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ARTICLES

The Moral Ambivalence of Crime in an Unjust Society

JEFFREY REIMAN

I Our Crime

In the summer of 2005, after thirty-five years of thinking and writing about crime, I was—along with my wife—the victim of one. It happened in the French city of Nice. There they have a crime called *vol à la portière*, “theft through the car door.” Teenagers wait for cars with foreign license plates or recently rented or leased cars. They come up along the passenger side of the car and grab a purse or a watch through the window, or they try the doors and, if they are not locked, open them and grab whatever they see. That is what happened to us. After flying all night, we picked up the car that we were leasing for the summer and, before we could lock the doors, before we even figured out how to lock the doors, we stopped at a red light and two teenage boys pulled open the front and rear passenger doors, and grabbed what they saw. The boy who opened the rear door grabbed a carry-on bag. The boy who opened the front door, grabbed my wife’s purse off her lap. She tried to hold on to it, but in vain. He yanked it away from her and, in the process, broke her finger. I jumped out of the car and started running after the boys. You can guess the outcome. Do the math. I was 63 at the time, they were 15 or 16. I lost them in the French equivalent of housing projects. Then followed dealing with the police, my wife to the hospital in an ambulance, a summer punctuated

by two operations—her finger was not only broken, but dislocated, so that pins had to be put in the bone to make it heal straight, and later the pins had to be taken out—and numerous visits to the hospital to change bandages and talk to the surgeon, and so on.

When this happened—for example, when I was running after the two boys—I must confess that I had violence in my heart. I do not clearly know what I would have done had I caught one of them, but later I came to think that it was lucky that I had not. I might now be in jail in France for murder. Afterwards, in the days that followed, my anger slowly dissipated. I found that I did not hate these boys. I did not feel rage or even much in the way of anger. My wife’s feelings were much the same. We would have liked to see them caught and punished, but we knew that was unlikely—and we did not have any strong feelings about that. My wife and I decided that our revenge against the thieves would be not to let their crime ruin our summer, and it did not. I suspect that we had a better summer than they did, even with our trips to the hospital and without the things that were stolen. They were poor kids living in what the French call a *quartier chaud*, what in America we would call a “rough neighborhood.”

At the same time, I started to wonder about these feelings and thoughts, in particular, about the dwindling of my anger at our criminals. How should one think and feel *morally* about such criminals? To answer this question, it is necessary to reflect on the moral nature of crime, since that will tell us what the criminal who commits it is morally responsible for.

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II The Moral Nature of Crime

Some people might think that the moral nature of crime is easy to determine. That the youngsters took our possessions or that a law was broken, they think, is enough to show that a moral wrong was done. But, things are more complicated than that. Consider this:

Suppose you see someone huddling over a bicycle that is chained to a post. You look closer and you see that the person is sawing the chain and, once the chain is severed, you see the person jump on the bike and pedal quickly off. I think that you would believe that you had witnessed a crime, and so would I. But now look at this letter that appeared in a *New York Times Sunday Magazine* column called "The Ethicist":

A few weeks after my bike was stolen, I saw it locked to a post. I knew it was mine, since I had modified it in various ways and recorded the serial number. I . . . had no qualms about . . . taking it back. Should I have called the police instead?¹

The Ethicist's reply begins: "You didn't steal anything; you reclaimed your own property." Think about what this means for the imaginary example I sketched. When we saw someone sawing the bicycle chain and riding away, we thought we were witnessing a crime. But then we found out that the bicycle belonged to the taker and was earlier stolen from him by the one from whom he now takes it. That contextual information changes what looked like a crime into the opposite of a crime; it changes it into *restitution*, that is, returning something to its rightful owner.

Here's another example that makes the same point with reference to society as a whole. In his *Lectures on Ethics*, Kant said the following about charitable giving:

Although we may be entirely within our rights, according to the law of the land and the rules of our social structure, we may nevertheless be participating in general injustice, and in giving to an unfortunate man we do not give him a gratuity but only help to return to him that of which the general injustice of our system has deprived him.²

Kant's idea is that, if the distribution of property or wealth in one's society is unjust, then what looks like

charity may really be giving a person what is rightfully his—that is, giving him what would be his (or its equivalent) if the economic distribution were just. Here, contextual knowledge makes what looks like charity into the opposite of charity, more like returning stolen goods than giving a gift. Kant's observation adds something that was not present in the bike example, namely, that the context that changes our judgment may be the injustice of the society as a whole.

If we combine the moral in the bike example with Kant's observation, we get an interesting result: we may think that someone is committing a crime, but if the social context in which the act happened was unjust, what appeared to be a crime may "only help to return to [the apparent thief] that of which the general injustice of our system has deprived him." Knowledge that the act occurred in a context of social injustice makes what seemed to be crime into its opposite. This works in the other direction also. When we think that an act is a crime, we are normally assuming that it takes place in a social context that is just, or at least not so unjust that it would make the act into, say, rightful restitution or justified resistance.³

To speak precisely about these matters, it is necessary to distinguish between committing a crime in the legal sense, meaning *violating a criminal law*, and committing a crime in the moral sense, meaning *doing a moral wrong*. There is no question that my wife and I were victims of a crime in the legal sense. To figure out how we should think and feel morally about it, however, we must determine whether we were also victims of a moral wrong. For a crime in the legal sense to have been committed, all that is needed is a violation of the criminal law. Whether it was a crime in the moral sense, however, depends on whether the social context in which it occurred was unjust—and, of course, on whether our criminals were victims of that injustice. The philosophical idea of the social contract can help us to think clearly about these matters, so I want to turn to that, and then I will come back to our crime and how I feel about it.

III The Social Contract Mental Experiment

The social contract asks us to think of our laws as if they are the product of a voluntary and reasonable agreement

among all citizens. Though different authors describe this exercise in different ways, it has a general form.

We start by imagining a condition in which no one has political or legal authority, commonly called "the state of nature." In this condition, people are to consider and finally agree to some set of political and economic institutions. Since they do not know the future, they must agree to institutions without knowing how they in particular will fare in them. This ignorance gives people in the state of nature a reason to form social institutions that are fair to all citizens, since they could end up with any citizen's fate.

