

Doing Things the Hurd Way: A Map for All Reasons?

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In a recent issue of *Law and Philosophy* Heidi Hurd wrote a paper¹ which she described as ‘an exercise in moral cartography’.² Her goal was to map ‘the morally plausible answers that can be given to the classic question in political philosophy: Why should the state accord persons freedom to pursue their own possibly bad conceptions of what is good?’³ In short, her self-defined task was ‘the search for political liberty’,⁴ where the object of that quest can be understood — more or less — as ‘being left alone by the state’.⁵

The question to which I seek an exhaustive taxonomy of answers can be put in several ways: Under what circumstances do citizens have a moral right of non-interference against the state? Are there principled limits to the state’s ability to coerce right action? What is the scope of the citizen’s legal rights to do moral wrongs? When and why must state actors tolerate conceptions of the good that conflict with their own?⁶

Notice, therefore, that Hurd wants to give the reader *all* possible routes to a justification of political liberty. To be judged a success, says Hurd, ‘the paper must ... chart every province within which readers might plausibly locate liberty’.⁷ Accordingly, every single reader must be able to ‘locate [his or her] approximate positions on the map’⁸ (or have it located

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¹ Heidi Hurd, ‘Liberty in Law’ (2002) 21 *Law and Philosophy* 385 (hereinafter ‘Hurd’).

² Ibid 386.

³ Ibid.

⁴ Ibid 445.

⁵ Ibid 447.

⁶ Ibid 387.

⁷ Ibid 386.

⁸ Ibid.

for him or her), otherwise Hurd's map will be deficient and her self-appointed task unfulfilled.

Two years later, in an even more recent paper published in this journal, Hurd revisited Part II of her original paper.⁹ This time she confined herself to that narrower Part II task of attempting to derive liberty from moral and institutional gaps, of showing when there may be

instances in which morality itself does not speak to citizens' conduct, and hence, ... instances in which liberty is the necessary compliment not of tolerance but of the inability on the part of lawmakers to pass moral judgment.¹⁰

Hurd tells us this second, more narrowly targeted paper, is a 'quite modified excerpt'¹¹ of the original.

Though a few references will need to be made to that second paper, the focus of this reply will be on Hurd's wider, original paper, her attempt to map *all* possible routes to a justification of political liberty. That is because the simple point of this reply is to argue that Hurd's map is deficient. It is incomplete and hence defective. Hers is like a map pointing the way to the East Indies which makes no place for the New World. It is as defective, in its way, as the one relied on by Columbus, or so I shall argue.

I will do so on the following principal ground. Unwarrantedly, Hurd's map completely ignores the Humean moral sceptic. Indeed, in her 80 page original paper, and also in her later paper, Hurd makes not one single reference to David Hume, and this despite professing to seek 'descriptively to exhaust the possible means by which moral and political theorists might characterize their views of political liberty — to chart the locations of liberty within the contours of plausible moralities.'¹² Reference is made to Kant, to be sure, and to a host of other moral and political philosophers. But there is not a word about Hume; he is omitted despite all the repeated professions of the catholic nature of the map she means to draw. At the very least, by leaving off her map the moral tradition that traces itself back to one of the greatest philosophers (on any reckoning) ever to have lived, *prima facie* suspicions are warranted. Presumably, one does not deliberately force the readers of one's map to see it through a glass, darkly.

It is possible, of course, that Hurd might try to reply to this charge of Humean omission in two ways. She might, on the one hand, note that she

⁹ Heidi Hurd, 'When Can We Do What We Want?' (2004) 29 *Australian Journal of Legal Philosophy* 37 (hereinafter 'Hurd 2').

¹⁰ *Ibid* 37.

¹¹ *Ibid*.

¹² Hurd, above n 1, 386.

devotes an entire Part of her original paper — one of only five Parts in total — to the possibility of deriving liberty from moral relativism.¹³ Alas, this answer will not do, as I shall argue at length below. For now, suffice it to note that Hurd's *Law and Philosophy* Part I on moral relativism comprises nothing more than two brief paragraphs — eight sentences in total — in an 80 page paper. Certainly as an elucidation of moral scepticism it is so exiguous (and I will argue misleading) that some might be tempted to see it as a caricature or straw man.

On the other hand, Hurd might try to reply in a different way. She might argue that Humean moral theory does not count as a moral theory at all, or at least it cannot provide the resources to generate a moral justification for political liberty. As will become evident, I think that this would be a difficult reply for Hurd to sustain, though there are hints of it being mooted very early in her original paper.¹⁴ It is doubly difficult, of course, when the author's stated aim is to be as catholic as possible and give the reader 'every province within which [one] might plausibly locate liberty'.¹⁵ To rule out a Humean defence of political liberty, of the advantages of citizens being left alone by the state, and to do so by definitional fiat, hardly seems a promising way to go about the task of comprehensively map-drawing why 'state actors must [or, perhaps more aptly, should] tolerate conceptions of the good that conflict with their own.'¹⁶

That, then, is the main ground I have for alleging the deficiency of Hurd's map. I shall add flesh to the bones of that just sketched complaint in a moment. Before proceeding to do so, though, it is worth remarking that there are in my view other defects and inadequacies in the Hurd map.

At one or two places in Hurd's original 80 page paper the 'ought' and the 'is' are concatenated or blended together in a way that seems to me to make her argument more attractive than it might otherwise appear. In addition, it is unclear whether Hurd means to limit her map to state tolerance in terms of simply the criminal law, or also to encompass all other forms of potential state regulation of citizens' conduct. Furthermore, there is the question of why Hurd has no place on her map for determinists. Is it because (as with the possible ground given by me above for omitting Hume) Hurd thinks determinists have no resources to generate a *moral* justification for liberty? Or is it because she thinks determinists simply

¹³ Ibid Pt I.

¹⁴ See *ibid* 388. But see, too, 387 where Hurd proclaims: 'Let me be clear that in presuming that laws must be capable of being justified morally, *I do not have in mind any singular, narrow conception of morality*' (emphasis added).

¹⁵ *Ibid* 386 (emphasis added).

¹⁶ *Ibid* 387.

would not care about liberty? Or maybe, as a self-declared deontologist,¹⁷ determinism is simply too distasteful for her? And lastly, the relative strength (as it appears in Hurd's map) of deontological moral theories vis-à-vis consequentialism can be reversed — or at least enervated — though to do so requires the backing of the sort of Humean moral scepticism Hurd so whole-heartedly eschews.

