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MORAL RIGHTS AND LEGAL RULES:

A Natural Law Theory

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I. INTRODUCTION

In an impressive and important article, *Rights Against Rules: The Moral Structure of American Constitutional Law,* Matthew Adler maintains that constitutional rights are "rights against rules: they protect citizens against the legislative enactment and judicial application of particular rules (rules with wrong act-type predicates); they do not provide guarantees that citizens can perform any particular sorts of actions free of governmental interference."[1] As Adler writes:

> We can imagine a legal world in which constitutional rights were structured as protective shields around certain types of actions. . . . If the action bore the protective shield, then the rights-holder would be legally immune from being sanctioned for performing the action, or coerced not to perform it, pursuant to *any* rule. . . .
>
> But of course constitutional rights work nothing like this. Constitutional rights in our own legal world are structured, not as shields *around* particular actions, but as shields *against* particular rules.[2]

In this collection and elsewhere, Larry Alexander has devoted similarly impressive efforts to defending the related claim that constitutional rights are rights against *reasons*—that is, legislative reasons for action: "The Constitution's individual rights provisions by and large do not protect specific conduct *per se*. . . . Rather, the Constitution ordinarily limits the types of reasons that government may act upon in regulating conduct."[3] In Alexan-

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1. Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law,* 97 MICH. L. REV. 1 (1998).

2. *Id.* at 13 (citations omitted).

3. Lawrence A. Alexander, *Is There an Overbreadth Doctrine?,* 22 SAN DIEGO L. REV. 541, 545 (1985). *See also* Larry Alexander, *Rules, Rights, Options, and Time,* 6 LEGAL THEORY 391–404 (present issue).

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der's view, the constitution's focus on rules (or legislative reasons[4]), entails what he calls "constitutional optionality": "[R]ules that are constitutionally permissible must also be constitutionally optional."[5] To illustrate, suppose that there are two cities, A and B. City A prohibits "the public burning of an American flag," and City B prohibits "burning objects on city streets and sidewalks." As Alexander argues, if the unconstitutionality of A's rule means that a flag burner escapes punishment, then it must be because B's rule is not constitutionally required. For if B's rule were required, then (questions of notice aside) the Court would/could just order A's officials to punish everyone who burns an object in public, including the flag burner in question.[6]

It is my hypothesis that Adler and Alexander are wrong in thinking that there is any substantive difference between conceiving of constitutional (or other legal) rights as rights against rules and conceiving of them as shields for action. Put differently, it is my hypothesis that our moral permissions define the boundaries of legitimate legislation and adjudication; that we have rights against the enactment and enforcement of a rule if and only if we have a moral permission to act in ways that are contrary to the rule; that legislators are entitled (indeed, obligated) to enact the same legislation and judges are entitled (indeed obligated) to lay down the same common-law rules and to reach the same adjudicative results, whether constitutional rights are conceived of as rights against rules or as rights to engage in particular actions. In short, it is my hypothesis that when we engage in a substantive analysis of the moral permissions that citizens have to act and the moral permissions that officials (legislators and judges) have to enact and enforce certain rules, we will find that our moral permissions define the moral scope and limits of legitimate legislation and adjudication. For ease of reference, I shall call my hypothesis the "identity hypothesis" because it postulates an identity between what Adler calls "the Basic Structure" of constitutional rights (that they are rights against rules) and what Adler thinks of as the alternative possible structure of constitutional rights (that they are rights to engage in particular actions).

In this contribution I shall test the identity hypothesis by asking whether our rights to act are identical to our rights against rules. First, however, let me both make a confession and issue a caveat. The confession is that what I know about American constitutional law I could put in a footnote (I was, after all, raised in Canada when all school children were then-subject to the teaching that American constitutional adjudication constituted an unnecessary shuffle). My discussion will thus necessarily be abstracted from the rich doctrinal examples that so fruitfully inform Adler's work and the work of

4. Rules and reasons are by no means identical objects of constitutional concern, but Alexander himself takes them to yield identical conclusions about the structure of constitutional rights. *See* Alexander, *Rules, Rights, Options, and Time*, *supra* note 3 at 399–401.

5. *Id* at 396.

6. *Id* at 396–97.

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those who have similarly sought the moral nature of constitutional rights and the rules that they arbitrate. My project here is to advance a general thesis about the philosophical relationship between moral rights and legal rules, using examples from criminal law and tort law with which I am most conversant, with the hope that those who theorize about constitutional law will find some use for it in doctrinal explanation.

Second, it is admittedly misleading, and probably both personally and professionally ill-mannered, to characterize my project as a critique of the basic thesis explored and defended by my valued friends and colleagues, Matthew Adler and Larry Alexander. What I ultimately seek to show is that our *cumulative* rights to act are identical to our *cumulative* rights against rules. My hypothesis is not that the right against a rule prohibiting the knowing desecration of a flag is identical to the right to burn a flag in any and all situations. Rather, my hypothesis is that the moral right to burn a flag (qualified as morality surely qualifies it, i.e., by limiting one's right to situations in which one is not committing arson, destroying governmental property, committing battery, etc.) defines the proper contours of one's legal right to burn a flag (defined, as that may be, by several different laws, e.g., state and federal criminal and civil laws that enjoin and/or impose liability for arson, battery, the destruction of governmental property, and instances of harmful expression). Inasmuch as Adler and Alexander may never have been disputing *this* thesis, my argument may pass theirs in the philosophical night.

Still, lest it be thought that I have just thrown back my fish before catching them, let me be clear that if I am right, then Adler's and Alexander's basic thesis about the nature of constitutional rights is undermined, and so too are the scholarly projects that turn on it. After all, the Bill of Rights does not characterize our constitutional rights as rights against rules. Its clauses, instead, appear to guarantee us freedom to speak,[7] freedom to engage in religious practices,[8] equal protection under the law,[9] and substantive due process.[10] Adler and Alexander have the burden of arguing that despite the plain language of these clauses, our constitutional rights are merely rights against the enactment and enforcement of certain rules that affect acts of speech, religion, etc.; they are not the legal analogues of the *moral* rights that we have to speak, practice religion, etc. If I am right, the Constitution says what it means: We have legal rights to speak, to exercise religious beliefs, etc., that mirror our moral rights to do so. The objects of our constitutional rights are not legal rules, but moral permissions.

7. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech. . . . ").

8. *See id.* ("Congress shall make no law . . . prohibiting the free exercise [of religion]. . . . ").

9. *See id.* amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").

10. *See id.* amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . . "); *id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . . ").

II. THE METHODOLOGICAL STRATEGY

In order to test whether our moral rights to act are identical to our moral rights against the enactment and enforcement of legal prohibitions and requirements, I propose to work through four questions:

(1) Could a person have a moral right to do act *A*, but no moral right that lawmakers protect her in the doing of *A*? (That is, could a person have a moral right to do something that she legitimately has no legal right to do?)
(2) Could a person have a moral right *not* to do act *A*, but no moral right that lawmakers not require her to do *A*? (That is, could a person have both a moral right to refrain from doing an action and a legitimate legal obligation to do it?)
(3) Could a person have *no* moral right to do act *A*, but a moral right that lawmakers not prohibit her from doing *A*? (That is, could a person have both a moral obligation not to do something and a legitimate legal right to do it?)
(4) Could a person have *no* moral right *not* to do act *A*, but a moral right that lawmakers *not* prohibit her from *not* doing *A*? (That is, could a person have both a moral obligation to do something and a legitimate legal right not to do it?)

These four questions force us to explore systematically the normative plausibility of coupling legal duties with conflicting moral rights, and legal rights with conflicting moral duties. If I am right, the answers to these questions collectively establish that all such marriages are morally dysfunctional. We should conclude that the moral rights and obligations of citizens define the proper scope and limits of legitimate state action: When, all things considered, citizens are morally permitted to act (or to refrain from acting), lawmakers are obligated not to interfere with their choices; when, all things considered, citizens are morally obligated to act (or to refrain from acting), lawmakers are obligated (absent systemic constraints of a morally significant sort[11]) to coerce their compliance. Our rights to act determine our rights against rules, and vice versa.

As will become clear, the answer to the second question falls out of the answer to the first question, and the answer to the fourth question falls out of the answer to the third question. In the interests of efficiency, I shall thus take up these four questions in pairs. In the next Part, then, let us seek answers to questions (1) and (2) in a general analysis of whether legal officials can ever legitimately enact and enforce legal rules that are inconsistent with our moral rights.

11. I discuss the sorts of systemic constraints that might prevent legal rules from mirroring moral rules in Section B. of Part IV. As I will argue, that considerations of efficiency and rule-of-law constraints preclude the legal enforcement of all of our moral duties buys neither Alexander his "optionality thesis" nor Adler his more general claim that our constitutional rights take rules rather than actions as their objects.

III. CAN LEGAL OBLIGATIONS LEGITIMATELY CONFLICT WITH MORAL RIGHTS?

Could a person ever have a moral right to do something, but no moral right that lawmakers not prohibit it? Conversely, could a person ever have a moral right *not* to do something, but no moral right that lawmakers not require it? There are at least two plausible reasons to think that legal duties could contradict moral rights. First, legal rules are at least contingently, if not necessarily, overinclusive as applied to certain persons in certain circumstances, and in such cases it might be thought that such persons' legal obligations are at odds with their moral rights. Second, certain actions may be "supererogatory" (praiseworthy but not obligatory) or "suberogatory" (permitted but blameworthy). If, as a perfectionist might argue, there are no principled objections to the law compelling all praiseworthy actions and prohibiting all blameworthy actions, then the law may require actions that persons are morally permitted not to do, or it may prohibit actions that persons are morally permitted to do. Let us take up each of these arguments in turn.

A. The Overinclusivity of Legal Rules

Those who believe that legal rules are either contingently or necessarily overinclusive relative to their background moral justifications surely believe that legal rules will occasionally contradict moral rights. If legal rules should be enforced as aggressively in cases in which they are overinclusive as in cases in which their requirements mirror those of morality, then persons will occasionally face legal liability for actions that they are morally entitled to perform, and persons will occasionally be legally required to perform actions that they are morally entitled to forgo.