The idea of states being formed in a state of nature is not a historical claim. States do not arise this way, and it is just about impossible that they could. This is because we would already need a state to have enough peace and prosperity to reach a point at which people could discuss and ratify some form of state. As Hume pointed out in his critique of the social contract doctrine, states are normally established by violence, rarely if ever by voluntary agreement.⁴

The social contract is not a historical theory; it is a *mental experiment*. And it is a mental experiment designed to yield a normative conclusion. The state of nature is a mental construct, an imaginary place, and the agreement in it is an imaginary agreement. It does not ask whether you do or did agree to the rules that govern your state's institutions, rather it is a way of asking whether it would be reasonable for you to do so. If it would be, then that is a strong argument that the laws and institutions of your state are just—or just enough—and its authority legitimate enough for citizens to be obligated to obey.

The social contract idea has a long history.⁵ It has roots in the biblical notion of the covenant. In ancient Greek philosophy, we find Socrates, in the *Crito*, giving a social-contractarian argument for the wrongness of his escaping from prison though he was unjustly condemned.⁶ Feudalism was a system based in principle on the exchange of promises between rulers and subjects. But the social contract really came into its own in the seventeenth century when modern physics, capitalism, and the Protestant Reformation combined to call radically into question the traditional bases of authority. Modern science had the effect of confirming the late Medieval idea that only particular things exist, and thus that essences and other general concepts are nothing but ideas in someone's mind. This meant that rules determining the legitimacy of authority did not exist outside of our minds, or possibly God's mind, if only we could determine what God wanted of us—which was looking increasingly problematic.⁷ Capitalism pit-

ted the demands of newly wealthy merchants for influence based on their accomplishments against the claims of the traditional nobility to authority based on birth, thereby undermining the traditional bases of social authority. Furthermore, the Protestant Reformation meant that Catholic subjects had Protestant kings and Protestant subjects had Catholic kings, and in both cases the subjects might have thought their rulers were heretics without authority to command. Since virtually no one doubted that people could bind themselves by promising, the social contract emerged as a way of establishing the legitimacy of political authority and the obligation to comply with it, in the face of all these challenges to traditional authority.

The social contract is not a historical theory; it is a mental experiment.

One may rightly wonder why the question of what laws it would be reasonable for people to agree to is posed to imaginary people in an imaginary state of nature, rather than just asking the actual people subject to some actual set of laws whether they agree to those laws. The answer is that actual people are likely to be affected by how well they are doing in their current society. If we were to ask the actual citizens of the United States whether they would agree to American institutions and laws, their answers would probably reflect how well they are doing in those institutions and according to those laws. Moreover, their minds have likely been shaped by a lot of propaganda in favor of precisely those laws and institutions. Consequently, actual agreement by actual citizens may tell us only how many are pleased with the way they have fared, or how effective the society has been in getting its citizens to believe that it is the best of all possible worlds. It will not tell us if it is genuinely reasonable for all citizens to comply with the laws and institutions of their country.⁸ To get to that, we must ask the theoretical question of whether it would be reasonable for all people to agree to those laws and institutions. And to ask that theoretical question, we must *imagine* posing the question to rational people who do not know how they in particular will be affected by the laws and institutions.

This is what the social contract mental experiment does. The state of nature—an imaginary situation out-

side and prior to the state—is meant, among other things, to simulate the ignorance of specifics that is necessary in order to reach an agreement that is reasonable to all concerned, irrespective of how they are actually faring.

It was probably not a good idea to label this imaginary situation the “state of nature.” This name suggests that we are being asked to imagine a purely natural condition, completely free of human cultural accomplishments. But, since language is a cultural accomplishment and one that is necessary for any group to reach agreement, this cannot work. The state of nature is not really a purely natural state, nor need it be. It is better to think of it negatively, in terms of what it is not. For Locke and Hobbes, the state of nature is the human world *minus* relations of social and political authority. There is no state, no officials with the right to tell people what to do and then to back their commands up with force. Looked at this way, there is nothing mysterious about the state of nature. It is reached by an act of abstraction of which we are surely capable. You imagine that humans stand in relations in which no one has authority over anyone else, and then you ask what would be the reasonable response to this condition. Nothing magical here. It is not very different from abstractions made in other fields, as when Galileo imagined balls rolling down slopes with no friction.

For Hobbes, the state of nature is a “war of all against all” and life in it is “nasty, brutish and short.”⁹ This is so because there are no institutions with authority to keep your fellows from robbing what you have produced. That in turn gives you a need to protect yourself, which makes it in your interest to attack preemptively because that is more effective than letting others attack at the most favorable moment for them: *The best defense is a good offense*. Since this same logic works in everyone’s mind, everyone quickly becomes a threat to everyone else. Each individual knows that others will find it reasonable to attack her preemptively, which gives her an even stronger reason to attack the others preemptively. This in turn gives everyone else an even stronger reason to attack *her* preemptively. And so on. The logic of threat and counterthreat snowballs. Even if you started off as a peaceful person with no desire for more than your own little plot of land, you would soon find it in your interest to attack others preemptively.¹⁰ And since everyone else knows this, it will be in everyone’s interest to preemptively attack you before you preemptively attack them, which will increase your incentive to attack them first, and so on, right on up to the war of all against all.

Contrary to a popular view, Hobbes’s theory does not depend on an extremely negative view of human nature.¹¹ No doubt Hobbes had a touch of Calvinist belief in the inherent sinfulness of human beings, but one does not have to believe in natural human evil to arrive at the consequence that Hobbes theorizes. All that is necessary is to imagine that there are no political institutions and no prevailing morality, and that some people may be tempted to take advantage of that fact to rob others. Then, everyone is uncertain, and everyone needs to make preparations for self-defense. This position will lead some to consider preemptive strikes, and then others will fear that they will be the victims of preemptive strikes and, even if at first they would have been willing to wait and see, that will give them an incentive to strike preemptively. And others, knowing this, will have an incentive to preempt that, and so on, right up to the war of all against all.

