BOOK REVIEW

Morality and Legal Authority: A Review of Heidi M. Hurd, *Moral Combat*

MORAL COMBAT. By Heidi M. Hurd.* Cambridge: Cambridge University Press, 1999. Pp. xviii, 348.

Reviewed by *R. George Wright***

There is a sense in which *Moral Combat*[1] can be concisely summarized, and another in which it cannot, any more than the essence of hot coffee can be conveyed by freeze-dried crystals.[2] Both of these senses reflect distinct virtues of this richly admirable and unusually valuable book. Let us in any event begin with the bare ideas of legal and moral obligation. It is Professor Hurd's assumption that even if there are such things as legal obligations, they cannot trump whatever overall moral obligations we may have, and that morality is in this sense ultimately binding on citizens, judges, and on the initiators and triers of judicial impeachments.[3] We are bound

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[1] HEIDI M. HURD, MORAL COMBAT (Gerald Postema ed., Cambridge Univ. Press 1999) [hereinafter cited as HURD]; *see* Heidi M. Hurd, *Challenging Authority*, 100 YALE L.J. 1611 (1991); Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2203 (1992), for antecedents of some key arguments.

[2] *See* HURD, *supra* note 1, at xi -xv, for Professor Hurd's own summary of her argument.

[3] *See* HURD, *supra* note 1, at 3-4, 62, 167, 185. For the sake of simplicity, we will herein focus mainly on doing the morally right thing. Our fallibility, individually and collectively, complicates matters. There are possible differences, for example, among doing the truly morally right thing, the right thing according to the current best moral theory, the currently most democratically or professionally popular theory, the best moral theory a given actor is capable of grasping and applying, or some minimally good moral theory in which the relevant actor sincerely believes. In a given instance, it is possible to misapply any of these standards. Surely we may consider more than one of these moral standards to be decisive depending on context and purpose. If we want to promote the society's overall moral well-being, we may want to stick close to actual moral truth, at least on our best collective judgment.

Determining and applying our best moral theory, however, may involve a measure of controversy. And sometimes, we may want to excuse actors who acted conscientiously, sincerely, and reasonably, but who were in some respect mistaken. Suppose our best moral theory is agreed to be some version of utilitarianism, and that

ultimately to do the morally right thing.

Professor Hurd then argues that we cannot expect a perfect coincidence between the permissions and obligations of morality itself and the presumed obligations of any legal system, even if the legal system is democratically based.[4] Following the law may not always be morally right. The gulf between our overall moral obligation and the presumed obligation to obey the law occurs in many contexts,[5] but perhaps the most obvious are those cases of conscientious civil disobedience with which we are sympathetic.[6] We can imagine, for example, a legal system in which a citizen is legally bound to not racially integrate a place of public accommodation,[7] yet is also morally permitted, if not morally required, to do so. In such a case, the citizen, the citizen's criminal trespass judge, a jury with the power to nullify the law,[8] appellate reviewers of questions of law, and the trial judge's possible impeachers or other sanctioners may all have successive decisions to make, based initially on the citizen's decision to violate the segregation law.

Let us suppose that the citizen is morally permitted or morally bound, all things considered, to integrate the place of public accommodation, despite the law's prohibition. This may certainly be

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a given actor has done a sincere and reasonable, though flawed, job of applying that sort of utilitarianism in deciding that she should violate a law. Should we excuse the actor or reduce the legal penalty in such a case? Does it matter whether she understood and accepted the right form of utilitarianism, but misapplied it, or else misunderstood or intentionally deviated slightly from the approved form of utilitarianism?

[4] *See* HURD, *supra* note 1, at 17, 185.

[5] We focus mainly on the obvious cases of civil disobedience and conscientious objection, but include a wider variety of cases *infra* at notes 38-41 and accompanying text.

[6] Given the wide spectrum of contemporary ideological perspectives endorsing some form of civil disobedience, it is unlikely that anyone in particular will be sympathetic with all acts of civil disobedience or that all such acts will count as morally worthy on our best moral theory.

[7] *See, e.g.*, Gayle v. Browder, 352 U.S. 903 (1956) (public bus system); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (public golf course); Mayor of Baltimore City v. Dawson, 350 U.S. 877 (1955) (public beach desegregation case).

[8] While Professor Hurd does not explicitly focus on grand or petit court jurors confronted with legally guilty but morally justified criminal defendants, their circumstances could presumably be included. *See, e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996). Consider also, as a further example, the dilemma of a potential juror who believes that capital punishment is never morally permissible, but who is asked on voir dire whether she is willing to uphold and apply the law to the contrary. *See, e.g.*, Wainwright v. Witt, 469 U.S. 412 (1985); Witherspoon v. Illinois, 391 U.S. 510 (1968). *See generally* Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433 (1998). Of course, jury nullification issues arise in a wide variety of contexts. *See id.*

possible if the law relevantly departs from the dictates of morality. To do, in such a case, what the law prohibits is nevertheless to do what may be morally justified or morally right. What if the citizen chooses to violate the law in order to do what is, we assume, recognizably morally justified? In particular, how should the citizen's trial judge, among other legal actors,[9] respond?

Let us simplify the analysis by focusing on the trial judge. The judge may legally convict and sentence the defendant, perhaps leniently, for what perhaps both judge and defendant recognize to be evidently morally justified conduct.[10] The judge may want to avoid this awkward outcome by adopting an unusually broad understanding of some relevant legal defense.[11] But the scope of legal justification and excuse can be stretched only so far. Beyond that legally recognized point, the judge may well choose to convict and impose legal punishment, involving suffering and blame, on the morally justified defendant.

If the judge were to then try to account for legally punishing a defendant for an evidently morally justified action, several lines of argument would arise. Beyond simply denying that law and morality can ever diverge, the judge might endorse a moral relativism that somehow brings morality, as mere social group norm,[12] and law into perfect compatibility. Or the judge might argue that all citizens are invariably bound to follow the law, simply because it is the law.[13] As

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[9] *See supra* note 8 and accompanying text.

