceration: while the prototype of incarceration (being in a prison cell) is itself not very upsetting, since the harshness is mainly produced by the duration, the prototype of caning (being caned) is much more likely to trigger strong aversive reactions.

Second, individuals that are prone to become criminals appear, on average, to have higher time-discounting rates (i.e., they give less priority to what is far into the future) than the population at large.¹⁷ Insofar as time-discounting rates are relevant to deterrence, we should expect to get more deterrence in return for each unit of harm that we inflict the closer in time the punishment follows from the crime. Although it is true that both incarceration and caning can start right after sentencing, the problem with incarceration is that the fourth year of a four-year prison sentence must, by necessity, lie at least three years into the future. By contrast, all twenty strokes with a cane can be delivered on the same day. Duration neglect and time discounting thus count in favor of caning. Although we should, of course, be careful not to infer causation from mere correlation, in discussing the deterrence potential of caning it should be pointed out that Singapore—where caning is a common method of punishment used for thirty-five different criminal offenses—is consistently ranked as having one of the lowest crime rates in the world.¹⁸

14 A central work on the limited deterrence effect of incarceration is Hirsch, Bottoms, Burney, and Wikström, *Criminal Deterrence and Sentencing Severity*. A large recent meta-analysis reached a similar conclusion, see Roodman, "The Impacts of Incarceration on Crime."

15 For a critical discussion of the findings of the Cadogan Committee of 1937, which evaluated the abolition of judicial corporal punishment in Britain, see Scarre, "Corporal Punishment," 300–302.

16 Kahneman, "Evaluation by Moments, Past and Future."

17 Åkerlund, Golsteyn, Grönqvist, and Lindahl, "Time Discounting and Criminal Behavior."

18 For a comparison with the United States, see NationMaster, "Crime: Singapore and United States Compared."

A final advantage is that corporal punishment is much cheaper than incarceration. Incarceration in the United States costs, on average, \$30,000 per inmate per year.¹⁹ This is only the direct cost paid by states; in addition, there is the cost incurred in cases where the convict would otherwise have been a productive member of the workforce. While the exact cost of caning has not been determined, it is much less time consuming and therefore also much less labor and capital intensive. Of course, cost is not all that matters in selecting a punishment method, but insofar as the resources that are currently spent on incarceration could have been spent on nobler goals (such as rehabilitation, compensation to victims, or improved conditions in prisons for convicts that must still be incarcerated), cost-effectiveness should be given some weight.

These six advantages of caning, taken together with the fact that caning cannot be rejected out of hand by the naive objections, constitute a *pro tanto* case for introducing caning into our penal repertoire. Let me now examine the objections.

3. THE BETTER OBJECTIONS

3.1. *Torture*

One important objection to corporal punishment, including caning, is that it is a form of torture, and that this makes it wrong. Is caning a form of torture? The answer depends on how we define torture. In the United Nations Convention against Torture, torture is defined as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes [as] punishing him for an act he or a third person has committed or is suspected of having committed . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.²⁰

Since caning involves “severe pain or suffering,” and is inflicted as a legal punishment, it very likely qualifies as torture according to the UN definition. The challenge, however, is that according to this definition, many mainstream variants of incarceration also seem to qualify as torture.

In “What’s Wrong with Torture?” David Sussman argues that it is central to

19 United States Bureau of Justice Statistics, “Direct Expenditures by Criminal Justice Function, 1982–2007.”

20 United Nations General Assembly, Convention against Torture.

torture that “the victim takes her tormentor to be someone who can do anything he wants to her,” that the victim is “exposed to a will that appears largely if not completely arbitrary,” and that the tormentor is indifferent to the victim’s rights.²¹ In the case of caning, however, the person who inflicts the punishment cannot do whatever they want and the convict knows it. The convict also knows that within a few minutes the caning will come to an end, and they know for certain that they will not be killed. Moreover, the convict’s punishment is not arbitrary and their rights are clearly defined. Therefore, although caning has some central features in common with torture—most obviously the deliberate infliction of intense pain—it is also different in important respects. Caning might be categorized as torture, but it might also be a borderline case.²²

I would like to suggest that not very much hinges on whether we categorize caning as torture. Although the way we categorize caning is relevant to the *descriptive* question of which laws would need rewriting for caning to be introduced into the penal code of a given country, it is not so relevant to the *normative* question of whether caning is a punishment that our laws ought to permit in the first place. In order to answer the normative question, we must confront what is arguably the more fundamental and substantive question at stake in assessing corporal punishments *vis-à-vis* incarceration, namely: Is it more justifiable to inflict mild- to medium-intensity psychological pain over long stretches of time (as in the case of incarceration) than to inflict very intense bodily pain over a very short stretch of time (as in the case of caning)?

3.2. Degradation

One substantive argument against the infliction of intense bodily pain is that it is degrading. Lenta argues that the reason it is degrading is that the “reactions on the part of the offender to the intense physical pain of judicial corporal punishment will more often than not be immediate and reflexive, not based on reasons so much as causes” and that “an offender who undergoes judicial corporal punishment may experience not only intense physical pain but also the emotional suffering resulting from his humiliating loss of self-control.”²³

It is true that an offender who is caned experiences emotional suffering resulting from a humiliating loss of self-control. In considering this objection, however, we must keep in mind that the same is very often true of offenders

21 Sussman, “What’s Wrong with Torture?” 7–8.

22 Patrick Lenta argues that judicial corporal punishment is torture, but in his view, twisting someone’s arm is also torture. Indeed, it is unclear if Lenta also categorizes standard forms of incarceration as torture. See Lenta, “Is Corporal Punishment Torturous?”

23 Lenta, *Corporal Punishment*, 200, 208.

that are incarcerated. Incarceration is not peaceful confinement to a prison cell; it includes frequent strip searches, intense surveillance, and detailed regulation of life, and for many inmates, it results in extreme desperation, isolation, lack of self-control, and destruction of character.²⁴ Although it is undeniable that caning is much more degrading *per time unit*, caning lasts only for a few minutes whereas incarceration lasts for months or years. Given the psychological hardships associated with incarceration, it is therefore not clear that incarceration is *in sum* any more degrading than incarceration.

3.3. *Invasiveness*

A closely related argument, also proposed by Lenta, is that corporal punishment is more *invasive* than incarceration.²⁵ Although an incarcerated man's body is forcibly locked in a prison cell, and although he might be forced to wear prison clothes and to comply with prison rules, the punishment does not invade his body the way caning does.

It is true that caning invades the body in a way that incarceration does not. We cannot take for granted, however, that bodily invasions are the only kinds of invasions that matter morally, or even that they are the invasions that matter the most. If we take a punishment to be invasive in case it strikes at and harms something intimate and personal, then incarceration will often be a very invasive punishment, the reason for which is that it strikes at a convict's relationships and emotions. Scarre, in criticizing incarceration, observes that "grief, disappointment, envy, frustration of projects, disillusion, boredom, lovelessness, lack of self-esteem or the esteem of others, insecurity, anger, etc. can be quite as severe spoilers of life as any physical sufferings."²⁶ Moreover, since incarceration often takes away from convicts years that they could have spent with family or friends, and since they will never get that lost time back, incarceration frequently robs convicts of some of the most valuable and meaningful things in life. The result is that while we might perhaps be able to pay proper damages to someone who has been wrongfully caned, it is much harder to see how we could properly compensate anyone for having missed several years of their children's lives.

3.4. *Teaches the Wrong Lesson*

It can also be argued that caning teaches the wrong lesson: the lesson that violence is an acceptable method of conflict resolution. "Corporal punishment," Lenta writes, is "a type of punishment that humiliates and shames offenders"

²⁴ Jacobs, "From Bad to Worse."

²⁵ Lenta, *Corporal Punishment*, 208–9.

²⁶ Scarre, "Corporal Punishment," 306.

and that is therefore “less likely to be successful in driving home the message that their degradation of their victims is morally unacceptable.”²⁷ I concede that in some cases, caning might seem paradoxical. If we cane a convict for violent assault, we can find ourselves in a situation where we are hitting someone in order to teach them that hitting is wrong. Paradoxical as this might seem, I do not think this is a weighty objection to caning, since it is uncontroversial that punishments may resemble crimes. A person can be fined for stealing money or incarcerated for kidnapping. In these cases we do not think that the reaction is paradoxical, the reason for which is presumably that we see that there is an important moral difference between, on the one hand, committing crimes, and on the other hand, inflicting a cost on those who commit crimes, irrespective of the surface resemblance of the two actions. It is unclear why this is a greater problem in the case of caning than in the case of fining or incarceration.²⁸

3.5. Violence

An alternative objection is that the problem with corporal punishment does not lie specifically in the apparent similarity between crime and punishment, but in the very violent nature of corporal punishment, which sanctions and normalizes violence. Judicial corporal punishment, Lenta argues, brutalizes us.²⁹ He argues that there is a danger that if we allow states to cane convicts, then even if this happens in prisons, out of public view, we undermine the taboo on violence in society.

This, I think, is Lenta’s strongest objection. If states act violently, they communicate that violence is an acceptable way to resolve conflicts, and this, in turn, might undermine important social norms that curb the use of violence.

In assessing the weight of the objection, we must keep in mind that states, through the military and the police, already use violence, and that most of us accept that they are sometimes justified in doing so. States, by their nature, hold a monopoly on violence, and must sometimes act violently. Here it might be said, in response, that the example is disanalogous, since when the police or the military use violence justifiably, they do so because it is *necessary*, but if a convict is caned that is not really necessary. I would like to suggest, however, that there is no morally relevant difference here. Although it is true that the police might have to act *urgently* in deciding, for example, whether or not to shoot at someone who has taken a hostage, we must keep in mind that in practical affairs, the claim that “*x* is necessary” presupposes some end that is conditional. In this example, shooting might be necessary *in order to* prevent the hostage taker from taking

27 Lenta, *Corporal Punishment*, 211.

28 David Benatar makes this argument. See Benatar, “Corporal Punishment.”

29 Lenta, *Corporal Punishment*, 197.

more hostages. It is not necessary in the sense that nothing else could happen and thus we could, if we wanted, have made laws that prevented the police from ever shooting at hostage takers. We do not want such laws, however, because of the negative effects that they would have.

We face the same conditional necessity in the case of corporal punishment. Given the way society is—and given that we want to create a significant deterrent effect in a way that is financially affordable and that does not ruin the convict's ability to reintegrate into society—it might well be necessary (again, conditionally necessary) to inflict a corporal punishment, since all of the alternatives might be even worse. The real difference between shooting a hostage taker and caning a criminal lies not in the *necessity*, but in the *urgency*, of reacting in a violent manner. It is difficult to see, however, how urgency itself could be morally relevant, other than, perhaps, by allowing a larger margin of error. Nevertheless, we should concede that caning is a violent act, and to the extent that it is *in sum* more violent than incarceration (in spite of its much shorter duration), this counts against caning.

3.6. *Fairness*

A different type of objection is that, contrary to what I argued earlier, caning is in fact *not* fairer than incarceration: people have different pain thresholds, whether due to biological factors or practice with handling violence and pain, and therefore caning is much worse for some than for others.³⁰

The weight of this objection depends on how we understand pain thresholds. On one interpretation, people with a high pain threshold are those that have fewer of the typical behavioral responses to pain. Some can clench their teeth and remain stoic even if the pain they experience is excruciating. To the extent that this is what we mean by a high pain threshold, differences in pain thresholds do not matter fairness-wise. Presumably, it is the *felt* pain that is the central bad-making property of caning, and the felt pain can be the same irrespective of the person's responses. In another interpretation, people with a high pain threshold are those that experience less pain from the same physical stimuli. Only to the extent that the latter is the right interpretation do differences in pain threshold matter justice-wise.

We should grant that some convicts are likely to feel less pain from a caning than others. We must keep in mind, however, that the same is true of the psychological pains of incarceration: While some inmates are thrown into depression for life after being incarcerated, others are much less affected. We should probably expect that, on average, social isolation harms extroverts more than

30 Lenta, *Corporal Punishment*, 207.

it harms introverts, and while some inmates find comfort in having a family on the outside, for others being separated from their family is excruciating. Unless we have a reason to believe that the differences in felt pain are greater in the case of caning than in the case of incarceration, this objection fails. Moreover, since incarceration has the added unfairness of being much more dangerous for certain groups (inmates that are not physically intimidating, transgender inmates, inmates serving time for child sex offenses, etc.), fairness considerations seem, *in sum*, to count somewhat in favor of caning.

3.7. Incapacitation and Rehabilitation

Another type of objection is that we often need to do more than just punish: we might also need, for instance, to incapacitate, i.e., to keep criminals away from civil society in order to prevent them from causing further harm. Lenta argues that while incarceration achieves this goal, corporal punishment does not.³¹ If, moreover, we reserve corporal punishment for relatively serious offenses, these will typically be just those offenses that require some form of incapacitation anyway, and since we must incapacitate these offenders by incarceration, inflicting corporal punishment will be redundant.

I concede that incarceration is sometimes a useful way to jointly achieve punishment and incapacitation. While incapacitation is needed in some cases, however, there are other cases—such as fraud, corruption, vandalism, theft, and burglary—that seldom require incapacitation. In these cases, caning might be a viable option.

Even in cases where we need to incapacitate, however, we cannot take for granted that incarceration is always the most effective means to achieve that goal. In some (but admittedly not all) cases, GPS-monitored house arrest, which is much cheaper than incarceration, can be sufficiently incapacitating. Today, this option must sometimes be rejected, not because house arrest fails to be sufficiently incapacitating, but because it fails to be sufficiently punishing. If we disentangle incapacitation and punishment, we can, when needed, sentence a convict to caning followed by house arrest.

In cases where we seek not just to incapacitate, but also to rehabilitate, we might have an additional reason to keep the responses separate, namely that punishment and rehabilitation have very different aims. While the aim of punishment is to make convicts worse off, at least temporarily, the aim of rehabilitation is to help them become better-functioning members of society. When rehabilitation and punishment are pursued jointly, the institution that helps convicts improve must also impose deliberate burdens. To the extent that this hinders

31 Lenta, *Corporal Punishment*, 198.

rehabilitation, we might have a reason first to inflict a corporal punishment and then to send a convict to a forced, yet not intentionally unpleasant, rehabilitation program. (To the extent that the rehabilitation is itself burdensome, the punishment would need to be made less severe or eliminated so that the convict is not burdened twice for the same crime.)

Here it might be said, in response, that rehabilitation encompasses much more than what goes on in formal rehabilitation programs. Reflection on past choices and feelings of regret are also important forms of rehabilitation. Lenta suggests that incarceration can “provide [offenders] with an opportunity for self-reform where conditions are such that inmates are not unacceptably degraded and constantly terrorized.”³² It is true that while incarceration gives room for thought, caning does not: it is over too quickly, and while it lasts, it produces only agony. Nevertheless, just as we cannot assume that locking people in a prison cell for a long time is the most effective form of punishment, we cannot assume that it is the most effective way to elicit reflection and regret. Reflection and regret can be pursued through many different means, including short-term incarceration, psychotherapy, empathy training, meeting with victims, and possibly even through psychopharmacology.³³

Incarceration is a package deal that combines punishment, incapacitation, and (sometimes) rehabilitation. Although this package is a useful response in the case of some crimes, in other cases it is too blunt a tool. Sometimes we can accomplish more of our goals, and do so at a lower cost and with less long-term damage, if we seek to pursue the goals of punishment, incapacitation, and rehabilitation separately. If we add caning to our penal repertoire, we get a means to do that.

3.8. Scars and Lasting Psychological Damage

Yet another objection is that caning can create physical scars. This a genuine downside to its most severe forms. In evaluating the weight of the objection, however, a few things must be kept in mind. On the one hand, many scars from caning are only temporary, and even permanent scars remain relatively private because they are confined to the buttocks. On the other hand, if we are concerned with scarring, then the caning method might be modified. In Singapore, military canings are carried out with a thinner cane and with a thin layer of protective clothing, which drastically reduces the likelihood of scars.³⁴ Although scarring is an important consideration, this problem can be minimized, and in-

32 Lenta, *Corporal Punishment*, 211.

33 For the last point, see Pugh and Maslen, “‘Drugs That Make You Feel Bad?’”

34 World Corporal Punishment Research, “Singapore: Caning in Military Forces.”

so far as prison environments are likely to be violent, incarceration can also leave permanent scars.

It might further be argued that caning causes lasting psychological damage, such as severe anxiety and PTSD. These are all well-known effects of torture.³⁵ Are these also effects of caning? Since there is little research on caning, we do not know, but this is certainly a danger. We must keep in mind, however, that the differences between caning and torture that we discussed above—such as the victim's having clear rights and knowing that her punishment will soon be over and will not kill her—give us some reason to believe that it is psychologically less harmful than torture. In caning, the harm lies just in the pain. We must also keep in mind that incarceration, which is our contrasting method in this paper, often causes lasting psychological problems, including hypervigilance, interpersonal distrust, social withdrawal, and PTSD.³⁶

Irrespective of which method of punishment we use, it is very difficult to punish in ways that do not cause lasting damage, especially if we wish to punish rather severely. The question is how we can minimize lasting damage. Given the available evidence, it is not at all clear that incarceration is better than caning in this respect.

A different appeal to psychological damage focuses on the damage done to the caner. This objection to judicial corporal punishment was considered by Jeremy Bentham, who suggested, idiosyncratically, that we might solve it by building a whipping machine that can carry out corporal punishments for us. He even made blueprints for such a machine.³⁷ Although whipping machines cannot be rejected out of hand, they are probably not necessary. Police officers and soldiers already carry out very harmful actions, even killings, and many of these actions seem worse than caning. I, at least, would much rather be caned than killed, and I would also much rather cane someone than kill them.

We must be careful, in assessing how bad it would be to carry out a caning, that we do not presuppose that caning is never justified. If caning is never justified, it would indeed be very bad to carry it out, but that takes for granted what is sought by the objection. If caning is otherwise justified, it might be a lesser evil to be opted for in situations that are inescapably very bad, and in that case, it becomes more difficult to explain why caning convicts is morally different from other forms of violent police and military operations. We must also keep in mind that while a country needs thousands of prison guards, it needs only a few

35 Kinzie, "Guidelines for Psychiatric Care of Torture Survivors."

36 Haney, "The Psychological Impact of Incarceration."

37 Bentham, *The Rationale for Punishment*, 82.

caners. The total damage to those who inflict punishments, therefore, might still be lower if we introduce caning.

It might be objected that jobs that involve caning would attract sadists. As long as the procedure is closely monitored and regulated, however, it is hard to see why this would be a significant problem. It is much more worrisome that people with sadistic inclinations end up in law-enforcement positions that are less ordered and less transparent, such as the position of being a prison guard.

3.9. *Slippery Slope*

It can be argued that if we accept judicial caning, we move onto a slippery slope where we will gradually accept even harsher punishments. As with all slippery-slope arguments, this argument can be interpreted either as a *logical* or as a *causal* argument. Interpreted as a *logical* slippery-slope argument, the argument states that if we accept caning, then we are also committed to accepting even harsher forms of punishment, which we ought not to accept. Thus construed, slippery-slope arguments are *modus tollens* arguments (if *P*, then *Q*; not *Q*; therefore, not *P*). Although it is true that caning would open up a new category of punishments in countries in which corporal punishment is currently banned, it is unclear why that would commit us, on pain of contradiction, to accept even harsher punishments. It is clearly consistent to claim that, granted the cost, the harm to the convict, and the deterrence, caning on the Singaporean model is exactly what we are justified in inflicting.