Given this logic—which Hobbes called an “inference from the passions”¹²—people in Hobbes’s state of nature find it reasonable to agree to form a state because it is the means to peace. Since war threatens to make everyone’s life nasty, brutish and short, it is reasonable from each person’s self-interested standpoint to accept the authority of a sovereign ruler who will enforce rules, protect property, and generally make life safe.

In Hobbes’s case, our self-interest lies in achieving peace; in Locke’s, our self-interest lies in achieving justice.

In Locke’s version, life in the state of nature is not nasty, brutish and short. Locke believed that there is a basic morality that all reasonable people will recognize, understand and feel compelled to act on.¹³ This makes Lockean people more peaceful than Hobbesian ones, because they do not have to fear the escalating logic of threat and counterthreat up to the war of all against all. They do not have to fear this because they can generally assume that everyone else will conform to the basic moral code that Locke thinks will be plain to all.

The problem in Locke’s state of nature is that application of the basic moral code will be uncertain. Though the moral law is easily understood by all, says Locke, when their own interests are involved, people tend to see things in ways that serve those interests.¹⁴ They will be

less likely to accept your judgment that they are wrong if they have something at stake in believing that they are right. Then, when you try to enforce your judgment, they will resist. You will bring your friends, and they will bring theirs, and soon there will be conflict or frustration or both, even if life is not nasty, brutish and short

as it is in Hobbes's state of nature. For Locke, though, as for Hobbes, we leave the state of nature out of self-interest. In Hobbes's case, our self-interest lies in achieving *peace*; in Locke's, our self-interest lies in achieving *justice*, that is, in creating the conditions for a more certain protection of our moral rights.

IV Justice and the Obligation to Obey the Law

Since social contract theory tests the laws and institutions of the state by whether it would be reasonable for people to agree to them in light of their self-interest, that agreement is based on citizens' expectations that they will get something in return for giving up some personal freedom by granting a ruler authority over them. That means that, according to the social contract, a state is legitimate—that is, its citizens are morally obligated to obey its laws—if the benefits to citizens are sufficient to make their obedience, which is the price of those benefits, a reasonable bargain. Under the social contract, the obligation to obey the law is a function of what the citizens get back in return for being law-abiding. And that is where the justice of the system enters to determine the morality of criminal lawbreaking.

Because the social contract makes obligations conditional on receipt of benefits from the rest of society, the doctrine shows us a fact about criminal justice that criminal justice officials almost never acknowledge, namely that, as a form of justice, *criminal justice is a two-way street*. When criminal justice officials focus on the question of how the criminal has failed to fulfill his obligations to society, they gloss over the correlative question of whether the society has fulfilled its obligations to the criminal.

Think of how the obligation to obey the law arises according to the social contract. Take something relatively uncontroversial, say, a law against driving through red lights. This law, like any law, requires that people restrict their freedom. You may not want to stop at a red light, you may be in a hurry, you may think it is quite safe to go through; but, except in a genuine emergency, the law requires you to stop. And the social contract implies that you are morally obligated to do so, morally obligated to limit your freedom of action. The reason for this moral obligation, according to the contract, is that other citizens also limit their freedom by stopping at red lights, and that benefits you. But it is only reasonable for citizens to stop at red lights if they can assume that other

citizens will stop as well. There is an exchange of costs and benefits: each citizen pays the cost by restricting his or her freedom, and each citizen gets the benefit of the predictability and safety that results. And all laws can be looked at in the same way. If a law is reasonable, each person benefits from everyone else limiting their freedom according to it, and each person is thus obligated to limit his or her freedom as well.¹⁵

The principle that underlies this obligation is that of basic fairness.¹⁶ If seven college students share a house and a different one does the dishes each day of the week, when the end of the week comes around the seventh person owes it to the other six to do the dishes because that person has benefited from the others doing the dishes on their days. It would be unfair of that person not to do his or her share on the seventh day, after having accepted the benefits that the others have provided on the earlier days—especially since those others did their share on the expectation that everyone else would as well. This is how the social contract leads us to view our obligation to obey the law. A rarely noted implication of this view is that the obligation to obey the law is not owed to the state. We owe it to our fellow citizens as a reasonable compensation for the sacrifices they make—when obeying the law—that benefit us.

If the obligation to obey the law is the fair return for benefits from others' cooperative efforts, it follows that the duty to obey the laws is conditioned on the justice of the society that those laws govern. I have less of a moral obligation to refrain from violence in a society that leaves me prey to violence. I have less of a moral obligation to respect property in a society that excludes me from the possibility of gaining my own property.

With this, we must face the implications of the fact that many of the people who find themselves convicted of crimes are victims of social injustice. They get less than their rightful share of social benefits. And since the obligation to obey the law is a function of the benefits one receives, it follows that many disadvantaged crimi-

nals are not violating their moral obligations to obey the law, at least not to the same extent as advantaged people who commit the same crimes would be, because injustice has reduced their obligation to obey the law.¹⁷

I am not going to try to determine if the young boys who robbed my wife and me in the summer of 2005 are victims of injustice, though I strongly suspect that they are. To determine definitively if they are victims of injustice would require a more detailed examination of the French legal and economic system than I can undertake here. My point has been to bring out the relation between the issue of social justice and the question of our criminals' moral obligation to obey the law. Nonetheless, since I believe they have lesser opportunities than other French citizens because of the poverty of their parents and because of discrimination against people of North African heritage, I shall henceforth assume that our criminals are victims of injustice.

Remember how Kant held that giving charity may really be giving people what is rightfully theirs, if the distribution of wealth is unjust. Furthermore, remember how taking the bike looked like a crime, but, in fact, was reclaiming what was someone's own. The social contract forces us to consider that a crime committed by the victims of injustice may also be a matter of reclaiming what is rightfully their own, and thus is not a crime in the moral sense.

A crime committed by the victims of injustice may also be a matter of reclaiming what is rightfully their own, and thus is not a crime in the moral sense.