In Frederick Schauer's view, for example, legal rules are a species of prescriptive rules the function of which is to guide the behavior of citizens so as to maximize their conformity with the rules of morality.[12] For legal rules to guide action more effectively than the moral rules themselves, they must be clearer, simpler, and more accessible than are the rules of morality. To possess these features, legal rules must be over- and underinclusive vis-à-vis morality's far more complex, nuanced, and fact-sensitive obligations and permissions. Since legal rules will effectively guide private action only if courts enforce them in all cases to which their plain meaning applies, including those cases in which they are, in fact, overinclusive, then in such cases of overinclusive application, persons will find themselves

12. Frederick Schauer, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 17–37, 100–02 (1991).

subject to legitimate legal obligations that are inconsistent with their moral rights.[13]

For example, it may be that the best *rule* that a legislature can craft concerning the justified use of deadly force in self-defense contains a requirement of imminent peril. Any other rule (for example, one that permits the use of deadly force whenever "necessary") would prompt persons to resort to deadly force when alternative means of escape or deterrence are in fact available to them. Even so, it is hard to deny that in some circumstances, persons are morally permitted to engage in preemptive strikes against yet-to-be aggressors. Imagine, for example, a battered wife, who is persuaded by her husband that when he awakes the next morning, he will kill her and their three children. If she cannot escape, cannot call for help, cannot barricade herself and her children from her husband, and cannot successfully defend herself and her children at the time of his eventual attack, surely she is morally entitled to kill him in his sleep. In such a case, it might be argued, it is both moral for the law to require her to await imminent peril and moral for her to act in its absence. In short, she has a moral right to do act *A* (kill her husband), but no moral right that lawmakers not prohibit her from doing *A*.

I have elsewhere described the possibility that citizens' rights can be contradicted by officials' duties as "the dilemma of legal perspectivalism."[14] It is generated by the claim that by virtue of their different roles, persons can occupy different moral "perspectives" in which they are subject to different, possibly competing, moral obligations. From the perspective of a legislator who is considering what rule of self-defense will minimize unjustified killings, the right rule to vote for may be one that requires imminent peril; from the perspective of a judge who is adjudicating a high-profile "burning bed case," the right rule to enforce may be one that makes no exception for preemptive strikes; and from the perspective of the battered wife who is considering how to protect herself and her children, the right thing to do may be to strike before peril is imminent. Legal perspectivalism is itself a product of several important theses: (1) that the content of law does not mirror perfectly the content of morality (perhaps because, as Schauer argues, the point of law is to simplify morality); (2) that law lacks the kind of authority that would make it morally right in all cases to obey its requirements and morally wrong in all cases to disobey its requirements; and (3) that our best moral theory in fact assigns role-relative obligations to actors, so that some actors, by virtue of their unique roles, have reasons for action that other actors do not have. Having devoted book-length

13. Larry Alexander and Emily Sherwin have also defended this thesis in their provocative new book, PAST IMPERFECT: RULES, PRINCIPLES, AND DILEMMAS OF LAW ch. 4 (2000). *See also* Larry Alexander & Emily Sherwin, *The Deceptive Nautre of Rules*, 142 U. PA. L. REV. 1191 (1994); Larry Alexander, *Pursuing the Good—Indirectly*, 95 ETHICS 315 (1985); Larry Alexander, *The Gap*, 14 HARV. J.L. & PUB. POL'Y 695 (1991).

14. Heidi M. Hurd, "Legal Perspectivalism" (1992) (unpublished Ph.D. dissertation, University of Southern California) (on file with author).

treatment both to vindicating the first two theses and to defeating the third thesis,[15] I do not propose to advance a detailed argument here against legal perspectivalism. Instead, let me beg my readers to indulge the conclusions of my previous work long enough to trace their implications for the thesis that Adler and Alexander have advanced concerning the lack of identity between our moral rights and our constitutional rights against rules.

If I am right, legal rules function, at best, as reliable indications of our moral obligations. We are not obligated to act in accordance with law; we are rather obligated to act in accordance with morality's maxims, and when law is our best evidence of those, we do well to abide by it.[16] Lawmakers fulfill their obligations qua lawmakers when they lay down rules that maximally assist citizens in acting rightly under circumstances in which citizens' independent moral judgments might be erroneous. It follows from this understanding of law—an understanding that accords law mere "theoretical authority"—that a citizen may have no right that the legislature not enact rules that are overinclusive as applied to her. Indeed, one might go so far as to say that a citizen could have a right *to* the legislative enactment of a rule that is overinclusive as applied to her. After all, it may well be that the battered woman's interests are best served, and her rights are best protected, by a general rule that prohibits, say, the use of self-defense absent imminent peril.

Does this argument lend substance to Adler's and Alexander's claim that our rights to act can diverge from our rights against certain rules? It concedes, after all, that the battered wife could have a right to preemptively kill her husband, but no right against a rule that prohibits preemptive killings. Does such a concession force us to admit that legal rights can meaningfully be about rules, without being about particular actions? The answer is no. For as I have also argued, on pain of inviting what I have called "moral combat," our best moral theory does not permit officials to punish those who are justified, all things considered, in violating the law.[17] Hence, if a battered woman has a moral right to use deadly force absent imminent peril (a question that requires us to examine not only her immediate circumstances, but also the long-term systemic consequences of adjudicating her case[18]), then she has a moral right that the law that requires imminent peril not be enforced against her by officials who are responsible for the prosecution, adjudication, and punishment of persons who violate

15. Heidi M. Hurd, MORAL COMBAT (1999).
16. This is the conclusion of the argument in chapters 2–6 of MORAL COMBAT, *id.* at 25–184.
17. This is the conclusion of the arguments in chapters 10–11 of MORAL COMBAT, *id.* at 253–70.
18. As I have argued, a citizen is only justified in violating the law if all of the systemic consequences of her violation do not cumulatively generate more unjustified violations by others than justified ones. Thus, for example, in assessing the morality of her violation, we must consider whether her acquittal will trigger more unjustified violations than justified ones, and whether her judge's acquittal (for failing to punish a morally, but not legally, justified offender) will trigger more unjustified, rather than justified, judicial disobedience. *See id.* at 297–321 (chapter 12).

just laws. Hence, while her moral rights may be in apparent conflict with her legal rights, as the latter are defined in general rules enacted by legislators, her moral rights ultimately dictate the scope and circumstances of any legal liability that might be justly imposed by adjudicators. Hence, the possible overinclusivity of laws is a poor reason, by itself, to conclude that a person could have a moral right to do act *A*, but no moral right that the law protect her in doing *A*, or that a person could have a moral right *not* to do act *A*, but no moral right that the law not require her to do *A*. In short, the moral rights that determine the actions that we may and may not do (all things considered), determine the rules that may and may not be enforced against us. If, all things considered (including offense to others, potential for destruction of others' property, the justness of the message communicated by the act, etc.), it is moral for me to burn a flag on the streets of my town, then legal officials are not justified in imposing liability on me (under any law), even if by so doing, they would maximally deter future unjustified flag burnings by me and others.

B. The Legitimacy of Perfectionism

We have just examined, and cursorily put to rest, the claim that moral rights can be contradicted by legal duties because (1) laws are either contingently or necessarily overinclusive and (2) laws can maximize persons' conformity to the requirements of morality if and only if they are aggressively enforced in all cases to which their plain meaning applies, including those cases in which their requirements are overinclusive. Let us now turn to a quite different account of how moral rights might be contradicted by legal rules—an account that takes its leave from a perfectionist theory of legislation. On this account, the law can properly prohibit suberogatory actions and properly require supererogatory actions, notwithstanding the fact that persons are morally permitted to perform suberogatory actions and to forgo supererogatory actions.

Although many are unacquainted with the philosophical terms for these categories of actions, daily experience is rich in examples of super- and suberogatory actions. It is common, for example, to hear persons condemn actions that they consider well within others' rights and praise actions that they consider entirely non-obligatory. Such instances of blame and praise suggest that morality embodies at least five discrete categories of actions. Two of these categories together exhaust our moral obligations. The first constitutes required actions—that is, actions that are positively obligatory. We are positively obligated to keep our promises, to feed our children, to pay just taxes, and to assist our parents in times of need. The second is comprised of forbidden actions—that is, actions that are negatively obligatory. We are negatively obligated not to kill innocent persons, not to rape, not to steal, not to invade others' privacy, and not to engage in libel.

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The remaining three categories of actions exhaust our moral permissions. The third category of actions is comprised of suberogatory actions —actions that are both morally permitted and morally blameworthy. Characterized in the literature as "offences,"[19] "permissive ill-doings,"[20] and the objects of "stained permissions,"[21] these actions reflect instances in which persons abuse their rights.[22] The woman who seeks repeated abortions rather than use birth control exercises a right in a blameworthy way.[23] The person who picks his friends in part by their skin color, or meticulously exacts compensation for trivial injuries, or smokes, or buys a Renoir only to destroy it, or burns his fortune in front of hungry children, acts in a way that is condemnable, albeit morally permitted.

The fourth category of morally relevant actions is that of supererogatory actions—actions that are praiseworthy to perform but not blameworthy to forgo. Variously described as the objects of "exclusionary permissions,"[24] acts that go "beyond the call of duty;"[25] and acts that are "saintly" or "heroic,"[26] this category of actions is illustrated by such examples as the soldier who throws himself on the grenade to save his comrades, the bystander who rushes into a burning building to save an unknown person, and the family who adopts a severely disabled child.[27]

The fifth category of actions is the very significant category of amoral or morally irrelevant actions—nonobligatory actions the commission or omission of which neither invites moral praise nor blame. Characterized as the

19. *See* Roderick M. Chisholm & Ernest Sosa, *Intrinsic Preferability and the Problem of Supererogation*, 16 SYNTHESE 321, 326 (1966) (coining this popular terminology).