Interpreted *causally*, the slippery-slope argument states that if we accept caning, then it is a social and psychological fact that we will very likely come to accept even harsher punishments. This is an argument not about what is logically entailed, but about what is likely to result, causally, if we start caning convicts. This argument is better, but it is empirically vulnerable. There appears not to be any escalation in the severity of caning in countries that permit it. This, arguably, places the burden of proof on those who believe that caning would lead to escalation. Notice also that evidence of escalation alone would not be sufficient for the argument to be successful, for we would need to see not just any escalation, but an escalation *beyond what is justifiable* (an escalation within the range of the justifiable is presumably not morally problematic), and for the objection to be weighty in the context of our discussion, it would also have to be unlikely that we would be able to take deliberate legal measures to avoid such an escalation if we introduce caning.

Another variant of the causal slippery-slope argument appeals not to a legal expansion or intensification of corporal punishment, but to an increased acceptance of the corporal punishment of children. Although it is possible that insti-

tutionalizing judicial corporal punishments would have this effect, and though there is almost certainly a positive correlation between countries that accept judicial corporal punishment and countries that accept the corporal punishment of children, it does not follow that if a country starts accepting judicial corporal punishment, then it is thereby more likely to become more accepting of the corporal punishment of children. After all, it is not common to conclude that the things that the state may do to adult criminals are also things that parents or teachers may do to children. My own view is that children should *not* be subject to corporal punishment, one reason for which is that children are both more vulnerable and less responsible for their actions than adults. Moreover, while corporal punishment in the judicial system can be tightly regulated to prevent abuse, the corporal punishment of children will often take place in less regulated environments, which is riskier. Finally, one of the central advantages of judicial corporal punishment—namely that, unlike incarceration, it does not harm dependents and does not ruin the convict’s social and professional life in the future—does not apply in the case of children. For these reasons, I think it is puzzling that in the US and the UK, and in many other countries, the corporal punishment of children is permitted but the corporal punishment of adult criminals is condemned. It would have made more sense if it were the other way around.

3.10. *Barbarism*

The last argument that I shall consider is that corporal punishment is barbaric, and that this gives us reason to reject it. In order to assess this objection, we need some understanding of what we mean when we say that something is “barbaric.” On the one hand, it might mean that this is a punishment method used by “barbaric” regimes. Thus stated, the appeal to barbarism would be a guilt-by-association fallacy, since presumably no punishment method is made wrong *in virtue of* being used by barbaric regimes. The punishment method would have to be wrong in virtue of some other feature, which in turn could help explain why the regime, in employing the punishment, is barbaric. It is not clear that barbaric regimes would be any less barbaric if they replaced their corporal punishments with equally harsh forms of incarceration.

It could be suggested, alternatively, that corporal punishments provide barbaric regimes with a way to deter opposition. This is unconvincing. Long-term incarceration also deters opposition, and while long-term incarceration keeps political opponents locked away so they cannot participate in public debate, caning does not have this effect.

Another variant of the barbarism objection might be that in a country like the United States, which has a legacy of slavery and of whipping slaves, caning

mirrors a grave historical injustice. This could be a particularly pressing issue if, in practice, black Americans were caned disproportionately, which is not an unlikely outcome, given that black Americans already constitute a disproportionately large percentage of prison inmates.³⁸ Although this is a reasonable objection, it is a local one, and even in the American context we must ask why caning black Americans mirrors slavery to a larger degree than incarcerating black Americans, given that incarceration takes away black inmates' freedom and forces them to obey orders given by predominantly white prison guards.³⁹ If caning mirrors slavery, so, arguably, does incarceration. Given the additional hardships that incarceration imposes on black families in the United States, this is not a weighty objection.⁴⁰

The most straightforward variant of the barbarism objection is that caning is barbaric simply in virtue of being viscerally extremely upsetting. In this respect I think we must concede that caning is barbaric. I would like to suggest, however, that rather than being a reason to reject caning, this is in fact one of its virtues. There are two reasons for this. One reason is that the more viscerally upsetting a method of punishment is, the more deterrence we are likely to get per unit of harm that we inflict. To the extent that we want the most deterrence and the least overall harm, this is good, and from that perspective, the worst strategy that a society could choose would be to inflict punishments that are very harsh on convicts, yet whose harshness is hidden such that we get very little deterrence in return. This, sadly, might be a feature of incarceration.

The other reason why a judicial punishment ought to be viscerally upsetting is that when the government acts brutally and inflicts harm, it is better that it does so explicitly and honestly, and in a way that makes its brutality intelligible to its citizens. If we send someone to prison for a year, this might not strike us as a very drastic measure, even though it could ruin that person's life. If, on the other hand, we sentence them to ten strokes with a cane, it is much more difficult for us to punish under the guise of mere incapacitation and rehabilitation. Punishments *hurt*, and caning makes this painfully explicit to all parties.

4. CONCLUSION

Judicial corporal punishment might lead to increased acceptance of violence, and it might also give convicts lasting physical scars and mental health problems.

38 Black Americans constitute thirteen percent of the population at large and forty percent of the prison population. Sakala, "Breaking Down Mass Incarceration in the 2010 Census."

39 Gandy, "In Prisons, Blacks and Latinos Do the Time While Whites Get the Jobs."

40 Western and Wildeman, "The Black Family and Mass Incarceration."

While these downsides are real and should be taken very seriously, I have argued that they are insufficient to reject this method of punishment. Incarceration, which is today's norm, also involves violence (albeit less visibly), and we know for certain that it has lasting negative effects on the mental health of convicts. On the other hand, caning has several beneficial features: it costs less; it punishes only the convicts; it does not destroy the social and economic networks that many convicts depend upon to reintegrate into society after release; it does not cause convicts to socialize with other convicts over long stretches of time; it makes it harder for us to evade what we are doing when we punish; and it arguably gives us a greater deterrent effect in return for each unit of harm that we inflict.

For all I have argued here, it might be that we should not punish at all. It is possible that we should only incapacitate and rehabilitate. To the extent that we should continue to punish, however, corporal punishment in the form of caning is a method worth considering.⁴¹

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REFERENCES

- Åkerlund, David, Bart H.H. Golsteyn, Hans Grönqvist, and Lena Lindahl. "Time Discounting and Criminal Behavior." *Proceedings of the National Academy of Sciences* 113, no. 22 (May 31, 2016): 6160–65.
- Benatar, David. "Corporal Punishment." *Social Theory and Practice* 24, no. 2 (Summer 1998): 237–60.
- Bentham, Jeremy. *The Rationale for Punishment*. London: Robert Heward, 1830.
- Boonin, David. *The Problem of Punishment*. Cambridge: Cambridge University Press, 2008.
- Duff, Antony. *Punishment, Communication, and Community*. Oxford: Oxford University Press, 2003.
- Edney, Richard. "To Keep Me Safe from Harm? Transgender Prisoners and the Experience of Imprisonment." *Deakin Law Review* 9, no. 2 (2004): 327–38.
- Gandy, Rachel. "In Prisons, Blacks and Latinos Do the Time While Whites Get

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- the Jobs.” Prison Policy Initiative, July 10, 2015. https://www.prisonpolicy.org/blog/2015/07/10/staff_disparities.
- Haney, Craig. “The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment.” US Department of Health and Human Services, December 2001. <http://aspe.hhs.gov/basic-report/psychological-impact-incarceration>.
- Hirsch, Andreas von, Anthony E. Bottoms, Elizabeth Burney, and P.O. Wikström. *Criminal Deterrence and Sentencing Severity*. Portland, OR: Hart Publishing, 1999.
- Jacobs, Jonathan. “From Bad to Worse: Crime, Incarceration, and the Self-Wounding Society.” In *Justice and Penal Reform: Re-Shaping the Penal Landscape*, edited by Stephen Farrall, Barry Goldson, Ian Loader, and Anita Dockley, 8–26. New York: Routledge, 2016.
- Kahneman, Daniel. “Evaluation by Moments, Past and Future.” In *Choices, Values and Frame*, edited by Daniel Kahneman and Amos Tversky, 693–708. Cambridge: Cambridge University Press, 2000.
- Kinzie, David J. “Guidelines for Psychiatric Care of Torture Survivors.” *Torture* 21, no. 1 (November 1, 2011): 18–26.
- Lenta, Patrick. *Corporal Punishment: A Philosophical Assessment*. London: Routledge, 2018.
- . “Is Corporal Punishment Torturous?” *Journal of Applied Philosophy* 34, no. 1 (February 2017): 74–88.
- Mariner, Joanne. *No Escape: Male Rape in US Prisons*. Human Rights Watch Report, 2001. <https://www.hrw.org/reports/2001/prison/report.html>.
- Moskos, Peter. *In Defense of Flogging*. New York: Basic Books, 2011.
- NationMaster. “Crime: Singapore and United States Compared.” <http://www.nationmaster.com/country-info/compare/Singapore/United-States/Crime>.
- Newman, Graeme. *Just and Painful: A Case for the Corporal Punishment of Criminals*. 2nd ed. New York: Harrow and Heston, 1995.
- Parke, Ross D., and K. Alison Clarke-Stewart. “From Prison to Home: The Effects of Incarceration and Reentry on Children, Families, and Communities.” US Department of Health and Human Services, December 1, 2001. <https://aspe.hhs.gov/basic-report/effects-parental-incarceration-young-children>.
- Pugh, Jonathan, and Hannah Maslen. “‘Drugs That Make You Feel Bad’? Remorse-Based Mitigation and Neurointerventions.” *Criminal Law and Philosophy* 11, no. 3 (September 2017): 499–522.
- Roodman, David. “The Impacts of Incarceration on Crime.” Open Philanthropy Project, September 2017. http://files.openphilanthropy.org/files/Focus_

- Areas/Criminal_Justice_Reform/The_impacts_of_incarceration_on_crime_10.pdf.
- Sakala, Leah. "Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity." Prison Policy Initiative, May 28, 2014. <https://www.prisonpolicy.org/reports/rates.html>.
- Scarre, Geoffrey. "Corporal Punishment." *Ethical Theory and Moral Practice* 6, no. 3 (September 2003): 295–316.
- Sussman, David. "What's Wrong with Torture?" *Philosophy and Public Affairs* 33, no. 1 (January 2015): 1–33.
- Trammell, Rebecca, and Scott Chenault. "We Have to Take These Guys Out': Motivations for Assaulting Incarcerated Child Molesters." *Symbolic Interaction* 32, no. 4 (Fall 2009): 334–50.
- United Nations General Assembly, Resolution 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (December 10, 1984). <https://undocs.org/en/A/RES/39/46>.
- United States Bureau of Justice Statistics. "Direct Expenditures by Criminal Justice Function, 1982–2007," December 2011. <http://www.bjs.gov/content/pub/pdf/jee8207st.pdf>.
- Western, Bruce, and Christopher Wildeman. "The Black Family and Mass Incarceration." *Annals of the American Academy* 621, no. 1 (2009): 221–42.
- World Corporal Punishment Research. "Judicial Caning in Singapore, Malaysia and Brunei." 2019 ed. <http://www.corpun.com/singfeat.htm>.
- . "Singapore: Caning in Military Forces." <http://www.corpun.com/counsga.htm>.

HUMILITY AND ETHICAL DEVELOPMENT

Cathy Mason

Humility is a rare virtue and an unfashionable one and one which is often hard to discern. Only rarely does one meet someone in whom it positively shines, in whom one apprehends with amazement the absence of the anxious avaricious tentacles of the self. . . . And although [the humble man] is not by definition the good man perhaps he is the kind of man who is most likely of all to become good.

—Iris Murdoch, *The Sovereignty of Good*

HUMILITY CAN SEEM like a somewhat “unfashionable” virtue: the word can conjure an image of cringing servility, unduly romanticized feelings of inferiority, or a level of self-denial which seems ill placed in a life well lived.¹ But the term can also capture *something* of great ethical importance. In this paper, I will propose an account of humility that attempts to capture this moral significance. I will then explore the connection between humility and ethical development, seeking to understand why Murdoch identifies the humble person as likely to *become* good. If such a connection is vindicated, it suggests that humility is valuable twice over: it has intrinsic worth but is also instrumentally valuable, enabling us to become better people.

I will begin, in section 1, by gesturing to the everyday conception of humility through offering two literary examples in which the characters’ lack of humility is particularly salient. In section 2, I will explore Nicolas Bommarito’s account of

1 O’Hagan thus writes: “‘Humility’ might arouse worries about failures of self-respect” (“Modesty as an Excellence in Moral Perspective Taking,” 1120). Raterman states:

One suspicion that bears entertaining is that modesty [which Raterman takes to be interchangeable with humility] was labeled a virtue by those who had some interest in keeping people subjugated. To teach people that modesty is a virtue is to teach them to divert credit for their skills and accomplishments away from themselves, so that when they demand their “just desert,” the amount they take themselves to be justified in demanding (in terms of rights, money, influence, standard of living, etc.) will be less than if they took more credit. Perhaps they will even consider the very act of demanding their just desert to be immodest. (“On Modesty,” 221–22)

humility, which importantly brings together two distinct aspects of humility.² I will suggest, however, that it falls short of identifying the core of the notion. In section 3, I will offer my own account of humility as the trait of not valorizing relative superiority. I will suggest that this explains the way that humility manifests, and why such a trait would be virtuous. In section 4, I will briefly consider three objections. In section 5, I will argue that humility thus understood is importantly connected with ethical development. I will thus argue that the humble person is both good (in a certain respect) and, following Murdoch, likely to become good.³

1. TWO PARADIGMS OF LACKING HUMILITY

Despite Murdoch's contention that humility can often be hard to discern, it seems possible to identify at least some paradigm cases of it—as well as paradigm cases of individuals *lacking* humility. The two examples below are paradigm cases of lacking humility. In depicting the absence of humility, they illuminate something at the heart of what is crucial to it. The first is taken from Charles Dickens's *David Copperfield*, in which Uriah Heep continually asserts that he is “a humble man”:

“When I was quite a young boy,” said Uriah, “I got to know what umbleness did, and I took to it. I ate umble pie with an appetite. I stopped at the umble point of my learning, and says I, ‘Hold hard!’ When you offered to teach me Latin, I knew better. ‘People like to be above you,’ says father, ‘keep yourself down.’ I am very umble to the present moment, Master Copperfield, but I’ve got a little power!”

And he said all this—I knew, as I saw his face in the moonlight—that I might understand he was resolved to recompense himself by using his power.⁴

Uriah's continual claims to be humble here contribute to his overall unpleasantness. He claims to be humble in order to ingratiate himself with others, and he is ultimately driven by a desire to be superior and have power over others. His as-

2 Bommarito, “Modesty as a Virtue of Attention.”

3 Although this paper defends Murdoch's insight that humility is connected with ethical development, it should be noted that I am not seeking to provide an interpretation of specifically *Murdochian* humility. Moreover, the claim I seek to defend will be weaker than Murdoch's: I will argue that humility is important for ethical development, but will not explore the stronger claim that the humble person is most likely to become good.

4 Dickens, *David Copperfield*, 491.

sertions regarding his own humility are particularly striking because they seem to be self-undermining: his claims are not only untrue, but are also undermined by the very purpose to which he puts them. For instance, his self-satisfied claim to have “a little power” here sits uncomfortably following an assertion of his humility. Dickens thus describes him as exhibiting “false humility.” This striking feature of this case is frequently regarded as holding for all or at least many instances of asserting one’s own humility.⁵ An account of humility should explain why Uriah Heep is not humble and should shed light on the self-undermining nature of his claims.

A second example comes from George Eliot’s *Daniel Deronda*. The two protagonists of the novel, Daniel and Gwendolen, stand opposed in almost every respect. Gwendolen has for all of her life been surrounded by servile flattery, and at the beginning of the novel is complacent about her own superiority. She is particularly proud of her singing, until she is told by someone she recognizes as a true musical genius that she possesses no particular musical talent. Upon having this realization, Gwendolen ceases to be able to enjoy music. The following dialogue occurs when Daniel urges her to enjoy others’ singing and suggests that hearing excellence in others will entice Gwendolen to pick it up once more:

“I should rather think my resolution [to stop singing] would be confirmed,” said Gwendolen. “I don’t feel able to follow your advice of enjoying my own middlingness.”

“For my part,” said [Daniel], “people who do anything finely always inspire me to try. I don’t mean that they make me believe I can do it as well. But they make the thing, whatever it may be, seem worthy to be done. I can bear to think my own music not good for much, but the world would be more dismal if I thought music itself not good for much. Excellence encourages one about life generally; it shows the spiritual wealth of the world.”

“But then if we can’t imitate it, it only makes our own life seem the tamer,” said Gwendolen, in a mood to resent encouragement founded on her own insignificance.⁶

At this point in the novel, Gwendolen is no longer ignorant of the limits of her talent, but her inability to continue to enjoy music indicates that she lacks humility. Eliot contrasts this with Daniel’s ability to enjoy music despite his lack

5 Driver, “The Virtues of Ignorance” and *Uneasy Virtue*; Kellenberger, “Humility”; and Bommarito, “Modesty as a Virtue of Attention,” for example, all discuss the peculiarity of asserting that one is humble.

6 Eliot, *Daniel Deronda*, 148.

of exceptional talent: Gwendolen's inability to enjoy music seems like a natural continuation of her earlier arrogance.⁷ But Gwendolen's lack of humility is also a barrier to her *becoming* better. It prevents her from immersing herself in the world (as Daniel advises her), which means she is unable to escape her self-centered preoccupations. By the end of the novel she is a sadly stunted character. I will suggest that there is a general connection between humility and ethical development that explains this case.

In depicting individuals who lack humility, the above examples depict people who are vicious in different respects. Virtues are generally thought to stand in opposition to certain vices. Lack of a virtue, that is, is realized in the possession of opposing vices. Courage, for instance, is thought to stand in opposition to cowardice and recklessness. Lack of humility, too, entails possession of certain vices. In the above example, Uriah Heep is plausibly invidiously envious, and Gwendolen's moral unattractiveness lies in her arrogance or conceit. Both thus lack the humility that would overcome their vices.⁸

In order to understand these cases, it is first necessary to have a more explicit grasp of what humility is. In the next section I will explore one recent account of humility, but argue that it misidentifies the core of humility. In sections 3 and 4, I will then set forward and defend my own account, which sheds light on what is morally lacking in Uriah and why his assertions of humility are problematic. In section 5, I will explore the connection between my notion of humility and ethical development, explaining why it is that Gwendolen's lack of humility is a barrier to her ethical improvement.

2. BOMMARITO: HUMILITY AS A PATTERN OF ATTENTION

Bommarito has recently set forward an account of humility that he suggests captures its moral value.⁹ He argues that there is a distinctive subset of virtues that

- 7 Calhoun, "On Being Content with Imperfection," suggests that contentment with imperfection can itself be a kind of virtue.
- 8 Kellenberger, "Humility," describes humility as opposed to "the axis of pride and shame," and thus opposed to vices of arrogance, envy or jealousy, and self-abasement.
- 9 Bommarito proposes this view in a paper titled "Modesty as a Virtue of Attention," but explicitly states that he will "take the terms [modesty and humility] to be interchangeable" (93). He discusses others' views on humility, and at times refers to humility rather than modesty. The assumption that humility and modesty are interchangeable is widespread, shared by Raterman, "On Modesty"; Garcia, "Being Unimpressed with Ourselves"; Sinha, "Modernizing the Value of Humility"; Priest, "Intellectual Humility"; and O'Hagan, "Modesty as an Excellence in Moral Perspective Taking," among others. I am sympathetic to the idea that humility and modesty are importantly distinct. Nonetheless, since many have tak-

are “virtues of attention,” and that humility is one such virtue. These virtues, he claims, are “rooted in certain patterns of attention.”¹⁰ The humble person, he claims, has a tendency not to attend to their own good qualities or achievements but instead will tend to attend to the good qualities of others. The humble person may sometimes attend to their own good qualities; but then it matters exactly what they attend to. For example, the humble person might attend to a good quality of their own but not to its value, or they might attend to the quality but direct their attention toward the good fortune enabling them to gain the quality in question. Bommarito suggests that in such cases, despite attending to their own good quality, the individual still exhibits patterns of attention appropriate to humility. He also puts this in terms of *dwelling* on one’s good qualities or achievements: “Modesty does not demand inattention in the sense of a total lack of attention but in the sense that one does not *dwell* on one’s own good qualities.”¹¹

Extant accounts of humility focus on either self-directed or other-directed aspects of humility.¹² In so doing, they tend to explain one aspect of humility but not the other. Self-directed accounts focus on the humble person’s beliefs or attitudes about or toward their self. For example, Garcia claims that humble people “are unimpressed with their own admired or envied features,” and Flanagan suggests of the related concept of modesty that it involves not overestimating oneself.¹³ Other-directed accounts focus on the humble person’s attitudes or

en humility and modesty to be identical, and take their accounts to shed light on both, I will engage with some of the literature on modesty.