I believe that my own feelings about those young criminals, especially the dwindling of my anger, came from my sense that those youngsters have less than they are justly entitled to and that my wife and I probably have more than our fair share.¹⁸ If our young criminals are victims of injustice, then my anger is more appropriately aimed at those in France, or perhaps anywhere in the global economy, who could rectify that injustice but do not. They even share responsibility for the violence that accompanied the crime, since, if the victims of injustice are not as strongly obligated to respect the property of others, then they are not as strongly obligated to leave

those others in peaceful possession of that property. It is as if we are holding goods that rightly should be theirs, and they have the right to do what is necessary to get their share back.

This last point may seem questionable. It may easily be supposed that my argument here reaches only to their taking of our property and not to the force that the criminals used to get it. But the issue is more complicated. As I have indicated earlier,¹⁹ not all moral obligations arise via the social contract. Even the victims of injustice have a "natural" (that is, pre-social contract, or pre-state) moral obligation not to inflict violence on my wife or me. However, the existence of institutions, such as a system of property ownership, can alter such natural moral obligations. If I possess property that is not rightly my own (even if I came by it innocently, say, by buying it from someone I believed had the right to sell it), then the state would be permitted to use force to take it from me and give it to its rightful owner. And, if in an unjust society, the state refuses to do this, then the victims of injustice have the moral right to do what the state should have done. This is not to say that the victims of injustice have a right to do anything they want to in order to get the property. They have a right parallel to the state's right in such a case, namely, to use violence that is necessary to rectify the injustice and proportionate to what is at stake. As John Rawls has written, "unjust social arrangements are themselves a kind of extortion, even violence."²⁰ The victims of extortion and violence have the right to use violence in return.

This analysis clearly works best for property crimes committed by poor people against well-off people. For crimes of the poor against the poor, and for crimes of simple violence not aimed at getting money or goods, it works more indirectly. Victims of injustice have reduced opportunities, less hope, more frustration, and less overall incentive to go straight. An unjust society shares responsibility for this as well, and thus for the crimes that inevitably result. To my mind, that reduces the criminals' moral responsibility even for crimes against other poor people. That, however, is not my main concern here.²¹

Note, further, what I am *not* saying. I am not saying that disadvantaged criminals are forced to commit crimes, or that they cannot help doing so.²² I assume throughout that criminals are free and responsible for their actions. What my argument claims is that injustice reduces their moral obligation to obey the law and thereby reduces the moral wrongness of their lawbreaking.

One implication of this claim is that the reduction in the criminals' obligation to obey the law is not normally

dependent on what their motives are. They must, of course, have the *mens rea* necessary for their act to be a crime. They must be intending to commit a crime, normally theft. But, aside from this, it matters little what they think they are doing, since the reduction in their obligation is a moral fact, so to speak, a truth independent of their inner states. I have argued this in a qualified way, however, because there are some extraordinary motivations that would negate the reduction in obligation. For example, even if victims of injustice have little or no moral obligation to respect the property of well-off people as well as reduced moral responsibility for crimes against other poor people, they do nonetheless have moral obligations not to harm or otherwise worsen the condition of fellow victims of injustice. Thus, if in robbing us, they thought they were robbing others in the same unjust condition as themselves, they would be morally guilty for that. But, in general, if they intend to commit a crime and they do not believe that they are

committing it against someone in similar straits to their own (or worse), their moral obligation is reduced because they are victims of injustice, independent of whatever else they think they are doing.

This conclusion does not amount to a moral license for victims of injustice to commit crimes. The issue is more complex. A judgment on obligatoriness requires balancing numerous considerations. For example, since it is better to cure injustice legally than illegally, if a society is generally open to rectifying its injustices, that is a reason it would be morally wrong to commit a crime even for a victim of injustice. Likewise, the more a society does to rectify injustice, say, by providing health care or other benefits to the poor, the less it is morally acceptable to commit a crime even for a victim of injustice.

But there is more to be said. There is another whole dimension of the moral nature of crime that is illuminated by the social contract, and this will complicate things even more.

V Trust, Peace, and the Moral Obligation to Obey the Law

The social contract shows us that a society is a kind of cooperative endeavor in which each person benefits from everyone else's willingness to limit his or her liberty and conform to the law. It is an important feature of such mutually advantageous cooperation that people need to know in advance that others will do their part. It is not enough that people in fact stop at red lights. For me to have the full benefit of their doing so, I must be able to rely on their stopping. I must be confident in advance that they will obey the law, even when they think that they could get away with violating it. If I were not confident in advance that others would stop at red lights, I would have to slow down at every intersection as if there were not a light there, and thus I would lose much of the benefit of others' stopping.

With this, the social contract points to another feature of social life that is easy to overlook, namely, that a free social existence is based on *trust*.²³ Everyone's freedom of action is based on their ability to trust that others will restrict their own freedom. I cannot freely walk in those parts of town where I cannot trust people to leave me unharmed. I cannot freely enter into economic exchanges if I cannot trust others to keep their part of the bargain. Our lives are based on a network of trust that we rarely notice, until that network is torn up, until people violate our trust.

It might seem that the social contract in its Hobbesian version is the opposite of a system of trust. After all, Hobbes's argument for the need for a sovereign is based on his view that we cannot trust our fellows' mere promises, and so he insists that verbal agreements be backed up by a powerful ruler who would enforce them by threatening punishment for violations. Hobbes does not ignore the need for trust. Rather, he believes that trust must be based on *fear*.

