

Multiple Moralities:

Tensions and Tradeoffs in Moral Psychology and the Law

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“Moral principle is the foundation of law.”
- Ronald Dworkin

Should gay marriage be legalized? Should abortion be outlawed? Regardless of their answers, people are usually quite confident in them. People have strong intuitions about what behaviors are morally right and wrong, from controversial political and legal issues to everyday interactions with friends, colleagues, and strangers. When the law codifies what we ought to do and what we ought not to do, ordinary moral intuitions influence to some extent what laws are laid down and certainly influence whether those laws are obeyed or broken.

The complexity of ordinary intuition presents interesting difficulties for the law. Moral intuitions cover diverse territory. Moral condemnation reaches those who hurt others, those who lie or steal, those who betray their family, friends, or country, those who disrespect or disobey authorities, and even those who eat taboo foods or engage in unusual sexual practices. Given the complexity of this moral space, tensions and tradeoffs abound. For instance, morals, like laws, may function primarily to deter us from victimizing other people, and, in turn, to keep us safe from potential transgressors. However, we often regard many behaviors as immoral or illegal even when there aren't any victims (e.g., consensual incest, necrophilia). Or, to take another example, people generally regard both fairness and loyalty as desirable moral qualities, but the

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very nature of loyalty requires one to treat people differently, to favor friends and family over unknown others – in essence, to be unfair. Finally, maintaining moral standards is crucial for identifying the people around us who meet those standards, the people we decide to trust, befriend, or follow; yet, as we’ll see, even our most basic morals are surprisingly malleable.

Emerging research in moral psychology offers insight into these complex and often contradictory morals. A deeper understanding of our moral intuitions and the tensions that arise among them may also inform our understanding of the law – why we care about certain behaviors and not others, why some laws are easier to follow than others, and why the law may feel too strict in some cases and too lenient in others. In this review, we will address three lines of research aimed at addressing tensions with particular relevance to the law.

I. Crimes that Take Victims, and Crimes that Don’t

In 2003, the would-be NFL draftee Tony Washington admitted to committing incest with his younger sister³. Both professed on record that the act was completely consensual, occurred only once and produced neither offspring nor emotional trauma⁴. Yet Washington, a juvenile at the time, was charged as an adult, spent a month in jail, five years probation, and he is now required to register annually as a sex offender in addition to attending mandatory therapy sessions⁵.

What purpose do our laws serve? On the one hand, laws function to protect us, to keep us safe, and to punish those who threaten our safety. However, as illustrated by the case of Tony Washington, among others, many actions that do not victimize anyone nor cause any harm are nevertheless illegal and, for many of us, immoral.

³ Glock, A. (2010, August 31). Unforgiven: Would-be Drafter Tony Washington’s NFL Future is Being Derailed by His Sad Past. Retrieved November 1, 2011 from <http://sports.espn.go.com/nfl/news>

⁴ *Id.*

⁵ *Id.*

Recent research in moral psychology attempts to make sense of this fundamental difference between actions that are wrong because of their harmful consequences and actions that are simply wrong, even in the absence of any adverse outcomes. Like laws, morals may serve a protective function, identifying dangerous others whom we should avoid. But moral judgments also apply to a vast range of behaviors. Convergent evidence from cognitive science, neuroscience, as well as philosophy and anthropology assign different morals to distinct “moral domains.”⁶

For instance, norms against harming others may belong to one domain, the domain of harm, while norms concerning which foods are taboo and which sexual relations are permissible belong to another domain, the domain of purity and sanctity.

These different domains of morality may serve different adaptive functions. Harmful behavior requires at least two parties, that is, a “dyad” consisting of an agent causing the harm, and the victim who is harmed.⁷ Harm norms may therefore govern how we treat other people. By contrast, purity norms may function to govern our own behavior – in essence, to protect us from ourselves. Purity violations do not involve a dyad and do not render anyone else a victim –

