Legal Judgment and Moral Reservation

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1. Neil MacCormick on Moral Judgment

In the fourth book of a quartet on "Law, State and Moral Reasoning"—a book entitled *Practical Reason in Law and Morality*[2]—Neil MacCormick considered the interplay of moral opinions and legal judgments. Much of that consideration was focused on an inquiry into the nature of moral reasoning, in the company of philosophers like Adam Smith and Immanuel Kant. "What is moral judgment like?" they asked and MacCormick echoed the question. What is moral judgment like? Is it, as Kant thought, like legislation (for example, legislation for the kingdom of ends)?[3] No, MacCormick argues, it is more like common law judgment, working from and elaborating already given principles. "Nobody comes to reflection about right and wrong in the context of practical deliberation save in the context of a learned and inherited practical code" (19-20). True there is "no single authoritative rule-book,"[4] which we interpret and apply. But there isn't any such canonical rule-book in common law either: judges elaborate and apply norms of various sorts that are kind-of given but also kind-of open to further development in the hands of the very people who are applying them, particularly as new and challenging cases come up; and that, MacCormick reckons, is a better analogy to moral reasoning than the idea that we confront all situations with either a quasi-legislative capacity or with something like the sort of canonical rule-book that an umpire has in his back pocket in a football match or in cricket.

Is morality in the end a matter of sympathy and sentiment, as Adam Smith thought? Yes, says MacCormick, provided we recognize the role accorded to reason in Smith's philosophy, in generalizing one's sympathetic responses to

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[2] NEIL MACCORMICK, PRACTICAL REASON IN LAW AND MORALITY (Oxford University Press, 2008). All page references in the text are to this work.

[3] KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 39 (James Ellington trans., 1981), orienting morality to the concept of a rational being "as one who must regard himself as legislating universal law by all his will's maxims, so that he may judge himself and his actions form this point of view." Cf. PRACTICAL REASON IN LAW AND MORALITY 19-20.

[4] PRACTICAL REASON IN LAW AND MORALITY, 20, 189 and 197.

others and in disciplining our response by impartial attention to every aspect of a given situation that might elicit sympathy for one person or another.[5]

> What I immediately feel, either as victim or by sympathy with the victim, is, so to say, recalibrated in accordance with an imagined common point of view, impartial between doer, sufferer, and interested or disinterested bystander. (62)

Once again this encourages the judicial analogy: this impartiality is exactly what we require of the judge. Indeed MacCormick toys with the idea that this is something the law learns from morality: it is "plausible to think that the good moral agent is the model that well-designed judicial systems seek to institutionalize" (66).

2. Moral Reservation

All three thinkers accepted that humans are capable of morality—capable of serious moral reflection and capable of monitoring and moderating their own behavior and their relations with others on the basis of the judgments formed on the basis of such reflection. But they did not think moral judgment was enough for social life: "[W]e do not and cannot simply rely on people's moral self-command or self-restraint" (123). This is partly because "not all persons seem willing to exercise such self-command as is necessary in order to keep them from breaching the basic duties of mutual coexistence" (123). That is surely true, though, if it alone is given as the reason, it suffers from what I think of as the "righteous philosopher" syndrome—the syndrome that goes,

> If only all people were as thoughtful and self-controlled as me (the philosopher) and my friends and colleagues, then morality would be all we needed. But because we coexist with another class of people—ruffians of one sort or another who are incapable of reflecting on their actions as we do and incapable of controlling their actions on the basis of thoughtful reflection as we are—we have to rely on "laws and institutions of law such as police forces, criminal prosecutors, courts of criminal jurisdiction and prison, and probation services" as bulwarks against "tidal waves of crime and bad behavior" (123).

Maybe it is an excess of self-insight; maybe it is the impression that was made on me by Richard Posner's observation about "[h]ow odd it is to think that people

[5] PRACTICAL REASON IN LAW AND MORALITY 57-66.

who have never left school should be society's moral preceptors";[6] or maybe it is simple irritation at the posturing of many of the moral philosophers I know, who aim in their writing to convey, e.g., through the examples they use, how delicate their own moral sensibility is or how respectable their intuitions are (and how congenial those intuitions are likely to be to the others found around High Table)—but I find explanations for the necessity of law predicated on this sort of contrast unappealing. Suppose there were no such contrast, no lowlifes incapable of moral thought or moral self-restraint. Suppose we were to grant that everyone is as capable of thinking morally as the philosopher is and capable, too, of the sort of moral self-restraint that the philosopher displays. Wouldn't we still need positive law? Kant thought so:

> [H]owever well disposed men might be, . . . individual men, peoples, and states can never be secure against violence from one another, since each has its own right to do what seems right and good to it and not to be dependent upon another's opinion about this. So, unless it wants to renounce any concepts of Right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined by law.[7]

Good moral reasoners disagree, and the better and more high-minded we are at moral reasoning, the more of an affront it will seem to us when someone tries to govern an area of common concern with *their* moral intuitions and judgments rather than ours. Sometimes those disagreements are so serious and so potentially disruptive that they need to be superseded by a charter of officially stated norms that can stand in the name of us all.[8] That's the case for positive law, and that case would stand even if we didn't face what MacCormick referred to as "tidal waves of crime and bad behavior" (123).

We need law, and we can't have law unless some or all of us are prepared to make the moral judgments that law-making requires and offer them through a political process to the whole society to endorse. Moral judgment is an

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[6] Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998), at 1688. See also Jeremy Waldron, *Ego-Bloated Hovel* (a review of POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY) 94 NW. U. L. REV. 597 (2000), at 620.

[7] Immanuel Kant, *Metaphysical First Principles of the Doctrine of Right*, in THE METAPHYSICS OF MORALS §44, at 124 (Mary Gregor trans., 1991).

[8] See also the discussion in Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535 (1996); also in JEREMY WALDRON, THE DIGNITY OF LEGISLATION (1999), Ch. 3.

indispensable input into law-making, whether it is direct and explicit law-making (like legislation) or oblique law-making (law-making under some other description, such as adjudication).[9] However, it is obvious that not all the moral judgments offered up in a society can become law: you think an estate tax is just, I think it is unjust; but we need a view on this matter than can stand in the name of us all; so one of the judgments must give way. The person whose moral judgment "loses out" in the political process (e.g., because a majority of representatives do not support it) will think the resulting law wrong.[10] But the Kantian point is that such a person must recognize the need we have in this matter to abandon the situation in which each follows its own judgment and move instead into a condition in which what is to be acted on officially as right or wrong, just or unjust, is determined by law. And nothing about the high-minded way in which such a person formed his own judgment exempts him from this discipline.

I don't think Neil MacCormick would have disagreed with this, though it is not the version of Kant's account of the relation between legal and moral judgment that he pursues.[11] MacCormick accepts that people must by and large submit themselves to comply with what the law requires even when it is not a law whose enactment or whose imposition through adjudication they would have supported.[12]

But one thing that MacCormick did insist on was this: the citizen always reserves the right to make his own judgment on the matter that the law addresses even if he accepts that his behavior must follow the law. He says:

> What never happens is that legal change (or legal stasis), by judicial decision or legislative enactment, cancels the validity of the conscientious judgment of any issue by a moral agent. Autonomy in moral judgment means that each person is responsible for her/his view of what is good and bad, right and wrong and can never be overruled on that issue. (181)

In *Practical Reason in Law and Morality*, he illustrates this with a case-study, which considers the way in which the Court of Appeal in Britain dealt with a case concerning the surgical separation of conjoined twins, a procedure that would certainly kill one of them, though it was a necessary condition for avoiding the

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[9] The phrase "oblique law-making" is Austin's: see JW on principles of legislation.

[10] For MacCormick's reflection on this in the context of Kant's legislative analogy, see PRACTICAL REASON IN LAW AND MORALITY, 65.

[11] He comes close to it in PRACTICAL REASON IN LAW AND MORALITY 204.

