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Frugal and (Sometimes) Wrong

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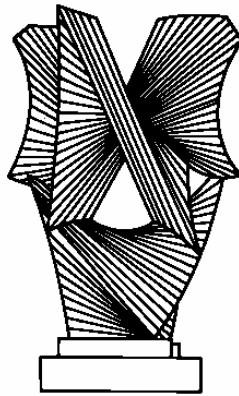
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FAST, FRUGAL, AND (SOMETIMES) WRONG

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Fast, Frugal, and (Sometimes) Wrong

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Abstract

Do moral heuristics operate in the moral domain? If so, do they lead to moral errors? This brief essay offers an affirmative answer to both questions. In so doing, it responds to an essay by Gerd Gigerenzer on the nature of heuristics, moral and otherwise. While focused on morality, the discussion bears on the general debate between those who emphasize cognitive errors, sometimes produced by heuristics, and those who emphasize the frequent success of heuristics in producing sensible judgments in the real world. General claims are that it is contentious to see moral problems as ones of arithmetic, and that arguments about moral heuristics will often do well to steer clear of contentious arguments about what morality requires.

For many problems, Gerd Gigerenzer celebrates heuristics. He believes that they are simple, fast, frugal, and remarkably accurate. He emphasizes that heuristics can be prescriptive, in the sense that they may well lead to good outcomes in the real world. In the moral domain, Gigerenzer is properly cautious about whether heuristics produce moral or immoral behavior. What I would like to do here is to emphasize the imperfect reliability of heuristics in general, and to suggest that their imperfect reliability raises serious cautionary notes about some of Gigerenzer's broader claims.

Let us begin with Gigerenzer's illuminating remarks about the "gaze heuristic," which enables baseball players (and others) to make otherwise difficult catches. Gigerenzer, who has often explored this particular heuristic, is quite right to emphasize that people who use heuristics are often not aware that they are doing so. But even a casual understanding of sports requires some qualification of Gigerenzer's claims. Stupid

tennis players tend to use fast and frugal heuristics, which contribute to their stupid tennis. Often they think, for example, that they should hit the ball hard and deep whenever the opportunity arises—an intuition, or thought, that can get them into serious trouble. Stupid athletes adopt simple heuristics that make them dumb. By contrast, smart tennis players are immensely flexible, and they are able to rethink their rules of thumb as the occasion demands. The best athletes have an exceedingly complex set of heuristics, fast but not at all simple, which they deploy as the situation requires. The moral domain is not so very different (see Nussbaum, 2003). It is pervaded by fast heuristics, as Gigerenzer suggests, but they often misfire, and good moral agents are aware of that fact.

My own treatment of moral heuristics, criticized by Gigerenzer, emphasizes the immense importance of moral framing and the possibility that people use “simple heuristics that make us good” (Sunstein, 2005). For morality, as for issues of fact and logic, it is important to see that many heuristics do point us in the right direction— and hence to stress, as did Tversky and Kahneman (Tversky and Kahneman, 1974) and later Gigerenzer, that heuristics can lead to excellent judgments in the actual world. If people believe that they ought not to lie, or harm innocent people, they will often do the right thing—especially in light of the fact that case-by-case inquiries into the morality of lying, or harming innocent people, could produce self-serving conclusions that produce grievous moral wrong. (The case of Nazi massacres, explored by Gigerenzer, can be understood as an example.) Moral heuristics, understood as simple rules of thumb, might well have a rule-utilitarian defense, in the sense that they might, on balance, produce morally preferable behavior even if they lead to unfortunate results in particular cases.

But no one should deny that in many contexts, moral and other heuristics, in the form of simple rules of thumb, lead to moral error on any plausible view of morality. Consider, for example, the idea, emphasized by Gigerenzer, that one ought to do as the majority does, a source of massive moral blunders (see Sunstein, 2003). Or consider the fast and frugal idea that one ought not to distort the truth—a heuristic that generally works well, but that also leads (in my view) to moral error when, for example, the distortion is necessary to avoid significant numbers of deaths. Or consider the act-omission distinction, which makes moral sense in many domains, but which can lead to unsupportable moral judgments as well (Baron, 2004).

Gigerenzer notes, usefully, that it may be possible to modify people's judgments, including their moral judgments, by altering the background. The idea is hardly original (see Sunstein and Thaler, 2004), but it is true that a default rule in favor of organ donations might well increase what, on one view, is morally desirable behavior (id.). Indeed there are many applications of this point. If default rules matter, an employer, including the state qua employer, could dramatically increase charitable contributions by presuming that (for example) each employer would like to devote 2% of wages to charitable causes. Of course the use of default rules to steer behavior raises normative questions of its own (id.). The only point is that default rules greatly matter to choices, including those with a moral component.

Thus far, then, Gigerenzer's general argument seems both plausible and illuminating, and I am merely underlining the possibility that even good heuristics will go wrong, for morality as for other questions. But on an important issue, Gigerenzer seems to me to miss some of the complexity of moral argument. His objections to maximization theories treat moral judgments as involving a kind of moral arithmetic, and this is a most contentious understanding.

