

Foreword: The Moral Obligation to be Intelligent

John Erskine, founder of Columbia University's core curriculum in the 1920s, wrote an essay with the title I admiringly filch¹ in which he poses this question:

If a wise man would ask, what are the modern virtues? and should answer his own question . . . what virtues would he name? . . . When the wise man brings his list of our genuine admirations, will intelligence be one of them? We might seem to be well within the old ideal of modesty if we claimed the virtue of intelligence. But before we claim the virtue, are we convinced that it is a virtue?

Throughout the essay, Erskine bemoans the English and American lack of faith in intelligence as a virtue, contrasting it with the special place accorded instead to goodness as a virtue. Although he sees some bucking of this trend (for example, "we do not insist that the more saintly of two surgeons shall operate on us for appendicitis"), Erskine's thesis remains that intelligence is not given its due in Anglo-Saxon tradition.

To be clear, neither Erskine nor I use the term intelligence to mean a general mental faculty – tapped by how fast I can type (I can type very fast) or whip through multiple choice questions (we did not do multiple choice in India) – that nineteenth- and many twentieth-century psychologists called intelligence. Instead, what I mean, with the benefit of the writings of Robert Sternberg and Howard Gardner, and what Erskine meant even without, is a broad set of competencies, skills, and knowledge.

¹ The same title was used for a collection of Lionel Trilling's essays, edited by Leon Wieseltier (Farrar, Strauss, & Giroux, 2000).

In the introduction to a collection entitled *American Character and Other Essays*, Erskine defends criticism leveled against the central thesis of the essay in question: "I still feel that the essay says clearly what I meant – that to be as intelligent as we can is a moral obligation – that intelligence is one of the talents for the use of which we shall be called to account – *that if we haven't exhausted every opportunity to know whether what we are doing is right, it will be no excuse for us to say that we meant well*" (emphasis mine).

Speaking to Phi Beta Kappa at Amherst College, he said that "to know is to achieve virtue . . . Between this rising host that follow intelligence [speaking of immigrants], and the old camp that put their trust in a stout heart, a firm will, and a strong hand, the fight is on. Our college men will be in the thick of it. If they do not take sides, they will at least be battered in the scuffle. At this moment they are readily divided into those who wish to be men – whatever that means – and those who wish to be intelligent men, and those who, unconscious of blasphemy or humor, prefer not to be intelligent, but to do the will of God."

Perhaps more so than in Erskine's time, today we recognize the importance of being intelligent rather than merely earnest. But I hazard that even today we still separate intelligence from goodness of heart; we not only assume the two to be divorced, we continue to place value on the latter. We expect our judges and jurors, lawyers and prosecutors, and other guardians of the law to strive to be good, to be as pure of heart as humanly possible. We do not set the same standards of intelligence and competence, asking as intently: What do they know, and knowing what they know, are they fit to judge?

As a science of the mind has grown, any simple separation between intelligence and goodness has become untenable, as has the privileging of either. More so than ever, to be good requires intelligence about matters that our predecessors, even those here just yesterday, not only did not know but could not know. So the standards of what it means for *us* to be intelligent are indeed higher, and one reason they are legitimately higher is the vibrant presence of the mind and behavioral sciences. At every turn, the data from these sciences teach us something about ourselves so new, or challenge a view of ourselves that is so appealing (and so wrong), that it is not possible – unless one is despairingly lacking in curiosity (if not goodness itself!) – to ignore the evidence.

If a proper offering of justice is a public purpose then a justice system that is not constantly striving and evolving in its use of new knowledge is in trouble. To avoid it, what can we know, to start with?

Modern psychology provides at least two clear messages: Our minds and behavior are fallible; our minds and behavior are malleable.

First the bad news: There are known and established limits on the human ability to introspect and know, limits on the ability to compute and assess, limits placed on us by the situations of our existence, by the experiences we have, by the fact that our brains and minds evolved in the ways in which they did. I have argued that the bounds on rationality, the very ones that keep us from being smart also keep us from being good. And to avoid the problem of having to define what is good, I have used as the gold standard each person's own conscious report of their preferences, beliefs, and values. If obvious deviance from our own statements of what is good and virtuous is brought to light, we are faced with a question that should be a primary motivator in the law: What are we willing to do, given our drifting from our own goals of fair and just treatment?

