Majestic Law and the Subjective Stop

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Justice John Paul Stevens subscribed to "a majestic conception" of the Constitution. This Article articulates and defends that vision. Majestic law and legal reasoning characteristically involve frank moral reasoning, such as one finds in the Eighth Amendment's "evolving standards of decency" test for proportionate punishment, or in Due Process formulations such as an appeal to "immutable principles of justice, which inhere in the very idea of free government."

The principal antagonist to majestic law is the belief that moral values, norms, and judgments are "subjective." That is, these moral commitments are thought to be irrational, arbitrary, prejudicial, mere intuitions, emotional reactions, personal instead of public, or supernatural instead of empirical. This view of moral commitments bars them from use in legal reasoning. In other words, it imposes a "subjective stop."

The subjective stop is premised on a mistake. Moral values, norms, and judgments are indeed subjective. It does not follow, however, that these moral commitments are irrational, arbitrary, or in any way unfit for legal reasoning.

The nature and status of moral commitments is the subject matter of metaethics, and the subjectivity of moral commitments is a topic of controversy in metaethics. The subjective stop rests on a primitive emotivism: the view that morality is a set of visceral "boo" or "hooray" exclamations. This view of morality, however, has no defenders in contemporary metaethics. This Article relies on two alternative subjectivist metaethical theories to defend majestic law and condemn the subjective stop. Allan Gibbard's norm expressivism explains that, while moral commitments are expressions of emotion, we adjudicate our moral disagreements rationally. A moral norm or judgment is wrong if it is rational only under a system of norms that we cannot rationally accept. Simon Blackburn's quasi-realism starts from the premise that morality is

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subjective in the most fundamental sense: it is something that human beings project onto the world. Blackburn argues that this changes nothing in what we think or how we act morally. The world onto which we project value imposes limitations on morality, and projection is subject to its own logic, which imposes further constraints.

The upshot of each of these theories is a view of moral commitments as subjective, yet rational and either true or false. Under these viable subjectivist theories of metaethics, we have no need to reduce moral commitments to descriptive terms before we allow them to operate in legal reasoning. Justice Scalia's insistence that the "evolving standards of decency" test should give way to an inquiry into historical and contemporary practices in punishment rested on a subjective stop—and was mistaken because of it. We can determine what cruel punishment is, and to frame that question in terms of decency is a meaningful and enlightening move. Due Process does not call only for a historical inquiry into past and currently prevailing legal processes in the United States; it also calls for rational inquiry into the truth about "a fair and enlightened system of justice," or "the concept of ordered liberty." To say a handgun is not "critical to leading a life of autonomy, dignity, or political equality" might or might not be true, but it is not enough to say, with Justice Scalia, "Who says?" To say this is to impose a full subjective stop. More importantly, it is, as Justice Stevens argued, an abdication of judicial responsibility that has led to the loss of majestic law.

The Court seems to assume that the Fourth Amendment—and particularly the exclusionary rule, which effectuates the Amendment's commands—has the limited purpose of deterring police misconduct. Both the constitutional text and the history of its adoption and interpretation identify a more majestic conception.[1]

The concept of due process which permits the invention and use of prosecutorial devices not included in the Constitution makes Due Process reflect the subjective or even whimsical notions of a majority of this Court as from time to time constituted. Due Process under the prevailing doctrine is what the judges say it is; and it differs from judge to judge, from court to court. This notion of Due Process makes it a tool of the activists who respond to their own visceral reactions in deciding what is fair, decent, or reasonable.[2]

I. INTRODUCTION

Justice Stevens's invocation of a "majestic conception" of the Fourth Amendment is unpersuasive on its face. The word "majestic" suggests an inspiring vision of the Constitution, and who could object? This kind of thing is not unheard of in Supreme Court opinions. Even so, the pragmatic author of an opinion that takes the absence of deterrence to be sufficient reason to suspend the exclusionary rule would hardly grant the majesty of the Constitution a substantive role in constitutional interpretation. Consider also an earlier instance of the same kind of rhetoric, courtesy of Justice Brennan:

> By remaining within its redoubt of empiricism and by basing the rule solely on the deterrence rationale, the Court has robbed the rule of legitimacy. A doctrine that is explained as

[1] Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting). Justice Ginsburg echoed Stevens's complaint. "Others have described 'a more majestic conception' of the Fourth Amendment and its adjunct, the exclusionary rule. Protective of the fundamental 'right of the people to be secure in their persons, houses, papers, and effects,' the Amendment 'is a constraint on the power of the sovereign, not merely on some of its agents.' I share that vision of the Amendment." Herring v. United States, 555 U.S. 135, 151–52 (2009) (Ginsburg, J., dissenting) (citations omitted).

[2] Hannah v. Larche, 363 U.S. 420, 505 (1960) (Douglas, J., dissenting).

> if it were an empirical proposition but for which there is only limited empirical support is both inherently unstable and an easy mark for critics.[3]

A pragmatic judge ensconced in a "redoubt of empiricism" would not mind the metaphor; it might even be appealing. But it seems an equally safe bet that she would set a strict boundary between constitutional governance by deterrence on one side and literary merit on the other. And the problem is not only "redoubt." The idea that anything other than empiricism could determine law died more than a century ago.[4] So the more we regard these phrases as rhetorical flourishes, the better. There is nothing wrong with a little style in a judicial opinion, but no one expects literary style to play a role in constitutional interpretation or governance. If the majestic Constitution and the redoubt of empiricism are literary devices, then there really is no reason to take them seriously at all.

The problem is that, in context, Justice Stevens seems to regard "majestic" as a genuine constitutional virtue, and Justice Brennan seems to believe that "empiricism" really is a constitutional vice.

Whether Justice Stevens is right or wrong, it is not difficult to see what majestic law is supposed to be. In *United States v. Leon*—the decision that prompted Justice Brennan's criticism and from which Justice Stevens also dissented—the Court ignored the moral foundations of the Fourth Amendment: the dignity inherent in privacy;[5] the autonomy inherent in property;[6] and the integrity of the judiciary itself.[7] Unlike the *Leon* decision's austere, exclusive concern with the deterrent effects of the exclusionary rule, majestic law recognizes moral values such as dignity, autonomy, and integrity—and also justice, fairness, decency, freedom of conscience, and freedom from cruelty—on their own terms. That is, it allows the intrinsic features of these

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[3] United States v. Leon, 468 U.S. 897, 943 (1984) (Brennan, J., dissenting).

[4] *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897) ("The fallacy to which I refer is the notion that the only force at work in the development of the law is logic.").

[5] *See* Kyllo v. United States, 533 U.S. 27, 37 (2001) ("In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes.").

[6] *See* Boyd v. United States, 116 U.S. 616, 630 (1886) ("It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . .").

[7] *See* Mapp v. Ohio, 367 U.S. 643, 660 (1961) ("Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.").

values—their etymology, history, conception, and extension—a determining role in legal reasoning.

As Justice Brennan suggests, doing this seems to require a justification beyond that which empiricism can provide. It is difficult to see, however, what such a justification could be—a difficulty usually expressed by saying that moral values are not "objective," but are, instead, "subjective" in the sense of their being irrational, arbitrary, intuitive, emotional, prejudicial, personal instead of public, or supernatural instead of empirical. Feelings are not facts, as the saying goes. Or, as Justice Douglas put it, a legal conclusion must be wrong if it is based on "visceral reactions" or "the subjective or even whimsical notions of a majority of this Court as from time to time constituted."[8] So however much we might wish we could use robust moral values and norms in constitutional adjudication, we must refrain from doing so because they simply do not exist or do not exist in the right way. Majestic law is usually unpersuasive, apparently illegitimate, and in all events unattainable because it is subject to this necessary limitation.

This Article rejects this limitation and argues that we can give our moral commitments to decency, fairness, integrity, and similar values a dispositive role in legal reasoning, including constitutional adjudication. This is neither irrational nor unwise. These values are not "subjective" in any pejorative sense. They are indeed subjective, but to recognize their subjectivity is not to prioritize the private over the public, to resign ourselves to irreconcilable disagreement, to depart from the realm of fact, or to cede any measure of rationality. We can confidently rely on moral values in legal reasoning because their subjectivity is benign, not malignant. A majestic conception of the Constitution is within our grasp and always has been.

This Article describes the loss of majestic law and the barrier to its reacquisition in terms of a "subjective stop." A subjective stop is an assertion that a moral commitment is impermissible in law and legal reasoning because it is "subjective"—or a "value judgment," "mere opinion," "intuition," "emotional reaction," "personal prejudice," or "personal preference." The word "stop" as it is used here is unusual, but not unheard of. Criminal law scholars will recognize it from their reading of H.L.A. Hart's "Prolegomenon to the Principles of Punishment." When it came to describing legal punishment, Hart rejected a "definitional stop."[9] A definition concerns the meaning of a

[8] Hannah v. Larche, 363 U.S. 420, 505 (1960).

[9] *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 5 (2d ed. 2008) ("The chief importance of listing these sub-standard cases is to prevent the use of what I shall call the 'definitional stop' . . . .").

word, which is a normative enterprise different from—and not necessarily enlightening about—the normative enterprise of legal punishment. To focus on the definitions of "legal" and "punishment" restricts our understanding of the practice of legal punishment itself. In other words, it stops the analysis prematurely. Similarly, it is thought to be enough for me to say, "That's subjective," to establish your belief's irrationality, and so its invalidity in any argument. "Everyone knows" that morality is an emotional reaction or a supernatural prejudice.[10] The assertion that a moral commitment invoked in a legal argument is "subjective" stops legal arguments prematurely; hence, "subjective stop."

To explain and debunk the subjective stop requires an excursion into the field of metaethics—that is, into the study of morality's standing in the world. The subjective stop raises and answers a question about the status of our moral commitments. Are these commitments facts amenable to reason, or are they nothing more than the expression of feelings? The subjective stop assumes the latter. This question is related to a cluster of issues that also fall under the heading of metaethics. Are moral values real things, in the sense that they exist independently of what we think and believe, or is their existence dependent on us—perhaps even on the least rational part of us? Are moral values natural things or are they supernatural—a category not limited to religious beliefs—and beyond the reach of empirical inquiry? Are moral claims meaningful at all, or, even if meaningful, just a strange pretense? On the second, third, and fourth questions, there is no popular consensus, mostly because these questions seldom arise in public matters. On the first, however, there seems to be a common understanding—in law and elsewhere in the public realm—that morality is subjective in a pejorative sense. If this were so, then reliance on moral values, norms, terms, explanations, and judgments in law would be, if not illegitimate, still to be minimized in legal reasoning and adjudication—and avoided if at all possible. This discrediting, avoidance, and minimization of morality in legal reasoning and adjudication is the reason we have lost majestic law. It is not majestic law that should be discredited, avoided, and minimized, however; it is the flawed metaethical theories responsible for its loss.

[10] *See* PETER RAILTON, FACTS, VALUES, AND NORMS: ESSAYS TOWARD A MORALITY OF CONSEQUENCE 3 (2003) ("So common has it become in secular intellectual culture to treat morality as subjective or conventional that most of us now have difficulty imagining what it might be like for there to be facts to which moral judgments answer.").

Part II, following this Introduction, will provide a sense of what is at stake in the conflict between majestic law and the subjective stop. The law of confessions under the Due Process Clauses and the Self-Incrimination Clause has devolved from a commitment to protecting freedom of conscience and the dignity of the person to a grudging application of narrow rules that deprive the government of some evidence in criminal cases. The truth-finding function of investigations and prosecutions has been prioritized over all other values short of a ban on torture, and setting this priority has been facilitated by the subjective stop's denigration of those values.

In Part III, majestic law will be defined, and its principal features will be described. Majestic law permits moral commitments—moral values, norms, terms, explanations, or judgments—to play a substantive role in legal reasoning. A moral commitment has legal authority only if it has been positively enacted by a legislature or high court, formulated to comply with the rule of law, and subjected to institutional constraints such as the separation of powers. These moral commitments, however, need not have been reduced to nonprescriptive terms, such as "revealed preferences" or tallies of various jurisdictions' doctrines. Instead, they appear in unreduced form, so that their intrinsic features play a substantive role in legislation and judicial decisions. In majestic law, moral values such as justice, fairness, integrity, dignity, decency, autonomy, freedom of conscience, moral proportionality, and the condemnation of cruelty operate on their own terms.

The central premise of the subjective stop, which is the subject of Part IV, is the belief that reliance on unreduced moral commitments is fatal to the rationality of law. The principal features of the subjective stop are a hard subjective/objective distinction and a naive reductionism that purports to render subjective values as objective facts that then serve unproblematically in legal reasoning. These arguments come in two varieties. In a full subjective stop argument, the accusation that a value or evaluation is subjective—or a "personal preference," an "emotional reaction," or a "mere opinion"—is deployed as a putative knock-down argument. In a presumptive subjective stop argument, the accusation that a value or evaluation is subjective is intended to impose a presumption that the value or evaluation in question is irrational or arbitrary, and therefore impermissible in legal reasoning unless it can be shown to be otherwise—preferably by reducing the evaluation to a description. "Decency," for example, becomes "a revealed preference for decency."

Both kinds of subjective stop arguments conceal a set of assumptions about the nature of morality that underwrites the argument against the use of moral values, norms, explanations, or judgments in legal reasoning. Part V explains why a moral commitment's being "subjective" is not the fatal defect in legal reasoning that the subjective stop supposes. The familiar "it's all subjective" is a metaethical statement—a statement *about* morality, in contrast to a statement *of* morality, such as "murder is evil." The notion that reliance on unreduced moral commitments *is* fatal to the rationality of law is supported by the emotivism of A.J. Ayer: the position that moral statements are meaningless exclamations on the order of, "Boo theft!" and, "Hooray charity!"[11] Ayer's metaethics has never commanded much support among scholars because it has flaws that Ayer himself acknowledged within a decade of advancing his theory. Why this flawed, failed metaethics took hold in law and the popular mind remains a mystery. It is clear, however, that it is past time for law to move on.

More recent theories recognize that morality is subjective, but reject the idea that morality is therefore irrational or arbitrary. Allan Gibbard's norm expressivism holds that we express emotions in our moral norms and judgments, but that, in doing so, we express support for normative systems under which these individual moral commitments are deemed rational.[12] It might seem that this merely shifts the fatal subjectivity of morality up one level, but Gibbard explains how moral systems are empirically grounded as well as rational, and how this grounding extends to individual moral norms and judgments.[13] Simon Blackburn's "quasi-realism" offers a more radical subjectivist metaethics that starts from David Hume's belief that we project value, including moral value, onto the world.[14] Blackburn explains that Humean projectivism changes nothing in how we morally think, speak, and act.[15] The world onto which we project value does not contain morality, but it does impose constraints on our moral beliefs. Projected value itself has its own logic, and we earn the right to treat morality as "objective" when we defend our moral commitments in terms of coherence and a body of epistemic virtues in moral reasoning. These epistemic virtues are by and large the virtues of sound empirical

[11] *See* ALFRED JULES AYER, LANGUAGE, TRUTH AND LOGIC 107 (2d ed. 1946) (comparing moral judgments to the use of exclamation points).

[12] *See* ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT (1990).

[13] *Id.* at 154–56, 181–82.

[14] *See* SIMON BLACKBURN, SPREADING THE WORD 170–71 (1984).

[15] *Id.* at 211.

inquiry: simplicity, responsiveness to experiment, utility, theoretical elegance, observation, induction, and so on.

Part VI defends majestic law by appealing to these subjectivist metaethical theories. Judges, lawyers, and others engaged in legal reasoning appeal to moral commitments that are founded on subjective responses to events. In majestic law and legal reasoning, they do this without purporting to reduce these moral commitments to descriptive form. For example, we can see that the familiar, very majestic, formulations of Due Process—such as rules that contribute to "a fair and enlightened system of justice" [16] or that reflect "immutable principles of justice, which inhere in the very idea of free government"[17]—can lay claim to moral rationality and moral truth. Majestic Due Process standards reflect complex normative systems under which the moral commitments expressed in these standards, and the decisions relying on them, are rational. They also constitute a coherent system, as law (mostly) is, and they exhibit epistemic virtues, as law does (most of the time).

Finally, many of the examples given in this Article are taken from the case of *McDonald v. City of Chicago*,[18] in which the Supreme Court incorporated the Second Amendment into the Fourteenth Amendment Due Process Clause and applied it to the states. Part VII demonstrates the depth to which Justice Alito's plurality opinion and Justice Scalia's concurrence are anchored by the subjective stop. The analysis presented here permits us to revive the lost Due Process standard of the "civilized legal system," which Chicago's brief attempted but failed to revive.[19] Once this standard is formulated properly, two possibilities arise. We can rebut the objections to the civilization standard of Due Process lodged by Justices Alito and Scalia so that the Second Amendment is not incorporated. Alternatively, we can use the frank moral reasoning that is characteristic of majestic law to explain what is permitted under the incorporated Second Amendment.

