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On *Minimal Morality*

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For many years, Michael Moehler has been one of the most original and thoughtful political and moral philosophers around. He is perhaps the most straight-forward and full-throated defender of what Gerald Gaus (2011) has called “orthodox instrumentalism.” From this, Moehler develops two interesting results: a Kantian flavored theory of justice and a novel, multi-level contractarian theory of social morality. In these short comments, I will discuss what I take to be the core of Moehler’s theory and then raise some questions and challenges to that theory.

1. The Project

The motivating force of Moehler’s project is the specter of “moral pluralism.” This leads him to declare, on the first page, that “in modern pluralistic societies, especially under the assumption of deep moral pluralism, the ideal of a fully just society as judged from the perspectives of all members of society is unattainable” (2018, 1). This sentence illuminates Moehler’s entire project. In it, Moehler mentions “deep moral pluralism,” the “idea of a fully just society,” and the “perspectives of all members of society.” He notes that current attempts to find a justification for an ideal of a fully just society do not and cannot assume *deep* moral pluralism of the sort that he will confront. This makes it impossible for them to provide justification from the perspective of *all* members of society. In effect, Moehler is claiming that the constructivist, contractual project justifying social morality—as it currently stands—is a failure.

The diagnosis of the problem of these theories is their inability to remain stable in the face of *deep* pluralism. This is a theoretical flaw, but it may also be a practical

one depending on how closely any society approaches the level of pluralism that concerns Moehler. We can think of the problem as a tension between two desiderata of contractualist theories of justice.¹ These are what I call *existence* and *stability*. In other work (Thrasher Forthcoming), I have argued that this problem—what I call, the *paradox of diversity*—is a general one for contractualist theories. This paradox results from a tension between the existence conditions of finding a possible (perhaps unique) contractual agreement and the ability of that agreement to remain stable in the face of diversity. What makes the problem paradoxical is that the tools used to secure agreement by reducing diversity in the contractual model makes the agreement unstable in the face of further diversity or deeper pluralism. Although Moehler does not describe the problem in exactly this way, he sees the flaw of existing contractualist theories as their inability to deal with this fundamental tension.

Many see this tension as making contractualism about justice “self-defeating” in some way (Wall 2002; Bajaj 2017; Wendt 2018). In response, the solution is to give up on constructivism and contractualism about morality or justice and to embrace some form of intuitionism (Enoch 2013), comprehensive theory (e.g., egalitarianism, libertarianism, or whatever), or perfectionism (Raz 1986; Wall 1998).² This strategy (in its various forms) doesn’t deny the substantial moral diversity in modern societies, but argues that this diversity is only an apparent one or the result of some error in reasoning. There may be one or many different true values or moral truths, but whatever these are, they should be the fundamental basis of our social morality and system of justice.³ There is no alternative, on this view to deciding between different and conflicting comprehensive views.

Without rejecting contractualism, there are two basic strategies for dealing with the *paradox if diversity*. One is to weaken the existence conditions, perhaps by giving

¹ I use “contractualist” throughout to refer to the constructivist, contractual theories of justice that Moehler is concerned with including those of Rawls, Harsanyi, Southwood, and Gaus. Moehler uses “contractarian.” Nothing hangs on this distinction for the purposes of my argument.

² I use “constructivism” here broadly to basically mean that the justification for morality or justice is an internal one to the agreement procedure, i.e., no external standards are used to directly generate the justification of the norms in question. For elaboration, see (Thrasher 2019).

³ It is important to note that Moehler is careful to restrict his theory to morality rather than politics. This division, however, is not particularly sharp either conceptually or practically. Justice, for instance, may be the “first virtue of social institutions” and, hence, political, but it is also a more general moral standard.

up on uniqueness (Thrasher 2014), or by going further and giving up on any determinant contractual agreement at all (e.g., Muldoon 2017). Another route is to weaken the importance of stability by arguing, as Jon Quong (2011) does, that the scope of the contractual agreement should only apply to “reasonable” people or, even more narrowly, liberals. This is what Quong calls the “internal” justification of liberalism.

Moehler rejects both of these strategies and instead argues that it is possible to solve the existence problem with a unique contractualist theory of justice that is also stable in the face of deep moral pluralism. His solution relies on several key innovations, which I will describe briefly.

