Richard Mailey

Political Liberalism and Civil Disobedience: The Morgentaler Affair Revisited*

Preliminary Note:

As may be guessed from the title of this paper, its focus is on the problem of civil disobedience from the perspective of political liberal theory. This may seem to mark a focal shift within the present volume: from the institutions (and procedures) with which many of the papers in this volume are concerned, to the individuals living under those institutions. What links these two perspectives (and what hopefully justifies the place of this paper in the present volume) is a shared concern for the problem of how liberalism ought to respond to the material and manifest suffering that persists on the fringes of even the most apparently civilized society. In particular, the paper wonders how liberals might respond to material and manifest suffering when doing so will most likely require the pragmatic suspension of our commitment to other, core ideals of liberal theory – specifically the ideals of respect for reasonable pluralism, and fidelity to law. My hope is not only that this unifying concern justifies the more marginal shift in focus undertaken in this paper, but also that the present volume can benefit – if only very slightly – from such a shift in focus.

I. Introduction

The following paper examines the legacy of *Dr. Henry Morgentaler* – a Polish-born physician who repeatedly and blatantly violated anti-abortion laws in *Canada* by operating unaccredited abortion clinics across a number of provinces – in light of recent works by the renowned liberal legal theorist, *Frank Michelman*. *Professor Michelman* is perhaps best known as an advocate of political liberalism, a branch of liberal philosophy made popular by the great *John Rawls*. Although his political liberalism (referred to as PL hereafter) runs pretty close to the Rawlsian version, Professor *Michelman* sets himself apart by adopting a slightly more conservative approach to the question of when and to what extent we are obliged to obey an apparently unjust law. At the risk of oversimplification, his position is that the apparent injustice of a law has basically no bearing on our moral duty to obey it, except insofar as the injustice of that law can be seen as symptomatic of the moral bankruptcy of the wider governmental system. This

* *Richard Mailey* is a doctoral researcher at the University of Luxembourg. Sincerest thanks go to Jeff Ellsworth, Brian Nail, and Johan van der Walt, for their extremely helpful comments on earlier versions of this paper. Thanks also to Frank Michelman, for responding – with the greatest patience and seriousness – to the main thoughts presented in this paper when he visited Luxembourg in November 2013. On this point, I should stress: all subsequent criticisms are made with the greatest respect, and the greatest appreciation, for Professor Michelman and his work.

position seems to clash quite sharply with the position adopted and practiced by *Morgentaler*, who repeatedly disavowed the clear terms of the *Canadian Criminal Code* (the CCC hereafter) as a means of responding to the injustice of those terms only. As he put it, his flagrant violations of the CCC amounted to a:

> *…statement on my part that I know what is the right thing to do and I will do my part in helping a minority of people who were discriminated against and made to risk their lives at the hands of incompetent people and charlatans.*[1]

So: *Morgentaler* "knew" what was right, and he acted accordingly. While many liberals may greet this attitude with admiration, the political liberal, like *Rawls* or *Michelman*, will be a little less impressed. In fact, from a PL viewpoint, we could even say that *Morgentaler* was guilty of committing one of the cardinal sins of democratic civic life: the sin of acting from a "zeal to embody the whole truth in politics."[2] As *Rawls* explains:

> *For… [some]… the political relation may be that of friend or foe… or it may be a relentless struggle to win the world for the whole truth. Political liberalism does not engage with those who think this way. The zeal to embody the whole truth in politics is incompatible with an idea of public reason that belongs with democratic citizenship.*[3]

Bearing this statement in mind, the aim of this paper is to ask whether PL really has no way of engaging with people like *Morgentaler*. It will ultimately argue that the version of PL that we find in the recent work of *Professor Michelman* is flawed precisely to the extent that it fails to adequately engage with the civilly disobedient acts and attitudes of *Morgentaler*. It will then offer one hopefully plausible way of reworking the *Michelmanian* perspective with the aim of 1) accommodating or at least engaging with the kind of conscientious lawbreaking that was practiced by *Morgentaler*, and 2) doing so in a way that leaves the moral foundations of PL basically unscathed. Without further ado then, I begin directly below with a brief, admittedly selective retelling of the *Morgentaler* affair, starting with his first forays into public life as a member of the *Montreal Humanist Fellowship*.