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16 Palko v. Connecticut, 302 U.S. 319, 325 (1937).

17 Powell v. Alabama, 287 U.S. 45, 68 (1932) (citing Holden v. Hardy, 169 U.S. 366, 389 (1989)).

18 561 U.S. 742 (2010)

19 *Id.* at 780 ("Municipal respondents' main argument is nothing less than a plea to disregard 50 years of incorporation precedent and return (presumably for this case only) to a bygone era.").

II. THE MAJESTIC LAW OF CONFESSIONS, LOST

Before embarking on the analysis of majestic law and the subjective stop, one should have a sense of what is at stake. In the 1970s and 80s, the law of confessions under the Due Process Clauses and the Self-Incrimination Clause devolved—precipitously, from a historical perspective—from a concern with the dignity of the person and freedom of conscience to an exclusive concern with coercion.[20] It was as if these moral commitments had been abandoned as cognizable values in the law. This is because they had been.

In his classic history of the Fifth Amendment, Leonard Levy found the roots of the Self-Incrimination Clause in the inquisitorial procedures of Britain's ecclesiastical courts and the Star Chamber.[21] The chief abuse was not torture. It was, instead, the use of the oath ex officio. The oath was a promise to tell the truth, and its defenders professed not to understand how this could be objectionable.[22] This response was disingenuous because it ignored essential context for which they were responsible.[23] The oath ex officio was a feature of an inquisition commenced by an ecclesiastical court or royal council; usually upon denunciation by witnesses whom the accused was not allowed to confront; on charges, if any, of which the accused was not informed; and under questioning in private.[24] The accused was questioned by learned judges or councilors, who were able to elicit answers tailored to corroborate the accusations of the anonymous witnesses or to support as yet undetermined charges.[25] The oath ex officio and inquisitorial procedures were used for centuries to root out religious heretics. After Henry VIII brought religion under the control of the Crown, the persecution of heretics merged with the persecution of political dissenters. The oath ex officio was the subject of legislation that alternately approved and abolished it, depending on who was in power, from 1236 to 1641.[26]

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[20] *See* United States v. Washington, 431 U.S. 181, 187 (1977) ("Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions.").

[21] *See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 42 (1986) ("[T]he prerogative courts' employing the oath ex officio, the inquisitional oath, provoked the struggle that eventually led to the creation of the right against self-incrimination.").

[22] *See id.* at 67–68.

[23] *See id*. at 46–47.

[24] *See id.* at 50–51.

[25] *See id.* at 66–67.

[26] *See id*. at 46–82.

The canonical statement of the principles drawn from this history is found in an editor's note by Thomas Leach in the 1787 edition of *Hawkins's Pleas of the Crown*:

> A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction.[27]

The Court has quoted this language many times in Due Process and Self-Incrimination Clause cases. More precisely, it has quoted the last clause of the sentence.[28] The sentence as a whole expressly describes the privilege not to speak as protecting against much more than coercion.[29] It describes protection against inducements as well as threats and against fear no matter how slight. The words "deluded instrument" also do not describe coercion; they describe a person who has been manipulated or deceived. Given the ecclesiastical and political uses of the oath and inquisition, it describes a violation of conscience.

Levy's history points toward another relevant evil: the violation of human dignity. To take the oath ex officio confidently or without appreciating its consequences was to be deluded, to be a fool on a grand scale. Every other option represented a loss of dignity in the form of a

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[27] 2 WILLIAM HAWKINS, PLEAS OF THE CROWN 604 n.2 (Thomas Leach ed., 6th ed. 1787) (citation omitted).

[28] *See, e.g.*, Smith v. Murray, 477 U.S. 527, 551–52 (1986) (Stevens, J., dissenting); Solem v. Stumes, 465 U.S. 638, 656 (1984) (Stevens, J., dissenting); Estelle v. Smith, 451 U.S. 454, 462 (1981).

[29] Significantly, the sentence is quoted in full in *Bram v. United States*, 168 U.S. 532, 547 (1897). *Bram* is considered both a precursor to *Miranda v. Arizona*, 384 U.S. 436 (1966) and an outlier in the law of confessions because coercion was not employed. As one scholar recently noted,

> Since *Bram*, the Supreme Court has stressed the unimportance of its holding, finding that *Bram* "does not state the standard for determining the voluntariness of a confession." Moreover, *Bram* located the right against use of coerced confessions in the Self-Incrimination Clause when today the prohibition on use of coerced testimony fits within the Due Process Clause.

Neal Modi, Note, *Toward an International Right Against Self-Incrimination: Expanding the Fifth Amendment's "Compelled" to Foreign Compulsion*, 103 VA. L. REV. 961, 989 n.121 (2017) (citations omitted). Up to and including the decision in *Miranda*, however, the Court did not see the Self-Incrimination Clause as a bar exclusively to coercion. Dignity was a cognizable value. The *Bram* Court noted, particularly, that he was questioned by an interrogator who "proceeded to take extraordinary liberties with him; he stripped him." 168 U.S. at 539. *Bram* is an outlier only if one assumes that human dignity is an outlier value in the law of confessions.

humbling theft of agency. To take the oath with knowledge of the consequences was to surrender control over self-determination unambiguously. To retain one's integrity by refusing to take the oath was to sentence oneself to imprisonment, banishment, or death. To take the oath and attempt to appease the inquisitor was, for religious dissenters and political dissenters alike, to abandon one's deepest beliefs. To take the oath and lie was to condemn oneself to divine retribution, corporeal retribution, or both. In the context of questioning by superiors of church and state, these were all acts of abasement.

Police interrogations today resemble inquisitorial questioning on an oath ex officio.[30] Interrogators with knowledge of the law question ignorant suspects in private, often upon denunciation by witnesses whom the suspect is not allowed to confront, on charges yet to be determined. They do not administer an oath. Instead, they misrepresent and mislead. They insist that the suspect must tell the truth, with a suggestion that this will resolve matters. They have a free hand in reducing any suspect to "a deluded instrument of his own conviction" by means of lies and tricks, including the false friend; bad-faith spiritual advice; the lie that an alleged accomplice has confessed; and the refusal to grant friends, family, and unrequested counsel access to the suspect without his knowledge.[31] It should not be surprising, then, that the United States Supreme Court has not quoted *Hawkins's Pleas of the Crown* in a majority opinion since 1981, in *Estelle v. Smith*.[32] This is largely because the historical values that Levy and Leach describe—a preference for adversarial instead of inquisitorial procedures and the protection of conscience and dignity—are much broader than the sole purpose assigned to the right to Due Process and the Self-Incrimination Clause today: protection against coercion.

The historical values described by Levy were routinely acknowledged by the Supreme Court as late as the 1960s. In *Rogers v. Richmond*, in 1961, the Court explained that coercion, "either physical or psychological," is banned, "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is

[30] *See* Kyron Huigens, *Custodial Compulsion,* 99 B.U. L. REV. 523, 560–69 (2019) (describing recommended techniques for, and actual practice of, custodial interrogation).

[31] *See* Moran v. Burbine, 475 U.S. 412, 427 (1986) ("Because neither the letter nor purposes of *Miranda* require this additional handicap on otherwise permissible investigatory efforts, we are unwilling to expand the *Miranda* rules to require the police to keep the suspect abreast of the status of his legal representation.").

[32] Estelle v. Smith, 451 U.S. 454, 462 (1981).

an accusatorial and not an inquisitorial system."[33] The Court went on to explain that, "[t]o be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration."[34] This reasoning was in line with *Chambers v. Florida*, decided in 1940, in which Justice Black wrote for the Court that, "[t]he determination to preserve an accused's right to procedural Due Process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes,"[35] and that "[t]yrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scape goats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny."[36] In other words, the Due Process Clauses protected not just freedom from coercion, but also freedom of conscience and the dignity of the vulnerable. In 1960, in *Blackburn v. Alabama*, the Court said that the language of "involuntariness" in its confession cases—which is now taken to refer solely to coercion—refers to "a complex of values [that] underlies the stricture against use by the state of confessions which, *by way of convenient shorthand*, this Court terms involuntary."[37]

Chief Justice Warren's opinion in *Miranda v. Arizona* fully reflects this understanding of interrogation and confessions. Following a long description of modern interrogation techniques, he wrote: "To be sure, this is not physical intimidation, but it is equally destructive of human dignity."[38] After reviewing the historical antecedents of the privilege, beginning with "the Star Chamber oath"—that is, the oath ex officio—Warren concluded:

> [T]he constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual

[33] Rogers v. Richmond, 365 U.S. 534, 540–41 (1961)*; see also* Watts v. Indiana, 338 U.S. 49, 54 (1949) (Frankfurter, J.) ("Ours is the accusatorial as opposed to the inquisitorial system.").

[34] *Id.* at 541.

[35] Chambers v. Florida, 309 U.S. 227, 237 (1940).

[36] *Id.* at 236.

[37] Blackburn v. Alabama, 361 U.S. 199, 207 (1960) (emphasis added).

[38] Miranda v. Arizona, 384 U.S. 436, 457 (1966).

> produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.[39]

Miranda is a byword for judicial activism,[40] and in the remedies it prescribed, it might have been.[41] The effort to preserve human dignity, personal integrity, and fairness, however, was firmly grounded in recent precedent, and that body of precedent was firmly grounded in history.

This Article is not about the law of confessions or *Miranda*, but its thesis can be framed as a question about *Miranda*, the Self-Incrimination Clause, and Due Process. What happened to dignity, integrity, fairness, and freedom of conscience? Obviously the post-Warren Court has been less protective of the individual in any number of ways. It might be less obvious, however, that the Court has refused to engage with moral values directly, on their own terms, in its legal reasoning. It has denigrated not only dignity, integrity, fairness, and freedom of conscience but also justice, decency, autonomy, moral proportionality in punishment, and the condemnation of cruelty. It has portrayed these moral commitments as presenting a threat to law, by virtue of their being, purportedly, irrational, arbitrary, prejudicial, mere intuitions, simple emotional reactions, personal instead of public, or supernatural instead of empirical.

A course correction was to be expected when Richard Nixon appointed four Justices to the Supreme Court. But a course correction in law is one thing. A course correction that wipes out an entire set of moral values, an understanding of what moral values are, and a style of legal reasoning about them, is something else entirely.

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39 *Id.* at 460.

40 *See* Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1, 14 (2011) ("The Supreme Court's decision in *Miranda v. Arizona* has been criticized as embodying the judicial activism of the Warren Court.").

41 *See* Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 145 (1985) ("While a rebuttable presumption of involuntariness absent the warnings arguably could be defended on the implied powers theory advanced here, the conclusive presumption that the Court established exceeds the limits of this theory.").

III. MAJESTIC LAW

A. *The Definition of Majestic Law*

As noted in the Introduction, "majestic law" is not a literary style. The term refers to a style of legal reasoning and the body of law that such reasoning produces—a body of law that crosses the boundaries of many legal doctrines. The difference between a literary style and a style of legal reasoning is that the latter has substantive legal consequences.

In simplest terms, majestic legal reasoning is characterized by the frank use of moral language. Here is an example from Justice Warren's opinion in *Miranda v. Arizona*:

> Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a 'noble principle often transcends its origins,' the privilege has come rightfully to be recognized in part as an individual's substantive right, a 'right to a private enclave where he may lead a private life. That right is the hallmark of our democracy.' We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values . . . . All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens.[42]

The complex of values that Warren refers to consists of moral values. He invokes nobility, dignity, personal integrity, and the autonomy inherent in privacy. He calls on all four values in such a way that they provide essential support to *Miranda*'s legal rule. This is not to say that majestic legal reasoning dictated the outcome of *Miranda*. The style of reasoning and the moral values invoked are no less evident in Justice White's *Miranda* dissent: "Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values."[43] Justice White does not say it is idle to talk about dignity because there is something suspect about dignity as such, or about dignity's role in legal reasoning. He takes moral value seriously and is engaged in majestic legal reasoning no less than Justice Warren is.

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[42] *See Miranda*, 384 U.S. at 460.

[43] *Id.* at 540.

To take moral value seriously is not a bad way to describe majestic legal reasoning, but we can be more precise. In majestic law, moral commitments appear in unreduced form, so that their intrinsic features play a substantive role in legislation and judicial decisions. A moral commitment is a moral value, norm, term, explanation, or judgment. A moral commitment appears in unreduced form when it has not been translated (purportedly) from prescriptive to descriptive terms. For example, to say that the Eighth Amendment's proportionality requirement is satisfied if a punishment reflects a revealed preference for dignity would be to reduce dignity to descriptive terms.[44] To say that a moral commitment appears in unreduced form in majestic law is not to say it appears in unmediated form. A moral commitment can have legal authority only if it has been positively enacted by a legislature or high court, formulated to comply with the rule of law, and subjected to institutional constraints such as the separation of powers. The moral commitments of majestic law have legal authority because they are mediated by law. They have moral significance because they are unreduced.

To say that a moral commitment's intrinsic features play a substantive role in legislation and judicial decisions is to say that its etymology, history, conception, or extension form part of a legal argument, interpretation, or decision. For example, the Eighth Amendment requires proportionate punishment. This proportionality is a moral value, not a numerical one. A legal analysis of proportionality in punishment will begin with a *conceptual* distinction between ordinal and cardinal proportionality. Cardinal proportionality is proportionality in absolute terms, which for criminal law is captured in the words, "Let the punishment fit the crime." At one point in *history*, capital punishment fit the crime of theft, but today we no longer think death is proportionate to theft. Ordinal proportionality is proportionality between cases, a question that can be framed as a question of equality, given that the relevant cases in the analysis must be similarly situated cases. This fits the *etymology* of "proportion" well, since the word means "relative to a person's share."[45] To determine which cases are similarly situated requires a description of the respective cases. Which description covers which case is a question of the description's *extension*. A persuasive legal argument about proportionality in punishment that appeals to the etymology, history,

[44] *Cf.* Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

[45] *See Proportion*, LEXICO, https://www.lexico.com/definition/proportion (last visited October 2020).

conception, and extension of proportionality allows that moral commitment to operate normatively on its own terms. A shorter way to say this is to say that majestic legal reasoning about proportionality in punishment appeals to the intrinsic features of proportionality as a moral value.

B. *The Features of Majestic Law*

Justice John Paul Stevens advanced the idea of majestic law on several occasions. Five distinct features can be gleaned from his dissent in *McDonald v. City of Chicago*.[46] A sixth appears in his dissent in *Van Orden v. Perry*.[47]

In *McDonald*, the Court incorporated the Second Amendment into the Fourteenth Amendment and applied it to the states.[48] In dissent, Justice Stevens examined substantive Due Process at length, on the ground that the incorporation of rights into Due Process and the evaluation of substantive Due Process rights are inextricable.[49]

First, Justice Stevens adds to the stock of moral values on which not only Due Process but also majestic law draw. Like Justice Warren in *Miranda*, Stevens cites dignity, personal integrity, and autonomy.[50] He then adds respect, equality, freedom of conscience, and liberty in intimate relationships, concluding that "these are the central values we have found implicit in the concept of ordered liberty."[51] Stevens also describes these moral commitments as a "conceptual core" of the liberty guaranteed by the Due Process Clause.[52] None of these moral commitments is confined to the Due Process Clause, however. Moral commitments, each with its own etymology, history, conception, and extension, underwrite many doctrines, each embodied in its own legal rules and standards.

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[46] *See* McDonald v. City of Chi., 561 U.S. 742, 861–80 (2010) (Stevens, J., dissenting).

[47] *See* Van Orden v. Perry, 545 U.S. 677, 732 (2005) (Stevens, J., dissenting).

[48] *See McDonald*, 561 U.S. at 750 ("Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.").

[49] *Id*. at 861 (Stevens, J., dissenting) ("This is a substantive due process case.").

[50] *Id.* at 879–80 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984) ("the ability independently to define one's identity") and Fitzgerald v. Porter Mem'l Hosp., 523 F.2d 716, 719 (1975) ("the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny")).

[51] *Roberts*, 468 U.S. at 880.

[52] *Id.* at 879.

Second, Stevens warns against the reduction of these moral commitments to descriptive terms.