But this is precisely where Hobbes's theory breaks down. The reason, as Locke clearly saw, is that Hobbes provides no ground for trusting the ruler. Hobbes's ruler is not a party to the contract, nor can he be. The ruler cannot be party to the contract because there is no one to enforce his agreement to it. Since the ruler is the one who uses force to back up agreements, his own promise could not be backed up by force. But this means that the ruler remains in the state of nature with respect to the citizens; his power is unlimited, and thus he remains a danger to all citizens. *The result is that Hobbesian citizens never really get out of the dangerous state of nature.* In fact, it is worse than that, because, in the state of nature, the danger to one person is from other individuals with roughly equal power—but in the Hobbesian state, citizens are vulnerable to the power of a ruler who has an army to back him up.²⁴

To be sure, Hobbes's sovereign does have a self-interested reason to protect his subjects generally and to promote their prosperity. Hobbes holds that the sovereign is bound by the law of nature to procure "the safety of the people, [where] by safety is not meant a bare preservation, but also all other contentments of life."²⁵ But the sovereign is accountable only to God for this duty, not to the people. Moreover, since the ground of the law of nature is everyone's interest in peace, this obligation of the sovereign goes only so far as is necessary to keep the peace.²⁶ Realistically speaking, then, the sovereign has a self-interested reason to avoid oppressing any large segment of the population, since that might provoke rebellion and cost him his rule. But this gives no individual security, because the sovereign can oppress a few without great risk. Locke saw this clearly and so he wrote, with Hobbes in mind:

As if when men, quitting the state of Nature, entered into society, they agreed that all of them but one should be under restraint of laws; but that [the ruler] should retain all liberty of the state of Nature, increased with power, and made licentious with impunity. This is to think that men are so foolish that they take care to avoid what mischiefs may be done to them by polecats and foxes, but are content, nay, think it safety, to be devoured by lions.²⁷

In order for it to be reasonable to form and belong to a state, it must be possible to trust the ruler and one's fellow citizens.

In order for it to be reasonable to form and belong to a state, it must be possible to trust the ruler and one's fellow citizens. Interestingly, this turns out to be a necessary condition of making government accountable to its citizens. Hobbes could not tolerate such accountability because he thought it would make the ruler's power uncertain. If citizens thought the government had to justify its actions to them, they might refuse to obey certain laws that they thought unjustifiable. Then, other citizens would have reason to fear that the laws might not be obeyed, and they would find it reasonable to protect themselves. And with this, the logic of threat and counterthreat that leads to the war of all against all is on again. Listing the opinions that are dangerous to the peace, Hobbes puts near the top of the list the idea

"That every private man is judge of good and evil actions." And he contends, "From this false doctrine men are disposed to debate with themselves, and dispute the commands of the commonwealth, and afterwards to obey or disobey them, as in their private judgments they shall think fit. Whereby the commonwealth is distracted and weakened."²⁸

Hobbes does not believe the government should be accountable to its citizens because he thinks that citizens will differ widely in their private moral judgments about the government's actions. Some will be moved to disobey while others obey, and this will make obedience uncertain and lead ultimately to anarchy as citizens act to protect themselves against this uncertainty. To avoid Hobbes's conclusion, then, it is necessary that citizens be able to trust that their fellow citizens will hold the government to account in predictable and widely acceptable ways. But how can such trust be established? If fear alone cannot work, what can?

One possibility that could account for trust of one's fellow citizens is that they share a culture that limits the actions that can be acceptably undertaken. However, reliance on a shared culture has a problem today analogous to the problem posed by religious differences in Hobbes's or Locke's time. No contemporary state completely overlaps with a people sharing a single culture today, just as no European state in Hobbes's or Locke's time completely overlapped with a people sharing the same religious beliefs. What was once optimistically called the "nation-state" no longer exists, if it ever did. Practically all states are multinational, as they are multi-religious and multicultural.

Another possibility is that there is a set of basic moral principles that all reasonable people can be expected to see and uphold. This is what Locke believed. Accordingly, he could hold that government had to be accountable to its citizens without having to fear that this would lead to anarchy. And, it is fortunate that Locke did believe this—otherwise Jefferson would not have been able to put so many stirring lines from Locke into the *Declaration of Independence*.

It is commonly thought that Locke and Hobbes are diametrically opposed on whether there is a basic, natural, shared morality, but this common view is mistaken. Although Hobbes is not optimistic about people being moved by morality in the state of nature, he does believe that there is a moral law in the state of nature. He lists no fewer than nineteen laws of nature, starting with everyone's obligation to seek peace and do what is reasonable to achieve it. His list includes accepting the

same limits on one's freedom as one wants others to accept on theirs, the obligation to be sociable, to treat others as equals, to be ready to pardon past sins, to punish only for deterrence, and in general to follow the *Golden Rule*.²⁹ Of these nineteen laws of nature, Hobbes writes that they constitute "the true moral philosophy."³⁰

Hobbes thought that these laws are really precepts of self-interest or prudence.³¹ They are ways of establishing and maintaining peace, and peace is in our self-interest since otherwise life is nasty, brutish and short. But even here Hobbes's distance from Locke is small. Locke also believed that morality was motivated by self-interest, namely, everyone's self-interest in receiving God's heavenly rewards.³² Hobbes thought of his natural moral laws as God's laws, but he did not think that fear of God's punishments would suffice to make people comply with them.³³ Hobbes discussed the appeal to God as a basis for obedience to the law, but apparently thought that religion was more likely to undermine social peace than to promote it.³⁴

Locke was more optimistic on this point, though he too expressed doubts. He believed that if people truly acted on their self-interest, then the infinite felicity of heaven and the endless punishments of hell would always prevail as motivators, and people would always be moral. He noted, however, that this was far from the case and concluded that people tended to act to gain short-term pleasures and avoid short-term pains, rather than to gain the more distant rewards and avoid the punishments of the afterlife.³⁵ For both Hobbes and Locke, then, there is a moral law in the state of nature,

moral action is based on self-interest, and fear of God's punishment is of limited value as a motivator.

Even Hobbes's belief that only fear of the sovereign will assure compliance with moral or legal rules must be qualified. He recognized that fear of the sovereign's forces would not stop people willing to rebel, since people willing to rebel were already willing to risk battle with the sovereign's forces. Law enforcement is not enough because a law against rebelling is like a law against law-breaking. Thus, Hobbes maintained that people must be taught the basis for the sovereign's authority so that they will not be tempted to rebel.³⁶ In short, they must see that only by respecting the sovereign's authority is peace possible. Peace is the condition of all decent social existence and, accordingly, Hobbes believed that "all men agree on this, that peace is good."³⁷

This gives us a fourth possibility—after fear, shared culture, and shared morality—as a basis for the trust necessary for decent social existence, namely, everyone's interest in *peace*. For there to be peace, people must be able to count on their fellows obeying the law, and to provide that reliability, people must be willing to obey the law *even when they disagree with it*. And with everyone wanting peace and knowing these things, everyone has reason to trust that everyone else will obey the law. To read Hobbes as putting forth this fourth possibility further reduces the distance between him and Locke. Now the obligation to obey the law in Hobbes's state can be seen to be based on a positive interest in peace rather than on fear alone.

