“With Me, It’s All er Nuthin’”: Formalism in Law and Morality*

Larry Alexander†

My thesis is simple: Law is essentially formalistic, and morality is not in the slightest degree formalistic. My plan to establish this thesis is as follows: In Part I, I define what I mean by formalism. In Part II, I present my argument for why law is essentially formalistic. I maintain that the problem law is meant to solve is that of information, not immoral motivation—that men are not gods, rather than that men are not angels. To solve this problem, law must consist of determinate rules. Standards are unhelpful. And theories of law such as the “justice-seeking Constitution” or other heavily moralized versions of constitutional or statutory interpretation recreate the very problem law is meant to solve.

In Part III, I identify the basic dilemma that formalistic law presents and then canvass various methods that have been advanced as solutions to that dilemma. The dilemma raises the question whether formalism, and hence law, is a possibility for fully rational agents who understand its nature. In Part IV, I turn to morality. Here, in opposition to a thesis recently advanced by Leo Katz,¹ I argue that formalism is completely absent from morality, despite some appearances to the contrary. Deontological side constraints are not formalistic rules and do not function as such. Finally, in Part V, I raise not the question whether formalistic law is possible—the problem of Part III—but the question whether formalistic law is by its very nature a violation of deontological side constraints. I conclude that law may turn out to be a moral possibility only for consequentialists.

* From Richard Rodgers and Oscar Hammerstein II, *All er Nuthin’*, in *Oklahoma!* (Williamson Music 1943), reprinted in *Six Plays by Rodgers and Hammerstein* 7, 66-67 (Random House 1959).

† Warren Distinguished Professor, University of San Diego School of Law. I would like to thank Emily Sherwin for her many contributions to this project and the participants and audience at the Symposium *Formalism Revisited* for their helpful comments.

¹ Leo Katz, *Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law* (Chicago 1996).

I. WHAT IS FORMALISM?

I can be brief here. By formalism I mean adherence to a norm's prescription without regard to the background reasons the norm is meant to serve (even when the norm's prescription fails to serve those background reasons in a particular case). A formalist looks to the form of a prescription—that it is contained in an authoritative rule—rather than to the substantive end or ends that it was meant to achieve. A norm is formalistic when it is opaque in the sense that we act on it without reference to the substantive goals that underlie it.²

II. WHY LAW IS ESSENTIALLY FORMALISTIC

In a forthcoming book, Emily Sherwin and I make the following case for the moral function of formal rules.³

A. The Circumstances of Law

1. Disagreement, uncertainty, and authoritative settlement.

Imagine a small community whose members have roughly similar views about their moral rights and obligations. At least, their views are fairly similar if we characterize them at a high level of generality. Thus, they generally agree that innocent lives should not be taken, that property rights should be respected, that promises ordinarily should be kept, that undue risks to others should be avoided, and that everyone should contribute a fair share to support actions necessary for the common good. In other words, they agree about moral rights and duties at the level of abstraction at which you, the readers, tend to agree with each

² Formalism as I am defining it—strict adherence to the prescriptions of norms without regard to the substantive goals those norms are meant to achieve—must be distinguished from something else that often goes by the name “formalism” but that I would call “conceptualism.” A conceptualist is one who believes that specific norms can be deduced from the form of various transactions. Thus, for example, a conceptualist might maintain that a “tort,” by virtue of its nature, must of necessity be governed by a fault standard and cannot be governed by norms chosen, say, to advance allocative efficiency or distributive justice. The sense of formalism that I am invoking here is not that of the conceptualists, as I understand them. See, for example, Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale L J 949, 951 (1988) (“Formalism postulates that law is intelligible as an internally coherent phenomenon.”). For an excellent account of formalism *qua* conceptualism, see Stephen R. Perry, *Professor Weinrib's Formalism: The Not-So-Empty Sepulchre*, 16 Harv J L & Pub Pol 597 (1993).

³ Larry Alexander and Emily Sherwin, *Past Imperfect: Rules, Principles, and the Dilemmas of Law* ch 5 (Duke forthcoming 1999).

other. In addition, imagine not that everyone in this community is a saint, but that everyone will honor his moral obligations *as he sees them* almost all the time. In other words, the members of this community are strongly motivated to act morally toward one another.

This community so far sounds pretty idyllic. Nonetheless, as favorably situated as this community is in terms of general moral agreement and good will, it lacks something necessary to prevent ruinous discord. It lacks authoritative rules.

Let me explain. I have said that the members of this community generally agree about the content of their moral rights and duties at a high level of abstraction. Yet as the moral questions become more specific—Does a fetus have a moral right not to be aborted? Should one be liable for causing an accident without regard to fault? Should a contractual obligation be extinguished when the purpose of the contract has been frustrated? Should resources be divided so as to reflect differences in welfare? and so on—they begin to disagree.⁴

Moreover, even when they agree about the formulation of moral rights and duties, they might disagree about the facts that govern when and how those moral rights and duties apply. For example, although they may agree that no one should put dangerous pollutants in the water supply, they may disagree over whether a certain pesticide is a dangerous pollutant. Or, if they agree that those in irreversible comas should be regarded as “dead,” they may disagree over whether a certain physical condition constitutes an irreversible coma.

These disagreements can produce considerable strife and turmoil, even among people of good will. Indeed, the road to the nasty, brutish, and short lives of the Hobbesian state of nature does not require people motivated solely by selfishness and predatory opportunism. Moral disagreement over concrete courses of conduct, coupled with the motivation to do the right thing, can lead to the Hobbesian state of affairs as expeditiously as naked self-interest.

What my otherwise rather favorably situated community needs to avert these bleak prospects is a method for resolving these concrete moral disagreements and uncertainties authorita-

⁴ Of course, in real communities, people often agree about what ought to be done in concrete cases even though they disagree about abstract principles. See, for example, Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv L Rev 1733, 1735-36 (1995). When there is such concrete agreement, the community does not require authoritative settlements, which means that it does not require law.

tively. That is, the community needs the capability for *authoritative settlement*.

The term "authoritative settlement" is something of a redundancy. The function of practical authority is precisely to settle the question of what ought to be done. And settlement requires that those for whom the answer is supposed to settle the question treat the answer as authoritative—that is, as if it is correct. Once the question is settled, those who want to know what to do need only consult the terms of settlement. They no longer need to debate the reasons behind those terms. Moreover, not only are they no longer required to consult the reasons behind the settlement in determining how to act, they are also required *not* to heed those reasons even if, from their perspective, those reasons conflict with the terms of the settlement. Given that the objective is a settlement, its terms must be authoritative, which means that the terms must supplant the reasons upon which they are based.⁵

Let me illustrate the previous paragraph with an example. Suppose Paul operates a factory that dumps a certain chemical byproduct into the river. Paula, a downstream water user, believes that the chemical is a dangerous pollutant and wants Paul to stop the dumping. Paul agrees that he has a moral obligation to Paula not to dump dangerous chemicals in the river, but he denies that the chemical is dangerous. Suppose now there is an authoritative settlement of the moral question in dispute, and the answer it gives is that Paul is obligated not to dump that particular chemical. If Paul must decide whether he may continue dumping, he need only consult the terms of the authoritative settlement, which will tell him that he may not. He may continue to believe that the reasons behind the settlement—the dangerousness of the chemical—point to a different result. If the settlement is truly authoritative, however, he will not believe that he may still act on those reasons. The settlement has supplanted them in his decisionmaking.

Without authoritative settlements, community members disagree or are uncertain about such matters as how fast they should drive, when they are relieved from their contractual obligations, and how much they should each contribute toward the support of the community's poor. If Agnes believes one should drive fifty-five miles per hour and on the left side of the road, but Ben believes one should drive seventy-five and on the right, seri-

⁵ See Joseph Raz, *The Authority of Law: Essays on Law and Morality* 24-25, 30-33 (Clarendon 1979); Joseph Raz, *Authority and Justification*, 14 *Phil & Pub Aff* 3, 10 (1985); Joseph Raz, *Authority, Law and Morality*, 68 *Monist* 295, 297 (1985).

ous collisions are likely to result. If Alfred believes that Victor is in an irreversible coma and should be taken off life support, so that the resources used to support him can be used to help others, but Bertha believes that Victor is not in an irreversible coma, Bertha might feel obligated to use force to prevent Alfred from disconnecting Victor. Finally, if Paul mistakenly believes that mercury is not harmful to the water supply, he might be tempted to dump mercury in a river and avoid the costs of an alternative means of disposal. Even if community members do not disagree about morality at an abstract level, concrete disagreements and uncertainties about particular moral principles and factual matters result in the types of disagreements and uncertainties just described. And those disagreements and uncertainties are potentially quite destructive.

Authoritative settlement solves the problems of *coordination*, *expertise*, and *efficiency*. As I am using the term, a coordination problem is any cost that results from moral disagreement or from uncertainty about how others will resolve questions about what they are morally permitted, required, or forbidden to do. Agnes's and Ben's opinions on how to drive may be equally sound, and yet if their opinions differ, and if they are free to act as they see fit, disaster will follow.⁶ Alfred and Bertha's disagreement over the status of Victor leads to a coordination problem because it may result in "moral combat."⁷

Moral combat is a coordination problem, as are attempts by agents to undertake mutually incompatible actions. So, too, are all the costs of upset expectations and the costs incurred to avoid these costs. These latter costs are frequently referred to under the headings of reliance and predictability. I view them as a genus of the species coordination problems.

Any authoritative settlement can solve coordination problems. Declaring Victor to be—or not to be—in an irreversible coma solves Alfred and Bertha's coordination problem. Likewise, declaring the rules of the road to include a fifty-five miles per

⁶ It should be apparent—and so I will not address it at length—that these coordination, expertise, and efficiency problems will arise even in a society all of whose members accept the same basic social morality, and even if that social morality is extremely libertarian. Even in a Nozickian Utopia, where everyone accepts Nozick's libertarian principles and desires to comply with them, human fallibility regarding knowledge of the world together with differing reasonable interpretations of Nozick's abstract principles would give rise to coordination and expertise problems under the best of realistic assumptions, as Nozick himself recognized. See Robert Nozick, *Anarchy, State, and Utopia* 96-101 (Basic Books 1974). See also Jonathan Wolff, *Anarchism and Skepticism*, in John T. Sanders and Jan Narveson, eds, *For and Against the State* 99, 111-14 (Rowman & Littlefield 1996).