1 See Morgentaler's obituary in the Toronto Globe and Mail, at http://www.theglobeandmail.com/news/national/abortion-rights-crusader-henry-morgentaler-revered-and-hated-dead-at-90/article12221564/?page=all.
2 John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765, 767 (1997).
3 Id. at 766-767.

II. The Morgenatler Affair[4]

Dr. Henry Morgentaler became involved in the *Canadian* abortion debate when he joined the *Montreal Humanist Fellowship* in 1963. He appeared for the first time before a House of Commons Committee a mere four years later, arguing fervently that a woman's right to a safe abortion should not hinge on the question of whether her own wellbeing would be threatened by the continuation of her pregnancy. The result of this brazenly public showing of pro-choice solidarity was that pregnant women started visiting *Morgentaler* at work, "begging him,"[5] pleading with him, to safely terminate their unwanted pregnancies.

After a brief period of hesitance and refusal, *Morgentaler* eventually gave in and performed an abortion for a friend's daughter in 1968. His 2013 obituary in the *Toronto Globe* and *Mail* charted this up to his later admission that he felt "like a coward and a hypocrite…"[6] for failing to take firm (and, to his mind, necessary) action in the name of a cause that he championed so vocally. Perhaps it was this aversion again – to cowardice and hypocrisy – that brought *Morgentaler* to open a private abortion clinic in *Montreal* the following year. The CCC had then only recently been amended to legalize abortion, for the first time in Canada, under a limited range of circumstances: specifically where a special three-doctor committee at an accredited hospital determined that the procedure was necessary to safeguard the health of the mother. The problem, though, was that the amended CCC made the establishment of these committees – the committees required to legally green light abortions – permissible rather than mandatory. This enabled individual hospitals to shun the new program, and their doing so inevitably left a great many women in *Canada* with no means of procuring a safe abortion. For *Morgentaler*, the choice that remained for (especially poorer) women was a disgraceful one: on the one hand, they could carry their pregnancy to term, potentially at the expense of their physical or mental health; or, on the other, they could venture blindly into the world of the "murderously dangerous back-alley."[7]

Having tried unsuccessfully to secure the legally required accreditation, then, *Morgentaler* nevertheless went on to perform thousands of illegal abortions at his newly opened clinic over the following years – continuing to work tirelessly even after he was arrested and charged with "procuring the miscarriage of a female person,"[8] in 1970. As if the manic continuation of his work was not daring enough, *Morgentaler* actually admitted publicly – after his arrest – to his work as an "unaccredited" and hence illegal abortionist, thereby setting himself up for what would turn out to be a breathtakingly

4 Much of the information in this section comes from Morgentaler's obituary in the Toronto Globe and Mail, at http://www.theglobeandmail.com/news/national/abortion-rights-crusader-henry-morgentaler-revered-and-hated-dead-at-90/article12221564/?page=all – herafter cited as "Globe and Mail," para. x. See also Bernard M. Dickens, *The Morgentaler Case: Criminal Process and Abortion Law*, 14 Osgoode Hall L. J. 229 (1976) for an excellent, thorough analysis of the legal issues surrounding the early phases of the Morgentaler affair in Quebec.

5 See again: Globe and Mail, para. 19.

6 Id. at para. 19.

7 This phrase is lifted from a piece on Morgentaler in the New Yorker – Adam Gopnik, "Good Faith," available at http://www.newyorker.com/news/daily-comment/good-faith.

8 See Morgentaler v. The Queen, (1976) 1 SCR 616.

protracted battle with the law. Indeed, "breathtakingly protracted" is probably too mild a formulation, because the battle would run on for a scarcely believable and presumably toll-taking twenty years – leaving aside the relatively minor battles that *Morgentaler* fought in excess of these years.

At his first trial – which was delayed until 1973 – *Morgentaler* convinced the jury that he was not guilty by reason of necessity. However, the Court of Appeal then took the unprecedented step of overturning directly rather than ordering a retrial, and, when the *Supreme Court of Canada* upheld this somewhat curious CoA decision, *Morgentaler* found himself jailed for (what turned out to be) ten months. This is where things get a little dense and blurry. Two more sets of charges were laid, and two more trials were fixed – one taking place while *Morgentaler* was still in jail, the other one after he was released. Once again, both juries voted to acquit, leaving the provincial government with little choice but to end its enforcement of the CCCs abortion rules. *Morgentaler*, then, had seemingly won. He had beaten the *Quebec* government into submission, and had earned the ability (if not the right, per se) to operate his *Montreal* clinic without fear of criminal sanctions. This could well have been the end of the story. Indeed, for most people it would probably have been an acceptable and thankful way to the end the story. But as it turned out, *Morgentaler* was not like most people.

