# Morality, Individual Responsibility, and the Law

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## ABSTRACT

If Mearsheimer thinks one can be an ethical participant in our society just by wishing to be one, he sorely misunderstands the demands of our society. [...] as Mearsheimer disavows any obligation to help his students deal with ethical problems, perhaps he would hoist that obligation onto the press, politicians, religious leaders, pre-college teachers, and parents.

## FULL TEXT

I am a non-academic: a federal prosecutor in New York City who also worked for several years as a civil litigator defending the City in a variety of lawsuits raising constitutional claims. For me, it is a given that universities have the important obligation of preparing their students to become meaningful participants in social life.

A democratic system committed to free expression governs social life in our country. This is fortunate, for all intellectuals wish to participate in a society with as much room for criticism, new ideas and reflection as they think appropriate. Indeed, it is by now a truism that a democratic system must have as its constituents thoughtful as well as active members if it is to survive. There is, however, more to social participation than presenting a flux of ideas. The participants must understand the country they contribute to and benefit from. They must understand what makes it work, what can improve it, and what can destroy it. In my view, universities do provide this understanding by teaching the humanities, which are nothing if not studies of what makes human life worthwhile and how we should interact with the world. This education best prepares us for participation in this country because our system of government and the United States Constitution are the legacy of Western civilization. The ethical spirit of this country's laws are powerful, and this is not an accident of nature. The laws resulted from the lessons in Western thought, so rigorously studied at places like the University of Chicago.

Against this backdrop, Professor Mearsheimer's emphatic message that universities do not concern themselves with moral issues is startling. His address to those who will shape this country through the next half-century could not have been more misleading. Great universities like Chicago provide a compelling moral guide to their undergraduates and they must continue to do so as long as they aspire to educate. That same guide is explicit in the Constitution of the United States and implicit in our social structure. Mearsheimer subscribes to at least one of these principles: that truth has value. While, oddly enough, he relegates the pursuit of truth to a mere proscription of plagiarism, it is a distinctly moral position that has an immeasurable practical impact on our society. There is at least one other equally profound principle our society has adopted which is critical in undergraduate programs at institutions like the University of Chicago: respect for human rights, also called, at various times, dignity, autonomy, or human spirit. From these twin moral aspirations, our nation has derived countless laws and rules of conduct that universities do and should prepare their students to understand.

Devotion to truth and human rights are among the many lasting lessons of an education in the humanities and, in teaching students about these values, universities come nowhere close to indoctrination or any other mind-narrowing process so offensive to a liberal education. By studying political philosophy texts as diverse as Plato's Republic, Hobbes's Leviathan, and Marx's Communist Manifesto, students analyze the authors' theories about the best way to govern individuals. Each author employs rigorous arguments based on what he deems propositions at the very foundations of knowledge and logic; truth, in short. Even as students proceed to twentieth-century thought, where rigorous scepticism challenges the very

possibility of knowledge, they encounter unblinking devotion to truth in the works of tortured intellectuals like Nietzsche, rebelling against the rational heritage of Greek philosophy, or Wittgenstein, who no less fiercely plumbed the depths and limits of logic. An education composed of such courses where ideas are so diverse poses no danger of indoctrination.

Similarly, literature courses develop a student's moral sensibilities in ways that few would deem "dangerous." Great works as old as Homer's Iliad, Dante's Inferno, Shakespeare's Hamlet, and those of more recent authors like Tolstoy, Jane Austen and Dostoevsky have shaped the modern respect for the individual spirit. Long after Romanticism died, and pragmatism gained favor in every way, Wallace Stevens's eye for beauty in an increasingly gray world or John Steinbeck's unabashed celebration of courage amidst despair serve as striking examples of the continuing vitality of the human character. From these books, students will learn something about the character-defining impact of fortune, as well as the world-defining impact of character. As their own lives resonate with these timeless themes, they may learn to love and grieve for the human spirit. If so, I think they will participate more fully in society and be better able to confront the ethical concerns of collective living.

This understanding is clearly vital because of the moral foundations of the Constitution and the demand to participate that is implicit in any democracy. The authors of the Constitution were themselves the product of thorough training in Western thought. Thus, through the First Amendment, they sought to guarantee freedom of speech and the press. Mills's argument that rigorous competition of ideas is the surest way to find truth is an ethics-based judgment that has taken a secure hold on our jurisprudence. Understanding the profoundly personal character of worship and the effort to find one's place in the universe, the founding fathers also forbade any state from either supporting or interfering with any one religion. The due process clauses of the Fifth and Fourteenth Amendments, which prohibit the deprivation of life, liberty or property, without due process of law, mandate hearings and otherwise fair legal procedures that tend to ensure error-free, that is, true judgments. The Supreme Court has also found implicit in the Constitution a right to other uniquely personal decisions, such as the use of contraception and abortion. The Court has drawn upon the general spirit of the Bill of Rights and its respect for the autonomy of individuals in our society to read those rights into the Constitution.

