Judicial Practical Reason:
Judges in Morally Imperfect Legal Orders

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I here address the question of how judges should decide questions before a court in morally imperfect legal systems. I characterize how moral considerations ought inform judicial reasoning given that the law may demand what it has no right to. Much of the large body of work on legal interpretation, with its focus on legal semantics and epistemology, does not adequately countenance the limited legitimacy of actual legal institutions to serve as a foundation for an ethics of adjudication. I offer an adjudicative theory in the realm of non-ideal theory: I adopt a view of law that has achieved consensus in legal philosophy, make some plausible assumptions about human politics, and then consider directly the question of how judges should reason. Ultimately, I argue that judges should be cognizant of the goods that are at stake on particular occasions of adjudication and that this requires treating legal requirements transparently, i.e. as sensitive to their moral justifications.

I. Introduction

Judges *normally* operate in a peculiar moral position. First, judicial decisions are occasions for the use of state power. Given a judge's *de facto* authority over state institutions,[1] a judicial decision determines how the state will treat a matter before the court. The use of state power

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[1] I follow Raz's understanding of *de facto* authority. A *de facto* authority claims or is believed to possess legitimacy and is capable (possibly because of the belief in its legitimacy) of imposing its will. Thus, while the judiciary may not possess the purse or the sword, it can still have *de facto* authority if its decisions effectively determine how the state treats certain matters. See Joseph Raz, "Authority, Law, and Morality," *The Monist* 68 (1985): 296.

requires moral justification. Second, judges make decisions in the context of a legal system that claims to settle many matters that come before the court. If the law indicates something about how an issue is to be settled, that seems important for how the judge should decide. Yet, the moral authority of law over judicial reasoning requires explanation. Third, most judges are officials of morally imperfect states. It will be important to be precise about the sense of "morally imperfect" that is relevant, but for now, it seems clear that states (at least occasionally) can and do demand what they have no right to. This means that some of the legal standards salient to a question before the court may be illegitimate. Fourth, according to any major contemporary theory of law, legal standards do not guarantee their own legitimacy. In other words, the legal validity of a standard does not amount to a right of the state to enforce that standard.[2] Fifth, judges are officials of a certain type. Their decisions are frequently *final* (at least for the case at hand), they usually possess *legal expertise*, and they are *expected to authoritatively interpret law*. The moral position of the judge gives rise to a need for a special account of practical reasoning – i.e., the form judicial reasoning *ought to* take in order to address the peculiar features of the judicial position. In this paper, I offer a theory of judicial practical reason.

For the sake of clarity, let me redescribe the problem of this paper. When a question comes before a court, a determination is to be made about how state power will be deployed. Standing law is typically regarded as the appropriate set of norms that are to guide judicial decisions (at least when they have something to say about the matter) and the scheme of

[2] This is what we would expect from positivist views, though is also true of Dworkin's theory and modern natural law accounts. See H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), 185-212, Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), 37-77, Jules L. Coleman, "Negative and Positive Positivism," *Journal of Legal Studies* 11, no. 1 (1982), Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 108-13, Mark C. Murphy, "Natural Law Jurisprudence," *Legal Theory* 9 (2003).

institutions designates the role of application and interpretation to the courts. Yet, legal requirements can demand what they have no right to and the scheme of institutions may be, in practice, dysfunctional (e.g., a legislative procedure may claim to be democratic, but fail in practice to meet the requirements that would make it capable of conferring democratic legitimacy). How, then, is a responsible judge, a judge who is concerned about doing what is all-things-considered morally right, to address questions before the court? The judicial decision normally has real (and sometimes quite significant) impact on the rights and interests of individuals in terms of how the state will treat those it governs. So, how should the judge address questions before the court? In what way should legal and moral norms figure into the reasoning of the judge? A theory of legal interpretation, strictly speaking, does not answer this question.[3] It is a question a theory of judicial practical reason must address. In this paper, I provide such a theory.

II. The Problem of Partially Legitimate States

A. Legitimacy

I will be using a highly restricted notion of legitimacy. Legitimacy, as I will use the term, concerns the justification of the use of state power. If the use of political power is morally justified, i.e. permissible, it is legitimate. Whether legitimacy entails a claim-right against interference by third parties or an obligation of those addressed by a directive to comply is not a matter I will investigate. Not all moral norms are relevant to legitimacy as some parts of morality are irrelevant to justifying the use of state power. People may have, for example, moral reasons

[3] Legal interpretation concerns uncovering legal meaning. A theory of legal interpretation concerns how we can determine legal meaning. Such a theory, then, does not address how legal norms ought to figure into judicial reasoning, but how we can determine the content of those norms. See Andrei Marmor, *Interpretation and Legal Theory*, 2nd ed. (Portland: Hart Publishing, 2005), 9-26, David Lyons, "Derivability, Defensibility, and Judicial Decisions," in *Moral Aspects of Legal Theory: Essays on Law, Justice, and Political Responsibility* (Cambridge: Cambridge University Press, 1993).

to give special consideration to the welfare of friends, but this does not tell us much about when state coercion is permissible. Also, it seems plausible that religious and other highly controversial standards cannot justify the use of state power, and thus are not salient to legitimacy.[4] The concept of legitimacy, then, demarcates the class of moral norms relevant to justifying the use of state power. Judges, I will argue, ought to be concerned with this class of norms and how best to justify standing law and legal practice in terms of them.

B. The Partial Legitimacy of States

The law of existing states is morally imperfect in the specific sense that it sometimes demands that state power be exercised illegitimately. The law occasionally violates moral rights, unjustifiably harms individuals, institutionalizes inequities, regulates realms of morally protected personal liberty, is a great detriment to the common good, etc. Moreover, law is often created in ways that are imperfectly legitimizing. Even assuming that democratic procedures are a source of legitimacy, it is unlikely that the legislative institutions of a state will always meet the requirements that make them capable of conferring democratic legitimacy on legislation,[5] i.e., they may suffer from systemic problems or, on particular occasions, conduct themselves in ways that compromise their claim to democratic legitimacy. For example, the gerrymandering of voting districts, inappropriate lobbyist influence over legislative decisions, modes of campaign financing and electioneering that favor wealthy interests, lack of independent media, corruption, and political interference with the integrity of the voting process arguably compromise

[4] See John Rawls, *Political Liberalism*, Paperback ed. (New York: Columbia University Press, 1996), 212-54.