⁷ See Heidi M. Hurd, *Moral Combat* (forthcoming Cambridge 1999).

hour speed limit and driving on the right solves Agnes' and Ben's coordination problem—though perhaps no better than a rule of seventy-five miles per hour speed limit and driving on the left. Sometimes the problem is exclusively one of coordination, and all that is needed to solve it is an authoritative settlement, whatever its terms.⁸

Usually, however, there are better and worse ways of settling matters. There is a fact of the matter about whether Victor is in an irreversible coma. There are costs and benefits associated with the choice of a speed limit. In these circumstances, a good solution calls not only for coordination but also for expertise. As for Paul dumping mercury, there is no coordination problem at all. Rather, the problem is Paul's lack of expertise.

Thus, the second benefit produced by authoritative settlements is a reduction in individual decisionmaking error through the authoritative decisionmaker's greater moral and factual expertise. If there are persons in the community whose moral and factual expertise is greater than that of others, then having them authoritatively settle disagreements and uncertainties about what ought to be done solves both the coordination and expertise problems.⁹

⁸ Sometimes it is said that authoritative settlement is necessary for solving Prisoners' Dilemmas. There are two points I want to make about Prisoners' Dilemmas. First, they do not require narrowly self-interested actors. Perfect altruists can face Prisoners' Dilemmas. For example, suppose Altruist One is faced with the choice whether to take a short cut across the grass. If he takes the short cut, he can spend five more minutes with his sick aunt, which will bring her pleasure. He also knows, however, that Altruists Two and Three face the same choice, and that if two cross the grass to spend more time with their sick aunts, the grass will be killed, which will be a greater loss to others than the aunts' gain. If only one crosses the grass, however, the grass will not be killed. Altruists One through Three face an "Altruists' Dilemma" that is parallel to standard Prisoners' Dilemmas. See Frederic Schick, *Making Choices: A Recasting of Decision Theory* 96 (Cambridge 1997); Wayne Eastman, *Telling Alternative Stories: Heterodox Versions of the Prisoners' Dilemma, the Coase Theorem, and Supply-Demand Equilibrium*, 29 Conn L Rev 727, 766-67 (1997).

Second, the problem in both types of dilemmas is coordination. In this respect, however, Prisoners' and Altruists' Dilemmas are no different from the coordination problem faced by Agnes and Ben. Therefore, I shall not treat these dilemmas separately from the general topic of solving coordination problems.

⁹ Many writers have emphasized the coordination function of authoritative rules. See Tom D. Campbell, *The Legal Theory of Ethical Positivism* 6, 50-51, 53, 58 (Dartmouth 1996); Jules Coleman, *Authority and Reason*, in Robert P. George, ed, *The Autonomy of Law: Essays on Legal Positivism* 287, 304-05 (Clarendon 1996); Neil MacCormick, *The Concept of Law and The Concept of Law*, in George, ed, *The Autonomy of Law* 163, 182; Mark C. Murphy, *Surrender of Judgment and the Consent Theory of Political Authority*, 16 Law & Phil 115, 125-27 (1997); Gerald J. Postema, *Law's Autonomy and Public Practical Reason*, in George, ed, *The Autonomy of Law* 79, 89-93; Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J Legal Stud 165 (1982); Raz, 14 Phil & Pub Aff at 17 (cited in note 5); Frederick Schauer, *Playing By The Rules* 137-45, 162-66

Finally, a third benefit produced by authoritative settlements is a reduction in decisionmaking costs. Even if members of the community could, through lengthy deliberations, arrive at coordinated and correct decisions, the moral costs in terms of time and other resources devoted to such deliberations might outweigh the moral gains. Only settlement by some means or another keeps us from potentially squandering all of our resources on deliberating about what to do, much in the manner of Buridan's Ass.¹⁰ In other words, authoritative settlement is *efficient*.¹¹

2. Achieving authoritative settlements: The first steps.

I have shown why our imagined community needs authoritative settlements of moral disagreements. Lack of coordination and expertise threaten deterioration into a Hobbesian nightmare despite the general similarity of members' moral views and their willingness to act on moral reasons.¹² But how does authoritative settlement get started? Necessity on its own will not generate solutions.

The requisite first step is for the members of the community to agree that they need ways of authoritatively settling their moral controversies. The logical next step is for them to designate someone as the authoritative settler. Suppose, for example, that they all agree that Lex has proven in the past to possess the reasoning ability and the knowledge to resolve moral controversies well. They might then all accept the following rule: "Let Lex de-

(Clarendon 1991). Many have also pointed out the expertise function that makes the choice of the authority, in addition to the choice that there be an authority, important. See, for example, Schauer, *Playing by the Rules* at 150-52, 158-59; Coleman, *Authority and Reason* at 305.

¹⁰ For example, suppose "Drive seventy-five on the left" is slightly preferable to "Drive fifty-five on the right." And suppose that, if Agnes and Ben deliberate for a long time and consult enough other people, they will both arrive at the conclusion that they should drive seventy-five on the left. Nevertheless, the net cost of their deliberations may exceed the net gain over the rule "Drive fifty-five on the right." Without the rule as an authoritative settlement of how they ought to drive, they will have to deliberate. And because they do not know in advance where deliberation will lead them and what the stakes are, they will keep on deliberating until they reach a decision, even if the costs of deliberation exceed the gains. Once a deliberative cost is sunk, it provides no reason against continuing to deliberate. For an explanation of Buridan's Ass, see *Columbia Nitrogen Corp v Struthers Wells Corp*, 307 F Supp 281, 282 (S D Ga 1969).

¹¹ See Campbell, *The Legal Theory* at 57 (cited in note 9); Schauer, *Playing by the Rules* at 145-49 (cited in note 9).

¹² A good analogy would be to an army attempting to operate with no chain of command. An army requires coordination to execute battle plans. And because not every battle plan is equally good, it requires expertise in selecting among them. That is why armies have chains of command and why they attempt in choosing generals to find people with strategic expertise.

cide (authoritatively settle) our moral controversies." And let us suppose further that Lex begins his work by resolving Agnes and Ben's conflict and issuing the following rule: "The speed limit shall be fifty-five miles per hour."

Notice that at this point in our story, we have two rules. The first rule—"Let Lex decide"—exists because the members of the community agree to its terms. That is, its existence is based on community members' acceptance of it as normative.¹³

The second rule—"Drive fifty-five"—exists because it has been *posited* by someone with authority to settle moral controversies, Lex. The posited rule has authority to settle moral controversies because its promulgator, Lex, does. And he has authority because the society accepts a rule to that effect.¹⁴

¹³ This acceptance by society of the rule "Let Lex decide" can obviously vanish at any moment. In other words, Lex's status as the authoritative settler of moral controversies and queries depends from moment to moment on his being regarded as such. There is no privileged moment of such acceptance; therefore, if Lex at any time ceases to be *regarded* as authoritative, he will cease to *be* authoritative. The fact that he *was* authoritative at one time will make no difference to his present authority.

¹⁴ Before I continue down the path toward a more elaborate set of rules and more complications, I wish to comment on a point that might be nagging some readers: If the members of this community are plagued by a predictable degree of moral disagreement, how could they agree that Lex has greater moral expertise than anyone else? In other words, if, in the realm of moral expertise, "it takes one to know one," will not the community's moral disagreements preclude agreement on the rule, "Let Lex decide"?

I think that, so long as the basic moral intuitions of the members are not wildly disparate, there is a reasonable likelihood that they will be able to agree on relative moral expertise despite their moral disagreements. In other domains one can identify experts through experience without becoming an expert oneself. For example, most people make errors in reasoning about risks. See, for example, Amos Tversky and Daniel Kahneman, *Availability: A heuristic for judging frequency and probability*, in Daniel Kahneman, Paul Slovic, and Amos Tversky, eds, *Judgment under uncertainty: Heuristics and biases* 163 (Cambridge 1982). They can, however, be brought to understand their errors by others. They will rightly regard those who consistently demonstrate their errors to them as experts in reasoning about risks. Yet, although these experts can bring others to understand their mistakes, such understanding will not make those who were mistaken into experts themselves. Left to their own devices, they will err again, and they realize that. That is why they can identify those who point out their mistakes as experts and yet not be experts themselves. Defects in moral judgment may be more difficult to demonstrate than defects in risk assessment, yet moral expertise will often be recognizable with hindsight.

Moreover, even if members of our hypothetical community regard themselves as equally expert in moral reasoning, they may agree that, when they themselves must decide what to do, they are subject to cognitive biases and errors that do not affect them to nearly the same degree when they are deciding in a more disinterested posture what others ought to do. Thus, they might agree that anyone who is in the role of Lex will be more morally expert than those facing decisions about how they should act, if for no other reason than the authority's greater degree of disinterest. (This point also suggests as a corollary that Lex's decisions might not be deemed authoritative regarding matters on which Lex has a certain type of personal stake.)

For a thoughtful discussion of the problem of establishing authoritative institutions in the face of moral uncertainty and disagreement, see Thomas B. McAfee, *Substance Above All: The Utopian Vision of Modern Natural Law Constitutionalists*, 4 S Cal Interdiscip L J

3. Achieving authoritative settlements:
Some complications.

Let us imagine that Lex is capable of moving from moral dispute to moral query, resolving them as they arise. If so, Lex need not resolve general moral questions; he need only resolve the particular dispute or question before him. Thus, Lex can tell Paul that Paul may or may not dump a particular pollutant in a particular river without deciding more. Lex need not resolve more general potential controversies because he can resolve particular manifestations of those general controversies and questions. Of course, to resolve particular controversies, Lex will perforce employ general moral and empirical principles. The point is that he need not resolve *authoritatively* any issue that is broader than the specific controversy he confronts.