20. *Id.*

21. Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 123–24 (1996).

22. For an analysis of the notion of abusing rights, *see* Frederick Schauer, *Can Rights Be Abused?*, 31 PHIL. Q. 225 (1981).

23. For a more extended discussion of how use of this example to illustrate the notion of stained permissions or suberogatory actions is consistent with the liberal's pro-choice commitment, *see* Julia Driver, *The Suberogatory*, 70 AUSTL. J. PHIL. 286, 292–94 (1992); Hurd, *supra* note 21, at 123–24.

24. "Exclusionary permissions" are second-order permissions to refrain from doing what we ought to do on the balance of first-order reasons for action. *See* Joseph Raz, *Permissions and Supererogation*, 12 AM. PHIL. Q. 161 (1975).

25. Gregory Mellema, BEYOND THE CALL OF DUTY (1991).

26. *See* J.O. Urmson, *Saints and Heroes*, in ESSAYS IN MORAL PHILOSOPHY 198 (A.I. Melden ed., 1958).

27. There is a hybrid category of morally relevant actions comprised of what are cumbersomely referred to in the literature as quasi-supererogatory actions—actions that are praiseworthy if done and blameworthy if omitted. These actions are done in catch-22 situations in which actors cannot help but do what is either super- or suberogatory. The brother who is asked to donate a kidney to his dying sister and the friend who is called upon to reciprocate a past favor both appear to be caught in a bind: Their willingness to help will take them beyond the call of duty, while their refusal will be an abuse of their rights. Because the legitimacy of legislating quasi-supererogation will turn on the legitimacy of legislating super- and suberogation, there will be no cause, in this article, to separately distinguish this category of actions. For the original discussions of this particular category of actions, *see* Gregory Mellema, *Is it Bad to Omit an Act of Supererogation*, 21 J. PHIL. RES. 409 (1996); Mellema, *Beyond the Call of Duty*, 105–129. *See also* Driver, *supra* note 23, at 286–89 (describing these actions as the product of "morally charged situations").

objects of "weak permissions"[28] or "unstained permissions,"[29] these actions are such that one neither ought nor ought not to do them. They include the vast majority of actions performed hourly, such as brushing one's teeth, taking a coffee break, and calling a contractor for a minor home repair, as well as more significant actions such as taking a spouse, picking a college, pursuing a particular career, and establishing a place of residence.

Theorists who seek to vindicate the five categories of common sense morality must explain how praise and blame can attach to the exercise of moral permissions. To bestow moral praise on an action is to commend it; it is thus to say that, in some sense, the action "ought" to be done. Similarly, to blame someone for an action is to condemn it; it is to say that, in some sense, the action ought not to be done. And yet, inasmuch as super- and suberogatory actions are actions that one is permitted both to do and to refrain from doing, the "oughts" implicit in our praise and blame of them must be "nonobligatory oughts." But what sense can be made of nonobligatory oughts?

I have elsewhere argued that while our best deontic theory—that is, our best theory of right action (be it deontological or consequentialist)—relegates super- and suberogatory actions to the arena of permitted (and hence, nonobligatory) actions, our best theory of virtue makes it obligatory on us to become the sorts of persons who do supererogatory actions and refrain from suberogatory ones. That is, we are *aretaically* obligated to cultivate personal dispositions that incline us to go beyond the call of deontic duty and that incline us not to abuse our deontic rights. Supererogatory actions derive their praiseworthy moral quality from the fact that they manifest our fulfillment of aretaic duties that require us to be the sorts of persons who perform such actions; and suberogatory actions derive their blameworthy quality from the fact that they manifest personal vice—that is, a failure on our part to live up to aretaic duties that require us to be the sorts of persons who do not stand on their deontic rights.[30]

28. Raz, *supra* note 24, at 161.

29. Hurd, *supra* note 21, at 123–24.

30. The natural temptation upon encountering this very abbreviated argument is to insist that I have overpopulated our moral ontology. Why do we need to say that while people have no deontic duties to supererogate, they have aretaic duties to be the sorts of persons who supererogate? Does not the judicious use of Ockham's Razor compel us to conclude that people simply do have deontic obligations to supererogate? The answer is no, and here are two reasons why. First, it is only by postulating that there are aretaic duties to go beyond deontic duties that we can make sense of our understandings of many relationships. For example, we commonly think that a person can properly be blamed for not being a good friend, where being a good friend requires actions that are not obligatory. And it is only by thinking that people can abuse rights that we can make sense of rights to begin with. After all, one does not need a right to protect one in doing what is otherwise morally good. Rather, one needs a right against others' intervention only when one may abuse that right, that is, only when one seeks to do something that can meaningfully be described as neither morally optimal nor morally neutral. Hence, to make sense of the common moral presuppositions of daily moral discourse, such as the notion that certain virtuous character traits (which themselves require supererogatory actions) are obligatory and the notion that persons can abuse rights, one needs a category of *deontologically* nonobligatory actions that are *aretaically* obligatory.

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Those who follow me this far in the analysis of the different categories of morally relevant actions might be inclined to argue that the law might properly coerce virtue and suppress vice by requiring us to do what is supererogatory and to refrain from doing what is suberogatory. Such an argument might be appealing to legal perfectionists who deny that there are any principled reasons why the law may not be used for the purpose of morally perfecting persons. Perfectionists might argue that inasmuch as persons are aretaically obligated to be the sorts of persons who do supererogatory actions and refrain from suberogatory actions, such actions are legitimately within the jurisdiction of the state (even though, as a deontic matter, persons are permitted to do what is suberogatory and forgo what is supererogatory).

If perfectionists are right in thinking that the law can properly be used to compel the satisfaction of our aretaic obligations, then we must answer the two questions with which we are concerned in this Part in the affirmative. A person could have a moral right to do, say, act *A*, but no moral right that lawmakers protect her in the doing of *A*. That is, she could have a (deontic) moral right to do something that she legitimately has no legal right to do. For she could be deontically permitted to do a suberogatory action, while being legitimately subject to a legal duty not to do that action—a duty enacted to suppress an aretaically prohibited vice. And she could have a (deontic) moral right not to do act *A*, but no moral right that lawmakers not require her to do act *A*. That is, she could have a moral right to refrain from doing what she legitimately has a legal obligation to do. For she could be deontically permitted to refrain from doing a supererogatory action, while being subject to a legitimate legal obligation to do that action—a duty enacted to cultivate an aretaically obligatory disposition towards virtue.

Adler and Alexander might thus be inclined to reach to a perfectionist political theory in partial defense of their claim that our rights to act do not perfectly correlate with our rights against legal rules. Whether our rights can depart from legitimate legal rules in the ways described above turns on whether perfectionism is ultimately a defensible theory of legislation. If the normativity of super- and suberogation is best explained by reference to aretaic obligations to develop certain character traits and suppress others, then the perfectionist thesis that the law can properly compel supererogation and prohibit suberogation makes moral sense only if it amounts to the claim that lawmakers may properly legislate virtue. Let us explore whether such a political agenda—if adopted by the likes of Adler and Alexander—could be practically implemented without moral objection.

1. The Standard Objection to Legislating Virtue: The Capacity of Law to Pervert Motivation

It is commonplace for those who concern themselves with the scope and limits of legislation to maintain that any perfectionist attempt to compel

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virtue will thwart its cultivation.[31] As these critics rightly argue, to be a virtuous person one must both *act* in virtuous ways (in many circumstances, supererogatorily) and do so as a result of virtuous motivations. If the motives with which we perform supererogatory actions are matters of aretaic duty and are necessary conditions for finding such actions supererogatory at all, and if the law's sanctions and incentives can pervert our reasons for action by motivating us to act out of fear or greed instead of out of selfless concern for others, then the legislation of aretaic duties will be self-defeating.

I do not find this argument, as stated, as compelling as do those who advance it. First, those who do charitable deeds for charitable reasons absent any legal requirement are not likely to change the reasons for which they do those actions just because charity becomes legally required.[32] That is, true virtue is immune to perversion. As such, we should have no fear that by legislating virtue we shall diminish its existence among those who already possess it. We should fear only that by legislating virtue we shall fail to encourage its cultivation by those who do not already enjoy the dispositional states within which it resides. One might think, however, that by prompting people who would not otherwise act to do virtuous deeds, even if for nonvirtuous reasons, we have gone some distance towards encouraging their fulfillment of their aretaic duties. If nothing can be lost (because those who are virtuous will continue to act in virtuous ways for virtuous reasons), and something might be gained (because those who are not virtuous will at least act virtuously, even if they do not do so for virtuous reasons), there seems no reason to object to legislation that requires virtuous deeds.

Second, and relatedly, the traditional argument against attempts to legislate virtue assumes that the law can change reasons for action for the worse, but not for the better. But it may be reasonable to suppose, with Aristotle, that the habitual repetition of an action cultivates a disposition to do that action for its own sake.[33] If true, then by legislating virtuous actions, lawmakers may induce, in the long run, the development of virtuous dispositions on the part of those who initially abide by the law for self-interested reasons.

2. A Modified Version of the Standard Objection to Legislating Virtue

The party line against employing the law to encourage the cultivation of virtue thus demands a more sophisticated formulation before it should

31. *See, e.g.*, Robert Paul Wolff, *In Defense of Anaschism*, in IS LAW DEAD? 110 (E. Rostow ed., 1971); Michael S. Moore, PLACING BLAME 746–50 (1997).

32. I owe this argument to Francis Kamm, who, at the Second Annual Seminars in Analytic Legal Philosophy (Columbia University School of Law, April 1997), advanced it against a paper that argued that coercive sanctions inhibited autonomous moral reasoning.