I will not go into too much detail from here on in. Suffice it to say only the following. *Morgentaler* spent the next decade opening up and operating clinics in two other Canadian provinces: *Ontario* and *Manitoba*. The *Quebec* government may have grown weary of fruitlessly prosecuting violations of the CCCs abortion framework, but *Ontario* and *Manitoba* were evidently up for the fight, as (*of course*…) was *Morgentaler*. Things finally came to a head in 1988 when the *Supreme Court of Canada* reviewed – or re-reviewed, actually – the constitutionality of the CCC rules on abortion, specifically in relation to charges brought against *Morgentaler* in *Ontario*. The question before the court was whether the CCCs abortion rules violated section 7 of the new *Canadian Charter of Rights and Freedoms* – a provision guaranteeing all persons a constitutional right to liberty and security of the person. The majority opinion, written by *Chief Justice Dickson*, declared that the CCC rules constituted a "profound interference with a woman's body and thus an infringement of… [her] security of the person."[9] Finding no legally recognizable justification for the infringement, the majority (5-2) proceeded to strike down the CCC framework as unconstitutional, thereby handing a long-awaited, hard-fought victory to *Morgentaler* and his supporters.

Although the SCC decision stopped short of granting a woman anything like a constitutional right to an abortion, the legal void that was left – and that remains even today – has amounted in some ways to roughly the same thing. We can ask whether this served as a retroactive justification, or vindication, of everything that *Morgentaler* did, but I sense that this makes things a little too easy. To explain: when *Morgentaler* took his first leap into the unknown, when he performed that first, secret abortion for the daughter of his friend, he had no way of knowing – as he later claimed (rather brashly) to have known – that he would land on the right side of history. The right side of history here is of course not the side of moral truth, but the side of the victors: the side of those who were dogged enough, or just lucky enough, to get their moral preferences stitched onto

9 R v. Morgentaler, (1988) 1 SCR 30.

the *Canadian Constitution*. This paper will have nothing to say about that *Morgentaler*, the dogged and/or lucky victor. Rather, it will focus exclusively on the *Morgentaler* of the late 1960 s: the one who leapt into the dark, holding only his own, delicate sense of what was right.

This is where we can bring PL and *Michelman* into play. As will shortly be explained, the PL that we find in the work of *Professor Michelman* does not exactly flatter *Morgentaler*. The problem, as already suggested, is that his actions seem to reflect what we might call a sense of counter-democratic conceit: a zeal to inflict his own morality on the world, over and above the will or beliefs of the various provincial communities – and, indeed, the wider national community – in which he worked. To clarify this assessment, we can now look at what *Professor Michelman* actually says about our duty (as democratic citizens) to obey the law. A note of caution, first, though: the remarkable sense of openness that *Professor Michelman* brings to everything he writes means that his theoretical stances and positions are rarely more than momentary resting places. As *Robert Post* puts it:

> *Frank is… indirect, and tentative. His archetypical article worries a question. And when I say worries, I mean the way that a terrier might worry a rat – by turning it over every which way… and by tasting its every implication. In the end, Frank may (or as likely may not) reach some provisional conclusions… [but will in the meantime have offered]… wisdom in the service of a passionate fidelity to the intractable complexity of legal issues.*[10]

I must stress then, from the outset, that the following presentation of *Michelmanian* PL and what I am calling the *Michelmanian* test is tied only to a theoretical position that can perhaps be gleaned from *Professor Michelman's* 2003 paper, *Ida's Way: Constructing the Respect-Worthy Governmental System*. My discussion, then, will be based on an admittedly loose construction of a theoretical position that may or may not be that of the real *Professor Michelman*, today. I hope and trust that the reader will bear this qualification in mind as we proceed.

