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A Note from the Editor-In-Chief

It is my great pleasure to be part of the revival of the Texas A&M undergraduate journal of philosophy, Aletheia. The journal was inactive for four years since 2014. However, thanks to efforts this year's Editorial Board, last year's board, and key faculty members of the Philosophy department, Aletheia is once again part of the Philosophy department's efforts to cultivate bright minds and facilitate discussion. We, the board, hope that those who come across our publications draw great insight and inspiration from what they have to offer. Lastly, I would like to thank the Aletheia Editorial Board for their time, effort, and, most importantly, their dedication to the publication. This edition could not be achieved without editors as talented and as passionate as they are.

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On Ethics of the Autonomous Vehicle: Life and Death Decisions

Grant Singleton

Abstract

This essay examines the decision an autonomous vehicle should make in the case of unavoidable fatalities. Research and popular opinion hold that these cars should preserve the most lives in any given situation even if that means killing the driver. This essay will argue, contrary to popular opinion, that autonomous vehicles should preserve the life of the driver above all else even if that means more fatalities in a particular situation. The ethical theories that I will use in the argument are Act Utilitarianism and Rule Utilitarianism with the preferred approach being Rule Utilitarianism.

Introduction

Before we discuss ethics, we should first establish a common notion of the greater context of our discussion. Merriam-Webster defines Autonomy as: “The quality or state of being self-governing” (Merriam-Webster, 2019). An autonomous vehicle is one which governs itself, and, therefore, does not need a human driver to control its path only its destination. These vehicles are equipped with cameras, sensors, and other technologies which allow the vehicle to “perceive” or “see” important things like stop signs while driving, and in the background, the software determines what decisions the vehicle will make based on what it sees. Since the computer is in control, the “drivers” of these vehicles become mere passengers.

According to the NHTSA, there is an average of 37,000 American lives lost in vehicle crashes per year. Two-thirds of these fatalities are from drivers being distracted, intoxicated, drowsy, or driving with excessive speed (NHTSA, 2017). These computers can be commanded to exceed the speed limit, but it is undeniable that they do not suffer from the same problems that humans have while driving. Because both they drive better than most humans do and do not suffer from some problems faced by human drivers (e.g. inattention, intoxication, drowsiness, ect.), autonomous vehicles significantly improve passenger safety. Moreover, human drivers are seven times more likely to crash than computer drivers according to Tesla crash statistics (Tesla, 2018). The gap between computer and human performance will only increase as technology and software improve, and these statistics show that encouraging the world “to go driverless” would save roughly 30,000 lives each year. In the interest of maximizing the good for all people, objective A in my analysis will be: *Minimize fatalities by allowing the computer to drive.*

The Problem

Vehicles are fast moving, massive, and often hurt people that are hit by them. Historically, cars have been driven by humans who have had to make life or death decisions in an instant. We understand that humans are fallible, and do not always make the best choice in that heart-racing instant. There will be no such understanding in the case of autonomous vehicles because whatever decision the car makes will be decided by a team of engineers who had more than enough time to consider the options. For the sake of informing our discussion, I will consider what an autonomous vehicle should do in the case of the “trolley problem.”

The trolley problem is an ethical dilemma in which a trolley is racing toward two victims tied to the tracks, but there is only one victim on a separate track which the trolley driver could choose to kill instead sacrificing one to save two. The trolley driver has no time to stop the trolley, so his only options are either

to switch tracks or not to switch the tracks. The driver must decide who lives and who dies. Should he change tracks and kill one person? Should he refuse to make a choice and kill the two? This decision—which is difficult at best—will be a decision that a computer will be expected to make in an autonomous vehicle. The program must decide what to do in a situation where death is imminent.

Popular opinion holds that autonomous vehicles should preserve the greatest number of lives in each situation. That is, autonomous vehicles should be Act Utilitarian. I will argue, contrary to popular thought, that autonomous vehicles should be Rule Utilitarian instead of Act, and that our *rule* should be to preserve the life of its passenger above all others even if that means more lives lost in a given situation.

I will begin by describing the ethical theories (Act Utilitarianism and Rule Utilitarianism), and how they are different from each other. I will then apply each theory to the case under consideration to show what each theory implies an autonomous vehicle should do in the case of the trolley problem. After, I will describe three negative consequences of Act Utilitarian autonomous vehicles, and show that Rule Utilitarian vehicles will be the best choice for realizing objective A.

Act Utilitarianism

Act Utilitarianism is an ethical theory which claims that a decision is good if it brings about the most favorable results for the most people *in some particular situation*. Rule Utilitarianism is an ethical theory distinct from Act Utilitarianism, and I will describe it in the following section. What makes Act Utilitarianism distinct from Rule Utilitarianism is that decisions are considered morally right or wrong based on the situation at hand. For example, an Act Utilitarian believes that it is morally right to lie if it brings about the most favorable results for the most people in the current situation. In another situation, it may be morally wrong to lie if the most favorable outcome for the most people is to tell the truth.

The Decision-Making Process for an Act Utilitarian

1. Person P is Act Utilitarian.
2. In some situation, it will be better for most people if person P lies.
3. By 1 and 2, person P should lie.

When applied to autonomous vehicles and the “trolley problem,” Act Utilitarianism claims that the computer’s life or death decision should preserve the greatest number of lives in each situation even if that means killing the driver. On this theory, if two jaywalkers cross the road and the vehicle cannot avoid hitting them without crashing, likely killing its one passenger, it will choose to crash.

Rule Utilitarianism

Rule Utilitarianism claims that a rule is just and good if, when universally followed, it brings about the most favorable results in aggregate. Rule Utilitarianism, unlike Act Utilitarianism, does not justify moral decisions on a case by case basis. A Rule Utilitarian, for example, does not lie if a society in which everyone tells the truth is more favorable for the greatest number of people than one in which everyone lies.

The Decision-Making Process for a Rule Utilitarian

1. Person P is Rule Utilitarian.
2. If people always lied, then everyone would be worse off in aggregate.
3. In some situation, it will be better for most people if person P lies.
4. By 1 and 2, person P should not lie.

Under Rule Utilitarianism, it is acceptable that a rule is less favorable in an individual situation as long as it is better for the most people when followed universally. Applying this theory to the ethical decisions that an autonomous vehicle programmer must make requires us to choose a rule which, if universally followed by all autonomous vehicles, would produce the most favorable results for the most people. In this discussion, I

argue that the most favorable results will be to maximize objective A. I will argue that this “rule” should be to preserve the life of the driver above all others in all situations. This theory together with our rule (“to preserve the life of its passenger(s) above all others”) implies that if two jaywalkers cross the road and the vehicle cannot avoid hitting them without putting the driver in significant danger, then the car should hit the jaywalkers.

Why Rule Utilitarianism is Favorable

I will argue the following three points Courageous Jaywalkers, Indirect Murder, and Passenger Confidence in the negative to show the potential shortcomings of Act Utilitarian autonomous vehicles. By these arguments, I will show that Rule Utilitarian autonomous vehicles will further objective A where Act Utilitarian autonomous vehicles will not.

Courageous Jaywalkers

It is imperative for the designers of autonomous vehicles to think about how society will interact with these vehicles. Imagine the future when all cars on the road are autonomous. I will show that if all cars are Act Utilitarian, then a group of pedestrians will be able to confidently step out in front of autonomous vehicles knowing that they will not be run over. If all autonomous cars are Act Utilitarian:

1. Pedestrians know that vehicles V are Act Utilitarian.
2. By 1, pedestrians in a group do not have a good reason to fear V, since V is programmed to preserve the greatest number of lives at the cost of the driver (i.e. V will not hit them.)
3. By 1 and 2, pedestrians in a group will not fear crossing the road without ensuring proper distance from oncoming V.
4. By 1, 2, and 3, passengers of V are put in danger more often than if pedestrians knew that V might hit them.

The Act Utilitarian vehicle with one passenger will swerve and hit a pole, maybe even another vehicle, before it will hit a group of pedestrians. This new confidence that pedestrians have as a result of this knowledge may cause more dangerous events to occur than would otherwise happen if pedestrians knew that a car might hit them. A typical example will further my point. All school buses stop at railroad tracks, and they are required to because we know that a train cannot stop quickly, to cross without looking is very dangerous, and taking time to stop and look for trains costs little compared to the potential disaster. Pedestrians, school bus drivers, and others have a good reason to fear trains because they know if they get in their way, the train will probably run them over. This fear causes drivers and pedestrians to exercise caution around railroad tracks, and ultimately benefits both crossers and train conductors. This reason to fear an autonomous vehicle will encourage pedestrians to ensure the proper distance between themselves and the car before making a brave leap into the road jeopardizing vehicle passengers.

Safety is promoted by preventing dangerous situations from ever happening. Rule Utilitarian vehicles that preserve the life of the driver will deter pedestrians from putting an autonomous vehicle in a position where it must decide who lives and who dies. So, Rule Utilitarian vehicles would be better than Act Utilitarian in this case.