10 Bommarito, “Modesty as a Virtue of Attention,” 93.

11 Bommarito, “Modesty as a Virtue of Attention,” 108. Nadelhoffer et al. (“Some Varieties of Humility Worth Wanting”) describe humility as consisting in low self-focus and high other-focus. I take their account to be similar to Bommarito’s. As I argue below with regard to Bommarito’s account, it seems that in order to capture the moral significance of this pattern of focus, one must stipulate that one focuses in this way for the right reasons (not, for example, because one is obsessively envious). Alternatively, such focus might be understood as normatively rich in the first place, but then it seems to be morally valuable in virtue of being a kind of care. In that case, an account is needed of what kind of care humility is grounded in.

12 This distinction is made by Garcia, who uses the terms “inward-directed” and “outward-directed” (“Being Unimpressed with Ourselves”). Byerly also draws on this distinction (“The Values and Varieties of Humility”).

13 Garcia, “Being Unimpressed with Ourselves,” 417; Flanagan, “Virtue and Ignorance.” These are far from the only adherents to this approach. Driver suggests that “a modest person *underestimates* self-worth” (“The Virtues of Ignorance”, 374). Raterman claims that the modest person has an “appropriate attitude” toward their own goodness (“On Modesty”). Richards suggests that humility involves withstanding pressures to think too much of ourselves (“Is

behavior toward others. For example, Byerly describes humility as “preferring to promote others’ good rather than one’s own.”¹⁴ Since such accounts focus on a single dimension of humility, they tend to struggle to shed light on the range of ways it can be manifested. For example, the self-directed accounts will fail to explain why the humble person is characteristically patient and generous with others (the manifestations of humility that other-directed accounts regard as central), whereas other-directed accounts fail to explain the humble person’s distinctive attitudes to their self (which self-directed accounts regard as central).

Bommarito’s account does not fall neatly into either category. He takes the pattern of attention constituting humility to have both other- and self-directed poles.¹⁵ Bommarito explains the self- and other-directed aspects of humility as resulting from a broad overall pattern of attention to oneself and others. His account, then, has an advantage over extant accounts in that it seems capable of explaining a wider variety of manifestations of humility. In this section I will first explain Bommarito’s account. I will then suggest that it is nonetheless ultimately inadequate as an account of humility since it misidentifies a manifestation of humility as constitutive of it. Moreover, I will argue that a particular care is at the heart of humility and that this sheds light on *why* certain patterns of attention manifest humility.

On Bommarito’s account, humility requires more than simply a pattern of attention. It also requires that the humble person possess a good quality to be humble *about*. After all, if one does not possess a good quality to direct one’s attention away from, one is not being inattentive to it. Bommarito therefore describes humility as a dependent virtue, a virtue that can be attained only if one already possesses good qualities.

Bommarito is seeking to provide an account of something he takes to be a virtue. What would be virtuous about manifesting the patterns of attention he identifies? There is no simple connection between patterns of attention and virtue. There can be good reasons for attending to one’s own good qualities (for example, to discern whether one is capable of taking on a new responsibility) and some reasons for attending to others’ good qualities that render such attention morally suspect (for example, enviously doing so). To secure the idea that hu-

Humility a Virtue?”). Although there are a range of tendencies identified here as humility, they all focus on the self-directed aspect of humility.

14 Byerly, “The Values and Varieties of Humility,” 890.

15 O’Hagan also offers an account on which humility is neither self- nor other-directed. On her account, it involves “excellence in moral perspective taking”: the humble person is committed to recognizing persons as equally morally valuable (“Modesty as an Excellence in Moral Perspective Taking”).

mility is a virtue, Bommarito suggests that the patterns of attention exhibited by the humble person must be grounded in the agent's values, desires, or concerns. Such concerns or desires, he claims, must be good. He therefore claims that the humble person has particular reasons for attending to others' good qualities rather than their own:

They are modest if their inattention is the result of a lack of certain bad desires or concerns, such as a desire to ogle their own self-image.¹⁶

Bommarito thus suggests that whether a pattern of attention counts as humble depends not only upon the pattern of attention itself, but upon the reasons behind the pattern. He does not, however, offer a specific account of the desires or concerns that underlie humility:

The general account of modesty as a virtue of attention is not wedded to any particular account of the desires and values that make directed attention count as modest. As long as one accepts that our values and desires are often closely related to how we direct our attention, one can fill one's own preferred good and bad desires or values into the account. The specifics of these values and desires are irrelevant to the claim that modesty is a virtue of attention.¹⁷

That is, whenever the pattern of inattention to one's own good qualities is a result of caring about good things, Bommarito considers the agent in question to be humble.¹⁸

There are therefore three distinct requirements for humility within Bommarito's account of humility as a virtue of attention:

1. that one "have a good quality to be modest about"
2. that one "direct one's conscious attention in certain ways—away from the trait or its value or toward the outside causes and conditions that played a role in developing it"
3. that "the associated pattern of attention is a manifestation of morally good desires or values"¹⁹

16 Bommarito, "Modesty as a Virtue of Attention," 104.

17 Bommarito, "Modesty as a Virtue of Attention," 104.

18 Bommarito does, however, allow that "modesty is not of equal importance to everyone," since he regards it as a counterbalance to a tendency to dwell on one's own successes, a tendency that is not universal ("Modesty as a Virtue of Attention," 116). In particular, it seems likely that such a tendency will be gendered, etc.

19 Bommarito, "Modesty as a Virtue of Attention," 103–15.

The first condition Bommarito picks up from existing literature.²⁰ The second condition is taken by him to be the core of his account; he describes humility as “rooted” in patterns of attention. The third condition is then introduced in order to secure the moral value of humility.

I want to raise concerns about each of the above conditions. First, I will argue that condition 1 is mistaken—one can be humble regarding failures as well as good qualities. Second, I will argue that condition 2 is unjustified, and rendered obsolete by 3. Most significantly, I will argue that 3 therefore ends up doing the work in this account, but is not sufficiently specific: we require a more complete account of *which* good values, desires, or concerns ground humility.

First, in condition 1 Bommarito suggests that humility is about particular good qualities that we possess.²¹ This, however, does not seem to quite match our ordinary conception of humility: humility can be exhibited as much in one’s attitudes toward one’s failures as one’s attitudes toward one’s successes. Gwendolen, for example, demonstrates a lack of humility through her behavior regarding her lack of musical talent. Uriah Heep similarly lacks humility though he has no impressive achievements or qualities. More generally, admitting to and apologizing when one is in the wrong is a paradigmatically humble action, though it is necessarily a response to failure rather than success.²² One can thus manifest humility in one’s attitudes toward qualities that are not admirable as well as in one’s attitude toward one’s good qualities.²³

Second, there are reasons to reject condition 2, that the humble person must direct their attention in the ways specified. Such an emphasis on attention

20 In this, Bommarito is following Slote, *Goods and Virtues*.

21 Garcia’s self-directed account in “Being Unimpressed with Ourselves,” also makes this assumption, as does Raterman in “On Modesty.” However, some recent writers have made exactly the opposite assumption, suggesting that humility requires *limitations*. Byerly (“The Values and Varieties of Humility”) and Roberts and Cleveland (“Humility from a Philosophical Point of View”) reject the idea that humility is a dependent virtue. Snow suggests that it involves acknowledgement of one’s weaknesses (“Humility”); and more recently Whitcomb et al. suggest that humility is “having the right stance towards one’s limitations” (“Intellectual Humility,” 516). Ben-Ze’ev (“The Virtue of Modesty”) and Um (“Modesty as an Executive Virtue”) make the related claim that modesty is not a dependent virtue. In section 3, I suggest that humility is not a dependent virtue.

22 Murdoch, *The Sovereignty of Good*, 89, similarly discusses “the honesty and humility of the scholar who does not even feel tempted to suppress the fact which damns his theory.”

23 This stipulation is perhaps influenced by the fact that Bommarito largely writes in terms of modesty rather than humility, though he explicitly states that he regards the two as interchangeable. It may make more sense to say that someone is modest about a particular quality or achievement than it does to say that they are humble about a particular quality or achievement.

seems independently dubious, as well as questionable in light of the account itself. Consider the independent reasons. Humility can be manifested in many different ways: there are patterns of emotions, judgments, and action as well as attention that are characteristic of humility. For example, the humble person will characteristically take pleasure in others' successes, sympathize with others' failures, and be patient with others' shortcomings. The humble person's judgments are, similarly, likely to manifest their appreciation of others. They will also be motivated to *act* in ways that manifest these concerns. These are all important manifestations of humility, and plausibly manifestations of virtue. Bommarito's account, however, privileges patterns of attention over the other manifestations of humility, assuming that attention shifts are the explanatorily basic manifestations of humility. There seems to be no good reason for this assumption.²⁴

Even by Bommarito's own lights it is hard to see why he focuses on attention rather than any other manifestation of humility. He claims that the patterns of attention he identifies count as humble and thereby virtuous *because* they manifest good concerns: "this connection between patterns of attention and values and concerns allows us to see what is morally good about modesty."²⁵ At this point, it seems far from obvious what work the idea of a pattern of attention is really doing in his account. In order to explain the goodness of exhibiting certain patterns of attention, Bommarito claims that such patterns manifest morally good cares or desires. But the goodness of humility then seems to be entirely dependent upon the goodness of the underlying cares or concerns rather than the pattern of attention. This suggests that the goodness of humility is more a matter of the concerns underlying a pattern of attention than the pattern itself. In this case, although the pattern of attention might result from such underlying concerns, it seems to be peripheral to humility itself, a mere symptom of the trait that is of moral significance.

Finally, the most serious problem facing the account is that condition 3 seems unsatisfactory without further specification of which particular desires, cares, or

24 Bommarito does suggest that the other manifestations can be understood with reference to patterns of attention. For example, attending to others' successes and achievements allows one to take pleasure in them ("Modesty as a Virtue of Attention," 115). However, it is far from clear that this is the right order of explanation. After all, it seems equally plausible to say that one is more likely to attend to things that one finds emotionally important. Although the two are interlinked, attention does not seem to be more foundational or explanatorily basic. I will suggest that a unified explanation of the emotions, judgments, patterns of attention, etc., that are characteristic of humility can be given by understanding them as manifestations of an underlying concern or value.

25 Bommarito, "Modesty as a Virtue of Attention," 104.

values ground humble patterns of attention.²⁶ First, desires, values, and concerns seem to each be fairly different. In a recent book, Bommarito argues that cares or concerns entail sometimes having certain desires, but can be contrasted with desires in that they are longer-term, persisting states:

Caring about something is an underlying, typically long-term, positive orientation to something. . . . To care about something means that it *matters* or is *important* to you in a deep way.²⁷

Bommarito suggests that desires can be fleeting, but values, cares, or concerns are long-term states revealing something important about the orientation of our lives. It is possible, he claims, to care about something in the absence of an occurrent desire: one can care about a friend, for example, while one is consciously occupied only with working out a crossword. On his account, cares are connected with judgments of value, but not identical with them: for example, you can judge that “scholarship on economics in the history of Latvia” is valuable, without it mattering or being important to you.²⁸ Given that humility, if a virtue, is a character trait, it seems that mere desire will not be sufficient to underlie it, and cares or concerns must underpin humility.²⁹

However, Bommarito underemphasizes the significance of particular cares or concerns in his account. Without identifying the *particular* cares or concerns that underpin humility this account overgenerates instances of it. There are morally good cares or concerns that give rise to patterns of attention along the lines Bommarito envisages that seem to have little or nothing to do with humility. For example, one might care about a friend who is keen on poetry and, as a result, always attend carefully to skillful poetry readings in order to be able to tell one’s friend about them. While this might make one a good friend (which seems like a good quality), it seems to say nothing about one’s level of humility. Not every pattern of attention regarding one’s good qualities that manifests a morally good concern will thus reflect one’s humility. Humility is therefore more dependent upon particular cares or concerns than Bommarito recognizes, and Bommarito lacks a full account of which particular cares it depends upon.

Bommarito thus fails to offer a satisfactory account of humility. There is reason to doubt condition 1, that one must possess a good quality to be humble about. Condition 2, the attention constraint, seems to privilege attention over

26 This is perhaps unsurprising, since Bommarito suggests that there are many different virtues of attention.

27 Bommarito, *Inner Virtue*, 30.

28 Bommarito, *Inner Virtue*, 29.

29 That is, assuming the standard conception of a virtue as something like a character trait.

the other manifestations of humility in a way that is independently implausible, and unnecessary given 3. Finally, although Bommarito seems right to introduce condition 3, that the humble person must care about or value the right kinds of thing, the particular cares that underpin humility need to be identified. In the absence of an account of the particular cares that underpin humility, this account overgenerates instances of humility. In the next section, I will propose an account of humility in terms of the particular things that the humble person cares about or values.

3. THE VIRTUE OF HUMILITY AS NOT VALORIZING BEING RELATIVELY SUPERIOR

The strength of Bommarito's account, I have suggested, is that it offers a way of unifying the self- and other-directed poles of humility. I have argued, however, that his focus on patterns of attention fails to identify the core of humility. Condition 3, the idea that the humble person cares about certain things, was introduced by Bommarito in order to explain why certain patterns of attention are morally significant. The things one cares about do seem relevant to whether one is humble. In this section, I will suggest that a particular care or value forms the core of humility. I will explain and motivate this account of humility and give some reasons to think that humility thus conceived is a virtue. In the next section I will defend this account against three important objections.

The variety of ways in which humility can be manifested suggests that it is not best characterized by any particular manifestation. Rather, Bommarito seems right to suggest that it has much to do with the underlying things the humble person cares about. My suggestion is that *the humble person does not valorize being relatively superior*.³⁰ That is, the humble person is not concerned with relative positionings and does not intrinsically value being relatively better off than others. To "valorize" relative superiority is to "care" about it in the sense outlined by Bommarito above. The humble person might value her good qualities or achievements for their own sake, but not for their impact on hierarchical ranking. This lack of valorization by the agent of relative positionings cannot be the result of mere indifference to the quality, activity, or achievement in question as a whole, but must concern qualities, activities, or achievements that the agent

30 Roberts and Cleveland make the similar suggestion that "the virtue of humility is intelligent lack of concern for self-importance, where self-importance is construed as conferred by social status, glory, honor, superiority, special entitlements, prestige, or power" ("Humility from a Philosophical Point of View," 33). However, they explore it primarily by contrasting it with pride.

cares about. A lack of interest in relative positionings that results from mere indifference to the quality would not suggest anything about the agent's overall character, whereas not valorizing relative positionings concerning things one cares about seems to indicate something far more substantial about the agent.

On this account, to be humble regarding x is

1. to care about x ,
2. to not valorize being relatively superior regarding x .³¹

As I noted above, however, humility does not seem to always take this specific form: we do not always think of humility as being "about" anything in particular. We naturally speak of "humble people" and take humility to be a general trait that one can possess. This kind of general humility can be understood on the same model as the more limited forms.

To be humble in general is

1. to not valorize being relatively superior.³²

The person who is generally humble simply does not value being relatively superior. She is not status conscious; she does not value being high up in a hierarchy herself, nor does she care about others' hierarchical positionings.³³ This explains why, for example, Gwendolen is not generally humble as a person. Her care about relative positioning means that music can have no role in her life if she is not highly ranked musically: she refuses to allow herself to *value* things that do not increase her relative positioning.

This account therefore avoids making humility a dependent virtue (as it is on Bommarito's account) since one can valorize being relatively superior whether or not one is actually superior.³⁴ Simply caring about being relatively superior, on this account, counts against humility, regardless of whether one is actually

31 The variable here could be read as referring to a character trait, an activity, or a particular achievement. One could be humble about one's athletic capacities, about athletics, or about winning a particular race, for example.

32 That is, assuming that one has a range of things one cares about, which seems essential for an ordinary human life.

33 This allows that the humble person might care about relative positioning in some sense, for example, by desiring an egalitarian society.

34 If modesty is taken to be dependent on achievements or good qualities, this gives a way of distinguishing the two: humility, unlike modesty, does not depend on the possession of a good quality, and is not about any particular quality. It is a more complex character trait than modesty. That there is some difference is suggested by the fact that in ordinary language there seem to be cases where attribution of modesty, but not of humility, would be appropriate.

superior. A person who is jealous or envious of another, for example, might very much valorize being relatively superior, while not themselves being at all superior. Not valorizing relative superiority, then, means that to the extent that they are superior to others they do not value this, and to the extent that they are not superior they do not desire to be.³⁵

What would humility look like? Imagine Anna, a humble runner. She counts as humble if she cares about being a good runner but does not intrinsically care about being better than other runners. And Anna would be humble not only regarding running but generally if she does not valorize being better than others generally.

This account does not entail that concern at being worse than others *necessarily* indicates a lack of humility. The agent might take such relative positioning merely as an indication that they could be doing much better than they are and that they therefore have reason to put more effort into the area in question.³⁶ Only if their concern is for their relative positioning itself, rather than for what it might indicate, does the concern entail a lack of humility. For example, Anna might be disappointed to come last in a race. If this disappointment were disappointment at her relative position, she would not be humble. But her disappointment could well be because losing is an indicator that she could be doing better, and such disappointment would be compatible with humility.

3.1. *Advantages of the Account*

On this account, not valorizing being relatively superior is what constitutes humility. What we valorize or care about shapes our emotions, judgments, and actions, so this account of humility is well placed to explain the patterns that are characteristic of humility. In this section, I will identify some commonly accepted core features of humility and show that they are well explained by understanding humility as not valorizing being relatively superior.

The pattern of attention that Bommarito highlights is explained by this account: the humble person has little motivation to attend excessively to their own good qualities, since doing so would not be a source of comparative pleasure.

35 One might worry that giving up on humility being a dependent virtue makes it too easy to attain. Should the unaccomplished but lazy person, for instance, really count as humble? I think that two responses are available. First, if the lazy person's laziness is incompatible with their *caring* about excellence in the respect in which they are unaccomplished, then they would not count as humble on the account I am offering. If, on the other hand, the lazy person can still care about the activity in question, then I think that they should count as humble. Such a person might lack ambition or drive, but these are distinct traits from humility. Thanks to an anonymous reviewer for raising this worry.