33. As Aristotle maintained, "Moral virtue . . . is formed by habit. . . . [W]e are equipped with the ability to receive [the virtues], and habit brings this ability to completion and fulfillment. . . . [W]e become just by the practice of just actions. . . . " Aristotle, NICOMACHEAN ETHICS, 1103a, 1103b1–2, 16–25 (H. Rackman trans., Harvard Univ. Press 1926).

persuade perfectionists to abandon their legislative agenda. We can bolster that argument considerably by recasting it as follows. First, if the normativity of super- and suberogatory actions derives from the fact that these actions manifest the satisfaction or violation of aretaic duties, then the perfectionist must admit that a lawmaker is justified in requiring such actions if and only if, by so doing, the lawmaker succeeds at compelling us to fulfill our aretaic duties. Put differently, if the moral value of super- and suberogatory actions lies (solely) in the virtues and vices that such actions reflect, then it is those virtues and vices with which the law must be *primarily* concerned in order to be *morally* justified in regulating super- and suberogatory actions.

Second, *if* Aristotle was wrong in believing that the habitual repetition of an action causes the development of a disposition to do that action for its own sake, then lawmakers cannot morally justify the regulation of super- and suberogation by the claim that it will encourage virtue and suppress vice. Whether Aristotle was right is a purely empirical question, demanding an enquiry into the progression of psychological states attendant upon the repetition of an action. If such an enquiry were to prove that the habitual performance of an action solidified, rather than altered, the initial motivation for that action, or, alternatively, bred a motivation to do that action for the sake of habit itself, then that action would fail to bear any relationship to an aretaic duty. The law requiring such an action would thus loose its normative justifiability. For recall, such an action is not a matter of deontic duty: Ex hypothesi we have a (deontic) moral permission not to do the action that is legally required. And although there may be a close connection between our aretaic duties and this action—in the sense that we have aretaic duties to cultivate character traits that necessitate the performance of actions of its sort when capacities and opportunities permit—the instrumental failure of the law to "reach" these aretaic duties through the legislation of this action renders the action, itself, without moral worth.

Finally, the law cannot remedy its failure to affect virtue through action, by seeking to regulate our motivations for action directly. For we have good grounds to believe that we cannot will the reasons for which we act. As James Brown has maintained, "clearly there are at least difficulties in the way of accepting that it is within an agent's power, on a particular occasion, to determine which motive will be the one which moves him to action. . . . "[34] The most significant of these difficulties emerges from the current consensus in the philosophy of mind about the necessary relation that must exist between mental states and actions in order to say of those mental states that they are our reasons for acting. Of all the various motivations (that is, belief-desire sets) that are consistent with an action, the motivation (belief-desire set) that *causes* that action is the motivation for that action. It is this causal account of motivation that vindicates the claims of historians and psychoanalysts to be doing empirical, rather than literary, work. But such a

34. James Brown, *Moral Theory and the Ought-Can Principle*, 86 MIND 206, 210 (1977).

causal account of motivation defeats any theory that legislation should concern itself directly with virtuous motivations. For if motivation consists in a causal connection between a belief-desire set and an action, then we can no more will into (or out of) existence a motivation for an action than we can will into (or out of) existence any other causal relation between events in the universe. Thus, a theory of legislation that calls upon us to will our reasons for action calls upon us to do the impossible.

Inasmuch as fairness dictates that our laws not exceed our abilities, it precludes the direct legislation of virtuous motivations. If lawmakers are to encourage the development of virtuous dispositions, they must thus do it indirectly. And if the arguments advanced above (together with the empirical work demanded by those arguments) persuade us that legally requiring supererogation and prohibiting suberogation will not instrumentally affect our motivations for the better, then we must conclude that perfectionists cannot use the law to enforce our aretaic obligations. They must instead confine their legislative ambitions to the regulation of our deontic obligations.

3. The Incompatibility of Perfectionism and Retributivism

Let us now turn to an argument that is quite different from the one traditionally advanced by those who oppose extending the scope of the law to include the development of virtuous character traits. This is an argument that denies that we are morally justified in using the law to achieve virtue, *even if* Aristotle was right in maintaining that we can induce virtuous dispositional states by requiring virtuous actions. To motivate this argument, suppose that lawmakers were to require us to contribute ten percent of our annual income to charity. Suppose, further, that we were to come to abide by such a law for virtuous reasons (that is, we developed a disposition to contribute the money for selfless reasons—a disposition amounting to a regular causal connection between selfless belief-desire sets and our acts of aid). If this happy state of affairs came about, would the law not have succeeded in coercing virtue?

The answer, I think, must be yes. But the moral costs of such coercion preclude such a strategy. To appreciate why, imagine that a citizen were to violate this law, keeping all of her earned income for personal use. But imagine that she were to donate thirty hours of her time each week to assisting the elderly, volunteering in soup kitchens, and helping to run a nonprofit battered women's shelter. Unless one believes that persons deserve punishment just because they violate the letter of the law, one cannot maintain that the citizen morally deserves punishment. After all, the point of the law that she violates is to induce charity. She has manifested precisely that virtue to the same degree, or to a greater degree, than do those who comply with the law. If criminal sanctions are inappropriate absent moral desert, then one cannot justify the use of the criminal law to enforce one form of virtue over others just because it is legislatively mandated.

This argument presupposes a host of contentious claims that I shall not attempt to defend here, but to which I have devoted considerable energy elsewhere. It rests, for example, on the claim that the law lacks both practical and influential authority, and hence, that by violating the law one does not necessarily deserve moral blame.[35] It further presupposes a retributive theory of punishment, according to which criminal sanctions are justified if and only if persons morally deserve them.[36] Let us, for the moment, suspend the temptation to further debate these more general jurisprudential claims and concentrate, instead, on the lesson that this hypothetical teaches us about the potential of law to police virtue.

This hypothetical is powered by the fact that any given virtue can be manifested by a virtually infinite set of actions. Unlike deontic duties, which concern themselves with specific actions, and so cannot be fulfilled without doing those specific actions, aretaic duties, concerning themselves as they do with character traits, can potentially be fulfilled without performing any actions at all (when the capacities or opportunities for their manifestation are absent), and can (assuming unimpaired capacities and normal opportunities) be fulfilled through the performance of a great many actions. Friendship, for example, can manifest itself in gifts, favors, shared hobbies and activities, false compliments, painful truths, emotional support, intimate conversations, advice following, and so forth. To mandate one form of friendship to the exclusion of all others, and then to punish persons who substitute other forms for the one that is mandated, would violate the principle that punishment should track moral desert, for it would impose sanctions on those who, in fact, do their (aretaic) duty.

4. The Incompatibility of Perfectionism and the Rule of Law

Now it might be admitted that the above argument demonstrates that the *criminal* law cannot enforce aretaic duties in a way consistent with a retributive theory of punishment. But it might plausibly be argued that other areas of law can properly concern themselves with the cultivation of virtue. Can there be any principled objection to using legal rewards, rather than sanctions, to encourage supererogation? In answer, consider three such objections that are distinct from the above concern that if rewards are offered, persons will perform seemingly selfless actions for selfish reasons in a manner that defeats, rather than encourages, their cultivation of virtue. The first is an equality objection. Unless any form of supererogation will do, what would justify lawmakers in rewarding one sort of supererogation to the exclusion of other equally valuable sorts? To give a tax break to those who contribute money to recognized charities, but not to those who contribute

35. For a lengthy defense of this thesis, see Hurd, *supra* note 15, *Combat*, chs. 3–6. *See also* Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945, 1006–28 (1990); Heidi M. Hurd, *Challenging Authority*, 100 YALE L.J. 1611 (1991).

36. *See* Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2203 (1992); Heidi M. Hurd, *What in the World is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157 (1994).

extensive amounts of time to helping their friends, arbitrarily advantages some when others are equally deserving.

The second objection is an administrative one. In order to escape the charge that rewarding supererogation would violate equality, the law would have to reward all forms of supererogation in equal proportion to their worth. But, surely, to do so would be administratively impossible. How could the law help but discriminate among forms of supererogation? Inasmuch as one can supererogate in a virtually infinite number of ways, legislators could not hope to enumerate the specific actions that would merit equal reward, and courts could not adjudicate general standards without implicating rule-of-law values that require the law to be public and predictable.

The third objection is an allocative one. To the extent that the law would have to discriminate among forms of supererogation in order to make its standards adjudicable, it would inevitably warp the kinds of supererogatory actions that persons perform. If persons were rewarded for making donations to charity, but not for helping their elderly relatives, presumably more would give to charity and fewer would help their relatives. Even if we could escape the fear that such a law would self-defeatingly motivate persons to donate to charity for uncharitable reasons, we should fear that it would reduce the types, if not the numbers, of supererogatory actions performed. And if we have good reasons to suppose that the world is a better place if persons perform a wide variety of supererogatory actions rather than a select few, we have good reasons to refuse to use the law to encourage supererogation.

This brings us to a final attempt to rescue perfectionism. Perfectionists might well argue that the above objections are sound reasons to think that the law ought not to attempt to coerce supererogation. But they might argue that those objections carry no weight against the claim that the law should seek to discourage vice by regulating suberogatory behavior. Although there might be sound reasons not to use the criminal law to sanction suberogatory actions (reasons that stem from the concern that general standards would effectively result in common-law crimes and specific standards would be underinclusive relative to the evils sought to be prevented), what could be the moral harm in exacting "sin taxes"—that is, monetary tolls targeted at discouraging specific suberogatory actions? One could hardly complain if the law, by successfully discouraging certain sorts of suberogatory actions, narrowed the types of vices that people manifested.

Yet one still ought to have powerful equality concerns about noncriminal legislation aimed at suberogation. For those whose means of manifesting vice are taxed could surely complain that others manifest similarly worrisome character traits in ways that are not taxed. Just as virtue manifests itself in many actions, so too does vice, and to avoid the unequal treatment of equally situated persons, the law would have to concern itself equally with all actions that manifest similar vice. To overcome this equality concern would of course invite the administrative objection. For legislators could

hardly enumerate the myriad actions that reflect vicious dispositions, and courts could hardly adjudicate general standards against vice without threatening the rule-of-law values concerned with fair notice and predictability of outcome.