Nor will there be problems in interpreting Lex's resolutions. For if the disputants misunderstand Lex's pronouncement on their dispute, Lex can correct them immediately. Of course, at some level Lex must be able to communicate his resolution to them; he could not function as a practical authority if his resolutions of moral controversies and questions were completely opaque to the rest of the society. If he is always on the scene, however, then the chances of failure of communication are minimized; Lex can fine-tune his formulations whenever he perceives that they are being misunderstood.

These two points—the specificity of Lex's resolutions and his ability to minimize misunderstandings of them—follow from Lex's being at the scene of each moral controversy or question. It is easy to see, however, why this method of resolving particular moral disputes and queries will not prove satisfactory once a community becomes sufficiently populous or far-flung. Indeed, even in a small community, with, say, a few hundred people living in a relatively small area, Lex's resolution of moral issues in this way will run into difficulties. Lex may die or become incapacitated. Or he may be distant from the location where the decision must be made and thus unavailable for consultation within the necessary time frame.

With respect to Lex's possible death or incapacity, the community will perceive that it needs a rule to take account of that contingency (indeed, with regard to death, inevitability). So the community might agree to a broader rule than "Let Lex decide," such as "Let Lex or Lex's designated substitute or successor de-

cide." Alternatively, this broader rule might not be agreed upon by the community but might instead be promulgated by Lex. In the first case, the rule's authority derives from social agreement on *its* terms. In the second case, the rule's authority derives from Lex's authority, which in turn derives from social agreement on "Let Lex decide." In both cases, however, the broader rule authoritatively settles the issue of who, in the absence of Lex, can take over Lex's function and authoritatively settle controversies over what morally ought be done.

To solve his inability to be present at the scene of each moral controversy, Lex could promulgate rules that are more general than the controversies and questions already resolved. Lex could thus anticipate and resolve controversies and questions that have not yet arisen. Indeed, Lex's resolution of Agnes and Ben's speed limit dispute—"Drive fifty-five"—goes far beyond resolution of the specific controversy between Agnes and Ben.

Of course, when Lex promulgates general rules to govern controversies and questions that have not yet arisen, there is a danger that he will not foresee the range of future circumstances very clearly, and that accordingly his rules will subsequently prove inapt. I have said that Lex is perceived by the community to be a moral expert, but that does not mean that he is or is perceived to be omniscient. To be realistic, we must assume fallibility, not just in Lex's motivation, but much more importantly for our purposes, in his knowledge and foresight. Moreover, even if Lex could somehow foresee every dispute that might arise, he could not draft a rule that would correctly resolve them all and be at the same time reasonably accessible to actors.¹⁵

We can see now that despite the extreme simplicity of this hypothetical social situation, the set of authoritative rules required for coordination, expertise, and efficiency will have a certain degree of complexity. Beyond the rule establishing Lex as the

¹⁵ An exception is a rule that solves a coordination problem by selecting one of several equally attractive options.

Of course, many of the controversies Lex must settle will be quite specific. Even if Lex has promulgated the rule "Do not dump mercury in the river," Alex may disagree with Sue, who lives downstream, about whether a particular substance he plans to dump *is* mercury. Clarifying the general moral principle that enjoins creating excessive risks by means of rules such as "Do not dump mercury in the river" will go some distance toward resolving moral controversy, but it will not eliminate it if there is controversy over the facts to which such rules apply. So Lex will have to decide factual disputes as well as promulgate general rules. Further, because he cannot be present at the scene of every dispute, he must promulgate general rules for how factual disputes are to be resolved and, in the event these "adjudicatory rules" cannot be applied without conflict, designate other persons as having the authority to resolve factual disputes.

authority—a rule based on its social acceptance—there will be rules promulgated by Lex that (1) will range from the general (“Do not dump dangerous pollutants”) to the more specific (“Do not dump mercury”) to the very specific (“Do not dump *this* substance *here now*”) and (2) will designate other persons as authorities for certain questions (such as adjudications) or authorities under certain conditions (such as Lex’s unavailability).¹⁶

Finally, Lex’s inability to be present at the scene of every dispute means that Lex will not be able instantaneously to correct misunderstandings of the rules he has promulgated. Suppose Agnes or Ben is unclear whether “Drive fifty-five” applies in rainy weather, or refers to kilometers rather than miles, or concerns aircraft as well as cars. So long as Lex is on the scene, he can clarify these matters. If he is not on the scene, however, it might be useful to have available some rules for how to interpret Lex’s rules. And these rules must be part of the rules constituting (and perhaps establishing limits on) Lex as the authority¹⁷—the part of the community’s rule of recognition, if you will; rules of interpretation cannot themselves be promulgated by Lex without a vicious regress.¹⁸

B. Settlement Requisites and the Nature of Authoritative Rules

The previous Part established the need for authoritative settlement of disputes through the mechanism of a set of rules. This Part addresses the following question: If the rule establishing Lex as the authority and the rules Lex promulgates are to facilitate

¹⁶ The continuity from the most general moral questions, such as, “What moral principle governs risk imposition?,” to the most specific, such as, “May Alex dump the substance here now?,” is well-known to American constitutional lawyers. These lawyers must grapple with how specific a question must be to be deemed a question of *adjudicative* fact as opposed to a question of *legislative* fact. The former must be determined in adjudicatory proceedings, whereas the latter need not be. See *Bi-Metallic Investment Co v Colorado State Board*, 239 US 441, 445 (1915) (finding no right to an adjudicatory hearing prior to the issuance of a general administrative order similarly affecting many individuals); *Londoner v City and County of Denver*, 210 US 373, 386 (1908) (voiding tax assessment affecting only a particular handful of individuals because they were denied a prior adjudicative hearing). Lex might decide that certain persons and procedures work best for totally factual questions, whereas others are best for devising more general rules, which are less fact-dependent the more general they are.

Finally, Lex may devise rules about to what degree these various rules should be entrenched against future change. He might decide that he should be minimally restrained in changing the most general rules, but he should never change—or rarely change—specific adjudications.

¹⁷ See Larry Alexander, *All or Nothing At All? The Intentions, Authorities and the Authority of Intentions*, in Andre Marmor, ed, *Law and Interpretation* 357 (Clarendon 1995).

¹⁸ For how would the rule promulgating interpretive rules itself be interpreted?

coordination, prevent error, and obviate the necessity of cost ineffective deliberation, what features must they possess?

1. Norm types: Posited rules versus moral principles.

My focus is on rules that are practical (prescriptive) norms and thus can be obeyed or violated, what I call "serious rules."¹⁹ Serious rules contain a factual predicate or hypothesis and a prescription.²⁰ For example, the rule "Do not dump pollutants in the river" can be roughly recast as "If you are considering dumping pollutants in the river (hypothesis), don't do it (prescription)." The most important characteristic of a serious rule, as I use the term, is that it purports to state a prescription applicable to every case that falls within the rule's factual predicate or hypothesis.

There are all sorts of practical norms. One major division is between, on the one hand, those norms that are posited by human beings and thus come into existence at particular times and places, and, on the other hand, those norms that are not so posited. The latter nonposited norms I shall refer to throughout as "moral principles." I use the term "principles" rather than "rules" to avoid confusion. Whenever I refer to a "rule," I shall be referring to a posited rule, not a moral one.

By contrasting posited rules with moral principles, I am taking a particular position neither on the metaphysics of morality—the reality to which moral propositions refer—nor on the content of morality. Whatever we think morality is—whether it is a realm of moral fact in the external world, a projection of sentiments onto the external world, or a purely emotional response to the world—and whatever we think its content is, all I need to assume is that moral principles do not exist by virtue of being pos-

¹⁹ The term "rule" has many meanings in ordinary usage. It should be relatively clear that as I am using the term, most of those meanings are inapplicable. I am, for example, referring to norms that guide conduct. Thus, empirical generalizations, such as, "As a rule, most tigers are yellow," or, "As a rule, the male bird will fly away before the female bird," although surely rules of a sort, are not the kinds of rules with which I am concerned. See Schauer, *Playing by the Rules* at 17-18 (cited in note 9) (discussing the distinction between prescriptive and descriptive rules). My interest is in normative rules, not descriptive or predictive rules.

Nor am I concerned with what some have called "rules of thumb" or "summary rules." See id at 4-5, 104-05 (discussing rules of thumb); John Rawls, *Two Concepts of Rules*, 64 *Phil Rev* 3, 19-24 (1955) (discussing the "summary view" of rules). Such "rules" offer practical advice, but they are not practical norms. Examples of such "soft," advisory rules are "As a rule, you should drive slowly rather than drive fast," and, "As a rule, you should engage in organic farming." Because these "rules" are not practical norms but are only advisory, they can be heeded or ignored, but they can never be "obeyed" or "violated."

²⁰ See Schauer, *Playing by the Rules* at 23 (cited in note 9).

ited by particular persons at particular times and particular places.

2. Norm types: Characteristics of serious rules.

Posited norms are not all alike in terms of their capacity to determine what ought to be done. If Lex is to perform his function as a practical authority, his norms must be general, determinate, and efficient. The need for general norms results from Lex's limited capacity for resolving uncertainties as they arise.

In the absence of general norms, decisionmaking must be *particularistic*.²¹ Particularistic decisionmaking means reasoning directly from moral principles to particular decisions—such as how fast Agnes should drive *now* or whether Paul ought to dump *this* substance in *this* river *now*. Particularistic decisionmaking is the decisionmaking that members of our hypothetical community engaged in before they adopted the rule “Let Lex decide,” and the costs of particularistic decisionmaking in terms of coordination, expertise, and efficiency are precisely what led them to adopt that rule.

So long as Lex can decide each particular question and controversy as it arises—that is, so long as Lex can, by engaging in particularistic decisionmaking, bring about coordinated, efficient, and morally proper decisions by the rest of the community—the need for decisionmaking under rules does not arise. Or rather, to be precise, the members of the community follow one rule—“Let Lex decide”—each application of which is guided very particularistically by Lex himself.

But, as I said, Lex will be unable to be present at each moment when a decision involving moral principles must be made and when the application of those principles is controverted or misunderstood. Lex therefore must anticipate such decisions and settle in advance what should be done in those cases through promulgating general norms—norms applicable to a range of cases that share common features.