All these ancillary matters will be discussed at least tangentially in the course of the discussion below.

I. Why moral scepticism should not have been omitted

To the extent Hurd directly considers the tradition and outlook of Humean moral scepticism at all, it is, as I noted above, in the eight sentences that comprise Part I of her 80 page *Law and Philosophy* paper. There she tells the reader that:

It is an infamous freshman mistake to argue that (1) all moral truth is relative to a person's individual beliefs, and hence, that (2) each person's beliefs are deserving of equal respect. For, of course, not only is the meta-ethical claim in (1) probably false, but the normative claim in (2) does not follow from (1). If each person's beliefs are equally true (for him), then it must be moral for the person who thinks that tolerance is *immoral* to coerce the actions of others with whom he disagrees. Neither metaethical subjectivism nor metaethical conventionalism has the resources by which to generate a principle of tolerance that makes it right for otherwise intolerant state actors to respect the choices of citizens with which they disagree. On the contrary, were state actors looking for a license to be intolerant, they could do no better than to argue that truth is relative to their own beliefs (or those of their carefully specified community), and that such beliefs do not include the value of tolerance.¹⁸

That is the extent of the case Hurd makes for deciding only to include on her map 'moral theories that do *not* locate moral truths in people's beliefs about them'.¹⁹

In her revisited *Australian Journal of Legal Philosophy* paper, Hurd modifies that passage ever so slightly. She changes premise (1) to 'all moral truths *are* relative to *individuals'* beliefs'.²⁰ Similarly, premise (2) is

¹⁷ See *ibid* 462. ('I am of a deontological disposition — at least inasmuch as I think that there are *some* constraints (although there may not be many) on our ability to justify actions by their results.' (Emphasis in original).)

¹⁸ *Ibid* 391–2 (emphasis in original, internal footnotes omitted).

¹⁹ *Ibid* 392 (emphasis added).

²⁰ Hurd 2, above n 9, 38 (changes in italics).

also put in the plural: ‘all *persons*’ beliefs are deserving of equal respect’.²¹ This is done again in lines four and five (‘If *all people’s* beliefs are equally true (for *them*)’²²), then the italics are removed from the ‘im’ in ‘immoral’ and the rest of the line made to read ‘to prevent others from acting as they choose’²³ instead of ‘to coerce the actions of others with whom he disagrees’. The phrase ‘to generate a principle of tolerance’ is then altered to ‘to constitute a source of liberty’²⁴ and the sentence ending phrase ‘with which they disagree’ deleted.²⁵

For my part, I cannot see how the move from the singular to the plural, or the other minor emendations, make any real difference to the gist of Hurd’s claim here. Certainly the changes make no difference to my complaint, that as an elucidation of the moral tradition of David Hume and J L Mackie and Simon Blackburn, Hurd’s attack is so exiguous and condensed that it hardly qualifies as a caricature. Worse, the dilemma that Hurd identifies as lying at the heart of all general views that reject the existence of mind-independent moral truths (or in Hurd’s loose and rather inapt terms, ‘moral theories that *do* ... locate moral truths in people’s beliefs about them’²⁶) can quite easily be dissolved away. Whatever mistakes freshmen may make, they were not made by Hume or Mackie or Blackburn.

At this point we need to specify some terms, set out a basic position, and then show how the dilemma Hurd identifies dissolves away. For the purposes of this reply then, let us say that a moral sceptic is to be understood as someone who broadly holds the following to be true.

Mind-independent values do *not* exist. Nor is there any logical connection or relation between humans and values. The relation depends on the way humans happen to be constructed, which could conceivably have been otherwise. Even in terms of how we have been constructed or have evolved, experience shows there to be little if any consensus (let alone unanimity) over time, place, culture or rank about valuing. At most it would appear that in some few general areas (eg, revulsion at the prospect of children being tortured) we can find a near uniformity of response — but not even this produces unanimity. Attempts to draw an analogy between ethics and science fail, as do attempts to equate moral evaluating and the processing of sensory data like colour.²⁷ Not even the attempt to

21 Ibid (changes in italics).

22 Ibid (changes in italics).

23 Ibid.

24 Ibid.

25 See *ibid*.

26 See above, text accompanying n 19. I have removed the ‘not’ and added the italics as I am here giving the position Hurd rejects.

27 This is known as the secondary qualities analogy. The idea is to argue that

limit the finding of 'rightness' to particular humans in a specified time and place, in effect to make epistemology independent of metaphysics,²⁸ succeeds. Categorical imperatives are all actually hypothetical imperatives fundamentally dependent on the observably variable sentiments and feelings people happen to have and are not determined by relations of ideas or by a function of external, mind-independent fitnesses.

This form of moral scepticism I have just traced falls somewhere within the Humean tradition. More importantly, it clearly rejects the existence of objective, or real, or higher, or transcendent, or perhaps most aptly, mind-independent values, attributing to them no non-relative status.

Notice immediately what this sort of Humean moral sceptic is *not* sceptical about. He is no Berkeleyan doubting the existence of an external, material, causal world. Nor is he some postmodernist, deconstructionist adherent, extrapolating from literary criticism to the view that humans can know nothing objective or real even of the external, causal world.

That the natural, causal world exists, with its uniformity of like cause producing like effect, is not doubted by this moral sceptic. Provided the external world shows a regularity of like cause being followed by like effect, a regularity of observed events, it is mere bad faith to purport to doubt the existence, the realness, of the natural, causal world. However much such a world may be filtered and interpreted by humans, none who wishes to go on living is prepared — from whatever culture, sex, or socio-economic background — to jump from a tenth storey window or to stop eating. As Hume argued, humans are not capable of this kind of doubt; assertions to the contrary are mere pretence and posing. Belief in the existence of causation and of a continuing and distinct external world is a belief we humans cannot escape and anyway would not want to, however precarious or circular or unsatisfying the support for that belief may ultimately prove to be.²⁹

while humans do in part subjectively interpret values there is nevertheless also some real, external component to values, something similar to the wavelength of light say. For a telling critique of this secondary qualities analogy see Simon Blackburn's 'Errors and the Phenomenology of Value' in Ted Honderich (ed), *Morality and Objectivity* (1985) 1.