As the arguments that I have advanced make clear, only actions are capable of being willed, and only actions can be specified with sufficient precision by lawmakers to make their adjudication consistent with the rule of law. Character traits, consisting as they do of dispositional states, cannot be willed. And character traits, manifesting themselves as they do in a multiplicity of actions, cannot be made the subjects of legal provisions without threatening equality, liberty, and fair reliance.

Yet actions are only obliquely related to virtue. Although they often manifest virtuous character traits and are necessitated by the possession of certain virtuous character traits (capacities and opportunities permitting), super- and suberogatory actions are not the stuff of which virtue and vice are comprised. Rather, these actions possess normative value (and are, thereby, the objects of moral oughts) just because of their contingent connection to the character traits that comprise virtue and vice. Hence, by requiring the performance of supererogatory actions and prohibiting the performance of suberogatory actions, the law may not succeed in compelling virtue and suppressing vice, because it may not succeed in inducing the necessary dispositional states that alone make the legislation of such actions normatively defensible. And even if the law could induce virtuous dispositions by requiring the performance of specific sorts of supererogatory actions and prohibiting the performance of specific sorts of suberogatory actions, we could not justify its use in this manner without violating the values of equality, liberty, and fair reliance in ways that threaten the rule of law.

These arguments conspire to place virtue beyond the jurisdiction of the law. Given the unique constraints on law—the requirements that for law to be law at all, and for law to be morally authoritative, it must protect equality, liberty, and fair reliance by being prospective, public, general, clear in meaning, free of contradiction, stable over time, and within the realm of the possible[37]—law must concern itself with actions, not character traits. Hence, law must confine itself to the enforcement of our deontic duties, leaving our aretaic duties to a higher or different authority.

If perfectionism is indefensible, then it cannot be used to support the conclusion that persons could have rights to do or refrain from doing certain actions, but no rights that lawmakers protect them in the commission or omission of those actions. We must conclude that just as we could not derive this conclusion from the overinclusive nature of law itself, so we cannot derive it from the bifurcated structure of morality itself. If no other

37. For the classic defense of these requirements as "the inner morality of law," *see* Lon L. Fuller, THE MORALITY OF LAW 33–94 (rev. ed. 1969).

arguments are available to defend the claims that a person could have a moral right to do act *A*, but no moral right that lawmakers not protect her in the doing of *A*, and that a person could have a moral right not to do act *A*, but no moral right that lawmakers not require her to do act *A*, then it would appear that we have good grounds to believe that legal rules cannot inhibit the exercise of moral rights. And this conclusion vindicates the first half of the conjunctive thesis that moral rights cannot conflict with legal duties and moral duties cannot conflict with legal rights. Let us turn in the next Part to the second half of that thesis—to the general question of whether those who enact and enforce legal rules could legitimately refuse to enforce our moral obligations (absent systemic constraints).

IV. CAN LEGAL RIGHTS LEGITIMATELY CONFLICT WITH MORAL OBLIGATIONS?

In this Part, we take up the second set of questions with which I began our inquiry:

(3) Could a person have *no* moral right to do act *A*, but a moral right that lawmakers not prohibit her from doing *A*? (That is, could a person have both a moral obligation not to do something and a legitimate legal right to do it?)
(4) Could a person have *no* moral right *not* to do act *A*, but a moral right that lawmakers *not* prohibit her from *not* doing *A*? (That is, could a person have both a moral obligation to do something and a legitimate legal right not to do it?)

If we must answer these questions in the negative, as I think we must, then we should conclude that the moral rights and obligations of citizens define the proper scope and limits of legitimate state action. When citizens are morally permitted to act (or to refrain from acting), all things considered, lawmakers are obligated not to interfere with citizens' choices (the conclusion of Part III); and when citizens are morally obligated to act (or to refrain from acting), all things considered, lawmakers are obligated (absent systemic constraints[38]) to coerce citizens' compliance. Our rights to act will thus be cumulatively coextensive with our rights against rules, and vice versa.

It will surely be counterintuitive to many modern political theorists to argue that there can be no principled objections to extending the jurisdiction of the law to all of our moral duties. After all, libertarians and those I shall call "weak liberals" are famously devoted to defending versions of the claim that law is not entitled to enforce all of our moral obligations. The claim of such theorists is not that there are some moral obligations that are, as a practical matter, too trivial to merit the concern of the state, but rather

38. *See supra* note 11; *see also infra* Pt.IV.B.

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that there are some admittedly important moral obligations that cannot, in principle, be coerced by the state. Inasmuch as the above questions cannot be answered in the negative without advancing convincing reasons to reject both libertarian and weak-liberal political theories, I propose to devote the bulk of this Part to that task.

At the close of this Part I shall take up the alternative thesis that though lawmakers are *permitted* to enact rules that coerce our fulfillment of any and all of our moral obligations, they are not *obligated* to do so. As I shall argue, absent systemic constraints, lawmakers are as obligated to pass laws that enforce our moral obligations as they are obligated not to pass laws that violate our moral rights.

A. The Legitimacy of Libertarianism and Weak Liberalism

Those who seek to defend an imperfect correlation between our rights against legal rules and our rights to perform certain actions will find their surest footing in libertarian theory, which holds that legislation is legitimate if and only if it is limited to prohibiting actions that are morally forbidden. In Robert Nozick's classic terms, the state should never function as more than a nightwatchman:[39] Its only justifiable role is to enforce our negative obligations to others. Lawmakers may thus properly legislate against murder, rape, and theft, but they may not require the fulfillment of good samaritan obligations, nor may they compel us to do what we are morally permitted not to do, even if by demanding that we supererogate (and refrain from suberogating) they would achieve a more egalitarian (and, ex hypothesi, fair) distribution of resources than is achieved by the lottery of nature.

Alternatively, those who fear the social implications of libertarianism, but who persist in believing that legal rules can fail to enforce our moral rights and obligations, may be tempted to embrace a kind of liberalism that holds that the state can enforce not only our negative obligations, but also (some of) our positive obligations. A weak brand of liberalism—or what might more descriptively be called a kind of "welfare liberalism"—might hold, for example, that legislation is legitimate only if it enforces our negative obligations and requires our performance of positive obligations necessary to guaranteeing that everyone's most basic needs are met. On this theory, the state is properly a welfare state: It may ensure both that we do not harm one another and that we provide help to one another sufficient to ensure that everyone enjoys a social safety net that prevents personal catastrophe. Weak liberalism thus envisions a sliding scale of enforceable positive duties. If everyone's minimal needs cannot be met without extensive good samaritanism on the part of others, then the law can coerce the performance of many or most of our positive duties. On the other hand, if a social safety net can be provided merely by enforcing the least demanding of our positive obli-

39. Robert Nozick, ANARCHY, STATE AND UTOPIA 25, 26–27 (1974).

gations, then lawmakers are not entitled to require us to satisfy more than our most minimal duties of aid. On this view, for example, lawmakers might sensibly enforce the potpourri of obligations that American law currently reflects: They might properly limit the legislation of good samaritan duties to those duties we owe to identifiable persons—for example, to persons we have placed in peril and to those with whom we have special relationships—and they might properly require a regular redistribution of resources to strangers who will perish without our aid.

We can juxtapose a stronger version of liberalism to the weak version that I have constructed on behalf of those who deny the identity of our rights against rules and our rights of action. Such a theory would hold that legislation is legitimate only if it prohibits what is morally forbidden and requires what is morally obligatory. The proper scope of state power is coextensive with the scope of all of our moral obligations, both positive and negative. Legislation can properly impose general good-samaritan duties (beyond those required to ensure that everyone's most minimal needs are met) as long as they are genuine duties and not instances of supererogation. The state may thus require that we give aid to strangers in need in all circumstances in which such aid is morally obligatory, and it may thereby effect a far more egalitarian distribution of wealth than is commonly associated with welfare liberalism (if, again, it is our moral duty to give to others more than is necessary to guarantee their minimal subsistence).[40]

The libertarian and weak liberal theories that I have advanced on behalf of the claim that moral obligations may be legally unenforceable both trade on the distinction between negative and positive moral duties. They jointly take our negative obligations to be the primary subject matter of legitimate legislation, implicitly agreeing that our positive obligations pose special difficulties for legal enforcement. There are three distinct arguments that might make sense of this shared conviction that the law may properly require us not to hurt one another, but may not, as a general matter, require us to help one another. First, libertarians and weak liberals might maintain that if (all or many of) our positive duties were not exempted from legislation, there would be no arena in which persons would be free from governmental intrusion. This claim rests upon the moral assumption that all of our

40. It is important to be clear that these definitions of libertarianism and liberalism do not correspond perfectly with conventional assumptions about the appropriate use of these terms, nor do they square with the theories of those who are commonly described as advancing libertarian or liberal political theories. Like all taxonomies of ideal types, this one is intended to capture categories that fruitfully cluster important properties. A number of the properties that characterize what I have here described as theories of "libertarianism" and "liberalism" are shared by contemporary political theorists who call themselves libertarians and liberals (e.g., Robert Nozick, John Rawls, and Ronald Dworkin), even though these are not the properties employed by such theorists to define their well-known theories. My claim for the stipulated uses I have given these terms is that they fruitfully display important disagreements about the scope of the law's legitimate power and provide helpful means of referring to political theories that might provide principled bases for defending affirmative answers to the questions at issue in this Part.

actions are matters of duty—that there are no permissions (or no significant permissions), such that the state might compel the performance of our obligations (*both* positive and negative) while leaving us free to do whatever we are permitted to do.

