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## Kahan on Mistakes

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# KAHAN ON MISTAKES

*Daniel Yeager\**

In *Ignorance of Law Is an Excuse — but Only for the Virtuous*,<sup>1</sup> Professor Dan Kahan reconciles what I had thought was an irreconcilable body of law. To be sure, imposing order on whether and when mistakes of law should pass as responsibility-evading accounts of untoward actions is far from light work. Yet Kahan somehow pulls it off in just twenty-seven pages.

In addition to acknowledging the importance of Professor Kahan's essay, I write here to point out if not correct what might have been two oversights in his view of the meaning and operation of mistakes. First, Kahan never acknowledges that the "legal moralism" he endorses has long governed when mistakes of *fact* — which bear at least a family resemblance to mistakes of law — can excuse us from responsibility for what we have done. Second, the real power and demands of Kahan's essay are only hinted at. While the implication of his thesis — "that law is suffused with morality and . . . the making of moral judgments"<sup>2</sup> — is profound, Kahan stakes out no moral positions. This strikes me as a gap in a theory that allows ignorance of law as an excuse only for those agents whose "underlying conduct violates no moral norms independent of the law that prohibits it."<sup>3</sup> Kahan certainly is free to consign to courts the task of establishing criteria for evaluating whether, for example, possessing firearms,<sup>4</sup> failing to pay taxes,<sup>5</sup> illegally transporting wildlife,<sup>6</sup> and failing to report campaign contributions<sup>7</sup> are matters of morality as well as of law. Still (and this may be more personal than dialectical), I felt deprived by his refusal to answer what, at least to my mind, had provided the occasion for his essay: Is it moral to obey the law? Immoral to break it?

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1. 96 MICH. L. REV. 127 (1997).

2. Kahan, *supra* note 1, at 128.

3. *Id.* at 149.

4. *See id.* at 141.

5. *See id.* at 146-49.

6. *See id.* at 149 n.89.

7. *See id.* at 149.

## KAHAN'S POSITION AND ITS CONTRIBUTION

Kahan's intention is to get to the bottom of both why "ignorance of the law is no excuse," and why sometimes it is. The conventional position, which Kahan dubs "Holmesian," cannot adequately explain either. The Holmesian position is based on a sense of "liberal positivism," which presupposes — mistakenly in Kahan's view — a disconnection between law and morality. In other words, the Holmesian position holds, "even the bad man can be a good citizen so long as he lives up to society's rules."<sup>8</sup> One need not be moral — one can "lack[ ] the values that would have motivated a good person to perceive the real value of things"<sup>9</sup> — in order to live a legally trouble-free life.<sup>10</sup> Because the Holmesian position "disclaims any reliance on the moral knowledge of citizens, as well as any ambition to make them value morality for its own sake,"<sup>11</sup> it celebrates the "utility of legal knowledge."<sup>12</sup> Since it is merely law-abiding (not necessarily good, or right, or true, or just) conduct that the law intends to inspire, the Holmesian position "shows no mercy for those who claim to be ignorant of what the criminal law proscribes."<sup>13</sup> This, in turn, "maximizes citizens' incentive to learn the rules that 'the law-maker has determined to make men know and obey.'"<sup>14</sup>

Kahan does a superb job of demonstrating that the Holmesian position does a lousy job of backing up its belief in the virtues of legal research. "[I]f the goal is only to protect society from the legally stupid," Kahan argues, then the Holmesian position is inverted.<sup>15</sup> In a strict liability regime — one in which the but-I-thought-it-was-legal defense is *always* denied — there is *no* payoff for legal research: break the law and go to jail, even after diligent *ex ante* efforts to verify the lawfulness of an action. But in a negligence regime, Kahan concludes — one in which reasonable steps to ascertain the law *are* rewarded — more legal research will occur because mistaken researchers can get off scot-free.<sup>16</sup>

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8. *Id.* at 128.

9. *Id.* at 144.

10. *See id.* at 127-28.

11. *Id.* at 128.

12. *Id.*

13. *Id.*

14. *Id.* (quoting OLIVER WENDELL HOLMES, *THE COMMON LAW* 41 (Belknap Press 1963) (1881)).

15. *Id.* at 135.

