

Law, Discursive Distortions, and the Loss of “Moral Knowledge”

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

The central thesis of Professor Dallas Willard’s book seems to me both important and correct: there is a loss of what he calls “publicly available moral knowledge,”¹ and that loss has deeply unfortunate consequences both for individuals and for our society generally. The book offers a great deal that is worthy of discussion, but my assignment (as I understand it) is not to review or critique the book in general but rather briefly to discuss this issue in the context I am most familiar with— namely, law and jurisprudence.

Preliminary Doubts

I do need to begin, though, by noting two worries about Professor Willard’s overall argument. These worries will lead into some observations about the disappearance of “moral knowledge” in the field of law.² My first worry is that talking about “moral knowledge” can imply that there is some discrete something— some natural or perhaps “non-natural” body of normative desiderata— that constitutes “morality,” and that might be the subject of “knowledge.”

Some such assumption seems to me pervasive in much modern metaethical theorizing; at times it almost seems as if “morality” were some kind of spooky or mysterious normative force field. And the assumption generates questions such as whether and how “morality” (whatever it is) actually gives us reasons to act in accordance with its prescriptions, and whether “legal” duties are different from “moral” duties, and whether the frustrations of philosophers result from not having agreed on a sufficiently precise definition of the subject matter. (Professor Willard seems to have been of this opinion.³)

But these kinds of questions seem to me quite alien to the concerns of the supposed subjects and practitioners of “morality”— namely, actual human beings who are going about the business of living. And the nagging recurrence of such questions in contemporary moral theorizing leads me to suspect that such theorizing finds itself trapped in a kind of Wittgensteinian fly bottle, from which it cannot find its way out. I also happen to think that

¹ Willard at 8. See also 7 (concern about the “unavailability [of moral knowledge] as a public resource for living”).

² These points are developed a bit more fully in Steven D. Smith, *Is God Irrelevant?*, 94 B.U. Law Rev. 1339 (2014).

³ Willard at 352-55.

Alasdair MacIntyre has given us an illuminating account of how we came to be in this situation⁴— even if, as Professor Willard argues, he did not manage to find a remedy for the ailment he so cogently diagnosed. We would do better, I think, to start not with “morality” (or “moral knowledge”) but rather with a very real, non-academic question that all of us constantly face: *How should I live?* Or, in a communal version: *How should we live (together)?* That, I think, is the question, and the subject matter. It is not so much some esoteric or technical subject matter that we need to define and carefully delimit so that we can be secure in our “knowledge” of it, but rather a real existential question that life itself inevitably thrusts upon us. Now, it might turn out that in reflecting on different responses to that question, or on the different kinds of considerations that are relevant to the question, we will find it helpful to distinguish some kinds of considerations from others; and we may find it helpful to use terms like “moral” or “ethical,” or “legal,” to mark these distinctions. But we will not mislead ourselves by assuming in advance that there is something— some *thing*— called “morality” about which we (or at least philosophers) are seeking “knowledge.” Nor will we worry about what sort of thing this “morality” might be, as if that were an important question in its own right. And if someone tells us, for instance, that something called “morality” prescribes *X* but that it is a separate question whether we ourselves actually have any good reason to do *X*, we will dismiss this “morality” as unresponsive to the very real question we are trying to answer— namely, *How should I— or how should we— live?*

Which leads to my second worry. In trying to decide how we should live, it seems to me that we necessarily will act on at least implicit assumptions about what sort of creatures we are and also about what sort of life or world or cosmos we inhabit. Suppose I am a young person (would that it were so! . . . or, on second thought, maybe not) trying to decide what to do with my life. Should I go to college, or get a job, or squander my scanty savings having a good time? In making this decision, it seems, I need to know something about myself— what am I good at? what sorts of things bring me satisfaction?— and also about the world I will be living in. If I have ample intellectual aptitude, college may be a good choice; if not, not. If I have good reason to think the world, or *my* world, will end a year from now (maybe I have a disease that gives me only a year to live), investing my efforts in something (studying to be a classical violinist, for example) that could yield benefits only years down the road would seem ill-advised. Without taking account of such questions— who or what am I?, what sort of world or life do I find myself in?— it would be senseless to ask what the right or correct decision is.