[12] Cite to MacCormick on compliance.

death of them both.[13] The court required the separation to take place even over the objections of the parents (who refused to authorize what was in effect the killing of one child to save the other). MacCormick disagreed: "I cannot see any sufficient reason … to override the parents' view. … To impose a decision about the children over the head of the parents is morally unacceptable" (178). But the official decision was not entrusted to MacCormick; it was entrusted to a judge, Lord Justice Ward, who was constrained to say:

> It gives me no satisfaction to have disagreed with [the parents'] views of what is right for their family.… It may be no great comfort to them to know that in fact my heart bleeds for them. But if, as the law says I must, *it is I who must now make the decision*, then whatever the parents' grief, I must strike a balance between the twins and do what is best for them.[14]

Once this decision was given by the Court, then, as MacCormick says, "necessarily the legal judgment rendered anyone's moral judgment inoperative as far as concerned the actual performance of the operation" (180). A National Health Service hospital must operate as directed by law. MacCormick briefly mentioned the possibility of conscientious refusal by a doctor who might share MacCormick's and the parents' moral view, though he said that in a case like this, that "is not a serious possibility, nor a desirable course of action" (180).

Still, he said, it is important that each person reserve—and not abandon or compromise—his or her own autonomous judgment in this matter. There may be an appeal at a later date or an overturning of the implications of this decision in a later case; or there may be a campaign to change the law on this matter; in either case people need to maintain their own sense of right and wrong as possible inputs into these future legal or political processes. And I suspect MacCormick believes too that, even apart from the prospect of legal change, it is simply important from a moral point of view that people retain a sense of their own autonomous judgment in matters like these.[15] Of course, as he acknowledged, "people can and should

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[13] *Re A (children) (conjoined twins)* [2001] Fam 147, [2000] 4 All ER 961—discussed in PRACTICAL REASON IN LAW AND MORALITY 173-181

[14] [2001] Fam at 193, [2000] 4 All ER at 1010, quoted in PRACTICAL REASON IN LAW AND MORALITY 179 (my emphasis). Lord Justice Ward was one member of a three judge panel deciding the case; the panel decided unanimously, and Lord Justice Ward wrote the Court's opinion. **[Check this]**

[15] Later in the book (PRACTICAL REASON IN LAW AND MORALITY 199), he says: "human beings in the territory of a state are heteronomous in face of the state's law and the commandments it imposes on them, but they are autonomous as moral agents. This gives each person the final say as to whether or not it is right to knuckle under to legal norms where one considers them to be morally unacceptable."

reflect deeply whether their minority opinion on some matter is an aberrant eccentricity rather than a clearer insight than that of the majority, or of the judiciary, into a moral truth" (181). But they should not abandon their opinion just because the contrary view has for the time being the status of positive law.

3. The Connection with Autonomy

All this seems to add up to an attractive and familiar position, engaging as it does Kant's principles of responsible enlightened citizenship: "Make public use of one's reason in all matters" and "[A]*rgue as much as you want and about whatever you want, but obey!*"[16] and also Jeremy Bentham's insistence on complementing the role of expositor of the laws with the role of censor of the laws, along with his motto of good citizenship: "*To obey punctually; to censure freely*."[17] We owe a duty to the law (not an absolute duty but, as MacCormick argues, a substantial and in most cases a conclusive duty).[18] But we also owe it to our society as citizens and to ourselves as autonomous moral reasoners to form and hold a critical view of our own on the matters which the law addresses so that in due time we can participate if necessary in campaigns for the laws' reformation:

> Thus much is certain; that a system that is never to be censured, will never be improved: that if nothing is ever to be found fault with, nothing will ever be mended: and that a resolution to justify every thing at any rate, and to disapprove of nothing, is a resolution which, pursued in future, must stand as an effectual bar to all the additional happiness we can ever hope for; pursued hitherto would have robbed us of that share of happiness which we enjoy already.[19]

A similar position is associated with modern English legal positivism, which insists on disentangling our own moral sense from our understanding of what the law requires. Only this, it is said, can keep alive the spirit of healthy criticism and prevent undue submissiveness to wrong-headed law. But for the moderns, as perhaps not for Bentham, the reservation of independent moral judgment is essential also to solve the question of obedience. So, for example, in the view of H.L.A. Hart:

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[16] Immanuel Kant, *What is Enlightenment*, in *TOWARD PERPETUAL PEACE* AND OTHER WRITINGS 17, at 18 and 23 (Pauline Kleingeld ed., 2006). Emphasis in original

[17] JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 98-99 and 101 (F.C. Montague ed., 1891).

[18] PRACTICAL REASON IN LAW AND MORALITY, __.

[19] BENTHAM, FRAGMENT ON GOVERNMENT, 101.

> So long as human beings can gain sufficient co-operation from some to enable them to dominate others, they will use the forms of law as one of their instruments. Wicked men will enact wicked rules which others will enforce. What surely is most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny. This sense, that there is something outside the official system, by reference to which in the last resort the individual must solve his problems of obedience, is surely more likely to be kept alive among those who are accustomed to think that rules of law may be iniquitous, than among those who think that nothing iniquitous can anywhere have the status of law.[20]

True, as Hart acknowledges, the big issue of obedience is not the only issue for which the citizen needs to reserve his moral judgment on the matter that law addresses.[21] There are all sorts of other detailed modes of engagement with a law's requirement—ranging from submission to punishment in the wake of disobedience to dealing later with the legacy of what we judge to be injustice resulting from the operation of a law that we judge to have dealt wrongly with some issue—which require us to come to reflection and decision with our moral sense intact and uncompromised by the law.

For MacCormick and perhaps also for Hart, the underlying idea of moral autonomy seems to be crucial. MacCormick puts this forward as a general proposition:

> As a person of self-command, or an autonomous agent, it can only be your own judgment that you apply in coming to a decision and acting on it. Sometimes this can feel lonely and unpopular, but persons of independent mind have to put up with that. … Perhaps the weight of what you think is popular opinion, or peer-group opinion, scares you off, and you decide to go along with an opinion you truly consider misguided or downright wrong. In one sense that is still your decision, and you are answerable for it; but it is not your authentic will. … It is all down to self-command in the end.[22]

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[20] Hart, COL, Ch. 9, p. __

[21] Ibid., next paragraph of COL

[22] PRACTICAL REASON IN LAW AND MORALITY, p. 68.

Talking of debates about the law on abortion or policies on nuclear weapons, etc., MacCormick says: "The idea that everyone as a moral person has her or his own autonomy lends a particular character to discussions of this kind. No one may lay down the law to anyone else. Each is responsible for her or his own opinions and decisions."[23] And so each person is entitled to—indeed morally required to—form and reserve his own moral position on any matter that the law addresses.

One cannot push this too far, of course, or else it leaves no room for positive law to operate at all in a universe of autonomous agents. MacCormick can't literally mean that "[n]o one may lay down the law to anyone else," for that is precisely what law does and MacCormick is not an anarchist. The point must be that law has its moral claims on us—which themselves can be apprehended morally—but that that fact doesn't diminish our responsibility to judge the matter for ourselves. That already indicates a more complicated picture and we shall consider these complications in detail in section 10, below.

4. Hobbes vs. Moral Reservation

I said that the position MacCormick adopts on the importance of our reserving the right of independent autonomous moral judgment in the face of a contrary legal norm is a respectable one. It is familiar and attractive. But it is not universally embraced in our tradition of political philosophy.

Consider the position of Thomas Hobbes. In *Leviathan*, Hobbes famously defined positive law in terms of the commands of a sovereign. But that's not all he said about it, in his definition. He said:

> I define civil law in this manner. Civil law is to every subject those rules which the Commonwealth hath commanded him, by word, writing, or other sufficient sign of the will, *to make use of for the distinction of right and wrong*….[24]

On Hobbes's view, laws are not just rules we are commanded to comply with, in the spirit in which MacCormick thinks the NHS doctors were commanded to comply with the decision of the Court of Appeal in the case we considered a moment ago. Hobbes's requirements of compliance are demanding enough. Law is a command and a command presents itself as something to be obeyed peremptorily: "Command is where a man saith, 'Do this,' or 'Do not this,' without expecting other reason than the will of him that says it."[25] But the Hobbesian

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[23] Ibid., 93.