[10] The difference between the mere existence of a morally best course of conduct and our knowledge of, or limited ability to recognize or publicly establish, that moral truth is briefly referred to in text accompanying notes 53 and 58 *infra*.

[11] *See, e.g.*, R. GEORGE WRIGHT, DOES THE LAW MORALLY BIND THE POOR? ch. 3 (1996) (arguing for an expansion of the legal defense of necessity).

[12] *See* HURD, *supra* note 1, at 27-61. Professor Hurd nicely undercuts the casual assumption that moral relativism is particularly associated with liberal tolerance. *See* HURD, *supra* note 1, at 36-39. She also shows that some of the most sophisticated versions of metaethical relativism leave us with nothing to say of any real cogency, just when some cogent moral response seems most incumbent. *See* HURD, *supra* note 1, at 53 (referring to the relativism of Bernard Williams) and 58 (referring to the relativism of Gilbert Harman). For debate over the question of whether a moral relativist could care about moral combat, *see infra* note 54 and accompanying text. For further discussion of moral relativism in general, *see, e.g.*, Robert M. Stewart & Lynn L. Thomas, *Recent Work On Ethical Relativism*, 28 AM. PHIL. Q. 85 (1991); Allison Dundes Renteln, *Relativism and the Search for Human Rights*, 90 AM. ANTHROPOLOGIST 56 (1988).

[13] *See* HURD, *supra* note 1, at 62-94 (in particular, note pp. 62-63: "Practical authority is thought to be the power not just to inspire belief in a deontic proposition, nor simply to influence conduct by providing a new reason for action; rather, it is thought to be the authority to compel action, even in the face of a plethora of good reasons to act otherwise"; p. 78: "Why would it ever be rational to act solely because one has been told to do so?"; and p. 93: "How could the sheer fact that a law has been passed reduce the importance of antecedently existing reasons for action?").

Professor Hurd refers here, and especially at pp.64-69, to a distinction between content-independent reasons and content-dependent reasons for action or belief. This distinction, traced to work of H.L.A. Hart, was developed by Joseph Raz. *See, e.g.,* JOSEPH RAZ, THE MORALITY OF FREEDOM 35 (1986). *See also, e.g.,* Michael S. Moore, *Authority, Law, and Razian Reasons*, 62 S. Cal. L .Rev. 827, 851-22 (1989); Louis E. Feldman, *Originalism Through Raz-Colored Glasses*, 140 U. Pa. L Rev. 1389, 1394-95 (1992). The idea is, roughly, that there is a difference between reasons that "go to the merits" of an issue, and reasons that carry weight solely by virtue of their pedigree, as opposed to their substance or content. The former are said to be content-dependent reasons, and the latter content-independent, or what we might call "just because" reasons. Professor Raz believes that valid laws, among other activities, may generate content-independent reasons for acting as the law requires.

By way of presumed example, consider a school child who is unsure whether to believe either or both of two propositions: that the Pythagorean Theorem is true, and that she should go to bed. Suppose she happens upon an understandable proof of the Pythagorean Theorem in her math book, and is then asked, perhaps rather peremptorily, by her mother to go to bed. She has at least one reason to believe or act upon both propositions. The reasons, however, are clearly somehow different in character. The math proof seems to bear, favorably as it happens, on the merits of the relevant belief. It is, therefore, said to be a content-dependent reason for believing that the Pythagorean Theorem is true. The maternal request, on the other than, seems content-independent. The mother could just as easily have asked the child to stay up and finish the math homework, or have specified some different bedtime. The child would then presumably have had a reason to do whatever the mother had asked, just because the person doing the asking was her mother.

There is certainly a very real difference between the child's reasons for belief, or for action, in these two cases. And the distinction potentially bears upon the legal theory of obligation, obedience, and authority. Our example, after all, left open whether the mother's request was most like mere advice, a request of some urgency, or a preclusive command. A parent's purportedly preclusive command could easily be analogized to a sovereign's legal command. *See, e.g.,* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfred E. Rumble ed. 1995) (1832) (developing a "command" theory of law eventually critiqued by H.L.A. Hart).

While there are certainly real differences among reasons associated with mathematical proofs, references to the physical environment, bits of advice, expert tips, requests, promises, arbitrators' decisions, and commands, the distinction is never really one of true content-independent reasons versus content-dependent reasons. There is actually no such distinction, in any context, because there are no true content-independent reasons. Of course, some reasons refer importantly, if only in part, to the pronouncements of someone occupying a distinctive social institutional role, with whom one may bear a relevant relationship, such as one's teacher, parent, arbitrator, commanding officer, legislator, or judge. But that does not make such reasons genuinely content-independent.

Let us try to clarify this with a simple example. Consider an injury victim, V, lying by the side of the road who directs the words "help me!" to a Samaritan, S, passing by. Now, if all V intended to communicate was the mere fact of her injury, we could see her words as providing a content-dependent reason for S to act. V would be informing S of some fact about the world providing a possible reason for S to act. S might then, in theory, draw together all of the various reasons for aiding V and for doing anything else instead, characterize or weigh those reasons, and then aid V, or not, based on whichever action was supported by the best reasons overall.

But the words "help me!" certainly may not be intended, entirely or even in part, to alert S to V's injury. V's injury may already be obvious to S, and V may know this. V may be asking S for help, where it is conceivable that she might not have asked if, for example, her injury had been minor, professional medical help had already been summoned, or if V distrusted or feared S. V might or might not,

therefore, have chosen to ask S for help. Doesn't the mere fact that V has made the request, then, give S a content-independent reason to help?