More generally, we will naturally answer the question of how we should live differently depending on whether we believe we are evolved complex organisms with capacities for rational thought and for pleasure but no larger existence or purpose or, conversely, eternal beings who (as Augustine famously said) will find no rest until we rest in our Creator. An understanding that aspires to the clarity and solidity we associate with “knowledge” would need to make these premises articulate, I think, and to examine them.

⁴ Professor Willard offers a concise summary of MacIntyre’s diagnosis, 304-08, and he seems to agree with it up to a point; but he then criticizes it as simplistic— as “very thin and largely irrelevant to the moral quagmire of daily life.” (308). This seems to me a bit unfair. Suppose you are distressed to find yourself wandering aimlessly in a desert. An account of how you came to be in this peculiar predicament is hardly to be scoffed at, I would think, just because the account does not tell you which dry hole you ought (futilely) to visit next.

My worry here is that at least in this book— I am not sure whether this reflects his actual or deeper belief⁵— Professor Willard seems to suggest that we eschew these larger or more “grandiose” questions and instead concentrate on trying humbly to give an account of “the good person.” (358-74) Or I might put the worry this way: some of the most important questions that I think unavoidable are usually classified as “religious,” but at least in this book Professor Willard seems to acquiesce in the common assumption that in our modern world, “religion” cannot serve as a source of moral knowledge. (E.g., 345, 347) In part, this assumption may reflect the notion just discussed— that “morality” is one thing, and “religion” is something different; so “religion” cannot really speak to our “moral” obligations. This seems to me a wrong move, for reasons I have already suggested. Another motivation that may be in play here is that Professor Willard is concerned about “*publicly available* moral knowledge,” and in a pluralistic situation it seems unlikely that people will agree about “religion,” or about the larger questions of what kind of beings we are and what kind of world or cosmos we inhabit. This is a real difficulty— on which more in a moment.

My worry, though, is that without addressing such questions, we cannot make genuine progress in our normative inquiries: we can only succeed in concealing (from each other and perhaps from ourselves) our real underlying questions and commitments. In our contemporary situation, it seems to me, people disagree fundamentally on what makes for a “good person”: as was foretold, character traits that some call virtuous and “good” others call hateful and “evil.”⁶ But even if we did happen to agree about what constitutes a “good person,”⁷ we would still not really understand *why* particular qualities or virtues are admirable in a person.⁸

Law and the Suppression/Distortion of Moral Knowledge

These worries already foreshadow the predicament of law today, I think, but that surmise requires some explanation. So as a segue, let me make two initial observations. First, the communal version of what I think the real question is— *how should we live (together)?*— is central to what law is all about. So law could hardly fail to say or at least mumble things about that question. Second, more generally (and as Professor Willard repeatedly acknowledges⁹), there seems to be no shortage in contemporary society of instructions and admonitions and judgments telling us how we should live, or at least how we should *not* live. We today are not so much

⁵ My sense is that in this book, Professor Willard was self-consciously working in his role as professional philosopher.

⁶ Isaiah 5:20.

⁷ Although in the book’s final chapter Professor Willard seems sanguine about the possibility of agreement with regard to “the good person,” this expectation is undermined, I think, by his earlier observation that “[o]n many familiar points, beliefs, and sentiments concerning what is right and wrong, and *on what or who is morally honorable or not*, have radically changed.” (5, emphasis added)

⁸ For a cogent critique of a “moral exemplarism” somewhat akin to Professor Willard’s, see Robert C. Roberts, review essay of *Exemplarist Moral Theory* by Linda Zagzebski, in *Australasian Journal of Philosophy*, May 2018, <https://doi.org/10.1080/00048402.2018.1470193>

⁹ See, e.g., Willard at 3, 32, 38-39, 44, 344.

starved for moral guidance as suffocated by it. Our society is saturated in praise and blame—especially in blame, which seems to claim a new public victim just about every day.

To be sure, much of this guidance and blame is conflicting, and unmoored. It does not rise to the level of what Professor Willard calls “knowledge.” And yet there are at least some communities that present normative guidance in a fairly consistent and systematic and concrete way—religious communities such as the one I inhabit, for example. I suspect that in his ministry work, Professor Willard himself was actively involved in, and in cultivating, such a community. These communities offer teachings about what sort of beings we are and what sort of world we live in— or what our purpose and destiny are— and these teachings provide coherent frameworks for understanding how we should live. (For reasons already noted, I would dismiss out of hand any objection that what such communities offer is “religious” but not “moral” guidance.)