[24] THOMAS HOBBES, LEVIATHAN (Richard Tuck ed., 1996), Ch. 27, p. __. (My emphasis.)

[25] Ibid., Ch. 26, p. __.

definition of law goes way beyond behavioral compliance. *We are to use the commanded rule for distinguishing between right and wrong; we are not to draw distinctions of right and wrong on any other basis.* To abide by law, Hobbes implies, is to renounce the reservation of autonomous moral judgment that MacCormick cherishes so much. I will call this position of Hobbes's "*the non-reservation principle*" (though you can probably think of unkinder terms for it, like "the authoritarian principle" or "the principle of heteronomy").

We may not like the non-reservation principle but the reason for it is clear in Hobbes's system. Our judgments of right and wrong considered apart from law are notoriously subjective and divisive. They start fights; people's disparate moral judgments offend and threaten one another. And they are likely to continue starting fights even if we submit our *behavior* to a sovereign command that stands in the name of us all. So: submitting our behavior to sovereign command is not enough for peace; we need to submit our judgment to it as well, our judgment of right and wrong. We need to discipline ourselves so that once the sovereign or his authorized agents (like judges) have spoken, their judgments become our judgments and any vestige of contrary judgment that we have in the depths of our conscience (or however one describes one's moral sensibility in a Hobbesian world) is abandoned. One can put this also in the language of initial authorization. Everything the sovereign judges, every command he issues, is something they have authorized and "owned" in advance; that is what submission to the sovereign amounts to.[26] And it is not only that each subject is required to behave as if these commands were his commands, but also he is required to judge as if these judgments were his judgments. He is not to think of himself as reserving an independent right of judgment.

I have no doubt that Hobbes intended the non-reservation view literally, though whether it is a viable position in his system is something that requires further thought (in a paper about Hobbes not MacCormick). Briefly, four other positions he held might undermine it.[27] First, Hobbes believed that the subject necessarily reserves a right of final judgment about matters imminently related to his own immediate survival;[28] some of his contemporaries believed this

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[26] Ibid., Chs. 17-19.

[27] I am most grateful to Richard Tuck for discussion of this aspect of Hobbes's philosophy.

[28] Ibid., Ch. 21, p. __: "If the sovereign command a man, though justly condemned, to kill, wound, or maim himself; or not to resist those that assault him; or to abstain from the use of food, air, medicine, or any other thing without which he cannot live; yet hath that man the liberty to disobey."

undermined the sovereign authority he sought to establish.[29] Secondly, he expected those charged with the interpretation of the sovereign's commands and judgments to treat them, when in doubt, as in conformity with the law of nature.[30] This surely supposes that they must reserve an ability to make judgments about the law of nature, if only as an interpretive device. Thirdly, he seems to have toyed with the idea that on matters religious Christians and (for slightly different reasons) Jews cannot give up the right to figure out for themselves what God requires of them.[31] Fourthly, he certainly thought that in the context of contemporary sectarian disputes, good statesmanship, if not compelling principles of political theory, required the sovereign to limit his demands to external conduct and refrain from scrutinizing people's private judgments. Fifth and most important: Hobbes believed that all the duties of the subject must be predicated on a deep and transparent understanding of the need for sovereignty and the need for subordination and obedience. There is no room for legitimating myth or noble lie in Hobbes's system. It is against the sovereign's duty "to let the people be ignorant or misinformed of the grounds and reasons of those his essential rights."[32] So if they are required to treat the sovereign's judgments as their own judgments, they are also required to have a full and transparent understanding of the reasons for this requirement; and it is not clear (to me at any rate)[33] that the replacement of their own autonomous judgments of right and wrong by the sovereign's judgment can survive this transparent understanding unshaken.

These (except perhaps the last) are all technical matters of Hobbescraft, and so not apt for discussion here. But even if the non-reservation principle could be made viable in a Hobbesian theory of politics, what should we think about it from a moral point of view? Isn't it offensive to require people to abandon their moral judgment in the face of the law's judgments? Doesn't this concede altogether too much to the law? Shouldn't we value the moral reservation that MacCormick cherishes and that Hobbes seemed to want to discredit?

I guess the answer to all these questions is "Yes." Silly old Hobbes. Of course we should all want to reserve the right of moral judgment. Not that we want to disobey the law in every case in which we disagree with it, but at least we want

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[29] See the discussion in JEAN HAMPTON, HOBBES AND THE SOCIAL CONTRACT TRADITION. On this ground Bishop Bramhall called Hobbes's view an "anarchist's charter"

[30] Hobbes, op. cit., Ch. 27, pp. __.

[31] Cites?

[32] Ibid., Ch. 30, p. __. See also Jeremy Waldron, *Hobbes and the Principle of Publicity*, 82 PACIFIC PHILOSOPHICAL QUARTERLY 447 (2001), 447.

[33] Tuck thinks this can work.

to keep our moral *judgment* intact. That seems right. And we may want to congratulate ourselves for taking this stand in favor of moral autonomy and against legal authoritarianism. But before we start celebrating, we might want to give a moment's thought to whether there is anything—or whether there should be anything—in our own mature attitude to positive law which might match, however imperfectly, the Hobbesian non- reservation principle.

5. Disrupting Coordination

I guess if there is anything to be said for the Hobbesian position, it might be said in regard to situations which have the following two features: (i) it is much more important in the given situation that there be a rule which is generally followed than that it be the right rule; and (ii) concentration on an alternative rule (i.e. an alternative to the one that is laid down and generally followed) is likely to be a distraction from following the rule laid down.

Condition (i) is exemplified by the rule of the road—the rule that says we drive on the right (i.e. two cars approaching each other on a road from different directions each move to the driver's right) or, in Britain and New Zealand, the rule that says we drive on the left (i.e. two cars approaching each other on a road from different directions each move to the driver's left). Indeed this is such a good example of (i), that it is not clear that the idea of "the right rule" makes much sense. Maybe there is an innate psychological disposition to veer right; or maybe we should strive for uniformity (and since the right-hand rule is more commonly followed in the world we should adopt that); or maybe, as Les Green once suggested, we should drive on the right because mnemonically that is the "right" side to drive on. But these paltry considerations shrink almost to nothingness compared to the importance of just having one rule or the other generally accepted on a given network of roads. Either rule is much much better than none, much better than confusion.

But this is not really a good example for Hobbes, because it is not clear what it would be to go on believing, for example in America, that the left-hand-side was the right side to drive on, even though the right-hand rule is laid down and generally followed. Someone who said they wanted to reserve the right of independent judgment on this matter, even though they of course intended to comply with the American rule, would probably strike us as a sort of looney. Maybe that is Hobbes's point. Anyway the difficulty of imagining what it would be to reserve one's judgment on this matter means that we hardly even get to condition (ii)—viz., imagining that the reserved judgment is distracting.

Here's a slightly different case, also a traffic example. In England, traffic at intersections is often controlled by traffic circles (roundabouts). They are used less frequently in the United States. For a traffic circle to work, there has to be a rule

about right-of-way: who yields to whom e.g. when a driver is coming on to the circle. The English rule is "*Circle prevails*": traffic already on the circle always has right of way over traffic entering the circle, unless there are traffic lights controlling it like the circle where Headington Road meets the Oxford Ring Road. "*Circle prevails*" is highly efficient; it enables the circle to operate as a valve open to the heaviest flow, and so it gets more traffic through the intersection than any alternative. In Berkeley, California, there is a traffic circle where Marin Avenue meets Los Angeles Avenue and Arlington Avenue.[34] Marin Avenue is a major street; plus it enters the traffic circle downhill from the east and continues westward on the other side of the circle. But there are four other entry points to the circle. When I lived in Berkeley, I discovered that the prevailing convention for this intersection (and for all I know the local traffic ordinance applying to it) was not "*Circle prevails*" but "*Marin prevails*": traffic already on the circle yields to traffic entering from Marin.