[5] How far this is the case will partly depend on the best account of democratic legitimacy. If the requirements for democracy are set very high (as in deliberative accounts of democracy, for example see Joshua Cohen, "Deliberation and Democratic Legitimacy," in *Philosophy, Politics, Democracy* (Cambridge, MA: Harvard University Press, 2009)., then legislative institutions in modern states might *normally* fail to confer democratic legitimacy. However, even if they are set much lower, such that representative majoritarianism as currently practiced in constitutional democracies is capable of fitting the bill (see Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), 69-118.), representative legislatures could still fail to confer legitimacy on their enactments – for example, if there were widespread corruption.

democratic legitimacy and are hardly irregular features of contemporary democracies. How far and in what ways existing legal orders are illegitimate will, of course, depend upon substantive considerations of political philosophy – i.e., on the best theory of legitimacy. I do not provide a full theory here.[6] Nonetheless, I take it that plausible accounts of what justifies the use of state force will have as a corollary that existing states and their policies are, at least in some respects, failures in terms of legitimacy. Existing states are not ideally legitimate – their use of force is not always morally justifiable.

On the other hand, existing states do possess some legitimacy in that their directives are, to some extent, justifiably enforced. States keep us from a state of nature, provide domestic and national security, facilitate collective action through coordination, protect moral rights, and provide a host of goods (e.g. education, unemployment insurance, highways). Moreover, representative democracies may be able to confer democratic legitimacy, even if limited, on their legislation. The legislative assemblies of these states are, to a significant degree, responsive to citizen preferences. Again, my aim is not to countenance precisely how we justify the regulatory power of the state in all of its instances, but rather to note that it is plausible to assume that a full account of legitimacy will identify many occasions of state use of force as justified and certain aspects of existing states' institutions as legitimizing.

It may now be clear that legitimacy (as I use the term) is fundamentally a property of occasions of the use of political power, i.e., of particular governmental acts. To say that a law is

[6] I am suggesting, though, that there are two different types of criteria for legitimacy: substantive criteria pertaining to the content of law and procedural criteria pertaining to its mode of adoption. This differs from a strictly proceduralist concept of legitimacy where legitimacy is exclusively concerned with mode of adoption. See, for example, Jeremy Waldron, "Rights and Majorities: Rousseau Revisited," in *Liberal Rights* (Cambridge: Cambridge University Press, 1993), 393. A strictly proceduralist conception of legitimacy cannot, I assume (understanding that there might be disagreement here), fully account for the kind of legitimacy I am concerned with, i.e. legitimacy as justified use of state force. A normally legitimizing procedure can, in the real world, produce legislation that is illegitimate – e.g., by eliminating due process for some class of citizens. *Prima facie*, this law would not be justifiably enforced.

legitimate, then, is to refer to a set of circumstances (where the law claims jurisdiction) where it could be justifiably enforced by the state. The Montana state constitution directs that "[a]ll lands disturbed by the taking of natural resources shall be reclaimed" and that the legislature is to set the standards of reclamation.[7] We might, in keeping with my usage and as a shorthand, say that the law is legitimate and mean something like: the state is generally justified in forcing the reclamation of exploited lands in accordance with the standards set by the legislature. We might be more precise. One could say that the law is completely legitimate in that state enforcement is justified in *all* circumstances that come under the law's description (i.e., all cases of land disturbed by extraction in Montana). Or, we might say that the law is wholly illegitimate, meaning that there are no circumstances where it is justifiably enforced. Or, we might say that it is *partially legitimate*, and mean that there are some circumstances in the law's jurisdiction where it is justifiably enforced and some where it is not. *Completely legitimate*, *wholly illegitimate*, and *partially legitimate*, then, identify the *extent* of a law's legitimacy – the number of fact situations the law claims to regulate where it can be justifiably enforced. A similar analysis holds for the partial legitimacy of the state. To say that a state or a legal order is partially legitimate is to indicate something about the extent of the legitimacy of the state's regulation. There are some regulated fact situations where the state can permissibly enforce its regulations and some where it cannot.

C. Officials and Judges in the Partially Legitimate State

Since officials are in the position to implement state directives and make use of state force, they are in a morally tricky position. In any given circumstance, the state may be asking an official to participate in morally unjustifiable coercion. The judge's position is peculiarly morally

[7] Mont. Const. art. IX, § 2.

problematic given her standard role in the legal order. I have already mentioned the special features of the judicial office, but let me briefly touch upon each to indicate its moral significance. In general, I take features discussed below to imply that responsible judges are to be concerned with legitimacy in adjudication.

(1) *De facto authority over state power*. Insofar as judicial decisions are recognized by state institutions, they effectively determine how the state will treat some matters. As Jeffrey Brand-Ballard puts it, "*Judges are in the force business*."[8] Given that judicial decisions are occasions of the use of state power, we have reason to think that they ought to be concerned with the legitimacy of those decisions.

(2) *Finality*. Normally, a court's decision is the final determination of how the state will treat some matter (at least for the case at hand). This is different than for many other officers of the state (e.g., police officers), for their decisions can be easily reviewed by the courts. Court decisions, even when appealed, rarely receive attention from appellate courts (and sometimes there is no appellate court). Thus, a judge cannot defer responsibility for ensuring the legitimacy of state behavior to some other official.

(3) *Legal Expertise.* Judges are legally informed decision-makers (normally). They are, consequently, in a position to understand what values a body of law serves or ends it might achieve overall. They are in a position, not always mirrored in other officials, to assess law in terms of political morality.

(4) *Expectation of interpretive authority.* When there is disagreement about law, or how the state ought to proceed regarding some matter, the dispute has the potential of ending up in court where parties to the case expect the court to settle the state's position on the

[8] Jeffrey Brand-Ballard, *Limits of Legality: The Ethics of Lawless Judging* (New York: Oxford University Press, 2010), 30. His emphasis.

matter. Settling the matter may have the effect of establishing the policy of the government concerning a range of circumstances. (E.g., a court's interpretation of a statute will likely guide the action of other agencies, possibly other courts, as well as citizens and corporate bodies not directly involved in administration or enforcement).