Not everyone finds such communities attractive, obviously, but they are hardly in short supply. So then, what is the problem, exactly?

It is all quite complicated, and confusing, and there are various responses that have their various insights and shortcomings. I might offer— and I sometimes have offered— a somewhat darker assessment,¹⁰ but for present purposes I will try to be cheerful and say that the problem is indicated by what I have already said, and by what was clearly one of Professor Willard’s central concerns— namely, that there are lots of different communities offering lots of different responses to the “how should I live?” question. We live, in other words, in a situation of rampant normative pluralism. This has been the central challenge for modern legal and political theorizing, and in many respects for modern law.

So, how has law responded to this challenge? Even a longish response would necessarily simplify;¹¹ a short response will simplify egregiously. With that caveat, let me say that, basically, the dominant modern legal response to pluralism has been to acknowledge that people today hold a variety of different “comprehensive views” (as Rawls put it), to insist that all of these views must be treated with “equal respect,” and to maintain a position of legal and political “neutrality” toward the various conceptions on offer of what the good life consists of.

These may seem to be admirable aspirations; given our situation, they are at least understandable. Their serious shortcomings have also been discussed at length.¹² The basic problem is actually quite obvious: Pluralism entails that people will make different and conflicting demands of law and government, and government cannot avoid granting some of those demands and denying others. Even to refuse to do anything at all would be to reject some demands in favor of others— as we would quickly appreciate if government were to announce that it intends to remain neutrally noncommittal, and hence to do nothing one way or the other, with respect to, say, domestic violence or racial discrimination. So it would seem that the neutrality to which law pretends and aspires is manifestly impossible.

This is the central conundrum of modern legal and political thought, I would say. And lawyers and legal thinkers have by and large adopted two main strategies in response to that

¹⁰ See, e.g., Steven D. Smith, *Pagans and Christians in the City*, chs. 10 - 12 (2018).

¹¹ See, e.g., Steven D. Smith, *The Disenchantment of Secular Discourse* (2010).

¹² Rawls’s particular solution is extensively and cogently criticized in chapter 6 of Professor Willard’s book.

conundrum. We might call these the consequentialist and the justice-oriented responses. I think each strategy works to negate or distort our moral discourse, albeit in somewhat different ways.

The consequentialist response in essence addresses pluralism by attempting to reduce all of our various interests, claims, and normative commitments to something we supposedly have in common— something like “interests, or “preferences.” These preferences are then fed into a consequentialist calculus designed to indicate how to achieve maximum overall satisfaction of such preferences. The pervasive use of economics and rational choice approaches in law are manifestations of this response to the challenge of pluralism.

Now, most all of us can approve of this approach in some contexts and for some questions. Other things being equal, we would prefer more pleasure and less pain. (Hardly any of us request the dentist to do the root canal without anesthesia.) And we would prefer a thriving economy with more jobs rather than a stagnant economy with massive unemployment. And yet many of us will feel that the consequentialist approach, and the translation of our values and commitments into “preferences,” undervalues or distorts some of our deeper normative commitments. My beliefs in the sanctity of life or of the family simply cannot be adequately rendered in terms of some sort of liking or “preference” I have for these things.¹³

Sensitive to this objection, the justice-oriented approach views preference-satisfaction as a sometimes appropriate but also somewhat grubby enterprise; it instead attempts to resolve controversial public questions by reference to supposedly loftier ideals of equality, or liberty, or “equal liberty.” These ideals are notoriously amenable to manipulation in support of whatever conclusion a particular clever advocate may happen to favor. What is important for present purposes, though, is how the justice-oriented approach treats people’s most fundamental normative commitments. Unlike the consequentialist approach, which purports to honor such commitments by (mis)translating them into “preferences,” the justice approach self-consciously screens such commitments out of public justification. Or at least it excludes the “comprehensive views” in which such commitments are based. People are admonished, basically— for present purposes we need not try to chart the various qualifications and “provisos”— to make public decisions by “bracketing” their deepest convictions, or by acting for public purposes as if they did not have such convictions.