When I lived in Berkeley, I used to give people lectures on what an inefficient convention this was and how Americans didn't understand roundabouts. I knew perfectly well what the convention was, and by and large I obeyed it; but I reserved the right of independent judgment. I thought the local rule was wrong. This reserved judgment would flare up in my mind every time I approached this circle from any direction. Sometimes I was tempted to yield to traffic on the circle even when I was coming down Marin; other times I was tempted to assert a right-of-way on the circle even against oncoming Marin traffic. I mostly didn't do that but every time I entered the circle, these thoughts would enter my head. At the very least I would fulminate. Fulminating is not a good driving practice. I never caused an accident, but my reserved judgment was definitely a non-inconsiderable distraction.

It would have been better if I had taken a Hobbesian approach once I discovered what the local rule was. Someone might say, "Well, you needed to reserve your judgment so that it would be there and available to use when you drove in England." But that is not so; I can drive ambidextrously so far as left-side and right-side are concerned; I just switch over into the relevant Hobbesian posture depending on what country I am in. I don't reserve any judgment; I don't fulminate; I just switch. I'm sure I could have done that for the Marin Circle too, and then switched back easily to follow the English rule whenever I was in

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34 http://maps.google.com/maps?f=q&source=s_q&hl=en&geocode=&q=Marin+Avenue,+Berkeley,+CA&sll=37.0625,-95.677068&sspn=31.150864,78.837891&ie=UTF8&hq=&hnear=Marin+Ave,+Berkeley,+Alameda,+California&ll=37.889605,-122.268348&spn=0.00757,0.019248&z=16

England. I didn't need to reserve judgment in a MacCormick fashion when I was driving in Berkeley. But I did. I reserved judgment, telling myself on every occasion that, despite the local rule, "*Circle prevails*" would have been better. I was a fulminating menace as a result.

6. Fragile Rules and Institutions: The Rule about Civilians

But these are fairly trivial cases: let's try a serious one.[35] There is a rule about the use of armed force—a rule of *ius in bello*—that is known as the principle of distinction or the principle of discrimination. I will call it PD_1. PD_1 requires those engaged in war to distinguish or discriminate among targets: they may fire upon combatants (people in uniform or people openly carrying weapons), but they may not fire upon civilians.[36] It is not always complied with: but it continues to be regarded as an important rule, and most countries have it incorporated into their military law and doctrines.

Some political philosophers are on record as saying that PD_1 is a bad rule, since it exposes to deadly attack many people who are morally innocent (like conscripts fighting in a just war against an aggressor) and immunizes against attack many people who are guilty (like civilian politicians and voters who instigated and supported unjust aggression). This is what Jeff McMahan thinks. He thinks one could make a moral case for saying that certain civilians are properly liable to intentional attack—for example, civilians who share responsibility for an unjust war. This is because he believes that "it is moral responsibility for an unjust threat that is the principal basis of liability to [be the target] of defensive (or preservative) force." Our principle of distinction should not be PD_1, it should be PD_2:

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[35] What follows is adapted from my paper *Civilians, Terrorism, and Deadly Serious Conventions*, available at http://ssrn.com/abstract=1346360 and forthcoming as chapter 4 of my book, TORTURE, TERROR, AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE (Oxford University Press, 2010).

[36] The basic legal principles are set out in Articles 48 and 51 of the First Protocol to the Geneva Conventions. Article 48: 'In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.' Article 51: '1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances. 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. 3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.'

> The requirement of distinction should hold that combatants must discriminate between those who are morally responsible for an unjust threat, or for a grievance that provides a just cause [for war], and those who are not. It should state that while it is permissible to attack the former, it is not permissible intentionally to attack the latter…[37]

In some contexts this might make an important difference. McMahan believes, for example, that the American capitalists who persuaded the Eisenhower administration to organize a coup in Guatemala in the 1950s so that they could get back some land that had been nationalized would have been legitimate targets for Guatemalan forces resisting American aggression.[38]

McMahan knows that PD_1 remains the law and is likely to remain the law so long as there are viable laws of war. But, he says,

> [T]he account I have developed of the deep morality of war is not an account of the laws of war. The formulation of the laws of war is a wholly different task, one that I have not attempted and that has to be carried out with a view to the consequences of the adoption and enforcement of the laws or conventions. It is, indeed, entirely clear that the laws of war must diverge significantly from the deep morality of war as I have presented it.[39]

The laws of war, he says, are conventions established to mitigate the savagery of war.[40] McMahan emphasizes that when we move from what he calls the deep morality of warfare to these conventions, we are still in the realm of the moral.

> It is in everyone's interests that such conventions be recognized and obeyed. … Given that general adherence to certain conventions is better for everyone, all have a moral reason to recognize and abide by these conventions. For it is rational for each side in a conflict to adhere to them only if the other side does. Thus if one side breaches the understanding that the conventions will be followed, it may cease to be rational or morally required for the other side to persist in its adherence to them. A valuable device for limiting the violence will thereby be lost, and that will be worse for all.[41]

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[37] McMahan, 'The Ethics of Killing in War,' 722-3.

[38] Ibid., 725-6.

[39] McMahan, 'The Ethics of Killing in War,' 730.

[40] Ibid., __.

[41] Ibid., 730.

He is suggesting, in other words, that the situation satisfies Hobbesian condition (i): it is better that we lay down, adopt, and follow one rule to mitigate the savagery of warfare. It could be PD_1 or it could be PD_2; PD_2 may be the better convention; but since PD_1 is the established rule, we should stick with that. As another philosopher has commented: "[T]he results of acting in conformity with a preferable convention which is not widely observed may be much worse than the results of acting in conformity with a less desirable convention which is widely observed."[42] Still, in true MacCormick fashion, McMahan wants to reserve his moral judgment in favor of PD_2. He believes, for example, that the moral arguments he has given can provide a basis "for the reevaluation of the rules we have inherited."[43]

A couple of small points, which we can push off to one side. (1) Notice that McMahan's approach is a little like my approach to the Marin traffic circle. He does not think that there is nothing to choose between PD_1 and PD_2. He does not think they are arbitrary alternatives; they are not like driving on the left and driving on the right.[44] Still he thinks the basic logic is that of convention. In his view the superiority of PD_2 over PD_1 is not so great as to justify running the risk of having no convention at all while we tried to replace PD_1 with PD_2 in international law and military doctrine and training. I think he is wrong about the logic of convention for this case however. PD1 is not a Lewis-convention.[45] Unlike either the traffic circle case or the rule of the road case, it may make sense for me to follow (say) PD_1 even when nobody else is. My following it would still mitigate the savagery of war *pro tanto*, just not as much as it would be mitigated if you followed it also.[46] (The equivalent makes no sense for the rule of the roads and next to no sense for the traffic circle example). Still for various other reasons, it may well be that a principle of distinction in warfare has little chance of being viable unless it is adopted by all or most armed organizations. Even though defecting while others follow it can make sense, and even though following it while others don't can also make sense, still in the terribly fraught circumstances of warfare people are unlikely to follow it for very long unless they are convinced that their opponents are too. Following a principle of distinction is costly; it's a

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[42] Mavrodes, 'Conventions and the Morality of War,' 127.

[43] McMahan, 'The Ethics of Killing in War,' __

[44] Cite to Marmor.

[45] Cite to DAVID LEWIS, CONVENTION—A PHILOSOPHICAL STUDY.

