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Law's regret: on moral remainders, (in)commensurability and a virtue-ethical approach to legal decision-making

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ABSTRACT

In his essay 'Ethical Consistency', Bernard Williams famously introduced the concept of a moral remainder, which points to the phenomenon of an in itself defensible decision that may nonetheless result in a moral cost that merits further attention. Inspired by Williams, many scholars have discussed this concept in several professional contexts. However, to date, the concept of a moral remainder has rarely been discussed in the context of legal decision-making. This is striking because this practice largely consists of judges making decisions that, although they may be legally justified, nonetheless negatively affect fundamental interests of the losing party. Hence, this article elaborates on the relevance of Williams's concept of a moral remainder in the theory and practice of legal decision-making in a liberal legal order. Moreover, it argues that the concept of a moral remainder is not only most naturally situated within but also a welcome complement to a virtue-ethical approach to legal decision-making. Finally, this article addresses three concerns that need to be further explored for the accommodation of moral remainders in the theory and practice of legal decision-making to be successful.

KEYWORDS

Bernard Williams; moral remainders; legal decision-making and moral costs; virtue-jurisprudence; (in)commensurability; agent-regret; compassion

'A habit of reluctance is an essential obstacle against the happy acceptance of the intolerable.'¹

1. Introduction

In his essay 'Ethical Consistency', Bernard Williams famously introduced the concept of a moral remainder, which points to the phenomenon of an in itself defensible decision that may nonetheless result in a moral cost that merits further attention.² Williams discussed this concept mainly in the private and political context, and indicated that it could also be

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¹Bernard Williams, 'Conflicts of Values', *Moral Luck: Philosophical Papers 1973–1980* (Cambridge University Press 1981) 63.

²Bernard Williams, 'Ethical Consistency', *Problems of the Self: Philosophical Papers 1956–1972* (Cambridge University Press 1973) 166–86.

pertinent in other (professional) settings.³ Inspired by Williams, many scholars have discussed this concept and its related phenomenology in several professional contexts, such as lawyering, health care, and military actions.

However, to date, the relevance of Williams's concept of moral remainder has rarely been discussed in the context of legal decision-making.⁴ This is striking because in liberal legal orders the everyday practice of legal decision-making involves judges making decisions that, although they may be legally justified, nonetheless negatively affect fundamental interests of the losing party. How best to conceptually grasp this troublesome phenomenon and respond to these losses is a question that mainstream legal theory has scarcely grappled with, nor have Williams's moral remainders been considered as relevant to the answer.

By contrast, this article elaborates on the relevance of Williams's concept of a moral remainder in the theory and practice of legal decision-making in a liberal legal order. First, it offers an overview of the discussion of (elaborations of) Williams's concept of moral remainder within practical philosophy (2). Second, the absence of this concept within legal theory will be explained by the reliance on legal commensurability in dominant approaches to law and legal decision-making (3). Third, it will be argued that the concept of a moral remainder is not only most naturally situated within but also a welcome complement to a virtue-ethical approach to legal decision-making (4). Finally, this article will briefly address three concerns that need to be further explored for the accommodation of moral remainders in the theory and practice of legal decision-making to be successful (5).

2. Moral remainder in practical philosophy: an overview

Bernard Williams first introduced the concept of 'moral remainder' in his seminal and influential paper 'Ethical Consistency' in which he asserted that 'moral conflicts are neither systematically avoidable, nor all soluble without remainder'.⁵ In this paper, Williams argues against the way Kantian and Utilitarian – and more generally rationalistic – moral theories conceptualise practical conflicts. These coherence-driven theories, according to Williams, falsely project the logic of theoretical reason onto such conflicts, leading to the categorical denial of the conflict as a genuine one and, relatedly, to the denial of the normative bearing of the losing claim.⁶ Theories such as Hare's and Ross's accounts of morality conceptualise practical conflicts as 'an inconsistency of some sort' that can be rationally resolved by practical reason. In so doing, as Williams famously put it, they 'eliminate from the scene the ought that is not acted upon', i.e., the moral remainder.⁷

³Bernard Williams, 'Politics and Moral Character', *Moral Luck: Philosophical Papers 1973–1980* (Cambridge University Press 1981) 61.

⁴This lack of attention for this concept's relevance for law reflects a general neglect in legal thought of Bernard Williams's work. For some exceptions, see Scot Veitch, *Moral Conflict and Legal Reasoning* (Bloomsbury Academic 1999); Emily M. Calhoun, *Losing Twice: Harms of Indifference in the Supreme Court* (Oxford University Press 2011); Iris van Domselaar, 'The Fragility of Rightness. Adjudication and the Primacy of Practice' (doctoral dissertation, University of Amsterdam 2014); Daniel Tigard, 'Judicial Discretion and the Problem of Dirty Hands' (2016) 19 *Ethical Theory and Moral Practice* 177; Iris van Domselaar, 'On Tragic Legal Choices' (2017) 11 *Law and Humanities* 184.

⁵Williams, 'Ethical Consistency' (n 2) 179.

⁶Williams, 'Conflicts of Values' (n 1) 81.

⁷Williams, 'Ethical Consistency' (n 2) 171, 175.

Williams corroborates this critique by following two argumentative paths. First, in a predominantly analytical vein, he stresses that, in a case where an agent faces a practical conflict, a distinction must be made between two different questions: the *deliberative* question about what all-things-considered one should do, and the *moral* question about the moral status of the ought that in the end is not acted upon.⁸ According to Williams, the answer to the former does not necessarily determine the answer to the latter.⁹ Or, put differently, choosing for one option does not necessarily dissolve the normative standing of the remaining option as this would conflate an all-things-considered judgement with a moral resolution.¹⁰

A rationalistic approach treats practical conflict as ‘a logical inconsistency of some sort’ that can thus be solved by practical reasoning.¹¹ However, for Williams, practical conflicts are mostly due to contingencies in the world that make it impossible for an agent to act in accord with both values at stake, rather than due to an intrinsic inconsistency, a logical incompatibility in one’s moral outlook.¹² Think, for example, of a physical impossibility, an impossibility regarding human nature, an impossibility due to time constraints, or an impossibility given the way a particular profession or institution works.¹³ In these situations what is wrong is not the agent’s ‘thought about the moral situation ... what is wrong lies in his situation itself – something which may or may not be his fault’.¹⁴

For instance, in Sartre’s famous example a young man faces a conflict between joining the anti-Nazi resistance or staying at home with his mother who needs him.¹⁵ Few would hold that this practical conflict can be exhaustively resolved by means of the rules of propositional logic. The conflict arises due to a particular constellation of facts: the physical impossibility of staying in France to look after his mother while at the same time joining the army to fight for the liberation of his country. Both options are impossible: they cannot be realised simultaneously. For Williams, therefore, although the student may be able to answer the deliberative question of what to do, this would leave the moral status of the resulting loss unchanged. It remains an ought that is not acted upon.¹⁶

This example brings us to the phenomenological argumentative path that Williams pursues in addition to his analytical argumentative strategy as he holds that one important task of moral philosophy is to illuminate and make conceptual sense of the experiences of moral agents.¹⁷ Moral theories must, at least to a sufficient degree, possess descriptive adequacy; that is, they should aim to give explanatory force to the first-

⁸ibid 184–86.

⁹Williams, ‘Ethical Consistency’ (n 2) 185.

¹⁰In this context, Williams rejects a particular understanding of the ‘ought implies can’ principle that suggests that being unable to do *both* A and B implies that one is also not bound to honor *each* of them. See ibid 183.

¹¹Williams, ‘Ethical Consistency’ (n 2) 171.

¹²Williams does not deny that such conflicts may occur, but he ‘doubts whether there are any interesting questions that are peculiar to this possibility.’ See ibid 108.

¹³For this point I have drawn on Henry S Richardson, *Practical Reasoning about Final Ends* (Cambridge University Press 1997) 144–45.

¹⁴Williams, ‘Conflicts of Values’ (n 1) 74.

¹⁵Jean-Paul Sartre, ‘Existentialism is a Humanism’ in Walter Kaufmann (ed), *Existentialism from Dostoevsky to Sartre* (Meridian 1957 [1946]) 77.

¹⁶In addition to practical conflicts in which the values at stake are impossible, Williams also focuses on the situation in which ‘something which (it seems) I ought to do in respect of certain of its features also has other features in respect of which (it seems) I ought not to do’. Williams, ‘Ethical Consistency’ (n 2) 171.

¹⁷See, e.g., Bernard Williams, *Morality: An Introduction to Ethics* (Cambridge University Press 1972) xxi; Williams, ‘Conflicts of Values’ (n 1) 75.

person point of view of practical agents. As such, for Williams, the observation that '[m]any people can recognise the thought that a certain course of action is, indeed, the best thing to do ... but that doing it involves doing something wrong' is itself an important reason to introduce the concept of a moral remainder.¹⁸

Within this phenomenological line of argument, a key role is played by the phenomenon of 'agent-regret', an emotion that according to Williams gives expression to the fact that one has committed a wrong despite the fact that one's decision was overall not mistaken.¹⁹ As Williams puts it: 'It seems to me a fundamental criticism of many ethical theories that their accounts of moral conflict and its resolution do not do justice to the facts of regret and related considerations.'²⁰

Williams's phenomenological and analytical arguments are intimately linked to his value pluralism.²¹ In line with the work of Isaiah Berlin, Williams holds that, because values qualitatively differ, they can never be exhaustively reduced to a single measure allowing one to exhaustively resolve practical conflicts without moral cost.

