BOOK REVIEWS

Objectivity in Ethics and Law, Michael Moore (Ashgate, 2004)

This book is part of a series of Collected Essays in Law. It comprises six articles and chapters published by Moore between 1982 and 2002, three on morality, three on law.

The seminal piece is 'Moral Reality', first published in the *Wisconsin Law Review* in 1982. This asserts Moore's claim that there is such a thing. The second is 'Moral Reality Revisited', from the *Michigan Law Review* in 1992. Is 'moral reality' any more real after 10 years, or even 12 years after that?

Moore begins with an epigraph from Arthur Leff's 1979 *Duke Law Journal* piece 'Unspeakable Ethics, Unnatural Law' which entertainingly sets out the dilemma: faced with the logical conclusion of moral relativism, most of us are prepared to assert a set of 'moral facts'. As Leff playfully responds when questioned by the moral skeptic whence these come, 'God help us'. Moore's mission is to get there without God, as the third essay, 'Good Without God', indicates.

His method in the first essay is to attack the notional skeptic. I find this less convincing than when he is building his own case. It is all too easy to manipulate these supposed opposing arguments to his own ends. It is not enough for Moore to *believe* that one is right, one must be *certain* – though he later concedes that even a moral realist cannot be certain. He mounts quite an effective attack on formalism and process values as ultimately value-neutral. However, he also rejects 'conventional morals' – the beliefs of the majority of the community. For Moore, there is a higher truth. He goes on to reject utilitarianism. He suggests that moral skeptics cannot articulate a theory of retribution in punishment yet he does not show that the US Supreme Court majority in *Gregg v Georgia* did not share society's 'moral outrage' justifying the death penalty.

He opts for a Lockean approach to property rights, but this can only be an assertion. He seems on firmer ground when looking at tort: it is hard to be convinced of a pure utilitarian justification for tort law. But even here, the law seeks only to impose a duty that is 'reasonable'. He also asserts a right to privacy and is dissatisfied with one based merely on what the community considers reasonable.

Moore proceeds to attack eight different types of moral skepticism. In the first of these, I think he reveals the negation of his proposition. Values are ultimately based on irrational preferences. Much argument can be built on these preferences, but that is all they are. To get beyond them is a futile act of assertion. He tries to ridicule them by comparing preference for watermelon and concentration camps, but that does not prove that he is right. It simply shows that the truth may be unpalatable.

In the second essay, 'Moral Reality Revisited', Moore picks up the cudgels ten years on, motivated in part by the Clarence Thomas confirmation hearings and the controversy over Thomas' profession of natural law. This requires some unpacking of what can be meant by 'natural law'. Naturally, there are several possible meanings but Moore is happy to make the term equate to his version of moral realism. For him, natural law also comprises the relationship between morality and law, building a bridge to the second part of the book, on law.

This second essay also gives him the opportunity to build a positive thesis for moral realism which as he says (p 102) was largely implicit in the first. He first seeks to co-opt 'realism' as used in other fields to his own cause. This assumes that which he has to prove. He then surveys the meta-ethical debate of the 20th century, culminating in the 'cacophony' of recent times. It does indeed seem to be a dialogue of the deaf. Moore stresses that here he is concerned with meta-ethics, the nature of ethical discourse, as distinct from substantive ethics which actually decide the rightness of actions.

He then explains 'Metaphysical Realism', the larger school within which his moral realism sits. Once again he seems to slide between the physical (eg electrons, p 108) and the metaphysical (eg moral qualities). Again, he would rather taxonomise his opponents than get on with proving his argument. Turning to his own side, he notes that realists are divided on whether metaphysical qualities can have 'mind-independence' – ie exist anywhere but inside the mind. The cat is on or off the mat regardless of what we think.

Moore then further dissects his opponents, ending with a generous summary of their views of his work (p 126). I am amused by his description of Rorty, Fish and Dworkin as 'not on the side of the angels'. Indeed not: they are not concerned with the number of angels that can dance on the end of a pin!

The author appears to make a good point when he argues that anti-realism makes us infallible: if there is no wrong, we can never be wrong! However, we could still see having been wrong as having changed our minds. He goes to great pains to rebut the argument that whether morals are real or not makes no difference. This is quite convincing, but makes no difference to whether he is right about their existence.

Moore then reveals a surprising modesty about the realist position – since realists might always be wrong, they should hold their beliefs modestly. This is an improvement on the infallibility I had thought him to be claiming, but it still does not show that he is right. It seems that if you believe there is a truth out there to be found, you are excused from being wrong as long as you change your mind when you learn the truth. This still seems to leave the considerable problem of how you find the truth and recognise it when you see it.