VI Locke, Hobbes, and the Moral Ambivalence of Our Crime

Nonetheless, there is a crucial difference between Locke and Hobbes. Where Locke allows for disobedience based on injustice,³⁸ Hobbes insists on obedience based on the need for peace. Locke thought that we form the state to achieve justice by securing our rights, while Hobbes thought that we form the state to achieve peace. Each view has a different implication: If the state is formed to secure justice, then *injustice can justify disobedience of the law*. If the state is formed to secure peace, then *injustice cannot justify disobedience of the law* since disobedience of the law is the opposite of peace.

Ironically, Locke and Hobbes each recognized the truth in the other's view. It is clear that for Locke, unless there is peace, justice will be uncertain—that is why

people form the state. And it is clear that for Hobbes, without justice, peace will be uncertain—that is why Hobbes counseled the sovereign to treat his subjects according to the natural laws of equity.³⁹ In fact, there is a two-way relationship here that is a basic truth of social life: *Without peace, there will not be justice because people will be defending themselves preemptively and taking what they can get; without justice, there will not be peace because people will be resentful and willing to chance violence to obtain what they believe is justly theirs*. Hobbes and Locke are both right!

Where does this leave us with regard to the obligation to obey the law? Earlier, I argued for the Lockean view that injustice weakens its victims' obligations to obey

the law. I do not take back that argument. But note that, since any existing society will not be perfectly just, there will always be occasions in which a person may accurately believe he has been the victim of injustice in a way that would reduce his obligation to obey the law. In fact, even if a society were perfectly just, a person might still believe himself to be a victim of injustice, though mistakenly. Remember that though Locke thought that people would recognize a common morality, he was aware as well that they would interpret it in ways that served their interests. Consequently, if people were to take their belief that they were victims of injustice as reducing or eliminating their obligation to obey the law, lawbreaking could become widespread. Life in the society would become very uncertain, trust would dissolve, and our freedom would contract accordingly. Thus a decent social existence requires that people refrain from taking their own judgments that they are victims of injustice as justification for breaking the law.

With this, we are brought back to Hobbes. Hobbes was wrong in thinking that a ruler could not both keep the peace and be accountable to the citizenry. But he was right in thinking that people cannot have the right to break the law on the basis of their own private moral judgments. If there were such a right, all citizens would have it. Since people will be biased in their judgments about their own interests, exercising this right will lead to injustice. But, even more crucially, it will undermine others' trust in their fellows' willingness to abide by the law, and this will cause people to take preemptive self-protective actions, and lead ultimately to the war of all against all. If everyone thinks they have the right to disobey the law because of injustice, then there will be no peace.

Thus, the Lockean argument that I made earlier, that injustice reduces the obligations of the victims of injustice, meets a Hobbesian argument coming in the other direction. For decent social life to exist, for freedom to exist, there must be secure peace. For there to be secure peace, citizens must be able to trust that other citizens will not break the law *even if they believe that they are victims of injustice*.

We have here two conflicting moral principles. The Lockean principle is that the *obligation to obey the law is reduced or eliminated for victims of injustice*. The Hobbesian principle is that everyone has an *obligation to obey the law even if they are victims of injustice in order to maintain the secure peace that makes freedom possible for all*. I think that both principles are valid. This is why the moral nature of crime—at least of a crime like ours, one committed

against the well off by the unjustly disadvantaged—is *ambivalent*.

These two conflicting principles reflect the fact that we want two basic things from the state—justice and peace—and, while ultimately each is a condition of the other, in the short run they may justify conflicting actions. And there is no formula for determining which principle should dominate in a given case. As I said earlier, that requires a judgment based on balancing numerous considerations. For example, the more obvious and extreme an injustice, the more it will tend to reduce the obligation to obey the law. The more open the society is to reform, the greater will be the obligation to maintain trust by obeying the law.

We want two basic things from the state—justice and peace—and, while ultimately each is a condition of the other, in the short run they may justify conflicting actions.

This brings me back to our crime. Worse than the loss of the stolen goods, worse even than my wife's injury, which happily could be treated and repaired, was the loss of the feeling of freedom that we used to have in the streets of Nice. We were robbed of trust. So, though I still believe that my criminals were victims of injustice, and thus that their obligation to respect our property was reduced by that fact, I also feel that they stole something from us that they did owe us. They disturbed the peace. They made the world a scarier place, and thereby constrained our freedom of movement in a more insidious way than mere chains would do.

I think that I owe the reader some statement about what I believe should be done to our criminals were they to be caught and brought to justice. Because of complexities already referred to, this is not an easy task, but here goes. That they are victims of injustice means that our criminals' guilt for stealing our property is reduced. How great that reduction is will depend on how badly victimized they are, on how great or small a chance there is to remedy this victimization legally, and so on—a set of factors too complicated to put into a simple formula. Nonetheless, if my argument is sound, this reduction must be substantial. On the other hand, that our criminals' abiding by the law is a necessary condi-

tion of the trust and peace that makes their own freedom possible means that they are morally guilty of violating that peace. In the end, then, I believe that justice would be served if our criminals were primarily punished for violating the peace, and only slightly if at all for stealing our property—as far as these aspects of our crime can be disaggregated. It is perhaps needless to add that it is

too much to hope that an actual criminal justice system could function in this way. No actual criminal justice system can be expected to acknowledge that the injustice of the society it defends weakens the obligations of some of its citizens to obey the law, and then to adjust penalties to this fact.

NOTES

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1 "The Ethicist," *New York Times Magazine*, September 25, 2005, 19.

2 Immanuel Kant, *Lectures on Ethics* (Indianapolis, IN: Hackett Publishing Company, 1963), 194.

3 See Jeffrey Reiman, *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice*, 8th ed. (Boston: Allyn & Bacon, 2007), 174-78, for discussion of the ideological effects of this fact.