16. *See id.* at 133-35.

So too, if fear of the “strategically heedless” explains why Holmesians repudiate ignorance-as-excuse, Kahan makes clear that the intentional head-burier is at most “a bit player in the mistake of law drama.”<sup>17</sup> Kahan emphasizes this point through a close reading of *People v. Marrero*,<sup>18</sup> in which a federal prison guard was prohibited from pleading his quite reasonable but mistaken belief that he was a “peace officer” exempt from New York’s concealed-weapons law. While New York’s highest court insisted that excusing Marrero would encourage mistakes of law and depreciate the utility of knowledge, Kahan insists that Marrero was far from heedless. Rather than “deliberately shield[ ] himself from legal knowledge,” Marrero “had tenaciously attempted to ferret it out.”<sup>19</sup> As for other would-be head-buriers, Kahan continues, they hardly would have been helped had Marrero’s request for a *reasonable*-mistake defense been accepted.<sup>20</sup> Ultimately, therefore, Kahan is convinced (and now so am I) that *Marrero* botches its stated intention of endorsing the utility of knowledge, not by denying a defense to the strategically heedless, but by denying a defense to “the impudently inquisitive” who pay “exacting attention to[ ] the law’s fine points.”<sup>21</sup>

Kahan then deftly rehabilitates *Marrero*. Legal research performed by someone who is contemplating action of questionable legality is far from an unalloyed good, Kahan tells us. Whether we are talking about Marrero or a possessor of “designer” drugs, to condition the excuse on reasonable efforts to learn the law is to institutionalize “loopholing.”<sup>22</sup> For example, drug manufacturers can avoid a jurisdiction’s controlled-substances list simply by “alter[ing] the composition of . . . a substance slightly without changing its pharmacological effects.”<sup>23</sup>

One way to fix the inevitable incompleteness of statutory definitions of crime is to draft laws at a level of abstraction sufficient to “remove offenders’ temptation to look for loopholes *ex ante* by giving courts the flexibility to adapt the law to innovative forms of crime *ex post*.”<sup>24</sup> This remedy for loopholing is what Kahan calls

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17. *Id.* at 131.

18. 513 N.E.2d 1068 (N.Y. 1987). See Kahan, *supra* note 1, at 131-37.

19. Kahan, *supra* note 1, at 133.

20. See *id.*

21. *Id.* at 136-37.

22. *Id.* at 137-41.

23. *Id.* at 138.

24. *Id.* at 139.

“prudent obfuscation.”<sup>25</sup> For it to work, Kahan posits, the law must deny *all* forms of mistake-as-excuse, *particularly* the excuse for reasonable mistakes. Otherwise, he points out, deliberately complex criminal laws would be thwarted by legal researchers whose efforts to keep current often would be understandably deficient.<sup>26</sup> Yet, as Kahan asks, “[i]f the law aspires to be deliberately vague and complex, and if it tries to discourage rather than reward inquiry into the fine points of law by punishing even reasonable mistakes, how can it expect individuals who want to be law-abiding to know what their legal duties are?”<sup>27</sup>

And so we arrive at the payoff of Kahan’s essay: “legal moralism,” a move he recommends to reward the diligent researcher at once (but not the loopholer) and to punish the strategically heedless. In a nutshell, legal moralism imposes strict liability on all agents whose wrongs are immoral in a prelegal sense and punishes all negligent agents whose wrongs are *malum prohibitum*, that is, technically wrong, but not immoral in a prelegal sense. According to Kahan we all know right from wrong,<sup>28</sup> and so the law need not excuse the ignorance of agents like Cleora King, whose sketchy moral knowledge left her stashing drugs in a small foil package in her underwear, only to argue later that Minnesota’s banned-substances list was too hard to keep up with.<sup>29</sup> Even Marrero, as almost-lawful as his conduct was, not only knew about “New York’s . . . strong antipathy toward, and fear of, handguns,”<sup>30</sup> but he also, it turns out, had 1) violated his employer’s internal gun policy; 2) unlawfully supplied others with guns; and 3) tried to pull a gun on the police who approached him at the nightclub where he was arrested.<sup>31</sup>

Kahan’s legal moralism is meant to chill more borderline-lawful behavior than a negligence regime. This is a welcome result for Kahan, since we gain nothing by excusing agents like King and Marrero, who knew they were acting *at best* in a marginally legal way. So for Kahan the question is not just whether we reasonably believe in the lawfulness of our actions, but also whether those actions are independently “morally blameworthy.” Kahan would

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25. *Id.* at 139-40.