> A rigid historical methodology is unfaithful to the Constitution's command. For if it were really the case that the Fourteenth Amendment's guarantee of liberty embraces only those rights "so rooted in our history, tradition, and practice as to require special protection," then the guarantee would serve little function, save to ratify those rights that state actors have already been according the most extensive protection.[53]

Stevens describes this problem as a matter of faux "objectivity" and hidden "value judgments," and cites Justice Harlan's objection that some Due Process standards are circular.[54] As we will see in the next Part and in Part V, however, the pathology of reducing moral commitments to descriptive terms is more fundamentally a feature of the flawed metaethics that underwrites the subjective stop. For now, it must suffice to say that the reduction of moral commitments to descriptive terms is inconsistent with majestic law and legal reasoning, which engage moral values, norms, terms, explanations, and judgments on their own terms.

Third, Justice Stevens writes that to fail to engage with the moral commitments we make in law and legal reasoning "effaces this Court's distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes. It is judicial abdication in the guise of judicial modesty."[55] If judges are required to reduce moral commitments to descriptive terms, then the judiciary's role is reduced to tallying how many jurisdictions follow one contested rule instead of another, or to poring over legal texts as if they were scripture, or to acting as amateur historians. This rush to the safe harbor of description goes beyond effacing the Court's distinctive role, to depriving the Court of moral authority altogether.

Fourth, Stevens expresses skepticism about "objectivity" as a virtue in legal reasoning. "My point is simply that Justice Scalia's defense of his method, which holds out objectivity and restraint as its cardinal—and, it seems, only—virtues, is unsatisfying on its own terms. For a limitless number of subjective judgments may be smuggled into his historical analysis. Worse, they may be *buried* in the analysis."[56] Justice Stevens

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[53] *Id.* at 875.

[54] *Cf.* Duncan v. Louisiana, 391 U.S. 145, 183 (1968) (Harlan, J., dissenting) (noting that to identify fundamental rights as those which are old, much praised, or found in the Bill of Rights is circular reasoning).

[55] *McDonald*, 561 U.S. at 876 (Stevens, J., dissenting).

[56] *Id.* at 908.

concedes too much here. Skepticism about "objectivity" is warranted, but the best way to get at the central problem is not to search for hidden subjectivity, but to query "subjectivity" itself. There is no easy objective/subjective dichotomy to be found in moral or legal reasoning. The best way to deal with deceptive pretenses to objectivity, or with the imposition of an obligation to achieve objectivity, is to deepen our understanding of what it means to say that our moral commitments, and our legal reasoning about them, are subjective. To say they are subjective is not to say that they are irrational, arbitrary, prejudicial, mere intuitions, inarticulate emotional reactions, personal instead of public, or supernatural instead of empirical.

Fifth, the enterprise of majestic law is more demanding of judges—as it is for legislators, lawyers, and scholars—than maintaining a pretense of objectivity is. Justice Stevens asks: "In considering such a majestic term as 'liberty' and applying it to present circumstances, how are we to do justice to its urgent call and its open texture—and to the grant of *interpretive* discretion the latter embodies—without injecting excessive subjectivity . . . ?"[57] He answers that "we must ground the analysis in historical experience and reasoned judgment, and never on 'merely personal and private notions.'"[58] Instead, he says, we should rely on the "guideposts" of constitutional terms' moral commitments.[59] Here too, however, the issue needs reframing. The challenge of majestic law is not to avoid subjective moral commitments. It is, instead, to recognize that the subjectivity of these commitments does not imply that they are personal and private or in any other way unfit for legal reasoning.

Finally, in *Van Orden v. Perry*, an Establishment Clause case, Justice Stevens had this to say about "personal preferences":

> To reason from the broad principles contained in the Constitution does not, as Justice Scalia suggests, require us to abandon our heritage in favor of unprincipled expressions of personal preference. The task of applying the broad principles that the Framers wrote into the text of the First Amendment is, in any event, no more a matter of personal preference than is one's selection between two (or more) sides in a heated historical debate. We serve our constitutional mandate by expounding the meaning of

[57] *Id.* at 877.

[58] *Id.*

[59] *Id.*at 878.

> constitutional provisions with one eye toward our Nation's history and the other fixed on its democratic aspirations.[60]

This amounts to a rejection of the subjective stop. It is a recognition that we debate moral questions in public life, and that courts and litigants do the same. It is easy, however, to imagine someone's arguing that choosing a side in a heated historical debate is itself a matter of personal preference. What is missing from Justice Stevens's argument, then, is a case against the idea that reasoning about moral commitments is identical to the unprincipled imposition of personal preferences. To understand majestic law we need a deeper understanding of what Justice Stevens rejected. This is the subject of Part IV, on the definition and features of the subjective stop.

Before we proceed any further, however, one fundamental objection to majestic law must be addressed: the question of judicial activism.

C. *Institutional Majestic Law*

If judges are released from the obligation not to decide cases based on unreduced moral commitments, then it seems that an essential constraint on judicial power has been removed. If a finding that a right has been violated is a true finding of moral transgression, and if adjudicating moral transgressions is the business of courts, then majestic law is dangerous to the balance of power between the branches.

This objection has no merit. Majestic law does not entail overreach by the judiciary, because it does not entail judges' imposing morality—theirs or anyone else's—on individuals or other institutional actors. A moral commitment in majestic law has legal authority only if it has been positively enacted by a legislature or high court, formulated to comply with the rule of law, and subjected to institutional constraints such as the separation of powers and federalism. For example, decency is a moral value, but it was not a feature of majestic law until it was adopted in *Trop v. Dulles* as part of the definition of "cruel and unusual punishment" under the Eighth Amendment.[61] *Trop* did not reduce decency as a moral value to something descriptive, but it did convert decency as a moral value to decency as a legal norm. Decency and its intrinsic features were incorporated into the Eighth Amendment by virtue of the Court's positive authority over the Constitution.

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[60] Van Orden v. Perry, 545 U.S. 677, 732 (2005) (Stevens, J., dissenting).

[61] *See* Trop v. Dulles, 356 U.S. 86, 100–01 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

This argument might seem formalistic. If a moral commitment has been imposed by law, it is still a moral commitment. It still imposes the morality of judges on people who might not share that commitment, especially if it is unreduced. This objection overlooks existing constraints on the adoption of any normative commitment in law. Courts have no desire to call their independence from politics into question. Courts are fully aware of the checks that the other branches of government can impose if they perceive judicial overreach, and of the impact on judicial authority when such checks are implemented. Federal courts have recognized the importance of comity with state courts, especially where one of the most contentious constitutional issues—the death penalty—is concerned, and Congress has reinforced the observance of federalism in habeas corpus legislation.[62] It is unthinkable that a court would incorporate any moral commitment into law unless that commitment has broad, not to say unanimous, support in society at large. The vision of heroic judicial activism is long dead.[63]

From this perspective, the idea of majestic law rules out only one set of arguments against judicial overreach: arguments to the effect that some contemplated judicial rationale is "subjective," and therefore unfit for legal reasoning. To bar this set of arguments is far from a license for judicial activism, given that every other reason not to engage in judicial activism remains in place.

One judicial constraint is particularly important: simple prudence. In *McDonald*, Justice Stevens argued that owning a handgun is not "critical to leading a life of autonomy, dignity, or political equality."[64] Justice Scalia replied, "Who says?"[65] Scalia's argument is a full subjective stop—a metaethical argument—in response to Stevens's moral argument about the role of guns in a good life. If we take away the subjective stop and imagine Scalia's meeting Stevens on the ground of morality, the result is a debate on the Court about whether owning a gun contributes to autonomy, dignity, and equality. Majestic law envisions this level of moral engagement in legal reasoning. On the role of guns in a good life, however, one can fairly ask whether direct moral

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[62] *See* Coleman v. Thompson, 501 U.S. 722, 730–31 (1991) (reasoning in capital case that "the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism."); Williams v. Taylor, 529 U.S. 420, 436 (2000) (purpose of the Anti-Terrorism and Effective Death Penalty Act was "to further the principles of comity, finality, and federalism.").

[63] *See* Paul W. Kahn, *Owen Fiss: Heroism in the Law*, 58 U. MIAMI L. REV. 103, 108 (2003) (reporting that, by 1979, "Fiss acknowledges that this heroic conception 'expects a lot from judges—maybe too much.'").

[64] *McDonald*, 561 U.S. at 893.

[65] *Id.* at 800.

engagement by the Court is wise. Guns are powerful symbols of political identity in the United States, on the order of tribal totems. Nothing in the argument for majestic law implies that the Court *must* dive into these dark waters.

IV. THE SUBJECTIVE STOP

A. *Two Kinds of Subjective Stop*

Virtually everyone has encountered the subjective stop at some point. In the course of a moral argument, one party will say something to the effect of, "It's all subjective," where "all" refers to moral values, norms, terms, explanations, and judgments generally. This is said sometimes to propose a truce, and other times to achieve victory by fiat. In either case, the aim is to shut down debate.

Defined more precisely, the term "subjective stop" refers to the use of "subjective"—or the pejorative use of similar terms such as "value judgment," "opinion," "intuition," "emotional reaction," "personal prejudice," or "personal preference"—as a disqualification in legal reasoning.[66] The term refers to either of two arguments that cut off or redirect legal analysis prematurely. First, a person might raise the charge of subjectivity intending it to be a comprehensive counterargument sufficient to halt further debate without addressing the substance of the argument to which it responds, if that argument relies on a moral commitment. I will refer to this kind of argument as a "full subjective stop." Second, a person might deploy the term "subjective" to impose a presumption that a moral commitment is not to be relied on in law unless its proponent can reduce the value to descriptive terms, such as a majority of jurisdictions' following a particular rule, or plain text, or a record of the founders' intent. I will call this kind of argument, which is the more common of the two, a "presumptive subjective stop."

The most colorful deployment of the subjective stop is found in Justice Scalia's opinion for the Court in *Stanford v. Kentucky*. He begins the argument with a striking metaphor:

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[66] This Article offers no objection to the many other uses of the terms "objective" and "subjective" in law, particularly the use of the former to indicate a reasonable person, or the use of the latter standard to describe states of mind. *Cf.* Wanatee v. Ault, 259 F.3d 700, 704 (8th Cir. 2001) (noting that the district court's application of an objective standard of reasonableness required a "subjective," i.e., potentially arbitrary, judgment into what a reasonable person might want, so this reasonableness determination was avoided by a subjective inquiry into what Wanatee himself desired, as a matter of "objective" fact).

> To say, as the dissent says, that "'it is for *us* ultimately to judge whether the Eighth Amendment permits imposition of the death penalty,'"—and to mean that as the dissent means it, i.e., that it is for *us* to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think "proportionate" and "measurably contributory to acceptable goals of punishment"—to say and mean that, is to replace judges of the law with a committee of philosopher-kings.[67]

It is possible to read Justice Scalia's reference to "philosopher-kings" in *Stanford* as merely a complaint that the dissenters had disregarded the applicable law and would have imposed a different set of rules because they preferred them. Of course, the dissenters would not have done this. Perhaps Justice Scalia felt that the dissent's interpretation of the applicable law was so far off the mark that hyperbole was called for. If it is read this way, then "philosopher-kings" is a literary device. If this were all it is, then there would be no reason to take it seriously.

In context, however, the "philosopher-kings" charge has real content. Near the end of his opinion, Justice Scalia makes his point much more precisely, using the metaethical "objective" versus "subjective" dichotomy, with the difference that he uses the equivalent term "personal preferences" to denote the latter.[68]

> While the dissent is correct that several of our cases have engaged in so-called "proportionality" analysis, examining whether "there is a disproportion 'between the punishment imposed and the defendant's blameworthiness,'" and whether a punishment makes any "measurable contribution to acceptable goals of punishment," we have never invalidated a punishment on this basis alone. All of our cases condemning a punishment under this mode of analysis also found that the objective indicators of state laws or jury determinations evidenced a societal consensus against that penalty. In fact, the two methodologies blend into one another, since "proportionality" analysis itself can only be conducted on the

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[67] Stanford v. Kentucky, 492 U.S. 361, 379 (1989).

[68] *Cf.* Furman v. Georgia, 408 U.S. 238, 431 (Powell, J., dissenting) ("[W]here, as here, the language of the applicable constitutional provision provides great leeway and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great. It is too easy to propound our subjective standards of wise policy under the rubric of more or less universally held standards of decency.").

> basis of the standards set by our own society; the only alternative, once again, would be our personal preferences.[69]

Three important points are buried in this quotation. First, just as "philosopher-kings" is a pejorative term, so is the more familiar "personal preferences." For example, the Court has interpreted the word "personal" in a moral-evaluative context as a pejorative intensifier indicating idiosyncratic bias and prejudice.[70] The word "preference" is the economist's preferred term for any individual normative evaluation, be it animal desire, aesthetic critique, moral judgment, or religious conviction.[71] Given the objectives of an appropriately modest economic analysis, this reduction is unobjectionable. The difficulty arises when this reduction of moral value is perceived to be tautological, necessary, exhaustively descriptive, or all three. In popular terms, this perception is expressed in the pejorative use of terms such as "subjective," "value judgment," "mere opinion," "intuition," "emotional reaction," "personal prejudice," or "personal preference."

Second, to say, as Justice Scalia does, that a judgment of proportionate punishment must include a survey of the legal standards employed by the states—to insist that proportionality and a survey of prevailing doctrine are methodologies that "blend into one another"—is to subject a moral judgment to a subjective stop that can be overcome by data. The underlying rationale for this demand is two-fold: first, that proportionate punishment is a moral question, any answer to which will invoke moral commitments; and second, that any moral commitment must be reduced to a description, on pain of its being deemed unfit for legal reasoning because it is a personal belief that is potentially irrational, arbitrary, or otherwise unfit for legal reasoning. To impose this presumption is to assert a presumptive subjective stop. That is, it is a refusal to allow proportionality to operate in legal reasoning on its own terms, as a moral commitment that carries its own normative weight in its etymology, history, conception, and extension.

Third, to the extent that Justice Scalia does *not* blend the methodologies of proportionality analysis and surveys of state law, he subjects the former to a full subjective stop argument. To say that "the only alternative [to a blended methodology] . . . would be our personal

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[69] *Stanford*, 492 U.S. at 379–80 (internal citations omitted).

[70] *See* Liteky v. United States, 510 U.S. 540, 549–50 (1994) ("It is common to speak of 'personal bias' or 'personal prejudice' without meaning the adjective to do anything except emphasize the idiosyncratic nature of bias and prejudice.").

[71] *See* Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 67 (2015) ("*Revealed preferences* reflect tastes or interests that the agent is pursuing through the use of her power.").

preferences," and unambiguously to dismiss this alternative is to deny these moral commitments *any* role in the determination of constitutional validity. It is to reject a judgment about proportionality that relies on the intrinsic features of relevant moral commitments because these commitments are necessarily irrational, arbitrary, emotional, personal instead of public, prejudiced, or supernatural instead of empirical—or, in a word, subjective.

B. *The Features of the Subjective Stop*

1. A Hard Subjective/Objective Distinction

Judges who employ either kind of subjective stop characteristically rely on a hard distinction between "subjective" and "objective" beliefs. Here, for example, is part of Justice Scalia's response to Justice Stevens's dissent in *McDonald*:

> Even though [Justice Stevens] does "not doubt for a moment that many Americans . . . see [firearms] as critical to their way of life as well as to their security," he pronounces that owning a handgun is not "critical to leading a life of autonomy, dignity, or political equality." Who says? Deciding what is essential to an enlightened, liberty-filled life is an inherently political, moral judgment—the antithesis of an objective approach that reaches conclusions by applying neutral rules to verifiable evidence.[72]

Under the logic of the subjective stop, the antithesis of objectivity is subjectivity, marked by the exercise of moral judgment, and it is evident that Justice Scalia regards moral commitments to autonomy, dignity, equality, and the like to be subjective in a pejorative sense. These moral commitments must be renounced in favor of "neutral rules" and "verifiable evidence." In other words, Justice Scalia imposes a full subjective stop.

As we will see below, in Section V.A., Justice Scalia's insistence that "verifiable evidence" is required for rational belief, and his apparent assumption that moral commitments cannot meet this requirement, are the products of a notorious failure in subjectivist metaethical theory. As for his insistence on "neutral rules," it is difficult to see how any legal rule can be value neutral. Norms necessarily advance one valued end in preference to others. Legal norms characteristically advance or balk competing moral commitments, notably in law's aspirations to fairness instead of unfairness, and justice instead of injustice.

[72] McDonald v. City of Chi., 561 U.S. 742, 799–800 (2010) (Scalia, J., concurring).