Indirect Murder

If all autonomous vehicles are Act Utilitarian, “villains” will have the opportunity to murder passengers of vehicles indirectly by utilizing the self-sacrificing capability of the vehicle. Imagine riding in your autonomous vehicle on a curvy mountain road, when all of a sudden, you launch off the side of the mountain road and tumble to your death. What happened? Someone placed two mannequins in the road around a sharp corner. In an effort to preserve the greatest number of lives, your vehicle decided to kill you to save the two mannequins which it believed were humans. The “villains” who set the trap indirectly caused your vehicle

to kill you. If one wants to cause harm to the passenger of an Act Utilitarian autonomous vehicle indirectly, they need only reason in the following way:

1. Car C is Act Utilitarian.
2. By 1, car C will kill the driver to save two persons.
3. By 1 and 2, two persons could indirectly murder the passenger of car C.
4. It does not matter whether the two persons were doing anything illegal since C is Act Utilitarian and Act Utilitarians only care about the consequences of this particular situation.

There is an old television commercial comically depicting this very scene. A squirrel runs in front of a car causing the vehicle to swerve and crash. The squirrel runs off to high five his fellow squirrel for the successful prank.

If autonomous vehicles protect their driver as an imperative, there will be no opportunities for prank-playing or sabotage that would cause the car to decide to hurt the driver. Of course, this will never eliminate the ability of others to harm those riding in autonomous vehicles, but it will remove their ability to coax the car into doing the harm itself. This driver protection will reduce the number of life or death situations that an autonomous vehicle has to make since there will be no yielding to sabotage and, hence, less reason to do sabotage in this way in the first place. Therefore, Rule Utilitarian autonomous vehicles are better than Act Utilitarian autonomous vehicles in furthering objective A in this case.

Passenger Confidence

In a study published by *IEEE Spectrum*, researchers presented participants with hypothetical scenarios in which an autonomous vehicle—in which they were a passenger—was faced with a life or death decision (Ackerman, 2016). In one sample situation, the car had to decide between either both swerving and killing the driver or both staying the course and killing multiple pedestrians. The participants almost unanimously agreed on the following:

1. Autonomous vehicles should be programmed to preserve the greatest number of lives in every situation even if they, or a loved one, were the passenger who had to die. So, autonomous vehicles should be Act Utilitarian.
2. They would not buy these vehicles even though they agree with the ethics.

Notice well: they agree that cars should be Act Utilitarian, but they would not buy one. This fact is not surprising. Who would want to buy a vehicle when they know that it might sacrifice them or a loved one? Since the majority of people would not want to buy Act Utilitarian vehicles, fewer people will “go driverless” if cars are programmed this way. Remember, objective A is to encourage people to buy autonomous vehicles so that we minimize the 37,000 deaths per year on roadways in the United States. This objective will not be realized if people do not have confidence in that their vehicle is going to protect them. With the assurance that their vehicle will not decide to kill them (i.e. the vehicle is Rule Utilitarian), more consumers will buy these cars and thus minimize the number of annual traffic accidents. Therefore, Rule Utilitarian autonomous vehicles are better than Act Utilitarian autonomous vehicles in furthering objective A in this case.

Conclusion

The primary benefit of increasing the number of autonomous vehicles on the road is the minimization of the number of driver negligence related deaths. The problem is an issue of ethics, and we need an answer to the question: What should these computers be programmed to do in the case of imminent or likely fatality?

Act Utilitarian vehicles appear *prima facie* to be the rational choice since they minimize death in each situation. I have shown, however, groups of pedestrians will have no good reason to fear stepping in front of these vehicles potentially putting the passenger of the vehicle at risk. This situation could be avoided if pedestrians were more wary as a consequence of knowing that an autonomous vehicle may not yield to them if it were to endanger the passenger. Also, those who wish to do harm will be able to exploit the self-sacrificing capability of these vehicles due to their Act Utilitarian ethics. The ability to cause an autonomous vehicle to decide to kill its passenger will not be possible if autonomous vehicles are Rule Utilitarian because the vehicle will decide to preserve the life of the driver. Last, research shows that consumers are not comfortable purchasing a car that may decide to kill them. So, Act Utilitarian vehicles decrease the confidence that consumers will have in autonomous vehicles, and, without this confidence, consumers are not likely to purchase any. Therefore, there will be few autonomous vehicles in use, and objective A will not be realized by Act Utilitarian ethics.

Rule Utilitarian vehicles will give passengers confidence, prevent sabotage, and dissuade pedestrians from causing unnecessary danger. Therefore, it will be in the best interest of our society to program autonomous vehicles with Rule Utilitarian ethics preserving the life of the passenger. Thus, by protecting passengers, Rule Utilitarian vehicles will save more lives in total and thereby make our society better off as a whole.

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On The Psuchê

Anna Snyder

Abstract

*It is easy to project Socrates' definitions of terms onto Aristotle's, such as his definition of the soul (the "psuchê") and his use of terms such as "nature" or "form." According to Aristotle, the soul not only belongs to a body, but is the first actuality of that natural body. The goal of this paper is to make the distinction clear. "On The Psuchê" thoroughly explains Aristotle's views from *De Anima* and *Physics*, so that the reader might understand his definition and explanation of the soul (psuchê).*

Introduction

Aristotle appears to be straight-forward and easily understood. It is easy to casually read and, consequently, miss much of what he says in his works. For instance, most people have some knowledge of *The Republic*, by Plato. The idea of the tri-part soul, discussed in *The Republic*, is commonly studied and relatively well understood. Because we are used to Socrates' conception of the soul, it is easy to project his definitions of terms onto Aristotle's, as, from a cursory reading, Aristotle sounds very much like Socrates. His definition of the soul, more properly called the "psuchê," and his use of terms such as "nature" or "form," sound especially similar to Socrates. To avoid this common mistake in the future, this paper will look at Aristotle's texts, specifically *De Anima* and *Physics*, more closely in order to gain a true understanding of his definition and explanation of the psuchê, and what he means in *De Anima* when he says that, "the soul is the first actuality of a natural body that has life potentially" (Aristotle, 2016, p. 515).

In *De Anima* I.1, Aristotle raises nine questions about the soul which are the basis of his discussion of the nature of the psuchê:

1. Is the soul is a substance, a quality, or a quantity.
2. Is the soul a potentiality or an actuality?
3. Does the soul have parts.
4. Are all souls are the same, or are they all different?
5. Are souls particular to a certain kind of being, as most people tend to think of the soul as distinctly human?
6. Are there specific type of souls for every specific type of being, or a general type of soul for the broad categories of beings?
7. If there are not many different kinds of souls, but only one soul which has many parts, should inquiry be made into the soul as a whole or into its parts?
8. Should inquiry into the functions of the parts be made before or after inquiry into the parts themselves?
9. Lastly, do the attributes of the soul belong only to the soul, or do they also belong to whatever natural body contains the soul? This paper will answer these questions and explain Aristotle's arguments regarding the soul.

Aristotle's *Physics* II.1, II.2, and II.3 discuss matter and form, the four causes, and actuality and potentiality, all of which are necessary for a discussion of the psuchê. The distinction between matter and form is crucial and, like many of Aristotle's concepts, unintuitive. The four causes shed light on the relationship between the soul (psuchê) and the body. The difference between actuality and potentiality is seemingly impossible to grasp, but almost astonishingly simple once understood; once explained, we will be able to discuss first and second actualities, which will be necessary for our main interest as well. After wrapping our minds more fully around these terms and concepts, we will be able to address the psuchê itself. However, before a discussion about any of these things can occur, we should define a few of the other necessary terms mentioned above, namely, Aristotle's meaning of "soul," and what he means by "nature" and "a nature."

Discussion of Terms

Aristotle's conception of the soul is crucial, and his discussion of the soul is unlike other philosophers'. In *The Republic*, Plato says that the tripartite soul and the balance between the parts form the best kind of man. This is analogous to the different natures of humans, forming the best kind of city. Here, is only concerned with examining and explaining the way the soul is. That being said, we must also understand that his definition is not our usual idea of the soul, or of what we, today, call the "psyche." We often think of the soul as some kind of spiritual or supernatural thing, as part of our beings, something distinct, something that makes us who we are, in both a general sense of being human and a particular sense of being individuals. While we consider a much more narrow scope of beings which might have souls, limiting inclusion to those that have minds or can feel emotion or that can reason, Aristotle does not. He says that everything "living," such as plants, animals, and humans, has a soul. The degree to which something is "living" and has a soul he bases on capacities, which he discusses in *De Anima* II.2. These capacities are understanding; perception, imaginations, and desire; movement and rest; nourishment; and growth. Because these are the capacities of the soul, according to Aristotle, it is not only humans which are living beings with souls, but also plants and animals; plants having nutritive capacities, animals having the capacities of desire and perception as well as nutrition, and humans having all of these along with thought and reason. While the soul is typically discussed only with regard to humans, this paper stays as close to Aristotle's text as possible and discusses the soul as he believed it exists - in all living things. Each living thing, he claims, has a kind of essence of themselves, a psuchê; and this is what Aristotle would call a soul.