²⁸ An example of this is the early Ronald Dworkin's 'One Right Answer' thesis. See, eg, Ronald Dworkin, *Taking Rights Seriously* (revised ed, 1978).

²⁹ This is, in essence, the argument of David Hume in Book I of *A Treatise of Human Nature* (L A Selby-Bigge ed, P H Nidditch 2nd revised ed, 1978). I set out in more detail the moral sceptic's position in James Allan, *Sympathy and Antipathy: Essays Legal and Philosophical* (2002), particularly ss A and C. Here I am drawing on ch 5 of that book.

The crucial point for the purposes of this reply is that this version of moral scepticism is *not* nihilistic; it does not doubt everything. Gravity is no social construct. Double blind drug trials have a solid foundation; homeopathy does not. There *are* external, imposed criteria for 'what the case is' as regards factual consequences in the natural, causal world. In some realms, therefore, all opinions are *not* equally valid. The view that the sun will fail to rise tomorrow, for instance, is almost certainly wrong. The same goes for claims about extra-sensory powers. Where there is an externally imposed regularity there is a right answer, even if that answer may prove to be beyond the grasp of limited biological creatures like humans. (For example, humans may never know how to cure AIDS or what the universe was like before the Big Bang.)

This version of moral scepticism therefore starts with an acceptance of the mind-independent reality of the external, causal world and the basic uniformity of nature, however unexaminable the core foundations of such a belief may be. It adopts an empirical, naturalistic program in which observed data and inductive reasoning become the validating standards. *It is on the basis of these standards* that mind-independent values are judged not to exist, natural law tenets are rejected, and Hurdian deontology found wanting.

Now having sketched a version of moral scepticism that I would argue is plausible (and in fact likely to be true³⁰), and one in the Humean tradition, let us return to the dilemma that Hurd identifies as giving rise to 'an infamous freshman mistake'.³¹ Confronting the very same perceived dilemma in the past, here is how I have argued it can be dissolved away by the moral sceptic.

Are all values then equally valid? The moral sceptic's dilemma appears to be this: To deny objective values is to play the game and admit there are criteria for establishing truth. To refuse to play the game, because all opinions are, if strongly felt, equally valid, is to accept even the view that values are objective. However the dilemma dissolves once one distinguishes empirical criteria from criteria about rightness and wrongness of values and norms. My view is that there *are* external, imposed criteria for 'what the case is' as regards factual consequences. To some extent at least the natural, causal world is a given. Torture causes pain and death. Suffering creates sympathy in most people. Scope to be inquisitive and pursue ideas where they lead often results in happier people and technological advance. The natural, causal world may well be interpreted by people but there *is* a core level of regularity, of imposed facts, and this can be used as a criterion of truth (at least for as long as those natural, causal facts continue to hold).

³⁰ See James Allan, *A Sceptical Theory of Morality and Law* (1998).

³¹ Hurd, above n 1, 391.

This is *not* true of normative values, says the moral sceptic like me. Once such values are tied ineradicably to the observably variable feelings and sentiments of people there can ultimately be no criteria for ‘what values are right’ — unless it be allegedly universal or near universal, but still contingent, human dispositions. So rejecting the existence of objective values rests on the evidence from the causal world. On this test or criterion moral scepticism is more likely than moral objectivism says the sceptic. Of course values may seem and may be believed to be real and mind-independent by many or most. But there is no necessary connection between peoples’ beliefs and what is actually the case. Apparently real or objective moral values are but felt and projected sentiments and feelings, says the moral sceptic, which cannot be true or false, right or wrong. One feels them or one does not. They have no propositional content. Hence the dilemma’s horns are cut off simply by explaining that criteria for determining truth *do exist* regarding the state of affairs in the natural world but *do not* regarding ‘goodness’ or ‘rightness’ in any sense grander than what is observably, normally felt.³²

If we go back³³ and parse the way Hurd sets out the dilemma, or infamous freshman mistake, we will see that the same response is open to the moral sceptic, though it requires clearing away some confusions in the Hurd formulation. Let us take it sentence by sentence.

Sentence No 1

It is an infamous freshman mistake to argue that (1) all moral truth is relative to a person’s individual beliefs, and hence, that (2) each person’s beliefs are deserving of equal respect.

As should be clear from the sketch of moral scepticism provided above, no moral sceptic would ever make claim (1). He would never make a claim about ‘all moral truth’ because the moral sceptic says there are no first-order moral truths, only moral sentiments and feelings. The moral sceptic *does* make a second-order truth claim — that there are no *mind-independent* moral values or moral truths and falsehoods or moral rights and wrongs — and he does so on the basis of the evidence from the external, causal world. It is extremely unlikely that Hurd means that, however, and if she does, this second-order claim is *not* a relative one. Likewise, talk of a ‘person’s individual beliefs’ elides together beliefs about the external, causal world and moral beliefs. The moral sceptic who insists on the fact-value dichotomy would not do this. The same is true of claim (2). Hence, the moral sceptic need not, and would not, say that all beliefs

³² Allan, *Sympathy and Antipathy*, above n 29, 90 (emphasis in original).

³³ See above, text accompanying n 18. I will use the version in Hurd’s *Law and Philosophy* paper, not the slightly modified *Australian Journal of Legal Philosophy* version. But as I noted above, I do not believe the slight changes make any difference to what follows.

about the external, causal world are ‘deserving of equal respect’. And in the moral realm he would not talk of moral beliefs at all, at least not when it came to what moves action. It is passions and sentiments, not an inert reason, that does that, he would say. So it is hardly unfair to conclude that Hurd’s first sentence significantly distorts the moral sceptic’s position.

Sentence No 2

For, of course, not only is the meta-ethical claim in (1) probably false, but the normative claim in (2) does not follow from (1).

First off, the meta-ethical claim is put by Hurd in such a way (as noted above) that no moral sceptic would ever make it. In the form I have put it above, I would argue — and have argued — that moral scepticism is, on balance, more likely to be true than not.³⁴ As for whether (2) follows from (1), the moral sceptic never in fact asserts (2) does follow from (1). Beliefs about the causal world (say, homeopathy versus conventional medicine) are absolutely *not* deserving of equal respect, says the moral sceptic. And as for moral evaluations, well you either have a particular sentiment (say, against torturing children) or you do not. Cause and effect reasoning provides information about likely future consequences, but it is the core level passion or sentiment that ultimately spurs action or lack of action. In this sense, evaluations are relative to the person, true, but it is a relativism that does not lead on to any form of nihilism. More crucially, as I shall now argue, this moral scepticism need not feed intolerance in the way Hurd supposes.