36 Morgan-Knapp makes a similar point ("Comparative Pride").

Neither would they be motivated to attend excessively to themselves through an anxious concern that others might be better off than them. The account allows that the humble person might nonetheless sometimes attend to their good qualities but rules out this attention being motivated by comparative concerns.³⁷

Moreover, the humble person's tendency not to valorize being relatively superior can shed light on the various emotional manifestations of humility. Since the humble person does not valorize their relative positioning, they are likely to feel neither self-aggrandizing pleasure at being better than others in particular respects, nor envy, jealousy, or shame simply at being less good than others. Anna, for example, would not feel distress if other runners are faster or have greater endurance than her. Moreover, the humble person is unlikely to make anxious comparative judgments between themselves and others, because others' success would not constitute a threat to them.³⁸ The humble person is likely to be good at taking pleasure in others' success, and feeling sympathy for their setbacks. This is because one significant barrier to such empathy has been removed: the selfish concern that others' success might relatively downgrade or upgrade one's own position.³⁹ Moreover, they are unlikely to feel complacency about themselves, since even if they are doing well on a relative scale, it is unlikely that they have realized the good quality in all its fullness.

The expectations we have concerning how a humble person would act can also be explained by this account. The humble person, I take it, is characteristically good at recognizing their shortcomings. That is what we would expect if are not concerned that such shortcomings would relatively downgrade them. They are also characteristically good at apologizing for the effects of such shortcomings. Again, that is what we would expect on the present account: for the humble person, such apologies do not lower them in any important way. The humble person is characteristically willing to spend time and effort on others' behalf. This, too, makes good sense, since on the present account the humble person does not feel threatened by others' success.⁴⁰

37 This also allows that the humble person might attend to their good qualities in order to improve themselves, which Bommarito is keen to allow for.

38 There are some reasons why the humble person might nonetheless make anxious comparative judgments. For example, they might be aware of their high achievement in a particular field and be anxious to not make others feel bad. But one kind of anxious comparative judgment, where one's anxiety is about one's own status, is inconsistent with humility.

39 As a result of the humble person's increased capacity to take pleasure in others' success, they are likely to be alert to others' needs and willing to help others without feeling any threat to their own positioning. As such, this explains the "focus" on others that Nadelhoffer et al. describe as central to humility ("Some Varieties of Humility Worth Wanting").

40 In the next section, I will explore a further characteristic of humble people: they are typical-

As we have seen, Bommarito notes that the humble person is more likely to be aware of the contingent factors that have led to their successes, as well as the ways in which their achievements have been dependent upon good fortune and the help of others.⁴¹ He suggests that humble people therefore typically express greater gratitude than non-humble people. For example, on winning a race, Anna might be likely to thank those who supported her and acknowledge their contributions to her success. This too is explicable on the present account. Awareness of one's dependence on other people as well as contingent strokes of fortune seems to destabilize one's position in a hierarchy. It makes one's position dependent on factors outside of one's control, things that could have been otherwise. As such, the person who valorizes their relative positioning is likely to find it unpleasant to recognize the role that such factors have played in their success and, therefore, would be reluctant to do so.

This account also sheds light on why Uriah Heep's continual assertions that he is humble are so grating. Uriah spends the whole of *David Copperfield* anxiously attempting to improve his comparative position. It matters very much to him that he should be considered, and that he should regard himself, as relatively more successful than others. As such, he takes pleasure in setbacks faced by those around him and is wholly unable to appreciate others. His general unpleasantness is therefore amplified by his asserting his own humility in the service of precisely the kind of one-upmanship that humility guards against.

Uriah Heep's assertions of his own humility are not only strange because of their contrast with his wider behavior but reflect something generally perplexing about such assertions. There seems to be something odd about making such claims at all, an oddness that would not disappear if Uriah did in fact generally act humbly. Heep's assertions serve to constantly call attention to his "humility" in a manner that suggests an air of competition: he wants his humility to be recognized, and wants himself to be regarded as *more* humble than others.⁴² This suggests that what is paradoxical about his assertions is at least in part that in making them he suggests that he is *better* with regard to humility than others: he regards his humility as worth calling to others' attention because he regards

ly good at listening and taking advice.

- 41 Bommarito's suggestion is stronger than this: on his account such awareness is (partially) *constitutive* of humility.
- 42 Of course, there are some cases in which assertions of one's humility do not have this competitive or comparative character. Raterman notes that in a "quiet conversation with a good friend about the personal qualities one values possessing," asserting that one is humble may be entirely consistent with modesty ("On Modesty," 232). My explanation accounts for why such self-assertions are *often* perplexing without implying that all instances are strange or self-undermining.

himself as more humble than others.⁴³ A truly humble person would not value such relative ranking, and thus would feel no need to self-ascribe humility in this way.⁴⁴

3.2. Humility and Virtue

As with Bommarito's account, this understanding of humility suggests that humility is likely to have good consequences. For example, humble people are likely to cause less social friction since they are likely to be more attuned to the needs of others. Conversely, the humble person would be more able to share in the happiness of others. I suggested above that they are also more likely to be aware of and grateful for others' roles in their successes. These seem like valuable consequences of humility. But this account allows for more than this to be said: it explains why humility is *intrinsically* valuable, and as such, it plausibly explains why humility is a virtue.

The humble person does not valorize being relatively superior. The central reason why this is morally valuable is that valuing relative superiority over others seems to involve a failure to properly value other people. In wanting to be superior to others, I fail to fully appreciate them and recognize their worth. Valorizing being *superior* to others (as opposed to wanting to be excellent) seems to involve valuing looking down on others, which is in tension with adequately valuing them. Since recognition of such worth is centrally morally important, humility is an important moral virtue.⁴⁵

Moreover, this trait is virtuous to the extent that the humble person is free to value the right kind of thing: the humble person can recognize that being good

- 43 Similarly, imagine saying at a philosophy conference that one is good at philosophy. While the sentence might be apt in a room of nonphilosophers, at the conference it would imply that one is *better* than others, or *notably* good.
- 44 Others have suggested alternative explanations of the oddness of assertions of one's humility. Driver suggests that humility requires ignorance of one's self-worth, and thus that the humble person must be *unaware* of their own humility ("The Virtues of Ignorance"). Kellenberger suggests that one might recognize one's own humility, but could not generally assert that one is humble ("Humility"). Bommarito suggests that the humble person would not dwell upon or draw others' attention to their own humility, but that one can know of one's own humility ("Modesty as a Virtue of Attention"). Like the latter two, my explanation of the oddness of assertions of one's humility allows that the humble person might recognize this about themselves. It suggests that the humble person would be generally unlikely to assert that they are humble, but such assertions would not be incompatible with humility.
- 45 That valorizing relative superiority involves a failure to properly value others suggests a connection between humility and love. Since love plausibly involves a certain kind of appreciation or valuing of others, humility seems to be necessary for love.

itself is what matters, rather than relative rankings. Gwendolen's inability to enjoy music once she realizes that she has no exceptional talent suggests a kind of failure in her valuing of it in the first place. Her excessive valorization of her own relatively elevated musical status is at the expense of truly caring about music itself. This seems like a general feature of valorizing one's relative ranking: such a care seems to be wrongly oriented and to indicate a lack of concern for goods or activities according to which there is a tendency to rank ourselves. At the extreme, such activities, qualities, or achievements become wholly fungible, since engaging with the activity becomes a mere means to hierarchically raise oneself.⁴⁶ The humble person, then, avoids one important way in which our valuing can be distorted.⁴⁷

Returning to the worries raised in the introduction about humility, we can therefore see that humility need not involve inferiority or servility. Not valorizing relative superiority leaves open whether one takes pleasure or pride in one's achievements, and whether one is able to recognize one's good qualities. These seem sufficient to ground a sense of self-worth that is in tension with servility and inferiority. Servility entrenches one form of hierarchy, social hierarchy. But far from serving to entrench and justify social hierarchies, humility is connected with resistance to such hierarchy. The individual who does not valorize their own relative superiority is likely to do so because they do not valorize relative superiority in general.⁴⁸ Undue acceptance of inferiority and subservience, however, seem to involve an acceptance of a social hierarchy that is in tension with not valorizing relative positioning in general. That is, acceptance of social hierarchy seems to depend on valorizing relative positionings, on viewing those in certain positions as better in virtue of their position. Humility thus need not involve inferiority or servility, and is in tension with some of the assumptions that un-

46 It might be the case that having some talents better enables one to appreciate certain activities or achievements, so it is not necessarily an indication of lack of humility if someone particularly enjoys those activities they are good at. What would indicate a lack of humility would be if they enjoyed those activities they are good at only because they get the satisfaction of being better than others.

47 Schueler suggests a similar account of humility ("Why Modesty Is a Virtue"), which he later explicitly links with the idea of "ranking" ("Why IS Modesty a Virtue?"). However, he gives a different argument for this, suggesting that such a trait is valuable because the goals and purposes of a person who cares whether others are impressed with them for their accomplishments are shaped or created by others: "to the extent that someone cares about whether people are impressed with her accomplishments, the direction of her life comes not from within herself but from others" (Schueler, "Why IS Modesty a Virtue?" 839).

48 Not valorizing relative rankings need not entail that one could not attend to such rankings at all. After all, rankings might be used merely as indicators of intrinsic value or worth.

derpin such attitudes. This account therefore avoids the politically concerning connotations of humility.⁴⁹

4. THREE OBJECTIONS TO THE ACCOUNT

Having proposed and motivated my account, I will now turn briefly to answer three objections to it. First, I will explore how the humble person can participate in competitive activities; second, I will examine whether caring about activities in themselves is compatible with caring about one's relative positioning; and finally, I will answer the objection that on this account humility is compatible with caring too much about one's achievements.

4.1. *Objection 1: Humility and Competitive Activities*

Are there not some cases in which valorizing one's relative positioning is unproblematic? Is valorizing one's relative positioning *always* a bad thing? While caring about being a good host for the sake of improving one's relative social positioning seems like a bad thing, there are some cases where the status of valorizing one's relative positioning seems less clear cut. Most prominently, it may seem that aiming to be better than others is integral to some competitive activities such as sports and games.⁵⁰ Moreover, it can seem that valorizing relative positioning is necessary for success in such activities. Take, for example, playing chess. It can seem impossible to *participate* in playing chess if one is not aiming to win (a matter of relative positioning), and it can seem impossible to be a *good* player without valuing winning. This poses a problem, because it seems that there can be humble people who participate in such activities.

Such cases pose a problem because excellence in such activities necessarily involves valuing relative victories. To be a good chess player involves having the capacity to beat others in a game of chess, the capacity to gain relative victories. My account of humility will not straightforwardly cover such cases. But on consideration, that should not be surprising: few ordinary virtues and vices seem to straightforwardly apply to games. A good Monopoly player is likely to exhibit avarice that would be condemnable outside the game, and a generous Monopoly player who shared their gains with others would be very dull to play with. None-

49 An implication of this is that on this account, humility has a lot more to do with *being humbled* (which need not be unpleasant) than with *humiliation*.

50 Austin argues that humility is a virtue in the context of sport ("Is Humility a Virtue in the Context of Sport?"). However, his conception of humility involves elements of self-lowering that mine does not.

theless, the present account explains how people participating in competitive activities can be humble.⁵¹

When aiming to win is an integral part of an activity itself, humility cannot simply be a matter of not aiming to gain a relative victory, since aiming to win is aiming to beat one's opponent. But there are nonetheless different reasons one might have for aiming to win. It seems unobjectionable to want to win simply because one valorizes being good at chess. But wanting to win *because* one valorizes being relatively superior to one's opponent does seem to be objectionable. In the former case, caring about relative superiority is compatible with humility: the player does not primarily or intrinsically valorize their relative positioning. In the latter case, however, the motivation seems morally objectionable, and at odds with humility. In the context of competitive activities, valorizing relative superiority is acceptable insofar as it is valued merely as something entailed by excellence in the activity or for some similar reason. However, caring about winning simply as such would rule out humility.⁵²

Moreover, not valuing one's relative positioning, or valuing it only insofar as it is necessary for excellence in the activity in question would leave one well placed to cope with *not* being the best at the activity in question. The humble person is well placed to be accepting of their losses while valuing their achievements. Returning to Anna, the humble runner, we can imagine her losing a race. Such a loss would not be likely to eventuate in bitterness or resentment toward the winners. Indeed, if she had run well, then she could well feel satisfaction in her achievement despite the loss. Moreover, she would be likely to admire people who are better runners, value their achievements, and perhaps attempt to emulate them in the future. Anna would therefore be well positioned to improve her skills and become a better runner.⁵³

- 51 One important thing to note here is that games, where excellence is necessarily indexed to relative positioning, are more highly socially constructed than activities like cooking. I am suggesting that with regard to such activities, valorizing relative positioning might be permissible as long as there is independent justification for the activity, and if the relative positioning is not valued or pursued for its own sake, but as a part of the game.
- 52 Roberts and Cleveland similarly note: "To be invidious, the kind of superiority that the prideful individual prizes has to be noninstrumental. For example, athletes typically want to outdo their competitors, but this concern for superiority need not be invidious, because it can be teleologically subordinate to winning the game, which may be merely playful" ("Humility from a Philosophical Point of View," 35).
- 53 It is an interesting feature of this account that it gives us resources to critique current social practices that foster competitiveness. Not all environments are equally conducive to virtue. Social practices that foster valorizing relative superiority rather than valuing achievements for their own sake will not be conducive to virtue, and this seems like a reason to at least alter them.

4.2. Objection 2: Compatible Cares

Another objection that might be raised at this point is that humans generally care about many different things. As such, it might seem possible for one to care about *both* relative positioning and activities or ends in their own right. If one could care about both things, then many of the purported reasons why humility is valuable would seem to be undercut.

A person who valued achievements, qualities, or activities in themselves but also valued being relatively superior would, however, still be regarding others in a problematic way. That is, their valuing being superior to others would constitute a failure to properly value others. Although the person who valued things in themselves as well as relative positioning concerning those things would perhaps be better off than the person who valued only relative positioning, they would still lack much that is of moral significance.

Caring about rankings is thus in tension with properly valuing activities, qualities, and achievements. Ranking individuals with respect to an activity seems to depend upon a flattening out of the valued realm. Determining who is better, even with regard to a relatively narrow realm, is a difficult task. In order to rank individuals, we thus tend to pick out a couple of fixed dimensions along which to evaluate. But our appreciation of the activities, qualities, and achievements characteristically extends far beyond these few dimensions, and we particularly value the ways in which people's contributions can be unique and interesting. Caring about ranking therefore seems to flatten out the rich and interesting ways in which a performance can be good. This suggests that caring about being better than others can lead to a kind of distortion in our appreciation of activities or performances themselves. For example, imagine trying to determine who is the better ballet dancer. There are certain things we could measure: the number of pirouettes they can turn, the height to which they can extend their leg in an arabesque, the elevation they reach in jumps. But obviously none of these (even taken together) seem like plausible candidates for determining who is the better dancer; there are many varied ways in which one can achieve excellence as a ballet dancer. It seems like most activities that we value are like this: there are many ways of achieving excellence at them, and often we particularly value the original and unusual ways of doing so. This therefore implies that we do not get the appreciative benefits of valuing things in themselves unless we *do not* care about relative rankings.

Finally, the benefits of caring about achievements, qualities, and activities are often dependent on not caring about relative superiority. Pleasure in achievement can be undercut by caring about one's relative positioning. That is, there

are many instances where one will have achieved something valuable that is not itself a relative achievement, and similarly there will also be cases where one has made a relative achievement but not performed well. In such cases, valuing relative achievement will undercut the pleasure (or displeasure) one would take in the performance itself. We would thus fail to get the benefits of caring about something without also being humble with regard to it.

4.3. *Objection 3: Humility and Pride*

As I noted earlier, on this account humility is not incompatible with pride. This opens up space for a possible objection to the account: Does this account allow for the humble person to care *too much* about their achievements? That is, is humility on this account consistent with an excessive pride in one's achievements?

In answer to this, it is important to first note that I take the compatibility of humility with pride in one's achievements or good qualities to be a virtue of the account. It coheres with our intuitive thought that taking pride in our successes is a good thing. It also seems important to motivate us to participate in such activities in the first place and to be necessary for adequate practical reasoning: recognizing and valuing when one has done well seems essential to knowing how one should improve.

Pride *per se*, then, does not seem to be necessarily problematic. What seems problematic is arrogant pride, or pride whereby one looks down on others or sees oneself as superior to them. Such superiority, haughty disdain, and contempt for others are clearly inconsistent with humility on this account: valorizing being relatively superior is a necessary condition for the objectionable kind of pride. When such pernicious underpinnings of pride are absent, it does not seem objectionable. For the same reason, by-products of pride like bragging are ruled out on this account: bragging functions on the presupposition that one is not merely good but *better than* others (stating that one has swum one hundred meters in two minutes might constitute bragging in some contexts, but not in a room of Olympic swimmers).

The objection might then be reformulated as follows: I have said that humility is consistent with some pride. But what if a person cares *only* about their own achievements (in nonrelative terms), and simply fails to care about others' (nonrelative) achievements at all? Would such a person not lack humility? There would certainly be something wrong with such a figure, but I think it would be incorrect to say that they lack humility. Their behavior would rather seem to be somehow pathological. Think, for example, of the people who most frequently exhibit such patterns of caring: very young children. Very young children do, for example, show great pride in their scribbles, while remaining unmoved by

great works of art. But we would not think of them as lacking in humility as a result of this. Rather, their failure to care about others' equivalent achievements is seen as resulting from the fact that they are not fully developed as moral agents or practical reasoners. It therefore seems inappropriate to describe them as *either* humble or lacking in humility. By contrast, if an adult were to act in this way, it would be pathological. It seems that it would be inapt to describe a person with such a pattern of caring as either humble or lacking humility: their pattern of care is, rather, disordered in a different respect.

5. HUMILITY AND ETHICAL DEVELOPMENT

Humility, then, seems to qualify as a virtue. However, I began with Murdoch's suggestion that humility also plays a significant role in ethical development.⁵⁴ I am taking "ethical" development to be broader than narrow moral development, although ethical development will have a distinct moral dimension.⁵⁵ In the answer to the above objection concerning competitive activities, I suggested that Anna, the humble runner, would be well placed to develop her talents. Although humility is no guarantee of development, my claim is that it generally puts one in a good position to develop ethically. This provides a limited vindication of Murdoch's claim that "although he [the humble man] is not by definition the good man perhaps he is the kind of man who is most likely of all to become good."⁵⁶

In the example from *Daniel Deronda*, Gwendolen's lack of humility is made apparent in her inability to appreciate music once she realizes that she has no exceptional talent. This lack of humility forms a formidable barrier to her becoming a better person. Gwendolen, although utterly selfish, has some capacity to perceive her own need to change. But she is prevented from doing so by her felt need to maintain her superiority. She is resolute in preventing others from recognizing that they are in some respects better off than her (hence her unwill-

54 Clifton also notes Murdoch's claim that the humble person is the most likely to become good. He suggests that this is explicable "because of his self-abnegation, which opens up possibilities for displaying attention to the world" ("Murdochian Moral Perception," 212). However, Murdoch states that "humility is not a peculiar habit of self-effacement," which seems to resist this interpretation (*The Sovereignty of Good*, 95). I am proposing a way of connecting humility with moral growth without understanding humility as involving self-abnegation.

55 This is particularly clear if one regards the virtues as kinds of skill (see, e.g., Annas, *Intelligent Virtue*).

56 Murdoch, *The Sovereignty of Good*, 101. In a recent paper, Soyarslan notes that Spinoza suggests that humility is not itself a virtue, but can be useful as a means toward virtue, though only for "weak minded" people ("From Humility to Envy").

ingness to tell anyone but Daniel of her unhappiness), but also unwilling to admit this to herself. Since she cannot bear to consider herself as lesser than others in any respect, she is therefore unable to appreciate how to become better. Her valorization of her relative positioning also prevents her from responding in the right way to those deficiencies in herself that she can perceive: she is both unable to see how to become better and unable to become better.