Again, the upshot is this: judges are responsible for ensuring the moral defensibility of their decisions. Their official decisions ought to meet conditions of legitimacy and judges themselves are responsible for ensuring that those decisions are legitimate. Given the partial legitimacy of the state, judges cannot simply rely upon standing law and legal practice (even where dispositive) to settle matters before the court. Below I develop and defend a view of how legal and moral norms ought to figure into the reasoning of deciding judges.

III. Judicial Practical Reason

A. The Authority of Law for Judges in Partially Legitimate States

The authority of law for judges tracks law's legitimacy. If a law can be justifiably enforced or applied *in the circumstances*, then it possesses legitimacy in those circumstances. If a legitimate law is enforced, then the enforcement is legitimate. An *authority*, as I will use the concept, is obligation producing – if x (e.g. an institution, person, or law) has authority over agent A, then when x issues a directive, A has a *practically significant reason* to see to it that the directive is carried out.[9] A practically significant reason is a reason for acting that ought to figure into an agent's deliberations about what to do – i.e., it is not inconsequential to the overall determination about what ought to be done. Law is obligation producing for a judge, i.e. is an authority, if and only if it is legitimate.

[9] I intentionally use a schematic concept of authority.

One reason we might have for thinking that the authority of law over judges extends farther than its legitimacy is that judges have an independent obligation of fidelity binding them to the law, e.g., because of their socially-recognized role as law-appliers or their oath of office. In this case, the relevant legal requirements would produce reasons for judges (irrespective of their legitimacy) because the judge, for example, swore an oath to uphold the law. Recent work, however, draws this common intuition into doubt, at least with regards to expanding the authority of law for the judge beyond legitimacy.[10] Here is the basic idea: any independent obligation a judge will have to enforce the law will have as a limiting condition moral permissibility. In much the same way that a promise to do wrong does not produce obligations to perform the wrongful act, an oath to enforce the law cannot produce an obligation to enforce illegitimate law, since that would require the oath-taker to engage in otherwise wrongful behavior (i.e., the use of coercive state force where such force is not justified). Similar conditions hold for any 'role-obligations' that might attach to the judicial office – they can only bind when the role requirements do not demand that the judge do things that are otherwise morally impermissible. If this is correct, then independent obligations of fidelity will have teeth only when law is legitimate. This is consistent with, and in fact supports (see below), my view that the authority of valid law for the judge tracks the legitimacy of law.

I know of no good reason for thinking that the authority of law for judges extends farther than law's legitimacy. To see why this is so implausible, let us examine why legitimate law *is* an authority for the judge. This is something that requires explanation - it is one thing to say that the judge would do no wrong by enforcing the law, because the law is legitimate and the state permissibility exercises its power according to the law's terms in the circumstances, and quite

[10] See Anthony R. Reeves, "Do Judges Have an Obligation to Enforce the Law?: Moral Responsibility and Judicial Reasoning," *Law and Philosophy* 29, no. 2 (2010), Brand-Ballard, *Limits of Legality: The Ethics of Lawless Judging*, 123-56.

another to say that the judge is *obligated*, has a significant reason, to enforce it. Just because it is permissible for the judge to deploy state power in accordance with legal requirements does not imply that the judge ought to. So why, as an ethical matter, should judges ever care about the law?

The primary answer, to put it generally first, is that the rule of law (contingently) secures moral valuables and these valuables may be at stake on particular occasions of adjudication. Sometimes morally desirable outcomes are either exclusively or optimally achievable by enforcement of the law and thus, in these circumstances, a judge has a significant (yet still defeasible) reason to adjudicate in accordance with legal requirements. On a particular occasion of adjudication, the judge may be in a position to see that these valuables, which bear a special relationship to standing law and legal practice in the circumstances, are had, and thus the judge has an obligation to secure them through adjudication in accordance with the law. I will not offer a complete inventory of what goods these might be, but they include familiar rule of law values like coordination, stability, prospective use of state power, disagreement resolution, facilitation of democratic governance, and the like. Some concrete examples may help illustrate my point here.

Example One*: Protection of entitlements and expectations*. People can come to morally deserve something because legal rules entitle them to it. For example, if Thomas and John create a contract in accordance with the legal rules for doing so, then each deserves to have their expectation that the contract will be enforced by the state protected. If Thomas reneges, John ought to be able to seek rectification through legal channels. If the state gives rise to the expectation that it will assist (by setting the requirements for contracts, etc.), and does not do so,

then John has been wronged (morally). The requirements for creating a legal contract are, obviously, legal – they could have been defined differently, but were not, and how they were actually defined is what matters in circumstances since they encouraged the development of a particular set of expectations. The actual legal requirements, and the consequences for contract breaking, were defined in a certain way and Thomas and John now deserve treatment in accordance with the law of contracts as they met the requirements for a valid contract. Enforcing the law when Thomas reneges, then, secures for John what he deserves.

If John's case comes before a judge, the judge has an obligation to enforce standing contract law because it secures a valuable (in this case, what John deserves) and doing otherwise would wrong one of the parties. That is, unless the relevant contract law is illegitimate in some respect. For example, if existing law permitted John to bind Thomas under duress (i.e., coercively), and John in fact did so, then it is hard to see that non-enforcement of the contract wrongs John. In such circumstances, John does not morally deserve that the terms of the contract be carried out, and thus the valuable of John getting what he deserves is not at stake. Not all expectations deserve protection. Under these circumstances, the judge does not have practically significant reason *deriving from what John deserves* for enforcing contract law.