So far, we have outlined Williams's arguments for introducing the concept of a moral remainder. We will now flesh out precisely what Williams means by this concept. The concept of a moral remainder as Williams defines it points to two separate but intimately related meanings. On the one hand, it refers to what he dubs a 'moral cost' – a violation of fundamental interests that result from an in itself defensible decision.²² In these situations, those who experience the burden of these costs 'can justly complain that they have been wronged',²³ as they at least have a legitimate claim to be acknowledged in their loss.²⁴

On the other hand, a moral remainder points to the many ways in which agents may react to this moral cost, which Williams describes as expressions of a sense of 'uncancelled moral disagreeableness'.²⁵ Here, Williams seems to have in mind a particular set among the broad category of emotions that Jonathan Haidt named 'the self-conscious' moral emotions, such as shame, guilt, regret, and remorse.²⁶ However, a sense of uncancelled moral disagreeableness can also be expressed in action, such as an explicit acknowledgment of the loss in question, an apology, an explanation, compensation, or 'other substantial reparatory action'.²⁷ In the words of Williams: '[T]he moral impulse that had to be abandoned in the choice may find a new object, and I may try, for instance, to "make it up" to people involved for the claim that was neglected.'²⁸

For Williams, experiences and expressions of uncancelled moral disagreeableness add to the ethical quality of a specific practice. They foster the moral sensibility of agents and as such they also decrease the chance that they will thoughtlessly act in ways that yield moral costs. As he puts it: 'Only those who are reluctant or disinclined to do the

¹⁸Williams, *Morality: An Introduction to Ethics* 85.

¹⁹Williams, 'Ethical Consistency' (n 2) 61, 175; Williams, 'Conflicts of Values' (n 1) 27–30; Bernard Williams, 'Moral Luck', *Moral Luck: Philosophical Papers 1973–1980* (Cambridge University Press 1981) 27–32.

²⁰Williams, 'Ethical Consistency' (n 2) 176.

²¹Williams, 'Conflicts of Values' (n 1) 72.

²²Williams, 'Conflicts of Values' (n 1) 63.

²³*ibid.* 60.

²⁴Bernard Williams, 'Liberalism and Loss' in Mark Lilla, Ronald Dworkin, and Aileen Kelly (eds), *The Legacy of Isaiah Berlin* (The New York Review of Books 2001) 102.

²⁵Williams, 'Conflicts of Values' (n 1) 61.

²⁶Jonathan Haidt, 'Moral Emotions' in KR Scherer and HH Goldsmith (eds), *Handbook of Affective Sciences* (Oxford University Press 2003) 859.

²⁷Williams, 'Conflicts of Values' (n 1) 74.

²⁸Williams, 'Ethical Consistency' (n 2) 172.

morally disagreeable when it is really necessary have more choice of not doing it when it is not necessary.’²⁹ In addition, such experiences and responses may also have intrinsic ethical value to the extent that they are a ‘correct reaction to *that case*, because the case does involve a genuine moral cost’.³⁰

Notably, when discussing moral remainders, Williams does not seriously touch upon the question of how to ascertain whether a moral cost exists or whether an agent is right to feel or express agent-regret or a sense of uncancelled moral disagreeableness. This question of the standard of correctness is, of course, urgent – not least in view of our everyday experience that people are easily mistaken in this regard.³¹ As Bagnoli puts it: ‘[I]t is easy enough to imagine cases where one experiences remorse or guilty feelings even if there is no moral failure.’³²

In view of other elements in Williams’s moral philosophy, it is safe to assert that from Williams’s point of view such a standard of correctness will in any case not be provided by ‘external’ abstract rules and principles. Valid reasons to criticise an agent for being wrong in feeling agent regret should be meaningfully linked to what Williams qualifies as the ‘subjective motivational set’ of a particular agent, and, relatedly, probably also to reasons stemming from the deeply entrenched cultural and social practices the agent has been inculcated in.³³

Williams’s concept of a moral remainder has been further developed by a variety of scholars, predominantly those working in the field of neo-Aristotelian virtue ethics.³⁴ This should not surprise us. Like Williams, neo-Aristotelian virtue theorists are committed to the idea that morality should not be modelled according to the demands of theoretical reason, whose goals of systematicity, coherence, and consistency require that one’s arguments start from basic premises leading to deliberative outcomes solely by means of the intellect.³⁵ Or, in the words of Aristotle: ‘That practical wisdom is not scientific understanding (*epistēmē*) is obvious’.³⁶

Similar to Williams’s phenomenological approach, a neo-Aristotelian approach to morality honours the *phainomena* by showing responsiveness to actual practices and

²⁹Williams, ‘Politics and Moral Character’ (n 3) 62.

³⁰Williams, ‘Politics and Moral Character’ (n 3) 63.

³¹This issue of the standard of correctness will be discussed further below in section 5.

³²Carla Bagnoli, ‘Phenomenology of the Aftermath: Ethical Theory and the Intelligibility of Moral Experience’ in Sergio Tenenbaum (ed), *New Trends in Moral Psychology* (Kluwer 2007) 197. Bagnoli (p. 197) gives the example of a woman who, as a result of a strict religious education, ‘feels guilty for having sex out of wedlock, although she does not take herself to be violating any moral obligation’. On this point of the standard of correctness, see also Michael Stocker, *Plural and Conflicting Values* (Oxford University Press 1990) 16.

³³Bernard Williams, ‘Internal and External Reason’ in Harrison R (ed), *Rational Action* (Cambridge 1979), 18. In the words of Rainer Forst, when describing Williams’s Humean internalism: ‘[M]oral reproaches can ... only be directed toward somebody in the sense that one can show him that he has not adequately brought to bear the dispositions he has that are conducive to morality.’ Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Columbia University Press 2014) 27.

³⁴See, e.g., Martha C Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (rev edn, Cambridge University Press 2001 [1986]); Michael Stocker, *Plural and Conflicting Values* (Oxford University Press 1990); Christopher W Gowans, *Innocence Lost: An Examination of Inescapable Moral Wrongdoing* (Oxford University Press 1994); Patricia S Greenspan, *Practical Guilt: Moral Dilemmas, Emotions, and Social Norms* (Oxford University Press 1995); Rosalind Hursthouse, ‘Fallacies and Moral Dilemmas’ (1995) 9 *Argumentation* 617; Lisa Tessman, *Moral Failure: On the Impossible Demands of Morality* (Oxford University Press 2015).

³⁵This view is of course intimately linked to Williams’s understanding of ethical theory as ‘a theoretical account of what ethical thought and practice are, which account either implies a general test for the correctness of basic ethical beliefs and principles or else implies that there cannot be such a test’. Bernard Williams, *Ethics and the Limits of Philosophy* (Fontana Press 1985) 72.

³⁶Aristotle, *Nicomachean Ethics*, 1142a23–4. As cited in Martha C Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (rev edn, Cambridge University Press 2001 [1986]) 290.

experiences, including pluralism and value conflict.³⁷ Moreover, by taking an ‘inside out approach’ to the issue of the justification of a right answer – that is, by focusing on the virtuousness of the agent in an account of rightness – this approach allows for the possibility that a virtuous person could make an all-things-considered right decision while at the same time experiencing regret about the wrong that this decision entails.³⁸ In the words of Hursthouse, a virtue-ethicist can coherently hold that the right thing to ‘do’ is, ‘after much hesitation and consideration of possible alternatives, feeling deep regret’.³⁹

Williams only briefly touches upon the relevance of the concept of a moral remainder for specific practical and professional realms, most notably those of politics and lawyering. However, this concept has been taken up by scholars grappling with the nature of decision-making in specific institutional or professional contexts. One such institutional and professional context is, most notably, indeed that of politics. Inspired by Williams, Michael Walzer has famously developed the claim that everyday political life *inherently* requires that one gets ‘dirty hands’. As Walzer puts it: ‘No one succeeds in politics without getting his hands dirty.’⁴⁰ By using this image of dirty hands, Walzer emphasises the disvalue that may be involved in making a decision.⁴¹

The concept of a moral remainder is also used in the literature on the ethical merits of decision making by nurses (or healthcare providers more generally).⁴² Similarly, we can find arguments favouring the inclusion of the concept of moral remainders for understanding the ethical bearing of military practices.⁴³ Given the nature of this practice, in which one ‘must harm to help, kill innocents to save other innocents’, it is held that ‘professional soldiers should not quickly dismiss this remainder of wrongdoing after deciding how to act, even when their decisions give greater weight to competing considerations’.⁴⁴ Finally, and not surprisingly, the phenomenon of moral remainders has

³⁷Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (n 34), 240–63.