I will suggest that this is a general feature of humility. Humility is not only, as I suggested above, intrinsically valuable but also importantly connected with ethical development, the process of becoming *better*. As illustrated with the case of Gwendolen, humility is important for both epistemic and motivational reasons. It removes barriers to developing the knowledge necessary for ethical development (knowledge about how to become better), and also removes barriers to being motivated in ways that aid ethical development. It therefore has an important role in ethical development.

First, humility has some direct epistemic benefits. It removes one significant motivation for distortion in our beliefs about ourselves, allowing us to recognize our successes and failings as such. Since the humble person does not valorize being relatively superior, they lack a significant motivation to distort what they see in order to reassure themselves that they are relatively more successful than others. They would also lack a significant motivation to regard their own achievements as uniquely admirable or worthy. They are thus more likely to be able to perceive the true value of their own qualities and achievements. Such recognition seems crucial to improvement, since improvement requires recognizing when one has done well or badly. That is, recognition of one's failings as such is necessary if one is to know where to improve. The ability to recognize the ways in which one's successes are the result of others' assistance or good fortune, an ability characteristic of the humble person, is also likely to enable one to have a realistic vision of developing one's skills.⁵⁷

Moreover, the humble person will be more likely to recognize the valuable achievements or qualities of others as such. They lack a significant motivation to anxiously look for reasons to think of others' achievements as less significant than they are, and are therefore likely to be able to recognize others' achievements. As a result, they are also likely to be well guided in their own attempts to improve, since accurately recognizing others' achievements enables one to have good models of how to be successful, and to choose wisely whom to emulate.

Humility also has some indirect epistemic benefits. The humble person is

57 MacIntyre suggests that some virtues are "virtues of acknowledged dependence" (*Dependent Rational Animals*, 133).

typically a good listener and able to take advice from others.⁵⁸ They are likely to be willing to listen to others in the first place and to not be dismissive of what others have to say. They are thus well positioned to gain knowledge that enables them to become better. Since they do not care about being relatively superior, they are likely to be less invested in pernicious stereotypes about what others have to teach us. Properly listening to someone involves thinking that the speaker might have something to tell us, that they may know some things that we do not. It thus involves attributing (possible) epistemic goods to others and acknowledging that we may not possess such goods. This acknowledgement can grate against a felt need to assert our own rightness, or to see ourselves as the ones with knowledge, with greater epistemic authority or success. For the person who valorizes being relatively superior, such acknowledgement will be particularly painful, and thus they are likely to be motivated to avoid it. But the humble person is not threatened by the thought that others may possess epistemic goods that they do not. They are not invested in the idea that others are “below” them on some hierarchical scale, nor that they are unlikely to have anything of note to communicate. A significant barrier to being a good listener and being good at taking advice is therefore missing in the humble person, enabling them to gain important knowledge.⁵⁹ Humility therefore lessens one important barrier to ethical growth, lack of knowledge, both by removing a distorting factor in our judgments and by removing an obstacle to receiving testimony.⁶⁰

Second, humility is important for ethical growth because it involves motivational or affective responses that aid ethical development. That is, it enables us to react in the right kinds of way to our own and others’ achievements and failures. Recall the example of the humble runner, Anna. On recognizing that another person is a better runner than she is, she would not feel envy or resent-

58 Fricker suggests that there are certain virtues involved in being a good listener in this sense (*Epistemic Injustice*). She refers to these as virtues of testimonial and hermeneutical justice. The humble person, I have suggested, will be a good listener in a slightly broader way than in the way she picks out, but would be likely to also possess the virtues she identifies.

59 Such advice or testimony might be moral or nonmoral, but seems particularly important in the moral case.

60 Tanesini discusses the moral and epistemic viciousness of intellectual arrogance. My account of arrogance has parallels with what she calls “haughtiness,” something that “manifests itself through disdain for other people. . . . Arrogance of this kind is often identified with a feeling of superiority over others” (Tanesini, “Calm Down, Dear,” 73). She suggests that such haughtiness involves the presumption that one is exempt from the ordinary responsibilities of conversational participants, and can lead to silencing. As such, she argues that it fosters ignorance. Although my claim is about general lack of humility rather than specific intellectual arrogance, this seems to me like a plausible account of some of the ways in which a lack of humility can be epistemically harmful.

ment. Rather, though she may feel disappointment at her own performance, she is also likely to feel admiration for the other runner's achievement. Anna's response seems like the appropriate response to admirable achievements. But it also seems likely to help her become a better runner through motivating her to emulate the person in question. By contrast, the person who recognizes that the other runner is better but feels only envy or resentment is likely to feel equally motivated to "pull down" the better runner as they are to improve themselves. This is what happens with Uriah Heep, who recognizes others' successes but is led to hope (and scheme) for their downfall.

For the person lacking humility, recognizing others' relative superiority can lead to sour grapes, where they feel discouraged from participating in the activity at all, regarding it as not worth trying. This is what happens with Gwendolen: her lack of relative success discourages her from appreciating or participating in music. Faced with the fact that others are more musically talented than her, Gwendolen cannot bear to think that music is valuable at all. As such, she forfeits any chance to improve musically, as well as the opportunity to appreciate music itself. By contrast, the humble person is not only in a good position to recognize others' successes but is also disposed to react to such successes in ways that enable them to emulate such success and, therefore, to become better at the activity in question.

Humility, then, removes common barriers to ethical development that are both epistemic and motivational. As a result, the humble person is disposed to become better. This does not guarantee that the humble person will develop ethically, since other obstacles might stand in their way, but it at least suggests that they are well placed to do so. This vindicates Murdoch's claim that the humble person is likely to become good.⁶¹ Humility is thus an interesting trait and one worth seeking for two reasons: not only because it is a virtue, but because it plays an important role in our ethical development.⁶²

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61 Murdoch makes the stronger claim of the humble person that "perhaps he is the most likely of all to become good." This is seemingly a result of her view that the "anxious ego" is the primary obstacle to moral growth. I have provided an argument only for the claim that humility is *an* important condition for ethical growth, not that it is the *most* important condition for it. Murdoch is, however, seemingly hesitant in making this claim, and thus it seems that my argument captures the spirit of her remark.

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REFERENCES

- Annas, Julia. *Intelligent Virtue*. Oxford: Oxford University Press, 2011.
- Austin, Michael W. "Is Humility a Virtue in the Context of Sport?" *Journal of Applied Philosophy* 31, no. 2 (May 2014): 203–14.
- Ben-Ze'ev, Aaron. "The Virtue of Modesty." *American Philosophical Quarterly* 30, no. 3 (July 1993): 235–46.
- Bommarito, Nicolas. *Inner Virtue*. Oxford: Oxford University Press, 2018.
- . "Modesty as a Virtue of Attention." *Philosophical Review* 122, no. 1 (January 2013): 93–117.
- Byerly, T. Ryan. "The Values and Varieties of Humility." *Philosophia* 42, no. 4 (December 2014): 889–910.
- Calhoun, Cheshire. "On Being Content with Imperfection." *Ethics* 127, no. 2 (January 2017): 327–52.
- Clifton, W. Scott. "Murdochian Moral Perception." *Journal of Value Enquiry* 47, no. 3 (September 2013): 207–20.
- Dickens, Charles. *David Copperfield*. Oxford: Oxford University Press, 2016.
- Driver, Julia. *Uneasy Virtue*. Cambridge: Cambridge University Press, 2001.
- . "The Virtues of Ignorance." *Journal of Philosophy* 86, no. 7 (July 1989): 373–84.
- Eliot, George. *Daniel Deronda*. New York: Harper and Brothers, 1876.
- Flanagan, Owen. "Virtue and Ignorance." *Journal of Philosophy* 87, no. 8 (August 1990): 420–28.
- Fricker, Miranda. *Epistemic Injustice: Power and the Ethics of Knowing*. Oxford: Oxford University Press, 2007.
- Garcia, J.L.A. "Being Unimpressed with Ourselves: Reconceiving Humility." *Philosophia* 34, no. 4 (December 2006): 417–35.
- Kellenberger, James. "Humility." *American Philosophical Quarterly* 47, no. 4 (October 2010): 321–36.
- MacIntyre, Alasdair. *Dependent Rational Animals*. London: Duckworth, 1999.
- Morgan-Knapp, Christopher. "Comparative Pride." *The Philosophical Quarterly* 69, no. 275 (April 2019): 315–31.
- Murdoch, Iris. *The Sovereignty of Good*. London: Routledge and Kegan Paul, 1970.
- Nadelhoffer, Thomas, Jennifer Cole Wright, Matthew Echols, Tyler Perini, and Kelly Venezia. "Some Varieties of Humility Worth Wanting." *Journal of Moral Philosophy* 14, no. 2 (February 2017): 168–200.
- O'Hagan, Emer. "Modesty as an Excellence in Moral Perspective Taking." *European Journal of Philosophy* 26, no. 3 (September 2018): 1120–33.

- Priest, Maura. "Intellectual Humility: An Interpersonal Theory." *Ergo* 4, no. 16 (2017): 1–18.
- Raterman, Ty. "On Modesty: Being Good and Knowing It without Flaunting It." *American Philosophical Quarterly* 43, no. 3 (July 2006): 221–34.
- Richards, Norvin. "Is Humility a Virtue?" *American Philosophical Quarterly* 25, no. 3 (1988): 253–59.
- Roberts, Robert C., and W. Scott Cleveland. "Humility from a Philosophical Point of View." In *Handbook of Humility*, edited by Everett. L. Worthington, Don. E. Davis, and Joshua N. Hook, 33–46. Abingdon, UK: Routledge, 2016.
- Schueler, G. F. "Why IS Modesty a Virtue?" *Ethics* 109, no. 4 (July 1999): 835–41.
- . "Why Modesty Is a Virtue." *Ethics* 107, no. 3 (April 1997): 467–85.
- Sinha, G. Alex. "Modernizing the Value of Humility." *Australasian Journal of Philosophy* 90, no. 2 (2012): 259–74.
- Slote, Michael. *Goods and Virtues*. Oxford: Clarendon Press, 1983.
- Snow, Nancy E. "Humility." *The Journal of Value Enquiry* 29, no. 2 (June 1995): 203–16.
- Soyarslan, Sanem. "From Humility to Envy: Questioning the Usefulness of Sad Passions as a Means towards Virtue in Spinoza's *Ethics*." *European Journal of Philosophy* (forthcoming). Published ahead of print, December 3, 2018. <https://doi.org/10.1111/ejop.12422>.
- Tanesini, Alessandra. "'Calm Down, Dear': Intellectual Arrogance, Silencing and Ignorance." *Aristotelian Society Supplementary Volume* 90, no. 1 (June 2016): 71–92.
- Um, Sungwoo. "Modesty as an Executive Virtue." *American Philosophical Quarterly* 56, no. 3 (July 2019): 303–17.
- Whitcomb, Dennis, Heather Battaly, Jason Baehr, and Daniel Howard-Snyder. "Intellectual Humility: Owning Our Limitations." *Philosophy and Phenomenological Research* 94, no. 3 (May 2017): 509–39.

THE IMPORTANCE OF ROLES IN THE SKILL ANALOGY

Matt Dougherty

ALONGSIDE A RENEWED INTEREST in virtue ethics in the past half century has come a renewed and growing interest in what is sometimes called the *skill analogy*, the ancient Greek idea that ethical virtue is well understood on the model of practical skills.¹ That these two interests have coincided is fairly unsurprising. Almost all ancient philosophers rely on the skill analogy in discussing virtue; so in returning to virtue, it makes good sense that we would too.

The ancients, however, rely on the analogy to differing degrees, thus also differing in the extent to which they treat it as a mere analogy. The early Platonic dialogues, for one, are often understood as extended arguments for the idea that virtue is a skill. In the *Gorgias*, for instance, Callicles teases Socrates for always going on about cobblers, fullers, cooks, and doctors, “as though our conversation were about them!”² The implication is often taken to be that Socrates holds, like the later Stoics, that the analogy is no mere analogy.³ Aristotle, on the other hand, despite making positive use of the notion of skill in developing his own account of virtue, ultimately treats a comparison with skill as merely helpful for

- 1 The analogy is also found in at least ancient Chinese and Roman philosophy. See, e.g., Stalnaker, “Virtue as Mastery in Early Confucianism”; Yao “The Way, Virtue, and Practical Skill in the *Analects*”; and Klein “Of Archery and Virtue.”
- 2 Plato, *Gorgias*, 491a.
- 3 Irwin (*Plato’s Ethics*) and Nussbaum (*The Fragility of Goodness*) contain classic expositions of this view of the early dialogues. For a dissenting voice, see Roochnik, *Of Art and Wisdom*. Roochnik interprets Socrates as making points in both the early and middle dialogues that suggest an important disanalogy with skill—namely, that the good practitioner of a skill, unlike the virtuous person, is best-suited to use it for bad (see, e.g., *Laches*, 195c, and *Republic*, 333e). This point is related to what I below call the “Capacity/Disposition Objection” and the “No-Bad-Ends Objection.” Plato’s *Hippias Minor* is also relevant to this discussion. There, Socrates presents an argument concerning runners in a race, related to what I below call the “Voluntary Mistakes Objection.”

beginning to think about virtue. Virtue is not a skill, he says, but we do well to start thinking of it on that model.⁴

In the ancient debate, the skill analogy is thus generally understood as taking one of two forms, as one of two positive positions on the relation between skill and virtue. The first holds that virtue is sufficiently analogous to skill to *be* a skill—call this position *Virtue as Skill*—while the second holds that virtue is analogous to skill but is *insufficiently* analogous to be a skill—call this *Virtue as Like Skill*. In this respect, the contemporary debate looks much like the ancient one. Thus, while some contemporary philosophers hold that virtue is a skill, others hold that it is merely like skill.⁵ And, further, that about which the ancients agree, contemporary philosophers largely do too. They largely agree that both skill and virtue involve practical knowledge, that both are to some degree teachable, and that acquiring each requires practice or training.⁶

Arguments purporting to show that the analogy is a mere analogy, however, seem to have multiplied. Four of Aristotle's objections remain and are often repeated. These are as follows:

The Action/Production Objection: The virtuous person performs the virtuous action for its own sake, whereas the skilled person acts skillfully for what doing so produces.⁷

The Firm Character Objection: The virtuous person acts from a firm and unchanging character, whereas the skilled person does not.⁸

- 4 Aristotle, *Nicomachean Ethics*. All references to Aristotle are to this work and are hereafter cited parenthetically. Bloomfield (*Moral Reality*, 59) and Annas ("The Structure of Virtue," 16–17) claim that among the ancient Greeks, *only* Aristotle held that the analogy is a mere analogy.
- 5 Annas ("Virtue as a Skill"), Swartwood ("Wisdom as an Expert Skill"), Stichter ("Practical Skills and Practical Wisdom in Virtue" and *The Skillfulness of Virtue*), for instance, fall into the former camp. Notes 7–13, below, list those who fall into the latter. Still other virtue ethicists will not find the analogy useful enough to be worth special emphasis, but no one denies that virtue and skill are similar in at least some respects.
- 6 Ryle argues that the teachability of virtue is more properly understood as *learnability* ("Can Virtue Be Taught?"). I intend to include his "learnable" in my "teachable."
- 7 Apart from Aristotle (1105a28–35, 1140a1–18), at least Broadie (*Ethics with Aristotle*, 83), Zagzebski (*Virtues of the Mind*, 113), and Klein ("Of Archery and Virtue") make this objection. Annas admits the content of the objection but thinks it inconsequential for the skill analogy ("Virtue as a Skill," 230, and *Intelligent Virtue*). As we will see, this objection also entails those claiming that one's motivation matters for virtue but not for skill, as in Hacker-Wright, "Skill, Practical Wisdom, and Ethical Naturalism."
- 8 Apart from Aristotle (1105a28–35), at least Wallace (*Virtues and Vices*, 46), Broadie (*Ethics*

The Voluntary Mistakes Objection: The virtuous person's virtue is impugned by voluntary mistakes, whereas the skilled person's skill is not.⁹

The Practical Wisdom Objection: Virtue requires practical wisdom, whereas skill does not.¹⁰

In addition to these, however, contemporary philosophers often note at least three other, *prima facie* distinct objections:

The Capacity/Disposition Objection: Virtue is a kind of disposition to act well, whereas skill is a mere capacity to act well.¹¹

The No-Vice-Analogue Objection: Virtue has vice as its contrary, whereas skill has only lack of skill, which is not analogous to vice.¹²

The No-Bad-Ends Objection: Virtue cannot be used toward bad ends, whereas skill can be.¹³

with Aristotle, 89), Zagzebski (*Virtues of the Mind*, 112), and Stalnaker ("Virtue as Mastery in Early Confucianism," 408) make this objection.

- 9 Apart from Aristotle (1140a21–24), Foot is most famous for making this objection (*Virtues and Vices*, 8). See also Ryle, "Can Virtue Be Taught?," 438; Zagzebski, *Virtues of the Mind*, 107; and Lott, "Situationism, Skill, and the Rarity of Virtue," 390–91.
- 10 Apart from Aristotle (1097a5–8, 1140a27–31, 1140b5–6), Wallace (*Virtues and Vices*, 43), Putman ("The Intellectual Bias of Virtue Ethics," 303), and Hacker-Wright ("Skill, Practical Wisdom, and Ethical Naturalism") make this objection. The content is agreed with as well by at least Stichter ("Virtues, Skills, and Right Action," "Practical Skills and Practical Wisdom in Virtue," and *The Skillfulness of Virtue*), but he thinks it inconsequential for the skill analogy. (See note 51 below on Stichter's treatment.)
- 11 Rees and Webber ("Automaticity in Virtuous Action") make this objection most explicit, pointing to Ryle ("Can Virtue Be Taught?") as inspiration. Zagzebski (*Virtues of the Mind*, 107), Watson ("Two Faces of Responsibility"), and Hacker-Wright ("Skill, Practical Wisdom, and Ethical Naturalism") seem to agree with the content. Related is Zagzebski's claim that skill is inherently difficult, whereas virtue is not (*Virtues of the Mind*, 108). Aristotle (1105a9–10) claims that *both* skill and virtue are inherently difficult. Wallace argues that each of skill and virtue has a *distinctive* kind of difficulty (*Virtues and Vices*, 44–46).
- 12 See Zagzebski, *Virtues of the Mind*, 112.
- 13 See Wallace, *Virtues and Vices*, 43; Putman, "The Intellectual Bias of Virtue Ethics," 303; Stalnaker, "Virtue as Mastery in Early Confucianism," 408. Given Plato's mention of a similar objection (see note 3 above), this is perhaps more accurately understood as an ancient objection. As it is *prima facie* not one of Aristotle's, however, I list it here. Some common objections, which I do not discuss here, are the Expertise Objection (that there are experts in skills but not in virtue), the Articulatory Objection (that virtue requires the ability to articulate what one knows but skill does not), and the Memory Objection (that while skills can be forgotten, virtue cannot be). It is worth noting that various of these and the above objections are also discussed in virtue epistemology (see, e.g., Battaly, "Virtue Epistemology").

I will further explain these objections later in the paper, but I will be arguing that each misses the mark. This is not, however, because any of these objections is factually incorrect about skill or virtue. I will be arguing that each misses the mark, rather, because each embodies a basic misunderstanding of the skill analogy—a misunderstanding already implicit in both of the standard treatments of it.

What is the misunderstanding? Roughly, it is to think that the skill analogy aims to understand virtuous human beings on the model of merely *skilled* individuals—individuals merely good (or very good) at making shoes, treating illnesses, or playing tennis, for instance—when it rather aims to understand them on the model of good occupants of skill-involving *roles*—individuals, that is, such as good cobblers, doctors, and tennis players.¹⁴ What follows is an effort to show that this is indeed a misunderstanding, to substantiate the distinction on which it relies, and to argue that correcting for it enables us to respond to each of the above objections—thus giving us good reason to hold that being virtuous is being a good occupant of a skill-involving role.