⁶ See generally James Blair et al., *Neuro-Cognitive Systems Involved in Morality*, 9 PHIL. EXPLORATIONS 13, 13–27 (2006); Jana Schaich Borg et al., *Consequences, Action, and Intention as Factors in Moral Judgments: An fMRI investigation*, 18 J. COGNITIVE NEUROSCI. 803, 803–817 (2006); Jesse Graham & Jonathan Haidt, *Beyond Beliefs: Religion Binds Individuals into Moral Communities*, 14 PERSONALITY & SOC. PSYCHOL. REV. 140, 140–50 (2010); Jonathan Haidt, *The New Synthesis in Moral Psychology*, 316 SCI. 998, 998–1002 (2007); Jorge Moll et al., *The Moral Affiliations of Disgust*, 18 J. COGNITIVE BEHAV. NEUROLOGY 68, 68–78 (2005); Paul Rozin et al., *The CAD Triad Hypothesis: A Mapping Between Three Moral Emotions (Contempt, Anger, Disgust) and Three Moral Codes (Community, Autonomy, Divinity)*, 76 J. PERSONALITY & SOC. PSYCHOL. 574, 574–86 (1999); Richard A. Shweder & Jonathan Haidt, *The Future of Moral Psychology: Truth, Intuition, and the Pluralist Way*, 4 PSYCHOL. SCI. 360, 360–65 (1993); Walter Sinnott-Armstrong, *Is Moral Phenomenology Unified?* 7 PHENOMENOLOGY & COGNITIVE SCI. 85, 85–97 (2008).

⁷ See generally Kurt Gray & Daniel M. Wegner, *Moral Typecasting: Divergent Perceptions of Moral Agents and Moral Patients*, 96 J. PERSONALITY & SOC. PSYCHOL. 505, 505–20 (2009); Adam Waytz et al., *Causes and Consequences of Mind Perception*, 14 TRENDS COGNITIVE SCI. 383, 383–88 (2010).

the transgression affects only the transgressor.⁸ Purity norms may function in helping us avoid physical contaminants as well as “impure” people.⁹ But does this abstract categorization of moral norms (i.e. harm on the one hand, and purity on the other) reflect a real difference in our moral psychology? One way to test this is to investigate whether different cognitive processes apply equally across different domains.

Mental state reasoning, for establishing *mens rea*, motives, or lack thereof, is critical for the law and ordinary moral judgment¹⁰. Imagine a person is fatally shot. In one scenario, the shooter takes careful aim and fires. In another scenario, a man was simply cleaning his gun when it goes off by accident, killing his friend. This difference between murder and manslaughter lies in the killer’s mental state and, just as in the law, leads to robust differences in our intuitive moral judgments of the agent and the action.¹¹ From hurtful jokes to fatal bullet wounds, intentional harms are judged to be more blameworthy than accidental harms.¹²

Why do mental states matter for these moral judgments? When people are victims of

⁸ Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 817 (2001).

⁹ See generally H. A. Chapman et al., *In Bad Taste: Evidence for the Oral Origins of Moral Disgust*, 323 SCI. 1222, 1222–26 (2009); Jonathan Haidt et al. *Affect, Culture, and Morality, or Is It Wrong to Eat Your Dog?* 65 J. PERSONALITY & SOC. PSYCHOL. 613, 613–28 (1993); Yoel Inbar et al., *Conservatives Are More Easily Disgusted than Liberals*, 23 COGNITION & EMOTION 714, 714–25 (2009); Yoel Inbar et al., *Disgust Sensitivity Predicts Intuitive Disapproval of Gays*, 9 EMOTION 435, 435–39 (2009); Simone Schnall et al., *With a Clean Conscience: Cleanliness Reduces the Severity of Moral Judgments*, 19 PSYCHOL. SCI. 1219, 1219–22 (2008); Simone Schnall et al., *Disgust as Embodied Moral Judgment*, 34 PERSONALITY AND SOC. PSYCHOL. BULL. 1096, 1096–1109 (2008); Thalia Wheatley & Jonathan Haidt, *Hypnotic Disgust Makes Moral Judgments More Severe*, 16 PSYCHOL. SCI. 780, 780–84 (2005); Chen-Bo Zhong & Katie Liljenquist, *Washing Away Your Sins: Threatened Morality and Physical Cleansing*, 313 SCI. 1451, 1451–52 (2006).

¹⁰ Fiery Cushman et al., *The Role of Conscious Reasoning and Intuitions in Moral Judgment: Testing Three Principles of Harm*, 17 PSYCHOL. SCI. 1082, 1082–89 (2006).

¹¹ John Mikhail, *Universal Moral Grammar: Theory, Evidence and the Future*, 11 TRENDS COGNITIVE SCI. 143, 143–52 (2007).