³⁸However, it is important to note that proponents of virtue-ethics are not necessarily committed to acknowledging moral remainders. John McDowell, for instance, has defended the claim that, when a virtuous person acts on the basis of an all-things-considered judgment, the reasons that support this specific judgment necessarily ‘silence’ the ‘losing’ considerations. See John McDowell, ‘Virtue and Reason’ in John McDowell (ed), *Mind, Value and Reality* (Harvard University Press 1998) 17, 56. For a defence and specific interpretation of McDowell’s ‘silencing thesis’, see Denise Vignani, ‘Virtuous Construal: In Defense of Silencing’ (2019) 5 *Journal of the American Philosophical Association* 229.

³⁹Rosalind Hursthouse, *On Virtue Ethics* (Oxford University Press 1999) 48.

⁴⁰Michael Walzer, ‘Political Action: The Problem of Dirty Hands’ (1973) 2 *Philosophy and Public Affairs* 160, 164. Importantly, Walzer’s use of this term in 1973 differs from what has later been part of his ‘ethics of emergency’, in which an appeal to ‘supreme emergency’ in conditions approaching a genuine catastrophe could not only explain but also justify the necessity to override deep moral constraints; cf Michael Walzer, ‘Emergency Ethics’ (2004) in *Arguing About War*, Yale University Press (2004); Coady CAJ, ‘The Problem of Dirty Hands’ (2018) *The Stanford Encyclopedia of Philosophy* (Fall 2018 Edition, website last visited May 2020).

⁴¹cf Stocker, *Plural and Conflicting Values* (n 32) 13. Note that Williams in his essay ‘On Utilitarianism and Moral Self-Indulgence’ touches upon Nagel’s notion of ‘dirty hands’. According to Williams, the notion of ‘dirty hands’ specifically pertains to domains such as politics where one might ask whether moral norms apply at all or are ‘just an irrelevance’. Bernard Williams, *Moral Luck. Philosophical Papers 1973–1980* (Cambridge University Press 1981), 42.

⁴²e.g., Alan. E Armstrong, *Nursing Ethics: A Virtue-based Approach* (Palgrave MacMillan 2007); Deborah Zion, ‘Dual Loyalty, Medical Ethics, and Health Care in Offshore Asylum-Seeker Detention’ in Pascale Allotey and Daniel Reidpath (eds), *The Health of Refugees: Public Health Perspectives from Crisis to Settlement* (Oxford 2019). In the context of nursing, the concept of ‘moral distress’ regularly comes up, referring to ‘feelings of frustration, anger, and anxiety people experience when faced with institutional obstacles and conflicts with others about values’. See Andrew Jameton, ‘Dilemmas of Moral Distress: Moral Responsibility and Nursing Practice’ (1993) 4 *AWHONNS Clinical Issues in Perinatal and Women’s Health Nursing* 542. Although there is an overlap between the concept of moral remainder and that of moral distress, the former is broader. That is, institutional constraints are only one of the ‘causes’ due to which moral remainders may occur. Williams, for instance, highlights the fact that moral remainders typically occur due to a genuine conflict of values; cf Williams, ‘Conflicts of Values’ (n 1).

⁴³e.g., Mark J Osiel, *Obedying Orders: Atrocity, Military Discipline, and the Law of War* (Routledge 1999).

⁴⁴*ibid* 328.

also received some attention in the context of lawyering.⁴⁵ Here it is used for coming to grips with the fact that lawyers ‘often feel themselves to be wrongdoers in some sense, even while being rightly obligated to take some action within a professional role’.⁴⁶

With Williams, this literature on professional practices emphasises the practical value of moral remainders. Moral remainders are considered to increase the moral sensibilities of professionals, they are also deemed valuable in themselves as appropriate responses to those who suffer from the professionals’ decisions. In the context of lawyering, for instance, it is argued that moral remainders ‘lead to a more morally sensitive style of practice in which the lawyer is better able to discern options for avoiding conflicts between legal and ordinary moral obligations’.⁴⁷ As to the intrinsic value of moral remainders vis-vis those affected by a lawyer’s decision, the following is stated:

‘[T]o experience sincere reluctance, to feel the need to make restitution, to seek the other’s pardon—these simply are appropriate responses to the actual features of the moral situation. In this way ... the moral relations between persons are respected or restored.’⁴⁸

Similarly, in the field of military ethics, it has been suggested that moral remainders will lead to ‘better soldiers who are also better human beings: the kind of people about whom a democratic society should have fewer qualms when bestowing control over weapons of great destructive power’.⁴⁹ It has also been claimed that, in response to certain military actions deemed necessary and proportionate, compensation is due to those that bear the burdens of these actions.⁵⁰

To sum up: Bernard Williams has introduced and defended the importance of the concept of the moral remainder for an adequate understanding of practical conflicts. This specific line of thought has been taken up predominantly by neo-Aristotelian theorists as well as by scholars grappling with the moral nature of specific professional practices such as politics, warfare, nursing, and lawyering. The next section will address the question of why this concept has scarcely appeared in mainstream theories of legal decision-making.

3. Moral remainders and legal commensurability: mutually exclusive?⁵¹

As stated in the introduction, the concept of a moral remainder has received little attention in theories of legal decision-making and, relatedly, in the conceptualisation of conflicting rights. In this section, it will be argued that one explanation as to why this concept has hardly been grappled with in the context of law is that, throughout the history of Western legal thought, legal decision-making has been connected with the notion of

⁴⁵Williams, ‘Politics and Moral Character’ (n 3) 61. See also, e.g., Gerald Postema, ‘Self-Image, Integrity, and Professional Responsibility’ in David Luban (ed), *The Good Lawyer* (Rowman and Allanheld 1983); Leslie C Griffin, ‘The Lawyer’s Dirty Hands’ (1995) 8 *Georgetown Journal of Legal Ethics* 219; Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (Cambridge University Press 2001).

⁴⁶W Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton University Press 2010) 172.

⁴⁷*ibid* 173.

⁴⁸Postema, ‘Self-Image, Integrity, and Professional Responsibility’ (n 44) 80.

⁴⁹Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War* (n 43) 335.

⁵⁰Jennifer Kling, *War Refugees: Risk, Justice, and Moral Responsibility* (Lexington Books 2019) 38–39.

⁵¹In this section I largely draw upon earlier discussion of legal commensurability in: Iris van Domselaar, ‘The Fragility of Rightness. Adjudication and the Primacy of Practice’ (n 4); Iris van Domselaar, ‘On Tragic Legal Choices’ (n 4).

commensurability (or comeasurability).⁵² Until today, contemporary legal theory has been predominantly premised on the idea that legal commensurability is a necessary condition for the rationality and hence justification of legal decisions. Conversely, incommensurability is often considered to be a threat to legal rationality in that it opens the door for strong discretion on the part of the decision-maker. According to Zucca, in cases of incommensurability, ‘whoever decides exercises a great amount of discretion. For what it matters, they could even toss a coin’.⁵³ Therefore, in cases where the rights at stake are considered incommensurable this becomes a ‘ground on which courts can claim deference to representative institutions’.⁵⁴

In order to properly assess why a framework of legal commensurability may be in tension with the accommodation of moral remainders, we need to expound what this framework entails, albeit at the risk of simplifying.⁵⁵ A framework of legal commensurability holds that, for almost all legal decisions (and thus negligible exceptions aside), there will be a legal commensurans available, an external and independent measure on the basis of which a judge can arrive at a rational, legally justified decision.⁵⁶ Such a measure is, as Finnis has put it, to provide for a ‘(non-optional) standard for comparing options and ranking them as obligatory, permissible, or impermissible, or as legally valid and enforceable or unenforceable, voidable or void, and so forth’.⁵⁷ This commensurans will allow the judge, in the words of Dworkin, only ‘weak discretion’ in the sense that it