Second, libertarians and weak liberals who are reluctant to argue against the existence of significant permissions, might, in the alternative, argue against the existence of positive duties. They might insist, that is, that there are only negative duties and permissions, so that all acts of aid are supererogatory, not obligatory. Such a claim would provide a principled basis for restricting the state's power to the enforcement of our negative duties, for if we are morally permitted not to give aid to others, then good samaritan legislation can plausibly be said to violate our (deontic) moral rights. Finally, libertarians and weak liberals might premise their theories of legislation on the claim that, permissions aside, there are genuine conceptual and/or normative differences between negative and positive duties—differences that provide a principled basis for restricting the law's jurisdiction to our negative obligations.

In the sections that follow, I shall take up each of these arguments in turn. As I shall argue, libertarians and weak liberals cannot deny either the existence of permissions or the existence of positive obligations, nor can they independently sustain the weight that their political theories must alternatively place on the distinction between negative and positive obligations. As a result, both libertarianism and weak liberalism impose limits on state power that are morally arbitrary.

1. On Denying the Moral Status of Permissions

If libertarianism and weak liberalism are premised on the assumption that there are no moral permissions, then their theoretical defensibility is hostage to the viability of that assumption. Both deontologists and consequentialists might be tempted to provide a defense of that assumption. Those of a deontological bent might insist that all of our decisions—from the most profound to the most trivial—are governed by what I have elsewhere called "mini-maxims."[41] At any given moment, there is something one is categorically bound to do to the exclusion of all else—whether it is buttering one's toast, opening one's mail, rescuing a drowning child, or entering into marriage. Consequentialists, in contrast, might defend the radical denial of permissions by arguing that the consequences that determine right action can never be "tied," so that there is always one course of conduct that alone maximizes the good.[42] On both of these accounts, our willingness to grant individuals spheres of autonomous choice can only be made sense of on

41. *See* Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 266–68 (1996).

42. Notice that consequentialists who would make such an argument cannot maintain that the good includes liberty, conceived of as the ability to make choices between (other) goods or, more robustly, as the ability to choose what is bad over what is good.

For a defense of the kind of simple utilitarianism that seemingly denies the possibility of permissions, *see* G.E. Moore, PRINCIPIA ETHICA 150–59 (1903).

epistemic grounds: Our inability to judge accurately the long-term consequences of others' many actions, or to assess the exact circumstances within which others find themselves moment to moment, makes it *reasonable* in certain circumstances to defer to their judgments concerning how best to act (as we judge it reasonable of them to defer to our judgments concerning our own conduct). To say that one is permitted to do something, on this account, is simply to say that others should defer to one's judgment concerning one's obligations. It is not to say that one is free of any moral obligations.

Yet it must be admitted that our daily moral discourse is at odds with any theory that makes all actions obligatory. While the point of moral philosophy is to reveal the errors of common practice, a theory that requires us to discard it altogether is unlikely to be defensible. At this moment the reader surely feels entitled *either* to read the next paragraph, *or* to stop reading so as to get a cup of coffee, *or* to stare out the window, *or* to call a friend. It is simply too implausible to think that the decision to read a paragraph or scratch one's nose is governed by a deontological maxim or is uniquely determined by long-term consequential calculations, and it is similarly implausible to think that the far more significant decision concerning whom to marry is so governed (notwithstanding romantic claims that there is a single right person for each of us).[43]

There are, I take it, more serious philosophical complaints with the denial of permissions than the sheer fact that it conflicts with our untutored conviction that most of our daily affairs are matters of moral indifference. Consider, first, the implications of denying a place to permissions within a deontological theory. First, most deontologists are generally anxious to preserve arenas in which decisions are made right by the fact that they maximize good consequences. They generally view deontological maxims as means of trumping otherwise legitimate consequential calculations. Few would deny, for example, that in the course of university administration, decisions concerning when to start Fall classes, what symbols to use when grading papers and exams, the amount of tuition to charge students, and so forth, are properly governed by considerations of what will maximize good consequences for all concerned. On this view of deontology, the principle payoff of categorical maxims is their ability to define and patrol the borders of legitimate consequential justification.

If all actions are governed by deontological "mini-maxims," then one is never entitled to conduct oneself so as to maximize good consequences. One must shovel one's sidewalk even if one's elderly neighbor needs assis-

43. For powerful indictments of philosophy for making morality too demanding, see Robert M. Adams, THE VIRTUE OF FAITH 164 (1987); James R. Horne, *Saintliness and Moral Perfection*, 27 RELIGIOUS STUD. 463 (1991); Richard McCarty, *Are There "Contra-Moral Virtues*?," 25 METAPHIL. 362 (1994); Michael Slote, *Some Advantages of Virtue Ethics*, in IDENTITY, CHARACTER, AND MORALITY 429 (Owen Flanagan & Amelie Oksenberg Rorty eds., 1990); Susan Wolf, *Moral Saints*, 79 J. PHIL. 419 (1982).

tance (or vice versa, depending on the content of the mini-maxim that governs); one must abide by the speed limit even if one is fleeing from an armed carjacker, and so forth. If a deontologist who is committed to the claim that all actions are obligatory insists that the mini-maxims that bind us in such circumstances are always ones that maximize good consequences, she can rightly be accused of substituting consequential calculations for the maxims that she claims bar such calculations. And if a deontologist remains true to her claim that all decisions are matters of duty, then she must explain why in many instances claims of right do not appear to be at stake, so that the right thing to do is determined by what will maximize good consequences. Inasmuch as right action is often defined consequentially *even for deontologists,* it cannot be the case that all actions are governed by categorical maxims that bar consequential calculations.

Second, one of the great virtues of a deontological moral theory is its ability to make moral sense of the preferential treatment we show those near and dear to us. But this virtue is dependant upon the recognition of deontological permissions. For although it is plausible to think that we may be subject to certain *duties* of preference, as when we are confronted with the choice between saving our own child or a stranger, it is in general difficult to claim that the inordinate amount of time, energy, and money we lavish on those we love is a matter of duty, when it would seem equally moral, if not morally better, to devote a good deal of our time and money to meeting the basic needs of less fortunate persons who we do not happen to already know and love. The only means of capturing this sense that we are both (a) entitled to disproportionately favor loved ones over strangers and (b) deserving of praise when we do for strangers what we are inclined to do only for loved ones is to maintain that we are permitted to choose how to spend our time, energy, and money in many circumstances.

Consider, now, the implications of insisting that consequentialism does not accommodate permissions. Those who maintain that right action is determined by consequential calculations (namely, consequentialists and deontologists who view deontological maxims as side-constraints on otherwise legitimate consequential calculations) should be reticent to deny that some actions are neither required nor forbidden. First, any consequentialist who takes liberty to be part of the good to be maximized (either because it is a good in itself or because it is instrumental to achieving other goods, e.g., utility or preference-satisfaction) cannot simultaneously rule out instances of morally permissible choice. Second, consequentialists who insist that in every choice situation there is a single right course of conduct dictated by the consequential calculus must advance a defense of the claim that there can be no "moral ties"—that two or more courses of conduct cannot yield the same net-balance of goodness. In light of the many situations in which what is good (for example, happiness) can seemingly be equally achieved by numerous alternative choices, and in light of the many situations in which what is good simply requires coordination with others (e.g., driving

on the same side of the road) and what achieves coordination with others is overdetermined (e.g., either side of the road will do), it is hard to imagine that consequentialists (and deontologists who make room for consequential calculations) can bear the burden of insisting that all actions are either required or forbidden.

If there are significant actions (both in number and in importance) that are neither required nor forbidden, then morality itself provides us with a forum of freedom. Libertarians and weak liberals need not assume, then, that the state must exempt some obligations from the reach of the law in order to provide persons with opportunities to make choices with impunity. For the law might regulate all actions that are either morally forbidden or morally required and still leave untouched important decisions about how to live our lives and relate to others. In order to defend their claim that the jurisdiction of the state legitimately extends only to our negative obligations, libertarians must, therefore, be prepared to advance one of the following three arguments: (1) that the permissions recognized by our best moral theory fail to define an adequate arena of political freedom, so that the law must allow us to violate positive obligations in order to provide us with sufficient freedom from governmental restraint; (2) that there are no positive obligations, so that by enforcing our negative obligations, the state makes political freedom coextensive with moral freedom; or (3) that there are positive obligations, but they are different in kind from negative obligations in ways that justify the state in enforcing only our negative obligations. Libertarians and weak liberals who seek to make out the first of these theses must presumably advance the third argument that negative and positive duties differ in kind, not just in content; for otherwise it would appear arbitrary for them to purchase political freedom at a cost to our positive, but not our negative, duties. In the sections that follow, I shall thus concern myself only with the latter two arguments.

2. On Denying the Moral Status of Positive Obligations

Libertarians and weak liberals might revise their theories by maintaining that there are no positive duties—that there are only negative duties and permissions. Positive acts of aid are morally supererogatory, never morally obligatory. Weak liberals have a tougher time advancing this argument than do libertarians. By limiting legislation to acts that are morally forbidden and denying that there are any acts that are positively morally required, libertarians make political freedom commensurate with moral freedom and so escape the charge of moral arbitrariness leveled at them in the previous section. Weak liberals, on the other hand, who do not limit legislation to acts that are morally forbidden but allow the state to legislate some positive acts of aid, are forced to confess that the positive acts of aid that the state may require are, in fact, acts that we are morally permitted not to do. By adopting this line of argument to rescue their theory from charges of arbitrariness, weak liberals thus find themselves elbow to elbow with perfec-

tionists: They are forced to maintain that the state may require us, at least in some instances, to be heroic—to go beyond our moral duties. The weak liberal would thus have to overcome the argument advanced in the previous Part against perfectionism in order to sustain the thesis that the state both may properly enforce our negative obligations and may require some (and perhaps many) positive acts of aid that are, ex hypothesi, not obligatory, but supererogatory.