III. The Michelmanian Test

Before looking directly at the work of *Professor Michelman*, let us begin with a few words about PL in general. In short, we can say that PL is ultimately built on two ideas. The first is an observation: namely that modern, democratic societies are indelibly marked (and perhaps even defined by) what *Rawls* calls "the fact of reasonable pluralism,"[11] which basically means that modern, democratic societies are riven by deep but reasonable disagreements over the nature of moral truth. The second is something more like a moral intuition: the intuition, or perhaps the culturally embedded assumption, that we generally ought to "shy away from… [the] coercion, of ourselves and of others,"[12]

10 Robert Post, *Provocation: Frank's Way*, 125 Harv. L. Rev. F. 218, 218 (2012).
11 This phrase is used constantly throughout John Rawls, Political Liberalism (1993).
12 Frank Michelman, *Ida's Way: Constructing the Respect-Worthy Governmental System*, 72 Fordham. L. Rev. 345, 352 (2003).

and that we can achieve this – albeit imperfectly – by treating others according to standards that we sincerely believe they would affirm, assuming that they consider those standards not only rationally (i.e. from the perspective of how best to advance their own, personal ends) but also fair-mindedly or reasonably. The combination of these two ideas – the observation of reasonable pluralism, and the *Kantian* thought that we should treat others in ways which align with their own rational and reasonable interests – raises a rather stark problem regarding our relationship with the law. The problem is that if citizens in democratic societies disagree about the nature of the good, then they will also disagree about the goodness or justness of particular laws. This brings us to the following question: how can we respond non-coercively (as political liberals believe that we must) to someone who disagrees vehemently with a law on sincere moral grounds? How can we tell them – *without telling them, as such* – that they must obey?

This is where we can turn to the work of *Professor Michelman*, specifically by looking at the answer that he gives to the above questions in his paper, *Ida's Way*. During the early phases of his argument, *Michelman* sides almost completely with his great PL precursor, *John Rawls*. His (or rather, their) general position is that we have good reasons for obeying all laws – including ones that we find morally abhorrent, or grossly unwise – on the grounds that:

> *...only on the condition of (more or less) everyone's guaranteed compliance (most of the time) with all of the laws can inhabitants secure to themselves and their fellows a package of very great moral goods of political union, through their practice of legal ordering or government by law.*[13]

This quote rests on two basic assumptions. The first is the assumption that "legal ordering… is a very good thing, morally,"[14] in the sense that it carries "inestimable benefits, for everyone affected, of social pacification, cooperation, coordination, and justice."[15] The second is the assumption that:

> *...no practice of government by law can succeed in delivering its vaunted moral goods without the persistence in society of widespread inclinations to comply voluntarily with the laws (and legal interpretations) that issue from the practice… [and] without an experientially justified expectation on the part of each participant that the others – most of them, most of the time – will play by the rules…*[16]

So to oversimplify things a bit, the existence of a liberal-democratic legal system makes all our lives better, provided that we adopt a general, observable attitude of respect for every law of the system, and provided that each of us senses the presence of this same attitude in most others. These are the unabashedly *Hobbesian* moves in *Michelman's* work, heralding the necessity – or the moral reasonableness – of a general posture of deference to the well-structured, better-than-all-the-alternatives system.

What, though, is the well-structured system, for *Michelman*? It is obviously not the realm of the all-powerful, dictatorial leviathan, as it was for *Hobbes*. No: for *Michel-*

13 See id. at 347.
14 See id. at 352. .
15 See id. at 352.
16 See id. at 353.

man, the well-structured system, the properly liberal system, is one that is demonstrably faithful to the moral sentiment that is at the heart of political liberal thinking – namely that we should always try to treat one another non-coercively. In the work of both *Rawls* and *Michelman*, the concrete formulation of this orienting sentiment is the "liberal principle of legitimacy"[17] – a moral principle according to which:

> *...our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.*[18]

Note: in his *Ida's Way* paper, *Professor Michelman* distinguishes between his own version of this principle and the more substantively thick one proposed by *Rawls*. This is important, but for the moment, we can leave it to one side and consider the principle of liberal legitimacy more generally. The basic idea is that, if we feel squeamish about the use of state coercion, like *Rawls* and *Michelman*, then we will have to find ways of explaining to those who disagree with particular laws (and, due to the aforementioned problem of reasonable pluralism, it is assumed that there will rarely be a shortage of such disagreements in democratic societies) why it is nonetheless in their interests to accept and comply with those laws. The liberal principle of legitimacy answers: you should obey such laws because – or rather, if – they are linked to a constitution that is acceptable to you as a reasonable (i.e. cooperative) and rational person. In other words: you should obey such laws because you sincerely believe that the constitution from which they stem is good enough to be preserved, and because you recognize (via the *Hobbesian* arguments presented above) that your failure to comply with even a single law will detract from the project, to which you therefore ought to be committed, of preserving your preservation-worthy or "respect-worthy"[19] constitution.