Perhaps the most stark example of how this country has embodied moral judgments in the law, however, is the Fourteenth Amendment's equal protection clause. As interpreted by the Supreme Court, the clause makes into law the once-debated notion that all humans are equal. We can view this legal judgment either as the triumph of truth or the clearest expression of support for human dignity. In either case, one should remember that the nation accepted this legal judgment, seemingly so uncontroversial to us, only after a savage civil war and, one hundred years later, the relentless efforts of civil-rights activists. Indeed, the moral judgments that make up so much of our law and our view of ourselves continue to evolve and require constant application as well as interpretation. With each new case raising constitutional claims, countless competing interests test our social commitment to truth and human worth. Powerful jurists and politicians battle over the limits of these values, and lesser people in the law work with the bricks and mortar of legal precedent to press the result desired by their respective clients, be they the state or complaining citizens.

In the First Amendment area, for example, there is an ongoing debate about whether violent pornography should be protected by the Constitution because to ban it is to proceed down the slippery slope toward censorship, which is contrary to a truth-loving society. Another example of conflict in the First Amendment area surfaces in a recent case where a publisher sold a manual whose sole purpose was to teach people how to become contract killers. Meticulously applying the lessons in that manual, a man executed a young boy and two witnesses. When the magazine was held civilly liable for damages to the families of the deceased, some nationally respected newspapers joined in an appeal to overturn the judgment on the ground that the First Amendment would be endangered by the verdict. The Fourth Circuit Court of Appeals rejected the argument in strong terms, clearly revolted by the newspapers' construction of the First Amendment guarantees. Still another example is the stiffening battle over affirmative action programs. In a society that has declared all persons fundamentally equal, what is the justification for treating certain groups more favorably because of their skin

color? The tension between social programs designed to reverse centuries of oppression of an entire race and the color-blind application of merit is as difficult a moral problem as life has to offer.

At stake in these contests is not just the resolution of discrete constitutional issues, for lawyers and jurists are not the only participants nor are they the only people affected. Teachers, police officers, and parents who talk to their children at the dinner table-that is, the public-all forcefully contribute to the debate, and the solutions we reach will change this country in important ways. If for example affirmative action is banned today, our children will learn to forget these competing interests and wonder why this was ever even a question. We will be a different people with a different consciousness.

The debate on constitutional issues is not the only level at which morality deeply impacts our lives. Even in the day-to-day operation of the criminal justice system, we engage in small skirmishes over the appropriate limits and value of truth. These skirmishes are so fundamental in some ways that it is easy to forget their implications in our society. Take the well-known example of the exclusionary rule. If evidence is obtained in violation of the defendant's constitutional rights against self-incrimination or warrantless searches, the court will exclude that evidence at trial, even if it would most certainly prove the defendant's guilt. Law enforcement officers generally do not like this rule and, sadly, many of them do not understand it at all. The media recently reported on a phenomenon called "testilying." Some police officers, frustrated with courts that exclude or suppress material evidence, lied on the stand during suppression hearings. Thus, if officers never administered the Miranda warnings to suspects before questioning them and obtained incriminatory statements, the officers would lie under oath to state that they did. Such officers justified their lies on the ground that the bad guys should not get away with their crime.

The corrupting influence of this attitude is grave. To make the damage vivid, one must consider what it means to distrust the honesty of officers. In criminal cases, the rules of evidence require a careful chain of custody over certain tangible pieces of evidence such as hair samples, the murder weapon, the three pounds of heroin. The jury must believe that the hair sample matching the defendant was in fact taken from the bed of the rape victim, rather than yanked out of the defendant after he was arrested. There is usually no way to know this for sure unless the jury is prepared to credit the officer who found the hair sample when he talks about the careful chain of custody he maintained over the hair after it was found on the bed. If we do not believe the officers because we fear that they will routinely subordinate truth to other interests, moral or otherwise, guilty convictions will become rare phenomena.