There is a sense, admittedly, in which V's request, like the mere enactment of a law, gives S a new or modified reason to help, but the "new" reason is not a content-independent reason. Merely that a request was made, or that it has a certain pedigree or a "just because I said so" quality, should rationally leave us cold. We have a tendency to think otherwise only because we reflexively "fill in the blanks" with various sorts of typical content-dependent considerations that give real meaning and cogency to the bare request. By itself, the request probably just clarifies, highlights, emphasizes, or makes more readily knowable or determinate one or more of the content-dependent personal or social considerations potentially bearing upon S's decision to assist V. "Help me!" may, for example, through shorthand or mere implication, clarify what is likely to promote V's health, or V's subjective well-being, or best fit in with V's lifeplans, projects, priorities, fears and anxieties, or moral or religious scruples. The request may impliedly refer to and urge discounting of other conflicting activities, or of the interests of S or of other persons. Or the request may impliedly refer to other content-dependent considerations, such as S's debt of gratitude to V, S's superior medical knowledge, the low risk to S of helping, their friendship, V's benevolence toward S, S's presumed moral obligation as a Samaritan, or to some simple or complex function of these and many other arguably relevant content-dependent background circumstances and considerations.

Typically, these content-dependent reasons will include not only general facts about human vulnerability, mortality, and fear of death, but also facts about V's current subjective state of mind and current preferences. Certainly, the morally right thing to do to a person often reflects what they want done to them. Content-dependent reasons may fluctuate rapidly with V's statements and state of mind, as with other changing circumstances. S will have objective evidence, including V's statements, about V's subjective state of mind. S will, or rationally should, somehow array, weigh, and resolve the various relevant considerations and do what is best supported by those reasons.

The decision-making process by S is ultimately "on the merits," based on all of the available assessed evidence, rather than somehow radically truncated by V's request. The bare request, like a bare legislative enactment, is by itself an unintelligible justification for action, until we fill in what is missing along the lines suggested above.

Suppose, however, that we thus abandon the idea that there are genuinely content-independent reasons for action or belief. This may affect our understanding of not only legal or political authority, but of other more informal sorts of authority as well. This is significant enough. But is there perhaps an even more dramatic price to be paid if we abandon the idea of content-independent reasons? A content-independent reason, after all, was supposed to be something like a self-subsistent, self-sustaining reason created, perhaps arbitrarily, by an act of will. The reason-creator could, presumably, have instead created a reason to the contrary, as when a legislature debates and amends a bill, or an injured party says "don't help me!" If we give up the idea of content-independent reasons, may we not be inadvertently abandoning as well any deep, valuable sense of non-arbitrary autonomous choice or decisionmaking, or of freedom of the will? If a request is not a content-independent reason for action, isn't it just a kind of commentary on the state of the world, including perhaps the requester's subjective state of mind, and not a genuinely creative, valuable and value-conferring mental act in the way all genuinely free, deeply autonomous choices must be?

We may assume that if we could give non-arbitrary content-independent reasons, the act of arriving at or giving such reasons would at least sometimes involve a deeply autonomous, morally valuable mental act. Could choosing to give, or actually giving, an admittedly content-dependent reason ever involve an equally autonomous mental act? Of course, it is notoriously hard in the first place to clearly envision autonomous decision-making in general. But it is hard to see why

well, the judge might argue that following the law is actually always morally right, based on some familiar theory of obligation, such as gratitude,[14] citizen consent,[15] reciprocity or "fair play,"[16] or other

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autonomous decision-making, if it can exist at all, could not issue in the creation, or the giving, of a merely content-dependent reason. Let us simply assume that V has, in some perhaps deeply mysterious fashion, freely chosen to prefer being helped despite being, at that time, fully able as well to choose the contrary. We may here attach whatever additional or different requirements for genuine autonomy as we may care to. *See, e.g.*, JOHN MARTIN FISCHER, THE METAPHYSICS OF FREE WILL (1994); ROBERT KANE, THE SIGNIFICANCE OF FREE WILL (1998); PETER VAN INWAGEN, AN ESSAY ON FREE WILL (1986).

This free choice, we may assume, merely clarifies, highlights, or emphasizes some arguably relevant aspect of the world, including some aspect of the chooser's overall state of mind. The free choice is thus content-dependent in the sense illustrated above and changes the world only in the limited sense in which a clarification, or emphasis, etc. changes the world. A newly enacted statute, we will assume with Professor Hurd, does not change the world in any more dramatic sense, or generate a new, content-independent reason. *See, e.g.* HURD *supra* note 1, at 93. That the choice changes the world in only this limited sense, however, does not by itself mean that the choice was not freely and autonomously made in the fullest sense.

Suppose V decides to tell S, truthfully, that based on V's elaborate reflections–including upon the fact that, S's current belief to the contrary, no one else is available to help her now–S's helping V would maximize the overall balance of pleasure over pain in the world. S has, at best, a new or improved content-dependent, on the merits, Benthamite-type reason for helping V, of whatever weight S may care to give it. Does this characterization of the reason show that V cannot have made her choice to tell S, or engaged in the underlying moral thinking, in a fully autonomous way?

It is hard to see any clear incompatibility between full autonomy and the production or giving of a content-dependent reason. We have, in sum, reason (of a content-dependent sort) to doubt that there are such things as content-independent reasons. And we have, reassuringly, no clear reason to shrink from this conclusion on the grounds that such a conclusion would imply that the standard deep sense of autonomy is an illusion.

[14] *See* HURD *supra* note 1, at 107-12 (in particular, note p. 111: "any benefits that one receives as a result of others' willingness to take the directives produced by a democratic process as having influential authority are conferred on one unintentionally," contrary to our ordinary understanding of the prerequisites for proper gratitude). For further discussion *see, e.g.*, George Klosko, *Four Arguments Against Political Obligation From Gratitude*, 5 PUB. AFF. Q. 33 (1991).