⁵²An important impetus to the contemporary debate about (in)commensurability and the law has been given by the Pennsylvania Law Review Symposium on ‘Law and Incommensurability’ held in 1998 at the University of Pennsylvania Law School. The papers presented at this conference are published in Matthew Adler, ‘Law and Incommensurability: An Introduction’ (1998) 146 *University of Pennsylvania Law Review* 1169. For a discussion about (in)commensurability in relation to or relevant for law, see Martha C Nussbaum and Rosalind Hursthouse, ‘Plato on Commensurability and Desire’ (1984) *Proceedings of the Aristotelian Society* 55; Joseph Raz, ‘Value Incommensurability: Some Preliminaries’ (1985) 86 *Proceedings of the Aristotelian Society* 117; R George Wright, ‘Does Free Speech Jurisprudence Rests on a Mistake? Implications of the Commensurability Debate’ (1989) 23 *Loyola of Los Angeles Law Review* 763; Jeremy Waldron, ‘Rights in Conflict’ (1989) 3 *Ethics* 503; David Luban, ‘Incommensurable Values, Rational Choice, and Moral Absolutes’ (1990) 38 *Cleveland State Law Review* 65; Richard Warner, ‘Incommensurability as a Jurisprudential Puzzle’ (1992) 147 *Chicago-Kent Law Review* 247; Frederick Schauer, ‘Commensurability and its Constitutional Consequences’ (1993) 45 *Hastings Law Journal* 785; Paul T Minerich, ‘Incommensurability in Legal Reasoning: If I’m Doing the Right Thing, Why Does It Hurt So Much?’ (1994) 21 *Western State University Law Review* 467; John Finnis, ‘Commensurability and Public Reason’ in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press 1997); Bruce Chapman, ‘Law, Incommensurability, and Conceptually Sequenced Argument’ (1997) 146 *University of Pennsylvania Law Review* 1487; Ruth Chang (ed), *Incommensurability, Incomparability and Practical Reason* (Harvard University Press 1997); Brett G Scharffs, ‘Adjudication and the Problems of Incommensurability’ (2000) 42 *William and Mary Law Review* 1369; Jacco Bomhoff and Lorenzo Zucca, ‘The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights, Evans v. The United Kingdom, Fourth Section Judgment of 7 March 2006, Application No. 6339/05’ (2006) 2 *European Constitutional Law Review* 424; Stephen Grimm, ‘Easy Cases and Value Incommensurability’ (2007) 1 *Ratio* 26; Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford University Press 2007); Lorenzo Zucca, ‘Conflicts of Fundamental Rights as Constitutional Dilemmas’ in Eva Brems (ed), *Conflicts between Fundamental Rights* (Intersentia 2008); Matthew Kramer, ‘When Is there Not One Right Answer?’ (2009) 53 *The American Journal of Jurisprudence* 49; Iris van Domselaar, ‘On Tragic Legal Choices’ (n 4).

⁵³Lorenzo Zucca, ‘A Debate on Constitutional Dilemmas’ (2008) Available at SSRN: <https://ssrn.com/abstract=1284490> (website last visited July 2021).

⁵⁴Bomhoff and Zucca, ‘The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights, Evans v. The United Kingdom, Fourth Section Judgment of 7 March 2006, Application No. 6339/05’ 434.

⁵⁵Due to reasons of scope, the discussion of legal commensurability in this section will be inherently incomplete, as it is tailored to the specific question of its purported exclusionary relation with moral remainders.

⁵⁶Henry Richardson describes a commensurans as ‘the commensurating value or good’. See Richardson, *Practical Reasoning about Final Ends* (n 13) 15. Note that, where comparability merely suggests that an agent can rank two or more different items on the basis of some shared feature, commensurability means that such a ranking is grounded in a ‘significant rationale’. See David Luban, ‘Incommensurable Values, Rational Choice, and Moral Absolutes’ (1990) 38 *Cleveland State Law Review* 65, 7.

⁵⁷Finnis, ‘Commensurability and Public Reason’ (n 52) 215.

will require judgment on the part of the judge to connect the term(s) of the commensurans with the concrete case at hand.⁵⁸ As such, a reliance on legal commensurability implicates an ‘outside in’ approach to (the justification of) legal decision-making: The measure for the right legal decision is to be found ‘outside’ the judge.⁵⁹ Typical examples of a legal commensurans are legal rules and precedents, which can be used in ‘easy cases’ to assess the legal merits of the interests at stake. When the legal rules themselves conflict, a higher-order commensurans such as a moral principle can resolve the conflict. In case constitutional principles conflict, such a higher-order commensurans can be for instance ‘the constitutional point of view’.⁶⁰

Unsurprisingly, within a framework of legal commensurability, genuine conflicts between legal claims are considered incidental. Such conflicts are typically considered merely *apparent*: that is, capable of exhaustive resolution via common methods of legal reasoning such as ‘deduction’, ‘balancing’, and ‘specification’.⁶¹ In such cases, a commensurans plays a decisive and exhaustive role in justifying each outcome.

Importantly, within a framework of legal commensurability, once (the interpretation of) a legal commensurans points to a particular outcome, there is no legal viewpoint available on the basis of which a judge can acknowledge and respond to the legal claim not acted upon. The legal commensurans, understood as normative, is assumed to possess ‘representative adequacy’: that is, to capture all that is legally relevant⁶² and to provide for an ‘overall evaluation’ of the interests at stake.⁶³ As such, once a legal commensurans offers decisive arguments in support of a legal decision, that decision cannot simultaneously lead to a legally relevant loss. As Dworkin puts it: ‘[W]e are drawn to each of the rival positions through arguments that, if we were finally to accept them as authoritative, would release us from the appeal of the other one.’⁶⁴

Indeed, legal commensurability is characterised by a ‘winners-take-all principle’.⁶⁵ Once a legal case is decided, the losing claim is understood in terms of what Dworkin calls a ‘bare harm’: a merely subjective state of the citizen that is legally irrelevant.⁶⁶ From this perspective, judges may experience the troublesome consequences of their decisions in a detached, dispassionate way – much in the manner of having solved a legal sum.⁶⁷

To the extent that in legal practice judges and legal scholars de facto do experience and give expression to a sense of moral disagreeableness due to the troublesome consequences of a particular legal decision, these ways of being and doing are not considered part and parcel of legal rationality itself. These expressions signal that the subjective inner

⁵⁸Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 31–39.

⁵⁹For this term, see John McDowell, *Mind, Value and Reality* (Harvard University Press 1998) 50.

⁶⁰Robert Alexy, ‘On Balancing and Subsumption’ (2003) 16 *Ratio Juris* 433, 442.

⁶¹For a concise discussion and defence of the method of balancing a conflict between fundamental rights, see Robert Alexy, ‘Constitutional Rights, Balancing and Rationality’ (2003) 16 *Ratio Juris* 131. See for a defence of a specificationist approach to legal reasoning in the context of conflicts between constitutional rights: José Juan Moreso, ‘Ways of Solving Conflicts of Constitutional Rights: Proportionalism and Specificationism’ (2012) 25 *Ratio Juris* 31.

⁶²Robert Alexy, ‘The Nature of Legal Philosophy’ (2004) 17 *Ratio Juris* 156, 164.

⁶³Stocker, *Plural and Conflicting Values* (n 32), 12–13.

⁶⁴Ronald Dworkin, *Justice in Robes* (Harvard University Press 2008) 110–11.

⁶⁵Guillermo Lariguét, ‘Constitutional Dilemmas: Some Criticisms of Lorenzo Zucca’s Conception’ (2008) in L Zucca, ‘A Debate on Constitutional Dilemmas’ (*SSRN*, 14 October 2008) 12.

⁶⁶Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 80.

⁶⁷For a similar point, famously made in the context of legal ethics, see Gerard J Postema, ‘Moral Responsibility and Professional Ethics’ (1980) 55 *New York University Law Review* 63.

life of the judge or legal scholar is not (yet) fully determined by the legal point of view.⁶⁸ As such, they are understood and theoretically conceptualised as stemming from a merely human point of view strictly opposed to the legal point of view. For instance, when discussing the notorious ECHR Evans case, Zucca and Bomhoff emphasise the troublesome nature of this case's outcome on the basis of this alleged dichotomy: '*Stripped of all legal technicalities*, the plight of Ms Evans presented an obvious human tragedy.'⁶⁹

This commensurabilist spirit can be discerned within contemporary theoretical discourse on conflicts between fundamental rights. It can even be discerned among the 'friends of dilemmas' – legal scholars conceptually investigating conflicts between rights.⁷⁰ For instance, Zucca – who describes himself as one of the few legal scholars 'that recognises the possibility of genuine conflicts of rights' – states, in the context of fundamental rights, that due scrutiny shows that 'most of the cases will appear to be spurious conflicts';⁷¹ therefore, 'they are not the daily bread of legal systems'.⁷² Moreover, Brems – who has extensively investigated conflicts between fundamental rights – has introduced a three-step model for addressing such conflicts, suggesting that, in the end, there is no room for the acknowledgement of *genuine* conflicts other than in cases of negligible incidents.⁷³

On the basis of the above, it may not come as a surprise that, within Western legal thought, with its dominant reliance on legal commensurability, the concept of moral remainder rarely appears in the context of legal decision-making. Within a framework of legal commensurability, a legal order is generally understood as a 'seamless web'⁷⁴ that allows the judge to avoid causing and experiencing moral remainders and to get dirty judicial hands. Legal commensurability offers the judge, as it were, the prospect of moral innocence.⁷⁵

⁶⁸The purported transformative influence of a reliance on commensurability is not specific to legal commensurability but is attributed to practical commensurability in general; cf Nussbaum, *Love's Knowledge: Essays on Philosophy and Literature* (Oxford University Press 1990) 106.

⁶⁹Bomhoff and Zucca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights, Evans v. The United Kingdom, Fourth Section Judgment of 7 March 2006, Application No. 6339/05' 427. Here it must be noted that the Evans case, in which Ms Evans's right to become a biological mother was at stake, had a happy ending, despite the fact that the court ruled against her claim. Due to new technological possibilities, in 2015 Ms Evans did give birth to a son: cf Lorenzo Zucca, 'Law, Dilemmas, and Happy Endings' in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford University Press 2017) (emphasis added).