We must also consider the difference between things that come about naturally and things that come about by other means: "what a nature is, and what [is meant by] 'naturally' and 'in accordance with nature'" (Aristotle, 2016, p. 482). According to Aristotle (2016), "Some things exist by nature, and others as a result of other causes. Those that exist by nature include animals . . . plants . . . and the simple [parts] of bodies" (p. 481). He distinguishes the two by saying that every natural thing comes from "a starting-point of change and rest" (Aristotle, 2016, p. 481). Natural things have a beginning, but also an existence which includes change and death. For example, a child proceeds from his parents and he continues to develop and change throughout his life into old age. However, things that do not naturally come to be (Aristotle mentions a chair or a cloak) have starting-points but do not innately change throughout the time of their existence, except insofar as the material of which they are made changes. These unnaturally occurring things have natures because of their starting points: "a nature is a certain starting-point and cause of changing and resting" (Aristotle, 2016, p. 481). Everything that has a starting-point, natural or otherwise, has a nature; each thing is a substance and therefore a subject, "and a nature is always in a subject" (Aristotle, 2016, p. 482). There is, also, not only one general nature of everything, but various ways to describe nature in relation to different aspects of a thing and with regard to whether or not the thing came to be through nature directly, as a child from its parents, or indirectly, as a bed from wood. Aristotle (2016) says that it would be "ludicrous" if we were "to try to prove that there is [such a thing as] nature" (p. 482), because there is not only one thing that is the nature of things. There are several senses in which nature is spoken of, not only one that confines us to strict rules of usage.

Aristotle says that some people think things such as earth, fire, air, or water, or some combination, make up the nature of things and that they are eternal, able neither to be created themselves nor destroyed. These things "cannot change from [themselves], whereas other things can come-to-be and cease-to-be" (Aristotle, 2016, p. 482). Having said this, it seems that Aristotle believes there is one underlying type matter of which

everything in the universe is made. However, he also seems to believe that matter is relative to the thing which it forms. A nature of a thing, in this sense, “is the primary matter that is the underlying subject of those things that have in themselves a starting point of movement and change” (Aristotle, 2016, p. 482). This is one idea of what a nature is, based upon a thing’s matter. It is the wood from a which a bed is made. A bed does not come from wood, but wood is, however, still the nature of the bed because it is the stuff from which the bed’s starting point occurs.

In another sense, nature is also said to be the shape, “i.e., the form [of a thing] according to its account” (Aristotle, 2016, p. 482). Like a craft, such as building, both the building and what is built are called the craft, “so too what is according to nature and what is natural are [called] nature” (Aristotle, 2016, p. 482). But for shape to be the nature of a thing, that thing must exist actually, not only potentially. The shape of an already existing being is its nature, but there is no shape of a bed that does not actually exist. Wood is the nature of a bed which has already been built, in the sense that it is the bed’s matter; however, not every piece of wood is the nature of a bed. Wood cannot be the nature of a bed until the bed has taken shape. Then, both the wood and the shape, the matter and the form, are the nature of the bed.

Concepts Necessary for Discussing the “*Psuchê*”

Having discussed Aristotle’s meaning of “soul,” and having explained nature and the nature of things, we are able to get into our discussion of form and matter, as we continue to move toward discussing the “*psuchê*.” There are two natures of a thing, the nature which is a thing’s matter and the nature which is a thing’s shape, or form. Matter is “the underlying subject of those things that have in themselves a starting point of movement” (Aristotle, 2016, p. 482). Form is “in accordance with the account, by virtue of which we say what flesh and bone is” (Aristotle, 2016, p. 482). Matter and form, in some ways, can be relative. For example, bricks and beams are the matter from which the form a house is made, but the brick itself is also a form, whose matter is mud and straw. Both the house and the brick have the nature of their matter and of their form. Matter is also relative, “a different form has a different matter” (Aristotle, 2016, p. 484). Furthermore, for things that occur naturally, such as children, their matter and their form also occurs naturally, through their parents. But “in the case of artifacts . . . we make the matter for the sake of a function” (Aristotle, 2016, p. 484): the matter of things made through craft does not have to occur naturally, like the house mentioned above being made of things that have their own form and matter. Having said this, it is clear that the body, flesh and bones, is matter, while the soul, as will be more clearly explain shortly, is the form of a living thing.

“Since the aim of our enterprise is knowledge, and we do not think we know a thing until we have grasped the why of it” (Aristotle, 2016, p. 484), we ought to, at this point, discuss what Aristotle meant by the four causes and their relation to natural and to crafted things. As Aristotle (2016) said, we must do this “with respect to coming-to-be and ceasing-to-be and every [kind of] natural change” (p. 484). According to Aristotle, this will help us understand things’ starting-points, allowing us to understand more about them and their nature. According to Aristotle (2016), there are four causes: 1) the material cause, regarding matter “in one way that out of which a thing comes-to-be” (p. 484), 2) the formal cause, regarding the form of a thing “the formula of the essence, and its genera” (p. 484). 3) the efficient cause, regarding the “primary starting-point from which change or rest originates” (p. 484), and 4) the final cause, regarding “what something is for” (p. 484).

The first cause is material, it is the stuff from which things are made, such as statues being made from bronze or from marble. This is perhaps the most simply understood of the four. The second cause is the cause of the form, that there is not only a general statue but a form of a particular statue. The matter from which it is made may be material, however the form is what makes the statue particular. The third cause is not only physical, according to Aristotle. Here, it is not only a sculptor creating the statue, but it can be anything which causes anything else to occur - “someone who has given advice . . . the father . . . of a child,” whatever type of thing is done which “alters something [is a cause] of what is altered” (Aristotle, 2016, p. 484). And the fourth cause is, simply, the purpose for which a thing is done. Aristotle uses the example of walking in order to be healthy: health being the cause of walking because it is the purpose for which the walking is done (this sounds counterintuitive because we would say that we walk to be healthy, or that walking is the cause of health).

After discussing these causes, it is easy to see how each thing could have more than one cause (easy in comparison to some of Aristotle's other concepts). Let us consider a bronze statue and its four causes. The bronze is the first cause, since it is the matter from which the statue is made. The particular form of the statue is the second of its causes. The third cause could be several different things, but for ease we will say that it is the creator of the statue. The final cause, the "what for" could also be many things, the sake of art, to adorn a house, or to immortalize the likeness of an individual, each of these could be the fourth cause.

We have one more concept we should discuss before getting to Aristotle's idea of the soul: actuality and potentiality and first actuality and second actuality. Matter is potentiality, it is, as Aristotle (2016) says, "intrinsically not a this-something" (p. 515). Matter itself does not have the actuality of a form, but rather, merely the potential to become a form, or a "this-something." It is not a living substance. Form, however, is actuality, and there are three ways of thinking about form. In "Zeta," part of Aristotle's *Metaphysics*, he discusses form as essence, as account, and as actuality (2016). Regarding form as essence, it is what makes a thing what it is. This sounds very straight-forward, but Aristotle thinks of the essence of a thing more as its capacities, such as a human's capacity to reason. He also considers the essence of a thing more particular to the type of thing it is, rather than the particular individual thing - the capacity for reason is a human capacity, not a particular individual's capacity. Form as account is that which ties its function to its essence. Aristotle says that the substance of an eye, as an example, is sight, which is its account, but also its capacity. Sight is what the eye is about, it makes the eye the type of thing that is an eye. Form as actuality brings more complications. Recall, matter is potentiality, whereas form is actuality for all the reasons we have already discussed. In addition, there are two actualities: the 'first actuality' and the 'second actuality' (Aristotle, 2016). The first actuality is both having the capacity and using it. The second actuality, however, is having the capacity but not using it. This second actuality is not to be confused with potentiality and matter. As a body is matter, which is potentiality, a soul is a form, which is actuality. Further, the soul must be a first actuality, since it does not merely have the capacities which give it its essence (or life), but also uses its capacities within the body, giving the matter (mere potentiality) a form.

The Psuchê

Having addressed all the concepts necessary for a discussion about the psuchê, let us now turn to our original inquiry and discuss what Aristotle believes the psuchê to be. He says that the psuchê both has a nature, as it is a substance, and is a nature of a living thing, since it is a form. As it is a substance, it must be one of these three substances: matter, form, or a combination of the two. Aristotle (2016) argues that the soul is not matter because a body is matter, and a body "is not among the things that are predicated of an underlying subject, but is rather as an underlying subject is and matter" (p. 515). Because the body is the underlying subject and the soul is predicated of an underlying substance, the soul cannot be matter. Furthermore, just as the soul is not matter, it cannot be a combination of both matter and form. Aristotle's reasoning behind this is not altogether clear. Perhaps, since the soul is not matter and it is not one with the body (as Aristotle argues later), which is matter, it cannot be a combination of what it is and what it is not. Additionally, while the soul is not one with the body, it must be separable from it, since it is the form of the body as well as a form itself, so "it is necessary, then, for the soul to be substance, as form, of a natural body that has life potentially" (Aristotle, 2016, p. 515). Regarding the soul and the four causes, the first does not apply since the soul is not formed by matter, but is itself a form. The soul, as a form, by nature, is particular due to the second cause. Nature, perhaps, is the third cause of the soul, and "living," the fourth - a being, we might go so far as to say a body, lives because it has a soul. Therefore, living is the "why" or the reason for the existence of the soul. Having a soul requires a body to be organized in a specific way so that it, the psuchê, may exercise the capacities which make the specific this-something a this-something. Regarding the soul and potentiality and actuality: a body has life, potentially, while Aristotle believes that the soul is an actuality, even the principle of life. As a substance, the soul must be both separable from the body and a this-something. Aristotle goes on, saying that substance, as form, like we have discussed above, is actuality, and therefore the psuchê, as substance and form, must be an actuality, rather than a potentiality. Further, the psuchê is not a second actuality, having the abilities relative to the kind of body to which it belongs, yet not using them, but a first actuality, using its abilities with respect to the organization of the body. Hence, the soul not only belongs to a body, which is only matter without the soul, but is the first actuality of that

natural body: and this is what Aristotle (2016) means when he says that “the soul is the first actuality of a natural body that has life potentially” (p. 515).