Sentences No 3, 4 and 5

If each person’s beliefs are equally true (for him), then it must be moral for the person who thinks that tolerance is immoral to coerce the actions of others with whom he disagrees. Neither metaethical subjectivism nor metaethical conventionalism has the resources by which to generate a principle of tolerance that makes it right for otherwise intolerant state actors to respect the choices of citizens with which they disagree. On the contrary, were state actors looking for a licence to be intolerant, they could do no better than to argue that truth is relative to their own beliefs (or those of their carefully specified community), and that such beliefs do not include the value of tolerance.

Of course for the Humean moral sceptic it is untrue to say ‘each person’s beliefs are equally true’ in the causal realm. As for the moral realm, it is not beliefs that matter. Nevertheless, here at last we have the

³⁴ See, in particular, my chapter ‘Truth’s Empire: A Reply to Ronald Dworkin’s “Objectivity and Truth: You’d Better Believe It”’ in Allan, *Sympathy and Antipathy*, above n 29, ch 3. See too Allan, *A Sceptical Theory of Morality and Law*, above n 30.

gist of what Hurd dislikes about moral scepticism. She thinks it likely to lead to intolerance.

At this point it is necessary to remind the reader that all I need to show is that Hurd's map of liberty in law — her self-declared attempt to 'chart every province within which readers might plausibly locate liberty'³⁵ — is deficient and incomplete for wholly omitting the moral sceptic's defence of liberty. It is *not* necessary for me here to show that moral scepticism in fact provides the most, or one of the most, powerful and compelling defences of liberty (though, in fact, I happen to believe it does).

Still, it is worthwhile here to respond directly to Hurd's assertions that moral scepticism provides the perfect 'license to be intolerant' and that state actors 'could do no better' than rely on it.

Notice straight off that Hurd, at least in part, is making an empirical claim. Moral scepticism, she thinks, will lead to greater intolerance than some moral view or other that accepted the existence of mind-independent values,³⁶ and certainly than her favoured deontologism. But as an empirical claim — one resting I suspect on the deontologist's self-image of reason mediating the passions and there to withstand the onslaught of darker forces — the evidence seems to me to be almost wholly against Hurd.

Few people who 'know' there are mind-independently true and correct wrongs and rights doubt that those wrongs and rights are the same as their own subjective perceptions of them. Such people might find tolerance of widely diverging views extremely difficult to sustain. Their converting dissenters should warrant not blame but praise, even from the converted. At best the believer in mind-independent moral truths might be able to don a Kiplingesque mask of *noblesse oblige*, a felt duty to suffer the follies of the blind and wayward. But that mask takes much effort to keep on, as so much of history has shown.

Start with religious believers. Against the many good things done by these believers in mind-independent moral values (whether right because God said so or God said so because they are right) must be set down a lengthy list of appallingly intolerant acts. Christian against Jew, Catholic against Protestant, Hindu against Muslim, the list of intolerant acts

³⁵ Hurd, above n 1, 386 (emphasis added).

³⁶ That is, a moral theory that asserted that a moral evaluation X can be objectively true even if few others alive agree — indeed, even if no one alive ever has perceived X to be true. In other words, it is right and true independently of the sentiments and perceptions the evaluating people bring to the table. I elaborate in James Allan, 'A Modest Proposal' (2003) 23 *Oxford Journal of Legal Studies* 197.

performed by state actors — in the name of what is thought and asserted to be mind-independently morally right — is too long to list.³⁷

Of course the secular totalitarian regimes of the 20th century were even worse in their intolerance, bloodthirstiness and savagery. But then none of them was based on moral scepticism. Quite the contrary. Each had its confident vision of what was morally right, at least in the beginning, and nothing, certainly not mere individual lives and happiness, could be allowed to stand in the way of realising whatever moral utopia happened to be envisioned.

Tolerance should be made of sterner stuff! Particularly as it is impossible to point to even a fraction, a minute fraction, of actual, historical intolerance driven or fired by moral scepticism.

Perhaps, then, Hurd did not mean her claim about how moral scepticism licenses intolerance to be taken as an empirical claim at all but rather as some sort of assertion about how it provides a ready justification (whether ever actually utilized or not) for intolerance. I take it the assumption would be something as follows. Once you accept moral scepticism, it might be urged, the effect would surely be to forsake argument and debate in favour of a ‘ruthless decision to cut the cackle, to damn the heretics and to exterminate the unwanted’.³⁸

The idea, I suspect, underpinning what Hurd asserts about intolerance and moral scepticism is that if people are deluded in their belief in the existence of mind-independent values, and they come to shake off those delusions, those same people will soon see the hopelessness of seeking agreement by peaceful means and by debate. Surely propaganda and brute force are then just a short step away.

The moral sceptic, aside from pointing out that history seems overwhelmingly to be against Hurd, has answers also on the theoretical plane.³⁹ True, an awareness of the key role of sentiments and feelings in moral evaluation will no doubt lead people in certain circumstances to defend their own interests through action not words. But let us be clear about this. Egregious anti-social behaviour requires action on any moral premises or theory. A complete tolerance which merged into a thorough-going *laissez-faire* would produce a society so lacking in cohesion it would

³⁷ Though for effect it might not hurt to point to the many religious wars in Europe, the plight of the Jews and the Bahaiis, or even the self-righteousness with which, say, Sir Thomas More pursued and had burned at the stake protestants such as William Tyndale.

³⁸ W B Gallie, ‘Essentially Contested Concepts’ (1956) 56 *Proceedings of the Aristotelian Society* 167, 194.

³⁹ I draw here on my book *A Sceptical Theory of Morality and Law*, above n 30, especially the epilogue.

not last long. At some point tolerance becomes weakness. The hate-mongering neo-Nazi no less than the psychopathic rapist is not to be tolerated but restrained. Hence it is something short of a thorough-going libertarianism that is the sort of liberty Hurd, and I, take to be compatible with tolerance.