⁷⁰Guillermo Lariguet, 'Constitutional Dilemmas: Some Criticisms of Lorenzo Zucca's Conception' (n 65) 11.

⁷¹Zucca, 'Conflicts of Fundamental Rights as Constitutional Dilemmas' (n 52) 24;

⁷²Zucca, 'A Debate on Constitutional Dilemmas' (n 53) 48. For a critique of Zucca's restrictive interpretation of dilemmas as well as a more inclusive approach to Zucca's work— one that acknowledges that the "[t]he phenomenology" of dilemmas is broad and complex' and that "[t]here are different dilemmatic situations with a different dramatic or tragic level," see Guillermo Lariguet, 'Constitutional Dilemmas: Some Criticisms of Lorenzo Zucca's Conception' in Zucca, 'A Debate on Constitutional Dilemmas' (n 65) 9.

⁷³The first step is to try to eliminate fake conflict, the second step is to find a compromise for the purpose of guaranteeing maximum protection of both rights, and the third step is to prioritise one right over the other on the basis of particular prior criteria. Eva Brems, 'Evans vs UK. Three Grounds for Ruling Differently' in Stijn Smet and Eva Brems, *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford: Oxford University Press 2017). For Brems's work on the conceptualisation of conflicts between human rights, see also Eva Brems (ed), *Conflicts Between Fundamental Rights* (Antwerp: Intersentia, 2008); Eva Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2005) HRQ 294–326.

⁷⁴Dworkin, *Taking Rights Seriously* (n 58) 115–16.

⁷⁵cf Christopher W Gowans, *Innocence Lost: An Examination of Inescapable Moral Wrongdoing* (Oxford University Press 1994) 220.

Of course, it can be objected that the above description has overstated the logic of legal commensurability and that a looser interpretation of this framework might accommodate moral remainders. Such an objection might find support in Kramer's criticism of Dworkin's understanding of commensurability for failing to acknowledge that, in the case of a moral conflict, the losing claim 'remains fully operative'.⁷⁶ As Kramer puts it: 'Being overtopped does not amount to being negated.'⁷⁷

Kramer's view resonates with Ross's classic distinction between *prima facie duties* and *all-things-considered* or *actual duties*.⁷⁸ On the basis of this distinction, Ross suggests that the resolution of a moral conflict does not necessarily take away the normative force of the losing *prima facie* duties involved. *Prima facie* duties should not be seen as merely apparent obligations; rather, they point to duties that, when forfeited, can generate residual obligations.⁷⁹ As Williams puts it: 'Ross ... makes a valiant attempt to get nearer to the facts ... , with his doctrine that *prima facie* obligations are not just seeming obligations, but more in the nature of a claim, which can generate residual obligations if not fulfilled.'⁸⁰

However, in this regard, it must be mentioned that Williams himself was critical of the potential of Ross's approach to accommodate the concept of moral remainders. According to Williams, it remained unclear how exactly the notion of residual obligations could fit within the general structure of Ross's moral theory. Moreover, he found Ross's notion of *prima facie* duties rather ambiguous.⁸¹

More specifically, within a framework of legal commensurability the justification of a particular legal decision must in one way or another be linked to the normative force of the commensurans, which in turn is understood as providing the overall evaluation of the interests at stake. Yet, to the extent that this feature of legal commensurability is indeed accepted, it remains unclear how it can then be coherently argued that the judge is duty bound to effectuate the ranking on the exclusive basis of the legal commensurans while at the same time having a *continuing* duty with regard to the losing claim. After all, the remaining disvalue is already exhaustively accounted for in the reasoning behind the specific outcome.⁸²

On the other hand, if we were to give up on the reliance on a commensurans as providing the exclusive measure for the overall evaluation evaluation of the competing claims, it is not clear on what ground the final actual legal decision is to be justified. In Warner's words:

'What does the court appeal to as a way of showing that one set of reasons is superior to another, competing set? My point is not that this problem is unsolvable. My point is that there is a problem to be solved.'⁸³

A final problem with harmonising the framework of legal commensurability with the concept of a moral remainder is that the latter implies (an evaluation of) a certain

⁷⁶Matthew Kramer, 'When Is There Not One Right Answer?' (2009) 53 *The American Journal of Jurisprudence* 66.

⁷⁷*ibid.*

⁷⁸W D Ross, *The Right and the Good* (Clarendon Press 2002 [1930]) 19–20.

⁷⁹For a critical discussion of Williams's claim that moral theories cannot accommodate moral remainders, see Bagnoli, 'Phenomenology of the Aftermath: Ethical Theory and the Intelligibility of Moral Experience' (n 32).

⁸⁰Williams, 'Ethical Consistency' (n 2) 175–76.

⁸¹*ibid.* 176.

⁸²Stocker, *Plural and Conflicting Values* (n 32) 12.

⁸³Warner, 'Incommensurability as a Jurisprudential Puzzle' (n 52) 170.

emotional state of the agent, such as agent-regret or ethical distress, which is not under the direct control of the agent. However, a commensurans – be it a rule or principle – is simply not suited for directly guiding the emotional state of the agent-judge when grappling with a particular moral cost post hoc.⁸⁴ In other words, because of the affective and emotional dimension involved, moral remainders in the sense of experiences of uncancelled moral disagreeableness fall outside the normative scope of the commensurans.⁸⁵

So, without having provided knock-down arguments for the claim that legal commensurability and moral remainders are *necessarily* incompatible, it does seem safe to assert that legal commensurability and moral remainders are far from natural allies.

4. Situating moral remainders within a virtue-ethical approach to legal decision-making

In section 2, we saw that moral remainders can logically be accommodated within a neo-Aristotelian virtue-ethical approach to morality. Consequently, it may come as no surprise that, to the extent that moral remainders have a place within an account of legal decision-making, their most natural place is within a neo-Aristotelian virtue-ethical approach to legal decision-making.⁸⁶ This approach is committed to value pluralism and conceives of legal judgments as having a cognitive, but also an affective dimension, because a judge needs to possess a specific sort of perceptual sensitivity to adequately perceive and respond to the particulars of a legal case.⁸⁷ A neo-Aristotelian approach thus emphasises the role of the virtuous judge as a justificatory ground for legal decisions, giving primacy to professional character excellences that concern both action and feeling. By connecting the concept of legal rightness with that of the virtuous judge, it logically allows for the possibility that a judge will take an all-things-considered justified decision while simultaneously experiencing a genuine moral cost – a sense of uncancelled moral disagreeableness.

To incorporate moral remainders into an account of legal decision-making has serious implications. As we shall see below, a virtue-ethical approach can naturally account for these implications without genuine tensions with its basic premises.

One obvious implication is that a virtue-ethical approach must take the loss-addressing phenomenology of legal decision-making (more) seriously.⁸⁸ Its account of the virtue of judicial wisdom must include a particular sensitivity on the part of judges to the moral costs of their decisions. A virtuous judge will need to ‘double-count’⁸⁹ such

⁸⁴Stocker, *Plural and Conflicting Values* (n 32) 12–13.

⁸⁵*ibid* 35.

⁸⁶For an elaborate introduction to and overview of the central themes within virtue-jurisprudence, see Amalia Amaya and Ho Hock Lai (eds), *Law, Virtue, and Justice* (Hart Publishing 2013). For different versions of neo-Aristotelian virtue-centred approach to adjudication, see, e.g., Lawrence B Solum, ‘Virtue Jurisprudence: A Virtue-Centered Theory of Judging’ (2003) 34 *Metaphilosophy* 178; Amalia Amaya, ‘Virtue and Reason in Law’ in Maksymilian Del Mar (ed), *New Waves in Philosophy of Law* (Palgrave Macmillan 2011); Iris van Domselaar, ‘Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship’ (2015) 1 *Netherlands Journal of Legal Philosophy* 24; Claudio Michelon, ‘Lawfulness and the Perception of Legal Salience’ (2018) 9 *Jurisprudence: An International Journal of Legal and Political Thought* 47; Iris van Domselaar, ‘The Perceptive Judge’ (2018) 9 *Jurisprudence An International Journal of Legal and Political Thought* 71.

⁸⁷Due to the constraints of this contribution, this point cannot be further fleshed out. For a defence and elaboration of a perception-centred account of judicial virtue, see Iris van Domselaar, ‘The Perceptive Judge’ (n 86).

⁸⁸To date, this dimension has also been largely ignored in the context of virtue-jurisprudence.

⁸⁹*cf* Stocker, *Plural and Conflicting Values* (n 32) 13–17.

moral costs: they must take them into account in the reasoning process leading to the actual judgment as well as assign them due weight once the decision is made. A moral cost-responsive account of judicial wisdom will thus assign a role to compassion, an emotion deriving from the judgment that another person undeservedly suffers.⁹⁰ This compassionate understanding is not only valuable in itself as an expression of judicial goodness: it can also prevent judges from structurally overestimating the normative force of the perspective of the ‘winner’ and thereby underestimating the costs incurred by the ‘loser’.