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The Separation of Law and Morals

Garrett L. Gray

Abstract

Positivism is arguably the most influential position in modern philosophical jurisprudence, and H.L.A. Hart's essay, "Legal Positivism and the Separation of Law and Morals" is one of the most influential texts on the position. The arguments he presents there against Natural Law Theory, however, fail to refute that competing jurisprudential tradition, and in his counter-arguments he unwittingly commits the mistakes he attributes to his opponents by obscuring the natures of the alternatives in play and assuming his own moral beliefs as absolute.

Introduction

Before the advent of Modernity, a certain understanding of the nature of law was embedded in the tradition of Western Philosophy. According to this perspective, which was frequently re-articulated but rarely challenged directly, the laws and legal structures of any given rational human society are always grounded in a significant way in another, prior sort of law, still rational but thoroughly inhuman, known as the Natural Law. This ground is what gives legitimacy to the laws of society and validates the ways they govern the people in that society; according to this perspective, if somebody attempted to impose an unnatural, an unjust law on people, their imposition could never truly become law, because it lacked the appropriate foundation. This perspective left a good many questions open, and pre-modern philosophers of law frequently and fervently debated those questions, contesting matters like the appropriate forms for governments to take or like the relationship between sovereign, law, and populace, but the perspective itself was not seriously contested until the Modern Era, when the British Utilitarians of the early 1800s articulated a new alternative. According to their new perspective, which would come to be called "Positivism," the legal (in)validity of a law is an entirely different thing from its moral (in)validity. Unlike the earlier perspective, which is now by contrast known as "Natural Law Theory" or "Naturalism," Positivists insisted that the grounding of a society's laws and legal structures in a pre-existing objective morality, while it may still be important, is no part of what makes them laws or legal structures. The debate between these two perspectives is now a fundamental subject in the philosophy of law, and this paper is meant to take a side in that debate. In what follows, we will begin by setting forth the broader details of a certain criminal case decided in Germany. This case serves as an illustration for our argument, and it fills that role because it filled the same role in the arguments of H. L. A. Hart, who claimed that the case demonstrated a dangerous tendency hiding in the Naturalist perspective. We will give a more thorough account of the beliefs of Naturalists and of Positivists in the words of philosophers who claim membership in those camps, and then we will consider Hart's particular arguments against Naturalism to determine whether or not he succeeds in refuting that position.

A Case Study

On July 29th of 1949, a criminal court of final appeal in Bamberg, Germany upheld the conviction of a woman for a crime she had allegedly committed under the Nazi government. The charge was wrongful imprisonment, but the accused was neither a government official nor a concentration camp administrator. The victim was her husband, a soldier in the Wehrmacht who had died, not in a prison or a labor camp, but rather, like so many soldiers in that decade, on the front lines of the war. The imprisonment in question was

a time he had spent in jail after having been convicted by a military tribunal for crimes against the state. His sentence had been to death, but his imprisonment terminated with a decision to redeploy him. His crime had been to publicly make “statements inimical to the Third Reich” (Harvard Law Review, 1006); specifically, he had allegedly gone so far as to lament the failure of an assassination attempt against Hitler. These remarks had been made while he was home on leave, conversing with his wife, and it was on her testimony that he was charged and convicted. Her motivation in reporting him was apparently not her legal obligation to do so¹ but rather a personal desire to be rid of her spouse. The court at Bamberg, reviewing these details and the conviction handed down by a lower court, rejected the defense’s argument that the woman’s actions were not in violation of that law—and even further, they were actually obligatory—according to the laws in place at the time of her actions. At the same time, though, they overturned a judgement by that same lower court to convict the judge who had convicted the woman’s husband, ruling instead that *he* had committed no crime. The woman, however, had in an effort to imprison her own husband relied on a “law” that ran against “the sound conscience and sense of justice of all decent human beings” (Harvard, 1006), and so she was guilty of a crime *despite her conformity to the positive law at the time of her actions*.

This case was discussed by H. L. A. Hart in his influential essay, “Legal Positivism and the Separation of Law and Morals”, and it has since become a major staple of philosophical jurisprudence². For Hart, it represented a certain danger that he claimed was inherent to a theory of law that he opposed. That theory, known as “Natural Law Theory”, asserts that the “law as it ought to be” is somehow a part of or is necessarily connected with the “law as it is.” Hart, by contrast, advocates the position known as Positivism, which is the focus of his essay and which amounts to the theory that “what the law is” does not depend on what it ought to be. His argument, though potent, fails, and in fact, the particular danger he identifies is compounded rather than averted by claims of the separation of law and morals.

Jurisprudential Naturalism

There must first be established an adequate understanding of the positions being disputed. The first, Natural Law Theory, maintains that the “positive” law of a society derives its nature and legitimacy from an ethical force that precedes it, known as the “natural” law. This position, which prevailed from antiquity through the Medieval era and can be found in the work of authors like Plato, Cicero, Augustine, and Aristotle, has a modern advocate in John Finnis, who summarizes it as the theory that,

“the act of ‘positing’ law (whether judicially or legislatively or otherwise) is an act which can and should be guided by ‘moral’ principles and rules; that those moral norms are a matter of objective reasonableness, not of whim, convention, or mere ‘decision’; and that those same moral norms justify (a) the very institution of positive law, (b) the main institutions, techniques, and modalities within that institution (e.g. separation of powers), and (c) the main institutions regulated and sustained by law” (Finnis, 290).

When carried to its conclusion, this position leads one, as Hart says it lead the German philosopher Gustav Radbruch,

“to the doctrine that the fundamental principles of...morality were part of the very concept of...Legality and that no positive enactment or statute, however clearly it was expressed and however clearly it conformed with the formal criteria of validity of a given legal system, could be valid if it contravened basic principles of morality” (Hart, 617).

Finnis puts the point more mildly; “attention to the [moral] principles,...justifies regarding certain positive laws as radically defective, *precisely as laws*, for want of conformity to those principles” (Finnis, 24). In brief, jurisprudential naturalism entails that if a law fails by a certain margin to be what it *ought* to be, it fails on that account to be law.

¹Hart, in his discussion of the case, concurred with the court at Bamberg that no such obligation existed, but the Harvard Law Review points out a certain statute, “§139 of the German Criminal Code which creates a duty to report certain offenses about to be committed” (Harvard 1006). Both Harvard and Hart cite the case study in the *Süddeutsche Juristen-Zeitung* cited below.

²See Dyzenhaus in the *New York Law Review*, “The Grudge Informer Case Revisited”, 2008, which traces and comments on the role of this case in some significant and relevant jurisprudential debates.

There are, of course, certain fundamental concepts that must go before Naturalism if that position is to be tenable. For example, to assert that something which *would* be law but *ought not* be law *is not* law leaves open one tremendous question; what *is* that thing? Classically, the answer would be given in Platonic or Aristotelian terms. Perhaps the thing in question would have the appearance or character of law, being a statute propagated by a sovereign power, but it would not have the true form of law because it lacked the necessary grounding in morality. Contrast this deeply metaphysical answer with the corresponding Positivist answer, which holds that the thing *is* law, but is *bad* law. The Positivist answer may seem more intuitive, but it is not available for the Naturalist, for whom “bad law” is a contradiction. Similarly, if Jurisprudential Naturalism asserts that the law is determined by what it ought to be, it must assume that there is a way the law ought to be. In other words, Naturalism requires that there be an objective morality that applies in all circumstances, or at least that a certain perspective on morality be privileged so that prospective laws can be evaluated against it. If a person is already committed to the nonexistence of such an absolute moral standard, they must necessarily find themselves in the camp of the Positivists.

Jurisprudential Positivism

In the philosophy of law, Positivism is the doctrine, developed by the likes of John Austin, Jeremy Bentham, and Oliver Wendell Holmes, that the law is an entirely “positive” affair, and is something entirely distinct from morality. As H. L. A. Hart puts it, “there are laws which may have any degree of iniquity or stupidity and still be laws. And conversely there are rules that have every moral qualification to be laws and yet are not laws” (Hart, 626). If this is the case, then “it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law” (Hart, 599). To put it briefly, Positivism entails that a sharp distinction divides the positive from the normative considerations of law and legality, and that Naturalism is wrong to propose a causal connection bridging this gap.

Hart’s purpose in the essay, “Positivism and the Separation of Law and Morals” is to trace the development of this argument and to defend it from certain criticisms it has received. Many of these criticisms, according to Hart, fail because they address doctrines that are not central to his position, but that are rather only attributed to that position because they were held by the first Positivists. One example is the idea that every law is essentially a command; Bentham and Austin each maintained this idea, but Hart rejects it as an insufficient account of the nature of laws. This disagreement between Positivists does not touch on their shared core doctrine of the separation of law and morals. If an argument is to touch Positivism proper, it must deal directly with this core doctrine, the principle that the answer to “What is the law?” is never determined by the answer to “What should the law be?”