Libertarians and weak liberals who seek to justify their limits on legislation by claiming that there are no positive duties of aid must argue that the tenants who heard Kitty Genovese's repeated screams had no *moral* duty to attempt to stop the killer who sustained a thirty-five-minute stabbing-attack on her in front of her New York apartment building.[44] They must maintain that Joyce Pope had no *moral* duty to intervene to save three-month-old Demiko Norris when the child's mother, suffering from the delusional belief that Satan inhabited the baby, beat Demiko to death while a guest in Joyce Pope's home.[45] They must declare that although parents like Melissa Norris have negative duties not to act so as to harm their children, they have no positive duties to act so as to help their children (and they thus have no duties to feed, clothe, shelter, educate, and interact with their children). They must further maintain that spouses have no duties to aid one another in times of need and that friends have no duties to administer to one another in times of crisis. Libertarians have traditionally eschewed such arguments just because they appear laughably unsustainable. Instead, libertarians have preferred to claim that although persons have positive moral duties to give aid in the above sorts of circumstances, the state should not enforce such duties.[46] But this move simply returns libertarians to the original statement of their theory above, forcing them, once again, to defend why the state should enforce our negative moral duties, but not our positive moral duties.

Weak liberals might maintain that they are weak liberals and not libertarians precisely because they believe that there are *some* positive duties of aid. They might insist that the positive acts of aid that the state can legislatively require on their theory are precisely those that are morally obligatory. Parents have moral obligations to aid their children, spouses have moral obligations to aid each other, strangers have moral obligations to aid those they have placed in danger, and so forth. As a result, although the general legal rule that persons need not be good samaritans is appropriate, so too are the exceptions to that rule that are recognized by most Anglo-American jurisdictions—exceptions that impose positive duties of aid on persons who bear special relationships to those in need.

44. *See* Diane Kiesel, *Who Saw This Happen—States Move to Make Crime Bystanders Responsible*, 69 A.B.A. J. 1208 (1983).

45. Pope v. State, 396 A.2d 1054 (1979).

46. Thus the court in Pope v. State was anxious to make clear that "Pope's conduct, during and after the acts of abuse, must be evaluated with regard for the rule that although she may have had a strong moral obligation to help the child, she was under no legal obligation to do so. . . . " Pope, 396 A.2d at 1067.

Yet weak liberals could not make this move without both becoming strong liberals (who simply believe that there are very few positive obligations) and giving up their claim that the state can exact as many positive acts of aid as are minimally necessary to guarantee everyone's basic subsistence. For if there are discrete positive duties that alone can be legally enforced, then the state's power cannot be specified by a sliding scale of communal need. Put differently, such a claim would render the tenets of weak liberalism inconsistent with their welfarist rationale. For it would appear that minimal subsistence can be maintained without the performance of many negative duties, and it would appear that in many circumstances, a minimally tolerable subsistence can be guaranteed only by requiring deeds that are clearly supererogatory. For example, to provide persons with a social safety net, the state may not need to enforce the negative duties not to defame others, not to break promises, not to lie to others, and so forth. But it may need to compel persons to donate organs to strangers and to work as many hours as is physically possible to provide food and clothing to those who cannot (or perhaps will not) work themselves. Weak liberals thus cannot argue both that the state acts legitimately only if it acts to ensure everyone's minimal subsistence and that the state acts legitimately only if it acts to enforce a discrete set of positive obligations together with our negative obligations.

If weak liberals are not to become strong liberals, they must stop short of permitting the state to legislate all positive obligations (however spare the set). But to do this, they, like libertarians, must advance principled reasons to believe that positive obligations are special in ways that justify the state in refusing to advance some (or all) of them. Let us turn, then, to this final move.

3. On Denying that Negative and Positive Obligations are Similar in Kind

Libertarians and weak liberals who return to the view that the state cannot enforce any or all of our positive duties are forced to premise political freedom on a robust right to do wrong—on a right not to do what one has positive moral duties to do. Such theorists can escape the charge that such a right is self-contradictory, for they can insist that the right to do wrong is simply the correlative of a primary duty on the part of others not to compel the performance of others' positive moral duties.[47] On this view, although lawmakers are obligated to do what they morally can to ensure that we do not kill, they are obligated not to compel us to rescue unknown persons in perilous circumstances. The law mirrors our moral duties when it coerces the fulfillment of our negative obligations but refrains from coercing the fulfillment of our positive obligations, for among our negative

47. This is to put to moral use the standard Hohfeldian analysis of what it means to have a legal right. Put precisely, to have a (legal) right to do act A is to have a claim-right that others not interfere with one's doing of A and a liberty (privilege) to do A. *See* Wesley Newcomb Hohfeld, FUNDAMENTAL LEGAL CONCEPTIONS 36–38 (W.W. Cook ed., 1919).

obligations is the obligation not to coerce others to perform their positive obligations.

Yet while this view survives charges of contradiction, it cannot easily escape the challenge that the right to do wrong is morally indefensible. For inasmuch as we are no more morally free to ignore positive duties than to ignore negative duties, it would appear that there should be no moral objection to the use of coercion to compel the performance of our positive duties *if* there is no objection to its use in assuring our performance of our negative duties.[48] Those who defend a right to do wrong—that is, a right that the state not interfere with our violation of our positive moral duties—must advance reasons to think that positive duties are different in type, not just in content, from negative duties, so that it is only appropriate, or only possible, for the state to limit itself to the enforcement of our negative duties.

Consider three philosophical tacks that might be taken toward this end. First, it might be argued that although morality is indifferent to the reasons with which we perform our negative duties, it demands that we perform our positive duties for specific reasons—for example, out of deference to their status as positive moral duties or out of beneficence towards those to whom we owe such duties. Although one satisfies the moral obligation not to kill innocent persons simply by refraining from killing innocent persons, one does not satisfy the moral obligation to be charitable simply by giving away money. Rather, the duty to be charitable is satisfied only if one parts with something one values and does so *because* one takes others' needs to be more important than one's own desires. Thus, the person who makes a donation out of a fear of punishment or a desire to procure a tax deduction fails to satisfy his duty to be charitable. If the law's sanctions and incentives can pervert our reasons for action by motivating us to do our duties out of fear or greed, rather than, say, out of respect for the moral law, and if the

48. Notice, moreover, that the obligation to do what one (morally) can to ensure that another does not kill an innocent person is a positive obligation. If the law cannot compel this obligation, then it cannot compel any obligations, positive or negative. For it can only coerce one's performance of negative obligations by compelling others to perform positive obligations of intervention or prevention. Of course, proponents of the limited right to do wrong might argue that *this* sort of (derived) positive obligation can be coerced. The law simply cannot morally coerce our performance of the positive obligations of aid and rescue that we owe to others whose peril is physical, not moral. Yet this will not do, at least not without an argument more complicated and compelling than I can muster. For it is surely bizarre to think that we can be coerced to perform the positive duty of compelling another to fulfill a negative duty—say, the duty not to steal a candy bar—but we cannot be coerced to perform the positive duty of turning over a child who is face down in a pool of water.

As a general matter, while we may have duties of nonintervention, it is implausible to think that they are coextensive with others' positive duties. That is, it is implausible to think that one has a duty to compel others to fulfill their negative obligations and a duty to refrain from compelling others to fulfill their positive obligations. More plausibly, one's duties of nonintervention cut across both negative and positive obligations, forbidding one to compel another to keep a secret (a negative duty) and requiring one to do what one can to motivate another to rescue his child (a positive duty).

motives with which we perform positive duties are matters of moral concern while the motives with which we perform negative duties are not, then there is good reason to restrict the state to the enforcement of our negative duties.

Yet even if some moral obligations concern themselves not only with certain acts, but also with the mental states with which we do those acts,[49] such obligations do not seem to be coextensive with the class of positive duties. Although it is difficult to think of a plausible example of a negative duty that concerns itself with the possession of a particular mental state—for our negative duties appear indifferent to the reasons for which we satisfy their prohibitions against harming others—it is easy to think of examples of positive duties that are indifferent to the mental states with which they are performed. A parent appears to fulfill the parental duty to feed her children, for example, if she conscientiously provides them with a sensible diet: *That* duty appears indifferent to whether she performs it out of love for her children or out of fear that the failure to feed them will result in charges of abuse.

Libertarians and weak liberals might be tempted to defend the claim that positive duties are of a different moral order than negative duties by pointing to instrumental reasons for the state to ignore violations of positive duties, but not negative duties. For example, if persons fulfill more of their duties in the long run if not coerced to fulfill many of them in the short run, or if persons are more likely to fulfill their most important obligations if not coerced to fulfill their least important ones, then the state has a reason not to coerce the fulfillment of some duties.

To make out the latter of these arguments in defense of the claim that the state can legislate negative, but not positive, duties, libertarians must maintain that positive duties are, as a category, less important than negative duties. Such a claim seems implausible, because it appears far more important not to violate the duty to care for one's aging parent or the duty to remove an unknown child from a busy fairway than not to violate the duty against trespassing across another's empty lot.[50] To make out the former of these arguments, libertarians must give an account of why the state should choose to ignore positive rather than negative violations as a means of encouraging maximal conformity with our entire set of moral duties in the long run. As we just said, our positive duties are not, as a class, less important than our negative duties, and we have no reason to think that moral education proceeds most effectively if we are coerced to do our negative duties, but not our positive duties. Indeed, since our negative duties are the

49. For a lengthy argument against theories that make motivations, deliberations, intentions, and attempted actions the objects of deontological maxims, *see* Hurd, *supra* note 36, at 157.

50. *But see* Knut Erik Tranoy, *Asymmetries in Ethics: On the Structure of a General Theory of Ethics*, 10 INQUIRY 351, 363–66 (1967) (asserting that norms stating prohibitions are more fundamental and important than norms stating positive obligations).

least burdensome of our duties,[51] one would think that coercion would be best used to teach us the importance of performing our positive duties.