¹² See generally Fiery Cushman, *Crime and Punishment: Distinguishing the Roles of Causal and Intentional Analyses in Moral Judgment*, 108 COGNITION 353, 353–80 (2008); Joshua Knobe, *Theory of Mind and Moral Cognition: Exploring the Connections*, 9 TRENDS COGNITIVE SCI. 357, 357–59 (2005); Bertram F. Malle & Joshua Knobe, *The Folk Concept of Intentionality*, 33 J. EXPERIMENTAL AND SOC. PSYCHOL. 101, 101–21 (1997); JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (Free Press Paperbacks, 1997); Tania Singer et al., *Brain Responses to the Acquired Moral Status of Faces*, 41 NEURON 653, 653–62 (2004).

harmful actions, they must decide if they wish to avoid the harmful agent in the future. To do so, they might ask, is the agent a clumsy friend who made a mistake, or an enemy who will continue to cause harm? Any reliable prediction of future behavior and evaluation of someone as friend or foe requires information about the underlying intent – an enemy is more likely to have caused harm intentionally, or attempted to do so. Even third party observers are likely to consider the transgressors’ mental states as they judge their innocence or guilt.

These same rules, however, do not apply to purity violations. Purity norms target the self, not others¹³. Therefore, mental state considerations, including whether we acted against ourselves intentionally or accidentally may matter less. We need not reason about our own moral status – whether we are our own enemy or friend. We simply care about avoiding bad outcomes, i.e. committing incest or consuming contaminated foods.

In our recent work, we have investigated the difference in the way people process harm versus purity violations¹⁴. Subjects read stories depicting harmful actions (e.g., physical and psychological harm) and purity violations (e.g., committing incest and eating taboo foods)¹⁵. Subjects’ judgments of moral wrongness reflected a large difference between accidental and intentional harms and a much smaller difference between accidental and intentional purity violations like incest¹⁶. In particular, accidental purity violations were judged quite harshly, whereas accidental harms were judged relatively leniently, taking innocent intentions into account.¹⁷ Purity violations simply do not elicit as much mental state reasoning (e.g., what the

¹³ Kwame Appiah, *Cosmopolitanism: Ethics in a World of Strangers*, 51-52, Gates, H.L. (Ed.), New York, NY: W.W. Norton & Company, Inc. (2006).

¹⁴ Liane Young & Rebecca Saxe, *When Ignorance is No Excuse: Different Roles for Intent Across Moral Domains*, 120 COGNITION 202, 202–214 (2011).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

agent intended) as harms do¹⁸.

To investigate this behavioral difference, we used functional magnetic resonance imaging (fMRI) to determine neural responses to different kinds of moral violations.¹⁹ fMRI research has found that moral judgments, particularly of harm, elicit robust activity in brain regions involved in mental state reasoning,²⁰ including the right and left temporo-parietal junction (RTPJ, LTPJ), precuneus and medial prefrontal cortex (MPFC).²¹ Focusing on these key regions, we measured brain activity when subjects read and rated stories describing harm and purity violations.²² Consistent with the behavioral evidence, common brain regions for mental state reasoning (RTPJ, LTPJ, precuneus, MPFC) were significantly more active while participants encountered harms versus purity violations.²³

These findings suggest that we do in fact process crimes of harm differently from crimes of purity. We care a great deal about an agent's intent when that agent causes harm, but we care significantly less about the agent's intent when that agent commits incest or consumes taboo foods, for example. Notably, strict liability, where a guilty mind (*mens rea*) need not accompany the guilty act, is quite rare in criminal law. However, key exceptions in many states include

¹⁸ *Id.*

¹⁹ Liane Young, David Dodell-Feder, & Rebecca Saxe, *What Gets the Attention of the Temporo-parietal Junction? An fMRI Investigation of Attention and Theory of Mind*. 48 NEUROPSYCHOLOGIA 2658, 2658–64 (2010).

²⁰ See generally Adrianna C. Jenkins & Jason P. Mitchell, *Mentalizing Under Uncertainty: Dissociated Neural Responses to Ambiguous and Unambiguous Mental State Inferences*, 20 CEREBRAL CORTEX 404, 404–10 (2009); Jose Perner et al., *Thinking of Mental and Other Representations: The Roles of Left and Right Temporo-parietal Junction*, 1 SOC. NEUROSCIENCE 245, 245–58 (2006); Rebecca Saxe, & Nancy Kanwisher, *People Thinking About Thinking People. The Role of the Temporo-parietal Junction in "Theory of Mind,"* 19 NEUROIMAGE 1835, 1839–40 (2003); Jonathan Scholz et al., *Distinct Regions of Right Temporo-parietal Junction Are Selective for Theory of Mind and Exogenous Attention*, 4 PLOS ONE e4869 (2008); Young, *supra* note 8.