4 "The face of the earth is continually changing, by the increase of small kingdoms into great empires, by the dissolution of great empires into smaller kingdoms, by the planting of colonies, by the migration of tribes. Is there any thing discoverable in all these events, but force and violence? Where is the mutual agreement or voluntary association so much talked of?" David Hume, "Of the Original Contract," in Hume, *Essays: Moral, Political, and Literary*, ed. E. Miller (Indianapolis, IN: Liberty Fund, 1985), 471.

5 On the history of social contract doctrine generally, see J. W. Gough, *The Social Contract: A Critical Study of its Development*, 2nd ed. (Oxford: Oxford University Press, 1957).

6 In the dialogue, Socrates imagines himself in a conversation with the laws of Athens, in which the laws say: "If any [Athenian] chooses to go to one of our colonies, supposing that he should not be satisfied with us and the state, or to emigrate to any other country, not one of us laws hinders or prevents him from going away wherever he likes, without any loss of property. On the other hand, if any one of you stands his ground when he can see how we administer justice and the rest of our public organization, we hold that by so doing he has in fact undertaken to do anything we tell him." Plato, *Crito*, in *Plato: The Collected Dialogues*, ed. E. Hamilton and H. Cairns (Princeton, NJ: Princeton University Press, 1989), 37 (51d-e).

7 "For since I know that my nature is very weak and limited, whereas the nature of God is immense, incomprehensible, and infinite, this is sufficient for me also to know that he can make innumerable things whose causes escape me. For this reason alone the entire class of causes which people customarily derive from a thing's 'end,' I judge entirely useless in physics. It is not without rashness that I think myself capable of inquiring into the ends of God." René Descartes, *Meditations of First Philosophy*, Meditation IV, in Descartes, *Discourse on Method and Meditations of First Philosophy* (Indianapolis, IN: Hackett Publishing Company, 1998), 82.

8 Of course, asking actual citizens if they approve the laws under which they stand is an essential element of democratic government. In the real world of politics, this—conjoined with constitutional protections for minorities—represents the best available practical approximation of the theoretical test of morality here discussed.

9 Thomas Hobbes, *Leviathan* (Indianapolis, IN: Hackett Publishing Company, 1994), pt. I, chap. 13, 76.

10 "[B]ecause there be some that taking pleasure in contemplating their own power in the acts of conquest, which they pursue farther than their security requires, if others (*that otherwise would be glad to be at ease within modest bounds*) should not by invasion increase their power, they would not be able, long time, by standing only on their defense, to subsist." Id., 75; emphasis added.

11 See note 10 for evidence that Hobbes did not assume that all people were naturally self-aggrandizing.

12 Hobbes, *Leviathan*, pt. I, chap. 13, 77.

13 "How short soever [men's] Knowledge may come of an universal, or perfect Comprehension of whatsoever is, it yet secures their great Concernments, that they have Light enough to lead them to the Knowledge of their Maker, and the sight of their own Duties." John Locke, *An Essay Concerning Human Understanding* (New York: Oxford University Press, 1975), bk. I, chap. 1, sec. 5, 44. And of those duties, Locke writes "The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions." Locke, *Second Treatise of Civil Government* (New York: Everyman's Library, 1975), chap. 2, sec. 6, 119.

14 "For though the law of Nature be plain and intelligible to all rational creatures, yet men, being biased by their interest,

as well as ignorant for want of study of it, are not apt to allow of it as a law binding to them in the application of it to their particular cases." Locke, *Second Treatise*, chap. 9, sec. 124, 180).

15 This is not to say that all obligations arise this way. I am speaking here strictly about the obligation to obey the law as such. There may, for example, be moral obligations not to kill people (outside of self-defense, etc.) and such obligations will bind us not to violate a law against homicide, but not because it is a law. This will raise questions about the status of the violence used in our crime that will be addressed below (see the text accompanying note 19).

16 "The main idea [of the principle of fairness] is that when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission. We are not to gain from the cooperative labors of others without doing our fair share." John Rawls, *Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), 96; see also H.L.A. Hart, "Are There Any Natural Rights?" *Philosophical Review* 64 (1955): 185ff.

17 Rawls asserts "that the duty to comply [with laws made by the majority] is problematic for permanent minorities that have suffered injustice for many years." Rawls, *Theory of Justice*, 312. See also Michael Walzer, "The Obligations of Oppressed Minorities," *Obligations: Essays of Disobedience, War and Citizenship* (New York: Simon and Schuster, 1970), 46-70; Bill Lawson, "Crime, Minorities, and the Social Contract," *Criminal Justice Ethics* 9, no. 2 (1990): 14-24; and Jeffrie Murphy, "Marxism and Retribution," *Philosophy & Public Affairs* 2, no. 3 (1973): 217-43. I think, by the way, that, in addition to injustice reducing the obligations of its victims to obey the law, injustice spreads moral responsibility for crimes beyond the victims of injustice who commit them to those who promote injustice (for example, by discriminating on the basis of race) or who benefit from injustice (for example, by earning more than they would if blacks were able to compete in the market without discrimination), but who don't work to correct it. I shall not make this argument here, however.

18 I am, for purposes of this argument, treating myself and my wife as participants in the French economy. This is reasonable in that, though we do not earn our incomes in France, we own property there and we spend a few months there every year. Thus we benefit from French economic and legal institutions and we are subject to French taxes. Moreover, we share membership with the French in the global economy in which the boundaries between national economies mean less and less each day.

19 See note 15, above.

20 Rawls, *Theory of Justice*, 302.

21 Given that the majority of crimes of the sort of which my wife and I were victims are committed by poor people against other poor people, it should be clear that among the unrectified injustices from which many of the disadvantaged suffer is that they pay the lion's share of the price for the injustice that prompts some of their fellows to commit crime. In my view, this only further weakens their obligations to obey the law.

22 See William C. Heffernan and John Kleinig, eds., *From Social Justice to Criminal Justice* (New York: Oxford University Press, 2000) for several essays that debate this point pro and con.