The core conceptual move is to distinguish between *traditional* and *pure instrumental* morality. Traditional moral theories are justified on the basis of moral premises. This means, however, that unless there is agreement on those moral premises, there will not generally be agreement on the moral conclusions. Traditional morality, as Moehler (2018, 7) points out, is logically conservative, “no morals in, no morals out.” In societies characterized by deep pluralism, however, it is guaranteed that there will be no agreement on basic moral premises and, hence, no stable fundamentally moral agreement. The entirety of Part I of *Minimal Morality*, is dedicated to showing the problems with traditional morality in its contractualist guise. But, as Moehler argues, just because *traditional* moral theory reaches its limits under conditions of deep moral pluralism, it doesn’t follow that moral theory as such has reached its limit. We may find other rabbits in other hats.

The trick is to go back to Hobbes and resuscitate a purely instrumental justification of a social morality. As Moehler shows (correctly to my mind) in Part I, the presumed avatar of instrumentalist morality, David Gauthier, is nothing of the sort. His contractualism relies on a move away from purely instrumental reasoning and, explicitly in its current version (Gauthier 2013a; 2013b), introduces a thin but, nevertheless moral, premises of “rational and reasonable cooperation” (Moehler 2018, 60). This leads him to adopt a revisionist theory of practical rationality and to move away from orthodox instrumental rationality.

In response to this failure, Moehler introduces his notion of “pure instrumental morality” in Part II. His aim is to avoid the revisionary instrumentalism of Gauthier. This creates a bit of a problem, though. Moehler has already spent 92 pages showing how Hobbesian theories (both orthodox and revisionist) go wrong, as well as the flaws of traditional bargaining approaches. The danger is that in so doing, he

may have also undermined his own case that an instrumental account of morality is possible.

He solves this not by revising the theory of instrumentalist rationality, as Gauthier does, but by introducing a new model of the rational chooser. As I have argued elsewhere (2019), we can think of the general form of contractualist theories as being:

General Model of Contractualism N chooses R in M and this gives N^* reason to endorse and comply with R in the real world insofar as the reasons N has for choosing R in M can be shared by N^*

The traditional “instrumentalist” contractualism models the contractual choosers (N) as *Homo Economicus*. Moehler argues, instead, that these reasoners should be modeled as, what he calls, *Homo Prudens*. These reasoners are forward looking instrumentalists who value their lives and well-being above other values and, for this reason, are primarily interested in securing the benefits of long-term social and economic cooperation. Importantly, although security is their highest value, they do not value it so much that they are unwilling to trade it off with welfare gains in other areas (Moehler 2018, 101). These agents are also unable to “follow rules” in the strong sense that they can make binding commitments (Moehler 2018, 103). Moehler argues that instrumental rationality, in this sense, is the “default theory” and can be assumed as the baseline of any rational agent.

This change in modeling of N , also requires a change in the model of agreement (M) and move from traditional contractualist deliberative models (e.g., aggregation or bargaining) to what Moehler (2018, 107) calls “empathetic contractor theory.” The motivation is that, given deep pluralism, the contractual agents may not be able to know or predict well the aims and behavior of their counterparts. The solution is that agents in the contractual model can empathize with each other as instrumentally rational agents even if they cannot empathize with each other as full-blooded persons. The main modeling assumptions are made in the context of two-person, non-cooperative game theory.⁴ The agents are not veiled as they are in the

⁴ For interesting reasons worth discussing in their own right, but that I will pass over here, Moehler does not think that formal techniques are particularly helpful as models of morality. This is an interesting claim for several reasons and could form the basis of an entire discussion of Moehler’s approach, but there is so much interesting in the substance of Moehler’s proposals that I will leave discussions of methodology for another time.

Rawlsian theory; they know who they are and what they want. They are, however, veiled by the uncertainty of their future conflicts. This is not a general “veil of uncertainty” of the type that we find in the work of Geoffrey Brennan and James Buchanan (1985), however, since the contractors are only uncertain about their future conflicts. We will return to this difference later.

Given these assumptions, the contractors are then assumed to have two goals. The first is to maximize their expected utility given peaceful cooperation. The second is that agents will only agree to principles of conflict resolution that allow them to meet a “minimal standard of living.” This second condition states that all contractors are assumed to have a background of basic rights that serve as a baseline to any agreement. So, given these two conditions, agents will seek the best possible cooperative settlement within the constraint of their basic rights (whatever those may be).⁵ The settlement or contract must also be one that *all* rational agents (in the sense Moehler has specified) can agree to and that covers *all* cases of conflict (in the sense that Moehler has specified). This is a tall order.