Generality is a matter of degree, of course. Rules can range from the most particular (“Drive *this* speed *now*”), to the more general (“Drive fifty-five so long as the weather is dry, the road has a shoulder, it is after sunup and before sundown, etc.”), to the quite general (“Drive fifty-five”).²² Yet to serve Lex's purposes, the norms he promulgates must be general enough to take the place of Lex himself.

²¹ See *id.* at 77-78.

²² See *id.* at 18-21 (discussing the levels of generality of descriptions).

Lex's norms must also be "rules," in the sense of posited general norms that settle determinately the questions and controversies that arise in the application of moral principles. Suppose, for example, that Agnes and Ben are trying to decide how fast they should drive and they take their concern to Lex. They will not be satisfied if Lex promulgates any of the following "rules" in response: "Drive at a reasonable speed"; "Drive safely"; "Drive so as to maximize total social utility"; or "Drive consistently with maximum equal liberty for all." They will say to Lex, "If we knew what was safe, or reasonable, or utility maximizing, and so forth, we would not need to have you settle how fast we should drive; we could decide for ourselves and achieve coordination, expertise, and efficiency." In other words, these posited norms do not settle for Agnes and Ben the particular question they need to have settled in order to coordinate desirably and efficiently.

Typically, norms like "drive reasonably" and the others described above are called *standards*.²³ Standards are posited norms that contain vague or controversial moral or evaluative terms in their hypotheses. Persons attempting to conform to standards must be able to resolve for themselves the application of these terms. If Agnes and Ben require an authority like Lex—because they cannot resolve for themselves efficiently, expertly, and consistently the applications of the moral principles to which they both subscribe at a more abstract level—then they will not be helped by Lex's promulgating standards. For the standards do not improve their ability to determine what they need to determine.

Nor will standards be any more helpful if they point to determinate factual matters as considerations or "factors." For example, Lex might promulgate the norm "Drive reasonably, taking into account the weather, visibility, traffic, and condition of the road." The difficulty is that, in order to decide what is reasonable in light of these factors, Agnes and Ben will most likely still need to resolve how to apply abstract moral principles in concrete situations—the problem that led them to seek Lex's determination in the first place.

Things are somewhat improved for Agnes and Ben if Lex promulgates a slightly different norm, "Drive reasonably, considering *only* the weather, visibility, traffic, and condition of the road." This norm, unlike the previous one, moves some distance

²³ See Cass R. Sunstein, *Legal Reasoning and Political Conflict* 27-28 (Oxford 1996). See also Larry Alexander, *Incomplete Theorizing: A Reviewing Essay of Cass R. Sunstein's Legal Reasoning and Political Conflict*, 72 Notre Dame L Rev 531, 541-44 (1997) (explaining and critiquing Sunstein's position on rules versus standards).

from being a pure standard and toward being a "rule" as I am using the term. For now Lex has told Agnes and Ben more than they already knew. He has told them to ignore all factors that they might think bear on reasonable behavior other than the four mentioned. The part of the norm that can be translated as "Do not consider anything other than weather . . ." is a rule-like norm coupled with a standard ("Drive reasonably").

The quality that identifies a "rule" and distinguishes it from a "standard" is the quality of determinateness. A norm becomes a rule when most people understand it in a similar way. When this is so, the rule will give every affected individual the same answer to unsettled moral questions and so bring about coordination. Although a standard is "transparent" to background moral principles and requires particularistic decisionmaking, rules can be applied without regard to questions of background morality. They are opaque to the moral principles they are supposed to effectuate. Thus, a "rule" is a posited norm that fulfills the function of posited norms, that is, settles questions of what ought to be done.

A pure rule is a posited norm that settles all questions about what ought to be done that fall within its scope. For example, the posited norm "Drive fifty-five" is a pure rule if it settles for each driver in our community the otherwise unsettled question of how fast he or she should drive. (A posited norm that settles some but not all unsettled questions that fall within its scope—"Drive fifty-five unless it is raining, in which case drive reasonably"—could be called an impure rule.)

The determinateness requirement refers to the moral functions that rules are meant to serve: coordination, expertise, and efficiency. The indeterminateness of how moral principles apply to particular cases is what produces the controversy and uncertainty that result in lack of coordination, costly deliberation, and mistaken (inexpert) conclusions. The purpose of having Lex promulgate rules to settle questions about how moral principles apply in concrete situations is to eliminate this controversy and uncertainty and their associated moral costs. Lex's rules can perform this function only if they are relatively determinate for those who must follow them.²⁴ In other words, it must be easier for the members of the community to ascertain correctly what Lex's rules require in concrete situations than it is for them to ascertain what their moral principles require. Otherwise, the rules will have failed to fulfill their moral function. Ideally, the rules should

²⁴ See Campbell, *The Legal Theory* at 118 (cited in note 9) (arguing that a good rule is clear and specific).

be fully determinate: everyone in the community should agree about what the rules require in every case.

I have spoken thus far of generality and determinateness. These are separate considerations: a quite specific rule can be either determinate ("Drive fifty-five on Wednesdays between two and five") or indeterminate ("Do not dump 'unsafe' materials in the Grand River this Monday"). Likewise, a very general rule can be either determinate ("Drive fifty-five") or indeterminate ("Drive safely").

Nonetheless, there is a tendency for generality and determinateness to go together. That is so because if Lex posits specific rules, then although they may each be determinate, they will have to be quite numerous to cover all the controversial or uncertain cases that likely will arise. And the presence of a lot of specific rules will create indeterminacy about what ought to be done even if the individual rules are quite specific.²⁵

So the desire for determinateness will tend to push Lex in the direction of generality. So, too, will another consideration, namely, Lex's inability to foresee all possible concrete applications of moral principles.²⁶ Lex only will be able to anticipate concrete cases in terms of broader, more general, categories of cases. Thus, his rules will handle cases in terms of the more general categories that he can foresee.

Generality and determinateness enable rules to settle moral questions and controversies. Of course, to fulfill their moral function, rules must not only settle moral questions, but also settle them efficiently enough that the moral gains of coordination are not exceeded by increased decisionmaking costs. A rule that produces coordination, where lack of coordination has modest moral costs, but that requires each person to make a thousand time-consuming and hence costly calculations, would be an undesirable rule, despite its ability to settle disputed moral questions. (For example, "Drive fifty-five when the temperature is over 33 degrees Fahrenheit, and skies are sunny to partly cloudy, and it has not rained for twenty-four hours; otherwise drive forty-five.")²⁷

²⁵ The instructions for filing the tax return of a business are a good example. Although the rules governing taxation might individually be quite determinate, there are so many of them that ordinary taxpayers have difficulty figuring out what the rules in the aggregate require. A prolix code of very specific rules can be so difficult to apply that it produces the lack of coordination and inefficient decisionmaking that determinate rules are supposed to remedy.

²⁶ Hart calls this rule making difficulty "indeterminacy of aim." H.L.A. Hart, *The Concept of Law* 125 (Clarendon 1961).

²⁷ A final desideratum of authoritative settlement is expertise. That is, we expect a practical authority not only to settle unsettled moral questions, but to settle them well.

3. The determinacy of rules and the question of moral content.

I have said that, if Lex's rules are to serve their moral functions and foster more coordinated, morally more expert, and more efficient decisionmaking, then their meaning—what they direct members of the community to do in particular cases—must be determinate. Some believe that this determinacy requirement means that Lex's rules cannot themselves refer to moral or evaluative considerations, but must refer solely to factual matters. I think, however, that this position, although it is correct in one sense, is incorrect in another and potentially quite misleading sense.

The position is surely correct in this sense: The application of "rules" must not require members of the community to resolve the very moral controversies and uncertainties that give rise to the need for rules in the first place. If Lex's "rules" did this, then they would really be standards and would leave everything as it was.

On the other hand, suppose there are moral or evaluative terms that all members of the community apply the same way across a broad range of circumstances. Suppose, for example, that Lex fashions a rule to deal with the effects on neighboring farms of a farmer's methods of irrigation, plowing, crop rotation, and spraying. And suppose that Lex's rule employs the phrase "the reasonable farmer." Finally, suppose that in our hypothetical community, everyone agrees about how "the reasonable farmer" irrigates, plows, and so forth in almost every conceivable situation. In such a case, Lex's rule—which we may assume is meant to settle some other moral controversy, such as whether "reasonable farmers" should nonetheless be liable for damages they cause adjoining farms²⁸—will be determinate and capable of performing its moral function despite its use of an evaluative term.²⁹

Obviously, a rule can bring about coordination and efficient decisionmaking and yet be morally obtuse or perverse. Such a rule, if sufficiently morally undesirable, negates the moral gains of increased coordination and efficient decisionmaking.

Nonetheless, expertise, unlike the capacity to affect coordination and efficient decisionmaking, is not a function of a norm's being a rule. That is, expertise is not a matter of whether the posited norm can settle unsettled moral questions, but is rather a function of the wisdom of the authority who posits the norm. What is important for a norm's being a rule is its ability to settle unsettled moral questions in a coordinated and efficient way within the community to which the norm applies, not its ability to settle those questions well.

²⁸ This is an important qualification. If it were not meant to settle a different controversy, the rule would be incapable of making a practical difference. The members of the community would be left in the same spot epistemically and motivationally that they oc-

4. The built-in imperfection of rules.

To the extent that Lex's rules are general and determinate, they will not always correspond to the results of ideal particularistic reasoning. That is, a particularistic decisionmaker will come to conclusions about what moral principles demand in concrete cases that differ from what general rules would require or permit in some of those cases. A particularistic reasoner might conclude correctly that he should not exceed fifty miles per hour on one stretch of road but that he should drive sixty on another. The general rule "Drive fifty-five" will permit him to exceed the morally optimal speed in some instances and require him to drive more slowly than the morally optimal speed in others.