[15] *See* HURD, *supra* note 1, at 112-19 (in particular, note p. 114: "It seems virtually impossible to determine when and how citizens living under democratic institutions consented to the attribution of [content-independent] influential authority to the laws enacted by such institutions."). For further discussion *see, e.g.*, JOHN P. PLAMENATZ, CONSENT, FREEDOM AND POLITICAL OBLIGATION (2d ed. 1968); Kent Greenawalt, *Promise, Benefit, and Need: Ties That Bind Us to the Law*, 18 Ga. L. Rev. 727 (1984). Of course, judges and jurors may, unlike most citizens, take express oaths to uphold the law, but this hardly means that their oath will always make upholding any law morally right. *See, e.g.*, JOSEPH RAZ, *Government by Consent* in *29 Nomos: Authority Revisited* 76, 85 (J. Roland Pennock & John Chapman eds., 1987).

[16] *See* HURD, *supra* note 1, at 102-07 (in particular, note p. 107: "Reciprocity . . . does not generate a content-independent reason to adhere to the will of the majority. Rather, it functions as an epistemic strategy for detecting the content-*dependent* reasons for and against the enactment of proposed rules.") (italics

approaches.[17] Finally, the judge might argue that either the maker of the law[18] or the text of the law itself[19] likely embodies greater moral wisdom than any individual citizen can rightly claim, or that there are other grounds, including the special visibility or salience of the law in resolving problems of social coordination,[20] that mandate obedience.

Professor Hurd argues that none of these possible responses entirely extricates the judge from the dilemma of legally punishing a morally justified action.[21] There seems to be something undeserved, and therefore unfair, if not deeply irrational, about punishing a criminal defendant for doing what is assumed to be, overall, morally

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in the original). See, e.g., GEORGE KLOSKO, THE PRINCIPLE OF FAIRNESS AND POLITICAL OBLIGATION (1992) (for further discussion).

[17] *See* HURD, *supra* note 1, at 120-24. Professor Hurd argues that none of these approaches, whatever its familiarity or pedigree, is ultimately satisfactory. For further discussion, see, e.g., A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS (1979). For exposition and critique of a slightly different typology, see R. GEORGE WRIGHT, LEGAL AND POLITICAL OBLIGATION: CLASSIC AND CONTEMPORARY TEXTS AND COMMENTARY (1992); R. GEORGE WRIGHT, REASON AND OBLIGATION chs. 1-4 (1994).

[18] *See* HURD, *supra* note 1, at 63 n.2, 126, 133, 138 ("One who would defend the advisory authority of the law must be able to make out the claim that legislators have the cognitive and empathetic skills, and the information-gathering capacities, that collectively make them moral observers of a more ideal sort than most.").

[19] *See id.* at 63 n.2, 153-58, 175-82 (endorsing the possibility of "theoretical" authority, embodied in particular legal texts, but granting such authority only reliable epistemic, heuristic, "assisting" or "guiding" force, without the power to preempt or exclude our considering independent reasons to follow or violate the law). The reliability of a legal text in helping us to recognize our moral obligations may be established without our being able to account for that reliability on any theory such as consent, gratitude, or natural duty. *See id.* at 157. While theoretical legal authority thus does not presume to dictate our moral calculus, it can serve as a legitimate basis for coercive legal sanctions. Genuine theoretical legal authority suggests not only that the overall balance of moral reasons favored obedience, but that the proper balance of moral reasons now favors legal punishment of the disobedient actor. *See id.* at 178-82. In a sense, one is punished not for defying the law, or for failing to do what the law prescribes, but because a theoretically authoritative law provides sufficient notice of what is morally required under the circumstances. *See id.* at 182. It would be interesting to pursue the idea of the enforceability of common law crimes, and the idea of the law's providing notice of what is morally required in the awkward context of ignorance of the law, where ignorance sometimes does, but commonly does not, excuse. *See, e.g.*, Bruce R. Grace, Note, *Ignorance of the Law As an Excuse*, 86 COLUM. L. REV. 1392 (1986); Michael L. Travers, Comment, *Mistake of Law in Mala Prohibita Crimes*, 62 U. CHI. L. REV. 1301 (1995). *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 569, (5th ed. 1998) (arguing that the common law tends toward efficiency through mechanisms apart from the moral wisdom of the judges); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977).

[20] *See* HURD, *supra* note 1, at 169-76. *See, e.g.*, Leslie Green, *Law, Co-ordination, and the Common Good*, 3 OX. J. LEGAL STUD. 299 (1983) and in a broader context, LESLIE GREEN, THE AUTHORITY OF THE STATE 102-05 (1990).

[21] See HURD, *supra* note 1, at 186.

right.[22] But there is, on the other hand, clearly something to be said for not encouraging judges to legally acquit defendants who were morally justified in acting as they did. Acquitting morally justified but legally guilty defendants seems, to one degree or another, to jeopardize the rule of law itself,[23] democracy in the sense of rule by representative majorities[24] or supermajorities in the case of constitutional rights, and crucial structural principles of government, including federalism[25] and the separation of powers and checks and balances,[26] under which the role of judges is subject to limits.

All told, these considerations raise the spectre of what Professor Hurd refers to as "moral combat." Narrowly defined, moral combat involves circumstances in which it is one actor's overall moral duty--in this case, let us say, the trial judge's--to thwart or at least punish the fulfillment of another actor's--in this case, the civilly disobedient criminal defendant's--own overall moral duty.[27] Professor Hurd urges that whatever sorts of genuine moral conflicts we may encounter, morality rightly understood cannot take on this agonistic "gladiatorial" character.[28]

Professor Hurd's argument on this point in particular resists quick summarization. We may briefly say that her argument depends upon what sort of broad approach to ethical theory we adopt. To some, Professor Hurd says that the defendant and the trial judge, for example, should both apply the proper moral weight, whatever that may be, to systemic values such as the rule of law, democracy, and the separation of powers.[29] If these systemic values weigh heavily, then the defendant's act will correspondingly tend not to have been overall morally justified.[30] Some sort of legal punishment is therefore presumably morally due. If these systemic values do not morally weigh heavily, the defendant's act will correspondingly tend to have been morally justified, and in a proper case, the defendant should,

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[22] *See, e.g.*, HURD, *supra* note 1, at 3-4, 11-14.