We have a clear deflection, then, from the suspect law to the constitution. In other words: rather than asking if a law is just, we ask the much more meagre question of whether it complies with the terms of a legitimate or "respect-worthy" constitution. As *Michelman* puts it:

> *The aim is... a constitution whose terms are such that they allow you or me to say, with a clear conscience, that any law whose process of enactment and whose content pass muster under the constitution's requirements can ipso facto be deemed a law with which all within range have good enough reason to comply...*[20]

We need to be specific here though, and to ask: what might such a constitution look like? Well, this is really where *Michelman* begins to tiptoe away from *Rawls* – specifically by suggesting that the *Rawlsian* principle of legitimacy "may yield too thick a conception of the governmental system in place to support a political-liberal legitimation project."[21] To explain: the problem is that *Rawls* requires that the "essentials" of the

17 See Rawls, *supra* note 11, at 137.
18 See id. at 137.
19 See Michelman, *supra* note 12, at numerous points – at 346 for example.
20 Frank Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, Int'l. J. Const. L. 663, 686 (2008).
21 Michelman, *supra* note 12, at 360.

constitution be minimally decent, and, for *Michelman*, this condition is every bit as likely to provoke disagreement amongst reasonable citizens as the question of whether a particular law is minimally decent. *Michelman* tries to solve this problem by doing two things: 1) by shifting focus away from the constitution, narrowly defined, to the wider governmental system, and 2) by lowering the bar of legitimacy so that, rather than asking whether the essentials of the constitution are minimally decent, we ask simply whether the system avoids being completely defined by its failings – whether its oh-so-inevitable creases can be ironed out by a *Dworkin*-esque reconstruction:

> *Every Ida… [i.e. every conscientious citizen] who attaches great moral importance to the general goods of union has strong, moral reasons to wish for a favorable judgment regarding the respect-worthiness of the system-in-place as she reconstructs it. All reasonable Idas, therefore, have reason to be tolerant of what they see as moral mishaps in the systematic history – specifically, by writing off those mishaps as mistakes.*[22]

Before critiquing this somewhat conservative sentiment, I should make clear that it stems from quite legitimate concerns. In particular, what concerns *Michelman* is the need to construct a test that will result in the vast majority of reasonable citizens coming to the same conclusion, but that will nonetheless give us some substantive content to work with. To explain: on the one hand, his worry is that citizens applying the *Rawlsian* test will disagree about whether the essentials of their constitution are morally solid, and that the *Rawlsian* test will therefore simply reproduce the problem of disagreement, or of reasonable pluralism, at a new level. On the other hand, his worry is that a purely procedural standard, like one that merely requires laws to be valid, will ultimately leave us with no moral recourse at all against the very severe injustices that a government might impose on its citizens. His test, then, is a middle ground between two extremes: the overly substantive and therefore potentially controversial terms of the *Rawlsian* test, on the one hand, and the toothlessness of a purely procedural test, on the other. This gives us a hybrid test, with a procedural component, whereby the questionable law must be constitutional, and a substantive floor, whereby the wider system must be minimally preservation-worthy.

How might all of this be applied to *Morgentaler*? Well, let us start with the general bit, the substantive floor. On this point, I doubt whether there are any even mildly compelling arguments by which we might cast the *Canadian* system of the 1960 s as unpreservation-worthy. To be sure: we can argue that the CCCs abortion framework was severely unjust, and severely detrimental to the interests of *Canadian* women, but, according to *Michelman*, we have good reasons for accepting such injustices as tolerable mistakes – blips within an otherwise legitimate system of governance by law. Assuming that these good reasons would be decisive (as *Michelman* suggests they usually should be) we are then left with the question of whether the CCC rules were constitutional. We could, I think, argue quite cogently that they were not. After all: the CCC rules were eventually declared unconstitutional by the SCC on the grounds that they violated the security of the person provision of the *Canadian Charter*, and, although the *Charter* was not enacted until over a decade after *Morgentaler* opened his first clinic in *Mon-*

22 Id. at 364.

treal, security of the person was nonetheless already protected by the 1960 Canadian Bill of Rights. In other words: there were already compelling grounds for concern over the constitutionality of the CCC rules when Morgentaler open his first clinic.