To be sure, Gigerenzer is correct to stress the cognitive difficulties of undertaking a full ex ante calculation of the consequences of social actions. Human beings do not have unlimited cognitive abilities, and hence they are often unable to specify the effects of one or another course of action. Gigerenzer believes that satisficers, using moral heuristics, have important advantages over optimizers. For some questions, this is undoubtedly correct. But to understand the relationship between heuristics and the moral domain, much more must be said. Three points are especially important here.

First: Gigerenzer does not mention that many people are rule-consequentialists; they know exactly what Gigerenzer emphasizes, and they favor clear and simple moral rules for that very reason (Hooker, 2000). A complex consequentialist calculus might lead to error, even if it would be preferable if properly applied. Because people are self-serving, and because their on-the-spot judgments are unreliable, they might do best to follow simple moral rules, or one-reason decision making. There are interesting relationships between Gigerenzer's understanding of heuristics and rule-utilitarian approach to morality.

Second: Consequentialism can be specified in many different ways. Utilitarianism is one form of consequentialism, but because it requires all goods and bads to be described along the metric of utility, it is controversial, even among consequentialists. When Gigerenzer speaks of the limits of maximization theories, and even of consequentialism, he appears to be operating under a utilitarian framework, without exploring the problem of plural and incommensurable goods. We might, for example, endorse a form of consequentialism that sees rights violations (so understood on nonutilitarian grounds) as a set of (very) bad consequences (see Sen, 1982). Gigerenzer's exploration of moral problems does not recognize the complexities in consequentialist accounts of morality.

Third: Many people are not consequentialists at all (see Scheffler, 1994). Consider the injunction to treat people as ends, not means, an injunction that runs afoul of many versions of consequentialism (but see Sen, 1982). Hence—and this is the most important point—it is not enough for Gigerenzer to show that moral heuristics do a good (enough) real-world job of achieving what we would achieve if we were optimizers with unlimited abilities of calculation. Perhaps some heuristics, in some contexts, violate deontological commands.

Return to Gigerenzer's first example: Should a Nazi massacre be evaluated in utilitarian or consequentialist terms? To make the calculation, does it matter if, for example, there were many more Nazis than Jews, and that many Germans had a great deal to gain, economically and otherwise, from mass murders? Many people would respond that this moral atrocity counts as such whatever the outcome of a utilitarian or consequentialist calculus—and hence that Gigerenzer's emphasis on the impossibility of *ex ante* calculations is often beside the point (or worse). Perhaps many moral heuristics, followed by most people and even most soldiers (putting Nazi soldiers to one side), should be seen as fast and frugal ways not of satisficing rather than optimizing, but of ensuring that people do what is required by nonconsequentialist accounts of morality.

The existence of plural and conflicting accounts of the foundations of morality makes it all the more difficult to argue that moral heuristics function well. If certain fast and frugal heuristics are defensible on utilitarian or consequentialist grounds, they might still be objectionable from the moral point of view. In my view, it is for this reason productive to explore heuristics that might be defensible, or indefensible, on the basis of

any view of what morality requires, or on the basis of the least contentious views of what morality requires (Sunstein, 2005).

Gigerenzer seems to think that moral heuristics might be shown to be prescriptive if a full consequentialist calculus is not possible; but this thought too quickly treats morality as a problem of arithmetic. If morality ought not to be so understood, as many people believe, then it is not clear what is shown by Gigerenzer's emphasis on the cognitive problems associated with optimizing. I emphasize that prescriptive treatments of moral heuristics are likely to be productive; but they should steer clear of the most contentious arguments about the foundations of morality.

References

- Akerlof, G. The Economics of Caste and of the Rate Race and Other Woeful Tales, in *An Economic Theorist's Book of Tales* (1984). Cambridge University Press.
- Baron, J. (1994) Nonconsequentialist decisions. *Behavioral and Brain Sciences* 17:1-10.
- Hooker, B. (2000). *Ideal Code, Real World: A Rule-Consequentialist Theory of Morality*. Oxford University Press.
- Nussbaum. M. (2003). *The Fragility of Goodness*. Cambridge University Press.
- Scheffler, S. (1994). *The Rejection of Consequentialism*. Oxford University Press.
- Sen, A. (1982). Rights and Agency. *Philosophy and Public Affairs* 11: 3-39.
- Sunstein, C. (2003). *Why Societies Need Dissent*. Harvard University Press.
- Sunstein, C. and Thaler, R. (2003). Libertarian Paternalism Is Not An Oxymoron. *University of Chicago Law Review* 70: 1159-1202.
- Sunstein, C. (2005). Moral Heuristics. *Behavioral and Brain Sciences* 28: 531-43.
- Tversky, A. and Kahneman, D. (1974). Judgment under uncertainty: Heuristics and biases. *Science*, 185, 1124-1131.

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