Why should attainment of a desirable level of tolerance in society be more difficult (or even impossible) with an awareness of the absence of mind-independent, objective, real, transcendent values? Do not forget, the Humean moral sceptic accepts the existence of an external, causal world. He accepts the large role reason plays in cause and effect predicting of consequences. So argument, debate and persuasion *about likely consequences* are in no way foreclosed to the moral sceptic. Indeed this is his natural home. And no less obvious to him than the ultimate contingency of values will be the historical consequences of intolerance — the limits it will eventually place on one's own scope for action, the fear, the hypocrisy and the rest.

So not only is it untrue to say moral scepticism impedes argument, it is also far from clear that a weighing up of consequences evidently tilts the calculation of self-interest towards intolerance over tolerance. And it gets worse for Hurd because the Humean moral sceptic need be no Hobbesian. (Certainly Hume himself was not.) There is no good reason to think most humans are entirely selfish or instinctively programmed so that their natural passions and sentiments are devoid of altruism and benevolence. Hume, himself, wrote not just of the artificial virtues but also of the natural virtues.

Hume took it that few, if any, people were wholly selfish and in need of a ruthless all-powerful sovereign to constrain them. In the vast preponderance of individual cases, limited altruism rather than unrelenting selfishness is a far better place to begin in describing human nature.

Oddly, however, Hurd seems to assume or pre-suppose that the starting point for any description of human nature — what we humans are like before her deontologism kicks in and our self-perceived sense of duty constrains us — is an extremely black, Hobbesian one. At least when it comes to moral scepticism, her argument begins by asking us to consider 'otherwise intolerant state actors' and 'state actors looking for a license to be intolerant'.⁴⁰ This is telling. And as an empirical claim it strikes me as a highly implausible one. Yes, there is no doubt that a big dollop of selfishness is hard-wired into most of us. But likewise there is also no small amount of benevolence, altruism, generosity and kindness. In most societies, education and parental efforts then combine to try to buttress the social inclinations.

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Hurd, above n 1, 392.

My simple point is that for those born with a modicum of benevolence or who have had instilled in them a love of justice or of friendly debate and argument, the case for tolerance over intolerance is even clearer.

So my assertion is that Hurd is simply wrong in her claimed linking of moral scepticism and intolerance; in other words, she is wrong to assert that moral scepticism is more likely to generate or foster intolerance than her own preferred deontological moral theory. First off, the historical facts are against her. As an empirical claim she has nothing to point to. And as some sort of conceptual or justificatory assertion she makes all over again the deontologist's error of misunderstanding the moral sceptic's position. Nothing in the Humean moral position rules out debate, discussion, and changing opinions through argument, provided one is focusing on the empirical realm. Debate about likely future consequences is the natural home of the moral sceptic. What is more, it is in this realm (and virtually only in this realm) where debate, dialogue and discussion have any prospect of changing others' opinions. A debate about the moral rightness of China's one child policy has virtually no prospect of altering anyone's entrenched views. But argument in terms of likely future birthrates, the extent of female infanticide, the future effects of surplus boys, environmental degradation, and other likely consequences might just change an opinion or two.

Assuming I am correct here, it follows that the moral sceptic does have the resources to dissolve the dilemma apparently posed by denying the mind-independence of values. He also can make a case for tolerance, a quite compelling case. That means that Hurd's rather perfunctory eight sentence dismissal of what she terms 'moral relativism' fails to give us any good reason for ruling this position *prima facie* out of bounds, or off the map, as it were.

What remains to be done then is to sketch the moral sceptic's case for liberty. If this can be done in any way at all, then Hurd erred in omitting it from her purportedly all-inclusive map.

II. Moral scepticism and liberty

Can the Humean moral sceptic give a good defence of political liberty, of the advantages of citizens being left alone by the state? I think he can, though to qualify for a place on Hurd's map remember that the defence does not even have to be all that good or all that convincing. After all, on page 386 of her *Law and Philosophy* paper Hurd says only that she seeks to chart where 'readers might *plausibly* locate liberty' and just before that 'the *possible* means by which moral and political theorists might characterize

their views of political liberty'.⁴¹ Plausibility, and the even weaker possibility, are what is supposed to qualify a defence of political liberty for inclusion on the Hurdian map.

Nevertheless, let us aim a bit higher than that and try to sketch at least a moderately convincing argument in favour of political liberty, one that specifically grounds itself in the moral sceptic's first principles.

What we need is an 'argument to which persons [might] appeal ... when defending the claim that the reach of the state ought to be limited'.⁴² For obvious reasons, 'the fjords of plausible deontological ... theories within which political liberty can find safe ... harbour'⁴³ are, for the moral sceptic, all non-existent. Not for him are there any such available arguments.

On the other hand, consequentialist defences of political liberty are very much available to the Humean moral sceptic. In fact, some version or other of consequentialism (let us here focus on the version that makes happiness or welfare the ultimately good consequence, namely, utilitarianism) is his only escape from subjectivism. In other words, if the moral sceptic wants (or needs) an external standard — something beyond his own moral intuitions and sentiments — then utilitarianism gives it to him. Count everyone equally at the first stage so that no one's felt happiness is ruled out of order before the counting even gets going. Then go for the action which results in the greatest happiness of the greatest number (or if you prefer, the greatest average happiness).

Of course there will be practical difficulties about how to measure the felt happiness (both over the chosen population and in terms of its intensity). But the crucial fact is this: Utilitarianism provides you with an inter-subjective standard of right and wrong — something external to the individual's (be she a moral sceptic or deontologist) own sentiments, preferences, beliefs or convictions. True, utilitarianism does *not* give you a mind-independent standard of right and wrong; it gives you nothing that would satisfy the deontologist's demand for an objective or transcendent or mind-independent standard. But utilitarianism does, nevertheless, provide an inter-subjective — an external-to-the-evaluator's-own-subjective-beliefs-or-sentiments — criterion of right and wrong. Once you have decided (on whatever grounds) to count everyone as equal in terms of the worth of his or her happiness, and on who is to count, you can at least roughly calculate right and wrong on a basis other than your own moral beliefs or sentiments.

⁴¹ Ibid 386 (emphasis added).

⁴² Ibid 465.

⁴³ Ibid.