The principle that Moehler (2018, 124–25) argues that rational agents would agree to is what he calls the *weak principle of universalization* as a “rational coordinative device.” This is basically a Kantian principle of universalization that is constrained by the minimal rights baseline and the assumptions that gains are relative to bargaining power. This result is, according to Moehler, the unique solution to the peace game. Part of the justification for this conclusion relies on Moehler’s arguments in favor of the (stabilized) Nash bargaining solution more generally. Something I will return to below. This solution to the problem of conflict also has the advantage, according to Moehler, of indirectly embodying many moral properties (autonomy, reciprocity, etc.) without assuming them at the outset. If he has succeeded, then, Moehler has shown that, under the rights circumstances, a lowly Hobbesian caterpillar can become a magnificent Kantian butterfly. An impressive achievement.

There is much more to say about the details of Moehler’s project, but I will now turn my attention to critically evaluating Moehler’s core story about how this deliberative chrysalis is formed and question whether it will produce what Moehler has argued it will.

⁵ See (Moehler 2018, 116–18) for a discussion of the complexities that will play into determining the exact nature of the basic minimum here.

2. Critical Evaluation

A. *Traditional and Instrumental Morality*

Moehler's entire approach relies on a distinction between what he calls "traditional" and "instrumental" morality. The idea, as I have described it above, is simple enough. Traditional moralities are close to what Rawls would call "comprehensive doctrines" or at least judgments about values and the good. Instrumental morality is restricted to one narrow conception of practical rationality, but the more important aspect of it is that it is meant to be a shared morality based on a shared ability for instrumental rationality.

This distinction raises interesting questions about the relationship between these two types of morality. In what sense are they both "moralities" at all. One of the most innovative and pregnant aspects of the theory in *Minimal Morality* is what we might call its account of the non-uniformity of the moral domain. He describes this as the distinctive "multi-level" aspect of his theory, but perhaps "levels" in this sense is misleading. What Moehler is really saying is that morality is not unified into one set of principles and norms or that many underlying moral systems can be unified through some set of hierarchical meta-principles or meta-norms. Instead, the realm of instrumental morality where his contract theory has its purchase is a fundamentally different thing than the "traditional" moralities where we normally live. He is, in this sense, not giving us account of *the* true morality, but of a true morality. One that can step in and solve a problem that other moral theories cannot. This aspect of Moehler's theory is one of the most important contributions of this book and even those who are critical of other aspects of the work should take this seriously.

Nevertheless, disunifying the moral domain has some theoretical risks. For instance, Moehler (2018, 133–39) is keen to show that his *weak principle of universalization* embodies important moral properties like equality, autonomy, and reciprocity. This is a principle in the instrumental domain of morality. Moehler means to show that this is not only an instrumental principle of peace and security (something like Hobbes's "laws of nature"), but a genuinely *moral* principles in its own right. In other work, Gerald Gaus and I (2015, 41) have argued that the contractual theories of Rawls and Gauthier both have what we call an *identification* and *recognition* test as success conditions. The identification test shows that some agreement on moral principles or rules is possible (and stable), while the recognition test shows that these principles or rules are genuinely moral rules or principles. Put slightly differently, passing the recognition test shows that the rules or principles agree upon in the contract have the distinctive normativity of morality rather than of, e.g., rationality or prudence. The identification test links the output

of the contract to rationality, while the recognition test links the output of the contract to a recognizable moral point of view.⁶

Very often, objections of this sort to contractualism are merely exercises in moral question begging, but the distinction between instrumental and traditional moralities poses distinct problems. Although traditional and instrumental morality are presented as hierarchically distinct, there is no doubt that the norms of one will often conflict with the norms of the other. Cases of conflicting moral codes, for instance, raise the specter of fundamental moral disagreement that may call into question a shared normative category of morality (Doris and Plakias 2008). In any case, delimiting the types of norms that count as distinctively moral as opposed to, for instance, honor norms, is harder to do than many have assumed (Thrasher and Handfield 2018; Thrasher 2018). This problem is amplified by the very different properties of traditional and instrumental morality.

The concern is that the distinctiveness of instrumental morality may make its principles difficult to recognize from the moral point of view. And, insofar as they are, why shouldn't we think that instrumental morality is a distinctive level of morality rather than a different (and perhaps better) type of traditional morality.