Libertarians and weak liberals face the problems that they do because their political motivations conflict with their moral presuppositions. They seek to circumscribe state power so as to protect a sphere of liberty. But by defining the sphere of liberty into which the state should not intrude as the arena of positive obligations, they are forced either to defend the claim that all actions are matters of duty (so that if some duties are not exempt from state enforcement, the state's power will be without limit), or to defend the claim that positive duties are different in kind from negative duties (so that there are principled reasons to seek the enforcement of the latter, but not the former). As I have argued, both of these claims appear untenable. Libertarians and weak liberals need not assume that liberty can be bought only at the price of allowing persons to violate positive duties, for the law might properly enforce all of our duties and still leave us free to do or omit to do the many acts that appear to be governed by moral permissions. Moreover, there seems no normatively defensible basis for exempting positive duties from the jurisdiction of legitimate legislation. Duties are duties, and in the absence of principled reasons to think otherwise, it appears arbitrary for libertarians and weak liberals to license the legislation of negative, but not positive, duties.

B. The Obligation of Strong Liberalism (Subject to Practical Constraints)

In the previous section I argued that lawmakers are entitled to extend the jurisdiction of the law to all of our moral obligations, both negative and

51. It is initially plausible to conceive of this claim as a conceptual one, not a psychological one. A negative duty—say, the duty not to kill innocent persons—leaves us free, at any moment of its application, to engage in a virtually infinite set of alternative actions. A positive duty—say, the duty to rescue a drowning child who is face down in a bathtub—functions, at the moment of its application, as a virtually infinite set of negative duties, precluding one from doing all acts but one. Negative duties thus appear considerably less liberty-limiting than positive duties.

Such a general claim is not conceptually sustainable, although it is generally true of the sorts of negative and positive duties that we take our best moral theory to impose, and that we often look to the law to enforce. Morality could, for example, subject us to a negative duty not to move a muscle, in which case we would be precluded, by a negative duty, from doing the many actions we generally think ourselves free to do. We could, in the alternative, be subject to a positive duty to do whatever we want to do, in which case we would not be precluded from doing any number of actions. Moreover, while morality might not subject us to such bizarre obligations as a general matter, it is possible that such obligations might be derived from the application of more standard duties in bizarre circumstances. Thus, for example, if one were hooked up to a "killing machine" that fired a bullet into an innocent person every time one flinched, one's duty not to kill would compel one not to move a muscle. Similarly, if one were able to save a drowning infant only by doing whatever one wanted to do, one's general duty to rescue those in peril would permit any number of actions.

Yet because the negative duties to which we are subject according to our most plausible moral theories generally permit extensive freedom, while our positive duties do not, it is safe to say that, as a contingent matter, our positive duties are more burdensome than our negative duties.

positive. But such a claim falls short of establishing that lawmakers are obligated to do so. If those who enact and enforce laws are permitted to refrain from legally requiring the fulfillment of all of our moral obligations, then it would appear that Alexander can preserve his claim that constitutional rules are optional, and Adler can reassert his thesis that our rights against particular rules need not be identical to our rights of action.

There are surely systemic constraints to employing the law to coerce all of our moral obligations. And, presumably, such systemic constraints are themselves objects of rights: That is, persons have rights that the legal system operate subject to such limitations. Some violations, for example, may be so persistently private that they defy adjudicators' attempts to meet the evidentiary burdens to which they are rightly subject. As such, the enforcement of these private violations is appropriately prohibited as a matter of law. Thus, the law may rightly impose a consideration requirement on the promises that it enforces so as to be confident of the existence of bargains to begin with.

Other violations of duties may be sufficiently trivial that considerations of systemic efficiency dictate against investing resources in their definition and prosecution. Thus, the law may rightly refuse to punish "rude" behavior, not because it does not involve duty-violations (although most of it appears to be merely suberogatory), but because the duty-violations that it involves are insignificant when compared to the resources required for its prosecution.

Still other duty-violations may be better policed by institutions of a non-legal sort, justifying the law in assigning their jurisdiction to those best able to detect and redress them. Thus, where peer pressure and social ostracism are effective means of policing impermissible behavior, as is the case, for example, when it comes to the misbehavior of colleagues within a collective enterprise, the law may do well to refuse a cause of action to those who are wronged, at least until the wrong rises to the level of defying informal prosecution. Thus, the law may rightly refuse to sanction malicious gossip yet reserve a cause of action for defamation.

And finally, some duties may be of a sort that cannot be enforced without significant costs to the rule of law itself. If enforcement of certain duties jeopardizes the generality, prospectivity, publicity, clarity, coherence, or stability of the law, then the values fundamental to the rule of law—liberty, equality, and the protection of reliance interests—will dictate against the use of the law to achieve the satisfaction of our moral obligations. Thus, for example, it is our concern for the rule-of-law values that precludes us from recognizing and punishing "common-law crimes," that is, freshly defined offenses articulated and sanctioned by courts as they progressively encounter new forms of morally prohibited behavior.

That all of these are reasons not to use the law to enforce moral obligations forces us to grant, prima facie, both that a person could have no moral right to do act *A*, but a moral right that lawmakers not prohibit her from doing *A*, and that a person could have no moral right not to do act *A* (i.e.,

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a moral obligation to do *A*), but a moral right that lawmakers not prohibit her from not doing *A* (i.e., a legal right to do *A*). But such a concession is a weak one, and it goes no distance toward vindicating the claims by Adler and Alexander with which we have been concerned. Let me explain.

First, all of these systemic constraints on the use of the law to enforce our moral obligations are practical ones, not principled ones. That is, we could have no objection to using the law in each of these cases were it not for practical limitations—insufficient information, scarce resources, etc. If we had surveillance technology that would selectively detect private wrongs without revealing an undue amount of properly private conduct, we would have little objection to using the law to redress those wrongs. If we had unlimited resources, we would have no objection to the law preoccupying itself with trivial wrongs (so long as they were really duty violations, and not merely exercises of suberogatory permissions). If, in addition to having the technology and the resources, we were unable to employ alternative methods of coercing persons to act morally, we would be happy to turn over to the law what we now punish with social sanctions. And finally, if we enjoyed general knowledge and agreement about what constitute duty violations, we would have no rule-of-law concerns about, say, the common-law enforcement of our moral obligations. For legal sanctions would never be unfairly surprising or constitute apparent (but not real) contradictions of past decisions, and hence, they would never seriously chill liberty, threaten the unequal treatment of like cases, or thwart reliance interests.

Thus, although practical constraints on the use of law give us rights against its use in certain circumstances, those rights are born of a "second-best" morality. We do not have rights against the legal enforcement of our moral obligations that would survive in a "first-best" world. And as our world works its way from second-best to first-best, we can have no moral objection to the law progressively extending its jurisdiction to moral obligations over which it gains practical competence.

That there are practical limitations on the law's ability to enforce our moral obligations does not entail either that constitutional rights should be thought to concern legal rules rather than private actions, or that legal rules are constitutionally optional. On the contrary, the argument thus far supports the claim that lawmakers are obligated to enforce all moral rights and duties, including those that concern the practical inabilities of law to enforce all moral rights and duties. There is, at any given time, a right answer to the question of which laws officials should enact and enforce—an answer born of a complex calculus concerning both the actions that citizens are morally obligated to perform and the systemic ability of law to coerce those actions in morally acceptable ways.

If constitutional rights should guarantee us freedom from legal intervention when, but only when, we are permitted to choose our actions, then there is no difference between conceiving of constitutional rights as rights against rules and conceiving of them as shields to action. To illustrate,

return to Alexander's flag-burning hypothetical: City A prohibits "the public burning of an American flag," while City B prohibits "burning objects on city streets and sidewalks." Recall that Alexander argues that if the unconstitutionality of A's rule means that a flag burner escapes punishment, then it must be because B's rule is not constitutionally required. For if B's rule were required, then, *questions of notice aside*, the Court could just order A's officials to punish everyone who burns an object in public, including the flag burner in question.

It is precisely my argument that *questions of notice aside*, the Court could and should punish those who burn objects in public (be they flags or leaves) where such burning is morally prohibited, all things considered (because of the physical danger to persons or property, the air pollution, the hazard of the smoke obscuring driving conditions, and/or the fact that others rightly take the action to be akin to speaking "fighting words"). In such a case, of course, questions of notice can never be put to the side, and it is for this reason that Alexander's hypothetical gives rise to intuitions of "optionality." But there is nothing optional about how legislatures ought to craft their laws (so that, as a package, they neither inhibit actions that are permitted nor permit actions that are forbidden), and there is nothing optional about how courts should adjudicate infractions. Legislatures and courts are both not only permitted, but obligated, to honor citizens' moral rights and enforce citizens' moral obligations, although in assessing the contents of those rights and obligations legislatures and courts must duly appreciate that systemic limitations on the ability to coerce moral action are themselves matters of right that preclude legislation or adjudicative decisions that are not prospective, public, general, clear, coherent, and stable.

V. CONCLUSION

I have advanced here the contours of what many would call a "pure" natural law theory. I have argued that the law cannot fail either to protect our moral rights or to enforce our moral duties. Although there are practical limitations on the ability of the law to enforce our moral duties, these constraints on the use of the law are themselves within our rights, so that in honoring them, the law continues to do what is, all things considered, required by persons' moral rights.

The upshot of this argument is that there is ultimately no difference between conceiving of constitutional rights (or other legal rights) as rights against rules and conceiving of them as rights to action. Contrary to Matthew Adler's claim, our moral permissions define both the scope and limits of legitimate legislation and adjudication. Thus, contrary to Larry Alexander's claim, legal rules are never really optional. If, all things considered, we are morally permitted to perform a particular action, then the law (conceived of as the package of restraints on our freedom that are sepa-

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rately embodied in criminal and civil codes, administrative regulations, common-law rules, and constitutional provisions) cannot legitimately prohibit us from performing that action; and if, all things considered, we are obligated to perform a particular action, then the law should enforce that obligation via the package of restraints that the law places on our liberty (subject to practical limitations that are themselves within our rights, and hence, nonoptional). If constitutional rights should be broadly interpreted to guarantee us freedom against legal intervention if and only if that freedom is morally legitimate, then constitutional rights should as readily be thought to be rights to action (identical in content to the set of our moral permissions) as to be rights against particular sorts of rules.

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