This utilitarian test, admittedly, will be completely dependent on other people's sentiments and felt happiness (including your own, though yours get no preferential weighting). But it *will* provide an external-to-you moral criterion or test, an inter-subjective one. It is just that the test will *not* appeal to any objective or higher or mind-independent criterion or criteria.

At this point one might well reply that it seems a wholly contingent matter whether the moral sceptic's sentiments incline him towards utilitarianism or raw subjectivism (or indeed anything else). Where, in other words, is the tie between Humeanism and utilitarianism? The short answer is this.⁴⁴ The moral sceptic would have as much reason as anyone to aim for such an external, inter-subjective standard. In fact, he may well have more grounds than others as he believes the world is devoid of objective moral values. The utilitarian moral standard is the best that he can hope for; it is his best chance of escape from raw subjectivism. And without such an escape he knows — from exercising his causal reason — that there will be no way to resolve moral disputes where people's moral sentiments conflict. In one sense then the link remains contingent, just as it is contingent whether a particular person opt for deontology or not. But in another sense utilitarianism (or perhaps some other sort of consequentialism) is the best the moral sceptic can do in achieving an external standard of right and wrong which can be used (however roughly at times) to resolve moral disputes.

Of course if objectivist moral theories, despite proclaiming the existence of mind-independent, transcendent answers, are unable to provide any sort of agreed criteria for resolving the moral disputes they proclaim have mind-independent answers then the moral sceptic may not be alone in seeing the attraction of an inter-subjective standard.⁴⁵ But whether that be the case or not, the moral sceptic will very often see the attraction of accepting the deficiencies of the utilitarian approach in order to get that external standard. The bargain will often be worth the costs.

The point is that the moral sceptic is not without access to an external moral standard. If he wants one, utilitarianism (or some other version of consequentialism) can provide it. And what is given is very much a non-

⁴⁴ For an elaboration of this claim about the close relationship between utilitarianism and moral scepticism see Allan, *Sympathy and Antipathy*, above n 29, especially the Introduction and Concluding Remarks.

⁴⁵ This is the point Jeremy Waldron makes in 'The Irrelevance of Moral Objectivity' in Robert George (ed), *Natural Law Theory: Contemporary Essays* (1992) 158. In other words, without a way to resolve moral disagreements that is more or less agreed upon by those who disagree (as with disagreements amongst scientists, say), it does not much matter whether objectivist claims about the non-contingent status of values be true or not.

relative (to the particular evaluator) standard of right and wrong. For example, a particular moral sceptic may feel sickened at the thought of abortion and think it wrong. It pains him. However, having committed himself to utilitarianism (in order to achieve an external moral standard) he may find that on adding up all the others' feelings or sentiments of pain and happiness, it turns out that allowing widespread access to abortion increases overall happiness. The right thing to do differs (or can differ) from his own subjective sentiments.

Once we combine moral scepticism with utilitarianism⁴⁶ we have all the tools we need to offer a strong prudential argument in favour of political liberty. Indeed, the reader can easily enough trace for himself or herself the broad outlines of a prudential, consequentialist argument in favour of political liberty, one defending the claim that the state ought to be limited. It would start with the assertion — one strongly supported by history — that the best consequences (in terms of happiness or welfare or protection of minorities or the status of women etc) overwhelmingly flow when individual citizens are left largely alone, even at times to do what the majority or conventional morality considers to be wrong or wicked. That is, the most desirable states in which to live (in terms of citizens' cumulative happiness and welfare) are those where individuals have relatively more rather than relatively fewer legal protections to pursue their own life plans and to follow their own conceptions of the good.

This sort of consequentialist defence of political liberty rests ultimately on prudential grounds. Hurd, herself, throughout her paper gives various prudential and instrumental arguments to support political liberty. Here I need distance the Humean moral sceptic's prudential support of political liberty from those Hurdian ones only in two main ways. Firstly, I remind the reader that in my view the full force of consequentialism is best captured by the moral sceptic. Hurd's deontologist and vaguely Kantian leanings seem to me continually to distort and enervate the consequentialist defence of political liberty. Whatever else one can say of Hurd's map, it is evident that in completing her 'exercise in moral cartography'⁴⁷ her heart is just not in it when it comes to making, say, the non-paternalistic Benthamite case. Her map is drawn with a Kant-ator projection.

⁴⁶ And I have argued elsewhere that, if anything, utilitarianism fits in better with the moral sceptic's first principles than with the non-sceptic's. See Allan, *Sympathy and Antipathy*, above n 29. In my view Bentham is best seen as a moral sceptic offering utilitarianism as a way to escape radical subjectivism. See the first five or six chapters of Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Burns and Hart ed, 1970).

⁴⁷ Hurd, above n 1, 386.

Secondly, I need to take issue with Hurd's view that by itself the prudential, instrumental defence of political liberty, even if it falls back on an indirect rule-utilitarian defence, is 'unstable'⁴⁸, 'no[t] principled'⁴⁹, and implicitly not 'robust'.⁵⁰

Let's take Hurd's claim that rule-consequentialism is an unstable basis to support political liberty in a way that a deontological, moral defence would not be. In my view, exactly the opposite is true. It is precisely the realisation that, as an empirical generalisation, leaving persons at liberty can be expected to maximize good consequences that makes the case for political liberty so powerful. The rule-utilitarian factors in the individual's inability to calculate for certain when best consequences point against liberty; the rule-utilitarian notes the frailties of human nature and the temptations to which those in power are subject; the rule-utilitarian sees that the best consequences are achieved by laying down a rule, one that errs on the side of liberty. It is facts such as these that convince people, not appeals to moral notions the listener will often not happen to share. (And in a world notoriously lacking in first order moral consensus, why should one presume a moral appeal is more conducive of stability than a prudential appeal when everyone knows that political parties and appellate judges and for that matter citizens all bring different moral views to the table, views that will have differential impacts on the level of citizens' liberty?)

Hurd, on page 437 of her original paper, replies by alleging that this sort of prudential defence of political liberty is unstable because, as a matter of fact, it condones the limiting of liberty 'whenever it is perfectly clear that by inhibiting such liberty, lawmakers would achieve a net gain in good consequences'.⁵¹ In a general sense Hurd's reply is an attack on rule-utilitarianism (or rule-consequentialism) itself.