26. *See id.*

27. *Id.* at 140.

28. *See id.*

29. *See id.* at 137-38, 140.

30. *Id.* at 141.

31. *See id.*

have moral failings block the mistake-of-law defense, since it is “commonplace” for us to “condemn someone for being inattentive to moral obligations”<sup>32</sup> “with which the law-abiders and law-breakers alike *are* thoroughly familiar.”<sup>33</sup>

#### THE FAMILIARITY OF LEGAL MORALISM

Kahan is certainly onto something, though it is an approach to mistakes that is far from new. His “legal moralism” owes to an old move known as the “lesser moral wrong”<sup>34</sup> or “moral-wrong doctrine,”<sup>35</sup> though without attribution. An example of this doctrine is the Victorian case *Regina v. Prince*.<sup>36</sup> There the Court upheld Prince’s conviction of absconding with a girl under sixteen without parental approval, no matter how old the fourteen-year-old Annie Phillips looked or said she was.<sup>37</sup> The reason? Prince was simply clearing the way for the immoral act of fornication, an act which could be cleansed, if at all, only by parental permission.<sup>38</sup> A half century later, an Ohio court, relying on other decisions on point, refused to hear a man accused of abandoning his pregnant wife plead ignorance as to her pregnancy.<sup>39</sup> Again, the court reasoned, abandoning one’s wife — pregnant or not — while rarely criminal, is *always* immoral.<sup>40</sup>

Although this particular form of moralizing still pops up in appellate opinions,<sup>41</sup> it is, in fairness to Professor Kahan, anything but popular. No leading commentator who addresses it — Joshua

32. *Id.* at 144.

33. *Id.* at 140.

34. WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 5.1, at 410-12 (2d ed. 1986); see 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 62(c)(4), at 254-55 n.30 (1984 & Supp. 1998) (“lesser wrong’ theory”); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 696 (1994) (“lesser-wrong principle”).

35. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 12.06[B], at 139-41 (2d ed. 1995); GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 69, at 188-90 (2d ed. 1961).

36. 2 L.R.-Cr. Cas. Res. 154 (1875).

37. See Offenses against the Person Act, 1861, 24 & 25 Vict., ch. 100, § 55. For commentary on *Prince*, see Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 652-56 (1984); Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 698-705; Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741, 788-92 (1993); Richard Singer, *The Resurgence of Mens Rea: II — Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459, 469-70 (1987).

38. See *Prince*, 2 L.R.-Cr. Cas. Res. at 174 (Bramwell, J., concurring).

39. See *White v. State*, 185 N.E. 64, 65 (Ohio Ct. App. 1933).

40. See *White*, 185 N.E. at 65.

41. See, e.g., *Bell v. State*, 668 P.2d 829, 833 (Alaska Ct. App. 1983); *Garnett v. State*, 632 A.2d 797, 813 (Md. 1993) (Bell, J., dissenting).

Dressler,<sup>42</sup> George Fletcher,<sup>43</sup> Graham Hughes,<sup>44</sup> Sanford Kadish,<sup>45</sup> Wayne LaFave,<sup>46</sup> Rollin Perkins,<sup>47</sup> or Glanville Williams<sup>48</sup> — approves. Either they doubt the possibility of a modern community ethic, or they reject this type of moralizing on legality, *mens rea*, or other grounds. While I'm persuaded that Professor Kahan gets the better of this disagreement — our pluralism rarely divides us on our sense of what is good, or right, or true, or just — I wonder why he does not acknowledge that we already consider lawful but immoral acts relevant to a determination of whether *other* conduct is criminal. Here I am not referring to the law of felony murder,<sup>49</sup> to the law of (some) conspiracies,<sup>50</sup> or to law's willingness to foreclose on the excuse of intoxication,<sup>51</sup> each of which instantiates legal moralism. Rather, I refer to legal moralism already at work in the law of mistake.