This feature of general rules—this bluntness and the resulting over and underinclusiveness relative to background moral principles—stems from rules being what Fred Schauer calls "entrenched generalizations."³⁰ The fifty-five miles per hour speed limit generalizes over an indefinite number of particular occasions for driving; it functions as if one should infer that fifty-five is the optimal speed on every occasion. And that generalization about optimal speed is "entrenched" because "Drive fifty-five" is an authoritative rule—it is meant to supplant the controversial background moral principles for members of the community in deciding how fast to drive. Only if the members consult the rule and ignore the background moral principles in deciding what to do—even if those principles appear to conflict with the rule in the case at hand—can the rule deliver the coordination, expertise, and efficiency it is there to provide.

This bluntness of general rules is therefore both morally desirable and morally problematic. Once Lex is forced by his limitations to promulgate general rules rather than on-the-spot commands, his rules will be blunt norms in the way described because only then can they solve the problems of particularism—lack of coordination, mistakes, and inefficient decisionmaking. But the very bluntness that enables Lex's rules to solve these prob-

cupied in the absence of the rule. See Scott J. Shapiro, *On Hart's Way Out*, 4 *Legal Theory* 469, 494-95 (1998). See also Anthony J. Sebok, *Legal Positivism in American Jurisprudence* 256-66, 307-12 (Cambridge 1998).

³⁰ Of course, what makes such moral and evaluative terms determinate and thus employable in rules is the "social fact" of agreement on their concrete applications. One might say that whatever their true referents, it is their conventional meanings—social facts—that the rules are employing. Members of the community do not need to be correct about the meaning of "reasonable farmer." They need only be consistent with each other.

³¹ Schauer, *Playing by the Rules* at 31-35 (cited in note 9) (over and underinclusion), 38-39 (entrenchment), 42-45 (entrenchment), 49-50 (entrenchment and over and underinclusion), 84 (entrenchment), 87 (entrenchment).

lems of particularism will also mean that the results they dictate will diverge from those that particularism, applied correctly, would dictate. In other words, blunt rules will be morally flawed even when they are morally desirable. Optimal decision procedures will not mimic the criteria of moral correctness infallibly applied.

It is important not to be misled into thinking that rules' moral flaws can be eliminated by having a better set of rules in terms of content. So long as the members of our community are finite in their knowledge and reasoning capacities—so long as they are human beings—the best posited norms for them will be blunt rules. Put differently, for a community with the normal human limitations, a good set of blunt rules will be preferable to particularism and its attendant controversies and uncertainties. But even the best set of blunt rules will produce outcomes at odds with correct particularistic reasoning.³¹

This paradoxical aspect of authoritative rules—the fact that such rules are simultaneously morally optimal and morally suboptimal—and the decisionmaking conundra this paradox engenders will be taken up extensively in Part III. My purpose here is merely to show how rules' paradoxical nature is a function of their entrenching and generalizing nature.

* * * * *

The moral function of Lex's rules, as well as the rule "Let Lex decide," is to solve the problems caused by controversy and uncertainty over the application of moral principles. Lex's rules can fulfill their function only if they are determinate rules, not indeterminate standards.³² And given Lex's human limitations, the rules can fulfill their function only if they are general and relatively blunt, which means that they will diverge in application from the moral principles they aim to serve.

³¹ Indeed, even if Lex were able to decide each particular controversy as it arose, and did not therefore need to promulgate any rules, he would occasionally make errors. In those cases, the one general rule in the community—"Let Lex decide"—would entrench a generalization that produced results in the cases of Lex's errors at odds with the background moral principles. This is not to say that "Let Lex decide" would not be the best rule available, nor is it to say that the rule would be inferior to pure particularism.

³² See Shapiro, 4 *Legal Theory* at 494-95 (cited in note 28).

C. The Problem to Which Law Is a Solution Is Not That Men Are Not Angels, But That They Are Not Gods

I have assumed a community of morally motivated people whose problem is that they are uncertain or disagree about what morality dictates in a host of concrete cases. Uncertainty and disagreement generate the moral costs of lack of coordination, lack of expertise, and inefficiency. If they are more determinate than the moral principles that they are meant to resolve, rules both constituting authorities and promulgated by authorities can reduce or eliminate such moral costs. Law as formal rules is a solution to the problem of the limits of moral knowledge.

To see why it is lack of information, not immoral motivation, that gives rise to the need for formalistic law, imagine a different hypothetical community. In this one, everyone *can* apply moral principles unerringly in concrete cases. Its problem is that some members are not motivated to comply with those moral principles.

In this community, there would be no need for posited norms. Morality would be self-sufficient. If some members violated their moral obligations, morality itself would instruct the remaining members how they should investigate, try, and punish the offenders. Remember, everyone can apply moral principles correctly in concrete cases. And there is no reason that morality cannot extend beyond its first-order requirements and speak to how to treat miscreants. Indeed, moral theory regarding crime and punishment and moral theory regarding adjudication are just aspects of moral theory generally.³³

Thus, if men were gods—morally omniscient—but not angels—not motivated morally—morality would be an adequate guide to behavior and posited norms would be unnecessary. If, however, men were angels but not gods, then posited norms in the form of determinate rules would be necessary to implement morality. Formalistic law is a solution to a cognitive, not a motivational, problem.³⁴

³³ The moral theory of what to criminalize and what justifies criminal punishment is, of course, a well-established department of moral theory. Somewhat less well-established is the moral theory of adjudicative procedures. But that does not mean moral theorizing about such procedures is unheard of. See, for example, Larry Alexander, *Are Procedural Rights Derivative Substantive Rights?*, 17 L & Phil 19, 19-36 (1998).

³⁴ See Gregory S. Kavka, *Why Even Morally Perfect People Would Need Government*, 12 Soc Phil & Pol 1 (1995).

D. The Worthlessness of Nonformal, Moralized Legal Norms:
The Case of the "Justice-Seeking Constitution"

If law is a response to moral uncertainty and disagreement rather than to immoral motivation, then law that is nonformal—that incorporates or refers to moral principles whose applications are uncertain or contentious—serves no function. That is, laws that direct people to be fair or just, or to do what is right and honorable, tell people no more than they already know. We do not need to be told through some posited norm that we should do what is right. We know *that*. What we need to be told is what course of action *is* right.

Private law—and a large portion of the public regulations that modify private law—is generally rather formal. That is, it consists largely of rules that are, in most of their applications, quite determinate. Because we operate in a complex, highly interdependent market economy, a high degree of formality is absolutely essential.

It is no less necessary for public law, including constitutional law, to be formal than it is for private law. Structural provisions of the Constitution—those specifying who is a legislator, a president, or a justice of the Supreme Court, or how a bill becomes law, and so forth—must surely be formal.³⁵ And what is true of the structural provisions is also true of constitutional rights. Telling legislators that they must comply with "fundamental fairness" and the morally correct conception of "equality" tells them nothing they do not already know. A "justice-seeking Constitution"³⁶—one that is to be "interpreted" to instantiate the correct theory of justice—and similar such notions, like Dworkin's "morally best constitution that it can be,"³⁷ are useless. They leave us with the very uncertainties and controversies that law, including constitutional law, is meant to resolve. A constitution that says no more than "be just and wise in governing" is a complete waste of paper.³⁸ And so, too, is a constitution that appears more specific because it contains a number of discrete injunctions—such as "do not abridge freedom of speech," "do not deprive

³⁵ Imagine deciding whether someone was "President" based on a nonformal standard such as whether that person is best qualified to bring about justice and good government rather than based on the formal rule, "He who gets the most electoral votes wins."

³⁶ See Christopher L. Eisgruber and Lawrence G. Sager, *Good Constitutions and Bad Choices*, in William N. Eskridge, Jr. and Sanford Levinson, eds, *Constitutional Stupidities, Constitutional Tragedies* ch 27 (NYU 1998).

³⁷ Ronald Dworkin, *Law's Empire* 53 (Belknap 1986).

³⁸ See Larry Alexander, *Constitutional Tragedies and Giving Refuge to the Devil*, in Eskridge and Levinson, eds, *Constitutional Stupidities* ch 23 (cited in note 36).

any person of equal protection of the laws," and so forth—but under which we are directed to interpret those injunctions not as formal rules, but as standards that refer us to whatever is the correct political/moral theory.³⁹

III. THE DILEMMA OF FORMALISTIC LAW⁴⁰

Authoritative rules that are promulgated by and meant to improve the moral condition of human beings of finite reasoning and informational capacities will always fail to capture precisely the requirements of morality. Sometimes the rules will require act A where morality requires not-A. Sometimes the rules will fail to require act A where morality does require it.

This over and underinclusiveness of authoritative rules relative to their background moral reasons is a product of what Schauer calls the entrenched generalization characteristic of rules.⁴¹ Rules of necessity generalize. And if they did not "entrench" the generalization—if they could be disregarded whenever the generalization was deemed inapt—they would devolve into the mere rules of thumb of particularism. True rules—the kind our hypothetical society needs—or what Postema calls "proper rules"⁴² and I have elsewhere called "serious rules,"⁴³ will of necessity be over and underinclusive relative to their background moral reasons.

Nevertheless, even though the best rules will be somewhat over and underinclusive and will thus, if followed, result in some morally regrettable acts and consequences, the moral gains from rules may still outweigh their moral costs.

Rules are thus morally desirable. Put differently, it is morally desirable that the subjects of rules, when determining how they should act in particular cases, should reason directly from the rules rather than from the moral reasons that lie behind the

³⁹ Interpretations of constitutional provisions—and of legal norms generally—that construe them as heavily moralized standards essentially read those provisions to be delegations of decisionmaking authority from one institutional decisionmaker (for example, the framers) to another (for example, the Supreme Court). In that sense, they accomplish something, although they do so only insofar as they are *rules* regarding decisionmaking institutions rather than standards for decisions. This is how I respond to my commentators, especially Professor Pildes, who believe I overstate this point. See Richard H. Pildes, *Forms of Formalism*, 66 U Chi L Rev 607, 614 (1999).

⁴⁰ The following Part is more fully elaborated in Alexander and Sherwin, *Past Imperfect* at ch 5 (cited in note 3).

⁴¹ Schauer, *Playing by the Rules* at 47-52 (cited in note 9).

