

Response to Cochran and Smith on Legal History and Ethics

Scott Rae
Biola University

Prepared for the Symposium on Dallas Willard's
The Disappearance of Moral Knowledge
Biola University's Center for Christian Thought
May 14-15, 2019

I am honored to contribute to this tribute to someone I consider one of the giants of both philosophy and Christian faith, Dallas Willard. Like some of you in this room, I had the privilege of studying with Dallas as a Ph.D. student at USC, longer ago that I would care to admit. Dallas was not only an academic contributor to my life but I also considered him my friend. Though he held his students who were also brothers and sisters in Christ to very high academic standards, he was also a subtle advocate for us.

I found both papers by Cochran and Smith to be very insightful and helpful and I admit to sharing some of the skepticism of Professor Smith about a reversal of course that would allow normative convictions, especially religiously grounded ones, to re-enter public discourse. I share this skepticism even though I am both heartened and persuaded by his diagnosis of the “disenchantment with secular discourse.”

A disclaimer at the outset—I am not a lawyer and don't pretend to be one, but I have thought quite a bit about the intersection of ethics and public policy, particularly in my primary fields of bioethics and business ethics. In both these fields, Professor Willard's thesis and the comments of both Professor Cochran and Smith are relevant. I'd like to extend the application to both these areas.

The competing positions that Cochran cites between Brandeis and Holmes was advanced as a more formal debate in 1958 in the classic exchange of papers between Oxford Professor H. L. A. Hart and Harvard Law Professor Lon Fuller.ⁱ While Hart does not deny that legal systems are strongly influenced by morality and that there are places in the law where law and morality intersect, he does deny an inherent connection between law and morality. That is, simply because a law contradicts standards of morality, it does not follow that the law in question is not a valid law. On the other hand, just because something is morally desirable, it does not follow that such a moral rule is a valid law.ⁱⁱ The validity of a law is dependent on its having been legislated into law by a bona fide legislative body, not on its relation to any moral norm.

Fuller suggests that the distinction between law and morality is not a particularly helpful one and instead proposes the distinction between order and good order. All law produces order in society, yet there is a clear difference between order produced by the law and a good order in which the individual citizens recognize that the law that provides such an order is necessary, right, and just.ⁱⁱⁱ He insists that a legal system cannot be built on law alone. Rather, the authority of the law depends on the moral attitudes that undergird it, giving it the competence to order society that it

claims to have. This is what Fuller calls a “morality external to law.”^{iv} Any valid law must be accepted not only as a law but as a good and just law. Further, a legal system must have an “internal morality,” that is, basic norms that clearly point to the source of the laws and a basic procedure by which the laws are made.^v In other words, the authority of the law depends on the moral attitudes that undergird it, giving it the competence to order society that it claims to have. It’s Fuller’s view of the law that is similar to Brandeis’ and is the view that is being lost today as moral knowledge disappears.

In the field of bioethics, the body of moral knowledge for some time has been the four-fold statement of principles articulated by Tom Beauchamp and James Childress, often known as the “Georgetown mantra.” These four principles consist of autonomy, beneficence, non-maleficence and justice. This looks to be a solidly deontological system that gives direction to clinical ethics at the bedside, and would appear to give a challenge to the notion that moral knowledge has disappeared from bioethics. But in more than 3 decades of applying this and watching others apply these principles, it has become apparent that they don’t function in this way at all. For example, when these principles conflict, which happens frequently at the bedside, it is almost always the case that the “principle” of autonomy is the trump card that takes priority over the others. It is very rare that physicians at the bedside will make decisions counter to the autonomy of the patient, or in the case of a child, the autonomy of the parents. We tried for years to get physicians to go against the family’s wishes for inappropriate levels of aggressive treatment for their loved ones at the end of life, on the basis that it’s morally wrong to impose burdens on patients for the benefit of their family members (it happened so frequently that we referred to it as, “we are now treating the family”). But very few physicians were willing to do that, even though the law protected them from liability if they did so properly.

In public policy in bioethics, most decisions are made on the basis of a “truncated utilitarianism.” It’s an example of what Professor Smith calls the consequentialist response to pluralism (p. 5). It’s an extension of the primacy of autonomy pointed to above. Standard utilitarian considerations include a calculus of harms and benefits both, however difficult to weigh (and only makes sense if some value considerations are smuggled in to explain what makes something harmful and beneficial). However, most public policy discussion in bioethics gives maximum space for autonomy unless there are compelling harms that come from that exercise of freedom. The debate over the legality of assisted suicide is a good example of this. The principled aspects of that debate (not taking innocent life, not licensing physicians to kill their patients, etc.) are subsumed by questions of “who’s being harmed?” Increasingly, the debate is conducted on this basis, and is being extended from harm to individual patients to harm to the society at large. The next phase of the debate over assisted suicide will reflect the discussion in Europe, which is focused on the demographic realities that western cultures have to face in the coming decades. Advocates of PAS are increasingly pressing the demographic point in arguing for legalizing PAS, on the basis of gerontologist Joanne Lynn’s statement that, “there is nothing cheaper than dead.”

Bioethics further reflects Professor Smith’s statement that “the neutrality to which the law pretends and aspires to is manifestly impossible.” For example, I recall debating a scientist and physician about the morality of embryonic stem cell research some time ago. One physician in the audience expressed exasperation about “you religious people imposing your morality on us.” I suggested in response that we give up the silly notion that it’s only religious people who are attempting to impose morality—that most, if not all law is the imposition of someone’s morality, hence the myth of the presumed neutrality of the law.