²¹ Liane Young et al., *The Neural Basis of the Interaction Between Theory of Mind and Moral Judgment*. 104 PROC. OF THE NAT'L ACAD. OF SCI. 8235, 8235–40 (2007); Liane Young & Rebecca Saxe, *The Neural Basis of Belief Encoding and Integration in Moral Judgment*. 40 NEUROIMAGE 1912, 1912–20 (2008).

²² Liane Young et al., *Theory of Mind for Evaluating Assault Not Incest: Selective Neural Encoding of Acts as Intentional Versus Accidental*, Submitted to NEURON (2011).

²³ See *id.*

statutory rape²⁴, distribution of contaminated foods, pollution and many acts involving intoxicating substances like drugs and alcohol²⁵ – standard purity violations. The “impure” nature of these violations may be the partial source of the harsher stance of the law.

The law may protect us from being victimized not only by others but also by ourselves in the case of purity violations. However, caution must be taken when legislating victimless crimes. People of different cultures, religions, and even political orientation differ dramatically in their perceptions of purity violations – both in what constitute violations and how serious they are.²⁶ Moral psychologists and legal scholars alike would do well to reflect on when and why we outlaw crimes that have no victims.

II. WHEN FAIRNESS AND LOYALTY COLLIDE

Suppose you discover that someone you know lied on his resume to secure a highly desirable job with a large salary. Should you report this fraud to the hiring authorities? To the police? Doing so would be the fair thing to do. But suppose this person happens to be your best friend, or your father. Should you proceed with the reporting? Or should you keep quiet as a signal of your loyalty? What if your roles were reversed? How would you wish to be treated? Both fairness and loyalty have been posited as fundamental moral values,²⁷ but these values often come into conflict as in the scenario above.

²⁴ Catherine Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*. 53 AM. UNI. L. REV. 313 (2003-2004).

²⁵ Sanford Kadish & Stephen J. Schulhofer (2001). "3". *Criminal law and its process: cases and materials*. 256, 261, New York, NY: Aspen.

²⁶ See Jesse Graham et al., *Liberals and Conservatives Rely on Different Sets of Moral Foundations*. 96 J. PERSONALITY. & SOC. PSYCHOL. 1029, 1029–46 (2009); Joseph Henrich, *Does Culture Matter in Economic Behavior? Ultimatum Game Bargaining Among the Machiguenga of the Peruvian Amazon*. 90 AM. ECON. REV. 973, 973–79 (2000).

²⁷ Jonathan Haidt, *The New Synthesis in Moral Psychology*. 316 SCI. 998, 998–1002 (2007).

On the one hand, it might seem that fairness should always be favored. As Folger noted, “the importance of justice cannot be overstated.”²⁸ Our government, the very foundation of our legal system, is built on justice, on fairness - every man is *equal* and endowed with unalienable *rights*. Dramatic calls for fairness can be seen throughout our history in civil rights movements and women’s suffrage campaigns.

The premium people place on fairness is supported not simply by our history, but by science too.²⁹ Perceived fairness crucially affects how we behave.³⁰ For instance, in the Ultimatum Game, a proposer decides how to split a sum of money between himself and a second person – the responder.³¹ If the responder accepts the deal, the money is split accordingly; however, if the responder rejects the offer, neither person receives any money.³² According to the perspective of the rational economist, the responder should accept even the smallest offer, since anything is better than nothing.³³ Despite this, nearly half of all responders reject offers below thirty percent of the total sum.³⁴ This “irrational” behavior highlights a strong desire for fairness – so strong that responders willingly sacrifice a monetary payoff in order to punish proposers for delivering an unfair deal. This same basic pattern of behavior is also found in simple societies,³⁵ suggesting not only do people in the West, interacting in highly competitive economic markets, place a high value on fairness, but fairness is valued around the world.

²⁸ ROBERT FOLGER, *THE SENSE OF INJUSTICE: SOCIAL PSYCHOLOGICAL PERSPECTIVES* at ix – x (Robert G. Folger ed., New York: Plenum Press 1984).

²⁹ Kees van den Bos & Joost Miedema, *Toward Understanding Why Fairness Matters: The Influence of Morality Salience on Reactions to Procedural Fairness*, 79 *J. PERSONALITY & SOC. PSYCHOL.* 355, 355–66 (2000).