I have been alluding here, of course, to one particular kind of political philosophy— to the kind of liberal philosophy that favors “public reason” and that is most influentially represented by John Rawls. American constitutional law does not explicitly embrace Rawls. And yet I would argue that it effectively accomplishes much the same thing in cruder fashion— by insisting that only “secular” purposes can count in the justification of laws and that “religious” perspectives are for that purpose out of bounds. (Both terms— “secular” and “religious”— are conveniently left undefined.)

Recent same-sex marriage decisions can serve as an illustration. Laws limiting marriage to opposite-sex couples were challenged in many states, and eventually in the Supreme Court, as violations of the Fourteenth Amendment’s due process and equal protection clauses. As interpreted by the courts, those clauses mean that a state must have at least a “legitimate” and “rational basis” for laws it adopts, and those criteria were understood not to include “religious”

¹³ I discuss this approach at somewhat greater length in Smith, *Pagans and Christians*, pp. 17-20.

reasons. So in attempting to supply such a basis, lawyers defending traditional marriage laws avoided talking about the Bible, or the law of God, or the sacramental quality of marriage, or anything of that sort. Instead, they argued basically that traditional marriage is good for children (with “good” being understood in terms of measures like rates of delinquency or graduation), for the institution of marriage, and hence for society. And in striking the laws down, the courts often suggested that whatever the lawyers might have argued, “religion” was in fact the real reason for the laws. Since religion could not provide a legitimate basis for law (or so the judges assumed), it followed that the traditional marriage laws were unconstitutional.

These cases illustrate, I think, the way our jurisprudence’s public reason operates, both in our philosophizing and in our ordinary public discourse. We are exhorted to use “public reason”— in substance if not under that label— but it turns out that “public reason” does not actually supply positive or affirmative reasons to act or decide. It does not respond to the question: How should I live? On the contrary, public reason self-consciously shuns that question. It *excludes* reasons— particular kinds of reasons— that many people might embrace.

Public normative discourse thus becomes a kind of secondary normativity that is actually an anti-normativity— a denial or negation of normativity at the primary level of people’s actual normative convictions. If we associate those primary normative convictions with “moral knowledge,” then we might say that what has happened is not that moral knowledge has “disappeared” but rather that it has been deliberately blocked or excluded from public justification.

In this respect, public discourse has arguably both followed and reinforced more popular tendencies. What we see in the world today, I submit, is a generation of people who are *not* amoral— it might in some respects be a relief if they were— but rather intensely and often harshly moralistic. Their morality consists largely of an aggressive non-judgmentalism that is vehemently judgmental toward judgments grounded in traditional normative convictions.¹⁴

In this way, the law arrives at, and supports, and to some extent enforces, the condition that Professor Willard describes as “the disappearance of moral knowledge.” The problem, from this perspective, is not that philosophers have failed to provide a “science of ethics.” (Although I can readily agree with Professor Willard that this project has not succeeded.) Nor is the problem that normative guidance has passed out of the world. The problem, rather, is that for purposes of *public discourse*, our law systematically either screens out our normative convictions or else requires us to mistranslate them into alien and inadequate vocabularies.¹⁵

What is to be Done?

¹⁴ Cf. Willard at 17 (discussing the “moral platitude to the effect that *it is always wrong to make moral judgments*”) (emphasis in original). See also *id.* at 40 (“That moral imperative— to allow people to do what they want (so long as others aren’t ‘hurt’)— is one major component in the moral system that is taught and relentlessly enforced in the university setting . . .”).

¹⁵ I am here considering how law works to deprive *general public discourse*— discourse about marriage and family and immigration and crime and matters of that kind— of its moral foundations. A different issue is how modern law deprives lawyers and judges of the normative resources necessary to understand *what law itself is*. I have discussed that phenomenon elsewhere, see Steven D. Smith, *Law’s Quandary* (2004), but leave it aside here as of less relevance to the concerns of Professor Willard’s book.

The charge for this conference includes an instruction to discuss how “moral knowledge” might be recovered—a topic taken up in Professor Willard’s last chapter. I have already registered my doubts about his particular proposal for a recovery through greater philosophical attention to “the good person.” More generally, honesty is one of the traditional and perhaps still recognized moral virtues, and I cannot in honesty say that I see any promising merely human remedy for our predicament. If there is any hope for our current society, I suspect it lies more in ministry than in either law or philosophy.