[46] So I think McMahan is wrong to say that "if one side breaches the understanding that the convention[ ] will be followed, it may cease to be rational or morally required for the other side to persist in its adherence to [it]."

handicap in relation to unrestrained indiscriminate warfare, and it may be a handicap that will be shouldered only by those who think it is being shouldered fairly on the other side. (Or there may be other mechanisms of reciprocity / retaliation that explain why the behavior of some in this regard is likely to be sensitive to the behavior of others.)

(2) A second point, also off to one side, is that McMahan's suggested alternative is a spectacularly inappropriate principle, for a couple of reasons. First, a principle of discrimination (like all rules of *ius in bello*) has to be administered among people who almost certainly disagree (or pretend to disagree) about justice and guilt in relation to the armed conflict in question. It may be impossible to administer norms using words like 'just' and 'guilty' in their traditional moral senses, or to impose tests about whose application there is likely to be irresolvable disagreement, particularly because most administration of the laws of war is self-application. McMahan acknowledges this: "the fact that most combatants believe that their cause is just means that the laws of war must be neutral between just combatants and unjust combatants, as the traditional theory insists that the requirements of *jus in bello* are."[47] Laws *in bello* have to use simple categories like the distinction between members of the organized military and civilians even though these categories are certainly over- and under-inclusive by moral standards. But the moral standards by which we judge them to be so could not possibly be administered effectively in these circumstances of dissensus.

Anyway, laws designed to govern conduct in the fog of war cannot possibly take account of every detail that a deep moral theory will take account of. Most rules of *ius in bello* are self-administered by individual soldiers and their unit commanders. A refined moral principle might require of our combatants a delicate inquiry of the guilt and moral status of every person or unit fired upon. But that would be utterly unworkable. Even if it is crude by moral standards, some criterion

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[47] McMahan, 'The Ethics of Killing in War,' 730. Perhaps the laws *ad bellum* can afford to use criteria whose application is more controversial; perhaps they have to. But in their modern form even they strive to avoid the difficulty we are discussing by orienting themselves not to disputable questions of justice but either to authoritative political determinations (e.g. UN Security Council determinations) or to circumstances that are thought to be patent and indisputable (like the imminence of attack). The 1967 war in the Middle East and the American invasion of Iraq in 2003 show that we have not wholly succeeded in this: the import of an array of Security Council resolutions can be a matter of dispute and the imminence of attack, justifying a resort to self-defense without authorization, can be a contested matter of judgment. So we do get some irresolvable disagreement over *ius ad bellum* too, which makes the administration of these norms quite difficult. But imagine the havoc that would result if the administration of the norms *in bello* were as contestable as this; that might well be the price of making the norms morally more refined along the lines that McMahan suggests.

such as the wearing of uniforms has to be used instead. No doubt these criteria are conventional in character. They place what may seem to a philosopher undue emphasis on trivialities like uniforms, or insignia, and the open (visible) carrying of weapons, and they denounce, again with what must seem like un-called-for vehemence, the perfidious use of flags and signage of various sorts. But these conventional criteria are indispensable for the administration of any norm like the rule about civilians in the circumstances where they have to prevail.

McMahan suggests that these points are less important for his deep moral inquiry than they would be if he were making a legal proposal. He seems to suggest that the moral judgment he has reserved in favor of PD_2 is not vulnerable to all these irritating points about administrability. But then it is not clear to me what the point of McMahan's moral inquiry is or what function is served by his MacCormick-style reservation.[48] If his deep moral inquiry and its results stand quite apart from the laws of war, if they do not even represent a proposal to change the laws of war, then they may seem fatuous. The vaunted reservation of moral judgment in face of contrary law is still be sustained; but to what point? McMahan says that even if his moral judgment does not represent a practical proposal, reserved for a propitious legislative opportunity, still it can provide a basis "for the reevaluation of the rules we have inherited."[49] But it will be an odd sort of "inactive" evaluation.[50]

We can factor this concern back into the main argument. If the reserved moral judgment is just an idly spinning wheel, then what's the big deal about moral autonomy and the reservations it sponsors? Is it just a sort of game? That wasn't how Kant or Bentham or MacCormick presented it.

In one passage, McMahan acknowledges that his reserved deep moral criticism may not be so innocuous. He wonders in fact whether it might not be appropriate to suppress his and others' moral criticisms of PD_1:

> Suppose … that … if combatants are to be sufficiently motivated to obey certain rules in the conduct of war, they will have to believe that those rules really do constitute the deep morality of war. If it is imperative to get them to respect certain conventions, must we present the conventions as the deep morality of war and suppress the genuine deeper principles? Must the

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[48] Perhaps McMahan thinks that an administrable approximation to PD_2, whatever that was, would still be different from PD_1.

[49] McMahan, *The Ethics of Killing in War*, 731.

[50] See also the "Endnote" at the conclusion of this essay.

> morality of war be self-effacing in this way? I confess that I do not know what to say about this.[51]

This toys with idea of a legal convention's being sustained by a sort of noble lie. If the troops become aware of the serious moral reservations that the philosophers (and perhaps the general officers) have about PD_1, they may be less inclined to follow it. Following it is already very demanding, they have to refrain from firing on civilians even when that would make the soldiers safer in a situation of terrible danger. They may not be disposed to incur this risk, suffer this cost, unless they are sure PD_1 represents what morality really requires, perhaps unless they internalize it as such. On the other hand, they may not think of themselves as competent to figure out the principle's moral status; they may defer implicitly to their betters in this regard. Knowing that their betters doubt its moral force may undermine their willingness to follow it. And even a little bit of undermining may cause the convention to collapse. This is really an instance of Hobbesian condition (ii): the reserved moral judgment may distract not necessarily those who hold it, but those who become aware of it. And so it may be better not to let on that PD_1 is morally objectionable. And if we can't keep our moral inquiry secret from the other ranks, it may be better to act in a Hobbesian fashion—taking the legal norm as our moral norm, rather than embarking on an inquiry which envisages the possibility of a divergence between the judgment of lawfulness and the judgment of right.

Notice how the danger in this case is different in character from the traffic circle case. In those cases the danger of distraction is that moral fulmination will lead to collision. Being distracted by my reserved judgment about the traffic rule and by my irritation at its not being the law, I may have less self-control; and an accident may be caused as a result. But I am unlikely to shake the convention itself. Drivers coming down Marin will still enter the circle confidently and those on the circle will still yield to them. In the case of the rule about civilians, some soldiers' moral doubts about PD_1 may be the last straw so far as their own compliance is concerned, and their own war-making may be less restrained as a result: they may kill more civilians. That's the equivalent of me crashing into another car on the traffic circle. But in addition, any sort of widespread failure on part of soldiers or military units to observe the conventional rule may actually shake or undermine the convention itself. Unlike the Berkeley rule about the Marin traffic circle, the rule about killing civilians is very precarious already. Quite apart from moral reservations, it is honored often in the breach, and sometimes defied by whole units (indeed by whole military organizations).

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[51] Ibid., 732

Any convention can stand a certain amount of defection and still survive; but the amount that it can stand and still survive may be quite limited. In the case of the laws of war, the environment in which they operate is such that they are inevitably close to this threshold most of the time. They are observed imperfectly at best and sometimes not at all. Violations here are not like individual contributions to pollution: a drop in the ocean, so to speak, making little discernable difference on their own. Quite the contrary, any significant number of violations may bring us close to the tipping-point where the convention simply collapses.

Remember too that these norms rely for their viability mostly on self-application, on the part of individual soldiers and unit commanders. There are sporadic *post facto* prosecutions for war crimes, and these may become more common with the institution of the International Criminal Court. But for the immediate application of the rules protecting civilians, we rely on the discipline and military doctrines of the world's armed forces. So anything which distracts from a sustained willingness to voluntarily observe the rule is a danger to the rule itself.