This brings us to an ambiguity though, specifically relating to the question of when exactly a law becomes unconstitutional, both in *Canada*, and for *Michelman*. Regarding the former, the answer is very simple: a law only becomes unconstitutional when a *Canadian* court of law declares it to be so. Granted, once it is so declared, the law may be made retroactively void from the moment of its enactment, *ab initio*. But lacking or pending this declaration, the law is fully constitutional, assuming that it does not obviously (in a way that is basically unquestionable) flunk the more basic tests of procedural validity.

The question, then, is whether *Professor Michelman* agrees with this approach, and I think it is quite plausible to say that he does. As already noted, the problem that *Professor Michelman* finds with the *Rawlsian* legitimacy test is that citizens holding different comprehensive moral doctrines will most likely disagree over the adequacy of constitutional essentials. The question of constitutionality – even as it diverts our attention from the justice of the law to the more technical issue of its legality – nonetheless leaves us with the same problem. As *Professor Michelman* says:

> *…[a constitutionality test]… cannot be a self-applying rule. Its correct application to testing cases can no more be certain or self-certifying – can no more be proof against the ravages of disagreement – than all out justice itself. It seems… [then]… that no liberally satisfactory such standard can possibly be framed with both sufficient breadth to serve as a widely acceptable clause in a public contract on legitimacy, and at the same time sufficient closure to fend off good-faith interpretative controversy at the point of application…*[23]

To remedy this problem, *Michelman* proposes the very same solution that I have described above with respect to *Canada*, namely the establishment of a "dedicated institutional service"[24] – typically but not necessarily a court of law – with exclusive domain over questions of constitutionality. So: for *Michelman*, the whole purpose of framing legal legitimacy in terms of constitutionality is to promote cross-community agreement, and this is only really plausible if decisions on constitutionality are reserved exclusively for a by and large trusted institution, like a court of law or a parliamentary committee or whatever.

If I am right on this point, then, for the individual citizen, the *Michelmanian* test is really designed to boil down to just one question: the question of whether the system as a whole is minimally preservation-worthy. And, as we have already seen, the whole point of this question is that it will most likely provoke a uniform and affirmative nod, which is to say that it enables the vast majority of liberal citizens (assuming that they accept some version of the *Hobbesian* theses on which *Professor Michelman* bases his theory) to unite in a collective embrace of their system, and to tolerate injustices – even relatively severe ones – in the name of the gleaming goods of governance by law.

23 Frank Michelman, *Legitimacy, The Social Turn, and Constitutional Review: What Political Liberalism Suggests* (at 18) – September 2014 draft of the paper presented in this volume.

24 Id. at 19.

So: *Morgentaler* fails. Or at the very least, he seems to fail, according to my necessarily partial rendering of the *Michelmanian* test. Must he fail, though, as a consequence of the deeper principles of political liberal theory? Indeed, is it not possible that his characterization as a failure (and perhaps even as a criminal, or an outlaw) actually runs against the grain of these deeper principles of political liberal theory? These are the questions that we must now confront, and we can turn to them presently in the final section of the paper.

IV. Soulful Liberalism

As already mentioned, the two key ideas at the core of political liberal theory are: 1) that disagreement is and always will be rife in democratic societies – that it is part of the defining fabric of such societies – and 2) that (so far as possible) nobody should be coerced into doing things that are against their interests as rational and reasonable persons. The question that we must now address is whether we can endorse these ideas without being compelled to condemn *Morgentaler*. And I strongly believe that we can. To explain: I had suggested earlier on that Morgentaler can be accused of committing one of the cardinal sins of democratic civic life – the sin of conducting one's public affairs in accordance with one's own, personal truth, without due regard for others who disagree with that truth on perfectly reasonable grounds. In terms of the two core ideas mentioned above: 1) given the fact of reasonable pluralism, we know that our personal, moral truths will never garner community-wide approval, and, 2) assuming that we hope (as political liberals) to engage with others on terms that they agree with, we should be hesitant, and extremely hesitant at that, about violating public norms (i.e. laws) on the basis of our own, personal sense of morality.