And yet in a sense, and surprisingly (to me anyway), my account of our condition might offer greater hope than some others accounts do. Put it this way: If moral knowledge had actually disappeared, we might despair of our ability to recover it through any sort of philosophical fix. But on my account, moral knowledge (to use Professor Willard’s term) has not exactly disappeared. On the contrary, not only are we awash in moralism, much of it misguided or negative in nature; we still have communities that provide systematic and sound normative guidance—guidance that might even meet Professor Willard’s criteria for “moral knowledge.” The problem is that we have excluded these normative resources from contributing to our public discourse or from being invoked and taught in our public institutions. And so it might seem that the remedy is obvious: we should simply remove the misguided prohibitions that forbid us to draw on these moral resources.

One way to accomplish this removal would be to eliminate the constitutional restrictions that block these convictions from contributing to public discourse and public justifications—restrictions such as the requirement that all laws must be based on “legitimate” “secular” purposes. If many citizens believe that, for instance, biblical teachings are relevant to public matters involving, say, marriage and family, those convictions might be welcomed in the sphere of public discourse. These constitutional restrictions are a modern and unwarranted construction anyway, I would argue, so their removal would in my view be entirely justified.

Still, I admit to being skeptical not only about whether there is any likelihood of such removal but also about whether it would actually make much practical difference at this point. Suppose the Supreme Court were to say, “We were mistaken. Religious convictions are now once again welcome in public justification.” The constraints have become so ingrained and instinctive, arguably, or so much a part of our national political culture, that the legal restrictions have become largely superfluous. In addition, our cultural polarization would deprive these resources of the force they once had.

Take an obvious example: The Bible. The Bible is a publicly available resource—anyone can read it, and if you need one the Gideons will be happy to supply it for free—and through much of our nation’s history the Bible served to ground and guide our nation’s deliberations.¹⁶ And yet even if the Supreme Court were to say, at this point, “We take it all back: It’s okay to study the Bible in public schools (and not just ‘as literature’), and okay to appeal to the Bible for political decisions,” there would still be a sense in many quarters that the Bible is a suspect source. In addition, so many citizens by now believe the Bible to be quaint or archaic, or

¹⁶ See generally Robert N. Bellah, *The Broken Covenant: American Civil Religion in Time of Trial* (2d ed. 1975). See also John Coleman, *An American Strategic Theology* 193-98 (1982).

positively perverse, that invocations of the Bible would probably be more counterproductive than helpful.

What seems to me a more hopeful possibility, therefore, is that our law and politics might partially back away from its aggressive intrusion into the communities or institutions in which comprehensive views and normative convictions still flourish. The law might, in other words, give greater deference and autonomy to religious communities— and to religious social service agencies and religious colleges, and even religiously motivated businesses— so that these institutions might be left free to pursue and teach their visions about who we are and what our purpose is.¹⁷ Left with greater freedom, such communities and institutions might be the “leaven,”¹⁸ so to speak, that helps to maintain some semblance of practical, constructive morality in our society. Who knows? It is even possible that such institutions and communities might serve as “lights”¹⁹ and examples from which a more general moral regeneration might arise.²⁰

But now I have passed from being Cassandra to Pollyanna. Which leaves me feeling a bit queasy; I am accustomed to being a cosmic optimist but a practical and short-term pessimist. And yet we do what we can, with as much faith and hope (and charity) as we can muster. So I have identified what seems to me the best prospect for a recovery— if not of “moral knowledge,” exactly— at least of a sensible, grounded normativity in our current society.

¹⁷ There is some support in recent judicial decisions for this possibility. See *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171 (2012); *Burwell v. Hobby Lobby Stores*, 573 U.S. (2014).

¹⁸ Cf. Matt. 13:33.

¹⁹ Cf. Matt. 5:14-16.

²⁰ In this respect, I am inclined to agree with Professor Willard that it is hard to “imagine any circumstances in which institutions of higher education as we now know them could teach moral knowledge.” (377). That observation seems right, at least, if we are talking about public universities. But I am not convinced that the task is impossible for at least some private universities. Indeed, if there is to be any recovery of “moral knowledge,” it seems to me that serious religiously-grounded universities will have to be part of that recovery.