

ALL TOO HUMAN MORALITY

By Peter A. Alces and Robert M. Sapolsky

Images, maybe grainy, of aborted fetuses, of darker-skinned people committing violent crimes, of “strung out junkies” unconscious in the street, of “drag queens” reading to children: Those who would change your mind or ossify your biases exploit emotional reaction to formulate your morality. In the end, “morality” is generally just the product of emotional reaction, moral argument an exploitation of the visceral: “I don’t know why I know what I know, but I am sure of it.” Good enough for government work. Law too, as handmaiden of morality, conspires in the exploitation, and facilitates it. Politicians and the media, mainstream or otherwise, hoist morality on the petard of emotion to sell what they are selling. And elected politicians close the deal by promulgating laws that just feel good to their target audience the way that morality just feels good. Both of us, from different disciplines, work at the intersection of law and neuroscience and conclude that law depends on the emotion-morality dynamic. We believe neuroscientific insights can disaggregate the elements of that dynamic and support a reconception and limitation of law’s reliance on morality as well as suggest appropriate limits of that reliance. We believe that liberating law from emotion-based morality would respond to myriad contemporary societal challenges, while a morality founded on emotion was adaptive on the savanna maybe 250,000 years ago but no longer serves human interests.

Embodied brains (a.k.a. “people, or, even “the People”) make decisions, both individually and in groups. Decisions are the product of neural processes: really nothing more, or less, than the

sum of our neurons, the molecules that comprise them, and the circuits that they form with each other. Group decisions often take the form of laws, and the efficacy of laws depends on the correctness of those group decisions. People generally rely on empirical evidence to make decisions (they “reason”) to the extent they can but then defer to conceptions of “morality” when they run out of empirical evidence. We are dubious that morality, as such, exists as anything substantially different from emotion, which is just a physically more salient (visceral) form of neural reaction than empirically-based, or rational, decision making. For example, such salient visceral reactions may manifest as disgust or arousal but have really nothing to do with the rectitude of the judgment. In fact, the emotional reaction dressed up as morality may mislead us into making costly mistakes. When someone engages in (or even just condones) behavior that provokes such salient reactions in others, those others may find it to be immoral, and those others may marginalize the behavior (or even make it illegal, if they have the power to do so).

The nexus of our two fields — law and neuroscience — challenges the work that morality does when emotion overtakes limited empirical evidence. Morality, we think, does the work of the supernatural, whether conceived in divine or secular terms. And, in the law, the results may be pernicious, justifying outcomes that do more harm than good because they “do good” on the bases of moral (essentially emotional) sensitivity. Now ours is not an argument in favor of immorality or even against the invocation of “moral” arguments in law, so long as such arguments’ emotional essence is appreciated. We cannot imagine legal argument without some invocation of morality, and that is fine so long as the argument looks forward (instrumentally) and not backward (non-instrumentally). Our work urges a reconceptualization of the fit between law and what morality connotes, a reconceptualization informed by neuroscientific insights.

The criminal law punishes the infliction of pain and also inflicts pain as punishment for crimes, in part, to vindicate the pain felt by the victims of crime. Emotional pain is physical pain. The stubborn colloquial distinction between the two is the product of ignorance: We just do not appreciate what it means to say that "all pain is in your head" even when we say it. But that is quite literally true: When you feel pain resulting from a physical injury, e.g., a sprained ankle, your perception of that pain results from activation of a particular circuit of neurons in your brain. Crucially, parts of that same circuit are activated by the emotional pain of ostracization, or your memories of a broken heart, by your ruminating on the future pain when seeing the dentist, or when feeling the pain of your loved one. There are neurons there whose activity is identical in all those circumstances. Neuroscience explains that.

The design of the criminal law has failed to measure accurately the cost to victims and, as well, to criminals and those who are affected by criminals' punishment. We may no longer have to guess. And it is clear now that it is the guessing under the guise of morality that is the source of non-instrumental normative theory's (colloquially "morality's") attraction and power. Astonishing as it may seem, all that humans are, all that humans experience, is mechanical, and we can comprehend mechanical systems, like brains and the emotions they instantiate, in cost-benefit terms. We can even do that long before we can do all the necessary math accurately.

As we are able to refine our understanding of the neural properties of emotional pain, we are able to calibrate our responses to crime to take accurate account of the costs and benefits of punishment and thereby calibrate the instrumental effects of criminal sentences. That realization should lead to the abolition of Victim Impact Statements ("VIS") and shaming. Both features of our sentencing process use emotion to try to inflict the "just" amount of pain on a convicted

criminal: VIS use emotion to influence the judge's supposedly rational sentencing decision; such devices also shame the criminal and shaming is a designed-in constituent of punishment. Shame inflicts emotional pain that would deter future crime or exact revenge on behalf of the victims of a crime. A fundamental misunderstanding of the nature of emotions, including pain, sadness, shame, and rage leads our criminal law to be both cruel and ineffective. Morality, ultimately, assumes the shape human actors want it to assume in order to justify doing something that those actors (at least) imagine it will "feel good" to have done. We believe that, in time, society will come to recognize that aspects of our criminal law, indeed, aspects of all of our law, built upon the "reality" of moral premises, will shrivel, as they certainly should.

The too human failure to appreciate morality's essential dependence on emotional reaction and then to attribute inappropriate (even something akin to supernatural) significance to visceral response is error and, ultimately, undermines rather than serves human thriving. That error is manifest in our law's clumsy efforts to rationalize enigmas such as racial disparities in sentencing, regulation of sexual preferences, accommodation of transgender identities, and even modern day versions of "book burning" in terms of morality. The bases of profound political differences may be found there too. Morality is just emotional (neural) reaction super-naturalized, and if law is to serve worthwhile ends it must understand the neuroscientific reality of that equation. We remain hopeful that it will. Neuroscientific insights provide the guide. The fit between law and morality, better elaborated by neuroscience, will invite, indeed compel, reevaluation of challenges law confronts, all built around the fact that the processes we view as rational are fueled, damped, or even invented by our far from rational emotions. Our capacities for empathy or perspective-taking are unevenly distributed; our judgments are distorted by biases implicit beyond our imagination;

our moral decision-making is contorted by extraneous factors as irrelevant as the wording with which a circumstance is described.

When embodied brains make decisions beyond their empirical competence, they rely on emotion, feeling, and infer from that feeling morality; they rely on what amounts to the supernatural, often even invoking their (or their political leaders') personal and parochial conceptions of the divine. That does harm because it obscures the best instrumental (cost-benefit) result, and is led by the brain-based foibles with which we think we understand someone else's pain. We do not have the capacity for such understanding, no matter how good, how moral it might feel to believe that we do.

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