The response is, I think, that traditional and instrumental morality do not *conflict* in the traditional sense. Instead, they answer practical normative question in different, but related domains. The scope of instrumental morality is sufficiently limited to a particular normative domain—cases of conflict—and that this restriction of scope should eliminate any possibility of conflict between the two types of morality. Imagine the set of traditional moral norms or principles (T) and the set of instrumental moral norms and principles (I) as both being subsets of the overall set of norms or principles (S) in a society. For the two sets to not conflict it must be true that $T \cap I = \emptyset$ or that the norms of traditional and instrumental morality are disjoint. This assumption is, in principle, plausible but it raises questions about the possibility empathetic contracting.

The problem is about the relationship between the two sets of norms. For instance, is it possible or even necessary to translate between the two sets of norms? Put differently, are moral questions within T what Carnap (1950) called *internal* questions? If so, each traditional morality will act like a Carnapian linguistic framework, with meaningful internal questions and meaningless external questions.

⁶ Nic Southwood (2010, 12–13) calls something similar to the recognition test, the “moral accuracy condition.”

To ask questions about the relationship between two disjoint sets of norms, however, internal questions will not be enough. There will need to be a way to translate from one to the other.

To put a fine point on this, consider the question semantically with regards to basic moral normative terms like “right” or “good.” These will have meaning within a set of norms or principles, but will not generalize if the sets of norms or principles are disjoint. We will have to move from the formal to the material mode of discourse to make sense of how the norms relate to one another, which is to say we will need to talk about the norms of traditional morality or instrumental morality, while not talking *within* them. This is what Quine calls, in the more general context, *semantic ascent* (2013, 250).

Moehler’s description of instrumental morality sounds like a form of *instrumental ascent*. Within our traditional moralities we have internal questions that cannot be answered between different moralities and to solve these problems, we ascend to a shared, higher moral ground as *homo prudens*. If this is what is going on, however, there are several potential problems for Moehler’s theory.

The first is that traditional and instrumental morality as Moehler conceives of them are not sets of moral norms or principles that range over different scopes, as I described above, instead they are two totally different domains. One is morality and the other is something else. The *types* of norms, not their substance is different. This undermines Moehler’s solution to the recognitional problem, though. Instrumental morality is not a morality at all, it is some other set of norms or principles that has some interesting indirect moral features, namely generating peace.

The second problem is more serious. Why should we restrict instrumental ascent to cases of conflict? To paraphrase Quine (2013, 254), *homo prudens* is not in “cosmic exile” from the moral conceptual schemes of his or her traditional moral counterparts.⁷ Which is just to say that this method of ascent is open to those in the context of traditional morality as well. This point pushes against the attempt to segregate or firewall off the arguments in favor of instrumental morality from the realm of traditional morality. Moehler (2018, 141) argues that the weak principles

⁷ It is possible that one can argue that we are in “cosmic exile” from one another’s moral conceptual schemes. One way to understand the radical diversity that Muldoon (2017) discusses, in terms of “perspectives,” and that Gaus (2016) analyses is in terms of something like radical translation of the Quinean variety.

of universalization “does not interfere” with traditional morality. Why not? If $A = \{a_1, a_2, \dots, a_n\}$ is a set of members of society that share some traditional morality and $B = \{b_1, b_2, \dots, b_n\}$ is a disjoint set of individuals in society who share some other, distinct morality, if any a_n can employ instrumental ascent with any b_n , why can't a_1 and a_2 do exactly the same thing, insofar as they disagree? That is, why isn't instrumental morality in the form of the *weak principle of universalization* a universal moral theory available to all members of society at any time insofar as they disagree?

The final point along these lines concerns how we are supposed to make sense of a common baseline of rights and goods given that there is fundamental moral disagreement in the background. This creates a dilemma for Moehler. Either the minimal bargaining baseline is individuated according to the moral categories of traditional morality, in which case the baselines won't be shared and cannot do their job, or they are made within the context of instrumental morality, in which case they can only range over cases of conflict. The first horn is a fundamental problem for the project, but the second is not very attractive either. Most of the basic rights and goods that we are concerned with are not defined in cases of conflict. The meaning of rights to self-ownership or autonomy, for instance, will not be easily translated into instrumental morality. This means that either Moehler will need to embrace the universal empire of instrumental morality or find some neutral and unique way of partition the space of rights and goods without relying on traditional or instrumental morality.