⁴² Gerald J. Postema, *Positivism, I Presume? . . . Comments on Schauer's "Rules and the Rule of Law"*, 14 Harv J L & Pub Pol 797, 801 (1991).

⁴³ Larry Alexander and Emily Sherwin, *The Deceptive Nature of Rules*, 142 U Pa L Rev 1191, 1198 (1994). See also Part II.B.1.

rules. When the background moral reasons direct the subject to act one way, and the rules—based on the same background moral reasons—direct the subject to act another, we end up with what I call “the gap.” We want the authorities to promulgate opaque, serious rules: specifically, we want rules that do not contain blanket exceptions for the inevitable cases where they conflict with background moral reasons; otherwise the exceptions would convert serious rules into mere rules of thumb. But when, as subjects of the rules, we believe the rules conflict with the background moral reasons that are the rules’ *raison d’être*, what possible reason do we have to comply with the rules rather than morality as we perceive it?

As I put the matter in the article in which I first coined the phrase “the gap” to describe this problem:

There is an always-possible gap between what we have reason to do, all things considered . . . , and what we have reason to have our rules (and the officials who promulgate and enforce them) require us to do. A rule may not allow for an exception where, all things considered, we should violate it, and yet be an ideal rule for all that. We may not trust others—really, ourselves in the role of the rule-followers rather than rule-authors—to apply the exception correctly. In other words, an exception may lead to an unfavorable balance of incorrect versus correct applications of the exception. But without the exception, we end up with “the gap.”⁴⁴

Schauer describes the same phenomenon as the “asymmetry of authority.”⁴⁵ He asserts that those subject to rules are irrational and immoral if they do not follow the background moral reasons when those reasons conflict with authoritative rules.

It does not follow, however, that it is rational for the creator of a decisionmaking environment to encourage that freedom of decisionmaking. Thus, I want to focus on the phenomenon of the *asymmetry of authority*, the way in which the irrationality or immorality of imposing authority does not necessarily result from the (stipulated) irrationality or immorality of succumbing to that authority.

The argument for the asymmetry of authority is quite simple. Consistent with my assumptions, suppose that deference

⁴⁴ Larry Alexander, *The Gap*, 14 Harv J L & Pub Pol 695, 695-96 (1991).

⁴⁵ Frederick Schauer, *Rules and the Rule of Law*, 14 Harv J L & Pub Pol 645, 692-93 (1991).

to authority in any strong sense is irrational and potentially immoral. Suppose, however, that it is also the case . . . that there is reason to suspect that a given decisionmaker or array of decisionmakers will make more errors, and consequently more immoral decisions, if allowed to make a decision on the basis of what she thinks is the balance of reasons than if compelled to make decisions only within a certain, much narrower range. In those circumstances, it seems plain that the moral designer of a decisionmaking environment has a moral responsibility to design that environment in such a way as to minimize the number of moral mistakes. If this is so, then just as it is rational and moral for a decisionmaker to reach the result she thinks best, then so too is it just as rational and moral for the designer of a decision-making environment to prevent her from doing so.⁴⁶

Even if “the gap” or “asymmetry of authority” is the inevitable consequence of proper reasoning about how to avert the moral costs of moral disagreement and mistake, it is nonetheless quite threatening. It suggests that we may not be able to have what we need—authorities and authoritative rules—because however rational it is to establish them, it is irrational to follow them. Even the morally motivated may find themselves doomed to a Hobbesian state of affairs by their own rationality. It becomes of overweening importance to the moral enterprise of establishing legal order to explore strategies for closing “the gap.”

In a recent article I explored several such strategies and found them all to be problematic.⁴⁷ The strategies are rule sensitive particularism (“RSP”), presumptive positivism (“PP”), consent, punishment, exclusionary reasons, and deception. RSP would have people follow rules unless the reasons for following the rules—including the reasons for choosing rules over particularism and the rule-undermining effects of rule violation—are outweighed by the reasons against following the rules. In the article I attempted to demonstrate that RSP collapses into pure particularism and converts serious, opaque rules into mere rules of thumb.⁴⁸

Under PP, those subject to the rule must follow it unless the reasons against following it exceed the reasons in favor of following it by some specified weight. I attempted to demonstrate

⁴⁶ Id at 692.

⁴⁷ Larry Alexander, *Can Law Survive the Asymmetry of Authority?*, 18 *Quinnipiac L Rev* (forthcoming 1998).

⁴⁸ Id.

that PP either does not eliminate “the gap” or collapses into RSP.⁴⁹

Neither consent to formal rules nor their democratic pedigree can eliminate “the gap.” “The gap” arises because an exceptionless rule may be morally optimal even though, for one subject to the rule, rule violation may be morally prescribed. But if rule violation is morally prescribed, one cannot escape that moral prescription by consenting to, promising to abide by, or democratically authorizing an exceptionless rule. One cannot in any morally effective way consent to immorality.

Punishment of morally justified rule violations is another strategy that I conclude is incapable of closing “the gap,” for both psychological and moral reasons.⁵⁰ It is both psychologically difficult and morally problematic to punish those who have violated rules for morally sufficient reasons, even if punishment is necessary to produce the very consequences that will morally justify the rule violation. Moreover, the directive to officials to punish morally justified rule violators is itself a rule that the officials might believe can on occasion be justifiably disobeyed, thus creating a new “gap.” And punishment cannot close *that* “gap” without creating an infinite regress of punishing the punishers

The exclusionary reasons claim is essentially a denial of “the gap.” The argument is that rules are reasons for acting (in accordance with their terms) and also reasons not to act on other reasons, including the reasons that stand behind the rule. This argument is mistaken. Rules are opaque to the moral reasons that stand behind them, but those reasons continue to exist for those subject to the rules. And their existence is what creates “the gap.”⁵¹

Deception about the moral status of serious rules—in other words, teaching those subject to rules that “the gap” does not exist—is also problematic. There is the vertiginous practical diffi-

⁴⁹ Id.

⁵⁰ Id.

⁵¹ A somewhat similar strategy is one that claims that accepting a rule entails a commitment to it, which by virtue of making rule violation infeasible as a matter of intention entails the rationality of following the rule according to its terms. See Scott J. Shapiro, *Rules and Practical Reasoning* (unpublished manuscript on file with U Chi L Rev); Scott J. Shapiro, *The Difference That Rules Make*, in Brian Bix, ed., *Analyzing Law: New Essays in Legal Theory* 33-62 (Clarendon 1998). I believe that this strategy either relies on a mysterious constraint that rules exert on the will or relocates “the gap” at the point of rule acceptance rather than at the point of rule compliance. For how can we rationally and morally “accept” a rule that will commit us to conduct that we now regard as irrational and immoral?

culty of who gets to deceive whom. And, of course, there is the moral problem, namely, whether deception, even if for moral ends, is morally justifiable.

In the end, I remain skeptical that we have a solution to "the gap." I have no doubt that "the gap" exists. Its manifestations are ubiquitous in the law: our ambivalence about rules that stand in the way of worthy substantive goals (that "provid[e] the Devil with refuge"⁵²); the synchronic battles between rules-oriented majorities and standards-oriented dissenters (and vice versa); the diachronic doctrinal shifts from rules to standards to rules and so on; the historic tension between law and equity, between letter and spirit; the tension between procedural regularity and substantive correctness,⁵³ which has parallels *within* law to the relation between legal rules generally and their background moral principles, as well as the procedure versus substance dilemma in the rules governing lawyering, which appear to dictate unjust behavior for the sake of overall legal justice. If "the gap" exists—and if it is an inevitable product of formal rules, which in turn are the essence of law—then the absence of a successful strategy for eliminating it calls into question the very possibility of law itself. If we are clear-headed about what formality entails, then however morally desirable a system of formal rules—that is, law—may be, we may not be able to achieve it. Or, put differently, law may be available only for those who do not fully comprehend its nature.

IV. THE NONFORMALISTIC NATURE OF MORALITY

I have argued that law is essentially formalistic, and that law's formalistic nature results in a practical dilemma for those subject to it. Here I argue that in complete contrast to law, morality is thoroughly nonformalistic. To understand that claim, however, requires that we first understand what its denial entails.

⁵² See Alexander, *Constitutional Tragedies and Giving Refuge* at 117 (cited in note 38).

⁵³ Compare the recent U.S. Supreme Court case declaring actual innocence to be immaterial to the legality of a conviction with the recent California Supreme Court case declaring actual innocence to be material to a claim of defense lawyer malpractice. *Herrera v Collins*, 506 US 390 (1993) (holding that claim of actual innocence based on new evidence is not grounds for federal habeas relief); *Wiley v County of San Diego*, 79 Cal Rptr 2d 672, 966 P2d 983 (1998) (holding that a former criminal defendant must prove his actual innocence to prevail on a legal malpractice claim).

A. The View That Morality is Formalistic

No one disputes that consequentialist moralities such as utilitarianism, welfare-equalization, and the like are nonformalistic. That is, according to those moralities, whatever action produces the morally mandated state of affairs just *is* the morally right action to take, no matter what one's motivation and no matter the character of the action involved. Of course, consequentialist morality may prescribe actions designed to alter one's character and motivations, and it may prescribe decision procedures such as following formalistic rules. Indeed, the last point was the topic of the previous Part of this Article. Ultimately, however, what makes an action morally right according to consequentialist moralities is not whether it conforms to formalistic rules or procedures, but whether it produces those consequences deemed desirable by the particular consequentialist theory.

If one is a deontologist, however, consequences are not all that matters morally. The character of one's actions and the motivations with which they are taken may make a moral difference as well. Indeed, in a recent book,⁵⁴ Leo Katz makes the claim that formalism in law is not primarily a product of law's indirect consequentialist function (the function of producing better moral consequences by following determinate posited rules rather than moral principles). Although Katz concedes that some of the formalism in law reflects that function, he maintains that a lot of—perhaps most—formalism in law mirrors formalism in morality. In other words, Katz believes that morality is deontological, and that its deontological nature is manifested in its consisting of formalistic rules—rules that formalistic legal rules implement directly rather than indirectly. These moral rules are formalistic in the sense that, so long as they are complied with, one is morally “safe,” even if one knows that compliance will bring about results that morality itself otherwise condemns, and even if one complies solely in order to bring about those very results. Indeed, without ever contravening a moral rule, a clever actor can arrange matters in order to bring about results that morality forbids him to bring about through other means. Just as formal legal rules provide actors with a legally safe harbor, for Katz, formal moral rules—which many legal rules are meant to mirror—provide actors with a morally safe harbor.⁵⁵

Katz calls the achievement of otherwise forbidden ends through proper means “avoision,” a neologism he coins out of

⁵⁴ Katz, *Ill-Gotten Gains* (cited in note 1).