[23] *See, e.g.*, HURD, *supra* note 1, at 15, 297, 203-25.

[24] *See, e.g.*, HURD , *supra* note 1, at 15, 297, 226-52.

[25] Professor Hurd does not explicitly address the possible conflict between a judge's refusal to punish morally justified acts and the institutional value of federalism, but it would be easy to devise such a case without, presumably, affecting the overall argument.

[26] *See, e.g.*, HURD, *supra* note 1, at 15, 297, 226-52.

[27] *See, e.g.*, HURD, *supra* note 1, at 9-10.

[28] *See, e.g.*, HURD, *supra* note 1, at 321 ("law does not require, and cannot permit, moral combat" in the sense of making "one person's moral success turn on another's moral failure.").

[29] *See* HURD, *supra* note 1, at 298-300, 307 (referring to consequentialist moral theories).

[30] *See id.* at 300-01, 307.

morally, be legally acquitted.[31]

If as a matter of our moral theory we are not disposed to do this sort of weighing of the consequences of an action, we can still, based on Professor Hurd's view, avoid the unseemliness of moral combat. It may be, for example, that any apparent conflict in the overall moral duties of the judge and the defendant-actor is indeed merely apparent, and not real and inescapable.[32] If both actors carefully assess the circumstances, including the existence and proper scope of any moral duty borne by the other party, they should, on some moral theories, recognize that one of the apparently antagonistic duties is merely *prima facie*, and thus, should be overborne by or make way for the other.[33] Crucial to Professor Hurd's conclusion is that the moral choices of both the defendant and the judge are not role-relative, in that neither is bound to give moral weight to some consideration that is out of the bounds of consideration by the other.[34] These and other sorts of considerations, Professor Hurd suggests, preserve an overarching commonality of moral reasoning process and commonality of moral considerations between the judge and defendant, whatever their relative ignorance or expertise, thus preventing the problem of moral combat from getting off the ground.

These few sentences summarize Professor Hurd's argument in roughly the sense, to change an earlier metaphor, that referring to the mishaps of a knight-errant summarizes *Don Quixote*. No review can substitute for a reading of Professor Hurd's highly nuanced, closely-reasoned, three hundred page text, in which readers can find something of real philosophical value on every page. Bearing this in mind, let us instead think about some ways in which readers might choose to react to the book.

Professor Hurd has raised the problem of moral combat. This is again, narrowly understood, something like the possibility of rightly punishing someone who has acted morally right in violating the law.[35]

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[31] *See* HURD, *supra* note 1, at 307. Note especially p. 300 ("Actors are justified in disobeying the law only if the consequences of their actions, including all of those systemic consequences that they cannot predict or accurately weigh, favor disobedience.") (italics in the original).

[32] *See* HURD, *supra* note 1, at 293 (referring to deontological moral theories). Professor Hurd thus responds somewhat differently to moral consequentialists and to moral deontologists. For brief discussion of this distinction in a related context, see Joel Feinberg, *The Right to Disobey: Review of Kent Greenawalt, Conflicts of Law and Morality*, 87 MICH. L. REV. 1690, 1698-99 (1989).

[33] *See* HURD, *supra* note 1, at 311.

[34] *See* HURD, *supra* note 1, at 15-16, 314-15 ("if our rule of law values are moral ones, then they serve as reasons for action for citizens as well as for officials."). HURD, *supra* note 1, at 315.

[35] *See* HURD, *supra* notes 27-28, at 15.

By way of response, therefore, we might somehow question the very possibility of the problem of moral combat. If the possibility of moral combat turns out to be real, we might wonder about the scope of the problem. How frequently does the problem of moral combat arise, for what kinds of actors, and in what forms and varieties? We might then reflect on the severity of the problem, as the frequency or variety of the problem and its moral gravity may clearly differ. Finally, we might think about whether the problem of moral combat can be solved, completely or partially, and about the forms the solution might take. Professor Hurd has much of value to say on each of these questions, and we may take *Moral Combat* as an invitation to further pursue these inquiries.

We will not tarry over the threshold question of the sheer possibility of a problem of moral combat. We can, admittedly, imagine moral theories that require citizens to invariably follow positive law. We can imagine moral theories that bar legal punishment of any morally justified act. We can imagine a subtler moral theory that requires obedience to all laws of, perhaps, any legal system democratically certified as being above a minimum threshold of general moral admirability. Individuals, after all, may be wrong more often than right in believing that their own disobedience is morally permissible. The administrative costs of judicially validating the few exceptions may seem too high. It is thus possible to imagine moral theories and legal systems in which the possibility of moral combat does not arise. But it seems unlikely that we would find any such system both stable and morally attractive. A viable legal system that asks, on any theory, for invariant obedience is likely to underplay the values of conscientiousness, self-reliance, individualism, and critical autonomy in favor of sheer passivity and moral complacency.

Let us therefore assume that the possibility of moral combat is real, and move to the question of the scope of the problem. If we allow moral combat to arise, we may be faced with few or relatively many instances thereof. Professor Hurd refers to the possibility of "numerous circumstances"[36] in which it may be right to violate the law, and to the possibility of a "jurisprudential crisis"[37] as a result. We must be concerned, after all, not only with justified instances of classical civil disobedience and conscientious objection. Someone who attacks her abusive spouse[38] with moral justification, but outside the scope of the legal defenses of self-defense or necessity, for example, is probably not considered classically civilly disobedient.

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[36] *See* HURD, *supra* note 1, at 123.