This is not the only way to interpret the *Morgentaler* affair, though. Another way of seeing it might run like this: *Morgentaler* was acting out of a conception of public or shared morality (as opposed to personal, private morality) that he felt was poorly reflected and, indeed, torn up by the CCC rules on abortion. This is actually the model of legitimate civil disobedience that was presented in the earlier work of *John Rawls*. As he puts it:

> *By engaging in civil disobedience one intends… to address the sense of justice of the majority and to serve fair notice that in one's sincere and considered opinion the conditions of free cooperation are being violated. We are appealing to others to reconsider, to put themselves in our position, and to recognize that they cannot expect us to acquiesce indefinitely in the terms they impose on us.*[25]

The idea here is that, if civil disobedience is a sincere attempt to mount an internal critique of public practices – i.e. a critique that is based on values that can plausibly and reasonably be seen as shared, rather than an external one that takes issue with public practices for their failure to embody one's own sense of what is right, or good – then it no longer sets itself above others who support those practices. Rather, it places itself alongside them, specifically insofar as it attempts to open up a dialogue over the precise

25 John Rawls, A Theory of Justice 335-336 (1999).

nature of deeper community values. In other words: it can be seen as holding up a certain "higher" will of the people (a more fundamental, constitutional will, perhaps) as a check on particular laws that are enacted in accordance with the "lower"[26] will of simple legislative majorities. What, though, might be the public or higher principle upon which *Morgentaler* based his actions? Well, to answer this we can return to the quote from *Morgentaler* that was presented at the beginning of the paper, in which he claimed that his lawbreaking amounted to:

> *...a statement on my part that I know what is the right thing to do and I will do my part in helping a minority of people who were discriminated against and made to risk their lives at the hands of incompetent people and charlatans.*

There is really nothing in these lines that necessarily implies a zealously pro-choice position. To explain: *Morgentaler* seems to be specifically decrying the fact that the difficulties that the CCC rules created for many women seeking to procure abortions drove some (and perhaps many) women, desperate and scared, to place their lives in the hands of unskilled, unregulated, back-alley abortionists – "incompetent people and charlatans" as *Morgentaler* says. In other words: the restrictiveness of the CCC rules (along with the failure of many hospitals to use their powers under the CCC rules to green light abortions where necessary) did not prevent women from seeking to abort, but only from doing so safely. *Morgentaler*, then, was not necessarily acting as a pro-choicer, even if he was (as he surely was) a devout pro-choicer. Rather, *Morgentaler* may (and I stress: *may*) be seen as the servant of a far more modest, fundamental, and crucially public principle – something like a principle of care or protection, by which the state is obliged to take reasonable steps to protect at-risk citizens. Is this really a controversial principle? And more importantly are there not good grounds for seeing the CCC framework, against which *Morgentaler* railed, as amounting to a serious violation, or perhaps more a catastrophic forgetting, of this principle?

I say no to the first, and yes to the second question. What about *Michelman* though? Well, assuming that we accept (for now) the *Michelmanian* test as a rough equivocation of his position, I think it is reasonable to assume that he would be very hesitant to admit an exception, as *Rawls* did, for persons who disobey laws because they believe them to run counter to a reasonably and sincerely held conception of public (rather than private) morality. I say this for at least three reasons. The first is that the *Michelmanian* test, as I have framed it, accords no relevance to the injustice of particular laws – except where that injustice seeps into and pollutes the whole system, which is almost certainly not the case with *Canada* in the 1960 s. The second is that *Michelman* is markedly more sceptical than *Rawls* about the existence of meaningfully thick, shared (i.e. public) values – the species of values that *Rawls* suggests could be appealed to as a means of legitimating (and democratizing) civil disobedience. Last of all, the third reason is linked to the *Hobbesian* theses lying at the very core of *Michelman's* argument: *Michelman* is simply too awed by the goods of governance by law – and has too keen a sense of the fragility

26 I am thinking here of the distinction that Bruce Ackerman makes between constitutional and ordinary politics when he invokes the concept of dualist democracy. See Bruce Ackerman, We THE People: Foundations especially at 3-33 (1991).

of those goods – to defend lawbreaking in any but the most extreme cases of endemic or systematic injustice.

Now I sympathize with and to some extent share all of these concerns. But I have another, slightly more burning concern, and that is with the women who may have suffered if not for *Morgentaler's* interventions. If *Morgentaler* had applied the *Michelmanian* test, and had arrived at the same conclusion that we have arrived at, then what would have become of these women; these women whose mental and physical wellbeing was (seemingly) written off by the *Canadian* government as being ripe for sacrifice? There is of course no definitive answer to this question. All we can say – quite reasonably I hope – is that it is a question that somebody like *Morgentaler* might want to think about, and think about seriously. After all: lacking this question, what does political theory become? The answer is probably that it becomes a formula, a cold, dead rule to be held up without due regard for the lives that can be burned down by its formal application. This is not the kind of theory that I associate with *Professor Michelman*, even if there are hints of it in the *Michelmanian* test. I am therefore quite confident that, even if his concerns about law and democracy and reasonable pluralism cajole him in the other direction, he would nonetheless endorse some sort of exception to the *Michelmanian* test presented in this paper. That might run along the lines of the *Rawlsian* exception, legitimating civil disobedience where it is based on a reasonable and sincere interpretation of public values. Or it might be something more specific and minimal, like an exception solely for disobedience that strives to abate serious human suffering.