It is hornbook law that some mistakes of fact can excuse otherwise criminal acts. To lift an example from J.L. Austin:

You have a donkey, so have I, and they graze in the same field. The day comes when I conceive a dislike for mine. I go to shoot it, draw a bead on it, fire: the beast falls in its tracks. I inspect the victim, and find to my horror that it is *your* donkey. I appear on your doorstep with the remains and say — what? 'I say, old sport, I'm awfully sorry, &c., I've shot your donkey *by accident?*' Or '*by mistake?*'<sup>52</sup>

Though Austin left the question open (and died before taking his next step into criminal law after '*Excuses*' and '*Ink*'),<sup>53</sup> I think it's safe to say we're meant to take this as a case of mistake. By that I mean that the shooter of the donkey was neither nudged nor careless, but instead "was looking at the whole thing quite differently."<sup>54</sup> So, if mistakes are *generally* viewed as responsibility-

42. See DRESSLER, *supra* note 35, at 140-41.

43. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 9.3.3, at 723-30 (1978).

44. See Graham Hughes, *Criminal Responsibility*, 16 STAN. L. REV. 470, 480-81 (1964).

45. See Kadish, *supra* note 34, at 695-96.

46. See LAFAVE & SCOTT, *supra* note 34, at 411-12.

47. See ROLLIN M. PERKINS, *CRIMINAL LAW* 698 (1957).

48. See WILLIAMS, *supra* note 35, § 69, at 185-99.

49. See, e.g., CAL. PENAL CODE § 189 (Deering 1997) (accidental killings deemed "murder" when act is otherwise felonious).

50. See, e.g., 15 U.S.C. § 1 (1988) (restraining trade is criminal only when by agreement); CAL. PENAL CODE § 182(a)(5) (Deering 1997) (injury to "public health, to public morals, or to pervert . . . justice" is criminal only when by agreement).

51. See, e.g., *Montana v. Egelhoff*, 518 U.S. 37 (1996).

52. J.L. AUSTIN, *A Plea for Excuses*, in *PHILOSOPHICAL PAPERS* 185 n.1 (J.O. Urmson & G.J. Warnock eds., 3d ed. 1979).

53. See J.L. AUSTIN, *Three Ways of Spilling Ink*, in *PHILOSOPHICAL PAPERS*, *supra* note 52, at 272.

54. AUSTIN, *supra* note 52, at 176.

evading accounts of actions and their outcomes, and they are, then why aren't they *uniformly* so viewed?

The answer is that the law of mistake does not merely excuse actions that were lawful from the agent's view of those actions and their factual background. Whether mistakes are excusable also entails, as Kahan says it should, an assessment of the moral content of the action. Take, for example, the California case *People v. Lopez*,<sup>55</sup> in which Lopez, charged with furnishing marijuana to a minor, was estopped from complaining that he thought the minor was an adult. But if Lopez's mistake was reasonable, why wouldn't the appellate court let him litigate the question? Why wasn't Lopez's crime really just *attempted* furnishing of marijuana to an adult? Because of the linguistic stretch of calling a successful drug transaction a failure? Unlikely. Rather, it is "legal moralism" at work in the law of mistake. Accordingly, when five years earlier the California Supreme Court recognized mistake as an excuse to charges of sex with a minor,<sup>56</sup> it was expressing a moral evaluation then shared only by a minority of states: that sex between unmarried consenting adults is not *necessarily* immoral.<sup>57</sup>

#### THE MORAL IMPLICATIONS OF KAHAN'S ESSAY

As anyone even casually familiar with his impressive oeuvre would expect, Kahan's essay aspires to more than just mapping on to mistakes of law this hoary, though erratically applied, lesser-legal-wrong approach to mistakes of fact. He seeks also to justify why a lawful but immoral act should be relevant to a determination of whether *other* conduct is criminal. Kahan's thesis is therefore both very important and in my view right on: the unalterably moral dimensions of criminal law should be confronted, not finessed.