Example Two: *Coordination and stability*. As is well-known, one function of law is to establish conventions for solving coordination problems.[11] Consider the straightforward case of traffic law. Driving requires that I can predict what others will do, e.g., what side of the road they will drive on, and they require being able to predict what I will do. Law facilitates successful driving by establishing which of available options for driving are salient – in our example, the side of the

[11] For a comprehensive discussion, see Gerald Postema, "Coordination and Convention at the Foundations of Law," *Journal of Legal Studies* 11, no. 1 (1982).

road to drive on. In cases like these, it matters little to the parties which of the available options is selected. What is important is that there is a convention that successfully sets the expectations of group members concerning how other group members will behave. In other cases, parties may not be indifferent to which option is selected as salient[12] and there may be some systems of conventions that are more optimal (from the standpoint of justice, efficiency, or some other value) than others. Zoning laws may be a source of contention in a community, and they may in practice be suboptimal according to the relevant values, but it is still of some value to a community that conventions for land use are simply set. In particular cases, the value of coordination may be more significant than pursuing what is otherwise best (e.g., more just or efficient).

If a traffic violation comes before a judge, the judge has reason to enforce it because maintaining the common expectations concerning behavior on the road is of some value. Applying the legally designated sanctions against Emma, who runs a red light, reinforces a convention that makes road travel possible (aside the fact that Emma's behavior endangered others because they *expected* her to abide by the conventions). If the judge fails to sanction Emma, this *may* (even if only slightly) somewhat undermine the conventions of the road – people may be less willing to consider "stopping at red lights" the salient option. Clearly, repeated failures of enforcement would have more dramatic effects.[13] On this occasion of adjudication, a rule of law valuable (i.e., coordination), is at stake and a judge consequently has reason to enforce it.

[12] For a nice summary of this type of problem in contrast to prisoner's dilemmas and pure coordination problems, see Waldron, *Law and Disagreement*, 101-05.
[13] For an extensive discussion of the systemic effects of judicial decision-making, see Brand-Ballard, *Limits of Legality: The Ethics of Lawless Judging*, 181-291.

Traffic law is easy since there are normally few competing values (though issues of safety, efficiency, and the environmental preservation may be relevant). In other cases, the relative significance of coordination may be harder to discern. Exclusionary zoning practices, regulatory regimes that have the effect of keeping low-income housing out of certain areas, certainly coordinate land-use (and land-use coordination is a good – it facilitates human purposes). Yet, other moral considerations are relevant. In 1979, the New Jersey Supreme Court struck down a municipal zoning ordinance that required a minimum floor area on homes built within the municipality. It held that the requirements were an arbitrary use of municipal police power since they were unrelated to the legitimate zoning purposes of public health, safety, or general welfare. Without a rational relationship to these purposes (the provision was seen, by the court, to be solely related to economic segregation), the minimum floor area requirements were deemed a violation of due process rights, since they limit one's ability to expend whatever one desires on one's house.[14] To put it more plainly, individual liberty (at least) was also at stake and it might undermine whatever force the value of coordination has in the circumstances. My point is this: whether or not the New Jersey court's decision was legally or morally correct, the value of merely having settled conventions in some sphere of action is not conclusive. Other (competing) values may be more important and at issue. Thus, for the judge, the fact that coordination is, to some degree, at stake on a particular occasion of adjudication does not provide a conclusive reason for enforcing the law – it is not always sufficient given that competing considerations may de-legitimate the coordination. This is even clearer in cases of the coordination of gross injustices (e.g., forced migration of an ethnic group). Here the judge does not have a significant coordination-based reason for enforcing the law since the coordination accomplishes a terrible evil.

[14] *Home Builders v. Berlin*, 81 N.J. 127, 405 A.2d 287 (1979).

Example Three: *Democratic Governance*. Statutes facilitate democratic governance – they provide a means for a legislative assembly to issue directives about how state power is to be exercised. Insofar as democratic governance is valuable, then, enforcement of law secures a good when that law is produced by a genuinely democratic legislative assembly. On a particular occasion of adjudication, the judge faced with enforcing democratic law has a practically significant reason for doing so since it is only by such enforcement that the good of democratic governance is to be achieved.

If, however, there are limits to democratic legitimacy, i.e. there are some things that not even a perfect democracy can morally get away with (e.g., eliminating due process for minority), then when a legislature produces law it has no right to produce, it does not obligate the judge in the same way. In these circumstances, democratic governance is not a valuable – the *good* of democratic governance is not at stake when a judge is faced with applying an illegitimate statute (i.e., democratic governance in this case is not a good). Also, if a set of institutions does not realize in practice democracy, or it only realizes it to some degree, then the good at stake is less significant. If democratic rule really is valuable, and institutions only approximate what is required by democracy, then the institutions are less able to secure whatever it is that is good about democratic governance than they would be if they were fully democratic. In a moderately democratic political system, something of value may still be lost when legislative determinations are not enforced, but not as much as in a fully democratic system, and thus competing considerations against enforcement will be comparatively stronger. Those obligations stemming from democratic governance will be weaker for the judge.

Again, on the view I am defending now, what ties a judge to enforcing the law is that there may be goods specially connected with enforcement that are at stake on particular occasions of adjudication. These goods are *part* of what renders the law legitimate. Thus, for example, a somewhat unjust taxation scheme may be rendered legitimate because it is the product of a democratic assembly, and the judge might have an obligation to enforce it in order to secure the good of democratic governance. In this example, though, it is not democratic governance *exclusively* that renders the tax law legitimate – the law must also have been publicly promulgated, within certain bounds of justice, etc. In any case, it is because enforcement accomplishes something worthwhile in the circumstances that the judge has reason to enforce it.

So far, though, I have elided an issue concerning when the ability to secure a good can produce an obligation to do so. Just because one can achieve a good does not, it seems to many, obligate one to actually achieve it. One must have a special relationship to the good for it not to be merely supererogatory to pursue it (e.g., one must have made a promise to secure it, encouraged expectations that one would secure it, have a natural duty to secure it, etc.). To account for a judge's special responsibility to secure rule of law valuables in adjudication, a responsibility not shared by non-officials, voluntary assumption of the office does seem relevant. The voluntary assumption of office does not bind a judge to illegitimate legal action since that would require the judge to participate in a moral wrong. When law is legitimate, this sort of limiting condition does not apply, as the state has moral permission to regulate in the way law prescribes. When the judge voluntarily enters the judicial role and office, with its various expectations, and takes an oath upon assuming it, the judge does acquire a special obligation to see to it that legitimate law is carried out.