⁵⁵ *Id.* at 52-59.

“avoidance” and “evasion.”⁵⁶ His novel view is that avoision works not just in law but in the moral universe that law reflects.⁵⁷ For Katz, the morality of many acts is determined by the form of those acts rather than by the actual effects produced or the state of mind of the actor. That neither consequences nor states of mind fully determine the morality of acts is what creates the possibility for avoision, the moral equivalent of having one’s cake and eating it too.

Thus, according to Katz, if a deontological theory of morality condemns harvesting one healthy person’s organs to save five dying persons, but does not condemn diverting a trolley from a track where it will kill five persons to a track where it will kill one, it will be possible for the determined organ harvester to achieve his otherwise immoral goal in a morally permissible manner if he somehow can convert a “harvest” situation into a “trolley” situation.⁵⁸ Or, if morality condemns private execution of those disposed to violence but does not condemn the use of deadly force in self-defense, it is morally permissible for Charles Bronson to walk in Central Park at night for the sole purpose of enticing violently disposed persons to attack him so that he can, in turn, kill them in self-defense.⁵⁹

For Katz, who comes down squarely on the side of the deontologists, the way we bring about desired results affects our moral responsibility for those results, and because of this we can bring them about in ways that leave us morally unscathed. Deontological morality, therefore, allows avoision, and avoision in law is as likely to reflect avoision in morality as it is to reflect the difficulty of drafting the perfect rule. By portraying deontological morality as full of Jesuitical formalism,⁶⁰ Katz leaves himself open to the internalist rejoinder, “If this is what morality is like, then why should anyone care about it?” Of course, Katz may be an externalist, simply reporting grim news from the moral front and not prescribing, but I doubt it. The tone of Katz’s book is that it is a

⁵⁶ Id at x (avoision refers to “practices[] hovering in the limbo between legitimate avoidance and illegitimate evasion”).

⁵⁷ Id at 16-30.

⁵⁸ See id at 56-57.

⁵⁹ See *Death Wish* (Paramount 1974) (Bronson as a mild-mannered businessman who turns into a silent vigilante after his wife is killed and his daughter is put into a coma by a group of jeering thugs). Katz uses a similar example. Katz, *Ill-Gotten Gains* at 30-32 (cited in note 1).

⁶⁰ The Jesuits made it “easy to be a good Christian by telling sinners how to circumvent their moral obligations.” Katz, *Ill-Gotten Gains* at 25 (cited in note 1). For examples of Jesuitical formalism, see id at 25-30.

good thing—in an action-commending sense—that law reflects the formalism of morality.

Are deontological moralities necessarily formalistic in the Jesuitical sense? I must confess that I do not see why that is so. Of course, all moral theories, even fully consequentialist ones, rest on bedrock principles that function as axioms. Every moral theory will be formalistic at its core, in the sense that no further substantive grounds can be adduced in support of those bedrock principles. But this is not the kind of formalism Katz has in mind when he invokes Jesuitical casuistry. Rather, he appears to be arguing that deontological moralities resist classifying all possible actions in terms of the basic values those moralities express, and instead classify at least some actions on the basis of factors unrelated to those basic values. If so, then I submit he has not proved his case.

B. The Nonformalistic View of Morality: The Nonappropriation Norm

There are, of course, all kinds of moral theories that one might describe as at least partially deontological or nonconsequentialist. There are Kantian theories based on respect for others as ends in themselves.⁶¹ Then there are theories that reflect some balancing of impartial concern for others' welfare and partiality towards one's own well-being and projects.⁶² I see no reason to expect any of these deontological moralities to generate Katz-like formalisms, although they undoubtedly contain difficult line-drawing problems to the extent that they contain both elements of consequentialism and nonconsequentialist-based rights.

A third set of deontological moral theories, sufficiently similar in many respects to the libertarian Kantian theories that they might be labeled neo-Kantian, are those built around what I shall

⁶¹ These Kantian theories come in a variety of versions, from the quite libertarian to the relatively nonlibertarian. See, for example, Bruce A. Ackerman, *Social Justice in the Liberal State* (Yale 1980) (assuming an ambiguous position with respect to whether bodies, labor, and talents are protected by side constraints); John Rawls, *A Theory of Justice* (Belknap 1971) (same); Nozick, *Anarchy* (cited in note 6) (promoting Kantian libertarianism). See also Larry Alexander, *Liberalism as Neutral Dialogue: Man and Manna in the Liberal State*, 28 UCLA L Rev 816, 822-26 (1981) (discussing the differences among Ackerman, Rawls, and Nozick).

⁶² See, for example, Thomas Nagel, *Equality and Partiality* (Oxford 1991). Compare Samuel Scheffler, *The Rejection of Consequentialism: A Philosophical Investigation of the Considerations Underlying Rival Moral Conceptions* (Clarendon 1982) (advocating a non-deontological balancing of personal and impersonal perspectives); with Larry A. Alexander, *Scheffler on the Independence of Agent-centered Prerogatives from Agent-centered Restrictions*, 84 J Phil 277 (1987) (arguing that Scheffler's approach of necessity results in deontological side constraints).

refer to as the nonappropriation norm: *Do not appropriate another's existence without her consent to make yourself better off than you would be had she not existed, and her worse off than she would be had you not existed.*⁶³ These theories might divide over whether the forbidden appropriation includes only appropriation of another's body, labor, or talent, or whether it extends to belief-mediated pleasure and distress as well,⁶⁴ so that, for example, it might enjoin building spite fences and similar exploitation of psychic vulnerability.⁶⁵

Does the nonappropriation norm itself generate Katz-like formalisms? Again, I do not see why this should be so. Rather than just assert that this sort of deontological morality can avoid the formalistic distinctions that Katz finds endemic to deontology, however, I shall turn to exploring how well the nonappropriation norm handles some of Katz's (and my own) examples nonformalistically.

The nonappropriation norm explains the distinction between redirecting a runaway trolley so that it kills one rather than five and carving up one healthy person in order to harvest his organs for the benefit of five dying persons. The trolley case involves interaction, not appropriation. With interaction, no one is made better off than she would have been had those made worse off not existed.⁶⁶ The organ-harvesting case is paradigmatic appropriation.

⁶³ See, for example, F.M. Kamm, *2 Rights, Duties, and Status: Morality, Mortality* 279-80 (Oxford 1996). Thomas Nagel has recently endorsed a nonappropriation deontology similar to Kamm's. See Thomas Nagel, *Personal Rights and Public Space*, 24 *Phil & Pub Aff* 83 (1995).

⁶⁴ See, for example, Judith Jarvis Thomson, *The Realm of Rights* 254-55 (Harvard 1990) (rejecting rights against belief-mediated distress).

⁶⁵ All nonappropriation theories would leave a large domain of action governed by purely consequentialist considerations. Thus, the interactions of X and Y, where either X or Y or both will be worse off than they would be had the other not existed—for example, where X wishes to play rock music and Y wishes to sleep, or where X and Y both wish to use the same natural resources—must be governed by consequentialist norms because they do not involve appropriation. These consequentialist norms might be implemented by indirect consequentialist methods—formalistic rules of law or conventions that will be over and underinclusive and draw somewhat arbitrary lines—but this is not the kind of inherent moral formalism Katz seeks to reveal. Although it would be a major theoretical task to “mesh” the nonappropriation norm with the consequentialist norms, I see no reason to expect Katz-like formalisms to pop up at the interface of these two moral domains.

⁶⁶ I should acknowledge that there is a version of the trolley case that is devilishly difficult for the nonappropriation norm. In this version, the trolley tracks divide at point A and rejoin at point B. The five potential victims are on the track past point B, while the trolley has not yet reached point A. If the trolley goes down the left branch it will kill the five. If, on the other hand, it goes down the right branch, it will not kill the five, but only because it will kill one victim on that branch and will be stopped by the victim's body. If the victim were not on the right branch, the trolley would continue to and beyond point B

What of the person who fails to rescue another so that he can then harvest the latter's organs? Katz says this conduct is morally permissible because of its form—nonrescue.⁶⁷ He is correct about permissibility, but the conduct is permissible because it does not involve appropriation. The victim is not worse off than had the exploiter not existed. The explanation is substantive, not formal.

Perhaps Katz and I agree in the sense that what I am calling a substantive distinction between appropriation and nonappropriation is, to him, a formalistic one. After all, the line between killing and not saving does seem morally insignificant to many, particularly consequentialists, but also to nonlibertarian deontologists. Nonetheless, if one regards nonappropriation as a core moral value, then the distinction is as substantive as one can be.

Consider then the person who drives carefully around his enemy's neighborhood for no other reason than the infinitesimal chance of having an "accidental" collision with his enemy.⁶⁸ Katz believes that if his plan succeeds, and he accidentally kills or injures his enemy, he is morally blameless though disreputable. But there the nonappropriation norm again declares, contra Katz, that the conduct *is* morally wrong. The reasons why conduct is engaged in are just as important to its morality as its physical aspects. The state of mind affects wrongdoing, not just culpability. Katz's formalistic moral loophole does not exist.

To see why Katz is wrong about my hypothetical driver, consider the following two cases. In the first, Cowardly Jackal, who has been promised millions by the O.A.S. if he assassinates DeGaulle, but who is very afraid of getting caught, takes a one-in-a-million shot at DeGaulle from atop the Eiffel Tower, a place from which he can escape undetected. If he succeeds in killing DeGaulle with that shot, he will have committed purposeful homicide. After all, in the words of the Model Penal Code, his "conscious object" in firing is that DeGaulle be killed;⁶⁹ that is how he will earn his reward. Also, his firing at DeGaulle does increase,

and kill the five even sooner than had it traveled down the left branch. If someone steers the trolley to the right to save the five by killing the one, has he violated the nonappropriation norm? Has he if he merely omits to steer it away from the right branch when, had the victim not been there, he would have steered left in order to give the five a few seconds more to live?