[37] *See* HURD, *supra* note 1, at 17.

[38] *See, e.g.*, HURD, *supra* note 1, at 185.

But her morally justified choice may nevertheless evoke moral combat. So may an act of stealing, or committing what would otherwise be stealing, where necessary to feed one's starving family.[39]

But the scope of the problem is not limited to cases of improperly narrow criminal defenses. Professor Hurd points out that virtually every law is to some degree overinclusive or underinclusive, or both, with regard to its moral justification.[40] Imagine, for example, the case of a legally valid will that displays contempt for the recognized moral rights of a party who lacks any other recourse, with no other significant moral considerations at stake.[41] A probate judge in such a case faces a choice between upholding the testator's admitted legal rights of disposition and the moral right of the contestant of the will. This is a civil, indeed an equitable, example of moral combat.

Professor Hurd recognizes, on the other hand, that some considerations limit the real scope of the moral combat problem. After all, the actor must have acted morally rightly, all things considered, in violating the law. Merely having reasonable grounds for believing that one has acted rightly will not suffice. Sincerity will also not suffice. An actor must somehow take proper account not only of her own biases and fallibilities,[42] but also of the relevant indirect,

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[39] *See, e.g.*, VICTOR HUGO, LES MISERABLES 83 (Lee Fahnestock & Norman MacAfee trans., 1987)(1862); EMILE ZOLA, WORK 25-28 (Ernest A. Vizetelly trans. 1925).

[40] *See* HURD, *supra* note 1, at 185. As one familiar, if in a sense exotic, example, Star Trek fans will appreciate that the Federation's supposedly inviolable Prime Directive, which is essentially a non-intervention principle, is violated with apparent moral justification on a number of occasions, and is occasionally recognized to be overly inclusive in its scope, without, however, inspiring any formal amendment. Perhaps the idea is that reducing the overinclusiveness of the prohibition would lead to more serious instances of unjustifiable violation. It is widely recognized that violating the Prime Directive will often seem tempting, and that the potentially disastrous long-term consequences of its violation will appear only in hindsight. For general background, see, e.g., Paul Joseph & Sharon Carton, *The Law of the Federation: Images of Law, Lawyers, and the Legal System in "Star Trek: The Next Generation,"* 24 U. TOL. L. REV. 43 (1992); Joakim E. Parker, *Cultural Autonomy: A Prime Directive For the Blues Helmets*, 55 U. PITT. L. REV. 207 (1993); Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals From the Twenty-Third Century*, 59 ALB. L. REV. 671 (1995). For primary source documentation, see, e.g., JUDITH REEVES-STEVENS & GARFIELD REEVES-STEVENS, PRIME DIRECTIVE (reprinted ed. 1993).

[41] *See, e.g.*, Gibson v. McCraw, 175 W. Va. 256, 332 S.E.2d 269 (1985) (for an admittedly far more defensible and far less egregious case).

[42] *See, e.g.*, HURD, *supra* note 1, at 190. This is not to suggest that everyone and every institution is equally biased and fallible in the moral sphere. See HANS-GEORG GADAMER, TRUTH AND METHOD 279-80 (Joel Weinsheimer & Donald G. Marshall rev. trans., 2d rev. ed. 1989) (for a concise discussion of the possibility of theoretical moral authority). *See* R. George Wright, *Whose Phronesis? Which Phronimoi?: A Response to Dean Kronman on Law School Education*, 26 CUMB. L. REV. 817 (1995-

often unpredictable effects of her action,[43] including the possibility that it may induce errors in other people's beliefs,[44] or somehow tend to undermine systemic values such as democracy and the rule of law.[45] The scope of moral combat certainly cannot exceed the actual number of cases in which law violation is fully morally justified.

Let us merely add that the scope of moral combat may also vary depending on precisely how the idea of moral combat is to be understood. If moral combat requires that, for example, the legal system thwart the successful "fulfillment of [the actor's] moral obligations,"[46] moral combat would exclude cases in which a civilly disobedient actor is *merely* punished after the fact, as opposed to being prevented or deterred from engaging in a morally required--and not just morally permitted--disobedient act. As well, one might successfully fulfill one's moral obligations merely by rightly doing one's best to violate a law, even if one's attempt to violate the law is blocked in practice. Similarly, merely permitting one actor to prevent another from doing what she is permitted to do[47] need not set up genuine moral combat. H.L.A. Hart's hypothetical case of two persons' striving simultaneously for a lost wallet on the sidewalk illustrates this concept.[48]

Whatever the possible scope of the problem of moral combat, we may still ask about the severity of the problem. How morally or otherwise important should we consider moral combat to be? Civilly disobedient actors often engage in merely symbolic law violations. A brief, principled trespass may evoke only a nominal legal penalty,[49]and perhaps even a candid judicial admission of moral

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96) (for discussion of some problems of actually recognizing the phronimos, or the Aristotelian practically wise person).

[43] *See* HURD, *supra* note 1, at 300 ("Actors are justified in disobeying the law only if the consequences of their actions, including all of those systemic consequences that they cannot predict or accurately weigh, favor disobedience.")(emphasis in the original).

[44] *See* HURD, *supra* note 1, at 191.

[45] *See* HURD, *supra* note 1, at 314-15.

[46] *Id.* at 272.

[47] *See id.*

[48] *See* H.L.A. Hart, *Are There Any Natural Rights?, in* POLITICAL PHILOSOPHY 53, 57 (Anthony Quinton ed., 1967) (reprinting Professor Hart's article from 64 PHIL. REV. 175 (1955)). *But see* Professor Hurd's discussion at 280-81 (assuming that some cases will involve "amoral" actions only). The competitive wallet-seekers may, of course, each have moral obligations that can be fulfilled only by actually obtaining the wallet, with neither actor having consented to the actions of the other.