B. Modeling the Possibility of Agreement

Leaving aside the questions raised above, there are several important questions to ask also about the deliberative or contractual model itself. First, why are cases of conflict modeled as pure coordination problems (2018, 121)? Pure coordination problems, like the one represented below in Table 1, have the interesting property that both parties are indifferent to the solution to the coordination problem.

	Cricket	Beach
Cricket	1,1	0,0
Beach	0,0	1,1

Table 1—Pure Coordination Game

This is in contrast to an impure coordination or “mixed-motive” coordination problem where the parties are not indifferent between the alternative solutions. A version of this type of problem is represented in Table 2 below.

	Cricket	Beach
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Cricket	1,3	0,0
Beach	0,0	3,1

Table 2—Mixed-Motive Coordination Problem

In this game, row would much rather have the coordination solution be going to the beach rather than going to the cricket and column thinks the opposite. In this situation, there is a kind of conflict between the two parties over whose better option should win out.

If the agreement situation really is meant to be a case of pure coordination, the problem is indeterminacy. Since either solution is acceptable and both parties are indifferent, there is no particular reason to choose either. This undermines the claim that there is a unique solution to the conflict case—any solution will do. This undermines the uniqueness of the case for the weak principle of universalization, however.

If, however, conflict is modeled as impure coordination, the problem is even more serious. The solution will need to be asymmetrical, but this will privilege some over others in the resolution of conflict. This raises the question, however, of why the scope of the contractual agreement should be over *all* conflicts instead of just particular conflicts. One can see why, in some cases, asymmetrical solutions could make sense as coordination points. It is harder to see how such asymmetries could be justified as a general solution. Indeed, it is hard to see how it could be universalized at all.

One solution would be to claim that it is not a particular asymmetry that is universalized, but rather the principle which allows for differential benefits based on bargaining power. This solution, however, raises several additional problems. First, what is bargaining power in this context? Remember the contractors have a protected baseline of rights and, as far as I can tell from the text, this baseline is shared between contractors. Leaving aside the theoretical problems with defining such a baseline that I mentioned above, how can the parties have differential bargaining power if they all have the same or similar disagreement points? Moehler argues that the fact that the parties have these shared disagreement points and, hence, cannot exploit their bargaining power, is the key feature of the stabilized Nash bargaining solution.

Second, insofar as there are minor differences in bargaining power given the shared or similar disagreement points, the question arises again as to why one should think that any inequality in bargaining power in a given case of conflict should generalize to all cases of conflict. If it doesn't generalize or there are no decisive reasons for

thinking that it would, then by the *homo prudens* model of practical rationality, we shouldn't expect any agreement to be stable. This is the old *paradox of diversity* rearing its head again. A diversity of bargaining powers over cases should lead to a diverse set of results and any agreement that didn't take that point into account would be vulnerable to instability. Remember, *homo prudens* can't make genuine commitments. They are trapped in a world of modular reasoning where they should make a better deal if their bargaining power improves or accept a worse one if it decreases. This fact is in tension, however, with the claim that the weak principle of universalization is both unique and general.

3. Conclusion

I have raised a number of theoretical and practical questions and concerns I have with Moehler's project as it is developed in *Minimal Morality*. To summarize, there is too much morality and the discussion of application is too minimal. That said, this is a tremendous book. It covers considerable ground and takes on the hardest and, to my mind, the most important questions of moral and political thought. If my concerns make it seem like I think Moehler has been unsuccessful in answering these questions, this would only put him same company as all who have come before him.

But, ultimately, I do not think Moehler has been unsuccessful. He has done several things here that are important despite any substantive disagreements I may have with the theory. First, he has highlighted the problem of deep pluralism in the context of rational choice contractualism more than anyone else. Second, his critical analysis of Gauthier, Rawls, and Harsanyi in Part I (which I have largely ignored in these critical comments) are worth the price of admission on their own. Moehler is one of the very best readers of these three thinkers, especially of Harsanyi with whom he shares much. Third, and most importantly, Moehler's innovation of multi-level contractualism is a very important development that, I suspect, will be the real, enduring legacy of this work.

In the end, Moehler has argued that we can go from Hobbes to Kant back to Hobbes again and he has helped us to rethink the key moral and political questions along the way. I think that he is right that there is more in common between what Jean Hampton (1991) called the "two faces" of contractualism. It is no surprise, I suppose, that a work dedicated to showing how rational people who disagree deeply about morality can, nevertheless, find common ground should also show us that two of the great moral and political thinkers shared more common ground than is typically assumed.

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