The Connection Between Law and Morals

One challenge that threatens the core doctrine of Positivism comes from what Hart calls “problems of the penumbra” (Hart 607). These problems arise when a judge or interpreter of the law must decide which specific, concrete things are covered by a general or ambiguous term in a law. “A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles?” (Hart 607). In these situations, a decision cannot be produced by the routine application of logical algorithms; the judge must exercise a measure of human judgement in determining which things do and which do not lie within the shadow cast by the general term. But if that judgment cannot be guided by pure logical reasoning, one might expect it to be guided instead by a judge’s understanding of morality, indicating the kind of necessary connection between law and morals that Naturalism alleges and Positivism denies. Hart, however, provides a counterargument to this criticism; a judge who decides a penumbral problem in this way is guided by his understanding of morality, but not necessarily by morality itself.

“The word ‘ought’ merely reflects the presence of some standard of criticism; one of these standards is a moral standard but not all standards are moral. We say to our neighbour, ‘You ought not to lie,’ and that may certainly be a moral judgment, but we should remember that the baffled poisoner may say, ‘I ought to have given her a second dose.’” (Hart 613).

In other words, different judges will have different perspectives on what “ought” to be law, and each of them will be speaking on the question in a valid way, even though they disagree. For example, one judge may decide penumbral problems by reference to the intent of an original legislator, while another might not think such considerations are relevant. Worse, a judge could decide on a problem of the penumbra according to his understanding of morality, but be outright mistaken about morality; he could even be directed to positively evil aims, like when courts under the Nazi regime sentenced men for criticizing the government. What would a Naturalist say about these, about decisions like the one referenced at the start of this essay? “Surely he would say that they are law, but they are bad law, they ought not to be law. But this would be to use the distinction, not to refute it” (Hart 612).

Hart is correct in that point; such a response would be to use the distinction, and so cannot be the response a Naturalist would give. Hart implies that no alternative response is forthcoming, but a Naturalist would surely say that if a decision *ought* not to be law, if it is “bad law”, then, as for Finnis, it is defective in its being a law. It is lacking *as a law*. It may appear to be a law, but it is not. Hart does not demonstrate that such a way of speaking is impossible, but merely assumes that it is, and that the only way to speak clearly about the law is to say that it may assume any “standard of criticism” and remain entirely legal in nature. The case of the woman who testified against her husband is illuminating here. Hart’s own problem with the way the German court handled the case is that “the objective - that of punishing a woman for an outrageously immoral act - . . . was secured only by declaring a statute established since 1934 not to have the force of law” (Hart 619). He believed this obscured the true dilemma, which was between letting the woman go unpunished and punishing her through “the introduction of a frankly retrospective law”, thereby “sacrificing a very precious principle of morality endorsed by most legal systems” (Hart 619). In other words, the court had a certain perspective on what the law ought to have done in the case at hand—it ought to punish the woman—and the court, because of its Naturalist implementation of this perspective, overlooks the moral difficulties of its decision. He fails, as before, to recognize that he has just assumed what he intended to demonstrate. He means to show that Natural Law Theory obscures the difficult choice that must be made between two alternatives, but in doing so he assumes that to declare an established statute to be invalid is not an option. What’s more, the position taken up by the court in Bamberg, that the woman had violated the principles of morality and so needed to be legally punished, was not the only possible Naturalist position, because the illegitimacy of *ex post facto laws* (i.e. laws which sanction an activity after the fact, or which apply retroactively to events that happened before the law existed) is itself a “precious principle of morality endorsed by most legal systems” (ibid). It would be a perfectly coherent Naturalist argument to say that the Bamberg decision was not legally binding because it violated the moral requirement that laws not be imposed after the fact. As with Positivists and the Command Theory of Law, the possibility of dispute within the school of thought demonstrates that the issue cannot cut to the core of the school. Merely advocating the Theory of Natural Law is clearly not enough to force one into obscuring the moral dilemma in the German woman’s case. In fact, Naturalist perspective highlights the dilemma specifically *as moral* and then asserts that this moral character is what makes the dilemma legally relevant. If an argument is to touch Naturalism proper, it must deal directly with this core doctrine, with the principle that the answer to the question, “What should the law be?” is fundamentally relevant to the question, “What is the law?”

The question then comes down to the nature of the law; what is it, and how does it relate to morality? It is illuminating to consider that, prior to the modern era, the ideas that the law was derived from a natural morality and that an unjust law is not really a law would have carried a different weight. The governments of Athens in Plato’s day, of the Roman Republic in Cicero’s, of the Empire in Augustine’s, and of feudal Europe in Aquinas’ day were none of them thought to rest on the efforts of the people they governed, or even of the people that made up those governments. Neither king nor priest, neither senator nor citizen ‘posited’ their positions; they received them, and the governments of these traditional thinkers were likewise something received, having organically grown out of pre-existing structures that, if traced far enough back in time, were ultimately mere codifications of inarticulate, unreflective, or “natural” social orders. Active human intelligence played a role in this growth, of course, but only to hold it in conformity to the absolute, eternal truth; if an innovation, a deviation, threatened this, to excise that wrongness from the law was obligatory precisely because it did not belong there—it wasn’t rightfully law.

By contrast, the governments of the United States, of democratic East Germany, and even to some extent (thanks to the combination of penumbral authority and the principle of *stare decisis*) the “common law” court tradition are all the positive product of human minds. Bentham was “an anxious spectator of the

French Revolution” (Hart, 597) and his positivist position carries the implication that people are ultimately free to make their governments whatever they want. After all, as Hart reminds us, there are as many valid statements what ought to be as there are perspectives; “The word ‘ought’ merely reflects the presence of some standard of criticism; one of these standards is a moral standard but not all standards are moral” (Hart, 613). This emphasis on the human ability to carry the law away from moral truth serves to center our focus on the inverse ability to carry it closer to it; “men like N. St. John Green, Gray, and Holmes considered that insistence on this distinction [between law and morality] had enabled the understanding of law as a means of social control to get off to a fruitful new start” (Hart, 600). The social control in question is implicitly for the reduction of suffering, which for many of them was the very essence of morality. The positivist insistence on the artificial nature of law reduces, then, to an insistence on our radical freedom to rework it in pursuit of whatever ideals we perceive as moral.

When Hart criticizes the moralizing language in the court decision referenced at the beginning of this essay as obscuring the dilemma in play and the freedom of the court to resolve it in accordance with (presumably Utilitarian) ideals, he misses the irony that his own attempts to highlight that freedom are disguised as entirely “objective” linguistic analysis. In other words, Hart claims that because the word “ought” can be used in senses that violate moral standards, there can be no insistence that the way the law “ought” to be determines the way that it is, and so there is no barrier to judges (and legislators) adapting the law to the moral principles that dictate the single way the law ought to be. There is no single best standard, and recognizing this is necessary to empower the adaptation of the law to the best standards. The tension is clear when Hart argues,

“The vice of this use of the principle that, at certain limiting points, what is utterly immoral cannot be law or lawful is that it will serve to cloak the true nature of the problems with which we are faced and will encourage the romantic optimism that all the values we cherish ultimately will fit into a single system” (Hart, 620).

In this argument it goes without saying that the *true* nature of these problems is in their lacking definite answers, and that we have to—or perhaps, that we *get to*—pick and choose which values to fit in our system. Hart clearly believes that there is a best way to go about this, but it’s not by asking ourselves what perspective on morality is built into the legal system we inherit and then asking ourselves what is right or wrong in it. Questions of morality never come into play if we simply pursue Utilitarian ends by acting within whatever legal framework we happen to inhabit, the way Hart’s rejection of Naturalism, allegedly motivated by purely linguistic concerns, empowers us to do. Perhaps it is this masquerade as an objective linguistic point that prevents Hart from ever actually considering the Naturalist thesis: if our laws are derived primarily from the will of Utilitarian moralists without any reference to objective morality, maybe this indicates a failure in our laws, and not a failure in Natural Law Theory.

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Active Euthanasia and the Difference Thesis: Refuting James Rachels' Justification for Assisted Suicide

Garion Frankel

Abstract

Although life expectancy in the United States has been decreasing for a few years now, the proportion of elderly Americans is projected to increase substantially in the coming decades. These Americans are living longer (and sicker) than ever before, and some would rather end their life instead of enduring the pain any longer. James Rachels, in an attempt to support the legalization of active euthanasia, disputes the difference thesis. However, his arguments are insufficient to support the legalization of active euthanasia once the arguments of Winston Nesbitt come into play, leaving an argumentative void which this essay will attempt to fill.