Turning to moral dilemmas, Moore aligns himself with Kant – that 'a conflict of duties and obligations is inconceivable' (p 139) – but somehow extracts from this

that an experience of apparent moral dilemma is 'not inconsistent' with moral realism. It must be that the dilemma is only apparent, not real.

He deals effectively with pure conventionalism as not providing answers to novel situations, but I think this conventionalism is a straw man. Conventions are built through a collection of individual moral judgments. A sharer in conventional morality would prefer to say 'I agree with the majority because they are right' rather than 'I agree they are right because they are the majority'. Conventionalism does provide a way to take a moral position without exercising moral judgment but it depends on moral judgment in order to exist at all. The catch is that for morality to work, it requires a moral community, so there must be some mutual reinforcement between moral judgment and convention. However, there must also be the possibility of change – when enough people change their minds, the convention changes.

Turning to US constitutional interpretation, Moore contrasts the anti-realist positions that interpretation requires either conventional morality or mere individual will with the realist position that it requires articulation of actual previously existing rights. I would take issue with his narrowing of the anti-realist position: the exercise of individual will by judges is not arbitrary but is attempting to make a moral judgment – what is right in the circumstances. It may be 'wrong' because we do not agree with it or because it is not convincing on its own terms (eg, the Australian High Court's decision that upholding 'free speech' meant defending the ability of those who could afford it to buy advertising time in broadcast media). Moore would argue that it can be wrong because there is definitely a 'right'.

Moore puts forward an interesting argument for why judges should be moral realists: if they come to believe that they are just exercising their own or society's will, they might shrink from thinking through difficult moral questions. I think, on the contrary, that judges should be aware that they are exercising their own will and should do so very carefully. This should not make them shrink from their work.

Moore seeks to answer those who suggest that his realism is no use if the answers cannot be known by arguing that the answers become known through the realist's moral beliefs (p 160). This appears to be a form of divine inspiration though, as we shall discover later, there need not be a God. It also has the flavour of believing in fairies, which comes with the warning that every time someone says they do not, a fairy drops dead. Moore insists that judges must believe there is a right answer in order to be motivated to search for it. This seems to me an invitation to the elaborate charade that was common law before the judges admitted that, yes, they do sometimes make up the law. We thus have judges as charismatic preachers, a very Middle-American confluence of church and state. This also fits with interpretation of the US Constitution as interpretation of holy writ.

However, the next chapter is entitled 'Good without God', a chapter from Robert George's collection *Natural Law, Liberalism and Morality* (OUP, 1995). In this, Moore demonstrates that his theory of moral realism does not depend on the existence of a God.

I find it inconsistent that Moore attempts to recruit scientific rationality to his cause then attacks his opponents on the basis that their arguments *might* be applied to scientific analysis. None of his opponents actually does this. It is Moore who makes the specious analogy between moral and scientific reasoning. He does at least make a connection of the moral to the natural world. It is just not a connection I find convincing.

The second half of the book applies the theory of moral realism to law. In 'Law as Justice', first published in 2001, Moore argues the relationship between morality and law – no legality without morality. Legal obligation is a species of moral obligation.

He is convincing on the existence of law separate from the utterances of judges. He is also convincing on the idea of the spirit of the law containing values. His argument for a method of statutory interpretation which includes literal meaning, purpose, and balancing with other values is in accordance with natural law principles but can also be defended on other grounds.

Problems arise as to why we should obey the law. Moore argues for this because law expresses moral obligations but there are functional reasons too, apart from the avoidance of punishment. These apply strongly to oppose Moore's argument that we should only obey the law when it is morally right because only then is it truly law. We can allow judges to try to balance statute, precedent and policy. Allowing the general public to do so seems dangerous.

Moore joins Dworkin in arguing that the law is backed by principles which are available to decide cases for which there is no precedent. He goes further than Dworkin in arguing that these principles are actually law. This does not seem all that far from a 'deep positivist' (Moore's term) argument that we can extract a legal answer from moral principles. The crucial difference is whether they need to be transformed into law or whether, as Moore would have it, they are law already.