Imagine what happens, for example, when people lose confidence in the integrity of the criminal justice system. In my line of work, one need not extend imagination very far; the consequences are apparent in the nearby community of Chinatown in New York City. In one investigation, I learned that recent immigrants from the Fukien province of the People's Republic of China endured hundreds of incidents of kidnapping, torture, theft, extortion, rape and murder within a four-year period by marauding Fukinese gangsters. Apparently based on their experience in Fukien, the community here had no confidence in the integrity of police officers or their effectiveness. Consequently, the victims chose to remain silent, hoping that they would be left alone by the gangsters in the future, rather than entrust their safety to the police. The suffering the community endured silently was truly heart-breaking. In one case, a woman was held in this city for several days by a group of young men as she was repeatedly raped and cut with a knife. At one point, the muzzle of a gun was placed in her vagina. The same group of men had kidnapped and extorted dozens of different victims in the previous months, and no complaints were filed. In yet another case, a gangster attempted to terrorize a group of kidnapped victims by severing the index finger of one of the victims and tying it around the victim's neck as the bloody member quivered for several seconds. This gangster and his crew had caused a virtual crime-wave, murdering, kidnapping, torturing and extorting other Fukinese people with impunity, for over two years. Eventually, by compelling accomplices to testify, the federal government was able to dismantle many of the gangs and, slowly, more victims became willing to cooperate as well. As over a hundred gangsters have been imprisoned for lengthy sentences, some semblance of the security we all take for granted has settled over the Fukinese community of immigrants here.

If one is inclined to brush off such scenarios as overly apocalyptic and improbable in this country, one is either supremely optimistic about our moral condition or fails to appreciate the fragility of social confidence. State prosecutors in inner cities can describe how difficult it is to obtain a guilty verdict from some juries. Because of the deep distrust of police officers shared by some inner-city residents, jurors will think long and hard before accepting the testimony of police officers. One consequence of this is a higher crime rate and brazen violence by criminals who bet they can "beat the rap," and often do. While there are undoubtedly many factors that cause a high crime rate in poorer neighborhoods, deep-seated suspicion about law enforcement officers is one of the primary factors.

Physical safety is only one of the basic social benefits we enjoy and which are endangered if we lose interest in the moral values underlying our society. Economic stability is another. The health of the marketplace relies heavily on accurate information, equally available to all investors. If public confidence in the integrity of this system falters, so does the economy. The international crisis stemming from the woes of the Asian business markets is an example of what can happen when people finally lose confidence in a system allegedly rife with fraud and corruption. In our own country, fantastically wealthy men in the securities industry have been prosecuted for engaging in fraud and practices that critically injured thousands of investors, for no reason other than to make yet another fortune. Detailed regulations and stern criminal sanctions attempt to weed out the renegades who care nothing for accuracy or their fiduciary duty to their investors, but there is no true safeguard if such players who lack any moral referent become a majority in the marketplace.

There are obviously many other examples that would illustrate the importance of moral attitudes to even the most basic benefits of social life. One may think the illustrations are too obvious, but they were not to the testilying officers, nor to some members of the public who apparently disagreed with the prosecutions. Eye-rolling cynicism about things like truth is a rot that eats at us. Our system relies so heavily on truthfulness that it cannot long withstand a moral attitude careless about that value.

Like so many jurists and other lawyers who work within our system of laws, I have no doubt that we will stay the course and achieve progress. That is true, however, only because I am surrounded by people who toil daily to maintain the ideals of our country, including the taxi drivers, school teachers, businesspeople, students, and journalists, who observe and reflect upon the moral issues all around them. This clear-sighted focus on maintaining our moral attitudes is vital. Teachers, parents and local police must pursue truth as if the material health of our society depended on it, for it does. People must remain alert to the current constitutional problems because the future of our society depends on it.

Mearsheimer apparently does not understand the urgency of these social efforts. Secure in the intellectual freedom, economic stability and physical safety afforded him by our social structure, he asserts that universities have nothing to do with ensuring that people understand moral issues. At one point in his address, he does add: "I am not saying that moral questions are unimportant and that you should pay them little attention in the years ahead. On the contrary, individuals and the societies they live in constantly run up against troubling ethical questions, and they have no choice but to wrestle with them and attempt to find the right answers." He goes on to insist, however, that universities will make no effort to provide guidance in these matters.

What then are the tools with which the students are to "wrestle" with moral questions? Devotion to truth and human rights is not something found in our genetic makeup. Western civilization reflected on the human condition for hundreds of years before achieving these values and, as the world grows, the ethical implications of action become increasingly complex. The value of a great liberal arts education is that it heightens important sensibilities so that the graduate is better equipped to recognize ethical problems and think about them. If Mearsheimer thinks one can be an ethical participant in our society just by wishing to be one, he sorely misunderstands the demands of our society.

Moreover, as Mearsheimer disavows any obligation to help his students deal with ethical problems, perhaps he would hoist that obligation onto the press, politicians, religious leaders, pre-college teachers, and parents. Everyone but the university. Everyone but the institution best suited to guide young people critically through the moral lessons of history, philosophy, and literature.

Fortunately, Mearsheimer is mistaken. Undergraduates do come from elite schools with a deeper appreciation for humanity and a devotion to the pursuit of truth. Having studied the ideals of the Western tradition, they emerge as better, not just smarter, people. As such, they are prepared to contribute meaningfully to the moral dimension of social life.

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