These worries are amplified when we consider the prospect that a norm like PD_1 is a norm of *international* law (international humanitarian law) and so applies in the first instance to states, as well as secondly and indirectly to the individual soldiers we have been considering so far. States are bound by it, and they are supposed to embody it in their military doctrine and enforce it among their troops. Now, presumably the MacCormick privilege of reserved moral judgment applies to states' submission to international law as well as to individuals' submission to national law. But states' allegiance to the legal norm may also be precarious and liable to upset in times of stress, anger, and danger; and a reserved national judgment (or a reserved moral judgment among high officials) that the norm probably doesn't have any real moral basis anyway lurks around awaiting an opportunity to break out in national decisions to violate the international norm and pursue some other approach as to who to fire upon. (We saw something like that happen in the United States with various policies about the treatment of captives in the war against terrorism and the wars in Iraq and Afghanistan in 2001-2008.) We know that in the recent past, PD_1 has been seriously violated at the level of national decision, even amongst the most civilized and best organized armed countries: the use of fire-bombing and weapons of mass destruction against civilian areas in Germany and Japan by the United Kingdom and the United States are appalling examples. Thankfully, the nations that perpetrated these atrocities do not seem to have repudiated PD_1 altogether. Since 1945 they have reaffirmed it in their practice (to a certain extent), in their international commitments, and in their

military doctrine. But the events of 1943–5 showed how fragile the law in this area is. Doubtless there will always be violations, even when doctrine is firm. As I said before, a convention can stand a certain number of violations and not collapse. But the distance from "a certain number of violations" to the tipping point may be quite small. We need to remember that, despite the large numbers of people actually engaged in combat, the numbers of individual states and armed organizations with military doctrines is quite small (numbered in the hundreds, not the millions).[52] Also, the knock-on effects of perceived violations, especially if these seem like acts of policy, are likely to be extensive. Terrorist organizations now routinely repudiate PD_1 and everything like it. In the name of "asymmetric warfare," they have organized a whole way of fighting around the repudiation of the laws and customs of armed conflict; they have adopted institutionally and doctrinally the principle of acting as though the viability of this body of law did not matter or as though it mattered only as something to exploit, via acts of spectacular violation. The temptation on the part of lawful states to respond in kind—with actions that are lawless and violent—is evident. Because of what is at stake for any group in armed conflict, because of the problem of the costs of compliance, because of the temptations of positional advantage and the fear of being taken advantage of, any sense that others are securing an advantage in armed conflict by violating these norms is likely to lead to others' violating them as well. And the rule may simply cease to be viable as a result (without being replaced soon by any other rule to mitigate the savagery of war.)

It may seem a bit much to saddle Jeff McMahan with all this. Jeff was just engaging in a harmless deep moral inquiry and all he did was reserve the right to reach his own judgments on the matter of distinction in warfare—non-plussed by existence of contrary legal norms, by their fragility, and by the importance of their being upheld. He wasn't urging anyone to disobey PD_1 or open fire on guilty civilians etc. Still a moral criticism of an existing legal rule can have an effect on it even when the critic does not urge disobedience. Legal rules are sometimes insecure; sometimes they rest on little more than opinion. A reservation of moral criticism can make a difference to the climate of opinion in which the legal norm wilts or flourishes. A lot will depend of course on what other supports there are for the norm in the culture, or what other pressure sit is under. It is perhaps ironic that the sort of moral challenge that McMahan's critique represents does tend to be mounted at precisely the times when the convention being evaluated is at its most insecure. It is when the country is challenged by terrorist attack and when the norms of war are under pressure from the anti-terrorist side as well, that the

[52] I don't just mean the numbers with regard to any given war, but even the numbers in regard to wars in general.

philosophers think the opportunity is right to hold conferences and publish proceedings on the deep morality of war.[53]

7. Legal Resilience

We have been exploring the significance of moral reservation, represented in Neil MacCormick's dictum to the effect that the law being thus-and-so should never be thought to "cancel[ ] the validity of the conscientious judgment of any issue by a moral agent" (181). MacCormick's idea was that even when the law settles an issue one way, it is never inappropriate for a person to form a contrary moral view—to the effect that the issue ought to have been settled in a different way. It may be wrong for a person to act on his reserved moral judgment; it may be necessary or right for him to follow the law; but he can't surely be required to abandon his own moral judgment. We have been exploring this in the company of Thomas Hobbes, who thought that the proposition MacCormick has adopted is generally wrong. Hobbes thought that law is something we should use to make our judgments of right and wrong, rather than reserving a power of judgment of right and wrong distinct from the law. He thought that moral reservation, as I have been calling it, would be disruptive. We have explored a couple of cases in which it seemed Hobbes might be right. By insisting on the reservation of his right of deep moral criticism, Jeff McMahan is not urging the violation of PD_1; by insisting on my right to criticize the rule that "Marin prevails" at the Berkeley traffic circle, I am not anyone to follow the norm embodied in my reserved moral judgment. It is not a question of incitement. Still, we have seen how there might be pathways between a reserved moral judgment and law-breaking nonetheless—dangerous law-breaking or worse still jurispathic law-breaking, i.e., law-breaking that leads to a collapse of the norm. To that extent Hobbes may be right and MacCormick wrong as to the general proposition.

Can we say anything in general about what distinguishes these cases from the general run of cases for which, it would seem, MacCormick's proposition is true? In the case that he tells us about—his own moral dissent from the decision in the case of the conjoined twins—it looks unlikely that the legal ruling in *Re A (children) (conjoined twins)* or the underlying legal principles will be shaken by MacCormick's moral criticism or by such moral criticism in general, even if it is

[53] The same is true of the rule about torture. Moral philosophers didn't begin holding conferences on torture or manufacturing a prodigious number of "ticking-bomb" hypotheticals to challenge the existing law on torture and to put into circulation their own moral reservations about an absolute prohibition on torture until the prohibitory norm came under pressure. That got the philosophers excited, and although many of them would disavow any intention to destabilize the legal norm, it was inevitable that their discussions and their moral reservations would contribute to the atmosphere in which it came disgracefully close to being abandoned.

widespread. Law is robust enough in this area so that particular legal orders can command general respect, and be complied with, even in the face of significant moral criticism. Those who have a duty of compliance (and those responsible for supervising or enforcing it)—nurses, surgeons, hospital administrators, and health boards—are unlikely to be distracted by even their own moral reservations (in the way that I was in the Marin circle case) or by the moral reservations of others, as I imagined in the case of the rule about civilians. This is because compliance is largely incorporated into existing routines and institutional processes, which form part of the fabric of everyday life, and which provide something of a buffer between a legal order's inherent vulnerability to moral criticism and the order being carried out and complied with in the usual way. I don't mean that we have made disobedience impossible. But one has to go out of one's way to do this and make an effort to tear apart the fabric of ordinary routines of institutions, bureaucracy and professionalism in which routine compliance is embedded.[54]

Ideally, military doctrine and military professionalism would serve this purpose, too, in the case of PD_1. But it is more difficult for that case. True, military training can establish in a person a whole form of life in which military principles and doctrines become internalized as routines, with layers of strict, even microscopic supervision, making the routines relatively impervious to whatever moral reservations about them a given soldier entertains wide awake in his barracks in the small hours of the morning. But *still*, the circumstance of *combat* is so stressful and so extraordinary—extraordinarily liberating (from regular constraints like the constraint on killing) but above all extraordinarily dangerous—that it is very difficult for PD_1 to establish itself resiliently in the sort of environment in which it actually has to operate.

The same is true in respect of the international-law requirement that PD_1 be firmly established in a country's military doctrine. One would think that institutions like State Departments would be so lawyer-ridden and so institutionalized—so oriented in their whole routine structural and bureaucratic outlook to being regarded as institutional citizens in good standing in international law—that it would be hard for a well-established norm of international law like PD_1 to be shaken. It turns out that those structures and routines are vulnerable too, vulnerable to national panic and political opportunism in times of emergency that

[54] Or if it is shaken, it will be shaken in an orderly fashion through the House of Lords' decision coming to be seen in due course as non-viable, and replaced (again in an orderly fashion) by a contrary precedent or by legislation. We have legal processes that can channel moral criticism in this way. Such processes not only reduce the threat to effective legal regulation in this area, actually (as MacCormick emphasized) they presuppose and draw on the moral reservations which people have established in relation to the legal *status quo*. As Bentham put it in the passage quoted earlier, "if nothing is ever to be found fault with, nothing will ever be mended."

puts everything up for grabs; and vulnerable, too, to the sudden evaporation of implicit moral support in the community once the time seems ripe for the moral philosophers to start grabbing a bit of the action.