For while rule-consequentialists can provide *epistemic* reasons to abide by rules that generally, if not always, assure the maximisation of what is good, they can give us no reasons to abide by such rules when we rightly and with complete confidence recognize that we can achieve a net gain in good consequences by violating those rules. And unless and until rule-consequentialists can make sense of why we ought to follow rules even in circumstances in which an over-all net gain in utility would clearly be achieved by violating those rules, rule-consequentialism will be an unstable location for

⁴⁸ Ibid 437.

⁴⁹ Ibid 454.

⁵⁰ Ibid 446. Again, it seems wrong to me to assume that because there are no mind-independent right (or wrong) moral answers it must follow that there is no solid way to go about justifying limits on state power. As I will try to argue convincingly, I think Hurd's implicit assertion (see, eg, at 450) that political liberty is only safe when it is morally grounded is wrong.

⁵¹ Ibid 437.

political liberty. For if the sole reason to leave persons at liberty is that such liberty can generally be expected (as an epistemic matter) to maximize good consequences, then it would seem that liberty should be limited whenever it is perfectly clear (as it sometimes is) that its exercise will violate the rationale for its extension — that is, whenever it is perfectly clear that by inhibiting such liberty, lawmakers would achieve a net gain in good consequences.⁵²

Two replies to this are in order. The first involves reminding the reader that on anyone's preferred version of political liberty — even the most ardent libertarian's — liberty will sometimes be limited. 'The search for political liberty'⁵³ is not a search for a state of affairs in which all people in a society are always at liberty to do as they please, be they rapists, corporate fraudsters, anti-abortionists sending threatening letters to doctors or pranksters running into a cinema and shouting 'fire'. If the rule-utilitarian concludes that there are instances in which liberty should be limited, he is surely no different than the deontologist in that regard.

The second reply, though, addresses Hurd's point in the cited passage above that indirect or rule-utilitarianism (as a separate sort of defence of political liberty to be contrasted to a more direct version of utilitarianism) appears likely to collapse into act-utilitarianism in extreme circumstances. This is a well known complaint.⁵⁴ On the level of the individual actor who accepts some form of consequentialism and is seeking to set herself moral rules to guide her conduct, the point about the *in extremis* collapse of the rules into a case-by-case determination of best consequences may well be correct.

However, that is *not* what we are talking about here. In the context of a search for a justification of political liberty, we are talking about rules that will guide and constrain the legislature and executive.⁵⁵ In a Westminster system where parliamentary sovereignty still overwhelmingly prevails,⁵⁶ it is nevertheless the case that the rule setter is distinct from the rule applier. (In a United States-style constitutional regime the distinction is even clearer.) And where the rule setter (namely, the legislature) and the rule

⁵² Ibid (emphasis in original).

⁵³ Ibid 445.

⁵⁴ See David Lyons, 'Utility and Rights' in Jeremy Waldron (ed), *Theories of Rights* (1984) 110.

⁵⁵ As an aside, it seems to me that the strongest objections to utilitarianism (say, its impracticality and its too demanding nature) fall away when it is understood as a theory addressed to the legislator (or other state policy-maker) and not as a guide to personal moral conduct. Indeed, I think this is the best way to understand what Bentham was doing. See above n 46.

⁵⁶ This today may mean New Zealand and Australia even more than the United Kingdom. On parliamentary sovereignty generally see Jeffrey Goldsworthy, *The Sovereignty of Parliament* (1999).

applier (namely, the judges) are distinct people or bodies, it is no longer clear that Hurd's argument about the collapse of rule-utilitarianism into a case-by-case series of act-utilitarian decisions still applies. That would depend on the judges and their willingness to stick to the rules and not to undermine them in the name of doing justice (or in utilitarian terms, in the name of maximizing good consequences in the case at hand). Certainly it is not at all obvious to me that those judges, faced with a hard case, who opt to abandon the liberty protecting rule (which, *ex hypothesi*, achieves more good consequences than an individual or group of individuals could achieve overall in a series of case-by-case determinations) have in fact 'achieve[d] a net gain in good consequences',⁵⁷ all things considered. *Pace* Hurd, the judge inclined to think hard cases make bad law *can* give us 'reasons to abide by such rules [even] when we rightly and with complete confidence recognize that we can achieve a net gain in good consequences [in the case at hand] by violating those rules'.⁵⁸

This judge points to institutional and separation of powers arguments that apply when rule setter and rule applier are distinct.⁵⁹ This judge, in an American context, may also be able to appeal to the need to uphold this constitutional rule (at least absent a constitutional amendment) *despite its bad consequences in this case*. Not everyone will be convinced, by any means. But Hurd asks whether 'rule-consequentialists can make sense of why we ought to follow rules even in circumstances in which an over-all net gain in utility would clearly be achieved by violating those rules'.⁶⁰ I think they can make sense of such fidelity to rules where rule setter and rule applier are not the same person or body.⁶¹

⁵⁷ Hurd, above n 1, 437.

⁵⁸ *Ibid.*

⁵⁹ See the fictional judgment of Justice Keen in Lon Fuller, 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616.

⁶⁰ Hurd, above n 1, 437.

⁶¹ For an insightful discussion of the gap between issuing rules and following rules see Larry Alexander and Emily Sherwin, *The Rule of Rules* (2001) ch 4. They elaborate on why the grounds for issuing rules (or not) is one thing; the grounds for applying rules (or not) is another; and the grounds for following rules (or not) is another again. Their working model is that 'of a small society whose members are motivated to do what is morally right' (at 183). In my opinion this model may too greatly downplay the fact of moral dissensus and moral disagreement in society. (For example, what is the morally right thing to do about abortion? The moral sceptic says the question cannot be answered outside the realms of conventional morality or some opted for inter-subjective consequentialist standard or raw subjectivism. But even the hard-core moral objectivist has to recognize his view of what is morally right to do will not be universally shared by others — others equally as thoughtful, educated, sincere and nice as he is.) And

That is all I intend to say in the way of offering a consequentialist defence of political liberty. I hope it has been enough to convince the reader that Hurd's map of the possible routes to political liberty was deficient for omitting the arguments in favour of political liberty, of 'being left alone by the state',⁶² that a Humean moral sceptic could offer. To such a one, Hurd's map has something of the flavour of a map of tort law drawn by the trial lawyers of America or of a map of abortion drawn by a theist.