Nonetheless, I'm not sure that he has altogether succeeded in instructing us how to do that or more, specifically, in instructing us what it is that gives a law its moral content. We know well the *consequences* of Kahan's theory — that violating a morally empty or *malum prohibitum* law is excusable by a reasonable mistake of law,

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55. 77 Cal. Rptr. 59 (Cal. Ct. App. 1969); *see also* 1 CAL. JURY INSTRUCTIONS (CRIMINAL) § 4.35 (West 1988); *cf.* MODEL PENAL CODE § 2.04(2) (Proposed Official Draft 1962) (suggesting that mistake cannot excuse otherwise criminal acts, but in such instances, the grade of offense is reduced to that which defendant thought he was committing).

56. *See People v. Hernandez*, 393 P.2d 673 (Cal. 1964).

57. *See* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 232 n.10 (6th ed. 1995) (noting that mistake of age defense is not recognized in the majority of jurisdictions). For an update, see 1 ROBINSON, *supra* note 34, § 108(b).



and that violating a law that is in some important sense moral, is not. Evaluating whether a law is moral or not is not, however, part of Kahan's project, although he is tough on legislatures who don't make it part of theirs.<sup>58</sup>

Kahan does stick his neck out a bit when, in discussing a recent Supreme Court case, *Cheek v. United States*,<sup>59</sup> he says that criminal tax provisions don't "embod[y] moral norms that have an existence independent of the law itself."<sup>60</sup> For that reason, Kahan argues, awareness of the duty to pay taxes is and should be a precondition to criminal enforcement of tax laws.<sup>61</sup> At the broadest level of generality, he adds, we are morally culpable for not knowing we are obliged to pay *at least some* taxes. And in this vein I think Kahan would agree that, say, driving a car or practicing medicine without a license, or draft-dodging, or contempt of court — despite their "derivative" or "artificial" nature<sup>62</sup> — also demonstrates the moral failing of being too far out of touch with law, even though none of these actions is wrong in a prelegal sense. But, as Kahan notes, we may be adequately in touch with law and still miss out on a range of ticky-tack legal obligations.

To substantiate this point, Kahan alludes to the plight of Justice Breyer, who before being elevated to the High Court got himself into a pinch by not knowing that he was obliged to pay taxes on the wages of his weekly maid.<sup>63</sup> For Kahan, not knowing that a maid's wages are taxable is neither morally equivalent nor even adjacent to not knowing of the general duty to pay taxes. Because Kahan finds the technical side of tax law — and banking law, broadcasting law, and election law — to be without moral content,<sup>64</sup> he sees nothing wrong with allowing loopholing through mistake defenses there, though not with otherwise morally empty laws that protect the public from "unusually high risks," as in the transportation of "dangerous or deleterious devices . . . or obnoxious waste materials."<sup>65</sup>

58. See Kahan, *supra* note 1, at 151-54.

59. 498 U.S. 192 (1991).

60. Kahan, *supra* note 1, at 146-47.

61. See *id.* at 145-49.

62. See, e.g., JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 11, 19-21 (1984) ("One can wrongfully kill whether or not there is a criminal law of homicide, but one cannot commit contempt of court unless there is already in existence a complex legal structure (the court system) whose rules confer powers and immunities, and define authority.").

63. See Kahan, *supra* note 1, at 147, 148 n.83.

64. See *id.* at 149.

65. *Id.* at 151 (quoting *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 564-65 (1971)). In his response to this correspondence, Professor Kahan suggests that, at

It is one thing for Kahan to ask us to accept the law's malum in se/malum prohibitum distinction — for him to, in essence, direct us back to the lesser-moral-wrong theory of mistakes. But it is quite another thing for him to instruct us on how to locate the moral content, if any, in a statute. Kahan concedes that the line between malum in se and malum prohibitum is “blurry.”<sup>66</sup> Normally I would say that conceding as much in no way constitutes a weakness in his position.<sup>67</sup> After all, that some wrongs are difficult to classify does not mean that we do not know what it means for a crime to be malum in se or wrong in a prelegal sense. It means that we do: “we could not recognize borderline cases of a concept as borderline cases if we did not grasp the concept to begin with.”<sup>68</sup>