The special obligation a judge acquires on the voluntary assumption of the office is, however, parasitic on and secondary to the valuables that are achieved through enforcement of the law. To see this, notice that promises are not only undermined by immoral content, but are also attenuated when little of value depends upon their fulfillment. If I promise a friend to raise my right hand at two o'clock every Saturday afternoon (and this, let us assume, accomplishes nothing of value – no significant expectations, for example, depend upon the promise's fulfillment), then maybe I do something wrong by failing to raise my hand at two on a Saturday afternoon. But I do not commit a serious wrong. Almost any competing consideration would defeat the obligation produced by the promise (e.g., if doing so would make me unsafely remove my hand from the wheel, cause discomfort to others in a crowded elevator, or cause minor muscle pain). If I promise to meet my friend for lunch, to drive her to a doctor's appointment, or to not reveal a bit of sensitive information, things look different. The significance of what is at stake affects the moral force of the promise.

The same point holds, I contend, for the judge's voluntary assumption of office. It engenders obligations, but the strength of those obligations (as compared to other considerations that may be relevant) depends upon the significance of the goods that are at issue. This is important because the seriousness of the judge's obligation of fidelity to the law will not only depend upon it crossing a threshold of legitimacy, but also on how much of value is at stake in enforcing the law on a particular occasion of adjudication. When enforcement produces an important valuable, the judge has a significant reason to enforce, and when it does not produce such a valuable, the judge does not have such a reason (at least if there are any important competing considerations). In other words, how much of an authority law is for the judge depends on how good the law is in the circumstances. The valuables produced by the rule of

law, then, are of primary importance to the judge, and (as I will argue in the next section) consideration of them ought to play a basic role in the decision-making of the judge.

Let us return now to the initial contention of this section: the authority of law for the judge tracks legitimacy. I have tried to motivate this thesis by first, pointing out the limits of promissory-like obligations that apply to the judge, and second, by accounting for the way in which legitimate law does have authority over the judge. Here is a more general argument. Whenever law is legitimate, then it is the case that whatever competing claims there are against state interference are outweighed or undermined or in some other way defeated (such that it is permissible for the state to intervene). Whenever law is illegitimate, then claims against interference have not been defeated and, in fact, prevail. Otherwise said, whatever moral valuables are gained by enforcement cannot justify state use of power as required by law in the circumstances. Law acquires authority over judicial decision-making when it is capable of producing important goods in the circumstances. Practically speaking, then, when a legal requirement has been determined to be illegitimate, its status as law no longer has any special significance for the judge since there is nothing at stake in the enforcement of law that is, compared to competing considerations, of significance. An authority produces *practically significant reasons* for an agent – reasons capable of making a difference in the overall determination of what is to be done. Illegitimate law cannot be an authority for a judge because whatever valuables are gained by enforcement are defeated by competing claims and hence, the requirement's existence as law does not create reasons powerful enough to make a difference in what ought to be done. They can be safely discounted and the mere fact of illegitimate law ought play no role in the decision-making of the judge.

An analogy might be useful here. Imagine that a military commander orders a soldier to aid in the commission of a war crime.[15] Under many circumstances, the commander's directives will carry authority for the soldier – the soldier ought obey because the commander issued the order. This circumstance is different as the commander is ordering what he cannot legitimately order. The soldier must decide what to do, and all manner of moral considerations may be brought to bear. However, one consideration gets to drop out of the soldier's reasoning: the consideration that the commander's orders produces obligations. There may be other practical issues relating to the fact of the commander's orders (e.g., the behavior of *other* soldiers in the situation may be affected by the orders, for example, and this may matter for our soldier in the overall determination of the practically best way to achieve what is morally optimal in the circumstances). Whatever goods follow from treating the commander's orders as obligatory are defeated by the nature of the command – and thus, the commander's order is not authoritative for the soldier. As an order, it does not produce a *practically significant reason*, a reason that makes a difference in the overall determination of what is to be done. The soldier should discount the fact that the order is a command of a superior capable of being an authority and appeal to other ethical criteria. So it is for the judge faced with the question of implementing illegitimate law.

Let me summarize the results of this section. First, legitimate law has authority for the judge because it produces valuables that are significant enough to give the state a permission to intervene in the circumstances. Second, the value of the goods produced by law determines the strength of the obligation a judge has to implement the law. Third, illegitimate law is not an authority for judges; it does not, merely in its existence as law, produce practically significant

[15] I use an example of grave moral wrong not because I think these are the only kinds of cases that warrant departure from accepted standards, but simply to clearly illustrate what role a legal requirement should play in the practical reasoning of the judge depends on its legitimacy, i.e., on its ability to secure goods by enforcement in the circumstances sufficient to defeat competing claims against enforcement.

reasons to enforce it. I now turn to what this tells us about the structure of responsible judicial reasoning.

B. Justifying Rationales in Adjudication

Since judicial concern with the law is fundamentally grounded in its legitimacy and ability to produce goods worthy of our attention, judges should engage in a strategy of reasoning that is legitimacy-ensuring and productive of the goods that make enforcement valuable. To see what type of judicial reasoning is likely to fit this bill, let us first distinguish between two modes of decision-making under a regime of rules: decision-making that is transparent to the justification of the rule and decision-making that is opaque to the justification of a rule. Frederick Schauer describes the two different modes as follows:

> Under one mode, a decision-maker treats the pre-existing generalization of a rule as if it arose in conversation, modifying it when and as it is unfaithful to the rule's underlying justifications...It is transparent rather than opaque, and a decision-maker operating in this mode is expected to look through that transparent generalization to something deeper when recalcitrant experiences present themselves...By contrast, an alternative mode of decision-making would see a decision-maker treat the generalization of a rule as entrenched, prescribing (although not necessarily conclusively) the decision to be made even in cases in which the resultant decision is not one that would have been reached by direct application of the rule's justification. Under this decisional mode, the decision-maker treats the generalizations as more than mere indicators, but as supplying reasons for decision independent of those supplied by the generalization's underlying justification.[16]

Judges ought not treat legal requirements as opaque – as providing reasons for action simply because they exist as legal requirements. Treating legal requirements as opaque is unlikely to be legitimacy-ensuring and productive of the valuables that give the judge reason to respect law in the first place. The existing regime of legal rules is not perfectly legitimate – the judge is operating in the context of a partially-legitimate state and cannot assume that valid law warrants enforcement. Since a judge cannot assume this, and a judge should not enforce an illegitimate law, the judge must be sensitive to whether there are justifications for the law that would make it

[16] Frederick F. Schauer, *Playing by the Rules* (Oxford: Oxford University Press, 1991), 51-52.

permissible for the state to carry out its terms. If the judge treats the law as opaque, as providing a reason for enforcement independent of the justification, the judge will on some occasions treat law as an authority when it is not. By treating law as opaque, the judge may assist in the illegitimate deployment of state power.