A striking example of "we are what we see" is Craig Anderson's review of the effects of viewing aggression on producing aggression. The length and breadth of that work is a persuasive sampling of our bounded rationality – that we mimic even unwanted aspects of our environment because of the laws of learning, because the stuff is out there. We mimic it whether we intend to or not. Why is it that science has put all the nails in the coffin of this problem but nobody is willing to perform the last rites? Most likely, it is because the message from the evidence on the effects of viewing aggression runs up against the First Amendment. But even somebody like myself, a First Amendment fanatic, believes that nowhere is there better expertise than among the great legal minds of this country to work out the issues raised by this robust body of science. If hate speech is something we have attempted to tackle alongside the First Amendment, why not this?

From study after study pointing to the bounds on our ability to be who we would like to be, in a thousand different ways, the pillar of twentieth-century social psychology was erected to show that good people can be bad – and just as bad as bad people! If this insight alone could be incorporated into the way the law intuits about humans and their situations, we will have catapulted ourselves into a place radically different than the primitive assumptions that show up in our thinking about the few bad apples in Enron, the bad Americans of Abu Ghraib that we cannot seem to shake off.

The good news comes from observations that we are flexible, sensitive to context and adapting to changing demands. As just one example, Susan Fiske has shown that although social groups dictate how we look at individuals, we see people as individuals rather than as members

of social groups – if knowledge about their groups becomes irrelevant to the task at hand.

We change our behavior – actively, by placing ourselves at tables where the food tastes like nothing we’ve eaten before. First we spit it out, then we become addicted. Likewise, first we might shy away or fight, but if the stakes change we are equally naturally able to cooperate and help. We also change our minds, or rather our minds are changed. Ellsworth and Gross’s analysis of radical shifts in attitude toward capital punishment is worth scrutiny not just because of what it says about that blemish but also for what it says about the very concept of attitude. So this remarkable flexibility is also a part of what we have discovered about what it means to be human. Attitudes, preferences, beliefs, values and the behaviors that reflect them are not fixed even though they may appear that way, perhaps because the world they reflect is relatively stable.

In both – understanding the limits and the capacities of humans in the context of social relationships, social groups, and social institutions – lies the stuff of what the law must be intelligent about. To be intelligent means many things of course. For the present purpose, I will underscore that intelligence is knowing how to weigh the evidence that flies in the face of steadfast assumptions. It means to know when causality can be inferred and not, to know when the weight of correlational evidence must be taken seriously, to know that a replication is worth much more than a single demonstration, to know that when new methods divulge strange truths about us and our brethren, it may be the theory that has to go. The moral obligation to be intelligent requires that we keep abreast of discoveries that require old views to be bagged and put out on the curb for recycling – every week.

Eugene Borgida and Susan Fiske have breathed life into Erskine’s idea that we are morally obliged to be intelligent. They understand that although this requirement should be everywhere, it is so much more urgent where decisions carry the authority of the law, where decisions wield justice, where the difference between suffering and happiness lies in the power given to a few and chosen to defend the many and less chosen.

As my own conversations with judges and lawyers have grown, I have been filled with admiration for their ability to understand large and obscure areas of knowledge required for every case before them, only to learn entirely new domains required by the next one. But let me push here a bit. To understand, for example, the technicalities of the Challenger disaster in order to assign legal responsibility, is one thing. It is quite another to develop a feeling for the tectonic movements of

a science so as to be ready to anticipate and cope with the big breaks when they occur. It is this latter form of education that Borgida and Fiske’s volume offers.

The research presented in this book shows what the mind and behavioral sciences have discovered about perception, memory, judgment, and decision-making, about discrimination generally, and more specifically about racial profiling, harassment, and capital punishment. But these papers do more than tackle a set of topics. As a totality they also reveal a way of knowing, a unique type of expertise that has developed iteratively about human nature and social circumstances that stands ready to be absorbed into the bones of the law.

Treat this book as a sanctuary in which to allow the mind to change its view of itself. Reading it, I was struck by the strength of the experimental evidence in some cases, the strength of the integration and argument in others, and above all the singular message it offers up: Common sense may be plenty common, but it is not always sense.

The building blocks of concepts that the law fundamentally deals with – mental states and social structures – are the topics of this volume, and in them lies much of what we are morally obliged to be intelligent about.

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