All this of course by no means suggests that virtuous judges as an expression of their judicial wisdom will *always* need to experience moral remainders. The virtue of judicial wisdom together with the virtue of justice – which implies that the judge will honour the applicable legal rules and principles – entails that such a judge will possess the kind of discriminatory power that is needed to accurately distinguish between cases that will result in a legally relevant moral cost and those that will not. In any case, a moral cost-responsive virtuous judge will be likely to stay away from what might be dubbed a ‘taximeter sensibility’⁹¹ or ‘institutional emotionalism’.⁹²

More generally, knowing how to adequately respond to a moral cost in a specific legal case requires situational appreciation on the part of the judge. For instance, on the basis of such a situational appreciation a judge might decide to clearly articulate the disvalue suffered by the losing party, expressing their own agent-regret. Alternatively, in scenario’s suggested by Calhoun, a judge might choose to make a ‘commitment to respect the claim in other contexts and circumstances’, or to avoid formulations that ‘might encourage others to be indifferent to the losing values and interests’.⁹³ In a high profile, politically sensitive, or controversial legal case, for instance, there might be strong reasons to articulate the prevalence of a moral cost only during a court session. In a different case, by contrast, it might be appropriate to articulate a moral cost in the actual sentence as well. Which option is best is in any case not something theory can prescribe.

To adequately respond to a moral cost, virtuous judges will need a ‘vocabulary of attention’.⁹⁴ A virtue-ethical account of judicial decision-making already highlights the importance of socially and institutionally embedded thick legal value concepts, which give substance to the perception of the judge.⁹⁵ However, for the accommodation of

⁹⁰As Nussbaum puts it: ‘[In] having compassion for another, the compassionate person accepts, then, a certain picture of the world, a picture according to which the valuable things are not always safely under a person’s own control, but can in some ways be damaged by fortune.’ Martha C Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press 2001) 315.

⁹¹Stocker, *Plural and Conflicting Values* (n 32) 16.

⁹²Cf Laura Krugman Ray, ‘Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions’ (2002) 59 *Washington and Lee Law Review* 193.

⁹³Emily M Calhoun, *Losing Twice* (n 4) 63.

⁹⁴The phrase ‘vocabulary of attention’ was coined by Iris Murdoch in her essay ‘Against Dryness’. There, Murdoch discusses the relevance of Simone Weil’s concept of attention for moral philosophy. See Iris Murdoch, ‘Against Dryness’ in Peter Conradi (ed), *Existentialists and Mystics: Writings on Philosophy and Literature* (Penguin Books 1997). For a further discussion of the relevance of Murdoch’s moral philosophy for theories of judicial decision-making see Iris van Domselaar, ‘All Judges on the Couch? On Iris Murdoch and Legal Decision-Making’ in Amalia Amaya and Maksimilian Del Mar (eds), *Virtue, Emotion and Imagination in Law and Legal Reasoning* (Hart Publishing 2020).

⁹⁵For the importance of thick value concepts for judicial perception, see also van Domselaar, ‘The Perceptive Judge’ (n 86). For a discussion of the role of thick concepts in a Confucian virtue jurisprudence, see Linghao Wang and Lawrence B Solum, ‘Confucian Virtue Jurisprudence’ in Amalia Amaya and Ho Hock Lai (eds), *Law, Virtue, and Justice* (n 88).

moral remainders, a specific loss-responsive vocabulary is also needed.⁹⁶ For instance, the language used by moral cost-responsive virtuous judges will likely contain expressions of ambivalence as well as emotionally laden and compassionate utterances.⁹⁷ These emphatically should not be understood as the subjective, extrajudicial verbal hic-coughs of judges. Rather, they should be valued and cherished as part and parcel of the legal point of view itself. In addition, judicial ethical discourse will ideally be infused with a range of thick value concepts to evaluate the (lack of) moral cost-responsiveness of judges. Think of concepts such as ‘cold-hearted’, ‘indifferent’, ‘mawkish’, ‘sentimental’, ‘perceptive’, ‘empathic’, or ‘compassionate’.

A final implication of integrating the concept of moral remainder into an account of legal decision-making concerns their practical role for a legal order as a whole. Moral-cost responsive judges will occasionally feel duty bound to express their sense of uncancelled moral disagreeableness in their sentences. These publicly accessible expressions can provide unique feedback for fellow judges, policymakers, legislators, legal scholars, and society at large regarding the troublesome consequences of law and policies in specific cases – consequences that, if possible, should be avoided in the future. In this way, moral remainders can function as important incentives for moral progress within a legal order.

It goes without saying that precisely how a moral remainder will manifest itself in the lived experience of a virtuous judge can, by definition, never be grasped theoretically. Nonetheless, to give at least some sense of the many ways in which a virtuous judge may give voice to their sense of uncancelled moral disagreeableness, I will provide an example.

One day a judge has to decide about a request for the compulsory confinement of an adolescent (A) in a psychiatric clinic. A suffers from severe depression and is suicidal. Her father, who is A’s sole caretaker, is psychologically and emotionally exhausted from having to continuously keep an eye on her so as to prevent her committing suicide. He therefore desperately wants her to be committed to a psychiatric hospital. However, the judge decides that there is no sufficient reason for the drastic measure of committing A to a psychiatric hospital. The judge concludes in his sentence that it is better for A to stay in her own environment with her father close by and with ambulant treatment. But, in addition to this dictum, the judge also responds to what he sees as the remaining moral cost: the troublesome predicament of the father. When confronted with the father during the actual court session, the judge expresses compassion for the father who strongly suffers from his responsibility to his daughter to keep her alive and safe. Moreover, in his sentence the judge acknowledges that he finds himself confronted with a dictum of a precedent stating that the interests of parents cannot be grounds for compulsory confinement of their children. After having decided several similar

⁹⁶For this term I draw upon Nussbaum, *Love’s Knowledge: Essays on Philosophy and Literature* (n 68) 65.

⁹⁷A famous example of a compassionate exclamation is ‘poor Joshua’ as uttered by Justice Blackmun and his related statement that ‘compassion need not be exiled from the province of judging’ in his dissenting opinion in the *DeShaney v Winnebago County Department of Social Services* case of the US Supreme Court. In this case, the Supreme Court decided a claim brought on behalf of Joshua DeShaney, a five-year-old boy, to be protected against the extreme violence of his father, which left him paralysed and profoundly cognitively disabled. Blackmun’s exclamation has been the object of severe critique. See, for instance, Krugman Ray, ‘Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions’ (n 92) (Krugman Ray rejects this opinion as a form of ‘institutional emotionalism’ and ‘an occasion of understandable but undisciplined sympathy’).

cases over the years, the judge eventually also gives expression to his continual ethical distress by writing an article in a professional journal drawing attention to the weak legal position of parents of severely suicidal children that refuse to be treated in a psychiatric hospital.

This example not only illustrates the many ways in which a virtuous judge in their everyday practice may give expression to their sense of moral disagreeableness: it is also helpful to illustrate why the concept of a moral remainder is a welcome complement to a virtue-ethical approach to legal reasoning in view of two pressing and interrelated concerns arguing against such an approach.

First, by focusing on the virtuous judge as the justificatory ground for legal decisions a virtue-ethical approach risks offering too elitist and thus illiberal an answer as to why a reasonable losing citizen, such as the father in the example above, should bear the burden of a particular legal decision.⁹⁸ In a liberal legal order that is committed to the principle of equal concern and respect this problem is particularly urgent given the fact that, as Solum has put it, within such an approach, ‘two inconsistent outcomes in the very same case could both be legally correct’.⁹⁹

Accommodating the concept of a moral remainder can at least partially address this concern.¹⁰⁰ A virtuous judge will have to responsibly deal with this inherent justificatory gap by trying to creatively and imaginatively communicate the reasons that support the decision in a way that shows respect for the concrete citizens involved.¹⁰¹ In this endeavour, the concept of moral remainder can be of support as it provides the judge with the conceptual tools to ameliorate the harm caused by their decision.¹⁰² The judge is no longer bound by a winners-takes-all principle obliging to categorically ban the losing claim from the legal domain such that the losing citizen in fact loses ‘twice’.¹⁰³ Rather, the judge can as a matter of respect now honour the perspective of the losing citizen who has to endure a genuine disvalue.

A related argument against a virtue-ethical approach to legal decision-making concerns its focus on judicial virtues. This focus on the professional character excellences of judges provides a rather ‘rosy’ picture of adjudication that may come at the expense of a more truthful view of the painful nature of legal decision-making. Accommodating moral remainders might possibly ameliorate this concern by providing judges the institutional

⁹⁸Tim Dare raises this point persistently in his critique of virtue-ethical accounts of legal ethics; cf Tim Dare, ‘Virtue Ethics and Legal Ethics’ (1998) 28 Victoria University Wellington Law Review 141. For this critique, see also Amalia Amaya, ‘Virtuous Adjudication; or the Relevance of Judicial Character to Legal Interpretation’ (2019) 40 Statute Law Review.