Not only are moral commitments said to be unverifiable and divorced from fact but they are also said to be irrational, in the root sense of not stating reasons. Justice Rehnquist wrote, dissenting in *Woodson v. North Carolina,* that, "[i]n Georgia juries are entitled to return a sentence of life, rather than death, for no reason whatever, simply based upon their own subjective notions of what is right and what is wrong."[73] Again, we will see that this is mistaken. Under an adequate subjectivist metaethics, morality gives reasons. To invoke "subjective" moral commitments to justify a discretionary choice in law, such as death sentencing, is not to act irrationally or arbitrarily. If the exercise of discretion were "subjective" in that pejorative sense, then any discretionary judgment that required some moral evaluation—such as fair *versus* unfair—would always be unjust.

Finally, the hard subjective/objective distinction has turned up in the form of a hard distinction between "subjective value judgments" and law itself:

> The question whether an alien's relatives are likely to suffer an exceptional and extremely unusual hardship upon the alien's removal is a discretionary decision because it is "'a subjective question' that depends on the value judgment 'of the person or entity examining the issue,'" not a legal determination.[74]

To say that law is or ought to be divorced from value judgments because value judgments are subjective is mistaken because the Ninth Circuit's conception of these judgments—as irrational, arbitrary, personal, emotional, intuitive, or supernatural—is false under any adequate subjectivist metaethics. More fundamentally, the idea that law can be severed from morality is absurd. Even hard legal positivism holds only that the validity and normativity of law do not depend on its moral merits.[75] Positive law serves moral ends.

2. Metaethical Traps and Strawmen

Those who defend majestic law have frequently undercut their own position with careless language that leaves it vulnerable to the subjective stop. Metaethics is the subject of the next Part, but a brief, high-altitude overview of the field of metaethics is helpful on this point. Most theories in metaethics can be described by a kind of triangulation. Such theories are realist or anti-realist, naturalistic or non-naturalistic,

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[73] Woodson v. North Carolina, 428 U.S. 280, 314–15 (1976) (Rehnquist, J., dissenting).

[74] De Mercado v. Mukasey, 566 F.3d 810, 814 (9th Cir. 2009).

[75] *See* Scott Shapiro, *On Hart's Way Out*, 4 LEGAL THEORY 469, 478–79 (1998).

and cognitivist or non-cognitivist. The gist of realism is that morality exists independently from us.[76] Both of the theories used to debunk the subjective stop in this Article are subjectivist theories that make morality dependent on us by definition; so, both are necessarily anti-realist. By the same token, these subjectivist theories are naturalistic. If morality rests in any way on human beings' subjective reactions to events, then morality is premised on nature, and not on supernatural forces such as a deity or any other reason apart from nature, as Kant, for example, understood morality.[77] Finally, these subjectivist theories are ordinarily classified as non-cognitivist theories because they hold that morality is an expression of emotion or values that we project onto the world.[78]

From this perspective, the polar opposite of a subjectivist metaethics is a realist, non-naturalist, and cognitivist theory.[79] For example, at the turn of the twentieth century, G.E. Moore advanced the theory that moral qualities are real entities that transcend the natural world and that we have access to these qualities through intuition.[80] From a present-day perspective, this theory is fanciful—which makes it an ideal strawman metaethics to attribute to majestic law:

> The next constraint Justice Stevens suggests is harder to evaluate. He describes as "an important tool for guiding judicial discretion" "sensitivity to the interaction between the intrinsic aspects of liberty and the practical realities of contemporary society." I cannot say whether that sensitivity will really guide judges because I have no idea what it is. Is it some sixth sense instilled in judges when they ascend to the

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[76] *See* RUSS SHAFER-LANDAU, MORAL REALISM: A DEFENCE 2 (2003) ("Moral realism is the theory that moral judgements enjoy a special sort of objectivity: such judgements, when true, are so independently of what any human being anywhere, in any circumstances whatever, thinks of them.").

[77] *See* Ernest Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 486–87 (1987) ("Practical reason is the determining ground that can conform free choice to its own nature as a spontaneous causality of concepts. This meshing of freedom and necessity imparts normative force—and thus practical reality—to the entire idea of reason.").

[78] *See* ALEXANDER MILLER, AN INTRODUCTION TO CONTEMPORARY METAETHICS 53, 95 (Polity Press ed., 2003). This point is open to debate. Simon Blackburn resisted calling projectivism a non-cognitivist theory. BLACKBURN, *supra* note 14 at 54. Allan Gibbard describes his norm expressivism as a non-cognitivist theory "in the narrow sense that, according to it, to call a thing rational is not to state a matter of fact, either truly or falsely." GIBBARD, *supra* note 12, at 8.

[79] *Cf.* MILLER, *supra* note 78, at 8 (flow chart of metaethical theories identifying the positions of Moore, Ayer, Gibbard, Blackburn *et al*.).

[80] *See* Panayat Butchvarov, *Ethics Dehumanized*, *in* METAETHICS AFTER MOORE 367, 368–70 (Terry Horgan and Mark Timmons eds.*)* (describing the intuitionist and non-naturalistic features of Moore's metaethics).

> bench? Or does it mean judges are more constrained when they agonize about the cosmic conflict between liberty and its potentially harmful consequences?[81]

In fact, liberty has intrinsic qualities that have nothing to do with a "cosmic conflict" perceived by a "sixth sense." This dismissive description fits Moore's moral realism, which is not the metaethics of majestic law. The intrinsic qualities of moral commitments are inferred from their etymology, history, conception, and extension—all of which are features of the natural world. As explained above, with regard to the Eighth Amendment's "evolving standards of decency" standard, these features give decency and other moral commitments entirely natural and cognitively available substance that is eminently suited to legal reasoning.

Justice Scalia's point may be nothing more than hyperbole, but this is no reason to walk into a metaethical trap. Non-naturalistic metaethical theories are vulnerable to the charge that they fail to explain how natural beings can perceive, or speak intelligibly about, a realm of morals or such "queer entities" as moral concepts.[82] One way to describe a unique moral realm or body of moral entities is to say it transcends nature. So, it is decidedly unhelpful to use transcendental rhetoric in majestic legal reasoning, as Justice Brennan did in in *Speiser v. Randall*:

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt.'[83]

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[81] McDonald v. City of Chi., 561 U.S. 742, 796 (2010) (Scalia, J., concurring) (internal citations omitted).

[82] John Mackie argued that moral statements are always false because they presuppose "queer entities," which are "entities or qualities or relations of a very strange sort, utterly different from anything else in the universe," and that "if we were aware of them, it would have to be by some special faculty of moral perception or intuition, utterly different from our ordinary ways of knowing everything else." JOHN MACKIE, ETHICS: INVENTING RIGHT AND WRONG 26–27 (1977).

[83] Speiser v. Randall, 357 U.S. 513, 525–26 (1958); *see also* Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."); Blackburn v. Alabama, 361 U.S. 199, 206 (1960) ("As important as it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence.").

Justice Brennan may have used "transcending value" as a rhetorical flourish. If so, however, he weakened the substantive argument that justice places the burden of proving guilt beyond a reasonable doubt on the prosecution. It is all too easy to paint non-natural qualities as being unsuited to legal reasoning and to impose the subjective stop for that reason.[84]

The cause of majestic law is also undermined by careless noncognitivism. In *Haley v. Ohio,* for example, Justice Frankfurter described moral commitments not just as "feelings" but as "deep inarticulate feelings."

> This Court must give the freest possible scope to States in the choice of their methods of criminal procedure. But these procedures cannot include methods that may fairly be deemed to be in conflict with deeply rooted feelings of the community. Of course this is a most difficult test to apply, but apply it we must, warily, and from case to case.[85]
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> * * *
>
> [W]hether a confession of a lad of fifteen is 'voluntary' and as such admissible, or 'coerced' and thus wanting in due process, is not a matter of mathematical determination. Essentially it invites psychological judgment—a psychological judgment that reflects deep, even if inarticulate, feelings of our society. Judges must divine that feeling as best they can from all the relevant evidence and light which they can bring to bear for a confident judgment of such an issue, and with every endeavor to detach themselves from their merely private views.[86]

If the moral commitments of society and the Constitution were nothing more than feelings, then "the humble exercise of judicial judgment" might well recommend reducing these commitments to the more "objective" terms of revealed preferences. As it is, however, no such reduction is necessary, because emotions are not feelings.

To describe moral commitments in terms of feelings instead of emotions radically understates the rationality of emotions and, as a result, overstates the non-cognitivism of subjectivist metaethics. Feelings are indeed "inarticulate," as Justice Frankfurter says, but in this respect they are distinguishable from emotions. A feeling is a somatic state, such as being hot or cold, whereas an emotion, such as love, has

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[84] *See, e.g.*, Schlumberger Techs., Inc. v. Wiley, 113 F.3d 1553, 1561 (11th Cir. 1997) ("Nonetheless, we reversed because the district court may not disqualify an attorney on the basis of some 'transcendental code of conduct . . . that . . . existed only in the subjective opinion of the court, of which [the attorney] had no notice . . . .'").

[85] Haley v. Ohio, 332 U.S. 596, 604 (1948).

[86] *Id.* at 603.

meaning. An emotion can have an object—"I love her"—whereas a feeling cannot. It makes no sense to say, "I am hot her," or "I am cold floor." We also predicate things of emotion—"I am distraught that she loves another"—but not of feelings. To say, "I am hot that this seat is taken," or "I am cold that this painting is blue," might have metaphorical sense, but neither has literal sense. Finally, emotions are fallible, whereas feelings are not. It makes sense to say, "I thought I loved her, but I realize now I was merely infatuated." It does not make sense to say, "I thought I was cold, but I realize now I was hot." If I feel cold when my body temperature is 103 degrees, then I feel cold. My high temperature does not describe my feelings at the time. This is a medical paradox, not a genuine mistake.

Justice Frankfurter ought to have referred to "deeply rooted emotions of the community" and "the deep emotions of our society." The practice and defense of majestic law requires more than this, but to acknowledge that emotions are meaningful is an essential starting point.

3. Naive Reductivism

Those who object to majestic law insist that moral commitments cannot be relied upon in legal reasoning, as Justice Neil Gorsuch does here.

> [J]udges should . . . strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be—not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best.[87]

For the most part, this is an admirably plain statement of a useful institutional principle. Judges should not decide cases "based on *their own* moral convictions," as opposed to the moral commitments of the law itself. Sometimes, however, the exclusion of morality from legal reasoning is bolstered by a metaethical claim. For example, in his dissent in *Hannah v. Larche*, in which the Court held that neither Due Process nor the Confrontation Clause was violated by a federal Civil Rights Commission that refused to disclose the identities of complainants, Justice Douglas condemned a conception of the Due Process Clauses that makes the guarantee dependent on "the subjective or even whimsical notions of a majority of this Court," and "visceral

[87] Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia, 2016 Sumner Canary Lecture at Case Western Reserve University School of Law*, 66 CASE W. RES. L. REV. 905, 906 (2016).

reactions" concerning "what is fair, decent, or reasonable."[88] This is, specifically, a metaethics of emotivism, holding that moral commitments—fairness, decency, reasonableness—are expressions of emotion. If emotion is non-cognitive—the point of comparing it to a state of the viscera—then it follows that moral commitments are irrational, intuitive, arbitrary, and otherwise unsuitable for legal reasoning.

There must be more to Justice Douglas's metaethical point than this, however, given that he plainly does not mean to say that fairness or decency—or justice itself, presumably—is entirely out of bounds in legal reasoning. One way to solve this riddle is to look more closely at Justice Gorsuch's point about the institutional limits on the use of moral commitments in legal reasoning. We can ask why he contrasts moral conviction to the apparently permissible considerations of text, structure, history, and original understanding. These things are descriptive, and so are admirably free of the "subjectivity" of fairness, decency, and reasonableness. By the same token, however, these descriptions are not prescriptive—to state an obvious but oddly unacknowledged point—and their standing relative to law's normativity is unclear.

One way to describe Gorsuch's point is that law should be *interpreted* in light of facts such as legal structure, history, and historical understanding. The problem is that legal interpretation has normative effects. Depending on the prevailing interpretation, a case will come out one way instead of another. The oughts or obligations of the applicable rule for which that case is taken as precedent also will come out one way or another, depending on interpretation. And the moral values at issue in any given legal interpretation are the same moral values that are expressed in the law being interpreted—values such as fairness, decency, and justice—which means that legal interpretation must be just as infected with the "subjectivity" of moral commitments as the direct invocation of moral commitments is supposed to be. It makes no difference to the "subjectivity" of law's moral commitments that their interpretation is done by the light of text, structure, history, or original understanding.

As an alternative, perhaps Gorsuch's point is that text, structure, history, and original understanding are evidence of the law. The idea of law as evidence is ambiguous, however. It might refer to a description of the information found in a law library—which might be evidence in a lawsuit against a rogue librarian, for example. Alternatively, law as

[88] Hannah v. Larche, 363 U.S. 420, 505 (1960) (Douglas, J., dissenting).

evidence might refer to law as precedent—that is, to the normative use of legal information. There can be no doubt that the notion of law as evidence is invoked in the subjective stop for normative, not descriptive, purposes. Even so, the ambiguity itself is instructive. Merely to describe the evidence of text, history, or original understanding might work fine as evidence in a trial of a librarian, but it is not sufficient to give these things normative significance. For this, the evidence must be interpreted in order to bring out its relevance to fairness, justice, and so on. Otherwise, law could not advance beyond a static body of precedent applied by rote. Again, however, these interpretations must be just as infected with the "subjectivity" of moral commitments as the direct invocation of moral commitments is supposed to be.

For example, in order to cope with the supposedly fatal subjectivity of the "evolving standards of decency" standard in Eighth Amendment proportionality analysis, the Court has turned to lengthy accounts of existing practices in punishment in the legislatures and jury rooms of the several states.[89] These descriptive tallies of law are said to be evidence for the Court's judgment about the punishment at issue, under the test of decency.[90] This evidence is relevant to the Court's independent determination, however, only if one assumes that it is evidence of what the people of the respective states consider a decent punishment to be. In other words, the tally is a description of a moral commitment to decency in punishment, not an alternative to that moral commitment, nor an escape from the challenge of living up to it. Polling a community's judgments of decency is no escape from the "subjectivity" of decency as a moral commitment if judgments of decency are held "subjectively" by the community.

There is a third way to understand the invocation of text, original intent, and so on, in presumptive subjective stop arguments. Justices Douglas and Scalia and other proponents of the subjective stop seem to want to liberate law from the "subjectivity" of morality by making law descriptive while retaining its normativity. The idea seems to be that all we wish to say about justice, for example, can be said in terms of legal facts instead. This describes a reduction of moral commitments to descriptive properties. Speaking broadly, a reduction is a translation, in which the essential properties of the thing reduced are carried over into

[89] *See, e.g.*, Graham v. Florida, 560 U.S. 48, 62 (2010); Kennedy v. Louisiana, 554 U.S. 407, 423–31 (2008); Roper v. Simmons, 543 U.S. 551, 564–68 (2005); Atkins v. Virginia, 536 U.S. 304, 312–17 (2002).

[90] *See, e.g.*, *Kennedy*, 554 U.S. at 426 ("The evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it.").

the thing it is reduced to, leaving behind the inessentials.[91] Where the subjective stop is concerned, the idea is that a reduction of our moral commitments into descriptions of original intent, the meaning of a text, or a tally of jurisdictions carries the normativity of our moral commitments over into these descriptions, leaving the subjectivity of morality behind.

The first question about the reductive strategy is: what kind of reduction is this supposed to be? Some reductions are ontological; that is, they are about what exists. This is a strong "nothing but" claim, as in the general proposition that biology is reducible to physics.[92] A theory reduction is different from this. A theory reduction can be explanatory, claiming that a reduced theory can be inferred from another, reducing, theory—for example, that biological science can be inferred from the science of physics.[93] Or a theory reduction can be a matter of replacement—a claim that a description in the reducing terms is more accurate or complete than a description in the reduced terms. For example, genetic inheritance can be explained in terms of Mendel's laws of inheritance, but DNA analysis explains not only observable inherited traits but also their molecular structure and chemical functioning.[94]

Subjective stop arguments seem to assert a "nothing but" kind of reduction. In the famous "philosopher-kings" passage from *Stanford v. Kentucky*, Justice Scalia argued that a tally of states' relevant doctrines determines proportionate punishment on its own. "'[P]roportionality' analysis itself can only be conducted on the basis of the standards set by our own society; the only alternative, once again, would be our personal preferences."[95] This seems to mean that any independent assessment of moral proportionality by the Court is obviated by the reduction to a tally of jurisdictions because no explanatory or normative

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[91] *See* Raphael van Reil & Robert van Gluck, *Scientific Reduction*, *in* STANFORD ENCYCLOPEDIA OF PHIL. 9–11 (Spring 2019), https://plato.stanford.edu/archives/spr2019/entries/scientific-reduction ("Saying that *x* reduces to *y* typically implies that *x* is *nothing more than y* or *nothing over and above y*.").