³⁰ *Id.*

³¹ Martin A. Nowak et al., *Fairness Versus Reason in the Ultimatum Game*. *SCI.*, Sept. 8, 2000, at 1773.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Henrich, *supra* note 15, at 974–76 (describing how the Ultimatum Game is followed in simple societies).

The universal importance of fairness may have deep-seated evolutionary roots. Recent research suggests that capuchin monkeys are also averse to the unequal distribution of rewards: monkeys noticed when another monkey received a highly prized reward (a delicious grape) for equal or less work than they had performed to receive a mediocre prize (a slice of cucumber).³⁶ This finding suggests that on some level the value of fairness exists beyond the human species; our sense of fairness that supports cooperation and equal treatment of others may have been passed down from our primate ancestors.

Infant studies also support fairness as an innate value. Infants as young as six and ten months old are sensitive to the difference between “helpers” and “hinderers.”³⁷ In one study, infants watched a character, the protagonist, unsuccessfully attempt to climb a hill.³⁸ Infants preferred a character who helped the protagonist up the hill over a neutral character that did nothing, but infants preferred this neutral character to a character that hindered the protagonist.³⁹ These robust responses, even in infants, suggest that fairness may be a key building block for morality.⁴⁰ In a more striking follow-up study that better approximates our full-blown sense of justice, infants show that they prefer a character who punishes a hinderer rather than rewards it.⁴¹ This result shows that infants are not simply drawn to positive behavior based on its surface features, but actually respond positively to third-party punishment – justice being served.⁴²

Beyond the typical experimental lab setting, toddlers continue to show sensitivity to violations of fairness. Toddlers are much more likely to tattle on their peers for moral violations

³⁶ Sarah F. Brosnan & Frans B. M. de Waal, *Monkeys Reject Unequal Pay*, 425 NATURE 297, 297–98 (2003).

³⁷ J. Kiley Hamlin, et al., *Social Evaluation by Preverbal Infants*, 450 NATURE 557, 557–59 (2007).

³⁸ *Id.* at 557.

³⁹ *Id.* at 558.

⁴⁰ *Id.*

⁴¹ Paul Bloom, *The Moral Life of Babies*, N.Y. TIMES, May 5, 2010, <http://www.nytimes.com/2010/05/09/magazine/09babiest.html?scp=1&sq=the%20Moral%20life%20of%20babies%20by%20paul%20bloom&st=cse>.

⁴² *Id.*

of fairness – such as refusing to share or taking a toy that another child was using - than violations of social convention.⁴³ Their tattles are almost entirely truthful and result in corrective action on the part of the adult.⁴⁴ In line with the infant studies, toddlers in the real world seem to be actively pointing out violations of fairness and appealing to the relevant authorities, i.e. adults, to make sure moral norms are appropriately enforced.

However, by adolescence, peer evaluation of tattlers changes dramatically.⁴⁵ In toddlers, tattling seems to serve the adaptive purpose of signaling and enforcing fairness norms.⁴⁶ For teenagers, though, perceived rates of tattling correlate negatively with likeability and positively with social rejection – these patterns are present in measures of both peer and caregiver ratings.⁴⁷

What accounts for this shift in reactions to tattling? One possibility is that teenagers see social groups everywhere, and group boundaries and group membership are more salient than during infancy. The importance of loyalty accompanies the formation of social groups. Appeals to outsiders, such as adult authorities, in the name of fairness and justice can have the unwanted effect of undermining group trust and result in rejection and expulsion from the group.

Examples of this tension appear in the law in reports of whistleblowers. Joseph Darby famously blew the whistle on the torture and abuse of foreign prisoners at Abu Ghraib. To the outside community, Darby's reporting seems unusually honorable, and morally praiseworthy; yet Darby became an outcast and was berated and threatened by his fellow military members⁴⁸. Frank Serpico is another example. Serpico reported widespread corruption in New York's police

⁴³ Gordon P. D. Ingram & Jesse M. Bering, *Children's Tattling: The Reporting of Everyday Norm Violations in Preschool Settings*, 81 CHILD DEV. 945, 949 (2010).

⁴⁴ *Id.* at 950–51.

⁴⁵ See Patrick C. Friman, et al., *Relationships Between Tattling, Likeability, and Social Classification: A Preliminary Investigation of Adolescents in Residential Care*, 28 BEHAV. MODIFICATION 331, 331–48 (2004).

⁴⁶ *Id.* at 332–33.

⁴⁷ *Id.* at 333.