The paper goes as follows. In section 1, I discuss two recent defenses of the skill analogy by two of its principal contemporary proponents: Julia Annas and Matt Stichter. Though each is committed to the traditional view of the analogy (as comparing the virtuous person to the merely *skilled* individual), each is also, like myself, committed to saying that the above objections embody a basic misunderstanding of the analogy. I will be arguing, however, that neither proposal can be correct because each defends the analogy by attributing to practical skill a feature that it in fact lacks. The two proposals do lead us, however, to what I will argue is the proper view of the analogy, which relies on the distinction between “skill possession” and “skill-role occupancy.” In section 2, I develop this distinction and the corresponding notion of a “good skill-role occupant.” In section 3, I point to a similar notion in the *Nicomachean Ethics*. And in section 4, I return to the above seven objections to show that the analogy withstands each of them, once understood in terms of good skill-role occupancy.

14 This point could be gleaned from the *Gorgias* passage mentioned above. Watson makes a similar distinction:

One can be “good at” playing tennis without being overall a good tennis player. A good tennis player, overall, possesses not only a high level of skill but, among other things, a commitment to the game, a responsibility to its distinctive demands. (In this way, “good tennis player” functions rather like “good human being.”) (“Two Faces of Responsibility,” 287)

As I discuss below, Stichter (“Practical Skills and Practical Wisdom in Virtue” and *The Skillfulness of Virtue*) attempts to use this distinction in relation to the skill analogy, but I believe he misuses it.

1. TWO PROPOSALS FOR HOW THE SKILL ANALOGY GETS MISUNDERSTOOD

1.1. Annas's Proposal

In *Intelligent Virtue*, Annas defends the view which I above called *Virtue as Like Skill*, arguing that virtue is importantly like skill along two main lines. She says, “We find the important similarity of virtue to skill in skills where two things are united: the *need to learn* and the *drive to aspire*.”¹⁵ As noted above, it is widely accepted that skill and virtue each requires learning (i.e., teaching or training), so in evaluating Annas's proposal, we can focus on “the drive to aspire.”

In beginning to do so, we should note that the above quotation already implies a fundamental way in which Annas's understanding of the skill analogy differs from those who make the objections introduced in the previous section. The need to learn and the drive to aspire, she implies, need be united in only *some* skills for virtue to be analogous to skill. And she makes clear in the ensuing discussion that this is because only *some* skills require the drive to aspire. The objections that we listed above, on the contrary, concern features purportedly shared by all skills—they say, e.g., “Skill is a capacity, not a disposition” and “Skill is concerned with production, not action.” Each of these objections, that is, assumes that virtue (*qua* virtue) has some feature *x* that every skill (simply *qua* skill) lacks. Annas is thus committed to saying that these objections embody a basic misunderstanding of the analogy: the analogy does not require that skills *in general* align with virtue in respect to a given feature; it requires merely that some do.

I will later be making use of a similar point in my own proposal for how the skill analogy gets misunderstood. But in evaluating Annas's proposal, we can focus on the fact that she invokes the point because she thinks that only some skills require the *drive to aspire*. We can thus evaluate her overall proposal for how the skill analogy gets misunderstood by asking whether the drive to aspire is in fact required for the possession of some skills.

What is the drive to aspire? Annas describes it as constituted by three interrelated sub-drives, which she says must be present from the start in learning the relevant kinds of skill: the drive to understand, the drive to self-direct, and the drive to improve.¹⁶ The drive to understand is a drive to grasp *why* a skill is exercised in such-and-such a way, rather than merely *that* it is exercised in that way—so, for instance, it is a drive to grasp not only *that* one builds buildings in ways *x*, *y*, and *z* but also *why* one does so in those ways. Annas contrasts per-

15 Annas, *Intelligent Virtue*, 16.

16 Annas, *Intelligent Virtue*, 17–18.

performances done understandingly with performances done by mere routine or parroting. And this naturally connects the drive to understand with the second sub-drive, the drive to self-direct. The drive to self-direct is a drive to do things according to *one's own* understanding—it is a drive to be self-directing in one's exercise of a skill. And lastly, the drive to improve is, as it sounds, the drive to get better and better in one's exercise of the skill.

We can now ask, though, whether the possession of some skills really does require the drive to aspire. The sub-drives which constitute the drive to aspire do seem necessary for *acquiring* skill—and in the case of the drive to understand and the drive to self-direct, that is all Annas claims. But the drive to improve, in particular, is meant also to be *constitutive* of the skills with which Annas is concerned, meaning she thinks that anyone who lacks the drive to improve also lacks the skills in question.¹⁷ She recognizes that this is a very demanding requirement of a skill, but she tries to preempt any worry that it is *too* demanding by saying that if a skill does not require the drive to improve, it is simply not the kind of skill that could be analogous to virtue. Being virtuous, she thinks, does require the drive to improve, so any skill that is to be like virtue must also require that drive.

But is the drive to improve constitutive of any skill? In considering this question, we might run through various skills of which Annas claims it is—she mentions *building, playing piano, and tennis*, among others. Is one skilled at these things only if one is driven to become better at them? Annas says yes, but it is difficult to see why this should be the case. For it seems that one possible situation in which one could be driven to improve a skill is the situation in which one already possesses it. For instance, it makes good sense even to say that so-and-so is an *expert* at building *and* that they are driven continually to improve. It also makes good sense to say that so-and-so is the best in the world at building but is *no longer* driven to improve. In either case it seems that the person's expertise does not on its own entail that they are driven to improve; such a drive is independent of their skill. If this is correct, it follows that lacking the drive to improve a skill does nothing to show that one presently lacks it. And in that case, neither the drive to improve nor the more general drive to aspire is a necessary constituent of any skill. Annas's proposal for how the skill analogy gets misunderstood, then, is mistaken.¹⁸

Before moving on to the second proposal for how the skill analogy gets misunderstood, however, it will be useful to consider why Annas might be tempted to think that the drive to improve is constitutive of (rather than merely necessary

17 Annas, *Intelligent Virtue*, 19.

18 Irwin argues similarly (review of *Intelligent Virtue*, by Julia Annas, 551).

for acquiring or maintaining) some skills. Part of the answer would seem to be that she thinks that some skills (but not others) *can* continually be improved. She mentions shoelace tying as a skill that does not require the drive to aspire, and it is at least plausible that shoelace tying does not allow for continual improvement. Building, playing piano, and tennis, on the other hand, plausibly do. However, from the fact that a skill *allows* for continual improvement, it does not follow that possessing the skill *requires* that one be driven, continually, to improve it. This answer on its own, then, cannot fully explain why Annas thinks that some skills (but not others) require the drive to improve.

A more enlightening answer might involve a thought that can seem to be in the background of Annas's discussion: she sometimes talks as if the drive to aspire is a possible feature of skills themselves. As we have just seen, she attaches the drive to aspire to the skills of building, piano playing, and tennis, for instance, but not to shoelace tying, saying: "We do not demand aspiration to improve in tying our shoelaces."¹⁹ This may just be a loose way of talking, but it seems to me potentially distortive. For drives are features of people, not skills themselves. *People* are driven (or not driven) to improve their skills. So what we mean when we say that we do not demand aspiration to improve in shoelace tying is that we do not demand *of people* that they continually be driven to improve in tying their shoelaces, not that we do not demand such a drive simply for the *possession* of that skill. Yet Annas can seem to attach this kind of demand (or, alternatively, lack of demand) to skills themselves.

If such a connection is what she has in mind, that would of course help to explain her view that the drive to improve is a necessary condition for the possession of some skills but not others. But if we rather accept that the drive to improve is a possible feature of people rather than skills, as I think we should, it seems that there is no pressure to think it is demanded of either *all* people or else *none* in regard to a given skill. We might instead think it is demanded of some people and not others. For instance, while it is perhaps a demand on human beings that they be driven continually to improve in respect to virtue, or on doctors that they be driven continually to improve in medicine, the former is clearly not demanded of non-humans, nor the latter of nondoctors. In that case, Annas would seem better off arguing that the virtuous human being is analogous to the skilled individual who is driven to improve and *of whom that drive is properly demanded*. It will not be my aim in what follows to argue for this particular view, but I do think that the account of good skill-role occupancy that I offer below could suit Annas's purposes well. Before offering that account, however, I turn

19 Annas, *Intelligent Virtue*, 18n3.

to the second prominent proposal for how the skill analogy gets misunderstood, as it provides a natural entry point to my own.²⁰

1.2. Stichter's Proposal

In his paper "Practical Skill and Practical Wisdom in Virtue," Stichter defends the view which I have called *Virtue as Skill*, thus thinking that virtue is not merely like a skill but is a skill. In defending this view, he concerns himself directly with some of the seven objections I listed in the introduction.²¹ In particular, he focuses on the Capacity/Disposition Objection, the Voluntary Mistakes Objection, and (an objection closely related to) the Action/Production Objection.²² In discussing his proposal for how the skill analogy gets misunderstood, I will focus on his treatment of the Capacity/Disposition Objection. This is the objection that, whereas virtue is a disposition to act well, skill is a mere capacity to do so. The nature of the distinction between dispositions and capacities is a controversial one, but the point of the objection can be understood fairly simply as follows. In saying that virtue is a disposition to act well, what this means is that the virtuous agent by and large *does* act well and hence is sufficiently motivated to act well. That skill is a mere capacity to act well, on the other hand, means that the skilled agent will act well as concerns their skill *when* sufficiently motivated, but that the skilled agent (simply *qua* skilled) need not be sufficiently motivated. Stichter has two separate proposals for responding to this objection. The first, however, runs into a problem similar to the one faced by Annas: he mistakes a condition necessary to *acquire* or *maintain* a skill for a condition *constitutive* of skill.²³ I thus discuss only his second proposal.

According to Stichter, the Capacity/Disposition Objection is the result of our tendency to evaluate *performances* rather than *performers*.²⁴ For whereas performances are evaluable only in terms of standards of performance (i.e., in

20 It is worth noting that Annas ("My Station and Its Duties," following Bradley, *Ethical Studies*) does discuss the importance of roles for virtue *generally*. But she does not connect this idea to the skill analogy in particular.

21 The relevant arguments also appear in Stichter, *The Skillfulness of Virtue*.

22 He discusses a worry akin to the Action/Production Objection in the section titled "Acting for Some Other End," 440.

23 The condition Stichter invokes is a certain quantity and quality of practice. He argues that, given the necessity of proper practice for acquiring and maintaining skill, skill at ϕ -ing requires being disposed to ϕ . Wolff proposes the same in response to much the same objections ("Aspects of Technicity in Heidegger's Early Philosophy," 326). As I have argued above, however, this is insufficient reason to think that such a disposition is constitutive of skill.

24 Wolff again makes a similar point ("Aspects of Technicity in Heidegger's Early Philosophy," 325).

terms of how much skill the performance exhibits), performers, he thinks, are also evaluable in terms of their commitment to the practice concomitant with their skill. So, for instance, he takes it that any individual who is playing tennis is evaluable not only in terms of how well they play but also in terms of their commitment to tennis, and he thinks the same of any individual performing surgery and their commitment to medicine.²⁵ To be committed to a practice, he says, is to be responsive to its distinctive demands, to be motivated to act in accordance with those demands.²⁶ To be skilled at *and* committed to a practice, then, is to be disposed to act well concerning that practice. It is this basis on which he thinks the Capacity/Disposition Objection, as well as the other objections with which he is concerned, miss the mark.

In beginning to evaluate this proposal, we first need to correct for a dialectical oversight—an oversight which is well conveyed in terms of a worry proponents of the Capacity/Disposition Objection are likely to have concerning Stichter's proposal. The worry is that his proposal considers only *performers*, and the Capacity/Disposition Objection takes it for granted that one can be skilled and *not* perform. Skill is, according to that objection, a mere capacity. So if Stichter is to count as responding to the Capacity/Disposition Objection, he also needs to account for skilled nonperformers. He must be willing to say that skilled nonperformers, too, are evaluable in terms of their commitment to the practice concomitant with their skill. I will assume in what follows that he is willing to say that.

Even if we amend the scope of evaluation from “all performers” to “all skilled individuals,” however, Stichter's proposal faces a second problem. For even if all skilled individuals are evaluable in terms of their commitment to the practice concomitant with their skill, that does not entail that they *are* committed. One can be evaluable in terms of commitment to tennis, for instance, but be *negatively* evaluated—hence, assuming accurate evaluation, be *uncommitted* to tennis. The problem, then, is that even if all skilled individuals are evaluable in terms of their commitment to a practice, that does not entail that all skilled individuals will be motivated to act in accordance with the demands of the practice. For out of “commitment” and “lack of commitment,” only the former explains an agent's being positively motivated. So even if all skilled individuals are evaluable in terms of their commitment, Stichter's proposal does not show that all skilled individuals (merely *qua* skilled) are disposed to act well as concerns the practice

25 Stichter does not specify what a practice is, but I take it that practices are domains or fields of activity. I further discuss the notion of a practice in section 2.

26 Stichter, “Practical Skills and Practical Wisdom in Virtue,” 443.

concomitant with their skill. Thus, it also does not show that skill is analogous to virtue in being a disposition to act well.

Now, as the skill analogy is usually understood, this would make for a failed defense of it. But I will be arguing shortly that it is rather the beginning of a successful defense, once the analogy is properly understood. Stichter, as I understand him, is tacitly committed to the view that the skill analogy relies on a feature of skilled individuals *additional* to their skill itself—namely, *commitment*. And recognizing that, I think, is essential to understanding the analogy correctly.

Before developing this view, however, we need to mention a final difficulty with Stichter's proposal. He is committed to saying that proponents of the Capacity/Disposition Objection have misunderstood the analogy in two ways, but only one of these is an actual misunderstanding. First, he is tacitly committed (as I have just suggested) to saying that whereas the skill analogy is usually thought to concern only the skilled individual's *skill*, it in fact also concerns their *commitment* to a practice. Again, I think that is correct. The remaining difficulty lies in a second purported misunderstanding, which we saw him suggest is the cause of the first: he claims that proponents of the Capacity/Disposition Objection have failed to notice that *all* skilled individuals are evaluable in terms of their commitment to the practice concomitant with their skill, in that they are criticizable if they are not so-committed.²⁷ But this is not true. On its own, possessing a skill does not entail that one is evaluable in terms of one's commitment to the corresponding practice. So this second purported misunderstanding does not constitute an actual misunderstanding.

The examples of skill possession that Stichter offers can tempt us to think otherwise. But that is because his examples happen to concern kinds of skilled individuals who plausibly *are* so-evaluable. He considers, for instance, a skilled emergency room doctor who refuses to perform surgery on a needy patient, saying that such an individual is a bad doctor for lacking commitment to the demands of medicine. He is certainly right; but *being* a doctor is not just a matter of possessing skill at doing doctorly things. Retired doctors, for instance, can possess such skill, but they are generally not evaluable in terms of their commitment to medicine. So it is not merely their skill that makes them so-evaluable.²⁸

27 Stichter, "Practical Skills and Practical Wisdom in Virtue," 442–43.

28 Russell makes a similar mistake when he says the following: "To say that someone has ... a skill is to say simultaneously that that person is committed to acting for a certain standing goal and that he or she is adept at finding what it would take to realize that goal in concrete circumstances.... [For instance,] to describe someone as a physician is to describe him or her in terms of the standing goal of healing by use of medicine" ("From Personality to Character to Virtue," 100). Again, being a physician is not merely a matter of possessing skill at treating patients.

Similar to Annas, then, Stichter requires a distinction between individuals to whom the demands of a practice apply and those to whom they do not. This is the kind of distinction that I will be developing in what follows, in distinguishing between mere skill possessors and skill-role occupants.

2. SKILLS, SKILL ROLES, AND GOOD SKILL-ROLE OCCUPANTS

That virtue ethics in general is comfortable with the notion of a “role” should be obvious from the importance it sometimes places on “role models.” A key way in which the not-yet-virtuous individual is supposed to become virtuous (learn how to live) is by having and emulating role models (those who are taken to know how to live).²⁹ Even so, if we do not have a firm grasp on what a role is, that would make good sense. Contemporary Western life and society are perhaps less explicitly structured around our roles than they once were.³⁰ Nonetheless, I take it that we do still occupy roles and that we do still have a basic grasp on the notion of a role. We know what it is to be a parent, a citizen, or a carpenter, for instance, also a cobbler, doctor, or tennis player. And as at least some of these roles properly involve skill, we should also have a basic grasp on the notion of a skill role.³¹ In the present section, I aim to make that notion more explicit and to defend my understanding of being a *good* skill-role occupant against an important objection. It is this notion that I take to be essential to a correct understanding of the skill analogy. In section 3, I turn to Aristotle’s *Nicomachean Ethics* to argue that the “practitioners of skill” (τεχνίτες/*technites*) whom he discusses in making positive use of the skill analogy are themselves not mere skill possessors but, rather, much like good occupants of skill roles. In section 4, I then return to the seven objections with which we began.

In the introduction to this paper, I suggested that the distinction between mere skill possession and skill-role occupancy is an intuitive one by reference to the apparent difference between possessing practical skill at making shoes, treating illnesses, or playing tennis, for instance, and being a cobbler, doctor, or tennis player. Roughly, while the former are kinds of practical ability, the latter are recognized *positions* that properly require possession of the concomitant

29 See, e.g., Curzer, “Aristotle and Moral Virtue,” 118; Hill and Cureton, “Kant on Virtue,” 269; Athanassoulis, “Acquiring Aristotelian Virtue,” 422. This suggests (*pace* Hardimon, “Role Obligations,” 334) that “human being” is a role, and that “living” is the practice it concerns.

30 This is a theme in MacIntyre, *After Virtue*. See Frede, “The Historic Decline of Virtue Ethics,” for a nice summary of MacIntyre’s view here; and see Lutz, *Tradition in the Ethics of Alasdair MacIntyre*, for a more in-depth treatment.

31 I take it that all of the aforementioned roles properly require skill. If one has a more specific notion of “skill,” however, one may wish to think of only some of them as skill-roles.

practical skill.³² In what follows, I want to further unpack this latter notion by reference to three core features of *good* skill-role occupants, in contrast to those of mere skill possessors.

First, in saying that skill roles “properly require” the concomitant practical skill, I mean just that occupants of a given skill role are normatively *expected* to possess the concomitant skill and that they will reliably fulfill their role only if they do possess it. There may be doctors without medical skill and tennis players without tennis skill, for instance, but they will be bad doctors and bad tennis players. If they do succeed in their activities, their doing so will be in an important sense accidental. So, while simply occupying a skill role does not entail possession of the concomitant practical skill, being a *good* occupant of such a role does. Skill possession, then, is the first of the three features of a good skill-role occupant. Perhaps rather obviously, it is the only feature shared with the mere skill possessor.

Next, to occupy a “position” in the sense relevant to occupying a skill role is to serve some function in a practice. This need not mean being employed in an official capacity or having a profession. It simply means having a task to carry out ongoingly, something for which one is responsible in a discipline, domain, or field of activity.³³ It means having a task one *ought* to perform, as an occupant of that role.³⁴ So, since a tennis player’s function (*qua* occupant of that role) is to play tennis, tennis players ought to play tennis; since a doctor’s is to see and treat patients, doctors ought to see and treat patients; and since a cobbler’s is to make shoes, cobblers ought to make shoes.³⁵ And if a role occupant regularly fails to

32 Here I talk about roles as “recognized” because recognized roles are the paradigmatic kind. A full account of roles, however, should leave room for new or at least significantly reconceived roles, which we would not immediately recognize.