Let me put the point slightly differently. The strength of the judge's obligation to the law depends on the valuables the rule of law produces in the circumstances, and thus, on the available justifications for relevant law and legal practice. Assessment of how much reason a judge has for enforcing the law requires assessing the significance of the goods that would be achieved by enforcement. Only with such an assessment in hand can a judge determine the relative value of enforcement as compared with other competing values that may be at issue on an occasion of adjudication. Treating legal requirements as supplying reasons independent of their underlying justification will distort the comparative assessment – it will create an unjustified presumption in favor of enforcement. The presumption will incline the judge to enforce when the available justifications for law may not warrant it. It will leave the judge incapable of accurately determining the strength of law's moral authority over her decision-making.

The moral position of judges does not permit viewing legal requirements opaquely – it is inconsistent with their responsibility, in a partially legitimate state, to ensure that their decisions are legitimate. Ought they, then, treat the law transparently, modifying it for the circumstances when it is unfaithful to justifications for having the requirement? The short answer is "yes," – though some qualification and clarification is required. Importantly, judges must be sensitive to the array of reasons for having a legal requirement – and these reasons will frequently have to do with the justifications for having rules at all (rather, for instance, than merely a list of policy

goals). The view I am defending here can be understood as *a kind* of *rule-sensitive particularism*. Schauer describes rule-sensitive particularism as a "form of decision-making treats rules as rules of thumb in the sense of being transparent to their substantive justifications, but allows their very existence and effect *as* rules of thumb to become a factor in determining whether rules should be set aside when the results they indicate diverge from the results indicated by direct application of their substantive justifications."[17] I say a *kind* of rule-sensitive particularism because a judge ought not take into account all possible rationales for having a law, but only those capable of legitimating the use of political power. The specific concern of a judge is legitimacy, and thus the kind of justifications that a judge ought appeal to are those relevant to justifying state use of force.

My central thesis is this: judges ought decide questions before the court on the basis of rationales that best justify the relevant law and legal practice. A judge ought reason from the standpoint of legitimacy: What ends or moral goods would justify the legal standards relevant in this case? What ruling would be in best service to those ends? The practical reasoning of a judge ought to be oriented towards producing the valuables that legitimate state use of force and give a judge reason to take law seriously. Treating legal standards transparently, as sensitive to the point or justification for having them, does precisely this. It mitigates the risk of illegitimate state power since the judge construes law in a way that best serves the rationales that justify legal standards. Moreover, in construing legal standards in ways that best serve their justifications in the circumstances, the judge secures the goods that give him reason to treat law as an authority – to treat legal practice as something that has a claim over his adjudicative decision-making.

The style of adjudication I am advocating will not be unfamiliar to readers of recent work on jurisprudence. Many legal theorists have suggested that judges must rely, in one way or

[17] Ibid., 97.

another, on the background justifications or principles of legal practice in order to adjudicate correctly.[18] However, much of this discussion has tended to be grounded, at least explicitly, in concerns of legal epistemology, semantics, and metaphysics. (E.g., How can we know what the law is? In virtue of what does law have meaning? What is law made of?). This makes sense if you think law automatically has authority over judicial decision-making, for then the primary issue for the judge is ascertaining what the law requires. I reject this idea and my defense of the use of justifying rationales in the construal of law relies primarily on ethical premises, as well as some uncontroversial assumptions about law and politics. The judge ought to decide on the basis of justifying rationales because, I have argued, he has a responsibility for ensuring that he deploys state power legitimately and applying it opaquely presents a substantial risk (in a partially legitimate state) of doing otherwise. I do not, for example, argue that judges must treat legal rules transparently in order to uncover their legal meaning.

Take, for instance, Ronald Dworkin's theory of legal interpretation.[19] Dworkin's theory describes a style of legal reasoning that closely models what I take to be the appropriate mode of practical reason for judges in a partially legitimate state. According to Dworkin, to determine what the law is in a jurisdiction concerning some matter, one must develop a principled justification of uncontroversial and core components of the relevant law and legal practice. Legal meaningis ascertained constructively, by positing a principled purpose or point to salient legal practice, rather than, say, by uncovering intentions.[20] If you want to know whether the New

[18] For a nice, but critical, overview of some of this body of work, see Larry Alexander and Ken Kress, "Against Legal Principles," in *Law and Interpretation: Essays in Legal Philosophy*, ed. Andrei Marmor (Oxford: Oxford University Press, 1995), 285-93.

[19] Explicated in various places, but see primarily Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), ———, "Law as Interpretation," *Texas Law Review* 60 (1982), ———, ""Natural" Law Revisited," *University of Florida Law Review* 34, no. 2 (1982), Dworkin, *Law's Empire*, Ronald Dworkin, *Justice in Robes* (Cambridge, MA: Harvard University Press, 2006).