[49] *See, e.g.*, State v. Marley, 509 P.2d 1095 (Haw. 1973) (antiwar protest taking the form of criminal trespass resulting in suspended jail sentences and partially suspended fines) (discussing and rejecting justification, necessity, and "Nuremberg" defenses).

admiration. On the other hand, some civilly disobedient actors receive substantial legal penalties, and find it appropriate, or even morally necessary, to commit more serious legal offenses.[50]

Punishing an actor for doing the morally right thing does not involve the moral cost of preventing the actor from fulfilling her moral duty. But others might be deterred from doing the morally right thing by the threat of punishment.[51] On the other hand, some of the most morally attractive acts of disobedience may be thought so in part precisely because of the suffering imposed by the law on the disobedient actors. We can imagine a Gandhian civil protest, for example, in which legally imposed and other forms of suffering contribute positively to the moral value of the protest.[52] More generally, though, we can hardly assess the moral severity of the problem of moral combat until we know the answer to some substantive moral questions. We would want to know, for example, the moral gravity of doing wrong by failing to violate an unjust law.[53] Even if we set aside the question of identifying unjust laws, we may want to know how many seriously unjust laws exist. How seriously morally wrong is it for a judge to punish a fully morally justified actor? How seriously morally wrong is it for the actor, or a judge, to somehow, perhaps unpredictably, jeopardize the rule of law, democracy, or the separation of powers? These answers will depend on one's substantive moral views. They will also depend upon one's more abstract metaethical theory, or on the nature and status of moral language. For moral realists, at least some of these questions have

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[50] *See, e.g.*, United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969) (conviction of the Berrigan brothers and others for violating three federal statutes in connection with destruction of local draft files). In *Moylan*, Judge Sobeloff concludes that "[i]f these defendants were to be absolved from guilt because of their moral certainty that the war in Vietnam is wrong, would not others who might commit breaches of the law to demonstrate their sincere belief that the country is not prosecuting the war vigorously enough be entitled to acquittal? Both must answer for their acts." *Id.* at 1009. *Compare* Frances Olsen, *Socrates On Legal Obligation: Legitimation Theory and Civil Disobedience*, 18 GA. L. REV. 929, 957-59, 965-66 (1984). Professor Olsen suggests that "the more interesting question is how could anyone confuse these sets of activities." *Id.* at 965. Of course, there may be a difference between the moral or other practical severity of a problem and its theoretical severity, and we should bear this in mind.

[51] Consider, by way of loose analogy, the "chilling effect" on fully protected speech feared by the Court in Gooding v. Wilson, 405 U.S. 518 (1972). *See also* HURD, *supra* note 1, at 11.

[52] *See* MOHANDAS K. GANDHI, NON-VIOLENT RESISTANCE 67, 112-15 (Bharatan Kumarappa ed., 1961). Professor Hurd refers to cases in which the actor seeks legal punishment for the sake of publicly displaying injustice at 275.

[53] Of course, some unjust laws, such as an overly broad "treason" statute, morally invite protest by means other than the direct violation of the treason statute itself, where life imprisonment might be risked. *See* Hugo A. Bedau, *On Civil Disobedience*, 58 J. PHIL. 653, 657 (1961).

objective, and in that sense rationally inescapable, answers.[54] For moral non-realists, on the other hand, the seriousness of any moral wrong is ultimately a matter of one's revisable attitudes and of ultimately arbitrary choice.[55]

Professor Hurd concludes, ultimately, that a system of moral combat cannot be morally justified[56] and that actors who are morally right in violating the law, all things considered, should not be subject to legal blame.[57] Without knowing which laws are just or unjust, we cannot know much about what a legal system without moral combat would look like. We cannot tell much, in particular, about how often courts would face the choice of perhaps punishing a defendant who was legally guilty but fully morally justified.[58]

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[54] Note that Plato, for example, believes that it is far worse to commit than to suffer injustice, and that the "systemic" effects of disobedience should be taken quite seriously. *See* PLATO, APOLOGY AND CRITO. Professor Hurd, who rejects the "bizarre metaphysics" of some forms of moral realism, 161 & 161 n.12, believes that the dilemma of moral combat does not arise for moral relativists, but should trouble at least some moral noncognitivists. *See* HURD, *supra* note 1, at 27, n.1. It would be easy to argue, however, that some moral relativists must confront the problem of moral combat. Consider a relativist, for example, who believes that morality rises no higher than group social norms, but that such social norms may be only imperfectly embodied in, or misunderstood by, the law, and that some individuals may grasp the deep logic of group social norms better than the current legal system. Surely these circumstances could give rise to moral combat. If this is right, Professor Hurd's critique of moral relativism is not strictly necessary for the main thesis of her book, but certainly retains its considerable independent value. A interested reader can examine many sources for a further general discussion of moral relativism. *See, e.g.*, GILBERT HARMAN & JUDITH JARVIS THOMSON, MORAL RELATIVISM AND MORAL OBJECTIVITY (1996); ROM HARRE & MICHAEL KRAUSZ, VARIETIES OF RELATIVISM (1996); RELATIVISM: INTERPRETATION AND CONFRONTATION (Michael Krausz ed., 1990) in addition to the citations *supra* note 12.

[55] It is difficult to see why moral noncognitivists need be seriously troubled by the possibility of moral combat. Moral noncognitivists may indeed be able to talk like moral realists. *See* HURD, *supra* note 1, at 27, n.1 (citing JEREMY WALDRON, THE IRRELEVANCE OF MORAL OBJECTIVITY, IN NATURAL LAW THEORY 158 (Robert P. George ed., 1992)). But while moral combat may certainly disturb the noncognitivist for articulable reasons, those reasons must, from the contrasting standpoint of the moral realist, be ultimately arbitrary, and, therefore, disposable at no great cost in one's moral reasonableness. Even the moral relativist, *supra* note 54, may have reason to care about moral combat as long as she has reason to care about applying her group's deepest social norms. *See, e.g.*, R. GEORGE WRIGHT, REASON AND OBLIGATION ch.5 (1994). *See* ALLAN GIBBARD, WISE CHOICES, APT FEELINGS (1990) (for an elaborate exposition of one version of moral noncognitivism). *See also* CHARLES L. STEVENSON, ETHICS AND LANGUAGE (1944); JEAN E. HAMPTON, THE AUTHORITY OF REASON 117-22 (Richard Healey ed., 1998) (critiquing noncognitivism).