33 I intend here to accept Putman’s criticism of MacIntyre’s notion (in *After Virtue*) of a “practice” as being “intellectually biased” (“The Intellectual Bias of Virtue Ethics”). Bricklaying, on my understanding, can be just as much a discipline or field of activity as architecture. One is a bricklayer if one has bricklaying as one’s ongoing task.

34 Some think that there is no obvious connection between functions (nor virtue more specifically) and such normative statuses. If one agrees, one can imagine “demands,” here, as matters of non-deontic evaluability. The crucial point is just that an individual with a function is evaluable in a sense that goes beyond mere measuring. I can measure a nondoctor by the standards of a doctor, but there is an important sense in which that measure is an inappropriate measure for the nondoctor. (See note 45 below on a related point.)

35 MacIntyre (*After Virtue*, 54–57) makes a similar point, following Prior (“The Autonomy of Ethics”). Haugeland (“Truth and Rule-Following”) and Korsgaard (*Self-Constitution*) do as well in discussing what they call “constitutive standards.” It is also worth noting that though roles are “interpretative” in that we can reasonably disagree about their more specific duties (as Hardimon, “Role Obligations,” 336; and Dworkin, *Law’s Empire*, 45, note), I take it that

fulfill their function appropriately—both in appropriate ways and at appropriate times—they are a bad occupant of the relevant role. Occupying such a position, then, and reliably fulfilling it, is the second of three features that sets the good skill-role occupant apart from the mere skill possessor.

Some philosophers, in focusing specifically on “social roles” (such as parent, teacher, doctor), have understood role demands as a kind of moral demand.³⁶ But clearly not all role demands are moral demands. The demand on a tennis player to play tennis, for instance, will in all but the oddest cases not be a moral demand. As a general characterization of role demands, then, this understanding clearly does not work. Rather, since a role is a position within a practice, whose function is a matter of its position in that practice, it is rather more plausible that role demands in general are demands of the practice of which the role is a part. We saw earlier that this is the language Stichter uses in talking of “the demands of the practice” concomitant with an individual’s skill; and it seems like the right language. The demand on a tennis player to play tennis and play in way w is a demand of tennis and is a result of their particular position in that practice; the demand on a doctor to do such-and-such for patient x with ailment y is similarly a demand of medicine; and the demand on a cobbler to make shoes and do so in way z is a demand of cobblery. Some of these demands may then *also* be characterized as being of moral concern, but as role occupants are subject to their specific role demands only in virtue of occupying those positions in the practice, the practice will be basic in this respect.

The third and final point that sets good skill-role occupants apart from mere skill possessors follows closely from this. As mere skill possessors have no obligation from within the concomitant practice to ϕ , demands on them to ϕ must come from outside the practice itself. An individual merely skilled at tennis, for instance, may play “to get some exercise” or “to please a friend” or “to blow off some steam,” but they cannot play simply “because they are a tennis player.” Skill-role occupants, on the other hand, not only *can* play for that reason; in some cases, they are evaluable in terms of the extent to which they *do*. The good tennis player, for instance, does not just happen to play tennis; they play because

this does not apply to a role’s most general duties. I will not discuss here what might ground such duties, but on this topic see, e.g., Sciaraffa, “Identification, Meaning, and the Normativity of Social Roles”; and Stern, *Understanding Moral Obligation*, 161–67, and “My Station and Its Duties.”

36 Hardimon, e.g., does so (“Role Obligations,” 334). I take it that a social role, in his sense, is a role that is understood as “for the good of society.” This is much narrower than what I am understanding as a role. Though I do not discuss them here, I also allow roles that are detrimental to society, such as “thief.” But even some good roles, such as “tennis player,” are not plausibly social roles in this sense.

they are a tennis player. Tennis is, as we sometimes say, *what they do*—they identify with tennis and are noninstrumentally committed to it and its distinctive demands.³⁷

This final claim about good skill-role occupants requires two clarifications. The first concerns the scope of “the skill-role occupants” said to be good in virtue of their noninstrumental commitment. The claim is merely that for *some* skill roles, one will be a good role occupant in virtue of one’s noninstrumental commitment. It thus allows that there are skill roles for which noninstrumental commitment does *not* make one a good role occupant. This weaker claim is (as I will be arguing in a moment) not only true but is also sufficient for my larger purposes here. In this respect, I am following a similar point we have seen made by Annas. Annas holds that only for some *skills* does possessing that skill require the drive to aspire and hence that virtue will be like skill in respect to the drive to aspire insofar as it is like some skills in that respect. My similar claim is that only for some skill *roles* does being a good skill-role occupant require noninstrumental commitment and hence that being virtuous will be like occupying a skill role well in respect to commitment insofar as it is like occupying some skill roles well in that respect.³⁸

The second clarification concerns the “goodness” attributed to these non-instrumentally committed skill-role occupants. The claim is not that lacking

37 I remain neutral here on whether evaluability in terms of commitment entails a *demand* to ϕ -for-noninstrumental-reasons. I also leave to the side how such reasons for action relate to Kantian “action from duty.” See Baron, “Virtue Ethics, Kantian Ethics, and the ‘One Thought Too Many’ Objection,” for a discussion of virtue and Kantian ethics. For a discussion of Schiller and Hegel’s early thought that such a difference exists between Kantian and specifically ancient Greek ethics, see Stern, *Understanding Moral Obligation*, ch. 4. That being a good role occupant is similar to possessing what Korsgaard (*The Sources of Normativity* and *Self-Constitution*) calls a “practical identity” will be obvious here—identity and commitment *are* important to being (at least some kinds of) good role occupant. Nonetheless, possessing a practical identity, as Korsgaard understands it, is distinct from being a role occupant, as well as from being a good role occupant. One’s role (unlike one’s practical identity) need not be expressed in what one actually does, and it need not be a description under which one values oneself (Korsgaard, *Self-Constitution*, 101). There are, for instance, bad role occupants—a terrible parent might not identify with their role at all. And, further, even if one does identify with one’s role, and even if the role is expressed in what one actually does, one may still carry it out reliably poorly, which we have seen is incompatible with being a good role occupant.

38 This point can seem to (but does not) revive the view that virtue is analogous to practical skill in respect of commitment, since *some* skilled individuals *are* noninstrumentally committed. As we have seen, however, such commitment is not constitutive of any agent’s practical skill itself. Being noninstrumentally committed, on the other hand, sometimes is constitutive of an agent’s being a good skill-role occupant. Or so I will argue.

noninstrumental commitment necessarily makes one a *bad* occupant of a role. Consider being a good husband.³⁹ Part of what makes a husband a good husband is their being committed to their partner and relationship for its own sake. But a husband who treats their partner well for other reasons is not an absolutely or definitively *bad* husband—presumably such a husband is better than the husband who intentionally treats their partner poorly and so is good at least relative to them. Nonetheless, the instrumentally motivated husband is, all else equal, still bad relative to the noninstrumentally committed husband. The claim here, that the occupants of at least some roles are good in virtue of their noninstrumental commitment, is similar. It is that noninstrumental commitment is a “good-making feature” of occupants of at least some skill roles. So while one might be a relatively good role occupant even without such commitment, the *best* or *ideal* skill-role occupant (again, of at least some skill roles) will be noninstrumentally committed.⁴⁰

The claim that needs defending, then, is that for at least some skill roles, being a good skill-role occupant requires noninstrumental commitment. I will offer two examples to the effect that this claim is true, before attempting a general explanation. If one thinks that “husband” does not denote a skill role—or, alternatively, thinks that that role possesses the relevant feature merely because of its moral dimension—return first to the example of being a good tennis player. I have said that being a good tennis player in the relevant sense requires noninstrumental commitment. Given what we have said, this means that the best or ideal kind of tennis player is noninstrumentally committed to tennis and its distinctive demands, while the less than ideal player has other motivations for playing. In support of this, imagine watching Serena Williams win Wimbledon and then give an interview in which she discusses her motivations. Any of the following, I take it, would impugn her standing as a tennis player: “I don’t care about tennis, I was simply playing for the prize money” or “The only thing that really motivated me was proving to my friends that I could do it” or “I entered the tournament and played like I did just because my coach told me to.” None of these are bad motivations *per se*, but much like the case of the instrumentally committed husband, they show a kind of disrespect for tennis that is, if not definitively bad for a tennis player, at least less than ideal. Someone else who played

39 Again, I am happy thinking of “husband” as denoting a skill-role, but if the reader is not, the example can serve simply as illustrative.

40 Plausibly, one can be instrumentally *and* noninstrumentally committed to something, and it seems that some forms of instrumental commitment do not impugn an agent’s noninstrumental commitment. I will not try here, however, to give an account of *which* instrumental reasons fall on which side of this line.

just as well, just as reliably, but was committed to tennis itself would be better *qua* tennis player.

Or consider being a good artist. The ideal artist, I take it, is noninstrumentally committed to art—in particular, they will be noninstrumentally committed to creating art. They will not merely reliably create good art, however. They will love art; they will be devoted to it and to artistic creation for its own sake. Consider, for instance, Irving Stone's portrayal of Vincent Van Gogh in the novel *Lust for Life*. For the sake of his work, Van Gogh regularly goes without much that he could otherwise have had: nice clothing, high society, and a reliable source of food. Instead, he lives in places and moves in circles that some of his friends consider unsuitable for him, wears clothes they consider unsuitable, and regularly goes without food—spending his money on models to paint, for instance, rather than on these other things. And when mocked by his cousin as “not a real artist,” on the basis that he has not been able to sell any of his work, Van Gogh responds by offering just the conception of the good artist in which we are interested: “When I say I am an artist, I only mean ‘I am seeking, I am striving, I am in it with all my heart.’” He would certainly be a better artist if he were also making art worth buying, but his commitment to art is part of what constitutes the goodness he does have as an artist.

If one doubts that *any* skill-role occupant is made good by such commitment, one also likely doubts that any role and its related activity are noninstrumentally valuable—that is, one likely doubts that any such thing is *properly* noninstrumentally valued.⁴¹ Such a person would see the value of roles, if at all, only “from the outside,” as extrinsic to them and as merely for the sake of something else. But if at least some skill roles and their related activities are also of intrinsic value, such a doubter will be missing out on something. Indeed, so would a merely instrumentally committed occupant of any of the relevant roles. If artistic creation is intrinsically valuable, for instance, then the artist who does not recognize that and does not create for its own sake would be a less than ideal artist. And the same will be true of a tennis player who does not recognize the value of tennis and engages in it merely instrumentally. As it seems that at least some activities and their associated roles are of intrinsic value, however, being the most excellent skill-role occupant will sometimes require noninstrumental commitment.⁴²

41 I stay neutral here on whether “noninstrumental value” should be given a realist or non-realist reading.

42 My understanding of a role thus diverges from that of Dreyfus (*Being-in-the-World*, 95) and Blattner (*Heidegger's Temporal Idealism*, 83–84), who understand role-talk as looking at an agent's activity only from the outside, as denoting a “mere social status” rather than a “for-the-sake-of-which.” In thinking that role-talk can also look at an agent's activity from the inside, my view is closer to that of Haugeland, *Dasein Disclosed*.

To sum up the account defended in this section, then, I have said that skill-role occupants are individuals serving a function in a practice and subject to certain demands of that practice, including the demand to exercise their skill and to exercise it well. And I have said that good skill-role occupants, as concerns at least some skill roles, do so out of noninstrumental commitment. Again, it is this notion of a good skill-role occupant that I believe is the relevant one for the skill analogy, rather than the merely skilled individual. I now want to offer some evidence that a similar notion is at work in Aristotle's positive treatment of the analogy in the *Nicomachean Ethics*. In section 4, I then return to the objections with which we began, to show that understanding the skill analogy in terms of good skill-role occupancy allows us to respond to each of them.

3. SKILL ROLES IN THE NICOMACHEAN ETHICS

Despite our having inherited the skill analogy from the ancient Greeks and others, I do not believe that we are completely beholden to them in understanding it. So, even if they did not understand the analogy in terms of roles rather than mere skills, that would not be conclusive evidence that it should not be understood in those terms. However, the ancients did understand the analogy in similar terms, at least at times. In particular, in drawing the analogy between virtuous and skilled individuals, they very often had in mind more than merely skilled individuals.

In the present section, I argue for this point by reference to the *Nicomachean Ethics* (henceforth, "the *Ethics*"). I think that in the *Ethics*, Aristotle in fact makes use of two distinct analogies with skill. However, in drawing *positive* analogies between virtuous and skilled individuals, we often find him using a notion very similar to that of the good skill-role occupant. Here my aim is just to show the core of this positive use and to demarcate both how the notion he invokes goes beyond that of merely skilled individuals but also how it stops short of good skill-role occupants as I have understood them. I will offer some brief reasons to go further than Aristotle does, along the lines of the discussion of the previous section, but the primary aim is just to make our similarities and differences explicit.

In discussing the core of Aristotle's positive use of the analogy, two preliminary points are worth making. First, what we translate as "virtue" (*ἀρετή/aretê*) is a fairly general term in classical Greek meaning "goodness" or "excellence." In the *Ethics*, in particular, the main topic is human excellence, or ethical virtue—which amounts to a human being's "living well" and "acting well" (1095a18–20). But, in the general sense, hammers are just as apt to be virtuous as human beings

are. Hammers of course do not live or act, but they can be excellent nonetheless. Second, as Aristotle understands virtue, the virtue of a thing is essentially related to its function or, in the case of a human being, to its “characteristic activity” (εργον/*ergon*) (1139a17–18). Thus, hammers and human beings are only apt to be called excellent in this sense because they both have a function, some activity or use proper to them. The function of a human being on Aristotle’s account is to live, so our characteristic activity (*qua* human beings) is living (1097b30–1098a5).⁴³ That is why a human being’s being excellent consists in their living *well*.

A key way in which Aristotle introduces these points is by use of an analogy with skilled individuals—in particular, by use of an analogy with what he calls “practitioners of skills” (τεχνίτες, often translated “craftspeople”).⁴⁴ In Book I, for instance, he makes an important connection between *the good* of each:

Just as the good—the doing well—of a flute-player, a sculptor or any practitioner of a skill (τεχνίτη), or generally whatever has some characteristic activity (εργον) or action (πραξις/*praxis*), is thought to lie in its characteristic activity, so the same would seem to be true of a human being (1097b25–28).

Since the good (the doing well) of a human being is the same as their being virtuous, then, Aristotle can be seen here as drawing a connection between the virtuous human being and practitioners of skills on the basis that, like human beings, the latter have characteristic activities. Practitioners of skills, then, as Aristotle understands them, are no mere skill possessors. They are individuals with a function related to their skill, some ongoing task or activity to carry out.⁴⁵ For Aristotle, just as the characteristic activity of a human being is living, so the characteristic activity of a practitioner of a skill is the exercise of their skill—the flute player’s is playing the flute, the sculptor’s is sculpting, “and so on, without qualification” (1098a11). And, further, as the good of anything with a characteristic activity is performing that characteristic activity *well*, a good practitioner of a skill is good in virtue of performing their characteristic activity well (1098a12–17). To

43 I take for granted here that the form of life distinctive of human beings is different from that of other creatures and plants.

44 These tend to be individuals who produce crafted objects, though not always. The lyre player, for instance, also has τέχνη.

45 Again, whether functions should be seen as entailing deontic normative statuses is a point of controversy. Anscombe (“Modern Moral Philosophy”) and Darwall (“Grotius at the Creation of Modern Moral Philosophy”) have argued that “oughts” are out of place in virtue ethics. I disagree. I think it is significant, for instance, that Aristotle says of the “sophisticated gentleman” that he acts as he does “as a sort of law (νόμος/*nomos*) unto himself” (1128a30). A full response to this worry, however, would require its own discussion.

this extent, then, good practitioners of skills are good skill-role occupants, rather than mere skill possessors: like the mere skill possessor, they possess skill, but they also have a function or characteristic activity concomitant with that skill, which they reliably perform well.

Performing one's characteristic activity well, however, involves more than merely performing it and performing it successfully. An assumption of the *Ethics* is that "a good" is anything worth acting for the sake of (1094a). So to say that the good of a thing with a characteristic activity is performing that characteristic activity well means also that such performance is a thing worth aiming at for those who have that characteristic activity. Performing a characteristic activity well, that is, also involves having a certain kind of aim or reason for (and in) exercising one's skill. It involves exercising one's skill, as it were, because that is one's characteristic activity.

The result in the case of a good human being is that they live and act well just for the sake of living and acting well—that is, they do so for its own sake. But as we saw earlier in stating the Action/Production Objection, the result in the case of good practitioners of skills is supposed to be different. Whereas virtuous human beings act well simply for the sake of acting well, those with skills, according to Aristotle, exercise their skills for the sake of what their skills produce—meaning that good practitioners of skills are taken *not* to exercise their skills for their own sake.

Aristotle has two reasons for thinking this. First, he thinks that if any activity has a product, the product is always more valuable than the activity itself—implying that the activity itself is merely instrumentally valuable (1094a4–5). Along these lines, he says, "The products of the skills have their worth within themselves, so it is enough for them to be turned out with a certain quality" (1105a26). Second, however, as Aristotle later qualifies, even such products are not valuable without qualification (1139b1–4). The only thing valuable without qualification is the good life—what he calls the "chief" or "universal" good. All other aims are subordinate to and aim at it (1094a19–23). On Aristotle's account, then, the good practitioner of a skill exercises their skill for what it produces and, ultimately, for the sake of living a good life.

These points mark the main differences between good practitioners of skills, as Aristotle understands them, and good skill-role occupants as I understand them. Whereas good practitioners of skills, on Aristotle's account, do not exercise their skills noninstrumentally, good skill-role occupants of at least some skill roles do. The latter fulfill their function because the concomitant activity is "what they do," which is to be understood as involving finding their activity in-

trinsically valuable. For Aristotle, on the other hand, the only thing intrinsically valuable (valuable without qualification) is the good life.

The worry that Aristotle would have about our notion of good skill-role occupants, then, is much like the one considered in the previous section: that good role occupants need not be (indeed, in a sense, *cannot* be) noninstrumentally committed to their practice. I, of course, want to disagree with Aristotle here as well. By taking up the perspective of the committed role occupant, I think we see that their engagement in their activity is noninstrumental, and at least sometimes properly so. First, the committed role occupant does not engage in their activity as a mere means to some end; the activity is important in itself. It is a proper *part* or deep *aspect* of who they are. And second, though such an individual's engaging in their activity plausibly does contribute to their living well—hence, is instrumental to their living well *in a sense*—it is no mere means to their living well. Their activity as a committed role occupant is a proper *part* of their life, rather than an activity separate from it. Hence, when their activity is of noninstrumental value, their engaging in it is also *part* of their living a good life.⁴⁶

4. RETURN TO THE OBJECTIONS

4.1. *The Aristotelian Objections*

In section 1, I argued that two prominent proposals for how the skill analogy gets misunderstood are incorrect and that at least the second of these proposals depends on the possibility of distinguishing between merely skilled individuals and good skill-role occupants. A skill-role occupant, again, is an individual serving a function in a practice and subject to certain demands of that practice, including the demand to exercise their skill and to exercise it well; and the good skill-role occupant, as concerns at least some skill roles, does so out of noninstrumental commitment. Finally, I have also argued that a similar notion is at work in Aristotle's positive use of the analogy in the *Ethics*. Again, Aristotle stops short of seeing good practitioners of skills exactly as I see good skill-role occupants, but the former still amount to more than mere skill possessors; they have a characteristic activity, which they fulfill reliably and well.