Bioethics is a good example of Professor Smith's critique of "public reason." That is, that only secular reasons and purposes are allowed in the door of public discourse. For example, in the Congressional hearings and debate over human cloning some time ago, the NBAC commission's report included an entire section on "ethical and religious" views on human cloning—which included testimony from religious groups of all sorts. Yet in the conclusion to the report, when it came time to give recommendations, the commission stated that,

"Americans share some but not all of their ethical and cultural traditions, and no single set of approaches that balances conflicting values in particular ways enjoys universal acceptance (Brock, 1995). Some theological analyses provide answers to their adherents, *but these are incapable of serving as the sole basis for policy making* in a religiously diverse nation committed to separation of church and state. "

What was really meant here is that they are not allowed in the door at all, unless accompanied by "public reason," however defined.

In business ethics, the disappearance of moral knowledge has taken a bit different turn than in bioethics. Here ethics has either been subsumed by the law or has become primarily procedural, devoid of normative content. In the first instance, ethics and compliance (with the law/regulatory standards) have become conflated. I remember when I was consulting on ethics for a large Catholic health system, and I was asked to get involved not only with clinical ethics, but also with organizational ethics. At that time the system had a significant compliance office and officer, which was important since the rules governing health care were changing so quickly at that time. In fact, the compliance office was titled, the Integrity Office, and she was the Chief Integrity Officer. One day in conversation I asked her, "what does the Integrity office and officer do?" She replied without missing a beat, "my job is to insure that our managers and executives don't go to jail." I was a bit taken aback by her response, and replied, "I thought the bar for integrity was a bit higher than that—I'm not sure that insuring our leaders are not indicted is an entirely worthy goal for an integrity office." It is very common throughout business and industry for ethics and compliance to be seen as one and the same thing, with the result that ethics is reduced to moral minimum—obeying the law is the moral floor, not the ceiling.

If not reduced to the minimum, it is often reduced to the *procedural*, virtually devoid of content. This is the way ethics is taught in most business schools today, particularly given the popularity of the case method for teaching in many of the disciplines of business. This is similar to the point Cochran makes about how law is taught with the case method. The merits of a procedural approach are that they can be used in pluralistic settings and with a variety of worldviews, but the downside is that it is procedural only, has little if any content, and little in the way of inspiring or motivating moral behavior in the workplace.

One other comment on the state of public discourse today as it relates to morality. Professor Smith maintains that moral knowledge has not disappeared but has been blocked or excluded from public discussion. The result is not amorality, but rather a generation that is intensely and harshly moralistic—I would put it that there is a new absolutism on the rise. As I read Willard on this, I don't think he would disagree, since he points out there are many ways in which morality is expressed and enforced today and he uses the university setting as the example (pp. 32-42). Smith is right that in public discourse the law screens out normative convictions or requires that they be translated into alien vocabularies (p. 6). The reason for this it seems to me is one of moral

epistemology—that morality in general is not thought to be a domain of knowledge in the same way that other domains of knowledge are. Morality, especially in controverted issues, is increasingly thought to be a matter of subjective opinion, not something that can be known, and thus is more readily bracketed out for public discourse. Of course, when pressed, most people would agree that morality is something considerably more than opinion, not precisely parallel to one’s preference for flavors of ice cream or vacation destinations. The failure to provide a “science of ethics” has been well documented by the recent book by James Davison Hunter, *Science and the Good*.

The only note of optimism for a recovery of moral knowledge is, according to Professor Smith, to unshackle religious communities and institutions to be themselves, and to do so in public, thereby enabling being lights to the culture. This is reminiscent of my conversation with Lutheran theologian Gilbert Meilander, who was reflecting on his service in President Bush’s (43) bioethics commission. After years of “translating” Christian ethics into publicly accessible terms on the council, he finally admitted that in the last phase of his professional life, he was committing himself to being unabashedly Christian, regardless of the setting, and letting “impact chips” fall where they will. I heard this as implicit trust in God for that impact on the culture, but underscored the importance of being who we are regardless of the setting.

Hunter suggests that short of a religious revival, hopes for a renewal of character and morality in our time are not bright. In his book, *The Death of Character*, he maintains, “We want a renewal of character in our day, but we don’t really know what we ask for. To have a renewal of character is to have a renewal of a creedal order that constrains, limits, binds, obligates and compels. This price is too high for us to pay (as a culture). We want character, but without unyielding conviction; we want strong morality, but without the emotional burden of guilt and shame; we want virtue, but without particular moral justifications that invariably offend; we want good without having to name evil; we want decency without the authority to insist on it; we want moral community without any limitations to personal freedom. In short, we want what we cannot possibly have on the terms we want it.” It strikes me that the death of character and the disappearance of moral knowledge go together, which lends urgency to the recovery of moral knowledge.

ⁱ. H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (February 1958): 593-629; Lon L. Fuller, "Positivism and Fidelity to Law: A Response to Professor Hart," *Harvard Law Review* 71 (February 1958): 630-72.

ⁱⁱ. Hart, "Positivism and the Separation of Law and Morals," 598-99.

ⁱⁱⁱ. Fuller, "Positivism and Fidelity to Law," 644.

^{iv}. *Ibid.*, 645.

^v. *Ibid.*, 641. Professor Hart appears to accept this notion of an internal morality of law when, in rejecting a command theory of law, he insists that the foundation of a system of law is not coercion but "fundamental accepted rules specifying the essential lawmaking procedures." Fuller then presses the issue by questioning whether these rules are rules not of law but of morality, which are accepted based on a general perception that they are necessary and right. Thus, there is a merger, not simply an intersection, of law and morality at this point. *Ibid.*, 639.