[92] *See* Ingo Brigant & Alan Love, *Reductionism in Biology*, *in* STANFORD ENCYCLOPEDIA OF PHIL. 3 (Spring 2017), https://plato.stanford.edu/archives/spr2017/entries/reduction-biology ("*Ontological reduction* is the idea that each particular biological system (e.g., an organism) is constituted by nothing but molecules and their interactions.").

[93] *See id.* at 16 ("[T]heory reduction as deduction from theoretical principles is an instance of explanation.").

[94] *See id.* at 5–6 ("Over the past four decades, discussion has concentrated primarily on the question of whether classical genetics can be reduced to molecular genetics and biochemistry."); *see also* van Reil & van Gluck, *supra* note 91, at 10–11 ("The main idea of diachronic reduction is . . . the replacement of one theory by another theory, such that one theory (the reducing one) becomes the successor of the reduced theory.").

[95] Stanford v. Kentucky, 492 U.S. 361, 379–80 (1989).

value in the moral commitment taken on its own terms survives the reduction. In *McDonald*, similarly, Justice Scalia insisted that the moral commitments at the heart of Due Process must be reduced to expressions of popular will in legislation.

> Courts, [Justice Stevens] proclaims, must "do justice to [the Clause's] urgent call and its open texture" by exercising the "interpretive discretion the latter embodies." (Why the people are not up to the task of deciding what new rights to protect, even though it is they who are authorized to make changes, see U.S. Const., Art. V, is never explained.) And it would be "judicial abdication" for a judge to "tur[n] his back" on his task of determining what the Fourteenth Amendment covers by "outsourc[ing]" the job to "historical sentiment,"—that is, by being guided by what the American people throughout our history have thought.[96]

To be guided by what the American people throughout our history have thought purportedly leaves no surviving value that might require the Court's independent moral evaluation of Due Process under standards such as "essential to free government" and "to the maintenance of democratic institutions,"[97] "a fair and enlightened system of justice," [98] "immutable principles of justice, which inhere in the very idea of free government,"[99] or "immunities . . . implicit in the concept of ordered liberty."[100]

We have no reason to believe that the descriptive-prescriptive divide can be jumped this easily. A purported reduction of the moral commitments of law to "nothing but" the descriptive features of legislation, or text, or historical intent is implausible. It is radically unlike a reduction of a body to molecules. We cannot say that legislation, or text, or original intent is constitutive of law's moral commitments as molecules are constitutive of a body. It does not help matters to read the subjective stop as an explanatory theory reduction. Our moral commitments cannot be inferred from legislation in the way that biology can be inferred from physics. The subjective stop most resembles theory reduction as a matter of replacement. It claims that a description in the reducing terms (legislation) is more accurate or complete than a description in the reduced terms (moral commitments) so that the former should supersede the latter. Any such reduction,

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96 McDonald v. City of Chi., 561 U.S. 742, 793–94 (Scalia, J., concurring).

97 *Id*. at 794, 874–75.

98 Palko v. Connecticut, 302 U.S. 319, 325 (1937).

99 Powell v. Alabama, 287 U.S. 45, 68 (1932) (citing Holden v. Hardy, 169 U.S. 366, 389 (1989)).

100 Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (citing *Palko*, 302 U.S. at 324–25).

however, leaves the explanatory value of the reduced properties intact.[101] The reduction of evolving standards of decency to state by state tallies of existing doctrine, even if possible and enlightening, does not imply that there is no such thing as decency or that judges cannot invoke decency in its unreduced form, despite its subjectivity.

V. MODERN SUBJECTIVIST METAETHICS

By now, it should be apparent that majestic law needs a metaethics sufficient to overcome the attractions of the subjective stop. Modern subjectivist metaethics is ideal because it undermines the assumptions of the crude subjectivist metaethics on which the subjective stop depends. Under each of two such theories discussed in this Part, we express subjective moral commitments in a rational, empirical way. First, however, it is important to understand the metaethics of the subjective stop itself.

A. *Caveman Emotivism*

Justice Douglas's *Hannah v. Larche* dissent, quoted in an epigraph at the outset, contains an instance of the subjective stop, but it is also a clear statement of the metaethics on which the subjective stop depends. Douglas thought the majority's analysis made Due Process "reflect the subjective or even whimsical notions of a majority of this Court," and that it left the law vulnerable to "visceral reactions in deciding what is fair, decent, or reasonable."[102] He thought the majority's view could not be rationalized "on cold logic or reason," and that "emotion rather than reason dictates the answer."[103] He found this subjectivity disqualifying in legal reasoning.

The canonical statement of Douglas's apparent premise is found in A.J. Ayer's *Language, Truth and Logic*, which was first published in 1936, with a second edition containing major emendations published in 1946. Ayer argued that fundamental ethical concepts are irreducible to empirical concepts; that their truth is not established by logic alone; that there are no criteria by which their validity can be judged; and that they are, for these reasons, meaningless "pseudo-concepts"[104] that are "neither true nor false."[105]

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101 *See* RAILTON, *supra* note 10 at 16–17 (in natural and social scientific reduction, reduced properties retain their explanatory value).

102 Hannah v. Larche, 363 U.S. 420, 505 (1960) (Douglas, J., dissenting).

103 *Id.* at 506.

104 *See* AYER, *supra* note 11, at 107.

105 *Id*. at 103.

> It is if I had written "Stealing money!!"—where the shape and thickness of the exclamation points show, by a suitable convention, that a special sort of moral disapproval is the feeling which is being expressed. It is clear that there is nothing here which can be true or false. . . . For in saying that a certain type of action is right or wrong, I am not making any factual statement, not even a statement about my own state of mind. I am merely expressing certain moral sentiments.[106]

Ayer describes his position as "radically subjectivist"[107] and a "radical empiricist thesis."[108] It is ordinarily referred to as "emotivism."[109]

In his *Hannah* dissent, Justice Douglas expresses a preference for judging according to "cold logic or reason." If we imagine Douglas and Ayer in conversation, Ayer would correct Douglas's contrast between emotion on one hand and "logic or reason" on the other, where moral norms and judgments are concerned. Ayer would insist that values are no more the product of logic than they are matters of fact. The truths of logic are meaningful and true by virtue of being tautologies, or so Ayer argued, and this is manifestly not true of morality.[110] Second, the same is true of "reason." Ayer was an empiricist, and as such he rejected rationalism—the view that the world can be reconstructed by reasoning from elemental ideas, as Plato, Descartes, and Berkeley believed.[111] He also rejected Kant's view that morality is the product of reason alone.[112] There is no doubt Douglas would agree with both of these points, but this raises the question of how he might have revised his dissent by contrasting emotion with something other than "cold logic or reason."

The obvious answer to this question is that Douglas could have made his point by contrasting emotion with facts (and happily would have done so if Ayer had been there to suggest it). Empiricists are naturalists, holding the view that genuine knowledge is gained only by experience of the natural world. As an empiricist, Ayer was strongly influenced by the Vienna School of logical positivists, and while he disagreed with that school of thought in some respects, he shared their basic view of meaning and truth.[113] Ayer argued that a statement is meaningful, and thereby truth apt—capable of being true or false—if

106 *Id.* at 107.

107 *Id.* at 109.

108 *Id.* at 102.

109 *See* MILLER, *supra* note 78, at 26 ("Ayer's version of emotivism is the simplest and most provocative version of non-cognitivism. . . .").

110 AYER, *supra* note 11, at 84–85.

111 *Id.* at 73, 134–35.

112 *Id.* at 113.

113 *See id*. at 135–38.

and only if it falls within one of two categories.[114] One of these categories consists of analytic statements (those that are true by virtue of being a tautology).[115] Second, a statement can be meaningful by virtue of being verifiable; it is either an observation statement or a combination of observation statements.[116] Ayer's emotivism is a trivial implication of his positivism, under which meaning is limited to formal implications and observation statements, because moral statements are neither one. As he says of moral statements in the passage quoted above, "there is nothing here that can be true or false," because moral statements are not verifiable.

Ayer's emotivism is no longer persuasive, however, and never really was. His metaethics was easily refuted. If we think of moral evaluations as assertions, then the "hooray" and "boo" conception of moral evaluation seems plausible. Suppose, however, that a moral evaluation appears in a more complex grammatical and logical structure, such as a subjunctive conditional: "If it were wrong for A to rob a bank, then it would be wrong for B to rob a bank." The moral content of the "wrong . . . to rob a bank" language in each clause is the same as the simple assertion that "it is wrong to rob a bank," which Ayer's emotivism renders as "Boo robbing banks!" But in the context of a subjunctive conditional, this moral content clearly is meaningful. Suppose we say, "If it were so that 'Boo A robs a bank,' then it would be so that 'Boo B robs a bank.'" This implies a meaningful moral evaluation of robbing banks. Otherwise, the point of the conditional would be to describe a similarity between A and B, whereas it is clear that we are at least as likely to be saying something about robbing banks as we are to be saying something about bank robbers.[117]

By the time Ayer published the second edition of his book in 1946, he was aware of this defect. He acknowledged that his definition of meaning in terms of his verificationism was too narrow.[118] Accordingly, he acknowledged that his verificationism did not support emotivism.

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114 *Id*. at 41.

115 AYER, *supra* note 11, at 79.

116 *Id*. at 13.

117 This is known as the Frege-Geach problem, after Peter Geach, who stated the problem and who attributed the insight to Gottlob Frege. *See* MILLER, *supra* note 78, at 40–42.

118 *See* AYER, *supra* note 11, at 15 ("In putting forward the principle of verification as a criterion of meaning, I do not overlook the fact that the word 'meaning' is commonly used in a variety of senses, and I do not wish to deny that in some of these senses a statement may properly be said to be meaningful even though it is neither analytic nor empirically verifiable.").

> The emotive theory of values, which is developed in the sixth chapter of this book, has provoked a fair amount of criticism; but I find that this criticism has been directed more often against the positivistic principles on which the theory has been assumed to depend than against the theory itself.[119]

Ayer did not, however, offer any new arguments in favor of emotivism in the second edition of *Language, Truth and Logic*, or subsequently.[120] Ayer's emotivism has virtually no adherents in the field of metaethics today. In fact, his theory has been characterized as "'cave man' expressivism."[121] If the subjective stop depends on verificationist emotivism, then the subjective stop should be abandoned along with its philosophical premise.

B. *Norm Expressivism*

Ayer's failure was by no means the end of subjectivist metaethics, but later subjectivist theories do not support the subjective stop. Allan Gibbard's metaethics, which he calls "norm-expressivism," agrees that our moral judgments are expressions of emotion, but his theory is part of a larger account of rationality.[122] He describes rationality in terms of a particular understanding of normativity.[123] "[T]o call something rational is to express one's acceptance of norms that permit it."[124] Where moral norms and judgments are concerned, this acceptance follows from a judgment about what it makes sense to do, think, and feel.[125] One implication of this view of rationality and normativity is that when a person calls something rational, she does not describe her beliefs about isolated acts, norms, and judgments. Instead, she expresses a judgment about whether it makes sense—broadly, in more than a pragmatic sense—to do an act, to require an act, or to evaluate an

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119 *Id*. at 20. The phrase "assumed to depend" in this sentence is disingenuous. Ayer could not have made the dependence clearer.

120 Instead, he referred the reader to a new book, *Ethics and Language*, by the American emotivist Charles L. Stevenson. *Id.* at 20 n.3; *cf.* CHARLES L. STEVENSON, ETHICS AND LANGUAGE (1944). In fact, "emotive meaning" is a central concept in *Ethics and Language*. *See id*. at 33.

121 Michael Ridge, *Ecumenical Expressivism: The Best of Both Worlds?*, 2 OXFORD STUDIES IN METAETHICS 59 (2007).

122 *See* GIBBARD, *supra* note 12, at 8. Gibbard opts for the term "expressivism" in part because he quite reasonably views the term "subjectivist" as a pejorative. *See id.* at 153. I will discuss his theory in his preferred terms of "expressivism" and "expressivist" but with the understanding that Gibbard's theory is, as I have framed my thesis, a "subjectivist" theory.

123 *See id.* at 7–8.

124 *Id.* at 7.

125 *See id.* at 8 ("We experience our lives in normative terms, in terms of things it makes sense to do, to think, and to feel.").

act in a particular way under some normative system.[126] Accordingly, "moral judgments consist in the acceptance of norms to govern moral emotions."[127]

The question of what it makes sense to feel presumes that emotions are rational. One might think that an emotion can be rational only to the extent that the beliefs supporting the emotion are rational.[128] It is rational to feel angry only if I believe I have suffered some wrong. It is rational to feel guilty only if I believe I have done wrong to someone else. It is not unheard of, however, for someone to know that she has not been wronged, but to feel that she has been wronged. The challenge is to explain how this error is a rational error.

Suppose an employee who has been passed over for a promotion feels angry with her employer for that reason, even though she knows that the prevailing candidate was better qualified. She might be angry because she considers her employer a friend, even though she has no right to expect favoritism at work and knows it. We might say "It makes sense *that* she is angry," if we were willing to tolerate her failure to live up to her beliefs. To say "It makes sense *for* her to be angry," however, would be to endorse her failure. The difference between the two statements is that to say the latter is to say something about the norms for anger. In the case of the passed-over employee, we would say that it does *not* make sense for her to be angry. Otherwise, we would make the same mistake under the norms for anger that the angry employee has made.

This points toward Gibbard's central argument. To hold an act to be rational is to accept a system of norms under which that act is rational.[129] Because Gibbard's norm-expressivist metaethics premises morality on emotions, this formulation extends to systems of both emotional norms and moral norms.[130] Indeed, "[m]orality consists in norms for moral sentiments."[131] If (as seems likely) the employee accepts a moral system under which a decision is unfair only if it is arbitrary, the product of discrimination or favoritism, or similarly defective, then her feeling that she has been treated unfairly is emotionally and morally irrational. She is, in a word, wrong.

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126 *See id.* at 6–8.

127 *Id.* at 129.

128 GIBBARD, *supra* note 12, at 39.

129 *Id*. at 92, 153.

130 *See id*. at 128.

131 *Id*. at 277; *see also id*. at 293.

Suppose, however, that the employee's idea of being treated unfairly does not turn on things such as arbitrariness, favoritism, or prejudice. Like a small child, she accepts a system of emotional and moral norms that designates as "unfair" anything that thwarts her desires. If this is so, then, on the analysis done so far, she *is* emotionally and morally rational in feeling that she has been treated unfairly. It follows from a system of norms, albeit a childish one, that she actually subscribes to. Norm expressivism seems to imply that she has indeed been treated unfairly because this assessment is rational under the system of norms she accepts. This is clearly a mistake, so Gibbard's norm expressivism needs some way to explain why and how this childish employee's emotional and moral evaluations are wrong.

Moral realism—which describes morality in "objective" terms, as existing apart from what we believe and what we do—could solve this problem, but norm expressivism does not appeal to that kind of objectivity.[132] Norm expressivism does not tell us how to locate moral truth. Instead, it holds that "[n]ormative judgment mimics the search for truth,"[133] and that it does so in a way that provides enough "objectivity" to allow us to say that the childish employee is morally irrational and wrong for that reason.[134]

What kind of objectivity is this, if not the objectivity of moral realism, and how does it help us with the problem of the childish employee? Note that Gibbard's theory is naturalistic. Systems of norms exist in society, as patterns of conduct and demands for reasons for conduct, in a wide variety.[135] If we see the childish employee as irrational, then this is because we have accepted a system of norms that not only treats unfairness as a matter of arbitrariness, prejudice, or favoritism but also refuses to call the mere thwarting of desires unfair. We have accepted the right normative system and she has accepted the wrong system. This might seem merely to redescribe at the level of normative systems the clash between the moral judgments we make and the moral judgments she makes. The difference, however, is that acceptance of this or that system of norms is adjudicated differently from, and more effectively than, the acceptance or rejection of isolated values, norms, terms, explanations, and judgments. This kind of

132 *See, e.g.*, SHAFER-LANDAU, *supra* note 76 (stating and defending a non-naturalistic moral realism); Richard Boyd, *How to Be a Moral Realist, in* ESSAYS ON MORAL REALISM 181 (Geoffrey Sayre-McCord ed. 1988) (stating and defending a naturalistic moral realism).

133 GIBBARD, *supra* note 12, at 218.

134 *See id*. at 154.