23 Following Hume, Annette Baier argues that the social contract is "an artificially contrived and secured case of mutual trust," in part because "in general we cannot trust at will." Baier, "Trust and Antitrust," *Ethics* 96 (1986): 245, referring to David Hume, *Treatise of Human Nature* (Oxford: Clarendon Press, 1978), 521-22. Baier faults the contractarian focus on voluntary agreements between equals as leaving out trust between unequals, such as an infant's trust in its mother. No doubt there is something to this, but I am not convinced that what infants have toward their mothers is really trust, since it seems rather only that they have not yet begun to doubt. Trust, says Baier, implies accepting vulnerability ("Trust then . . . is accepted vulnerability to another's possible but not expected ill will . . . toward one" [235; my emphasis]). But, accepting vulnerability presupposes an awareness of vulnerability—which is more than we can attribute to infants. Moreover, the trust implied in the social contract is not *willed*. What is *willed* is the agreement; trust itself is based on something else: in Hobbes's case fear and our interest in peace, in Locke's on a shared basic morality.

24 "[H]e being in a much worse condition that is exposed to the arbitrary power of one man who has the command of a hundred thousand than he that is exposed to the arbitrary power of a hundred thousand single men." Locke, *Second Treatise*, chap. 11, sec. 137, 187.

25 Hobbes, *Leviathan*, pt. II, chap. 30, 219; see also 226.

26 See note 31 below, and accompanying text.

27 Locke, *Second Treatise*, chap. 7, sec. 93, 163.

28 Hobbes, *Leviathan*, pt. II, chap. 29, 212. Hobbes likewise condemned the opinion "That he that hath the sovereign power is subject to the civil laws." Id., 213. Earlier he rejected the notion that the sovereign receives his power from the covenant, since the sovereign is not party to the covenant but must already exist with power to enforce it (*Leviathan*, pt. II, chap. 18, 112). All of these views that Hobbes rejected would justify holding the sovereign accountable to the citizens.

29 Hobbes, *Leviathan*, pt. I, chaps. 14, 15, 79-100.

30 Hobbes, *Leviathan*, pt. I, chap. 15, 100.

31 "These dictates of reason men use to call by the name of laws, but improperly; for they are but conclusions or theorems concerning what conduceth to the conservation and preservation of themselves, whereas law, properly, is the word of him that by right hath command over others. But yet if we consider the same theorems, as delivered in the word of God, that by right commandeth all things, then they are properly called laws." Hobbes, *Leviathan*, pt. I, chap. 15, 100. Interestingly, Hobbes calls these theorems *laws* throughout his discussion of them.

32 "[T]he true ground of morality can only be the Will and Law of a God, who sees men in the dark, has in his hands Rewards and Punishments, and power enough to call to account the Proudest Offender." Locke, *Essay*, bk. I, chap. 3, 69. There is considerable controversy over the question of wheth-

er Locke's moral theory requires the notion that moral laws come from God. My own view is that Locke believed that moral laws had to come from God, but that his moral theory has sufficient resources for a secular grounding of morality. See Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (New York: Cambridge University Press, 2002). My view is defended in Jeffrey Reiman, "Towards a Secular Lockean Liberalism," *The Review of Politics* 67 (2005): 473-93.

33 Hobbes considered swearing to God as a means of making agreements binding in the state of nature, but soon after insisted that people only have good reason for relying on others keeping their agreements if there is a sovereign who enforces those agreements. Hobbes discussed swearing to God at the end of *Leviathan*, pt. I, chap. 14, 88, and then almost immediately in chap. 15, wrote: "there must be some coercive power to compel men equally to the performance of their covenants, by the terror of some punishment greater than the benefit they expect by the breach of their covenant ; and such power there is none before the erection of a commonwealth" (*Leviathan*, pt. I, chap. 15, 89).

34 See Hobbes, *Leviathan*, pt. I, chap. 11, 67, 71.

35 Locke, *Essay*, bk. II, chap. 21, 255.

36 "And the grounds of [the sovereign's] rights have the rather need to be diligently and truly taught, because they cannot be maintained by any civil law or terror of legal punishment. For a civil law that shall forbid rebellion (and such is all resistance to the essential rights of sovereignty) is not (as a civil law) any obligation but by virtue only of the law of nature that forbiddeth violation of faith; which natural obligation, if men know not, they cannot know the right of any law the sovereign maketh. And for the punishment, they take it but for an act

of hostility [i.e., an act of war], which, when they think they have strength enough, they will endeavor by acts of hostility to avoid." Hobbes, *Leviathan*, pt. II, chap. 30, 220.

37 Hobbes, *Leviathan*, pt. I, chap. 15, 100.

38 "And where the body of the people, or any single man, are deprived of their right, or are under the exercise of a power without right, having no appeal on earth they have a liberty to appeal to Heaven whenever they judge the cause of sufficient moment. . . . And this judgment they cannot part with, it being out of a man's power so to submit himself to another as to give him a liberty to destroy him; God and Nature never allowing a man so to abandon himself as to neglect his own preservation." And further: "Who shall be the judge whether the prince or legislative act contrary to their trust?The people shall be judge; for who shall be judge whether his trustee or deputy acts well according to the trust reposed in him, but he who deposes him and must, by having deputed him, have still a power to discard him when he fails in his trust?" Finally, though God "alone is judge of the right. But every man is judge for himself, as in all other cases so in this, whether another hath put himself in a state of war with him." Locke, *Second Treatise*, chap. 14, sec. 168, 203; chap. 19, sec. 240, 241.

39 "In this [the sovereign's] distribution [of goods], the first law is for division of the land itself, wherein the sovereign assigneth to every man a portion, according as he (and not according as any subject . . .) shall judge agreeable to equity and the common good." Hobbes, *Leviathan*, pt. I, chap. 24, 160. In addition: "The safety of the people requireth further, from him or them that have the sovereign power, that justice be equally administered to all degrees of people, that is, that as well the rich and mighty as poor and obscure may be righted on the injuries done them." Hobbes, *Leviathan*, pt. II, chap. 30, 226.