# Law in the Neighborhood of Morality and Convention

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Nicholas Southwood, *The Moral/Conventional Distinction*, 120 **Mind** 761 (2011).

Law is related both to morality and to convention. Differently related, surely. But how, exactly? That should be easier to explain if we could say how morality and convention are related to each other. But how easy is that?

Even as children, almost all of us understand the difference between saying that something is wrong, and saying that something "just isn't done around here." We would say that rape is wrong no matter how commonly it occurs; but we wouldn't say that passing the decanter of port to the right was wrong even if we found out that, where we happened to be, doing so breaches a hallowed custom. Not wrong, strictly speaking, anyway, if we mean morally wrong. We all understand the difference, at least until we're asked to explain it. ("And which kind are legal judgments?" –one might wonder: see answer below.)

Nicholas Southwood (Philosophy, Australian National University) considers two general ways of understanding the commonsense, non-overlapping distinction between moral judgments, on one hand, and "conventional normative judgments," on the other –such as the two contrasted above. One way he calls the "Form View," the other, the "Content View." A Form View explains the distinction in terms of a difference in underlying logical form: moral judgments are universal, or unconditional, or something like that, while conventional normative judgments are not. A Content View distinguishes the two in terms of a difference in what the two kinds are really about, whatever their form. Moral judgments on this type of view are about respect for persons, for example, unlike conventional normative judgments, which are about respect for appearances or for tradition or something of the kind.

Southwood rejects both of these ways. They are open to counterexamples and, anyway, "fail to be explanatory on the right kind of way." (P. 4.) He advances an alternative, the "Grounds View," which, as the name suggests, casts the difference as one having to do with what, in the speaker's mind, justifies the judgment. When uttering a moral judgment, a speaker does not invoke social practices, unless in some derivative manner; but when uttering a conventional normative judgment, the speaker's grounds for saying what she says have something, necessarily, and non-derivatively, to do with some social practice or another. In advocating the Grounds View, Southwood intends to answer those who have taken the failures of Form Views and Content Views to warrant skepticism about the distinction.

Southwood's focal point is a distinction between two types of normative judgments. Moral judgments are all normative; but not all conventional judgments are. He gives the example of a group of friends who conventionally meet at a certain spot at a certain time if they wish to lunch as a group. Conventional normative judgments are normative, in the sense that they are typically uttered with the intention of conveying the idea that some certain kind of conduct is required or, as Hart put it, "in some sense non-optional." (Hart 1994, 82.) Conventional normative judgments are not about any convention; rather, they are constitutive of them. But not all normative judgments constitutive of a convention are conventional normative judgments as Southwood intends the term; for their normativity involves "a richer set of reactive attitudes" (P. 3) than those that are appropriate when, for example, someone moves a rook as though it were a bishop, not to cheat, but because she isn't playing chess.

The distinction in question is between types of normative judgments and not between types of norms. Southwood, surprisingly, finds the distinction between moral norms and conventional norms to be relatively easy: "conventional norms are constellations of (certain kinds of ) normative attitudes, whereas moral norms are not (even in part)

constellations of normative attitudes." (P. 3, n. 4.) But in saying that, he does not rule out "conventionalist meta-ethical views," viz. that all moral judgments are at bottom conventional normative judgments that we erroneously project "into the world" beyond social practice. (P. 25 n. 27.)

What is at issue then is a distinction that might better be put as one between types of judgings (attitudes toward propositions) rather than judgments (propositions or assertions). This becomes clearer when Southwood offers his blanket objection to all varieties of the Content View. Even if the content of a judgment qualifies as moral under a Content View criterion, what is "in my mind" (P. 11) as I make that judgment may be a justification whose relation to that content is mediated by a social practice, such as law or custom, and thus the judgment I make is not in fact a moral judgment. This, he says, shows that any content criterion must fail. (Building proper motive into the content will not, as Southwood rightly points out, solve the problem.) A quizzical expression may have commandeered the reader's brow by now. The commonsense distinction on first appearance seemed to be one between the moral and the merely conventional, not one between kinds of rationalization one might have for making normative judgments. (On the subject of what is sufficient in order for a normative judgment to be moral one he is deliberately silent.) But hear him out.