Again, my contention is that the skill analogy is correctly understood as likening the virtuous human being to the good skill-role occupant. Here, I return

46 Swanton relies on a similar difference with Aristotle, implicitly agreeing also that his "practitioners of skills" are to be understood as a kind of role occupant: "The goodness of a role [on Aristotle's account] is determined by reference to its place in the life of a good human being. . . . [But] there is another, non-Aristotelian, possibility. . . . Roles must themselves be worthwhile or valuable" ("Virtue Ethics, Role Ethics, and Business Ethics," 208).

to the seven objections with which we began, to see whether conceiving of the analogy in these terms can account for those objections as promised. Insofar as it can, we have good reason to think that being a virtuous human being is being a good occupant of a skill role. In that case, the skill analogy not only has those points that a comparison with practical skill has to offer but, also, those points offered by a comparison with being a good role occupant. In reconsidering the seven objections, I will simply be talking in terms of “good skill-role occupants,” rather than constantly making the qualification that noninstrumental commitment makes one a good role occupant “for at least *some* skill-roles.” But I will have in mind just those roles for which noninstrumental commitment is a good-making feature.

I begin with the four Aristotelian objections. If the above account has been adequately detailed, we should be able to respond to each objection fairly quickly. The Action/Production Objection has already received a fair amount of attention in the above sections. Again, Aristotle claims that whereas the virtuous person acts well for its own sake, the skilled person exercises their skill for what it produces (1105a28–35, 1140a1–18). To choose an action for what it produces, again, is to perform it instrumentally; whereas to choose it for its own sake is to perform it noninstrumentally.⁴⁷ As I have argued above, however, good skill-role occupants also exercise their skill noninstrumentally; they are characterized by noninstrumental commitment to their practice. Thus, if we understand the skill analogy in terms of good skill-role occupancy, the Action/Production Objection misses the mark.

Next, the Firm Character Objection is the objection that whereas the virtuous person acts from a firm and unchanging character, the skilled individual does not (1105a28–35).⁴⁸ Like the idea of the good of a human being, Aristotle introduces the idea of having a firm and unchanging character (which he sometimes also refers to as “stable” or “unshakeable”) by comparison with good practitioners of skills. He says:

The truly wise and good person, we believe, bears all the fortunes of life with dignity and always does the noblest thing in the circumstances, as a good general does the most strategically appropriate thing with the army at his disposal, and a shoemaker makes the noblest shoe out of the leather

47 “While production has an end distinct from itself, this could not be so with action, since the end here is acting well itself” (1140b6–8).

48 This objection is especially related to the “situationist challenge.” For good discussions of that challenge as concerns the skill analogy, see Lott, “Situationism, Skill, and the Rarity of Virtue”; Russell, “From Personality to Character to Virtue”; Stichter, *The Skillfulness of Virtue*.

he is given, and so on with other practitioners of skills. If this is so, the good person could never become wretched. . . . Nor indeed will he be unstable and changeable. He will not be shifted easily . . . and not by ordinary misfortunes, but by many grave ones (1101a).

To have a firm character, then, is to continue to be disposed to act well even in difficult circumstances, so long as those circumstances stay within reason. The virtuous human being *is* so-disposed. But as Aristotle makes clear in this passage, so are good practitioners of skills. When he makes the Firm Character Objection, then, Aristotle must be relying on a distinct analogy to the one invoked in this passage. As he notes here, good practitioners of skills reliably perform their function well—and the better the practitioner, the more reliable. The good skill-role occupant, then, certainly will as well. For they, too, reliably perform their function well, and they do so in the additional sense that they do so out of noninstrumental commitment.

Next is the Voluntary Mistakes Objection. This is the objection that the individual who makes voluntary mistakes is preferable in the case of skill but not in the case of virtue (1140a21–24)—“preferable” meaning, as Philippa Foot has put it, that voluntary mistakes impugn a person’s virtue but not their skill.⁴⁹ So, for instance, shooting an arrow and intentionally missing the target (when one ought not to) does not impugn one’s skill at archery; but voluntarily *lying* (when one ought not to) does impugn one’s virtue. As we have seen, however, the overall goodness of a skill-role occupant, unlike their skill alone, *is* constituted by their exercising their skill in accordance with the demands of the practice. Being a good role occupant requires not only the ability to do well but, also, a *commitment* to doing well. In competition, for instance, the good archer is able *and* committed to hitting the target. Voluntary mistakes, then, do impugn their status as a good occupant of their role, and the Voluntary Mistakes Objection thus misses the mark.

The last of the Aristotelian objections is the Practical Wisdom Objection, the objection that whereas virtue requires practical wisdom, skill does not. This objection is also stated by Aristotle as that skills are ignorant of the universal good and fail to look for it (1097a5–8), that what conduces to living well as a whole “lies outside the ambit of a skill” (1140a27–31), and that production (and, by implication, skill) is “not concerned with what is good and bad for a human being” (1140b5–6). How can we respond?

True, the good skill-role occupant is not concerned with what is good or bad for a human being *qua* human being. But they *are* concerned with what is good

49 Foot, *Virtues and Vices*, 8.

and bad for an occupant of their role—that is, they are concerned with doing well in their role. The good tennis player is concerned with doing well as a tennis player, the good doctor with doing well as a doctor. And, of course, as good occupants of these roles, they also *in fact* do well in them. So, though the universal good (again, taken as a good life) is not their concern *qua* occupant of their role, they do possess a feature analogous to practical wisdom.⁵⁰ They are concerned with what is good and bad for a thing occupying their role and they choose well as concerns such things; and that is all that an analogy with virtue requires. The challenge put forward in the Practical Wisdom Objection, then, is met as well.⁵¹

4.2. The Contemporary Objections

Only the three contemporary objections remain. I begin with the Capacity/Disposition Objection, the objection that whereas skill is a mere capacity to act well, virtue is a disposition to do so. It should be obvious by now that this objection is in fact closely related to at least the Firm Character and Voluntary Mistakes objections, for they too rely on skill's being a mere capacity to act well. As we responded there, we can thus say here that the good skill-role occupant does not merely have the practical ability to act well; such an individual is disposed to and does act well. The good doctor, for instance, does not sit at home all their life. They exercise their skill. They, again, are both skilled at and committed to their practice. So reinterpreting the skill analogy in terms of good skill-role occupancy sidesteps the Capacity/Disposition Objection.

Next is the No-Vice-Analogue Objection, the objection that virtue is dis-analogous to skill because there is no “vice-analogue” for skill. Why is there no vice-analogue for skill? First, we should say what vice is, at least roughly. Whereas virtue is a disposition to act well, vice is a disposition to act badly—either to act instrumentally in accordance with standards of good action or else to act out of accord with those standards altogether. As a disposition to act badly, though, there can be no vice-analogue for skill, because lacking skill is either lacking a capacity altogether or else having a capacity to do something only badly. And neither of these is a positive disposition to act badly.

There is, however, a vice-analogue for the good skill-role occupant. There is the bad skill-role occupant, who is disposed to act poorly. Such an individual is

50 Aristotle, in fact, seems to admit this late in the *Ethics*, when he says that medicine and the other sciences “require some kind of care and practical wisdom” (1180b28). The implication is that there are *kinds* of practical wisdom.

51 Stichter responds similarly in saying that the Practical Wisdom Objection asks that skill be *coextensive* with virtue (“Practical Skills and Practical Wisdom in Virtue,” 446–47). That alone, however, cannot be a *response* to the objection. To be analogous, skill requires an analogous feature. I have argued that the good skill-role occupant possesses such a feature.

the bad doctor, cobbler, or teacher. They, too, are bad either in virtue of acting in accordance with the standards of their practice for the wrong reasons or else in virtue of acting out of accord with those standards altogether. The bad occupant of a skill role, like the vicious human being, is the person who has *learned* to act badly, as the virtuous person and good skill-role occupant have learned to act well (1103b9–10).⁵² Just as the vicious human being is still a human being, so the bad role occupant is still a role occupant; they just occupy the role badly. Thus, understanding the skill analogy in terms of good skill-role occupancy also allows us to avoid the No-Vice-Analogue Objection.

Finally, we have the No-Bad-Ends Objection, the objection that whereas skill can be used for either good or bad ends, virtue can only be used for good ends. The view of virtue implied here is especially contentious, and if it fails, then so does the objection.⁵³ But I will argue that even if the implied view of virtue is correct, the No-Bad-Ends Objection is met by a correct understanding of the skill analogy.

I will take it, again, that the “good end” of virtue implied by the No-Bad-Ends Objection is what we above called “life going well as a whole.” That, at least, is what we must say if we continue to take a roughly Aristotelian line on virtue. The question that the No-Bad-Ends Objection asks of us, then, is “Does the good skill-role occupant (*qua* role occupant) also have *life going well as a whole* as their end?” We can answer here much as we did concerning the Practical Wisdom Objection: no, not every skill-role occupant (*qua* occupant of that role) has life going well as a whole as their aim, but every such occupant does aim at life going well within their role, at doing well by the standards of the practice of which that role is a part. The problem with the No-Bad-Ends Objection, then, as with the Practical Wisdom Objection, is that it asks that goodness in a role *be* ethical virtue. But good skill-role occupants only need an end concomitant with their roles in order to be analogous to the virtuous human being in this respect. And they have such ends. They have the ends of cobblery, medicine, and tennis, for instance. They pursue those ends for their own sake, not for the sake of life going well as a whole. And this leaves ethical virtue and its requisite practical wisdom the jobs often associated with them: that of evaluating and organizing the various *parts* of a life—one’s various roles and projects—into a whole, coherent life.

52 Jacobson tries to use the fact that vice is like skill in this way to argue *against* the skill analogy (“Seeing by Feeling,” 395). Clearly, that attempt is misplaced. Vice *should* fit the skill model (at least in this respect) if the analogy is to be a good one. Annas makes essentially the same point (“Virtue, Skill and Vice”).

53 For arguments to the effect that virtues *can* have bad ends, see, e.g., MacIntyre, *After Virtue*, 142; Zagzebski, *Virtues of the Mind*, 93; and Jacobson, “Seeing by Feeling,” 400.

5. CONCLUSION

I noted earlier that we find it natural to talk of the virtuous human being as a role model. That description should now seem even more apt. We now have good reason to think that being virtuous *is* being a good occupant of a skill-involving role. For in each of the respects with which we have been concerned, good skill-role occupancy is analogous to virtue. As a human being's activity is living, the virtuous human's distinctive skill would be "skill at living"—the know-how they possess, knowledge how to live. But being a good human being, like being many other kinds of good skill-role occupant, plausibly requires more than mere practical skill. It requires a certain kind of noninstrumental commitment to the practice of which one is a part. Being virtuous, in that case, requires not only knowing how to live but also being noninstrumentally committed to life and to living well. I have argued by analogy that such commitment in a role is the main difference between being virtuous and being a mere possessor of a practical skill.

Where does this leave the two traditional versions of the skill analogy with which we began? These were, on the one hand, that virtue *is* a practical skill and, on the other, that virtue is merely *like* practical skills in certain respects. If being virtuous is a way of being a good occupant of a skill-involving role, the stronger of these traditional ways of understanding the analogy is false, while the weaker is true but limited. In that case, while Aristotle was correct that we do well to start thinking of virtue on the model of practical skills, we do better once we grasp the importance of roles as well.⁵⁴

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REFERENCES

- Annas, Julia. *Intelligent Virtue*. Oxford: Oxford University Press, 2011.
- . "My Station and Its Duties: Ideals and the Social Embeddedness of Virtue." *Proceedings of the Aristotelian Society* 102, no. 1 (2002): 109–23.
- . "The Structure of Virtue." In *Intellectual Virtue: Perspectives from Ethics*

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- and *Epistemology*, edited by Michael DePaul and Linda Zagzebski, 15–33. Oxford: Oxford University Press, 2003.
- . “Virtue as a Skill.” *International Journal of Philosophical Studies* 3, no. 2 (1995): 227–43.
- . “Virtue, Skill and Vice.” *Etica e Politica* 17, no. 2 (2015): 94–106.
- Anscombe, G. E. M. “Modern Moral Philosophy.” *Philosophy* 33, no. 124 (January 1958): 1–19.
- Aristotle. *Nicomachean Ethics*. Translated and edited by Roger Crisp. Cambridge: Cambridge University Press, 2000.
- Athanassoulis, Nafsika. “Acquiring Aristotelian Virtue.” In *The Oxford Handbook of Virtue*, edited by Nancy E. Snow, 214–31. Oxford: Oxford University Press, 2018.
- Baron, Marcia. “Virtue Ethics, Kantian Ethics, and the ‘One Thought Too Many’ Objection.” In *Kant’s Ethics of Virtue*, edited by Monika Betzler, 245–77. Berlin: De Gruyter, 2008.
- Battaly, Heather. “Virtue Epistemology.” *Philosophy Compass* 3, no. 4 (July 2008): 639–63.
- Blattner, William. *Heidegger’s Temporal Idealism*. Cambridge: Cambridge University Press, 1999.
- Bloomfield, Paul. *Moral Reality*. Oxford: Oxford University Press, 2001.
- Bradley, F. H. *Ethical Studies*. Oxford: Clarendon Press, 1927.
- Broadie, Sarah. *Ethics with Aristotle*. Oxford: Oxford University Press, 1991.
- Curzer, Howard J. “Aristotle and Moral Virtue.” In *The Oxford Handbook of Virtue*, edited by Nancy E. Snow, 104–29. Oxford: Oxford University Press, 2018.
- Darwall, Stephen, ed. “Grotius at the Creation of Modern Moral Philosophy.” In *Honor, History, and Relationship: Essays in Second-Personal Ethics II*, 157–88. Oxford: Oxford University Press, 2013.
- Dreyfus, Hubert L. *Being-in-the-World: A Commentary on Heidegger’s Being and Time, Division 1*. Cambridge, MA: MIT Press, 1991.
- Dworkin, Ronald. *Law’s Empire*. Cambridge, MA: Harvard University Press, 1986.
- Foot, Philippa. *Virtues and Vices, and Other Essays in Moral Philosophy*. Oxford: Oxford University Press, 2002.
- Frede, Dorothea. “The Historic Decline of Virtue Ethics.” In *The Cambridge Companion to Virtue Ethics*, edited by Daniel C. Russell, 124–48. Cambridge: Cambridge University Press, 2013.
- Hacker-Wright, John. “Skill, Practical Wisdom, and Ethical Naturalism.” *Ethical Theory and Moral Practice* 18, no. 5 (November 2015): 983–93.
- Hardimon, Michael O. “Role Obligations.” *Journal of Philosophy* 91, no. 7 (July 1994): 333–63.

- Haugeland, John. *Dasein Disclosed: John Haugeland's Heidegger*. Edited by Joseph Rouse. Cambridge, MA: Harvard University Press, 2013.
- . "Truth and Rule-Following." In *Having Thought: Essays in the Metaphysics of Mind*, 305–61. Cambridge, MA: Harvard University Press, 1998.
- Hill, Thomas E., Jr., and Adam Cureton. "Kant on Virtue: Seeking the Ideal in Human Conditions." In *The Oxford Handbook of Virtue*, edited by Nancy E. Snow, 263–80. Oxford: Oxford University Press, 2018.
- Irwin, Terence. *Plato's Ethics*. Oxford: Oxford University Press, 1995.
- . Review of *Intelligent Virtue*, by Julia Annas." *Ethics* 123, no. 3 (April 2013): 549–56.
- Jacobson, Daniel. "Seeing by Feeling: Virtues, Skills, and Moral Perception." *Ethical Theory and Moral Practice* 8, no. 4 (August 2005): 387–409.
- Klein, Jacob. "Of Archery and Virtue: Ancient and Modern Conceptions of Value." *Philosophers' Imprint* 14, no. 19 (June 2014): 1–16.
- Korsgaard, Christine M. *Self-Constitution: Agency, Identity, and Integrity*. Oxford: Oxford University Press, 2009.
- . *The Sources of Normativity*. Cambridge: Cambridge University Press, 1996.
- Lott, Micah. "Situationism, Skill, and the Rarity of Virtue." *Journal of Value Inquiry* 48, no. 3 (September 2014): 387–401.
- Lutz, Christopher S. *Tradition in the Ethics of Alasdair MacIntyre*. Plymouth: Lexington Books, 2004.
- MacIntyre, Alasdair. *After Virtue*. London: Gerald Duckworth and Company, 1981.
- Nussbaum, Martha C. *The Fragility of Goodness*. Cambridge: Cambridge University Press, 2001.
- Plato. *Complete Works*. Edited by J. Cooper. Cambridge: Hackett Publishing, 1997.
- Prior, Arthur N. "The Autonomy of Ethics." *Australasian Journal of Philosophy* 38, no. 3 (1960): 199–206.
- Putman, Daniel. "The Intellectual Bias of Virtue Ethics." *Philosophy* 72, no. 280 (April 1997): 303–11.
- Rees, Clea F., and Jonathan Webber. "Automaticity in Virtuous Action." In *The Philosophy and Psychology of Character and Happiness*, edited by Nancy Snow and Franco Trivigno, 75–90. London: Routledge, 2014.
- Roochnik, David. *Of Art and Wisdom: Plato's Understanding of Techne*. University Park, PA: Penn State University Press, 1990.
- Russell, Daniel C. "From Personality to Character to Virtue." In *Current Contro-*

- versies in Virtue Theory*, edited by Mark Alfano, 92–106. London: Routledge, 2015.
- Ryle, Gilbert. “Can Virtue Be Taught?” In *Education and the Development of Reason*, edited by R. Dearden, P. Hirst, and R. Peters, 323–32. London: Routledge and Kegan Paul, 1972.
- Sciaraffa, Stefan. “Identification, Meaning, and the Normativity of Social Roles.” *European Journal of Philosophy* 19, no. 1 (March 2009): 107–28.
- Stalnaker, Aaron. “Virtue as Mastery in Early Confucianism.” *Journal of Religious Ethics* 38, no. 3 (September 2010): 404–28.
- Stern, Robert. “My Station and Its Duties.” In *Kantian Ethics: Value, Agency, and Obligation*, 171–89. Oxford: Oxford University Press, 2015.
- . *Understanding Moral Obligation: Kant, Hegel, Kierkegaard*. Cambridge: Cambridge University Press, 2012.
- Stichter, Matt. “Practical Skills and Practical Wisdom in Virtue.” *Australasian Journal of Philosophy* 94, no. 3 (2016): 435–48.
- . *The Skillfulness of Virtue: Improving Our Moral and Epistemic Lives*. Cambridge: Cambridge University Press, 2018.
- . “Virtues, Skills, and Right Action.” *Ethical Theory and Moral Practice* 14, no. 1 (February 2011): 73–86.
- Swanton, Christine. “Virtue Ethics, Role Ethics, and Business Ethics.” In *Working Virtue: Virtue Ethics and Contemporary Moral Problems*, edited by Rebecca L. Walker and Philip J. Ivanhoe, 207–24. Oxford: Clarendon Press, 2007.
- Swartwood, Jason. “Wisdom as an Expert Skill.” *Ethical Theory and Moral Practice* 16, no. 3 (June 2013): 511–28.
- Wallace, James D. *Virtues and Vices*. Ithaca, NY: Cornell University Press, 1978.
- Watson, Gary. “Two Faces of Responsibility.” In *Agency and Answerability: Selected Essays*, 260–88. Oxford: Clarendon Press, 2004.
- Wolff, Ernst. “Aspects of Technicity in Heidegger’s Early Philosophy: Rereading Aristotle’s *Techné* and *Hexis*.” *Research in Phenomenology* 38, no. 3 (2008): 317–57.
- Yao, Xinzhong. “The Way, Virtue, and Practical Skill in the *Analects*.” *Journal of Chinese Philosophy* 39, no. 1 (March 2012): 26–43.
- Zagzebski, Linda. *Virtues of the Mind: An Inquiry into the Nature of Virtue and the Ethical Foundations of Knowledge*. Cambridge: Cambridge University Press, 1996.

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