The fifth essay is 'The Plain Truth About Legal Truth', first published in the *Harvard Journal of Law & Public Policy* in 2003. Starting with the question 'What is truth?', Moore stresses that before it can be answered, we must first understand the question. He puts aside normative issues, the form of the utterance, and existentialism to concentrate on mind-independence. He acknowledges that the response to these issues could be 'oh yeah?' and 'so what?' and proceeds to address the second first. If you care about the truth at all, you do have to care about this debate. Either there is no truth, there is an absolute truth, or there is only truth as constructed by the mind. Drawing on his moral philosophy, Moore argues that there is indeed a moral truth, and therefore a legal truth. He goes on to show how hard it is to be truly skeptical about this. He

argues that the 'Legal Realists' and Critical Legal Studies movements were true skeptics but that 'Legal Realists' were misnamed because they did not believe law was real at all. This contrasts with his 'moral realism' as outlined above. He then proceeds to dismiss their five bases for skepticism, though not entirely convincingly.

Moore isolates the issues of ontology, epistemology and linguistics. Ontology is perhaps the most difficult for him as legal realities are as elusive as moral ones. He skips on to epistemology where he calls for a lowering of the standard of proof, dealing with ontology more thoroughly in the final essay. He tries to back constructivists into the corner of only believing what is in their own minds, but I don't think he gets them there. As he concludes, if he is correct about the nature of truth then he has discovered something about truth, but if not he has constructed a fairytale.

The final essay is 'Legal Reality: A Naturalist Approach to Legal Ontology (*Law & Philosophy* (2002)). He begins by stressing the modesty of his claims. He is not going to attempt victory by knockout but rather attempt a points victory.* We must abandon the hope of certainty. We will also not consider law as such but rather some specific aspects of the US legal system.

By the conclusion, Moore has switched from boxing to mountain climbing. In the context, it is worth enquiring whether, unlike the horde of theorists with whom he enthusiastically trades punches throughout the book, the mountain he is seeking to climb is actually there. If not, he may have nowhere to go but at least he cannot fall very far either.

He returns to the case of *Kirby v United States* discussed in Essay 4, a classic case of conflict between federal and state law in which common sense prevailed by application of the spirit of the law rather than the letter. He then asks us to make three assumptions. Of these, the hardest to make is that the rule of law existed before the court declared it. This is the mountain Moore has to climb. He prefers to assume that it is there and have us climb it with him.

He is persuasive that correct (or should I say good) statutory interpretation requires the weighing of a variety of factors but that there is no conclusive order and weight for these. He also returns to *Cappier* discussed in Essay 4, a case on the possible extension of tortious duty of care. This raises for common law the issue of whether there was correct law out there waiting to be found or whether it was only law when decided. Today's public would probably call for a different result although the recent turn against remedies for personal injury raises some doubt about this. But as with statute, a decision to change the rule depends on the weighing of a number of factors of no predetermined weight.

He then proceeds to address five objections to the existence of law. One is refusing to even consider the question. A second is the denial of the existence of law even though our use of language suggests that we believe it exists. There are

* It is perhaps presumptuous to expect a student of jurisprudence to be familiar with boxing, but the similarities are instructive!

several varieties of this. A third is skeptical reductionism such as the Legal Realists' description of law as the prediction of what judges will decide. As Moore and others have pointed out, this is not of any assistance to the judge nor to the advocate before him or her. What is it that advocates and judges are arguing and deciding? Then there is relativism/conventionalism. I think Moore dismisses this too quickly, for the reason I outlined above. Conventionalism does not rule out changes in law or morals, but it does mean that they only become law or right when the majority has been convinced.

Then there are unhappy skeptics who want it to be true but do not think it is. As Moore points out, this raises problems for legal practice and it seems that many such skeptics are willing to suspend their disbelief and just get on with it. This seems analogous to reading and writing fiction. We know that in law we are doing this some of the time but perhaps it is all the time. That is not Moore's answer. He insists on reality.

In aid of this, he explores some possibilities – dualistic realisms go close to the fiction idea but give it some form of reality. As Moore outlines, these are hard to accept. Naturalist realisms are more to his taste and come in several varieties. Of these, his favourite is supervenience naturalism, as explored in the morals essays.

Moore has produced an impressive array of work, as evidenced by these essays and the comprehensive bibliography of his work included in the book. He is well versed in a dazzling number of disciplines from law and philosophy to psychology, linguistics and natural sciences. He spends a lot of time refuting other theorists and his critics and just when you think you have him pinned down, he is elusive. It is a difficult and complex claim he is making and he did not persuade me that it is true. The collection does nevertheless give a good picture of a major strand of his work within a broad interdisciplinary framework.