135 *See id*. at 160–64.

adjudication helps us with the childish employee because it expresses our reasons for judging her conduct as we feel compelled to do.[136]

If we reject a system of norms that equates "unfair" with "thwarts my desires," and hold the employee to be irrational in accepting childish systems of emotions and norms, how is this conflict adjudicated? We can begin by noting that disagreements over which system of norms to accept are governed by higher-order norms: norms that govern the choice of systems of norms.[137] Consistency, for example, is a norm for the choice of systems of norms. Gibbard writes that a system of these higher-order norms "amounts to a story of when it is rational to accept norms and when it is not."[138] This is a four-part story of normative discussion,[139] within a community of judgment[140] exercising mutual influence,[141] leading to normative governance.[142]

This process sounds more complex and formal than it is. Consider the first two parts of the story of the choice of systems of norms: normative discussion within a community of judgment. Imagine that you hear a conversation on a train between two other passengers.[143] Their indignant, incredulous, and aggrieved tone of voice catches your attention first. Listening more closely, you catch expressions such as "seriously?" "unbelievable!" "that's just embarrassing," and "immature." You gradually gather that a fellow employee of one of the passengers was passed over for a promotion, and insisted, against all efforts to convince her otherwise, that she should have been promoted because her employer was her best friend. The conversation dwells particularly on her inexplicable insistence on a right to favoritism, her repeatedly citing "I wanted that job, and he knew it," as the reason she was entitled to it, and her red-faced fury at anyone who told her she was wrong. You find yourself in full agreement that the childish employee was in the wrong, and that the worst part was indeed her belief that a right to favoritism entitled her to the job. You sum up your feelings to yourself with the word "childish." You are at that point part of a community of judgment, evincing a relevant emotion, expressing a judgment in

136 *See id*. at 154–56, 181–82.

137 *Id*. at 168.

138 *Id*. at 181.

139 *See* GIBBARD, *supra* note 12, at 72–73, 231, 248–50.

140 *See id*. at 201–08, 233–48.

141 *See id*. at 177.

142 *See id*. at 79–80.

143 Gibbard invites us to think of "how much overheard conversation on sidewalks, buses, and the like consists in recounting problematic events such as personal confrontations, apparently to elicit reactions." *Id*. at 72.

emotively charged words.[144] You have engaged in a shared emotional and moral evaluation of the situation involving the persuasive effects of emotionally laden and emotively charged language.[145] Most importantly, you have gone beyond the condemnation of the employee's behavior to a condemnation of the childish moral system that led her to believe she had a right to favoritism. The reason for this is that she has violated the system of moral norms that you regard as rational. This illustrates how "moral judgments consist in the acceptance of norms to govern moral emotions."[146]

The example of the childish employee also illustrates the third part of Gibbard's story about the choice of normative systems: the higher-order norms that govern mutual influence.[147] The office-wide effort to persuade the childish employee that she was mistaken about her rights was subject to norms beyond consistency. The childish employee could rightly demand that others be sincere and open in their attempts to persuade her.[148] They could not simply browbeat her into agreement.[149] The others cannot demand that she accept more than what actually follows from the premises they both accept, plus shared supporting observations.[150] The other employees could not privilege their views because they hold them,[151] or insist that the relevant higher-order norms have less flexibility than they actually do.[152] In short, the others could not attempt to persuade her of anything lacking a standpoint-independent validity.[153]

If and when we meet the demands of these higher-order norms, then we generate normative authority, the fourth part of the story of the choice of systems of norms.[154] If the childish employee proves to be incorrigible, insisting not only on a right to favoritism but also on norms for anger and resentment that authorize these emotions whenever her desires are thwarted, then she must be excluded from the community of

144 *See id*. at 73.
145 *See* GIBBARD, *supra* note 12, at 72.
146 *Id*. at 129.
147 *Id*. at 177.
148 *See id.* at 190.
149 *See id.* at 189–90.
150 *See id.* at 191.
151 *See* GIBBARD, *supra* note 12, at 182.
152 *See id.* at 190.
153 *See id.* at 191.
154 *See id.* at 193.

judgment we occupy.[155] Norm expressivism is not relativism, however.[156] The thesis is not that one community makes normative judgments that are valid for them, while we make judgments that are valid for us. We say that the childish employee, and anyone who agrees with her about the thwarting of desires as rational anger, is not only mistaken but also irrational.[157] It does not make sense for anyone to do what she is doing, emotionally or morally.

The adjudication of moral choices at the level of the choice of moral systems confers as much "objectivity" as it is reasonable to expect in our norms and judgments, obviating the need to adjudicate isolated evaluations, norms, or judgments, along with any need to appeal to moral realism.[158] The exercise of normative authority under the norms governing the choice of moral systems is not relativistic; nor is it, at the other end of the spectrum, dogmatic. Normative authority functions to exclude[159] and inform.[160] If we are to say that the childish employee is irrational, then we must have a story to tell—one that explains why she cannot rationally rest on her preferred norms for anger and resentment.[161] The metaethical story we would tell in her case would be a story of the inadequacy of childish judgments and the norms they entail, within a normative community of adults coping with a complex and unpredictable world. Moral discussion serves to coordinate the actions of society and to achieve consensus on matters that are essential to social life.[162] The story that excludes the childish employee maximizes normative coordination and consensus, giving our community of judgment the widest scope possible.[163] The value of our broad, coordinated, consensual, rational community of judgment is, specifically, survival value in natural selection.[164] There are survival costs to exclusion and repression, and survival benefits in accommodation and tolerance.[165] We exclude people such as the

155 Perhaps unnecessarily, I will note that Gibbard is speaking figuratively. There is no organized community with a designated authority who banishes those who do not accept the community's norms.

156 *See* GIBBARD, *supra* note 12, at 214, 216–17.

157 *See id.* at 164–66, 181.

158 *See id.* at 199–203.

159 *See id.* at 199.

160 *See id.* at 212.

161 *See* GIBBARD, *supra* note 12, at 193.

162 *See id.* at 76–77, 282–83.

163 *See id.* at 211–13.

164 *See, e.g.*, *id.* at 219–26.

165 *See, e.g.*, *id.* at 238–48. If this danger seems far-fetched, consider the possibility of a high-level government official who understands "unfair" to mean "thwarts my

childish employee from the community of moral judgment only when the cost of including her—in terms of coordination, consensus, and rationality—is too great.[166] The survival value of normative authority provides as much "objectivity" as the human condition allows.

C. *Quasi-Realism*

The metaethical theories that I have described as subjectivist theories are more often referred to as expressivist theories.[167] To say that our moral values, norms, and judgments are expressive can mean several different things, depending on what one supposes is being expressed: emotions instead of meanings, according to Ayer, or commitments to normative systems, as Gibbard argues. Simon Blackburn's "quasi-realism" is an elaboration of David Hume's philosophy,[168] so it would be fair to say that "sentiment" is what is expressed, according to quasi-realism. [169] It is more enlightening, however, to interrogate Blackburn's metaethics along two other lines. We can ask, first, what does it mean to "express" value? And we can ask, second, what kind of intellectual exercise is Blackburn describing in when he portrays the expression of value as projection?

1. The Projection of Morality

Blackburn's quasi-realism is an application of Hume's projectivism, the most prominent instance of which is his explanation of causation.[170] If two events follow one another, Hume argued, we never know if one event has caused the other or if, on the other hand, the events merely occurred in sequence but independently from one another. Put another way, it is impossible to say what we claim to have perceived when we attribute causation to events. If we think of causation as solid surfaces bouncing off one another, as we tend to do, then we have merely defaulted the problem to the behavior of solid surfaces, and the possibility that this behavior is mere coincidence. If we think of

desires," and the threat to basic legal norms and informal norms of government that this person's official actions would pose.

166 *See id.* at 197–98.

167 *See* David Faraci, *On Leaving Room for Doubt: Using Frege-Geach to Illuminate Expressivism's Problem with Objectivity,* 12 OXFORD STUDIES IN METAETHICS 244, 244 n.1 (2017) (identifying Blackburn and Gibbard as expressivists).

168 *See* BLACKBURN, *supra* note 14, at 170–71 (describing quasi-realism as a Humean projectivist theory).

169 *See* DAVID HUME, A TREATISE OF HUMAN NATURE 589 (1739) (P.H. Nidditch, ed., 2d ed. 1978) ("Moral good and evil are certainly distinguish'd by our sentiments, not by reason . . . .").

170 *See* BLACKBURN, *supra* note 14, at 210.

causation as the behavior of atoms or sub-atomic particles, then we have merely shifted the problem of solid surfaces bouncing off one another to a microscopic level. The most we can say with confidence is that we observe events as occurring in regular, predictable sequences. Any perception of causation beyond these regularities is something that we project onto events.

Hume argued that projectivism changes nothing in how we explain and justify our beliefs concerning causation. If all we say about causation can be said in terms of observations and judgments of regular sequences of events, and if these statements can be true, then we have no reason to go any further in seeking reasons for belief in causes and effects. This explanation entails a view of the truth conditions for causation—whatever it is that makes beliefs about causation true or false—as something other than a correspondence with reality and other than something operating *out there*, waiting for us to discover it. In this sense, projectivism is an anti-realist theory. To surrender the view of causation as a feature of events themselves, however, does not require us to surrender the beliefs that we express in terms of causation, or to doubt their truth.

Hume applied the same view to ethics, and the anti-realism of projectivism raises the worries that motivate the subjective stop: that because morality is not a feature of the world, it must be irrational, arbitrary, and personal instead of public. Following Hume, Blackburn explains morality as an expression of value, and moral expression as the projection of these values onto the world.[171] He develops Hume's ethical projectivism more fully, in such a way as to relieve these worries.

Projectivism raises at least two questions about morality, which are the topics of the next two subsections. The first question is, if we project moral value onto the world, and claim that we can engage in moralizing as if morality were to be found in the world, what does the "as if" mean? Does the projectivist embrace the fiction, as a skeptic would, or does she give the fiction a function, as a pragmatist would? Blackburn argues that the "as if" of projectivism and quasi-realism is not a fiction at all. Even if our sentiments color the facts, they are still the facts, and they impose significant constraints on our moral beliefs.

The second question is, what replaces the realist's view of moral truth as correspondence to features of the world? The standard alternative is a coherence theory, meaning that any true belief has that status by virtue of its being a feature of an internally consistent, mutually reinforcing system of belief. Quasi-realism rests on a

171 *See id.* at 170–71.

coherence theory, but coherence theories have their own serious weaknesses. Blackburn measures quasi-realism's version of coherence against the common-sense appeal of the correspondence view and formulates quasi-realism accordingly.

2. Projectivism and Quasi-Realism

The note of "as if" in Blackburn's rejection of realism and correspondence is hard to ignore. If morality does not correspond to features of the world, then it seems that the best we can do is to act as if it did.[172] This might be a good strategy, but it theorizes as pragmatism, and quasi-realism is very different from pragmatism.[173] Blackburn argues that moral statements can be true even if they are projections. Projected moral values, norms, and judgments "are not the children of our sentiments in the sense that were our sentiments to vanish, moral truths would alter as well."[174] As with causation, projected moral values, norms, and judgments are stable, persistent, and predictable because they still depend on the facts of the narrower, less abundant world onto which we project morality. The role of projection is to color our experience of the facts, giving them value, but this is still an experience of facts. It might not be wrong to set fire to a cat if cats or fire were other than what they are, but this radically different moral evaluation would be attributable to a different set of facts, not a different set of sentiments.[175] If our sentiments about cats were hostile to the point of deranged pyromania, it would still be wrong to set fire to cats—cats being defenseless against cruelty, and cruelty being what it is, projected or not.

The stability, persistence, and predictability of moral evaluations such as cruelty are also features of projection itself. Regarding Hume's projectivism and causation, Blackburn writes: "[a]gain, since we have a purpose in so projecting we will have standards by which to assess the evidence we use for the existence of causal connections, and the quasi-realist can again earn a right to the notion of truth, and a notion of the true causal structure of things."[176] We also have standards by which to assess the evidence we use for the existence of moral commitments, and we can earn a right to the notion of truth and a notion of the true moral structure of things.

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172 *Id.* at 257 ("Does this make moral commitments true in the same sense as others, or only in a different sense? I do not greatly commend the question. What is important is our right to practise, think, worry, assert, and argue as though they are.").

173 *See* SIMON BLACKBURN, ESSAYS IN QUASI-REALISM 66–67 (1993).

174 *See* BLACKBURN, *supra* note 14, at 219 n.21.

175 *Id*. at 219.

176 *Id.* at 211.

One might balk at the substitution of "the existence of moral commitments" for "the existence of causal connections" in the preceding paragraph because causal connections seem to be well-rooted in the world, as compared to moral commitments. But this objection attacks realism where realism is not assumed or intended. Our moral commitments do not have to rise to the level of causal connections; each starts at the same level as the other. Regarding both causation and morality, Humean "existence" refers to projected attributes, not the realists' "existence" as something in the world that is entirely independent of us.

3. Coherence and the Epistemic Virtues

Blackburn frequently describes the truth of projected moral values, norms, and judgments as a matter of earning the right to moralize.[177] This expression has a specific meaning. We earn the right to call our projected moral commitments true if we exercise epistemic virtues as we work out those commitments.[178] "The root idea," Blackburn notes, "is that the virtue of truth is constructed from the virtue of method."[179]

To understand the notion of epistemic virtue, one has only to think of the epistemic vice of the conspiracy theorist. He reels off a long list of facts, drawing tenuous connections between them, and declares that he has discovered the truth "because it all fits." Instead of doing this, he ought to be *questioning* the provenance and reliability of his facts. He ought to be looking for facts and reasons that *disprove* his thesis, in the manner of scientific peer review. He ought to pick up the pieces of his disproven thesis and either formulate a better one or concede error. In other words, the conspiracy theorist ought to exercise epistemic virtue instead of epistemic vice. As Blackburn recognizes, the principal set of epistemic virtues is indeed found in the natural sciences. He states, "[c]onsider the common marks of merit in scientific theories: simplicity, responsiveness to experiment, utility, theoretical elegance and strength, fertility, association with familiar models rendering processes intelligible, and so on."[180] If we moralize in the same way, virtuously, we earn the right to call our moral commitments true.

It is troubling, initially, to realize that Blackburn's rejection of a correspondence theory of truth led him to opt for a coherence theory instead. Reliance on coherent explanation *alone*—the hallmark of conspiracy theories—is one of the chief epistemic vices. One must

177 *See, e.g.*, *id.*

178 *Id.* at 237–48.

179 *See* BLACKBURN, *supra* note 14, at 247.

180 *Id*. at 237.

emphasize the word "alone," however, because some degree of coherence is itself an epistemic virtue. Mutual reinforcement between beliefs does not establish their truth, but it does contribute to their credibility. This credibility is bolstered by epistemic virtues. Elaborating on the coherence supposed by quasi-realism, Blackburn identifies three complementary epistemic virtues.

The first virtue of a defensible coherence theory is comprehensiveness. The more experience one draws into a coherent explanation, the more mutual support it has. This raises a powerful objection: one way to make an explanation comprehensive is to add falsehoods to it.[181] Since any falsehood can be added at will to any explanation, the comprehensiveness of the coherent explanation signifies nothing.[182] One way to defend comprehensiveness as a virtue of coherent explanations is to invoke a second virtue of coherence: control over what is admitted to the explanation. Any element admitted to the network of coherent belief must have the right pedigree. That is, it must have epistemic virtues other than coherence, such as the virtues of the scientific method: "observations, memory, induction, and sober practices of enquiry and judgement."[183]

Drawing epistemic virtues from the natural sciences presents a problem, however: it is difficult to invoke the virtues of science in support of moralizing without implying that these virtues will lead to success in morality comparable to success in science.[184] Specifically, it is possible to see scientific explanations converging on the truth, but convergence is less clear where moral explanations are concerned. Progress in science has reliable pragmatic indicators: roughly, things

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[181] The viral internet conspiracy theory known as QAnon illustrates this weakness perfectly.

> QAnon is the umbrella term for a sprawling set of internet conspiracy theories that allege, falsely, that the world is run by a cabal of Satan-worshiping pedophiles who are plotting against Mr. Trump while operating a global child sex-trafficking ring.
>
> QAnon followers believe that this clique includes top Democrats including Hillary Clinton, Barack Obama and George Soros, as well as a number of entertainers and Hollywood celebrities like Oprah Winfrey, Tom Hanks, Ellen DeGeneres and religious figures including Pope Francis and the Dalai Lama. Many of them also believe that, in addition to molesting children, members of this group kill and eat their victims in order to extract a life-extending chemical from their blood.

Kevin Roose, *What is QAnon, the Viral Pro-Trump Conspiracy Theory?*, N.Y. TIMES (Sept. 1, 2020), https://www.nytimes.com/article/what-is-qanon.html.

[182] *See* BLACKBURN, *supra* note 14, at 239.

[183] *Id*. at 240.

