

Mistake of Fact, Moral Justification, and Justificatory Defenses in Law

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Re'em Segev, *Justification Under Uncertainty*, 31 **Law and Philosophy** 523 (September 2012), available at [SSRN](#).

In this article, Segev defends a sophisticated analysis of the pro-tanto justification of actions taken under uncertainty (more precisely, with “partial information”) in both morality and law. Applied to law, Segev’s analysis challenges some mainstream views.

Here’s the puzzle and Segev’s starting point: Thanks to mistake of fact, an action may appear “subjectively justified” but not “objectively justified,” and vice versa. A moral agent has a false but epistemically justified belief about a relevant non-normative fact; and if that belief had been correct, the action would have been (objectively) justified under a correct norm. Some would say that the act is subjectively justified, nonetheless. An action is objectively justified—the agent correctly acted according to a correct norm—but the action is not subjectively justified, given the agent’s epistemically justified (but false) belief about a relevant non-normative fact. In either case, was the agent’s act really justified? The answer provided by an objective conception of justification under uncertainty appears to conflict with that produced by a subjective conception. Segev denies the conflict. He holds that the question is ambiguous; its answer depends on which “aspect” of the relevant normative standard the question concerns.

Segev examines morality first, and then uses his results as a template for law. He contends that the arguments for an objective conception of moral justification under uncertainty and for a subjective conception are initially equally compelling. On the one hand, surely individuals may be mistaken about what they ought to do. Moreover, using a moral agent’s beliefs to answer the justification question is circular, for the object of his or her belief would then be a belief. Thus, the question about what the agent should do (or what is right) seeks something independent of the agent’s belief, and we arrive at the objective conception of justification. The actual facts count, not the moral agent’s justified belief (presumably, even if correct). So, for example, a nurse ought to encourage a patient to take the contents of a cup if the cup actually contains the patient’s medicine, but not if the cup actually contains poison.

On the other hand, “What should I do when I am uncertain about the cup’s contents?” is a moral question. Segev notes that it isn’t a question about the nurse’s responsibility. There is no guidance for the nurse in the objective conception’s conditional answer, given above. But morality supplies guidance. Guidance is provided if what a moral agent should do depends in some way on his or her (epistemically) justified beliefs. So it seems that moral justification (and thus, the right action) in situations of partial information depends on the agent’s beliefs—which is the subjective conception. Justification may at times depend straightforwardly upon those beliefs; Segev claims that “I did what I justifiably thought was acting in accordance with this (correct) moral standard,” states a justification. But not always, he rightly adds; and not, one would think, in his under-described nurse example. Sometimes, given the probabilities, the agent with partial information should inquire further into the facts. Sometimes the agent ought to act contrary to what seems to her to be best, on a probabilistic maximin principle. (Note that probabilities are also tied to the agent’s epistemic states.)

Segev convincingly contends that the best explanation of the power of these opposing arguments, and the one that casts them in the best moral light, is that they address different but related aspects of moral obligation (or of moral standards), an ideal aspect and a pragmatic aspect. The ideal aspect provides “the moral truth,” the governing moral norm. Unsurprisingly, Segev holds that the objective conception of justification is appropriate to the ideal aspect (of morality). What constitutes doing one’s moral duty in a given situation is action in the light of the actual facts in

accordance with the correct norm.

The pragmatic aspect determines the correct action under uncertainty. It provides an evaluation of the actions of one who acted under uncertainty (that is, acted with partial information), and also provides guidance to one who must act under uncertainty (but who does not question the relevant norm). This aspect is invoked when the nurse (who knows the correct norm) asks for guidance about what he should do, given his uncertainty about the contents of the cup. Segev argues that only the subjective conception of justification is proper to the pragmatic aspect, and that this conception is best understood as playing this role.

Segev then goes on to argue on essentially the same grounds and against some leading legal scholars that the appropriate conception of justification for the ideal aspect of law (that is, what is legal according to the valid legal standards) is the objective one, and the appropriate conception for the pragmatic aspect (that is, what is legally permitted or required of an agent acting under uncertainty about a relevant non-legal fact) is the subjective one. His argument for the latter claim relies, unfortunately, unconvincingly on the contention that the law should “advance” morality. His conclusion might be better defended on fair notice or efficacy grounds. His account has interesting applications, as he points out, to justificatory defenses, such as self-defense in the criminal law. The pragmatic moral justification of an action under uncertainty, he argues persuasively, should count against criminal liability. Less persuasively, he contends that combining objective and subjective elements in legal justifications of the use of defensive force is a mistake. This argument is incomplete. Segev is correct that fair notice is thereby sacrificed, but stronger (policy) considerations may support some combination of objective and subjective elements for judging uses of force under uncertainty.

What I like best is Segev’s idea that there is a separate and complete subjective kind of moral justification, no matter what the correct theory of right is. This idea is defended well and at considerable depth. But all of Segev’s theses and the arguments for them are worth grappling with.

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