⁹⁹Lawrence B Solum, ‘Virtue Jurisprudence: Towards an Aretaic Theory of Law’ in Liesbeth Huppel-Cluysenaer and Nuno MMS Coelho (eds), *Aristotle and the Philosophy of Law: Theory, Practice, and Justice* 29. Similar objections have been raised against rule or principle-based approaches to legal decision-making, as these approaches cannot avoid the influence of the judge’s subjectivity on the outcome of a legal case.

¹⁰⁰Elsewhere I have argued that a virtue-ethical approach to legal reasoning also needs to accommodate the concept of civic friendship as a way to deal with the inescapable justificatory gap that exists with regard to a judge’s decision. See Iris van Domselaar, ‘Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship’ (n 86).

¹⁰¹With these words, they must of course also exhibit sensitivity to the concerns of other ‘stakeholders’ such as the public at large, one’s colleagues, and the legal community.

¹⁰²For the phrasing of moral cost-responsiveness as a form of harm amelioration I am indebted to Calhoun, *Losing Twice* (n 4) 69.

¹⁰³For the phrase ‘losing twice’ I again draw on Calhoun, *Losing Twice* (n 4). Calhoun’s use of this phrase refers to the phenomenon of the loser in a constitutional rights dispute who not only loses their case but often also suffers indifference on the part of the constitutional judge regarding the relevance of their loss from a legal-democratic perspective. According to Calhoun, judges can therefore be blamed for ‘inflicting double harm’ on constitutional losers. Admittedly, Calhoun focuses her argument on ‘tragic choices’ in judicial reviews conducted by the Supreme Court of the United States. However, I think her arguments apply to rights adjudication in general.

opportunity to discursively acknowledge that, despite the fact that a legal decision may be right, ‘all has not been made right’.¹⁰⁴ By publicly giving voice to the law’s moral costs or, if you will, law’s regret, moral remainders can be an important antidote against the potentially self-congratulatory and morally self-reassuring character of legal concepts such as ‘judicial virtue’ as well as other morally comforting notions such as ‘rightness’, ‘justification’, ‘rationality’, and ‘justice’.¹⁰⁵

To wrap up: the concept of moral remainders can be naturally situated within a virtue-ethical approach to legal decision-making – but not without serious implications. The required adaptations should, however, be welcomed, as they add to the overall strength of this approach.

5. Three debates to further explore: defeatism, feasibility, and the standard of correctness

So far, we have situated the concept of moral remainders within a virtue-ethical approach to legal-decision-making. Now three concerns need to be further explored: defeatism, psychological and institutional feasibility, and the standard of correctness.

First, the defeatism concern. Williams himself stresses that an important feature of moral remainders is that they are due to contingent factors beyond the agent’s direct control and thus inescapable at the moment of choice. Again, according to Williams, the cause of a moral remainder lies in the situation, not in the agent’s thoughts about the situation.¹⁰⁶

However, precisely because of this purported inescapability of moral costs, the concept of moral remainders has been the subject of critique. For instance, according to Nussbaum, Williams more generally is the bearer of unwarranted ‘bad news’ about the world in his suggestion that, in situations where moral costs occur, ‘there is nobody to blame and nothing more to do’.¹⁰⁷ For Nussbaum, however, ‘what looks like grim necessity is often just greed, laziness, or a lack of imagination’.¹⁰⁸ To this critique on Williams’s worldview, Nussbaum adds a straightforwardly moral critique, charging Williams with fostering a defeatist attitude vis-à-vis moral costs as a consequence of his stress on their inescapability.¹⁰⁹

¹⁰⁴Claudia Card, *The Atrocity Paradigm: A Theory of Evil* (Oxford University Press 2005) 169. Of course, the force of this argument, which is based on legitimacy and respect for citizens, also partially depends on how citizens de facto appreciate the many ways in which judges express their sense of moral disagreeableness with their own decisions. One urgent question in this regard is whether and to what extent moral-cost-responsive reactions can be experienced by citizens as offensive and paternalistic and insufficiently acknowledging citizens’ resilience in the face of unfavourable outcomes.

¹⁰⁵For a fundamental critique of the morally reassuring use of legal concepts such as justice, rights, and legality, see Louis Wolcher, *Law’s Task: The Tragic Circle of Law, Justice and Human Suffering* (Applied Legal Philosophy, Ashgate 2008). Judith Shklar also famously criticized the concept of justice insofar as it silences the injustices victims of serious harm experience. See Judith Shklar, *The Faces of Injustice* (Yale University Press 1990).

¹⁰⁶Williams, ‘Conflicts of Values’ (n 1) 74.

¹⁰⁷Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (n 34) xxxv, xxx. Or, as she has elsewhere put it: ‘Williams imagines us looking at the world as it really is, and his picture is that we are looking into a black chasm not of our making...My picture of “looking at the world as it really is” is different.’ Martha C Nussbaum, ‘Tragedy and Justice: Bernard Williams Remembered’ (2003) *Boston Review* 220.

¹⁰⁸The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy (n 34) xxxi. See for this point also Stocker, who states that ‘it is difficult to overestimate the importance of the role of immorality in creating situations which necessitate and justify acting with dirty hands’. Stocker, *Plural and Conflicting Values* (n 32) 19.

¹⁰⁹As Nussbaum rhetorically asks: ‘If the Williamsian agent does not adopt detachment and resignation as a response, what other attitude remains open to him?’ Martha C Nussbaum, ‘Bernard Williams: Tragedies, Hope, Justice’ in Daniel Callcut (ed), *Reading Bernard Williams* (Routledge 2009) 219.

Against this background, it could be argued that a moral cost-sensitive approach to legal decision-making will indeed foster an uncritical acceptance of the institutional status quo, judicial laziness, docility, or defeatism on the part of judges. Judges may not be encouraged to use all their judicial intelligence to adequately solve hard cases or, for instance, to annul certain unjust legal rules. Rather, there is a risk that they will simply accept the legal wrongs and inescapable moral costs they are confronted with.

Of course, some judges will, as a matter of fact, either intentionally or unintentionally structurally treat actual injustices as if they were moral remainders or will too easily accept organisational constraints that lead to genuine moral costs instead of resist these constraints. However, from a virtue-ethical perspective, this will be viewed as a reason for criticism; the identification of the potential moral cost of a particular legal decision is not the same as passively, uncritically accepting them as inherent to the everyday practice of legal decision-making. A moral cost-responsive virtue-ethical approach implies a relatively active judicial role as a way to prevent certain moral costs from occurring. Virtuous judges must put serious intellectual and emotional effort into thinking of ways to prevent moral costs from occurring, even if this sometimes means that one has to stretch the limits of the judicial role. Think, for instance, of a judge who is faced with a highly contentious divorce case and who, during the court session, actively aims to work towards the establishment of parental access arrangements so as to prevent one of the parents suffering a genuine infringement of their right to family life.

Next, concerns arise of psychological and institutional feasibility. As to psychological feasibility, we have seen that one of the arguments in support of accommodating moral remainders is that they will provide agents with the psychological space to fully experience a range of moral cost-responsive reactions. Indeed, moral remainders suggest, to quote Stocker, 'a moral psychology of attention and involvement'.¹¹⁰ Hence, their accommodation can function as a strong antidote against the general human tendency to take a moral cost 'evasive'¹¹¹ approach to practical conflicts and more generally to avoid ambiguity, inner conflict, and stains to one's self-image.¹¹² In the empirical literature, a range of common and often unconscious strategies for disengaging from or neutralising moral costs that stem from one's behaviour have been identified, such as disregarding or minimising these costs, using language euphemisms, or invoking a moral justification.¹¹³ Luban has succinctly summarised the gist of this research as follows: 'Apparently, we are all highly resistant to the thought of our own wrongdoing, and the result is that we will bend our moral beliefs and even our perceptions to fight off the harsh judgment of our own behavior.'¹¹⁴

However, in view of this general human need for a positive moral self-image, the question arises whether the accommodation of moral remainders is feasible within the

¹¹⁰Stocker, *Plural and Conflicting Values* (n 32) 17.

¹¹¹cf Nussbaum, *Love's Knowledge: Essays on Philosophy and Literature* (n 68) 65.

¹¹²See, for instance, Mary R Haight, *A Study of Self-Deception* (Harvester Press 1980); CS Batson, ER Thompson, and G Seufferling, 'Moral Hypocrisy: Appearing Moral to Oneself Without Being So' (1999) 77 *Journal of Personality and Social Psychology* 525; David Luban, 'Integrity: Its Causes and Cures' (2003) 72 *Fordham Law Review* 279.

¹¹³Albert Bandura, 'Selective Moral Disengagement in the Exercise of Moral Agency' (2002) 31 *Journal of Moral Education* 101; Albert Bandura, *Moral Disengagement: How People Do Harm and Live with Themselves* (Worth Publishers 2016); for the use of language euphemisms, see also Ann Tenbrunsel and David Messick, 'Ethical Fading: The Role of Self-Deception in Unethical Behavior' (2004) 17 *Social Justice Research* 223.