We saw earlier that Neil MacCormick associated moral reservation not just with the possible vindication of moral objectivity (objective right and wrong), as against the contingencies and arbitrariness of positive law, but also with individual autonomy. We owe it to ourselves—we say—as autonomous agents and thinkers, to figure out the moral right and wrong for ourselves. We see that as admirable, and our self-admiration may be enhanced by the sense that this ability is by and large exercised in a way that does not have the destructive impact that Hobbes predicted. People are not as irresponsible, *we* are not as irresponsible as Hobbes portrayed us, we may say. The inherent responsibility and respectability of our powers of autonomous moral judgment and our ability responsibly to manage our moral reservations—that, we may say, is what allows law to do its work in the sort of atmosphere of moralizing that Hobbes regarded as so unpropitious.

In fact, the ability of law to flourish resiliently in spite of people's moral reservations may have more to do with the way in which law is established among us, than with any particular responsibility on our part so far as moral judgments is concerned. Law flourishes when it takes on a life of its own and becomes, as positivists portray it, something that in large part can be understood separately from the moral judgments that legal interpreters and the makers of legal argument bring to it.[55] It flourishes when it becomes routine, internalized in the lives of individuals as habit and training or into the life of a society through institutionalization.[56] It flourishes resiliently when we have set up effective and routinized enforcement systems, not just in the sense of good policing, but in the way we structure ordinary transactions. Also, although law can't work without relying on self-application as its basic mode of administration,[57] it becomes

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[55] In a footnote to the passages we quoted earlier, Bentham said this: "There is only one way in which censure, as upon the Laws, has a greater tendency to do harm, than good; and that is when it sets itself to contest their validity." (A FRAGMENT ON GOVERNMENT, 103n). He goes on to say this harm is least problematic in the case of written laws, most problematic in the case of unwritten laws, inasmuch as their identity and authority is never clearly established anyway.

[56] See also Aristotle's observations on the relation between law's constancy and law's role in habit formation in POLITICS, Book 2 and the last chapters of NICHOMACHEAN ETHICS, Book

[57] For the idea of self-application, see HENRY M. HART and ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 120-1 (William N. Eskridge and Philip P. Frickey eds., 1994): "[E]very directive arrangement which is susceptible of correct and dispositive application by a person to whom it is initially addressed is self-applying. . Overwhelmingly, the greater part of the general body of the law is self-applying, including almost the whole of the law of contracts, torts, property, crimes and the like."

resilient when it no longer has to rely on self-administration as the primary mode of applying serious sanctions.[58]

So, to conclude. We may venerate our moral autonomy and flatter ourselves that we can exercise it in ways that are not self-indulgently destructive of social order. But the reality of the matter may be that the hard work in this regard has been done on the side of law. Law has made itself resilient so that it can withstand the mischievousness and self-indulgence of our vaunted moral autonomy

8. Is Waldron Becoming an Authoritarian?

I find myself vaguely embarrassed by all of this. What I am doing, defending the claims of positive law against the claims of moral judgment? How dare I use terms like "self-indulgent" and "irresponsible" to describe the autonomous exercise of persons' individual moral capacities! Why am I worrying so much about the possible disruption to the legal order of people reserving the right of moral judgment to themselves? In short—what sort of authoritarian talk is this?

Maybe it's the company I am keeping. Not just Thomas Hobbes but Immanuel Kant,[59] and not just Kant, but Kant in his dotage,[60] Kant with his late authoritarianism, his insistence that defiance of the legislature "is the greatest and most punishable crime in a commonwealth."[61] Why have I distanced myself so far from an earlier Kant that I regard moral autonomy as a menace? After all, an earlier generation of students in political theory saw Kant through the eyes of Robert Paul Wolff, as someone skeptical of all claims to legal authority, insisting

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[58] In the CRITO, Socrates was able to imagine the Laws reproaching him for an escape attempt, saying: "Can you deny that by this act which you are contemplating you intend, so far as you have the power, to destroy us, the Laws, and the whole State as well? Do you imagine that a city can continue to exist and not be turned upside down, if the legal judgments which are pronounced in it have no force but are nullified and destroyed by private persons?" This was because once a legal order was issued, its administration was still primarily in the hands of those to whom it was issued: Socrates was supposed to remain and administer his own execution tonic. Athens had no well established enforcement mechanisms, and it was therefore much more vulnerable to high profile acts of defiance than law is among us. See also KRAUT, SOCRATES AND THE STATE.

[59] See Waldron, *Kant's Legal Positivism*, op. cit., and also *Kant's Theory of the State*, in IMMANUEL KANT: TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE AND HISTORY (Pauline Kleingeld ed., 2006), 179.

[60] Kant's declining years in which, as Hannah Arendt puts it, "the decrease of his mental faculties, which finally led to senile imbecility, is a matter of fact." (ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY, 9.

[61] Kant, "On the Common Saying: That may be True in Theory, But it is of no Use in Practice", 8: 299.

instead on the responsibility of each person to figure out for himself what he ought to do. The true moral agent, said Wolff, never does what another tells him *because* he has been told to do it: "For the autonomous man there is no such thing, strictly speaking, as a *command*."[62] Since submission to legal authority involves doing certain things precisely because the legislature tells us to, the burden of Kantian autonomy seems to be that we are required, on principle, to reject legal authority—to become, as Wolff puts it, philosophical anarchists.[63]

True—the discussion in this paper has not been about the legitimacy of civil disobedience or resistance, but only about the possible destabilizing effects of the citizen's reservation of autonomous moral judgment in the face of the law. But even that concern seems excessive, with its labored account (in sections 5 and 6) of the possible pathways from moral autonomy to legal disruption.

Any answer to these worries must focus not on a denigration of moral judgment as such, but on a moral concern for the health and resilience of positive law. The idea is that law in areas of common concern—even law in areas of severe moral disagreement—is something we need. We need it as a resilient and effective force in social life for coordination, for the possibility of justice, and for securing of public goods and the common good generally. We cannot do without it. If we don't have law, we have a natural duty, as Kant and modern thinkers like Rawls and Finnis have emphasized, to play our part in brining legal institutions into being.[64] And if our legal institutions are fragile and precarious, in general or in some particular domain of importance (such as in the case of the laws of war that I dwelt on in section 6), we have a duty either to play our part in making them more resilient or at least to refrain from undertaking action or striking attitudes that may possibly undermine them.

All this is something that we can and should figure out autonomously, applying our moral judgment to the circumstances of our lives together. These considerations are not opposed to moral autonomy; they are the upshot of its exercise.

10. Chipping away at the Importance of Moral Reservation

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[62] Wolff, In Defense of Anarchism 14-15 (emphasis in original).

[63] Ibid., 18: 'Insofar as a man fulfills his obligation to make himself the author of his decisions, he will resist the state's claim to have authority over him. ... [H] he will deny that he has a duty to obey the laws of the state *simply because they are the laws*. ... [I]t would seem that anarchism is the only political doctrine consistent with the virtue of autonomy.'

[64] FINNIS, NLNR, Ch. 9; RAWLS, TJ (on natural duty to support just institutions).

But then MacCormick's position on moral reservations threatens to unravel in another way. Once a law has been passed in an area where law is necessary, then its existence will attract favorable moral judgment in and of itself; and that we ought to preserve it (or at least preserve the possibility of law in this area) will be the most important moral judgment we can make for ourselves. If that is granted, is there room left for an additional moral reservation along the lines of: "I judge that the law ought to be, or to have been, different"?