The Humean moral sceptic's defence of political liberty may even have implications in terms of its adherents' willingness to favour strong judicial review and countermajoritarian institutions. Judicial supremacism could well prove harder for them to defend than for the deontologist and none would be likely to say with Hurd that:

While (appointed) judges may enjoy a special moral vantage point by virtue of both their relative inability to use their positions for personal gain and their insulation from political pressures, the degree to which politicians can be thought to possess moral expertise is notoriously suspect.⁶³

Courts tend to force a public interest conception onto legislation, no matter what the motivations of individual legislators might have been. By so doing, courts force (possibly self-interested) legislation toward a conception of what is morally required, and this may make it at least plausible to regard such legislation as a reflection of the content of morality.⁶⁴

My point is that while moral sceptics have as much reason to distrust powerful rulers as anyone, they may have *more* reason to favour majoritarian democracy — the so-called tyranny of the majority may well appear to them the least bad sort of potential tyranny going, better than the tyranny of the unelected few in a kriticalarchy.⁶⁵

factoring in widespread moral dissensus in society may make it easier to adopt the Justice Keen-like rule-bound approach to judging. At any rate, Alexander and Sherwin agree (as do I) that when it comes to rules, and hence to defending rule-consequentialism, '[t]hese moral difficulties are especially acute if one takes a deontological view of morality' (at 92).

⁶² Hurd, above n 1, 447.

⁶³ Ibid 419.

⁶⁴ Ibid 421.

⁶⁵ I say this well aware of, and largely in agreement with, Jeremy Waldron's 'The Irrelevance of Moral Objectivity', above n 45, 160. I discuss Waldron's chapter in James Allan, 'Positively Fabulous: Why it is Good to be a Legal Positivist' (1997) 10 *Canadian Journal of Law and Jurisprudence* 231.

III. Concluding remarks

I remarked at the start that Hurd's map also lacks a place for the determinist. Given that a Humean moral sceptic could also be (but need not be) a determinist, this alone calls into question the determinist's omission. Surely a determinist can have as much reason to care about liberty as the believer in free will. And the conviction that everything is ultimately causally determined, even human actions, need not eliminate the desire to offer a defence of political liberty; it does not necessarily foreclose an interest in defending liberty and in providing a compelling defence of it. From the (believed to be) true fact that all actions and beliefs are determined (albeit in a staggeringly complex way and one beyond the ability of limited biological creatures to trace out), it hardly follows that all those who believe this fact are thereby foreclosed from defending political liberty. Nor are they somehow unworthy of inclusion in a map aiming to be as catholic as possible.

At the start I also alleged that Hurd once or twice blends together her 'oughts' and 'ises'. Take this example at the end of her *Law and Philosophy* Part I attack on what she calls moral relativism.

Unless we are content to protect a person's liberty from state interference only because, and only to the extent that, it is valued by state officials or by the larger community whose beliefs are deemed to define the morality of state actions, we must abandon the relativism of subjectivist and conventionalist theories in favor of moral theories that do not locate moral truths in people's beliefs about them, and do not hold an individual's liberty hostage to the value that others place on it.⁶⁶

This simple sentence in fact contains a complex argument. But notice this:

- (1) It begins with an 'is' claim (ie, 'unless we are content...').
- (2) It then moves to an 'is' claim about an 'ought' claim (ie, '...only because...it is valued by ...').
- (3) Then we get the conclusion, which is itself an 'ought' claim (ie, '... we must abandon...').
- (4) This is supported by one 'is' claim (ie, '...that do not locate...').
- (5) And it is then supported by another 'is' claim about an 'ought' claim (ie, '... and do not hold an individual's liberty hostage to the value that others place on it').

⁶⁶ Hurd, above n 1, 392.

In other words, the ‘ought’ conclusion in (3) is supposed to follow from (1) and (2) (with (5) offering ancillary support to (3)). But (1) is a straight out ‘is’ claim and (2) and (5) are both ‘is’ claims about ‘ought’ claims. It is not that Hurd is here actually deriving her desired ‘ought’ from an ‘is’. Rather, the problem seems to me to rest with the persuasiveness of the three ‘is’ claims. Take the first two:

Unless we are content to protect a person’s liberty from state interference only because, and only to the extent that, it is valued by state officials or by the larger community...

The initial, and brutal, reply to this is that if state officials and the larger community do not value political liberty, Hurd’s deontological moral views (and for that matter all the best pieces of prose from the Western canon including Mill and Holmes and whomever) will not do a thing to protect a single person’s liberty from state interference. Whether we would prefer a different state of affairs, one in which people’s liberty did not ultimately depend on whether political liberty were valued by state officials and the larger community, is wholly beside the point. As Bentham said, ‘hunger is not bread’.⁶⁷ We have to take our ‘ises’ as we find them, though no doubt we can argue about, and try to design, ways to change them and institutional set-ups that help protect liberty.

That said, it is completely open to Hurd to offer us a theory of political liberty that completely divorces itself from any need for state officials or the larger community to value liberty. Hurd can put forward any sort of ‘ought’ claim she wishes. It just strikes me that at some point such ‘ought’ theories become unreal and somewhat ethereal. So my point is simply this. It is no great criticism to say that the Humean moral sceptic ultimately (as an ‘is’ matter of fact) leaves ‘liberty hostage to the value that others place on it’.⁶⁸ On the ‘is’ level the same is exactly true of the Hurdian deontologist.

The most that Hurd can say is that her ‘oughts’ — the ones wholly divorced from the external, causal ‘is’ world of fact and of the actual values of state officials and the larger community — are more moving or uplifting or paint a better picture of the human condition. But even that is debatable.

⁶⁷ Jeremy Bentham, ‘Anarchical Fallacies’ in *The Works of Jeremy Bentham* (John Bowring, ed, 1843) 501:

In proportion to the want of happiness resulting from the want of rights, a reason exists for wishing that there were such things as rights. But reasons for wishing there were such things as rights, are not rights; a reason for wishing that a certain right were established, is not that right — want is not supply — hunger is not bread.

⁶⁸ Hurd, above n 1, 392. The reader can see that Hurd’s claim (5) is open to the same analysis as claims (1) and (2) above.

And whatever your view of the merits of that debate, it is no ground for leaving the Humean moral sceptic off the map.