[184] *Id*. at 241.

work better when sound science underwrites our efforts. Progress in morality might be judged on pragmatic grounds—certainly things work better once the moral prohibition on homicide takes root—but morality has little of the natural sciences' precision, and the inference of moral progress from moral success is correspondingly vague. Dispelling this implication points to a third necessary virtue in coherent explanations: varying levels of conviction. Blackburn suggests that we take a more modest stance toward moral truth than we do toward scientific truth, accepting the basic level of conviction provided by our experience of projection. "When we alert our senses nature forces us to the beliefs which then flood in. The most we can do is to use those, and our best ways of forming [controlled, comprehensive, coherent] systems. If truth is anything *more* than this, how could we possibly regard ourselves as knowing anything about it?"[185] Projected value is constrained by the facts onto which it is projected, by the nature of projection itself, and by the application of epistemic virtues within a coherent body of belief. This provides us with as much moral truth as we need. Specifically, for our purposes, it provides us with enough moral truth to reject the subjective stop.

VI. SUBJECTIVIST METAETHICS AND MAJESTIC LAW

This Part will explain how modern subjectivist metaethics undermines the subjective stop and supports the pursuit of majestic law. Much of the discussion will portray legal reasoning as tracking the explanations of moral rationality and moral truth provided by Gibbard and Blackburn. The point of these tracking explanations is not to say that courts follow procedures for moral rationality, as prescribed by Gibbard or Blackburn, in a way that leads us to moral truth. The point is, instead, that law and legal reasoning can be described in terms of these theories, so that, if Gibbard or Blackburn (or both) is right about rationality and truth in morality, then majestic law's claims to rationality and truth are supportable, and the subjective stop is not.

A. *Claims to Moral Rationality and Moral Truth*

In his opinion for the Court in *Gideon v. Wainwright*, incorporating the Sixth Amendment right to counsel and applying it to the states, Justice Hugo Black wrote this:

> Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor

185 *Id.* at 242–43.

> to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth . . . . From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[186]

Gideon overruled *Betts v. Brady*, but Justice Black quoted this language from *Betts*: "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial."[187] This is legal reasoning in the style of majestic law, in its invocations of fairness, justice, equality, and nobility.

We have seen this style of reasoning in Justice Warren's *Miranda* opinion and Justice Stevens's *McDonald* dissent. In Justice Black's *Gideon* opinion, however, we also see a defining feature of majestic law as a style of legal reasoning: its claims to moral rationality and moral truth. For Justice Black, the fact that some procedures are unfair is an "obvious truth" that is arrived at by "reason and reflection." His reliance on "the universal sense of justice" can also be fairly read as a claim to moral truth.

Courts seldom proclaim moral truth, but there are other instances of their doing so. In *Rochin v. California*, a substantive Due Process case in criminal law, Justice Frankfurter described Due Process values as being "deeply rooted in reason and the compelling traditions of the legal profession."[188] In *Mapp v. Ohio*, incorporating the Fourth Amendment's exclusionary rule and applying it to the states, Justice Clark wrote: "Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him . . . ."[189] Justice Stevens argued in similar terms in *McDonald* that the "implicit in the concept of ordered liberty" standard of Due Process "is a recognition that the postulates of liberty have a universal character . . . . Whether conceptualized as a 'rational continuum' of legal precepts . . . or a seamless web of moral commitments, the rights embraced by the liberty clause transcend the local and the particular."[190] The word "transcend,"

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[186] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[187] 316 U.S. 455, 462 (1942).

[188] 342 U.S. 165, 171 (1952).

[189] 367 U.S. 643, 660 (1961).

[190] McDonald v. City of Chi., 561 U.S. 742, 871–72 (2010) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

while problematic for the reasons given above, nevertheless clearly denotes moral truth, as do "postulates" and "universal." And of course, the ideas of a rational continuum and seamless web refer to rationality in moral reasoning, albeit in coherentist terms.

Moral rationality and moral truth in legal reasoning is not a matter of safe-as-houses "objective" decision-making *versus* the boogeyman "subjective" decision-making that motivates the subjective stop. In *Sweezy v. New Hampshire*, Justice Felix Frankfurter argued:

> [S]triking the balance [in Due Process analysis] implies the exercise of judgment. This is the inescapable judicial task in giving substantive content, legally enforced, to the Due Process Clause, and it is a task ultimately committed to this Court. It must not be an exercise of whim or will. It must be an overriding judgment founded on something much deeper and more justifiable than personal preference. As far as it lies within human limitations, it must be an impersonal judgment. It must rest on fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed. Such a judgment must be arrived at in a spirit of humility when it counters the judgment of the State's highest court. But, in the end, judgment cannot be escaped—the judgment of this Court.[191]

The idea of "objective" legal reasoning perpetuates the subjective stop's hard subjective/objective distinction. Instead of contrasting "personal preference" with "objectivity," Justice Frankfurter contrasts it with judgments that exhibit impersonality, humility, deference to others' views, and the willing acceptance of responsibility for one's beliefs. In *Rochin*, Justice Frankfurter acknowledged that "[w]e may not draw on our merely personal and private notions."[192] He contrasted this judicial vice, not with "objectivity," but with epistemic virtues: "[t]o practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared."[193] Frankfurter thought that legal reasoning should aspire to the virtues of empirical inquiry. "In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims."[194]

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191 354 U.S. 234, 267 (1957) (Frankfurter, J., concurring).

192 Rochin v. California, 342 U.S. 165, 170 (1952).

193 *Id*. at 171.

194 *Id*. at 172.

The reasoning of Black, Frankfurter, and Stevens, and of majestic law generally, is well described in Blackburn's terms. We can claim that a moral norm or judgment is true if it is part of a coherent moral system that is comprehensive and controlled. Any body of legal doctrine meets the minimum requirement of coherence. It consists of a set of mutually reinforcing rules and standards that are—if not always, at least for the most part—non-contradictory. The coherent Due Process doctrine that Stevens describes in *McDonald* is comprehensive, encompassing "historical and empirical data of various kinds .... [t]extual commitments laid down elsewhere in the Constitution, judicial precedents, English common law, legislative and social facts, scientific and professional developments, practices of other civilized societies, and, above all else, the 'traditions and conscience of our people'...."[195] To avoid the pitfalls of coherentism—as evinced by the conspiracy theorist—we abide by epistemic virtues. These are the virtues of science, as Justice Frankfurter notes in *Rochin*: disinterested inquiry, facts exactly and fairly stated, and the detached consideration of conflicting claims.[196] Of the epistemic virtues that Blackburn lists, law also aspires to simplicity, theoretical elegance, and strength,[197] along with supporting "observation, memory, induction, and sober practices of enquiry and judgement."[198]

As broad, deep, and "value laden" as majestic standards of Due Process are, they do not claim transcendent truth. There is no need to deny that values are subjective, even in the strong sense that they exist only because we project them onto the world. The facts onto which value is projected are as stable and predictable as we ordinarily assume them to be, and our subjective, projected moral commitments are rational and true at the level of conviction appropriate to morality and majestic law. We can go on arguing about right and wrong, good and bad, as we always have done, but with confidence that these debates are meaningful, because moral commitments are rational. They are rational in ways that, as Blackburn says, earn the right to be called true.

Gibbard's insight concerning the adjudication of moral conflicts at the level of systems of the norm is also helpful in understanding how moral rationality works in law. In 1976, in *United States v. Barker*, the District of Columbia Circuit Court reversed the convictions of two men convicted of conspiring to violate another person's civil rights.[199]

195 *McDonald*, 561 U.S. at 872.

196 *Rochin*, 342 U.S. at 172.

197 *See* BLACKBURN, *supra* note 14, at 237.

198 *Id*. at 240.

199 United States v. Barker, 546 F.2d 940, 944, 954 (D.C. Cir. 1976).

Barker and an accomplice had burglarized the office of Daniel Ellsberg's psychiatrist, in the service of Richard Nixon's 1972 re-election campaign.[200] Their convictions were overturned because they were denied the right to present evidence and argument on a mistake of law theory: that they had relied on the word of a low-level Nixon Administration official who purported to have legal authority to authorize a search.[201] As a rule, reliance on official misstatements of the law as a defense in criminal cases is tightly circumscribed. Traditionally, not even the advice of the state's attorney was sufficient for such a defense.[202] The Model Penal Code provides, in effect, that *only* the advice of the state's attorney is sufficient.[203] This accords with the fact that mistake of law defenses undermine an attribute of law that is both conceptually and pragmatically fundamental: its binding effect.[204] The decision in *Barker* was in error.

Gibbard's norm expressivism describes the moral error committed in *Barker*. To say that something is right or good is to endorse a system of norms that identifies it as right or good, and to recognize that system's authority within a community of judgment. One can say that other normative systems are mistaken and that moral beliefs and actions that are rational under these systems of norms are irrational under a correct system of norms. We can condemn the conduct of the childish employee as morally wrong because she is mistaken about unfairness under our, correct, system of moral norms.

The reversal of the convictions in *Barker* was wrong because the majority accepted a system of norms under which it was morally rational to excuse a politically motivated burglary in violation of a citizen's civil rights. The burglars had guided their actions by the morality of the Nixon cabal.[205] This was a mistaken normative system,

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200 *See id.* at 933–34.

201 *See id.* at 949.

202 *See, e.g.*, Hopkins v. State, 69 A.2d 456, 460 (Md. 1950).

203 *See* MODEL PENAL CODE § 2.04(4)(b)(iv) (AM. LAW INST. 2019) (authorizing a mistake of law defense for reliance on "an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.").

204 On the pragmatic rationale, see OLIVER WENDELL HOLMES, THE COMMON LAW 48 (1881) ("[T]o admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales."). On the conceptual rationale, see SCOTT SHAPIRO, LEGALITY 212 (2011) ("From the perspective of legal institutions . . . their plans morally bind regardless of whether those who are bound consent to their authority.").

205 One of the other conspirators was Egil Krogh. *See* United States v. Barker, 546 F.2d 940, 943 (D.C. Cir. 1976). Krogh, a lawyer, was disbarred, but was later reinstated on the grounds, *inter alia*, that he had overcome the effects of "his position of

and the burglars' beliefs and actions were morally wrong because they were irrational under any acceptable moral system. Their patriotism was misconceived as loyalty to Richard Nixon; their good intentions were corrupted to the point of criminality; and they learned the wrong moral lessons from their involvement with the CIA—a predictable outcome. As fellow conspirator Egil Krogh later explained: "[t]he premise of our action was the strongly held view within certain precincts of the White House that the president and those functioning on his behalf could carry out illegal acts with impunity if they were convinced that the nation's security demanded it."[206]

In its insupportable expansion of a mistake of law defense, the *Barker* majority endorsed this mistaken system of norms. The reversal of the burglars' convictions was irrational, most immediately, under the set of norms governing mistake of law; and behind this, the normative systems of the criminal law, the principles of a rule of law society, the moral authority of law, and the rational demands of morality. As Judge Harold Leventhal pleaded in his dissent, "[i]s this judicial novelty, a bold injection of mistake of law as a valid defense to criminal liability, really being wrought in a case where defendants are charged with combining to violate civil and constitutional rights?"[207] None of this is to say that moral rationality or moral truth exists independently of us. It is to say that to endorse the majority's expansive view of mistake of law would serve society poorly and perhaps imperil its survival in the long-term.[208]

B. *A Refusal to Reduce*

The conditional subjective stop is an exercise in reductionism, such as the reduction of law to text, history, original intent, or tallies of state law. This reductionism is a relic of Ayer's caveman emotivism. The positivist school to which Ayer belonged attempted to reformulate value statements in verifiable, sense-experience terms.[209] For example, talk about Henry's "piety" should be reduced to talk about who admires Henry, and why, because an evaluation of piety entails a commitment to

subordination to the President, and the 'frantic atmosphere' in the White House at that time." Matter of Krogh, 610 P.2d 1319, 1320 (Wash. 1980).

206 Egil Krogh, *The Break-In That History Forgot*, N.Y. TIMES (June 30, 2007), https://www.nytimes.com/2007/06/30/opinion/30krogh.html.

207 *Barker*, 546 F.2d at 958 (Leventhal, J., dissenting).

208 *Cf.* GIBBARD, *supra* note 12, at 238–48 (discussing the cost of accommodating irrational norms in a community of judgment). *Barker* serves as a reminder of the threat that a presidential cult of personality presents to a democracy. In addition to the pathologies described by Krogh, tribalism, willful ignorance, and belief in paranoid conspiracy theories are good reasons to reject such a system of norms.

209 BLACKBURN, *supra* note 14, at 152.

theism that the positivists were not willing to make. The substitution of reasons for admiration in place of piety allowed them to shed this unwanted theistic commitment.[210] In Ayer's emotivism, the substitution of pro and con exclamations in place of pro and con value judgments allowed him to shed a commitment to meaning in moral talk—something he was constrained to do in any case because his theory of meaning required it. Proponents of the subjective stop appear to feel the same constraint, and to have adopted the same method of coping.

The problem with a reductive substitution of B terms (reasons for admiration) for A terms (piety), however, is that it raises a paradox. If B is an improved version of A, then the more B improves A the more likely it is that B is not a reduction of A, but something different from A instead.[211] If we shed the theism of "piety" in favor of non-theistic reasons for admiration, then we are not talking about piety at all. "Because of this problem," Blackburn points out, "there is a tendency for reductionist programmes to take on a revisionist air."[212] Ayer revised moral statements into something else entirely: meaningless exclamations. In law, the reductivism of the subjective stop has a revisionist air. If we shed the intrinsic features of justice, fairness, and the rest of law's moral commitments, then we are not talking about law's moral commitments at all.

Majestic law rejects reduction as a requirement of legal reasoning. Instead, it permits moral commitments to operate in legal reasoning on their own prescriptive terms, without a purported translation to descriptive terms. Once again, Justice Stevens makes the point in *McDonald*: "To the extent the principal opinion could be read to imply that the historical pedigree of a right is the exclusive or dispositive determinant of its status under the Due Process Clause, the opinion is seriously mistaken."[213] Elsewhere in his dissent, he writes:

> Justice Cardozo's ['implicit in the concept of ordered liberty'] test undeniably requires judges to apply their own reasoned judgment, but that does not mean it involves an exercise in abstract philosophy. In addition to other constraints I will soon discuss, . . . historical and empirical data of various kinds ground the analysis. Textual commitments laid down elsewhere in the Constitution, judicial precedents, English common law, legislative and social facts, scientific and

210 *See id.* at 153.

211 *Id.* at 154.

212 *Id.* at 156.

213 McDonald v. City of Chi., 561 U.S. 742, 874 (2010).

> professional developments, practices of other civilized societies, and, above all else, the 'traditions and conscience of our people,' are critical variables. They can provide evidence about which rights really are vital to ordered liberty, as well as a spur to judicial action.[214]

It is all too easy to read Justice Stevens's appeal to "historical and empirical data," "[t]extual commitments," and so on as recommending the reduction of moral commitments to revealed preferences. His disavowal of "abstract philosophy," however, is not a rejection of "subjective" moral commitments; it is a rejection of a metaethical strawman that is often raised to discredit majestic law.[215] Likewise, his invocation of "evidence" of what is "vital to ordered liberty" is not a suggestion that the moral commitment to ordered liberty can be reduced to "[t]extual commitments," "legislative and social facts," or "historical and empirical data." Such a reduction would indicate an aspiration to transmute "subjective" into "objective," and Stevens consistently expressed doubts about this aspiration.

If Stevens's assurances that the Due Process standard of "implicit in the concept of ordered liberty" entails the examination of text, history, and "social facts," and if this examination is not part of a reduction, then one can fairly ask what it means to say that these things "provide evidence about which rights really are vital to ordered liberty." Gibbard's norm expressivism provides a non-reductive way to understand Stevens's reference to evidence.

Recall that the advantage of seeing moral controversy in Gibbard's terms is that the adjudication of individual moral commitments is different from the adjudication of conflicting systems of norms within which these commitments are rational. We can read Stevens's catalog of relevant considerations in Due Process analysis as a system of norms under which his judgment on the Due Process and Second Amendment issues presented in *McDonald* is rational. He says explicitly that the rights granted by the Due Process Clauses are "a seamless web of moral commitments."[216] This conceptually thick, morally rich system has evolved in the context of, and for the purposes of, interpreting the Due Process Clauses in United States courts. This moral system properly draws on a wide range of sources and incorporates moral commitments from these sources into a comprehensive constitutional analysis. To

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214 *Id.* at 872.

215 *See also* Rochin v. California, 342 U.S. 165, 169–72 (1952) (Stevens, J., dissenting) ("Due Process of law thus conceived is not to be derided as resort to a revival of 'natural law.'").