[56] *See, e.g.*, HURD, *supra* note 1, at 321.

[57] *See id.*

[58] The best natural law theory does not attempt to bypass this problem by arguing that a seriously unjust law cannot be a law in even the most elemental, positivist sense of effective state coercion. *See, e.g.*, R. A. Duff, *Legal Obligation and the Moral Nature of the Law*, 25 JURID. REV. 61, 87 n.50 (1980); Neil MacCormack,

One of the central tradeoffs, Professor Hurd notes, is between the morally favorable elements of the defendant's act and the indirect, long-term, perhaps essentially unpredictable effects of that act, or its adjudication, on the systemic values of the rule of law, democracy, and the separation of powers.[59] How would one trade off the moral value of feeding one's family against the moral value of democracy, or the relevant effects on democracy of one's act? If moral thinking happens to require actors and judges to take full account of these effects, then morality requires that we successfully juggle massive indeterminacies.[60] But let us also remember the status of these systemic values. The rule of law, democracy in the sense of majority rule,[61] and the separation of powers are best thought of as largely instrumental, secondary values.[62] Their moral value consists largely in their contribution to more basic values, including individual freedom, which in turn may be furthered, as well as impaired, by refusing to punish some legally culpable defendants. This suggests that as we seek to avoid moral combat, we should not assume that the values underlying the rule of law, democracy, and separation of

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NATURAL LAW AND THE SEPARATION OF LAW AND MORALS, IN NATURAL LAW THEORY 105, 108 (Robert P. George ed., 1992).

[59] *See, e.g.*, HURD, *supra* note 1, at 297 ("We are not governed by rules, the majority does not give itself its own laws, and powers are not checked and balanced if individual judges are ultimately entitled to set aside democratic enactments whenever their application would be unwise or immoral.").

[60] Consider, for example, the problem of tipping points, cascade effects, or other discontinuities after a series of decisions upholding actors' disobedience despite the incremental effects on majority rule, including the effects on other actors' correct or mistaken judgments in their own cases. *See generally*, THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 101-02, 137-66 (1978). *See, e.g.*, JOHN L. CASTI, COMPLEXIFICATION (1994) (for discussion of the unpredictabilities of complex systems). *See generally, e.g.*, Eric Kades, *The Laws of Complexity and the Complexity of Laws: The Implications of Computational Complexity Theory For the Law*, 49 RUTGERS L. REV. 403 (1997) (discussing computational complexity theory in particular); J.B. Ruhl, *Complexity Theory As a Paradigm For the Dynamical Law-and-Society System: A Wake-Up Call For Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849 (1996). *See also* NICHOLAS RESCHER, COMPLEXITY: A PHILOSOPHICAL OVERVIEW (1998).

[61] *See* HURD, *supra* note 1, at 297.

[62] We expect the rule of law to be leavened by equity, if not tempered by mercy. *See, e.g.*, Frank Kermode, *Justice and Mercy in Shakespeare*, 33 HOUS. L. REV. 1155 (1996); JEFFRIE G. MURPHY & JEAN E. HAMPTON, FORGIVENESS AND MERCY (1990); Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 953 (1995). Some deeper principle or value is therefore required to adjudicate among these values. Majority rule may be of independent moral value, but is largely instrumental and subject to telling moral critique. *See, e.g.*, Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) and the underlying Fugitive Slave Act of 1793. Presumably, we enshrine some rights at a constitutional level because we do not trust political majorities. The separation of powers is defended classically, but in instrumental terms, by James Madison in the 10th and especially the 51st Federalist Papers. *See* THE FEDERALIST NOS. 10, 51 (James Madison).

powers speak unequivocally in favor of the moral wrongness of the defendant's illegal act.

Let us briefly conclude not by pretense of further summarization, but by describing the book more generally. *Moral Combat* focuses on a central jurisprudential problem that should be of interest to conscientious citizens. It clearly articulates that jurisprudential problem, and offers a well-organized, detailed, and patiently sustained treatment of that problem. These virtues are not invariably characteristic of all contemporary jurisprudence. Some special terminology is invoked, but that terminology is explicitly defined and consistently adhered to. Clarity is enhanced by a general introduction, and by a repeated pattern of anticipation of the argument, careful exposition of the argument, and summarization of the argument. Sophisticated counterarguments are at every stage recognized, expounded, and fairly assessed, often at greater length than the author's own argumentative exposition. Special care is taken not to confound separate lines of argument or of response. The result is an argument of genuine importance and great sophistication. *Moral Combat* deserves the compliment not of an allegedly definitive immediate assessment, but of conscientious dialogic response.[63]

[63] We might, for example, again note the staggering complexity of determining whether as simple an act as running a red light on a plainly deserted street is morally justified. It is arguably fair to say that we live in a culture that ranks personal convenience, personal gratification, and sheer self-indulgence relatively highly. Perhaps these values not only support, but in some ways conflict with, genuinely progressive political change and a spirit of personal sacrifice where such sacrifice is worthy, and not merely pointless. How should we morally commensurate the presumed fact that there seems no evident reason to wait for the red light, and the presumed fact that our broader culture already inculcates an excessive generalized concern for sheer personal convenience? Perhaps the law should discourage us a bit from seeking out instances where the law's injustice consists solely in insufficient accommodation of our sheer personal convenience, as opposed to the moral rights of the disadvantaged.