But boundary cases here are *so* plentiful that even as early as 1822 the malum in se/malum prohibitum distinction was said to have “long since exploded.”<sup>69</sup> Even if the distinction is not *entirely* spurious, then surely it comes close, as a glance at the Supreme Court's pertinent decisions betrays.<sup>70</sup> Because reference to the malum in se/malum prohibitum distinction cannot by itself recommend Kahan's legal moralism, I wish that he had given comments like this more explanation: “The willingness to abide by the judgments of those institutions [legislatures, administrative agencies, courts], while not an uncontested understanding of moral and civic virtue, is nevertheless clearly recognizable as such.”<sup>71</sup> In saying so, Kahan morally faults anyone who *knowingly* privileges his or her own belief system over his or her community's. But can one's failure to observe those norms fully — knowingly or not — *help* but be a moral failing? And oppositely, is not the successful integration of

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the level of implementing legal moralism, assaulting a civilian is “equivalent” to assaulting a federal officer. Compare Dan Kahan, *Is Ignorance of Fact an Excuse Only for the Virtuous?*, 96 MICH. L. REV. 2123, 2123-24 & n.9 with George Thomas III, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 CAL. L. REV. 1027, 1031 n.12 (1995) (“Perhaps a statute limited to killing the President would manifest significantly greater blameworthiness than a generic murder statute. (The idea is Akhil Amar's.) I am not sure I agree but, in any event, few jobs would be as unique and important as the Presidency.”). I, contrariwise, cannot see the equivalency of the two actions. Rather, only the greediest sense of equality would value the President's time or life equal to the rest of ours. Yet it is precisely this type of moral claim that Kahan recommends, but for now has chosen to bank, or at least leave open.

66. Kahan, *supra* note 1, at 151.

67. See, e.g., Daniel Yeager, *Helping, Doing, and the Grammar of Complicity*, CRIM. JUST. ETHICS, Winter/Spring 1996, at 25, 28.

68. JOHN SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 8 (1969).

69. *Bensley v. Bignold*, 106 Eng. Rep. 1214, 1216 (1822).

70. See, e.g., *Staples v. United States*, 511 U.S. 600 (1994) (and cases cited therein).

71. Kahan, *supra* note 1, at 148-49.

even the most hypertechnical norms into one's belief system itself a moral accomplishment?

At one point Kahan observes that loopholers in areas that do not implicate morality are "compensate[d]" and "honor[ed]," not "condemn[ed]."<sup>72</sup> He admits that his observation is contested, but he doesn't tell us why it is *not* a moral failing *not* to condemn loopholing in every instance. Indeed, I once heard tennis star John McEnroe say on television that he pays more taxes than necessary. While acknowledging that a shifty tax lawyer could save him a bundle, McEnroe declaimed that he'd rather not "cheat" the government by lawfully "bending" the laws.

Now *that* is moral, since McEnroe's commitment to law-abidingness evidently was in no sense motivated by fear of detection, apprehension, and punishment. Isn't it highly moral to have so fully integrated law into one's belief system as to be given over to the activity of *ensuring* law-abidingness — naturally with an exemption from obedience to immoral "laws" such as those in force in Nazi Germany?<sup>73</sup> Perhaps Professor Kahan holds that question — whether law abiding and law breaking, without more, are *always* matters of morality — for another day.

Meanwhile, I'm not sure why someone so skilled at recognizing and writing about the judicial veneering of morality in criminal law would disqualify himself from staking out moral positions. Certainly there must be a difference between taking moral positions and moralizing, just as there must be a difference between exercising judgment and expressing one's preferences. How else could we get beyond the sort of skepticism that would prevent our taking positions on, say, eating one's young or unanesthetized clitoridectomy? Indeed, that Professor Kahan has over the past five or so years so successfully "outed" the relevance of moral theory for us in criminal law is something I not only acknowledge, but even emulate.<sup>74</sup> But after adumbrating a moral theory,<sup>75</sup> Kahan's decision to leave its operation to politics is to my mind a disappointment, at least to the extent that his moral position is, ultimately, not to take moral positions, at least not here.

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72. *Id.* at 148.

73. See generally Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

74. See, e.g., Daniel B. Yeager, *Dangerous Games and the Criminal Law*, CRIM. JUST. ETHICS, Winter/Spring 1997, at 3; Yeager, *supra* note 67.

75. See Kahan, *supra* note 65, at 2127.