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Anti-Discrimination Law, Christopher McCrudden (ed) (Ashgate, 2nd ed, 2004)

This volume appears thirteen years after the publication of a volume of the same name in the same series, also edited and with an introduction by Professor McCrudden of Oxford University. The aim of the series then was 'to provide important research materials in an accessible form' (McCrudden (ed), *Anti-Discrimination Law* (1991) p ix). In the 2004 book, series editor Professor Tom Campbell comments that '[t]he rapid growth of theoretically interesting scholarly work in law has created a demand for a second series which includes more recent publications of note and earlier essays to which renewed attention is being given' (p ix).

Each volume consists of twelve or thirteen influential law review articles (called 'essays') in anti-discrimination law and theory reproduced with their original layout and pagination in order to facilitate research. While this approach was valuable in 1991, particularly for those whose libraries may not have had access to all the journals from which the essays were sourced, it is more difficult to see a role for such a collection in 2004 when electronic access to law materials on the internet is pervasive. The book may still be important for readers who have limited access to an electronic law library, and is useful in providing an overview of contemporary scholarship on the theoretical underpinnings of anti-discrimination law.

What sets these collections apart is the selection of essays and the very useful introductions of the editor. The 1991 volume included sections containing essays on Process versus Results Approaches, Liberal Perspectives, Left Perspectives, Feminist Perspectives, and Economic and Market-based Perspectives. While it would be impossible to cover any of these perspectives definitively through the choice of any two or three law review articles, those selected were excellent examples of reasoning on the topics they covered. Ten were from American law reviews and two from English journals, reflecting the origins and level of activity in anti-discrimination law in the United States. McCrudden's 17 page introduction not only introduced the selected essays but located them and many other articles in the context of the development of anti-discrimination law and the multitude of issues and problems it raises, both practical and theoretical.

In the 2004 volume, the emphasis has changed, reflecting the change in legal and intellectual debate on anti-discrimination law. In the search for better explanations of the law's rationale, and therefore its justifiable legal scope and effect, the focus of this volume is on the underlying theoretical rationales for anti-discrimination law, and the four sections reflect four themes: 'libertarian critics of anti-discrimination law, and responses to that criticism; theories based on the argument that anti-discrimination law, in part or in whole, should be seen as founded on the ideal of human dignity; theories justifying anti-discrimination law on grounds of economic distributive justice; and theories based on the idea that anti-discrimination law can best be seen from the perspective of protecting and

enhancing group and individual identities' (p xii). Twelve of the thirteen essays appearing here are from American law reviews, with one Canadian essay selected, and they were published from 1989 to 2003. Overall they introduce the reader to the complexity of debates occurring in this dynamic area of law.

While these essays focus on one of the most important issues underlying the law, namely its justification and philosophical basis – or in Larry Alexander's words from the first essay 'What Makes Wrongful Discrimination Wrong?' – many other important areas are excluded by this focus. There is little in this volume on the struggle over the definition and scope of 'disparate impact', or indirect, discrimination, or the significance and legitimacy of affirmative action requirements in moving towards a model of equality that is more substantive and less formal. Nor is there any consideration of the current scope of the problems of enforceability in anti-discrimination law – in terms of the ability to prove a case, including causation and the evidentiary means of proving disparate impact or indirect discrimination. Nor is there any article on the contribution over the last thirteen years of critical legal studies, feminist legal thought, disability theory or queer theory to understandings of the law, although the collection does include some articles written from feminist (Fudge, Schultz, Crenshaw) and critical (Crenshaw) perspectives. These omissions illustrate the limitations of the collection's approach: by reproducing in full relatively few lengthy articles, only limited aspects can be included.

What of the theoretical aim of the collection – to examine the coherence of the underlying philosophies of anti-discrimination law? This is a fundamental issue and its clarification would contribute to resolving many other problems in the law, although a simple one-dimensional answer is unlikely. The essays selected here contribute to deepening our understanding of the complexities involved in an area of law which appeared deceptively simple when first adopted. To mention just a few articles of interest, Donohue ('Advocacy Versus Analysis in Assessing Employment Discrimination Law' (1992) p 131) refutes Epstein's libertarian argument that African Americans may be better off *without* employment discrimination laws given the transaction costs imposed by the laws and the dependence of black economic welfare on the general level of economic welfare of the country. Donohue identifies the lack of empirical knowledge on discrimination in employment and the consequent lack of a base of data with which to evaluate arguments about the costs and benefits of anti-discrimination law arguing that, given its symbolic importance, any argument for its repeal must be justified by such data. Denise Reaume's 'Discrimination and Dignity' (2003) considers case law of the Canadian Supreme Court which she sees as outlining a concept of equality based on valuing human dignity. Reaume reviews the cases and the concept of dignity to see if it can fill the empty space that many writers have seen in equality, whether formal or substantive. She identifies three emerging forms of claims to dignity: legislation based on prejudice, stereotyping and the denial of access to 'benefits or opportunities that ... constitute part of the minimum conditions for a life of dignity' (p 274). Interestingly such an approach is able to link anti-discrimination law more directly with human rights analyses