[20] Though lawmaker intentions may become relevant, on Dworkin's view, if it turns out that the best justification for a particular domain of legal practice demands that they become relevant, e.g., to preserve the authority of the

York statute of wills permits a murdering heir to inherit,[21] it is not enough to simply read what the statute says. You must rely upon a sense of what is valuable about law generally, what is valuable about statutory law, the point of the law of wills, and the like. Whether the murdering heir ought legally inherit depends upon whether the best justification of relevant law entails that conclusion. If you want to know whether the Equal Protection Clause of the U.S. Constitution permits segregated schools in the circumstances,[22] you must interpret the legal history surrounding the 14th Amendment in way that best justifies it as a matter of political morality. Whether segregation is constitutional, on Dworkin's theory, depends again on what the best principled justification entails. Now, it may turn out that a morally attractive justification fits much, but not all well-recognized features of legal practice, but that is not necessarily defeating for the justification. Sometimes an attractive justification is compelling enough to warrant abandoning features of accepted legal practice – it offers such a forceful and convincing account of why certain legal features are valuable that one permissibly disregards those aspects of legal practice that do not fit the justification. According to Dworkin, the abandoned features (if the justification really does present a substantial portion of salient law in its best light) *are not law*.[23]

In some respects, Dworkin's view is much like mine – at least as it concerns adjudication. I also suggest that judges abandon or modify accepted legal standards when they do not fit the justification for implementing them in the circumstances. As I have said, I take it that doing otherwise carries the risk of illegitimacy and compromising the goods that give a judge reason to take law seriously. I also agree that the proper resolution of a case like *Brown* ought to have depended, at least in part, upon the principles of political morality capable of justifying the legal

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legislature. Even if this turns out to be the case, legal meaning (on Dworkin's view) still fundamentally depends upon the best justification of legal practice. See Dworkin, *Law's Empire*, 45-73.

[21] *Riggs v. Palmer*, 115 NY 506 (1889).

[22] *Brown v. Board of Education* , 347 US 483 (1954).

[23] Dworkin, *Law's Empire*, 62-73, 87-101, 225-40.

practice surrounding the Equal Protection Clause. The judges ought to have considered justificatory rationales for the clause and their significance in the circumstances. However, I do *not* claim that when accepted legal practice ought (morally) be abandoned, that the practice is not really law. Nor, relatedly, do I propose that legal meaning is ascertained constructively or that there is a right answer of law that is always available concerning any matter that comes before a court. My approach is perfectly consistent with the denial of those theses since it is not a descriptive account of law. It is a normative theory of adjudication. In fact, I take it that my account is particularly compelling if legal positivism turns out to be correct, for then law only very contingently meets standards that render it legitimate. In any case, Dworkin did get this right about adjudication: the authority of law for the judge depends crucially on law's ability on an occasion of adjudication to serve some worthwhile purpose of political morality.

C. The Main Argument

It will be useful to summarize the argument for transparent reasoning in judicial decision-making. That is, for the employment of justificatory rationales in the construal of standing law and legal practice. I will do that here and then close the paper by addressing some possible objections.

The moral position of the judge is both risky and complex in terms of its relationship to an existing legal order. Insofar as a court has power over institutions that enforce state directives, a judge's decision can affect the state's regard for people's moral rights, morally protected entitlements, and morally significant interests. State use of force to regulate these matters requires justification; use of state power to enforce directives requires legitimacy. An official judicial decision is an occasion for the determination of how state force is going to be deployed and as such it ought meet standards of legitimacy to be morally defensible. There is

nothing about the judicial position capable of blocking personal responsibility on the part of the judge for seeing to it that her decision meets conditions of legitimacy. The judge's decision is final and informed – and thus responsibility cannot be deferred to other actors or avoided by appeals to ignorance. Moreover, since illegitimately using state power to regulate people's affairs is a moral wrong, a judicial obligation requiring fidelity cannot bind a judge to applying law that does not meet standards of legitimacy. Lastly, the judge cannot have total confidence in the legitimacy of the legal system. Since it is unlikely that any actual polity's law and legal practice is wholly legitimate, a judge is not morally safe in merely applying valid law. Put otherwise, so long as the legitimacy of actual legal practice is limited, a judge cannot be sure that she is acting responsibly without recourse to moral considerations apart from what law and legal practice demands. A judge is irretrievably in the moral position of engaging in moral reasoning in adjudication.

The idea that a judge must employ moral reasoning to adjudicate responsibly can be further refined. In her official capacity, the moral concern of the judge is specific: How should the state treat those it governs? On what basis is state power justifiably used to regulate the affairs of those falling within its jurisdiction? The judge's rightful concern, then, is with legitimacy. Concerning an existing legal system, a judge is likely warranted in assuming that it possesses partial legitimacy. That is, the legal requirements of a polity cannot be enforced in all the fact situations they claim to regulate, but the system serves many values that would justify the use of state force. The judge, therefore, can have confidence that it will be possible to identify rationales that would justify much of what the law requires. Crucially, it is these justifying rationales, i.e., the valuables to be achieved by enforcement, that properly ground a judge's respect for standing law and legal practice in the course of adjudication. In other words,

the goods achieved through law in the circumstances are what give the judge, along with her voluntary assumption of office, significant reason to adjudicate on the basis of legal norms. Consequently, a judge should adjudicate in a way that is legitimacy-ensuring and productive of the goods that make enforcement important and worthwhile. The judge should construe law so as to best serve the valuable ends that justify its enforcement by the state, since it is these ends that ground the authority of law over judicial decision-making.

Treating legal requirements relevant to questions before the court opaquely does not reliably permit judges to meet their responsibilities as state officials. Treating legal requirements as reason-producing independent of their justification inclines towards enforcement when it may not be warranted and overestimates the degree of moral authority the law has over judicial reasoning. Only with undistorted sensitivity to underlying justifications can a judge correctly gauge legitimacy. A transparent approach to legal requirements permits this sensitivity and thereby protects individuals from unjustified state coercion – coercion that can seriously damage the lives of real-world individuals. In addressing questions before the court, then, judges ought to be prepared to consider what would justify relevant law and construe law in accordance with the best justification for it.

In a discussion of constitutional interpretation, David Lyons contends that we ought understand appeals to original intent as appeals to the original justification for constitutional provisions – at least insofar as we want to understand it as a defensible adjudicative strategy. He summarizes his view as follows:

> Courts should interpret the Constitution so that it most effectively serves the rationales that provide the best justification of its actual provisions. This approach would maximize the likelihood that decisions reached are morally defensible. It would then maximize the likelihood

> that decisions will respect one's right to be treated by the government in a morally defensible way.[24]

The point here is not dissimilar, though more general. Treating legal standards transparently, subject to the qualifications outlined above, protects people within the jurisdiction of a legal order from illegitimate use of state force. It tends to ensure that state action meets conditions of legitimacy by advancing the rationales that justify state action. If legal rules fail, in the circumstances, to produce the goods that would justify the rules, then their moral force for the judge is attenuated.