⁴⁸ Hanna Rosin, *When Joseph Darby Comes Marching Home*. (2004, May 17). Retrieved November 1, 2011 from <http://www.washingtonpost.com>

department, where he worked, and suffered significant backlash as a result⁴⁹. Less famous, but equally unfortunate, are the many cases of violence toward people reporting crimes in their local communities, such as Michael Brewer, a fifteen year old boy who was doused in alcohol and set on fire by his peers for being a “snitch”⁵⁰.

Though these cases seem extreme, experimental findings support this basic pattern: morally appropriate behavior that nevertheless violates loyalty norms can be seen as undesirable.⁵¹ For example, a measure of White people’s endorsement of affirmative action policies was mediated by how they perceived such policies to affect their in-group, not by how they expected the policies to affect minorities.⁵² Furthermore, when questions were framed to focus on losses for their in-group, racial identity was negatively related to support for affirmative action.⁵³ Conversely, when questions were framed to focus on out-group gains, or when participants were explicitly told that their in-group would be unaffected, racial identity did not predict support for the policies.⁵⁴ These findings show that in-group loyalty plays a key role in motivating behavior and can even outweigh or alter our perceptions of what is fair and just.⁵⁵

Ordinary intuition and empirical evidence suggest that we care a lot about loyalty. However, despite the significant role loyalty plays in our moral lives, the law, for better or for worse, does not place as much emphasis on loyalty as it does on fairness. Consider adultery. Most people agree that adultery is not only disloyal, but also morally wrong. Adultery remains a

⁴⁹ New York Knapp Commission, *The Knapp Commission Report on Police Corruption*, New York, G. Brazillier (1973).

⁵⁰ *Police: Juveniles Laughed After Setting 15-Year-Old on Fire*. (2009, October 13). Retrieved November 1, 2011, from <http://www.cnn.com/2009/CRIME>

⁵¹ Brian S. Lowey, et al., *Concern for the In-Group and Opposition to Affirmative Action*, 90 J. PERSONALITY & SOC. PSYCHOL. 961, 961–74 (2006).

⁵² *Id.* at 961.

⁵³ *Id.* at 970.

⁵⁴ *Id.*

⁵⁵ *Id.* at 970–71.

crime in several East Asian and Middle Eastern countries, but in the United States there is less legal consensus. Laws against adultery vary significantly across states. For example, in states where adultery remains on the statute book, consequences range from a felony charge in Michigan⁵⁶ to a ten-dollar fine in Maryland⁵⁷. In all states, though, adultery is rarely prosecuted and unlikely to lead to any consequences for the offender; Supreme Court rulings have consistently favored the right to privacy of sexual intimacy among consenting adults⁵⁸ over outlawing extramarital relations. A notable exception is in the military, a group that presumably places a high premium on loyalty: adultery is a potential court-marshal offence.⁵⁹ Of course, some laws do focus on loyalty – laws against treason⁶⁰, for instance. However, in a country where we can freely burn the national flag under the protection of free speech⁶¹, laws concerning loyalty are relatively scarce. It appears that loyalty to our country, to our spouses, or to each other may take a backseat to making sure that all is fair and just in the world.

Future research into the psychology of fairness and loyalty may lead to a better understanding of the different situations in which people favor one value over the other. Preferences may differ both across individuals and across contexts. Loyalty may have served an important evolutionary purpose within groups, strengthening group bonds, and maintaining group boundaries. Yet, as illustrated by cases of violence against whistleblowers, people's emphasis on loyalty over fairness can result in lasting and dramatic damage. By contrast, fairness may have functioned to foster good relations and exchange within and between groups. Therefore, people may value fairness more in distant others and loyalty more in close social

⁵⁶ Michigan Penal Code, 328 M.P.C. Ch. V, Section 750.29-750.32

⁵⁷ Maryland Code, Title 10, Subtitle 5, § 10-501.

⁵⁸ Lawrence v. Texas, 549 U.S. 558 (2003).

⁵⁹ Uniform Code of Military Justice, 134 U.C.M.J. Section 5, Part IV, pg. 62c.

⁶⁰ United States Code, 18 U.S.C. Part I, Ch. 115, § 2381.

⁶¹ *Texas v. Johnson*, 491 U.S. 397 (1989).

partners. The law must determine how to treat people who make different choices, across different contexts, when loyalty and fairness collide.