⁶⁷ Katz, *Ill-Gotten Gains* at 208 (cited in note 1) ("Killing is bad, letting die is all right.").

⁶⁸ See Larry Alexander, *Crime and Culpability*, 5 J Contemp Legal Issues 1, 4 n 10 (1994).

⁶⁹ Model Penal Code § 2.02(2)(a)(i) (ALI 1962).

ever so slightly over the background risk, the odds that DeGaulle will be killed.

Now compare this version of Cowardly Jackal with a second. Here, Cowardly Jackal does not fire a one-in-a-million shot at DeGaulle. Rather, he daily drops a banana peel near DeGaulle's office for the purpose of creating a one-in-a-million chance that DeGaulle will slip on it and die. Because committing purposeful homicide by causing someone to slip on a banana peel is neither morally nor legally distinguishable from achieving the same end by causing someone to get hit by a bullet, Cowardly Jackal in my second case is in the same moral and legal boat as Cowardly Jackal in my first case.

If this is correct, however, then my third Cowardly Jackal, who, of course, plots to "assassinate" DeGaulle by carefully driving in his vicinity over and over, is no different from the others. Katz might maintain that driving carefully is morally and legally permissible, whereas firing shots and dropping banana peels are not, but this begs the question at issue. Moreover, firing guns and dropping banana peels *are* permissible, even if they increase the risks to others beyond what I have stipulated, *if undertaken for permissible ends*.

If one accepts my account of deontological morality and its core norm of nonappropriation, then morality is not formalistic in Katz's sense. One cannot intentionally arrange matters in order to appropriate from others and manage to escape moral reproach through clever avoision. One cannot do in morality what one *can* do in law, namely, escape *legal* reproach and still achieve substantive ends that formal legal rules are meant to block. The latter is possible because the very qualities of formalistic legal rules that allow them to achieve their moral goals of coordination, expertise, and efficiency also make them over and underinclusive with respect to their background purposes as well as opaque to those purposes. Those qualities create loopholes that the legally clever can exploit. Morality—even deontological morality—contains no such "loopholes." It is thoroughly substantive, not formalistic. There is no room for "avoision."⁷⁰

⁷⁰ One cannot even count as benefits in moral balancing those gains that are appropriative in nature. Thus, in deciding whether to switch the infamous trolley to the side where one worker will be killed in order to save the five workers on the main track, I can balance the lives, but I cannot take into consideration that the one worker will be killed in a way that allows the harvesting of his organs for others' benefit.

V. ARE FORMAL LEGAL RULES AND DEONTOLOGICAL SIDE CONSTRAINTS COMPATIBLE?

There are three moral problems occasioned by the existence of formal legal rules and the resultant gap between those rules and background morality. These three moral problems arise from the two strategies—punishment of morally justified rule violators and deception regarding the moral status of legal rules—that seem at all capable of closing “the gap.”

First, the moral benefits of serious rules are consequentialist in character. That is, the moral benefits stem from the rules’ bluntness relative to background morality, and bluntness results in more averted moral errors relative to particularism than induced moral errors under the rules. This means that some who correctly violate the rules according to pure particularism, but who, if they are not punished, incorrectly violate the rules according to RSP, are sacrificed (punished) in order to avert a greater number of incorrect (according to particularism) rule violations by others.

If, however, those punished are acting in accordance with their own or others’ deontological rights, then punishing them, though net beneficial, represents a utilitarianism of rights that is inconsistent with rights as side constraints.⁷¹ For example, it is possible that there is a strong deontological right to commit suicide under certain conditions, and that this right entails the right to assist others and to be assisted in committing suicide. It is also possible that permitting assisted suicide creates such dangers to other moral rights and values—such as the right not to be killed involuntarily—that a rule forbidding assisted suicide minimizes rights violations overall. Those who are punished under this rule and who are in fact exercising their moral right to assist and are not violating others’ moral rights are thus being punished not for *their* violation of rights, but to minimize *others’* violations of rights. In such a domain of strong deontological rights—if such a domain exists—formal legal rules appear morally problematic.⁷²

The second moral problem of formal legal rules is perhaps but an instance of the first. Because those who violate rules when

⁷¹ See Nozick, *Anarchy* at 28-29 (cited in note 6).

⁷² Procedural legal rules as well as substantive ones (such as the rule against assisted suicide) are also morally problematic from the standpoint of deontological side constraints. Almost all procedural rules contemplate occasional violations of deontological rights in order to minimize rights violations overall. Thus, for example, legal rules of repose may require implementing rather than overturning procedurally regular verdicts that are nonetheless factually incorrect. The moral rights of those erroneously found liable or guilty are violated in order to minimize such violations of others’ moral rights.

RSP so dictates are both justified and nonculpable—and because those who violate rules when RSP *appears* to so dictate are nonculpable even if unjustified—punishing these violators for the greater moral good will be, on at least some moral theories, morally impermissible. Yet if they are not punished, then unless a strategy of mass deception is employed, the rules will be undermined. Therefore, viable formal legal rules appear to demand punishment of the morally nonculpable, surely a morally problematic implication for a deontologist.

The third moral problem of rules is the complement to the second. Either the citizens or the officials who must punish for rule violations must ultimately be deceived about the moral force of the rules. If the citizens are not deceived, they will follow RSP and undermine the rules unless they are punished. But punishing the morally innocent will be a psychologically unstable strategy for the officials. Moreover, it too will be the product of the blunt legal rule directed at the officials, “Punish all rule violators.” Moral deception would appear to be necessary at some level.

Here is a possible rejoinder. The second moral problem, that of punishing the justified and the nonculpable, can be handled through consent. Although it is true that one cannot consent to violating others’ moral rights, one *can* consent to what would otherwise be a violation of his own moral rights. If that is so, then everyone could consent to his own punishment were he to violate serious rules, even if his violation were justified under RSP. And if everyone consents to punishment for rule violation, the punishers are off the moral hook: they can pursue the moral goods of formal legal rules without violating any nonwaived moral rights of those they must punish to obtain such moral goods.

There is a difficulty with this strategy, however, if it is unaccompanied by moral deception. Punishment of the justified and the nonculpable achieves moral goods by deterring violations of serious rules by those who would otherwise violate them believing themselves justified by RSP. The threat of punishment will deter such violations, however, not by introducing weighty *moral* reasons against violation into the equation, but by introducing *prudential* reasons against violation. That means that the threat of punishment works by moral corruption.⁷³ The threat of punishment for acting as one thinks is morally correct is no different from a bribe offered to not act as one thinks is morally correct.

⁷³ See Postema, 14 Harv J L & Pub Pol at 819-22 (cited in note 42).

If I am correct that punishment can by itself shore up serious rules only by corrupting, then punishment as “the gap” closer is surely morally problematic, even if everyone consents to it. Moreover, the most virtuous will be undeterred by the threat of punishment unless the punishment threatened is so draconian that it changes the moral calculus and rule compliance becomes morally demanded by RSP. (If the severity of the threatened punishment permitted, but did not demand, rule compliance, the morally virtuous might violate the rules in a spirit of morally supererogatory self-sacrifice.) But a rule requiring officials to impose draconian punishments on the justified and/or nonculpable, even buttressed by the consent of the punished, will be a rule that, unsupported by punishment of noncomplying officials, most likely will collapse.⁷⁴

CONCLUSION

Formal legal rules offer the prospect of moral gains. The more complex and diverse the society, the greater the moral gains serious rules can achieve. The question is whether in light of “the gap”—and its associated practical and moral problems—formal rules are a possibility for us, at least so long as we can see clearly what “the gap” entails.

The mere fact that we can make moral gains by having formal rules and that therefore it is rational for us to *want* formal rules does not mean it is rational for us to *have* them. Rationality itself may preclude our having formal rules. Formal rules may be like “the intention to drink the vile potion tomorrow” in Gregory Kavka’s “toxin puzzle.”⁷⁵ Although it would be rational to want to intend tonight to drink the potion tomorrow—because, in Kavka’s story, an intention tonight guarantees a lot of money tonight—we may be unable (so long as we are rational) actually to form the in-

⁷⁴ Perhaps we can consent to automatically imposed punishments that are so draconian as to make rule compliance morally mandatory, even in situations that would otherwise fall into “the gap.” In a world of morally fallible rule makers, however, automatic punishment devices would be extremely dangerous technological fixes to the problem of “the gap.” The same is true of other similar schemes, such as having draconian harms automatically imposed on innocent people whenever a rule is violated for moral reasons—or perhaps for moral reasons of less than a certain weight (an automatic form of presumptive positivism).

⁷⁵ Gregory Kavka, *The Toxin Puzzle*, 43 *Analysis* 33 (1983). For recent commentary on Kavka’s puzzle and its implications, see David Gauthier, *Rethinking the Toxin Puzzle*, in Jules L. Coleman and Christopher W. Morris, eds, *Rational Commitment and Social Justice* 47-58 (Cambridge 1998); Michael E. Bratman, *Toxin, Temptation, and the Stability of Intention*, in Coleman and Morris, eds, *Rational Commitment* 59-83; Gilbert Harman, *The Toxin Puzzle*, in Coleman and Morris, eds, *Rational Commitment* 84-89.

tention to drink the potion, given that we know it will be irrational for us to drink it tomorrow.

Formal rules may be analogous. Just as with promising and its benefits in a society comprised entirely of utilitarian maximizers, so long as we see the true nature of formal rules—and thus “the gap” that undermines their normativity—we may be unable to establish them, no matter how much we lose morally without them.

The concept of law is bound up with the existence of formal rules. Surely the benefits of law are synonymous with the benefits of formal rules. If that is the case, then the impossibility of formal rules means in the most important sense the impossibility of law.