Introduction

By the year 2030, the elderly population in the United States will outnumber the youth (US Census Bureau 2018), and not only are the elderly living longer and increasing in number, they are living sicker. The number of Americans with limitations on activities necessary for independent, dignified living such as dressing or feeding oneself rose from 8.8% of people who have a retirement age of 65 to 12.5% of people at the current retirement age of 66 who had them in their late 50s, with rising alcoholism, obesity, and dementia being the culprits (Choi and Schoeni 2018). The poor quality of life for the rising elderly population has generated discussion about euthanasia, the painless, purposeful killing of a mentally aware and suffering patient, as a part of end of life care. In a nation where political polarization on mainstream issues such as inequality, immigration, foreign affairs, and national identity has dominated the headlines, less “flashy” issues like the topic of euthanasia have taken a relative backseat.

Within public policy, the American Medical Association's (or AMA's) position on the issue of euthanasia, or more gently, assisted suicide, distinguishes passive euthanasia (allowing a patient to die) from active euthanasia (directly ending the patient's life), allowing the former while condemning the latter in totality. In his essay, “Active and Passive Euthanasia,” within the *New England Journal of Medicine*, James Rachels, a professor at Duke University, criticizes AMA doctrine, stating his position that the “distinction between killing and letting die...has no moral importance” (Rachels 1975). To support this claim, Rachels makes four primary assertions. First, that in some cases, allowing the patient to die causes more suffering than directly ending the patient's life. Second, that the AMA doctrine causes decisions regarding life and death to be made on irrelevant grounds. Third, that killing is morally no worse than allowing someone to die. Lastly, that inaction on the part of the doctor is an action in and of itself, meaning that passive euthanasia is the moral equivalent of active euthanasia. On the other hand, Winston Nesbitt, a professor at the University of Tasmania at Launceston, appears completely uninterested in the policy question surrounding the legality of active euthanasia. Instead, Nesbitt focuses on Rachels' philosophical justification, the criticisms of what he refers to as the “difference thesis,” the idea that killing someone is morally “worse” than simply allowing them to die. Although Rachels' overarching position in favor of the legalization of active euthanasia is more than reasonable, Rachels did not adequately reinforce the case for active euthanasia, as Nesbitt further widened holes that were already present in Rachels' argumentation. In this essay, I will explore the morality of euthanasia, specifically whether there is a morally distinct difference between killing and letting die, and whether this distinction even matters in the first place.

The Flaw of Consequentialism

In order to truly isolate why Rachels' argumentation is insufficient to support his stance in support of the legalization of active euthanasia, as well as being inferior to that of Nesbitt's, each of his assertions must be addressed individually. Rachels' first assertion, that allowing the patient to die sometimes causes more suffering than directly ending the patient's life (Rachels 1975), is probably his strongest argument by far for active euthanasia. There is a definite consequentialist argument at play here (though intention is not entirely ignored), with the implication being that the primary duty within the medical profession is the alleviation of suffering, and thus, doctors have an obligation to alleviate the suffering of their patients by any means necessary, even if that involves directly ending the patient's life. This argument is firmly rooted in policy, and as a result, Nesbitt had no particular counter to the arguments centered on euthanasia alone. Thus, Rachels' first assertion must be addressed on its own merit. The flaw in his argument is the exact same flaw that permeates the defenses of many arguments rooted primarily in consequentialism, that being the intrinsic tendency of humanity to identify actions with positive consequences as wrong. The backlash, especially among those on the political right, to active euthanasia is one example. The general opposition of the political right to active euthanasia is firmly rooted in the fact that they, as a whole, see the procedure as a form of murder, and in extreme cases, invoke the slippery-slope fallacy by arguing that the simple, regulated authorization of active euthanasia would lead to a barbaric system where children and the elderly are routinely euthanized for no "legitimate" reason. Jose Pereira, a palliative care expert and Professor at the University of Ottawa, though not an extremist himself by any means, invokes this line of argumentation in his 2012 essay within *Current Oncology*, arguing that even if active euthanasia would relieve the pain and suffering of some, it should never be allowed. This argument is essentially fallacious because of its admitted invocation of the slippery slope in the form illustrated a few lines above, but it is also inhibitive of rights, which I will expand on later. At this stage, however, it is a clear example of a large amount of people labeling an action with seemingly positive outcomes as wrong. Another is one of the associated symptoms of Stockholm Syndrome, a psychological condition when an individual who is kidnapped grows deep affection and devotion to their kidnapper. To pose an example, if Jim kidnaps Bill and holds him hostage, it is viewed as inherently wrong because, by kidnapping Bill, Jim is depriving him of his natural right to liberty, specifically his freedoms of movement and choice. However, Bill then develops Stockholm Syndrome, and although he is still a hostage, removing Bill from Jim at that stage would cause Bill great emotional suffering. Yet the general viewpoint of society would favor freeing Bill from his captivity, despite his subsequent suffering. Thus, the alleviation of suffering alone is not sufficient to deem an action as moral. Therefore, Rachels' first assertion is insufficient to support changing the AMA's policy to allow for active euthanasia, and weakens his argument when compared to those of Nesbitt, who does not employ consequentialist principles within his essay.

The Grounds for Euthanasia

Secondly, Rachels asserts that the AMA doctrine causes decisions regarding life and death to be made on irrelevant grounds, specifically citing an example regarding a newborn with Down's Syndrome, and the potential for withholding life-saving and unintrusive intestine repair (Rachels 1975). The assertion definitely gives weight to Rachels' overall argument with real life examples, but the assertion by itself fails to give us an adequate moral prescription for action, and as a result, it is impossible to support or negate Rachels based off of this argument. Moreover, this is a section that Nesbitt ignores entirely in his subsequent essay, so although it does not support Rachels' argument on its own merit, it's nullified by Nesbitt's lack of address. Thus, neither author has the argumentative edge when it comes to this section.

The Difference Thesis

Rachels' third assertion, that killing is no worse than allowing someone to die (Rachels 1975), is rather problematic for his overall argument, especially when compared to Nesbitt. Rachels devises a scenario involving Smith and Jones, two men that would stand to inherit a large amount of wealth if something were to happen to their young cousins. Smith devises and executes a murder plot, eventually drowning his cousin in a bathtub. However, unlike the case with Smith, Jones walks into the bathroom to find his cousin had slipped and fallen face-down into the water. Instead of killing the child, Jones allows him to drown. Rachels concludes that although Smith directly killed the child, and Jones did not, both are equally reprehensible from a moral perspective, and he is exactly right (Rachels 1975)! However, Nesbitt criticises that in these two scenarios, Smith and Jones are far too similar to one another. Both Smith and Jones are equally evil men with equally evil intentions who were prepared to commit the same equally despicable action. Intent matters, and thus, Rachels fails to create a strong and cogent distinction between killing and letting die, as both Smith and Jones had the exact same intention of murdering a family member. To rectify this deficiency, Nesbitt creates a different but relevant Smith and Jones example of his own. In Nesbitt's example, the situation with Smith is the same as with Rachels, but Jones has been modified to adequately reflect the distinction between killing and letting die. This time, although Jones would benefit substantially from the child's death, Jones makes no plan to kill him. However, when Jones randomly stumbles upon the child drowning in a bathtub, Jones remembers that the child's death would benefit him substantially, and allows the child to die as a result of this realization (Nesbitt 1995). Assuming that Jones' reservations about murdering the child were due to some form of moral standard against it, or a sense of familial obligation to the child, then is it really prudent for Rachels to argue that there is no moral distinction between this instance and the outright murder committed by Smith? Rachels would likely stand firm with his initial position, but Nesbitt would differ, and I find he has the much stronger argument. When dealing with the involvement of morality in policymaking, it does not appear that consequences are the only consideration involved. If Smith and Jones from Nesbitt's scenario were to be tried in an American court of law, Smith would be charged with first degree murder, and Jones would only be charged with negligent homicide, at worst, as the American criminal justice does not operate solely on consequences or solely on intentions - rather, it is a mix of both. These are two very different crimes with two very different punishments (in most states, first degree murder is the most severe form of felony, and in some cases can carry the death penalty, while negligent homicide is normally a third degree felony), and the former crime is generally viewed as a much more severe moral offense than the latter. Although the fact that something is true doesn't mean that it ought to be true, philosophical application should have a rational basis in reality. When it comes to his third assertion, Rachels has a rather steep hill to climb in order to adequately support his assertion that the difference thesis is invalid. He does not reach the summit of this hill, as Nesbitt provides stronger counterarguments that negate Rachels' third assertion completely, leading to the conclusion that Nesbitt is the stronger debater on this issue.

Fourth, Rachels stipulates that a doctor's inaction is an action in and of itself, which would theoretically once again counter the difference thesis. There are, however, two problems with this line of argumentation. The first problem that I think weakens the argument is that I would not impose any moral culpability on the doctor regardless of whether we are discussing active or passive euthanasia. In contemporary law, it is the patient (or the specifically chosen representative of the patient) that determines whether or not to "pull the plug," or in the case of Oregon, decide to undergo active euthanasia outright. The doctor in either of these situations is not the one, in the end, making the life or death decision for neither active nor passive euthanasia. But secondly, even if we grant to Rachels that doctors have some level of moral culpability, his arguments continue to fall flat. Rachels formulates this contention based around the idea that the doctor is committing a morally equal action regardless of the situation, using his previous negation of the difference thesis as justification. Unfortunately for Rachels, since Nesbitt already counteracted the Smith and Jones example, and the difference thesis is still intact, Rachels' fourth assertion fails to justify active euthanasia as well, leaving Nesbitt with the stronger argument.