It may seem obvious that the answer is "yes." But consider whether the reserved moral judgment then does any work in the moral life of the person who makes it. So far as his external actions are concerned, it seems that they should be governed by the moral principles that favor the law, i.e. they should be governed by

(1a) Law or legal settlement is morally necessary for this domain, Δ, of conduct and interaction; and

(1b) The law that has been laid down for Δ requires me to do φ; and so

(1c) I ought to do φ in Δ.

Our reserved moral judgment, which may take the form either of

(2a) I ought to do ψ ($\neq \varphi$) in Δ; or

(2b) The law ought to require me to do ψ (instead of φ) in Δ,

should play little or no role in my practical moral thinking, at least until such time as I have the opportunity to present it as an input into the political process ("How should what the law requires in Δ be changed?"). At least until an appropriate political opportunity presents itself, insisting on one's right to reserve allegiance to moral judgments (2a) and (2b) seems like playing. It is no longer clear why the moral reservation has the importance that McCormick and others say it has.

None of this is strictly incompatible with what I quoted MacCormick and Bentham as saying in sections 2 and 3 above. What they emphasized was precisely the utility of moral reservation for the sake of possible political reform of the laws. But there was also a strong hint in MacCormick's account that the reservation of autonomous moral judgment was important, in and of itself, as something that an autonomous being owed to his moral faculties, quite apart from its utility in later revisiting of the processes by which law is made for the domain in question. If there is no immediate prospect of the law being changed or overturned, is there any practical point to such reservation? MacCormick hints that one ought to maintain one's moral autonomy, so that one can decide ultimately for oneself whether to obey the law that requires φ:

> [H]uman beings in the territory of a state are heteronomous in face of the state's law and the commandments it imposes on them, but they are autonomous as moral agents. This gives each person the final say as to whether or not it is right to knuckle under to legal norms where one considers them to be morally unacceptable.[65]

Fair enough. But in this regard, it is worth noting two things. First, the judgment that follows (1a), (1b), and (1c) will already reflect the impact of a moral judgment that the law in question is not too wicked to serve in domain Δ, i.e. not so wicked that it would be better to have no norm at all than to follow *this* one. Like the judgment that we need law in this area, that will be part of a person's moral judgment in the (1)-series, as it were. Secondly, a law requiring φ in Δ can be thought unjust (and an alternative, requiring ψ, more just), even though it is rightly judged morally better to have a law requiring φ than no law at all. On that assumption, we may ask again: what is the practical importance of judgments (2a) and (2b)?

Take this one step further. (1b) leaves entirely unexplained *how* it came to be that the law requires φ in Δ. Given the contingency of positive law, we may think: it just happened that way. But the processes by which it happened may themselves be morally significant. Suppose the relevant law was enacted in a properly elected representative assembly; that surely is a fact about it that has moral weight in addition to the straightforward necessity of having some law, any law, in this domain. Given the democratic credentials of the law requiring φ, in what sense can we continue to reserve our judgment (2b)? I guess (2b) might have functioned as my input into the morally significant process that yielded the law requiring φ, and when I lose out on that process, I may polish it and put it on the shelf for use in any future vote there might be on that question. But that apart, and for reasons familiar to aficionados of Wollheim's paradox of democracy, judgment (2b) may have little practical work to do.[66]

The case that Neil MacCormick presented us with—the English case of *Re A (conjoined twins)* from 2000—was a case involving a legal order issued by a court rather than a law enacted by a democratic assembly.[67] Is the moral center of

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[65] PRACTICAL REASON IN LAW AND MORALITY 199. See also note 15 above, and accompanying text.

[66] Richard Wollheim, *A Paradox in the Theory of Democracy*, in Peter Laslett and W.G. Runciman (eds.), PHILOSOPHY, POLITICS AND SOCIETY Second Series (Oxford: Basil Blackwell, 1969).

[67] *Re A (children) (conjoined twins)* [2001] Fam 147, [2000] 4 All ER 961—discussed in PRACTICAL REASON IN LAW AND MORALITY 173-181. See text accompanying note 13 above.

gravity less likely to be shifted to the law side of the equation in a case like this than in a case where the morality of the democratic process of legislation comes into play? I am not sure. Maybe there is little more to be said in favor of the decision made in that case (by Lord Justice Ward and the judges that voted with him) than that a decision was needed, and any authoritative decision is better than none in this area: maybe there is nothing more to add to (1a), (1b) and (1c), in terms of the moral elements of the legal process, than that. But there might be.

The Court's decision in *Re A (conjoined twins)* might have drawn on precedents and it might, in Dworkinian terms, represent the best and most attractive fit of any possible outcome with the existing legal materials.[68] Most defenders of the use of precedent cite moral reasons for following decisions in past cases (like the importance of established expectations and the importance of treating like cases alike), and Dworkin's theory of integrity is no exception. They are not simple or straightforward moral reasons—and we are certainly not going to go into them here—but they are moral reasons nonetheless. So it is possible that a sophisticated moral thinker addressing this situation, with their moral autonomy intact, would think it appropriate to factor these reasons into his analysis of what it was right to do about this case. Certainly such a thinker would think it a mistake to accord any great importance to (2a) or (2b) if they were predicated on *not* taking into account reasons of this kind. On this account, *legal judgment is a kind of moral judgment*, only a kind that takes the moral significance of more facts into account than the usual sophomoric exercise of "moral autonomy" on the part of the legally unlettered.[69]

Now, such a sophisticated moral thinker might not reach exactly the decision that the court reached. He might think a legal order requiring ψ was a better fit with the existing precedents than a legal order requiring φ. At that stage what this analyst might think of himself as reserving would be a contrary view of what the relevant law was, not a contrary view sponsored by his moral judgment in opposition to the law.

(Much of Ronald Dworkin's early work on civil disobedience proceeds in this spirit, not by saying that morality sometimes dictates resistance to law but by arguing that a good citizen is entitled to follow his own sincere figuring of what the law requires rather than the a court's determination of that: "A citizen's allegiance

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[68] DWORKIN, LAW'S EMPIRE (1986), Chs. 6-7.

[69] Notice that this does not in any way draw on MacCormick's point noted in section 1, that moral reasoning is like adjudicative reasoning in various ways. That may or may not be true. The point here is that respectable moral reasoning must actually be a version of adjudicative reasoning, taking into account the moral significance of the same facts that judges take into account (like precedents) and taking them into account in the same way.

is to the law, not to any particular person's view of what the law is, and he does not behave unfairly so long as he proceeds on his own considered and reasonable view of what the law requires."[70])

Of course a thinker who believes a court has got the law wrong, may have to mobilize an additional layer of argument, along the lines of (1a) through (1c), to explain why it is sometimes or always better to allow a mistaken order of the highest court to take effect, at least for the case in hand, than to leave a situation unsettled. And this too will be a moral judgment. So once again it seems as if all the real moral action is on the side of the discussion where we determine what the law requires; and there is very little of importance on the side of the reserved moral judgment if that is understood apart from the judgment of what the law is.

***Endnote:**

In all of this I have been assuming that the moral reservation thesis is uninteresting unless the reserved moral judgment has practical work of some kind to do. This may seem like an objectionable concession to prescriptivism,[71] as though moral judgments can't just register interesting (moral) facts about laws and legal determinations. I plead guilty to closet prescriptivism. But even if there are non-prescriptive senses available for (2a) and (2b), I just fail to see what the big deal would be about respecting and reserving space for their autonomous production.

[70] DWORKIN, TAKING RIGHTS SERIOUSLY, 214. Certainly this is the attitude that our judges often take. They persist with their dissents from one case to another; they don't simply knuckle under to the majority view. (See, e.g., Justice Scalia on virtually everything.)

[71] As in HARE, THE LANGUAGE OF MORALS and FREEDOM AND REASON.