Whatever the exception, an exception is sorely needed. It simply cannot be that all laws merit our respect, up until the point where the system itself no longer merits our respect. To say this – to say it without exception, as *Professor Michelman* frequently seems to say it – would be to endorse the sacrifice of a few (and perhaps even of a very great many) in the name of the smooth and superficially respectful functioning of liberal democracy. I say "superficially respectful," because the form of respect that would come with such a theory and with such a test would be purely formal, with an absolute dearth of consideration or empathy for the pain of those who fall on the wrong side of the law – in this case the women whose lives stood to be destroyed, wasted, by the smooth functioning of democracy. Granted, *Michelman* is right to be wary of legitimating civil disobedience readily or hastily. But we really have to ask: what does liberalism become when it flatly condemns somebody like *Morgentaler*? When it forgets about or neglects the real, material suffering of even a very scarce few?

The answer is that liberalism loses its soul; the flicker of authentic concern that connects it to the material world, and to the material reality of human suffering. On this point, *Judith Shklar* once wrote that liberalism ought to be fundamentally defined in opposition to cruelty – "the worst"[27] of the vices. The worry that I have tried to express in this paper is that the *Michelmanian* test – and I stress again that I do not see the *Michelmanian* test as an accurate expression of the views of *Professor Michelman*, but only as a gathering of theoretical threads that can be found in one corner of his work – forgets this. Granted, it has good reasons for forgetting this – reasons that are linked to

27 See Judith Shklar, Ordinary Vices 7-44 (1984). Perhaps the best expression of Shklar's views on this point, though, can be found in Judith Shklar, *The Liberalism of Fear* – in Nancy Rosenblum, Liberalism and the Moral Life 21-38 (1989).

the promotion of our dearest democratic ideals. But, to the extent that privileging these reasons requires us to abandon some individuals or groups to abject suffering and pain, liberalism starts to lose its soul. As *Rawls* said, with so much force and poise:

> *A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many.*[28]

This passage is for me the perfect expression of what we might clumsily refer to as soulful liberalism. To explain: endowing one's theory or conduct with liberal soul means (as *Rawls* suggests) keeping a caring eye fixed on each and every individual, regardless of the benefits that can be reaped by occasionally closing that eye. A test that flatly condemns somebody like *Morgentaler*, somebody who goes out on a limb in the name of the at-risk or vulnerable individual, is a test that closes its liberal eye. And so: this test needs an exception, a way of keeping the liberal eye open, even if this runs the risk (and remember, it is after all only a risk) of detracting from other, very great and quite rightly exalted goods of governance by law.

V. Conclusion

In this paper, I have suggested that the condemnation of *Henry Morgentaler* that is implied by what I have called the *Michelmanian* test is overly harsh, and that the *Michelmanian* test therefore needs to be supplemented by a narrow but sufficiently toothy exception – one that ensures that our analysis of civil disobedience does not turn a blind eye to those who stand to suffer within the smooth, unnervingly seamless functioning of the law.

Before signing off, though, I want to issue one last proviso. The proviso is that, as far as I am concerned, nothing in this paper is meant as a declaration of fidelity to the pro-choice movement, or as an absolute defense of *Henry Morgentaler*. On this point, I must remind the reader that I have not actually suggested that the *Michelmanian* test is flawed because *Morgentaler* does not pass it, but only that it is flawed because it seems to condemn him too quickly and flatly. The question is therefore open, for the reader, as to 1) whether *Morgentaler* should still not pass an appropriately amended version of the *Michelmanian* test, or 2) whether his passing of that test signals the need for an exception to the already suggested exception. All I mean to say here is that a disobedient act's capacity to abate human suffering really should be factored in by any test purporting to assess the liberal defensibility of that act. Whether the abatement of suffering at issue here is itself a monstrous or even murderous act… the reader must decide for themselves.

28 See Rawls, *supra* note 25, at 3-4.