III. FLEXIBLE MORALITY ENABLES MORAL HYPOCRISY

Laws vary nation-to-nation and state-to-state. Even among individuals are different opinions about which laws are serious and which are “optional” – speed limits, jaywalking, shoplifting, underage drinking and marijuana use, for instance. Furthermore, laws change over time. At one time, only free people counted for enumeration purposes, while everyone else counted as three-fifths of a person⁶². Sodomy laws outlawed homosexual activity in many states until 2003 with the Supreme Court decision in *Lawrence vs. Texas*⁶³. These examples suggest that the law is subject to change.

Morals, on the other hand, are supposed to be less flexible. People write laws, while morals are often said, by spiritual leaders and scientists alike, to be written on our hearts, or hard-wired into our brains. Laws are inventions and perhaps to some degree expressions of our intuitive morality. Many people believe that morals represent deeper objective truths,⁶⁴ intuitive internal guidelines for behavior, which can be appreciated universally and remain more or less constant overtime.⁶⁵ People often view morals as strict codes of conduct, unyielding standards to which we hold the people and world around us, past, present, and future. We exalt “moral exemplars” of our historical past – Mohandas Gandhi, Mother Teresa – and denounce the moral demons. As such, moral standards are particularly useful in helping us to identify moral role models, across time and space, or, simply, acceptable social partners – people we trust and

⁶² U. S. Constitution, Art. I, § 2, cl. 3.

⁶³ *Lawrence v. Texas*, 549 U.S. 558 (2003).

⁶⁴ See generally Geoffrey P. Goodwin & John M. Darley, *The Psychology of Meta-Ethics: Exploring Objectivism*, 106 *COGNITION* 1339, 1339–66 (2008) (Experiments conducted to assess the perceived objectivity of ethical beliefs).

⁶⁵ See generally ELLIOT TURIEL, *THE DEVELOPMENT OF SOCIAL KNOWLEDGE: MORALITY AND CONVENTION*, (Cambridge Univ. Press 1983).

admire and love.

A key question is whether our morals are in fact as solidly steadfast as we would like to think. Imagine you are playing poker at a casino. It is a particularly high stakes round with a lot on the line. Imagine that the person who wins the money cheated. Most likely, you would feel infuriated, condemn the cheater, and reject the possibility of future friendship, or even a future poker game. Now imagine that you were the one who cheated. Perhaps, there were student loans to pay off, sick children's medical expenses to cover, gambling debts to pay off. Would you judge yourself according to the same standards? Would you see yourself as equivalently immoral? Perhaps, instead of offering firm rules to live by, our morals function as tool to use for our own benefit, to evaluate potential social partners in some cases, or in others, to see ourselves in a more positive moral light.

Evidence suggests that our morals are not unchanging at all.⁶⁶ To demonstrate this, a series of experiments used a paradigm involving two tasks – one dull and tedious, the other enjoyable and profitable – including the chance to win thirty dollars.⁶⁷ Subjects were instructed to assign themselves one task and a stranger the other. This stranger would never know how they were assigned the task. Ninety-nine percent of subjects agreed that assigning the other subject the enjoyable task represented the morally superior action. Would subjects assign themselves the enjoyable task anyway, provided they had a way to appear moral to the outside world (in this case, the experimenter) and perhaps to themselves as well? Subjects decided how to divide the tasks in private by flipping a coin and then reported the outcome to the experimenter. When they did this, only ten percent of people (significantly below chance)

⁶⁶ C. Daniel Batson, et al., *Moral Hypocrisy: Appearing Moral to Oneself Without Being So*, 77 J. PERSONALITY & SOC. PSYCHOL. 525, 525–537 (1999).

⁶⁷ *Id.* at 525.

assigned themselves the dull task.⁶⁸ Most subjects were therefore being moral hypocrites – acting in a way they initially judged to be less moral, in order to secure a favorable result for themselves, while protecting their image with the alleged coin flip. Extensions of this basic task shed further light on the psychology behind moral hypocrisy. One hypothesis is that moral people act immorally by avoiding comparison to their own moral standards. Researchers tested this hypothesis in two ways. First, subjects were instructed to assign the tasks (boring, fun) with a coin flip just as before; this time, however, they did so in front of a mirror, to induce self-awareness. Second, moral standards were made highly salient; before assigning tasks, subjects read a statement explaining that most people believe assigning the other participant the enjoyable task is the morally superior decision. When subjects read this statement in addition to looking in the mirror, over ninety percent of subjects assigned the other subject the enjoyable task. This research demonstrates that under some conditions, but not others, people are able to flexibly apply their morals in order to avoid feeling bad about their behavior⁶⁹.