Since the problem Southwood frames is one of classifying acts of judging, the Grounds View looks tailor-made to solve it. A judging is a moral judgment only if the grounds the judger has in mind, or would offer if pushed, have nothing non-derivately to do with social practices. (If the practice serves only to "activate the conditions" (P. 22) under which a moral principle applies, it's derivative.) A judging is a conventional normative judgment only if the grounds the judger has or would offer inescapably refer to a social practice (and maybe to other things as well). Put another way, "moral judgements are essentially practice-independent. Conventional normative judgements are essentially practice-dependent in the sense that they are necessarily grounded, at least in part, in presumed social practices." (P. 21.)

From this perspective, legal judgments – made by anyone, whether an officially robed judge or not – are never (or hardly ever) moral judgments. The judgment that there is a general duty to obey the law is a moral judgment whose content refers to a social practice, but whose grounds do not. (P. 25.) Ordinary legal judgments aren't moral judgments because the existence of a social practice is an essential part, even if only a part, of what a non-idiosyncratic judger has in mind when it comes to justifying her making the judgment. The social practice may be merely customary, but it has to be there for any judger, save only one who believes that what morality requires can proprio vigore be law. And no one nowadays believes that: not contemporary natural lawyers like Finnis and Murphy, not Dworkin, and certainly no legal positivist. "We have a certain social practice around here" is going to be at least part of anyone's ground for judging that a given norm, whatever it may be, is the law around here.

So, has Southwood turned up something that might serve as common ground uniting legal theorists of all stripes? No. All should agree that legal judgments aren't moral judgments, but he has defined conventional normative judgments in a way that allows, but does not require, moral considerations as well as social practices to figure among their grounds. Even if all can agree that legal judgments are conventional normative judgments, the familiar dispute about whether their grounds may include, must include, or must not include moral considerations will remain –but perhaps in better focus.

Leaving aside Southwood's defense of the practice-independence of moral judgements, what of the possibility that conventional normative judgments are, at the end of the day, practice-independent too? If asked to justify his judgment that it is wrong to pass the port to the right, a don might appeal solely to some transcendent general value that is instantiated by his social practice. Yet, even so, we might want to say that his was a conventional normative judgment, all the same. But if we do say that, we reject Southwood's formulation. He says, in defense, that to justify conventional normative judgments in wholly practice-independent ways is to "leave out … the fact that the social practices are our practices, that they are ones to which, rightly or wrongly, we are in some important way attached … [and to] divest[] social practices of their constitutive roles in our lives." (pp. 26-27; emphasis in original.)

If we think of legal judgments as conventional normative judgments, Southwood's defense of their practice-

dependence is bound to put legal theorists in mind of Hart's internal point of view. (Hart 1994, 88-90.) But Southwood's description of the participant perspective lays it on a bit: "In internalizing and orienting our behaviour in accordance with social practice, we express a sense of affinity with our fellows by affirming a set of values that have made us who we are, individually and collectively." (P. 30.) Did Hart imagine that legal insiders typically identify so strongly and stickily with legal practice ("Isn't reason-giving enough?")? Although Southwood is keen to the difference between a participant's and an outsider's standpoint, the article does not make it plain whether outsiders are capable of making conventional normative judgments at all. (In correspondence, the author has assured me that "outsiders aren't capable of making conventional normative judgements (of the kind that constitute the conventional norms of the ground with respect to which they are outsiders).")

Therefore it is not immediately obvious how to reconcile Southwood's account of legal judgments with Raz's of detached legal statements, which acknowledge and convey but do not endorse the norms they state. (Raz 1979, 153-57.) "According to the Grounds View, what is essential to conventional normative judgements is that the judger judges that the relevant principle is accepted within his own group or community." (P. 33.) Southwood does not, and could not, claim that moral judgments and conventional normative judgments exhaust the category of normative judgments. Might it be that legal judgments, for many or even most of us, are normative but in neither the moral nor the conventional normative sense?

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