The Body and Self-Ownership

In general summation, Rachels' opinion, with his overarching support for active euthanasia, is one that I can most certainly agree with, but his arguments are insufficient to prove the case for the permissibility of active euthanasia when compared to those of Nesbitt. Nesbitt's arguments, though completely uninterested in the issue of active euthanasia itself, are superior in that they sufficiently defend the difference thesis from Rachels' failed attacks, meaning that Rachels' dissertation cannot be used to justify the legalization of active euthanasia within the United States, primarily because I think Rachels is mistaken when he assumes that active euthanasia involves some form of moral culpability on the part of the doctor or medical official administering the procedure. For the sake of argument, this essay will refer to the rights of "life, liberty, and property" in the context of John Locke, since this is the interpretation most reflected within both statutory and judicial law throughout American history (Griffith 1995).

After all, this essay discusses a dispute within the status quo, rather than an entire re-examination of what our rights are and how governments ought to protect them. But specifically in regards to the moral culpability of the doctor in euthanasia, Rachels overtly assumes that the doctor involved has at least some level of moral responsibility in both active and passive euthanasia. This assumption is flawed, as it assigns moral culpability to an entity that had no part in the decision-making process, meaning that the doctor has moral culpability in neither active nor passive euthanasia. This concept is rather simply illustrated when one looks to history. In feudal Japan, when a daimyo, or lord, was dishonored gravely, one of the only options to restore said honor was ritualistic suicide, or seppuku, which was a form of self-disembowelment. It was not a particularly fast death, and seppuku is considered to be one of the most painful forms of death a human can experience. To prevent such severe levels of pain, samurai would often have a retainer, usually a trusted friend or family member, on hand with a sword. Once the person committing suicide stabbed themselves, the retainer would then decapitate them, dealing the killing blow. However, even modern historians consider these events to be suicides and not homicides. Moral culpability was never assigned to the retainer, as the impetus for the death was solely on the part of the daimyo. Doctors in the United States are legally bound to seek informed consent from a sound of mind patient or their appointed representative before undertaking or proceeding with any major procedure (of which active euthanasia would most certainly be considered, as passive euthanasia already is), and this forms one of the ethical totems of the industry (Pandit and Pandit 2009). The question of whether there is any morally significant difference between killing someone and allowing someone to die does not apply in this debate, because in both active and passive euthanasia, the final decision is made by the patient or the individual that the patient transfers medical rights to. The doctor isn't killing anybody; the agent involved is merely using the tools the doctor provides to end their own life. Ergo, Rachels' argument is rendered utterly null, because in the end, the doctor is not the agent committing the morally significant action, so it matters not whether or not this "inaction" on the part of the doctor is an action.

When governments institute restrictions on active euthanasia, they are restricting, from a Lockean perspective, the natural rights of liberty and property. *Roe v. Wade* (though the ruling itself was based mainly on privacy, and the philosophy behind it is controversial even on the best of days) established a legal precedent that people are the owners of their own bodies, a paradigm that has generally been upheld in the legal system throughout the following decades. If the government imposes bans on any form of suicide, whether it be active, passive, or overt, does the implication not exist that lives are under ownership from the state, and not by individuals? This would not be a logical problem if the arguments against active euthanasia followed the social contract of Thomas Hobbes, in which agents can be seen as owned by the state, but rather ironically, those who oppose euthanasia in the west (generally, as mentioned earlier, those on the political right) claim to be the foremost proponents of Lockeanism. The general inhibition of rights is where the arguments espoused by individuals like Dr. Pereira becomes especially problematic, as the policy paradigm he promotes maintains the status quo in the United States, in which bodily autonomy is, operating under the general frame of Lockean natural rights, unjustly restricted by governmental authorities (except for the state of Oregon, in which active euthanasia is permissible). Bodily autonomy ought to be preserved to the maximum extent possible.

Conclusion

For those who no longer wish to suffer, active euthanasia may be their only painless method of relieving suffering. Although the issue may be dormant in the status quo, demographic and situational changes will inevitably lead to a revival in the discussion over the ethical considerations of active euthanasia. In this discussion, the views of James Rachels will not be a viable candidate for policy-making, as his crusade against the difference thesis was nullified by Winston Nesbitt. However, this does not doom the case for active euthanasia, as a solid argumentative foundation lies with the Lockean natural rights of life, liberty, and property, as well as the importance of individual bodily autonomy, a view I ascribe to myself. The nation would be greatly benefited if the AMA restrictions against active euthanasia are revisited and revised, as it is safe to assume that James Rachels, being a utilitarian, would agree, as in his eyes, the ends justify the means.

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Criminal Jurisdiction Under the Doctrine of Tribal Sovereignty

Jordan Dunlap

Abstract

*In 1978, a critical power that was a pillar in Indian nations' ability to self-govern was stripped away with the Supreme Court ruling of *Oliphant v. Suquamish Indian Tribe*, in which they lost the ability to exercise criminal jurisdiction over non-Indian perpetrators. The decision raises an essential question of whether or not the doctrine of tribal sovereignty allows for Indian nations to possess this kind of jurisdiction, and whether or not the doctrine has been violated. With reference to the opinions of the *Oliphant Court*, as well as the definition of sovereignty itself, it seems to follow that there is, in fact, a violation of the doctrine.*

Introduction

The United States of America has a relationship with three different domains of government: foreign nations, states, and Indian nations. Out of the three, Indian nations arguably have the most complicated relationship with the U.S. in that they retain a sovereign status through the doctrine of tribal sovereignty, yet they are subject to the Supremacy Clause. A sovereign nation is a governing body that operates by virtue of self-governance. However, in 1978, a critical power that was a pillar in Indian nations' ability to self-govern was stripped away by the Supreme Court ruling of *Oliphant v. Suquamish Indian Tribe*, in which Indian nations lost the ability to exercise criminal jurisdiction over non-Indian perpetrators. This decision raises an essential question: Does the doctrine of tribal sovereignty allow for Indian nations to exercise criminal jurisdiction, and is the *Oliphant* ruling a violation of the doctrine? In this paper, I will address two of the reasons provided by Justice Rehnquist as to why Indian nations should not have criminal jurisdiction, and shed light on how his assertions are not supported by the doctrine. Furthermore, I will detail how the decision rendered by the *Oliphant Court* has violated the underlying value of sovereignty itself.

The common law concept of an aboriginal land claim is crucial to understanding from where tribal governments derive their sovereign status because it is what enables sovereignty to be exercised. In the 1823 Supreme Court case, *Johnson's Lessee v. McIntosh*, Chief Justice Marshall defined aboriginal land claim, signifying the Supreme Court's endorsement of the doctrine of tribal sovereignty. Justice Marshall explained that American-Indians are "admitted to be rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and use it according to their own discretion" (*Johnson's Lessee v. McIntosh*, 1823). However, "their rights to complete sovereignty, as independent nations were necessarily diminished" following the colonization of European nations (*Johnson's Lessee v. McIntosh* 1823). Thus, the doctrine of tribal sovereignty states that although American-Indians "are acknowledged to have an unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government," they may be viewed as "denominated domestic dependent nations" (*The Cherokee Nation v. The State of Georgia*, 1831).

Tribal lawyer and member of the Seneca Nation of New York, Michalyn Steele, explains the significance of Marshall's ruling in *The Utah Law Review*. Steele says that "even in Marshall's view of tribes as diminished sovereigns, he noted that some core of sovereignty, specifically the right of self-government, remained in the tribes" (Steele, 2018, p. 218). Moreover, Indian nations have not been granted sovereignty by the United States, but rather, "the doctrine of tribal sovereignty as a principle of federal law finds its roots deep in the legal soil predating America's founding" (Steele, 2018, p. 316). Steele further expounds that the United States recognizes the "inherent governing authority of tribes as stemming from an aboriginal sovereignty that

has never been extinguished;” thus, aboriginal sovereignty “does not derive from the Constitution, is not necessarily constrained by the Constitution, and predates the Constitution” (Steele, 2018, p. 315). Because of their primary occupancy of this region—before they were conquered by European nations—Indian nations should be able to exercise criminal jurisdiction over all wrongdoers within their territory. Since Indian nations have aboriginal claim of land, and the sovereignty that that entails, the validity of the Oliphant Court’s decision is able to be questioned; therefore, it must follow that the court could support their decision with a reason consistent with the doctrine of tribal sovereignty.

Incompetent Tribunals of Justice

Retained sovereignty through aboriginal claim of the soil should be adequate enough to support the claim that tribal governments should be allowed to have criminal jurisdiction over non-Indians. Justice Rehnquist’s first reason as to why they should not addresses the newness of the court systems of the tribal governments was that their court systems were not “competent tribunals of justice” (Oliphant v. Suquamish Indian Tribe, 1978). Admittedly, the Indian Reorganization Act (an attempt to “promote self-governance amongst the Indian nations” by “encouragement of the adoption of a written constitution” and systematic structures of government) had been passed less than fifty years ago at the time that the Oliphant Court passed their decision (National Congress of American Indians, 2001, p. 17).