¹¹⁴David Luban, 'Integrity: Its Causes and Cures' (n 113) 72.

context of judicial decision-making, a context in which we expect judges to take difficult and painful decisions on an everyday basis. Indeed, Oakley and Cocking hold that a certain detachment with regard to the detrimental consequences of actions performed within the capacity of a specific role should be allowed for, albeit under two conditions: that the disengagement must be necessary for the professional to be able to adequately perform the role, and that the goal that is served by means of the role must itself be legitimate.¹¹⁵

Following these conditions, in the context of legal decision-making in a liberal rule of law, it seems safe to assert that the inclusion of moral remainders in the practice of legal decision-making should not categorically imperil the judge's capacity to decide cases. Hence, a moral cost-responsive virtue-ethical approach needs to strike a balance between, on the one hand, sufficiently sensitising judges to the moral costs of their decisions and, on the other hand, ensuring that this sensitivity does not yield to paralysis and inertia. In striking this balance, a neo-Aristotelian virtue-ethical approach emphasises the formative role of moral cost-responsive formative practices, such as primary and secondary school, law schools, and vocational training.¹¹⁶ Not least also because, as Bandura has argued, the tendency for moral disengagement is highly embedded in social and institutional practices, thereby suggesting that, in order for this tendency to be reduced, these practices must be changed.¹¹⁷ Ideally, these practices will provide for an education in which future judges are trained and habituated in dilemmatic thinking, in enduring moral ambivalence as to the moral quality of a legal order, and the practice of legal decision-making. Moral cost-responsive legal education will in any case pay attention to the 'dark sides of legalism'¹¹⁸ and avoid propagating what Judith Resnik describes as a 'cheerful story'¹¹⁹ about the law and legal practice. Or to stick with Williams's terminology, it would avoid bringing 'good news' about the law, suggesting that, in the end, good laws and good judging can structurally prevent legally relevant moral costs from occurring.¹²⁰

We now turn to institutional feasibility. While it is one thing to generally acknowledge the added value of moral remainders for practice, it is another thing to assess whether and to what extent such an accommodation is feasible within a particular institutional practice such as the law. For instance, a specific spontaneous, direct response to a moral cost might be appropriate in a private setting – think of apologising to one's child for having attended a professionally important conference instead of their music performance at school. However, this sort of approach may not be appropriate for the response of a presiding judge in court. Moreover, 'activist' expressions in judicial

¹¹⁵Oakley and Cocking, *Virtue Ethics and Professional Roles* (n 45) 137.

¹¹⁶Aristotle famously stressed the crucial role that social practices have in the development of virtues. For Aristotle, virtues can only be developed by practice and habituation. See Aristotle, *Nicomachean Ethics: Translation, Introduction, and Commentary* (Oxford University Press 2002) NE 1103a32-1103b3.

¹¹⁷Bandura, 'Selective Moral Disengagement in the Exercise of Moral Agency' (n 114).

¹¹⁸For the phrase 'dark sides of legalism' I am indebted to Leora Bilsky and Natalie R Davidson, 'Legal Ethics in Authoritarian Legality: A Response to David Luban' (2021) 34 *Georgetown Journal of Legal Ethics*. Bilsky and Davidson in turn drew inspiration for the use of this phrase from David Kennedy's *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2004). See for this point also: Iris van Domselaar, 'Where Were the Law Schools? On Legal Education as Training for Justice and the Rule of Law (Against the "Dark Sides of Legality")' (2021) 1 *Netherlands Journal of Legal Philosophy* 3.

¹¹⁹Judith Resnik, 'Ambivalence: The Resiliency of Legal Culture in the United States' (1993) 45 *Stanford Law Review* 1525.

¹²⁰Bernard Williams, 'The Woman of Trachis: Fiction, Pessimism, Ethics' in Robert B Loudon and Paul Schollmeier (eds), *The Greeks and Us: Essays in Honor of WH Adkins* (The University of Chicago Press 1996).

sentences of ethical distress that aim to instigate changes in the law will give rise to the question of their reconcilability with the principles of a constitutional democracy, such as the separation of powers and the principle of democratic legitimacy. Core professional values, such as impartiality, also need to be reconciled with such an approach. In this regard, the following question is highly relevant: to what extent will the (perceived) legitimacy of judicial decision-making be imperilled if judges publicly acknowledge and express the moral ambivalence, indeterminacy, and subjectivity surrounding their decisions?¹²¹

From a virtue-ethical perspective, these questions cannot be answered by means of a normative theoretical framework. Rather, they again highlight the importance of a virtuous judge's ability to make responsible and context-specific choices of style and types of reasoning and moral cost-responsiveness. In terms of tone and style, a virtuous judge may responsibly express himself in one way during a court-session when facing the concrete parties involved and in another way in the written sentence, considering, among other things, the constitutional principles that must be honoured, the (societal impact of the) actual decision, the parties involved, and the composition of the relevant audience(s).

A virtuous judge must therefore walk a thin line between being moral cost-responsive and living up to other core professional and institutional values. To do this, the judge must use their institutionally informed situational appreciation. This is, of course, not an exclusively individual matter. It is an issue of collective concern to the judiciary and the legal order as a whole, and about which further debate is needed.

A final concern is the epistemological question of how to determine whether a particular legal choice yields a moral cost and whether the judge in question has responded adequately. On the virtue-ethical approach to legal decision-making, the relevant 'standard of correctness' is the notion of the virtuous judge.¹²²

However, when assessing the actual experiences of judges regarding the moral costs of their decisions, reliance on the internal viewpoint of a virtuous judge may be too simplistic. To have sufficient critical bite, this notion of the virtuous judge needs to be informed by a serious analysis of the relevant judicial vices, such as cowardice, foolishness, and sentimentality.¹²³ Were judges to 'act from vicious motives, such as corruption, wilful disregard of the law, or bias', then the identification of moral costs and related moral cost-responsive reactions should be rejected as legally incorrect.¹²⁴ In addition, precisely because the identification of moral costs is likely to be mediated by emotions, judges should also be trained to deal with common human cognitive fallacies, such as the fact that humans are more likely to empathise with those with whom they share certain characteristics.¹²⁵

¹²¹I am indebted to an anonymous reviewer for raising this point. Due to the constraints of this contribution, this point will need to be explored elsewhere. Such an exploration would need to take into account the empirical literature on perceived procedural justice. For a recent overview of studies in the field of perceived procedural justice, see E Allan Lind, 'The Study of Justice in Social Psychology and Related Fields' in EA Lind (ed), *Social Psychology and Justice* (Routledge 2020).

¹²²For this phrase I draw upon Carla Bagnoli, 'Phenomenology of the Aftermath: Ethical Theory and the Intelligibility of Moral Experience' (n 32) 198.

¹²³So far, little attention has been paid to the study of vices in the legal domain. For a brief discussion of judicial vices, see Lawrence B Solum, 'Virtue Jurisprudence: A Virtue-Centered Theory of Judging' (n 86) 178.

¹²⁴*ibid.*

¹²⁵For a general discussion of these findings in the context of judicial decision-making, see Chris Guthrie, Jeffrey J Rachlinski, and Andrew J Wistrich, 'Inside the Judicial Mind' (2001) 86 *Cornell Law Review* 777; Jeffrey J Rachlinski,

Furthermore, the notion of the virtuous judge as a standard of correctness ought to account for the possibility that the relevant value concepts informing a judge's perception might have been developed in a biased way, favouring a particular social group. To identify and reduce these biases, historical, sociological, and psychological understanding – and perhaps moral theory itself – is necessary.¹²⁶ Extant legal-empirical and ethnographic research into post-decisional judicial phenomenology can also provide critical insights into the extent to which certain groups of citizens profit more from this practice than others.

6. Conclusion

In this article, the relevance and import of Bernard Williams's concept of moral remainders for legal decision-making was outlined. We saw how this concept can illuminate the phenomenology of the loss-addressing dimension of legal decision-making. We also saw how this concept can add to the moral quality of legal decision-making and the legal order as whole. Importantly, moral remainders empower judges to honour the demand of respect that is due to the losing citizen.

It was argued that the relative neglect of moral remainders in legal discourse is partly attributable to legal theory's commensurabilist spirit. It was further argued that the most natural theoretical context for the accommodation of moral remainders is a virtue-ethical approach to legal decision-making. Having identified the implications of this accommodation, we found that these were broadly consistent with a virtue-ethical approach: a welcome situation, as these adaptations ameliorate important concerns that have been raised against this approach. Finally, we identified three issues that must be further addressed if one is to fully integrate moral remainders into a theory of legal-decision-making: defeatism, feasibility, and the standard of correctness.

More generally, this contribution might be read as an invitation to theoretical and empirical legal scholars to pay more attention to the loss-addressing dimension of legal decision-making. In accounting for the moral quality of legal decision-making, there is much more involved than getting the legal answer right.

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Chris Guthrie, and Andrew J Wistrich, 'Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?' (2015) 93 *Texas Law Review* 855.

¹²⁶For the need for a reflective perspective in the construction of value in legal reasoning, see also Boško Tripković, *The Metaethics of Constitutional Adjudication* (Oxford University Press 2017).