This may have rather ominous implications beyond the laboratory. We are often self-aware, but moral standards are not as often highly salient. When self-aware subjects were not prompted with a statement about the morally correct action to take, one hundred percent gave themselves the positive task⁷⁰. Even more surprising, more than half of the subjects subsequently reported either that this was the most moral thing to do or that there was no moral way to assign the tasks, so their decision was trivial.⁷¹ In sum, instead of recalling their moral standards, people fashioned new standards to justify their own immoral behavior.

These studies suggest that our morals do not function consistently as principles of right

⁶⁸ *Id.*

⁶⁹ see generally, *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

and wrong; instead, we may apply our morals flexibly in order to view ourselves as good moral agents. Flexible morality is particularly evident when people compare themselves to others.⁷² In one study, subjects who needlessly wasted time on a tedious task rated themselves as more moral than an unknown experimental confederate who, after one minute, asked if he could discontinue “such a useless task” and was allowed to do so.⁷³ Importantly, subjects who completed the task alone or simply observed the confederate quitting did not rate themselves as more moral.⁷⁴ This phenomenon may result primarily from threats to subjects’ self-image. In another study, subjects outcast not only selfish members of their group but also altruistic members, those sacrificed all of their goods in a cooperative game and, as a result, made the subjects “look bad” by comparison.⁷⁵ Furthermore, this finding persisted for other tasks that were more explicitly moral in nature⁷⁶. Subjects were asked to complete a task that required making classifications based on race-based stereotypes⁷⁷. As before, when a confederate refused to complete the task (this time on the grounds of the racist nature of the task) subjects who had already completed the task judged the objecting confederate (i.e. the moral rebel) as less moral, while subjects who had not yet completed the task or simply observed the events did not.⁷⁸

Some may find these findings unsettling; however, not all is lost for our intuitive morals. Even though subjects judge their own moral transgressions more leniently than the transgressions

⁷² Alexander H. Jordan & Benoit Monin, *From Sucker to Saint: Moralization in Response to Self-treat*, 19 PSYCHOL. SCI. 809, 809–15 (2008).

⁷³ *Id.* at 809.

⁷⁴ *Id.*

⁷⁵ Craig D. Parks & Asako B. Stone, *The Desire to Expel Unselfish Members from the Group*, 99 J. PERSONALITY & SOC. PSYCHOL. 303, 303–10 (2010).

⁷⁶ Benoit Monin & Pamela J. Sawyer, *The Rejection of Moral Rebels: Resenting Those Who Do the Right Thing*, 95 J. PERSONALITY AND SOC. PSYCHOL. 76, 76–93 (2008).

⁷⁷ *Id.* at 79.

⁷⁸ *Id.* at 81.

of others,⁷⁹ this asymmetry is eliminated if subjects' cognitive resources are absorbed by another task (e.g., remembering strings of digits).⁸⁰ This suggests that moral hypocrisy depends on people's effortful justifications of their immoral own behavior. However, at an intuitive level, people disapprove of any immoral behavior, their own or others'.

The law is often subject to change given that it ought to function flexibly to protect the people. Law-makers can therefore rewrite laws to better serve us. Psychology tells us that perhaps morality is not much different. Often we become our own law-makers, re-writing our own morals to better serve ourselves. In particular, moral standards serve, on the one hand, to identify moral people as social partners, and, on the other hand, us to see ourselves as moral people, especially in social contexts. Such a moral self-bias may be adaptive at times, but may also lead to dangerous consequences and a very shifty sort of morality.

IV. CONCLUSION

In this review, we have presented three lines of research aimed at addressing tensions that emerge in our complex moral codes. The tensions that arise between how we respond to crimes with and without victims, how we value and act on fairness versus loyalty, and how we apply morals to ourselves versus to others – represent only a small subset of the ways in which morality is relevant to the law. Moral psychology will continue to contribute to our understanding of how people judge right from wrong and behave in accordance with these judgments, or not. Moral psychology will thus inform our understanding of the ordinary intuitions behind our complex legal system.

⁷⁹ Piercarlo Valdesolo & David DeSteno, *Moral Hypocrisy: Social Groups and the Flexibility of Virtue*, 18 PSYCHOL. SCI. 689, 690 (2007).

⁸⁰ Piercarlo Valdesolo & David A. DeSteno, *The Duality of Virtue: Deconstructing the Moral Hypocrite*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1334, 1334–38 (2008).

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