However, when Albania became an independent, sovereign nation on its split from the Ottoman Empire in 1912, the United States granted the Albanian government diplomatic recognition in 1922, and gave them full powers of extradition in 1933 (Department of State, 1935, p. 6). Yet, in the early 1920’s, Albania still had many questions to consider about its legal composition and state structure, including ideas as fundamental as “what form [would] the regime take: ‘monarchy or republic?’” (Pollo et al., 1981, p. 185). Likewise, “Albania [still] needed a constitution—a basic system of laws with a clear framework” so that “there were no legal lacunae that might force [the administration] to resort to Ottoman Laws” (Pollo et al., 1981, p.185). Albania is just one of many countries in which a similar process of recognition and granted jurisdictional powers has been enacted on behalf of the United States. The acknowledgement of Albania’s jurisdiction over American citizens in such a short time from when they actually became an independent nation implies that there is a serious flaw in Justice Rehnquist’s logic. As a new and inexperienced nation, what made Albania more eligible than Indian nations to have criminal jurisdiction over U.S. citizens that were to commit crimes within their territory? The newness of the Indian nations’ tribunals of justice cannot be used in a valid argument to show why the Indian nations cannot have criminal jurisdiction over non-Indians if the United States is going to ignore the same newness by allowing other new countries to have jurisdiction over their citizens.

Furthermore, since the Oliphant decision, the United States has, in fact, recognized tribal governments as competent tribunals of justice. Today there are 573 federally recognized Indian nations in the United States, comprised of approximately 4.3 million people, making their population slightly larger than the state of Oregon, the twenty-seventh largest state in the Union (National Congress of American Indians, 2001, p. 13). Besides fulfillments relating to ancestry, some of the requirements that the tribe must possess in order to be considered a federally recognized nation are qualifications such as, the tribe has “been identified as an American Indian entity on a substantially continuous basis since 1900,” a predominant portion of the tribe “comprises a distinct community and has existed as a community from historical times until the present,” and the tribe “must provide a copy of the group’s present governing document, including its membership criteria” (National Congress of American Indians, 2001, p. 23). In the federal recognition of the Indian nation’s status as a tribe, the U.S. government is essentially admitting that the tribe is able to successfully function as a sovereign Indian nation, and is able to operate in a relationship with both the federal government, and the state. The current relationship between the United States and Indian nations operates very differently than at the time of the Oliphant ruling since they have been granted Indian nation status. Justice Rehnquist’s previous reason—purporting tribal governments are not competent tribunals of justice—in support of his claim as to why Indian nations should not be allowed to exercise criminal jurisdiction over non-Indians is therefore nullified. Although it may have been a justified rationale at the time of the Oliphant case, the behavior of the United States (i.e. granting powers of extradition to nations like Albania) contradicts the principle that Justice Rehnquist used to support his claim. Moreover, just as his reasoning was never

supported within the doctrine of tribal sovereignty, it is no longer contemporarily applicable to the nature of Indian nations and their systems of government.

The Want of Fixed Laws

A second reason that Justice Rehnquist provides as to why Indian nations should not have criminal jurisdiction over non-Indians is that “officers, persons in the service of the United States, and persons required to reside in the Indian country, must necessarily be placed under the protection, and subject to the laws of the United States. To persons merely travelling in the Indian country the same protection is extended, because of the want of fixed laws” (*Oliphant v. Suquamish Indian Tribe*, 1978). I would like to dissect why “the want of fixed laws” are part of specious reasoning for why Indian nations should not be able to exercise criminal jurisdiction over non-Indians. First of all, when a U.S. citizen crosses from one jurisdiction to another, whether it is from city to city, or from one state to the next, that citizen is not operating in fear of whether or not a law has changed, even though they may not have knowledge of the posited laws under that particular jurisdiction. This is because, like all cities and states, Indian nations are subject to the Supremacy Clause of the United States Constitution. The Constitution provides a mold for the relative fixity of the laws that lower jurisdictions are to follow which in turn does not allow for those jurisdictions to pass legislation outside of its constraints; likewise, Congress has the authority to exercise “plenary authority over the tribal relations of the Indians” (*Lone Wolf v. Hitchcock*, 1903). Therefore, tribal laws are not constitutionally permitted to differ from federal, state, or even local laws.

Although Justice Rehnquist essentially begs the question when he cites the need for “fixed laws,” the intergovernmental relationship of federalism allows for a lower political sovereign to pass legislation as long as it is in accord to the ruling doctrine of the higher; thus, preventing some laws that would potentially be deemed as variable. Moreover, it follows that since Indian nations are not able to pass tribal laws that are inconsistent with federal law, all of their legislation necessarily falls within the scope that the U.S. government requires. Hence, fixed laws are not sufficient to conclude whether or not Indian nations have criminal jurisdiction over non-Indians.

Attitudes Toward Native Americans

“Incompetent tribunals of justice” and “fixed laws” may stand as the main premises on behalf of the Oliphant Court’s decision, but the prejudices that still surrounded the Native Americans in 1978 are worth noting in the court’s argument. Despite the fact the organization of tribal governments was in its beginning stages at the time of the Oliphant ruling, hence earning little respect, the Trail of Tears—the relocation of Native Americans from their ancestral homelands and onto reservations—had taken place less than one hundred years ago. Likewise, the Carlisle Indian Industrial School, the predominate school of cultural assimilation, had just ended in 1918. Because of these fairly recent atrocities at the time of the decision, it is likely that the Native Americans themselves were not held in high esteem by the American people to begin with. With the widespread acceptance of these cultural attitudes in mind, it is dubitable that the case was to be ruled in their favor.

Restraint of Self-Governance

Perhaps the most compelling reason why tribal government should be allowed to exercise criminal jurisdiction over non-Indians lies not exclusively within the doctrine of tribal sovereignty, but within the definition of sovereignty itself. Sovereignty is the ability to self-govern, and is essential “if tribal governments are to continue to protect their unique cultures, identities, and communities” (National Congress of American Indians, 2001, p. 22). A government is not able to protect its people if is not able to exhibit a fundamental tool of governance, namely law enforcement; hence, the decision on behalf of the Oliphant Court has arguably been a key influence in the tribal governments’ inability to seek justice for their people.

Although there are many facets of crime that affect the American Indian community, I will use one group of people that has quite possibly felt the reverberations of *Oliphant v. Suquamish Indian Tribe* the

most: Native American women. On average “1 in 3 Native American women are raped at least once in their lifetime, and the murder rate of Native American women is 10 times higher than the national rate” (Perry, 2018, p. 2). The significance of this statistic can be contextualized by the Department of Justice statistics on rape that show “sexual violence is most likely to occur within one’s race.” Consequently, “white perpetrators made up 65.1 percent of the rapists who raped white women in the United States in 2004, and African-American perpetrators made up 89.9 percent of the rapists who raped African-American women” (Perry, 2018, p. 2). However, the majority of perpetrators who rape Native-American women do not follow this trend. In the same set of statistics, the Department of Justice states that “only 14 percent of perpetrators of rape and sexual assault against Native American women are Native American men, while 86 percent are other races” (Perry, 2018, p. 2). To put that statistic into the perspective of legal framework, that means about 86 percent of reported rape and sexual assault in Indian country goes unprosecuted, because tribal governments do not have the authority to exercise criminal jurisdiction over these perpetrators, and instead the cases go to the hands of “the federal Department of Justice office in whatever state the rape occurred” (Perry, 2018, p. 4). Do these perpetrators know the advantage that Oliphant has given them over these Native American women? Do they specifically choose to rape them on a reservation, or in Indian country, because they know that the location of the crime allows them to escape prosecution? Although there is no quantitative data that is able to answer these questions, because of the stark, proportional difference of members of other races that rape Native American women in comparison to the rape statistics of white and African-American women, this seems like provocation for further inquiry.

Although there have been efforts to address domestic violence amongst Native American women with husbands that are outside of their race, but live with them in Indian territory, through the Violence Against Women Act, there has been no legislation passed that is able to help women who are victims of sexual violence with a perpetrator who is a stranger. The way in which Native American women are able to be taken advantage of because the inability of their government to seek justice for them exemplifies one of the ways in which the underlying principle of sovereignty is violated.

Tribal governments are unable to exercise criminal jurisdiction over non-Indians, and this impotence enables crime throughout Indian country. Moreover, it does not allow for Indian nations to effectively protect the people it is to govern, and since they are not truly able to self-govern, a cardinal aspect of sovereignty is lost. Therefore, criminal jurisdiction over non-Indians should be allowed because it is vitally essential both to Indian nations under the doctrine of tribal sovereignty and to the protections for its people which that entails.

Conclusion

Under the doctrine of tribal sovereignty, which derives from aboriginal claims to the land, Indian nations should have the ability to exercise criminal jurisdiction over non-Indian perpetrators. Justice Rehnquist’s fallacious arguments that attempt to justify reasons as to why Indian nations should not have criminal jurisdiction over non-Indian perpetrators are not remotely supported by the doctrine of tribal sovereignty. Not only is the argument that is given in *Oliphant v. Suquamish Indian Tribe* not upheld by the doctrine, but Indian nations need this jurisdiction to function properly in the name of sovereignty. Therefore, tribal nations should have criminal jurisdiction over non-Indians because it is a right inherent within them as a people justified by the doctrine of tribal sovereignty.

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