which emphasise each individual's humanity and entitlement to enjoyment of fundamental human rights.

In relation to the redistributive justifications for anti-discrimination law, Strauss ('The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards' (1991)) advocates an approach which focuses on monitoring the numbers of minority employees in the workforce, rather than on proof of individual incidents or acts of discrimination. He argues that the aim of the law is to ensure the redistribution of opportunities and their benefits to previously excluded groups, and that a systemic, structural method would be more efficient in achieving this given the costly and inefficient nature of attempts to identify discriminatory incidents. Fudge, in 'The Paradoxes of Pay Equity: Reflections on the Law and the Market in *Bell Canada and the Public Service Alliance of Canada*' (2000), discusses the multiple levels of analysis which must be used in assessing the effects of anti-discrimination laws using Canadian pay equity law as an example. She concludes that although many individual women received significant benefits through the law, discursive shifts and management decisions effectively reducing pay undermined these gains in other locations, so that assessing overall 'success' is problematic.

In relation to the role of identity in anti-discrimination law, Crenshaw's important 1991 article, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', discussed the multiple aspects of individual identity and the inability of law to deal specifically with the experience of black women. Thus, none of the 'isms' can stand alone: those concerned with the position of non-white people must also be concerned with the experience of women within their groups, while feminists must also be concerned about the experience of women marginalised by race, sexuality or disability. Choudry's essay, 'Distribution vs Recognition: The Case of Anti-Discrimination Laws' (2001), identifies the problems of using social characteristics such as race and sex as proxies to identify the disadvantage and exclusion of some people with those attributes. He identifies the risks of essentialising and reinforcing the categories used, and also the fact that, although this approach may not be ideal, no better alternative seems to be available.

It is reassuring to be reminded that anti-discrimination law scholarship is so lively and sophisticated overseas. Australian scholarship in anti-discrimination law continues to develop, but remains a trickle rather than a flow. However, government commitment to anti-discrimination law in Australia is fading. Proposals by the recently re-elected federal government to roll back the *Sex Discrimination Act 1984* (Cth) in order to allow scholarships for education degrees to be provided to men only and to allow states to preclude single women from access to assisted reproductive technologies are now likely to be adopted, following the rolling back of the *Racial Discrimination Act 1975* (Cth) by the *Native Title Amendment Act 1998* (Cth) to limit the native title rights of indigenous people in relation to resource exploitation. The government does not seem to have considered whether the 'male teachers' policy will successfully

attract men to teaching in the face of the profession's relatively lower wages and feminised status. Instead this area has become a fertile source for a government seeking weapons to reinforce its political support through division and exclusion. The government's reasoning is that since men are underrepresented in teaching, they are thereby disadvantaged and should be assisted to enter it. All this while refusing to take seriously equal employment opportunity and equal pay for women in the general workforce: Australia's Equal Opportunity for Women in the Workforce Agency ('EOWA') has a total staff of 27 and an annual budget of $3.5 million[1] on which to encourage change in the whole country, given the absence of any regulatory teeth in the Act, leaving EEO as essentially a voluntary undertaking in the private sector.

The book's emphasis on the free-market or law and economics debates on anti-discrimination law, beginning with the debate on whether the free market encourages or negates discrimination, suggests that it is aimed at the US market – as this issue does not feature as prominently in any other jurisdiction with extensive equality laws, such as Canada, the European Union, the UK or Australia, all of which currently accept more regulatory intervention in the market. But as Donohue points out, in this area of law, Congress has not only legislated initially, but has further legislated to strengthen anti-discrimination law when narrow judicial interpretations limited it (p 162). However, how long this favourable attitude will prevail in the current climate is not clear.

Overall this book brings together some very interesting articles addressing the fundamental justification for anti-discrimination law from a number of different (not necessarily exclusive) perspectives.

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[1] EOWA, Annual Report 2003-2004, Appendix 1, Appendix 8.