216 *McDonald*, 561 U.S. at 872.

recognize a legal rule as a requirement of Due Process "not because the States have always honored it, but because it is 'essential to free government and to the maintenance of democratic institutions'" is to make a normative evaluation of democratic institutions, not merely the legal rule at issue.[217]

The richness of this moral system is the reason behind the majestic law quality of many Due Process standards. To determine which legal rules contribute to "a fair and enlightened system of justice" requires evaluation according to not only the familiar moral values of fairness and justice but also the less familiar moral criterion of "enlightened."[218] Similarly, to identify "immutable principles of justice, which inhere in the very idea of free government,"[219] or "immunities . . . implicit in the concept of ordered liberty,"[220] requires us to deliberate on justice and liberty as such, in terms of their etymology, history, conception, and extension.[221] Specifically, both of these standards direct legal reasoning toward conceptualization: justice as an inherent property of free government; and immunities as implicit properties of ordered liberty. These Due Process standards are characteristic of majestic law.

A judgment under these Due Process standards expresses a subjective judgment in rational, empirical terms. They satisfy the second order norms by which the rationality of normative systems is judged. By virtue of their evolving in the context of a common law method, these Due Process standards are the product of a systematic process of normative discussion, within a legal community of judgment, exercising mutual influence in precedent, leading to normative governance not only by law but also by moral commitments in law. Law aspires to consistency, of course, but law as an enterprise also requires sincerity,[222] inferences from shared premises based on shared supporting observations,[223] refraining from privileging one's own views,[224] flexibility,[225] and, in general, a pursuit of "standpoint-

217 *Id.* at 874–75.

218 Palko v. Connecticut, 302 U.S. 319, 325 (1937).

219 *McDonald*, 561 U.S. at 760.

220 *Palko*, 302 U.S. at 324–25.

221 *See also* Haley v. Ohio, 332 U.S. 596, 602 (1948) (Frankfurter, J., concurring) ("The only way to relax such a grip, the only way to avoid finding in the Constitution the personal bias one has placed in it, is to explore the influences that have shaped one's unanalyzed views in order to lay bare prepossessions.").

222 *See* GIBBARD, *supra* note 12, at 190.

223 *See id.* at 191.

224 *See id.* at 181.

225 *See id.* at 190.

independent validity."[226] When complied with, these norms generate normative authority sufficient to justify rejecting judgments that are rational only under unacceptable systems of norms.

This is the sense in which the broad range of moral commitments listed by Stevens are "evidence about which rights really are vital to ordered liberty."[227] Reduction is unnecessary as well as misleading, because it is evident that the subjectivity of these commitments is benign, and there is no reason to pursue phantom "objectivity" in the law of Due Process.

VII. "CIVILIZED" DUE PROCESS

Many of the examples of the subjective stop discussed in the preceding Parts are taken from Justice Scalia's concurrence in *McDonald v. City of Chicago*. The examples are numerous, but this fails to convey how deeply his opinion is anchored in the subjective stop. This is also true, for a different reason, of Justice Alito's plurality opinion.

Not all of the subjective stops imposed by Scalia are as abrupt (and puerile) as his "Who says?"[228] in response to Justice Stevens's observation that owning a handgun is not a necessary feature of human autonomy, dignity, or equality.[229] Most of them, however, are full subjective stops. According to Justice Scalia, Justice Stevens's application of *Palko*'s "fair and enlightened system of justice" standard "basically means picking the rights we want to protect and discarding those we do not."[230] The guideposts that Stevens uses to avoid "excessive subjectivity" in Due Process analysis are "omnidirectional," and "incapable of restraining judicial whimsy."[231] Stevens's efforts to clearly describe the interests at stake consist of "capacious, hazily defined categories," but not much precision is needed, Scalia quips sarcastically, to protect rights to "[s]elf-determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity, [or] respect."[232] And on it goes. Steven's methodology "does nothing to stop a judge from arriving at any conclusion he sets out to reach."[233] Stevens's "criterion . . . is inherently manipulable."[234] His "criterion lets

226 *Id.* at 193.
227 McDonald v. City of Chi., 561 U.S. 742, 872 (2010).
228 *Id.* at 800 (Scalia, J., concurring).
229 *See id.* at 893.
230 *Id*. at 794.
231 *Id*. at 794–95.
232 *Id*. at 797.
233 *Id*. at 799.
234 *McDonald*, 561 U.S. at 799.

judges pick which rights States must respect and those they can ignore."[235] "This criterion, too, evidently applies only when judges want it to."[236] And, "[o]nce again, principles are applied selectively."[237]

To no one's surprise, the reason for all this arbitrariness turns out to be that Justice Stevens's Due Process analysis is "subjective," particularly when contrasted to originalism.[238] A historical methodology, Scalia assures us, "is much less subjective, and intrudes much less upon the democratic process. It is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor."[239]

Justice Alito's plurality opinion more subtly imposed a subjective stop and disavowed majestic law. Because the City of Chicago was arguing against the incorporation of the Second Amendment, it relied on an all but forgotten "civilization" standard of Due Process from the pre-incorporation era. In *Twining v. New Jersey*, the Self-Incrimination Clause was said not to be incorporated because it "has no place in the jurisprudence of civilized and free countries outside the domain of the common law."[240] In *Palko v. Connecticut*, Justice Cardozo reasoned that the Double Jeopardy Clause, like the Sixth Amendment Jury Guarantee, could not be applied to the states on the ground that "[f]ew would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them."[241] In *Chicago, Burlington and Quincy Railroad Company v. City of Chicago*, the Court held that the Fourteenth Amendment Due Process Clause required compensation for property condemned by local governments under eminent domain because compensation "was a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice"[242] and "laid down . . . as a principle of universal

235 *Id*. at 800.

236 *Id*. at 801.

237 *Id*. at 802.

238 *Id*. at 793.

239 *Id.* at 804.

240 Twining v. New Jersey, 211 U.S. 78, 113 (1908), *overruled, in part, by* Malloy v. Hogan, 378 U.S. 1 (1964). The plurality opinion quoted language omitted here: "and it is nowhere observed among our own people in the search for truth outside the administration of the law." *Id.* This "search for the truth" refers to police interrogation and the privilege against self-incrimination.

241 Palko v. Connecticut, 302 U.S. 319, 325 (1937).

242 Chicago, Burlington & Quincy R.R. Co. v. City of Chi., 166 U.S. 226, 238 (1897); *cf.* Trop v. Dulles, 356 U.S. 86, 100 (1958) ("While the State has the power to punish, the

law."[243] In his plurality opinion, Justice Alito pronounced these standards dead.[244] Justice Scalia also roundly rejected any standard not limited to the moral and legal norms of the United States or Britain.[245]

In rejecting the civilization standard of Due Process, the plurality opinion merely followed Justice White's imposition of a subjective stop, complete with a metaethical strawman, in footnote fourteen of his opinion in *Duncan v. Louisiana*, in which the Court incorporated the Sixth Amendment's jury guarantee and applied it to the states. White noted that, in past cases, "the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection."[246] Recent cases, he wrote, "have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country."[247] White's reference to "imaginary and theoretical schemes" amounts to a metaethical strawman of the kind that Justice Scalia erected in *McDonald*. Administering imaginary schemes might call for a "sixth sense instilled in judges when they ascend to the bench."[248] It also calls to mind Justice Stevens's defensive denial that *Palko*'s "implicit in the concept of ordered liberty" test "involves an exercise in abstract philosophy."[249]

Reading *Palko* in full, it is no wonder that White imposed a subjective stop in *Duncan*. Justice Cardozo argued in majestic law terms, even though *Palko* did not expand the protections of the Constitution. Cardozo claimed that the non-incorporation of the Double Jeopardy Clause was a logical necessity, "dictated by a study and appreciation of the meaning, the essential implications, of liberty itself."[250] He contrasted the Double Jeopardy right at issue in *Palko* with the First Amendment, which guaranteed freedom of conscience as "a logical

Amendment stands to assure that this power be exercised within the limits of civilized standards.").

243 *Id*. at 236.

244 *See McDonald*, 561 U.S. at 760–64 ("The Court [has] made it clear that the governing standard is not whether any 'civilized system [can] be imagined that would not accord the particular protection.'") (second alteration in original) (quoting Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968)).

245 *See id.* at 800–01.

246 *Duncan*, 391 U.S. at 149 n.14.

247 *Id*.

248 *McDonald*, 561 U.S. at 796.

249 *Id*. at 872.

250 Palko v. Connecticut, 302 U.S. 319, 326 (1937).

imperative."[251] This logic produced the truth of the matter. Freedom of speech, he wrote, was "the matrix, the indispensable condition, of nearly every other form of freedom," and "a pervasive recognition of that truth can be traced in our history, political and legal."[252] These were existential truths of the kind claimed by moral realism. The incorporation of certain rights turned on "the belief that neither liberty nor justice would exist if they were sacrificed."[253] None of this was majestic literary style; it was majestic legal reasoning because it had substantive legal consequences. This is why *Palko*'s civilization standard of Due Process drew a subjective stop in *Duncan*.

The *McDonald* majority made quick work of Chicago's argument by treating the civilization standard as an appeal to foreign law. Justice Alito expressed amazement at Chicago's reliance on the civilization standard, writing that, "[i]f *our* understanding of the right to a jury trial, the right against self-incrimination, and the right to counsel were necessary attributes of *any* civilized country, it would follow that the United States is the only civilized Nation in the world."[254] Justice Scalia argued that "this follow-the-foreign-crowd requirement would foreclose rights that we have held . . . are incorporated, but that other 'advanced' nations do not recognize—from the exclusionary rule to the Establishment Clause."[255]

All sides should have recognized, however, that the civilization standard is not an invocation of foreign law. References to other countries can be severed from the civilization standard of Due Process without losing its substance. In *Palko*, Cardozo made only a vague reference to "narrow and provincial" views of other legal systems while discussing Due Process standards in the language of majestic law.[256] Instead, he stressed that the rights to a grand jury and trial by jury "are not of the very essence of a scheme of ordered liberty," and that "[t]o abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[257] He asked whether the state had subjected the appellant to "a hardship so acute and shocking that our policy will not endure it?" and whether it had violated "those 'fundamental principles

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251 *Id.* at 327.
252 *Id.* at 326–27
253 *Id.* at 326.
254 *McDonald*, 561 U.S. at 781–82 (original emphasis).
255 *Id*. at 800–01.
256 Palko v. State of Connecticut, 302 U.S. 319, 325 (1937).
257 *Id.*

of liberty and justice which lie at the base of all our civil and political institutions'?"[258]

Consider also the language preceding Justice Moody's reference to civilized countries in *Twining*, by which he contrasted the morality of Due Process with the mere utility of the Self-Incrimination Clause.

> Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege [against self-incrimination] from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. The wisdom of the exemption has never been universally assented to since the days of Bentham; many doubt it to-day, and it is best defended not as an unchangeable principle of universal justice, but as a law proved by experience to be expedient.[259]

Far from invoking foreign law as authority, Moody framed the question as one of universal assent to immutable principles of universal justice. Similarly, in the *Chicago, Burlington and Quincy Railroad* case, the reference to "all temperate and civilized governments" is just another way of saying that the right to compensation is "a settled principle of universal law," reflecting "a deep and universal sense of its justice."[260] The civilization standard of Due Process is a moral norm, not only a legal one and not at all a question of foreign law.

Attempting to straddle the descriptive-prescriptive divide, Chicago argued that "if it is possible to imagine *any* civilized legal system that does not recognize a particular right, then the Due Process Clause does not make that right binding on the States."[261] The city seems to have understood that it was advancing a moral argument, but it ought to have left imaginary civilizations out of it. Had it done so, it would not have fallen into one of the standard metaethical traps that impede majestic law. Our moral commitments are not imaginary, but this is precisely how the proponents of the subjective stop portray them.

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258 *Id.* at 328

259 Twining v. New Jersey, 211 U.S. 78, 113 (1908).

260 Chicago, Burlington & Quincy R.R. Co. v. City of Chi., 166 U.S. 226, 238 (1897).

261 *McDonald*, 561 U.S. at 780–81 (original emphasis).

As matters stand, there is no way to undo *Heller* for the foreseeable future.[262] After *McDonald*, the Court's insistence on jot-for-jot incorporation moots any direct appeal to Due Process in subsequent gun control cases from the states, including, of course, the civilization standard. In future Due Process cases in other areas of the law, however, the civilization standard might be revived. Some of the language in *Palko*, *Twining*, and *Chicago, Burlington and Quincy Railroad* is archaic and not entirely persuasive. It is possible, however, to avoid the language of the old cases that suggests moral realism or nineteenth-century formalist jurisprudence. The "immutable principle of justice" standard stated in *Twining* is viable because "immutable" means "unchanging," not "transcendent" or "eternal." The "principle of natural equity" formulation in *Chicago, Burlington and Quincy Railroad* is not viable, because it comes too close to the language of moral realism and natural law jurisprudence.[263] The frank use of moral language will always draw a subjective stop, but the practice of majestic law in the area of Due Process would restore much of its former power.

VIII. CONCLUSION

The subjective stop has been used in a persistent campaign, spanning decades, to hollow out moral commitments in law, on the authority of a primitive emotivism. Majestic law, in contrast, is defensible by means of at least two metaethical theories that embrace the subjectivity of moral commitments. If law students, lawyers, scholars, and judges were to abjure the subjective stop, this would open the way for the recovery of majestic law. This path will have to be trod carefully, but to insist that it is a dead end unjustifiably empties the law of a wide range of moral commitments: not only integrity, dignity, decency, autonomy, freedom of conscience, freedom from cruelty, and moral proportionality in punishment but ultimately justice and fairness.

Instead of assuming a primitive emotivism, we can see moral commitments as expressions of support for moral systems and not merely expressions of isolated moral norms and judgments. The former are adjudicated differently from the latter. We can rationally reject moral errors on the ground that they express support for moral systems—such as a childish set of moral commitments—that we cannot

262 *See* District of Columbia v. Heller, 554 U.S. 570 (2008) (recognizing an individual's Second Amendment right to keep and bear arms).

263 *See* John Finnis, *Natural Law: The Classical Tradition, in* OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1, 4 (Jules Coleman and Scott Shapiro eds., 2002) (natural law "cannot be reduced to, or deduced from, the principles of natural science or metaphysics, logic, or any craft").

rationally accept if we hope to have a healthy society. We can also attribute the subjectivity of moral commitments to the fact that we project them onto an austere external world, but with the understanding that this world of fact puts constraints on what we can do and believe for moral reasons. These projected values also have their own logic to constrain them, and we can earn the right to speak frankly and authoritatively about the moral commitments of law by living up to the epistemic virtues ordinarily associated with empirical inquiry.

Either or both of these metaethical theories—for they do not seem to be mutually exclusive—allows us to claim moral rationality and moral truth for law. Moral choices in criminal law, such as the rejection of a presidential cult of personality, are rational at a systemic level, so that a subjective evaluation of the crime committed in the service of the cult is not disqualified from legal reasoning about mistake of law as a defense to crime. The same is true for most of the quite majestic standards of Due Process. We can, for example, bar the norms of uncivilized legal systems from ours on the ground that they are wrong, not only for us but for anyone. We also recognize epistemic virtues specific to law that combine with the epistemic virtues of empirical inquiry to justify claims to truth in law, even though truth is something that we project onto the world. A punishment is indecent if that is what an honest debate conducted in the rich, unreduced terms of decency concludes—even though any such conclusion requires the less rich, more formal imprimatur of law. And if we conclude someday that this legal rule is in error, the error will be discovered and debated in the same unreduced moral terms. No meaningless pretensions to "objectivity"—most notably imagined reductions of prescriptions to descriptions—are required.

Majestic law does not entail disregarding the limitations of federalism, the separation of powers, or basic rule of law principles. Because all other institutional constraints on law and legal reasoning remain in force, the rejection of the subjective stop safely licenses a deeper engagement with moral commitments in law than we have had for decades. While this Article has argued that we *can* recover majestic law, the reason we *ought to* recover it was stated eloquently by a philosopher whose work we have noted only in passing, but whose emotivism could be used to bolster the case for majestic law. Of moral ideals, Charles L. Stevenson wrote this:

> For these ideals, like all other attitudes, are not imposed upon human nature by esoteric forces; they are a part of human nature itself. If they are to become a more integral part of it, they must be fought for. They must be fought for with the

> words "right" and "wrong," else these attitude-molding weapons will be left to the use of opponents.[264]

When law calls for moral commitment, it is wrong to hide behind a convenient mistake.

264 STEVENSON, *supra* note 120, at 110.