IV. Objections and Replies

A. Opacity as a Device for the Allocation of Power

We might understand legal rules as a piece of social technology for the allocation of decision-making power. Schauer describes the point as follows:

> [A]ny argument for rule-based decision-making can be seen to view rules as essentially jurisdictional, as devices for determining who should be considering what. Rules therefore operate as tools for the *allocation of power*. A decision-maker not constrained by rules has the power, the authority, the jurisdiction to take everything into account. Conversely, the rule-constrained decision-maker loses at least some of that jurisdiction.[25]

If rules are treated opaquely, as supplying a reason for compliance independent of their background justification, a decision-maker is restricted in terms of the array of considerations he can take into account. A rule prohibiting unleashed dogs in the park, if taken seriously in this way, restricts the array of factors one takes into account in considering whether to unleash one's pet. One still has to determine what falls under the description of the rule (for instance, whether one's pet is a dog proper), but one does not consider, for the sake of making a decision, the wisdom of unleashing one's particular dog in the circumstances, since the rule is seen to provide

[24] David Lyons, "Basic Rights and Constitutional Interpretation," in *Moral Aspects of Legal Theory: Essays on Law, Justice, and Political Responsibility* (Cambridge: Cambridge University Press, 1993).
[25] Schauer, *Playing by the Rules*, 159.

a reason for leashing in any case. We can put the point in terms of legal rules and the judge. Formulating legal requirements as rules is a way of restricting the kinds of considerations judges may rely upon in making decisions, which protects the authority of other decision-makers to decide on some set of matters. A criminal statute stipulating sentencing requirements permits legislative institutions to negotiate the array of rationales for sentencing in any particular way, at least if treated opaquely by the judiciary. A transparent mode of adjudication would usurp this authority, since judges might then be inclined to adjust the legislature's determination for the circumstances based on their own judgment about what an appropriate sentence would be (i.e., based on their own judgment concerning what would justify the sentencing rules). Rules function, if treated opaquely, to secure a society's judgments about institutional jurisdiction. "Rules, including legal rules, apportion decision-making authority among various individuals and institutions, reflecting a society's decisions about who will decide what, who is to be trusted and who not, who is to be empowered and who not, whose decisions are to be reviewed and whose are to be final, and who is to give orders and who is to take them."[26]

Rule-sensitive particularism, the objection might go, disrupts the jurisdictional decisions of a legal system.[27] Although rule-sensitive particularism in adjudication can account for rule of law values like coordination, predictability, and stability, it by its very nature reapportions decision-making authority to the judiciary, since a judge must decide whether the justifications for the particular rule are being served in the circumstances. But this may be precisely the kind of determination that we want left to other decision-makers, *and we may not want the judiciary to consider when it should deliberate about the available justifications*.

[26] Ibid., 173.
[27] Schauer does not quite endorse this line of objection against rule-sensitive particularism in adjudication, but rather concludes that one way of treating rules opaquely, "presumptive positivism," may be the best way of describing the role of rules in legal systems. See Ibid., 167-206.

> If...we see rules not so much as implements for achieving predictability but as devices for the allocation of power, then it is far from clear that granting the power to a rule-applier to determine whether following the rule is on the balance of reasons desirable on this occasion is necessarily desirable...*If we do not trust a decision-maker to determine x, then we can hardly trust that decision-maker to determine that this is a case in which the reasons for disabling that decision-maker from determining x either do not apply or are outweighed*.[28]

Not only might we be worried about judicial consideration of the rationales for particular rules, but also their judgment concerning when they ought to let the judgment of others prevail.

I do not think we have good reason for assuming such general incapacity on the part of judges, particularly concerning their ability to recognize their own incapacity. Recognizing one's unfitness for determining x may be an entirely different matter than determining x, and a judicial strategy of rule-sensitive particularism, as I defend it above, does permit some rules to be treated opaquely when doing so achieves a good in the circumstances. Take legal rules promulgated by specialized government agencies. Frequently, judges have good reason to defer to the determinations of the Food and Drug Administration (FDA), for example, because of the agency's technical expertise. If the FDA is functioning properly, then a judge may appropriately treat their rules opaquely, given her own lack of expertise in the area. Doing so would secure the goods of expert governance in the relevant domain. If, however, it is apparent that the review process for a drug, for instance, was not properly followed, or there is evidence of corruption or that the agency has been captured by the industry, the judge may rightfully doubt that the goods of expert governance are at stake on a particular occasion of adjudication (and thus have little reason to be overly deferent). This doubt, moreover, will be grounded in considerations heterogeneous from those concerning what regulatory rules are appropriate.

Similar things can be said about democratic authority. Democratic procedures, when conducted properly, may give a judge reason to treat statutory rules as opaque (as this secures the

[28] Ibid., 98. My emphasis.

good of democratic governance, whatever the nature of that good is) – at least when the rule is demanding what a democracy can legitimately demand. But as actual, real-world procedures depart from those demanded by a normative theory of democracy, the reason a judge has for treating statutory rules as opaque diminishes (at least out of concern for securing democratic governance). Identifying failures in democratic process will normally be a different matter than considering justifying rationales for particular statutory rules.

The general worry about official disruption of a community's determination concerning the allocation of decision-making authority is, if pressed too strongly, a part of ideal theory. For one, it is normally unclear what sense of "community" or "we" is operative when it is claimed that, e.g., "we do not trust a decision-maker to determine x". Existing institutional arrangements are frequently not the product of anything resembling a democratic process. Also, the partial-legitimacy of the state makes it difficult to trust jurisdiction-ensuring devices when those devices may be implicated in the illegitimate exercise of government power. Without good evidence that judges are more likely to get judgments about jurisdiction wrong than they would simply by following the rules in a particular partially-legitimate legal system, the objection is weak and near irrelevant. (And if there is such evidence, it would be available to judges too.) In a well-ordered society where illegitimate use of state power is quite limited, an adjudicative ethic of treating legal rules non-transparently may be appropriate. Not, however, when there is justified concern that the state may be doing what it ought not.

B. Particularism as a Threat to Rule of Law Valuables

The rule-sensitive particularism I am advocating demands that judges consider the value of having rules in the course of developing justificatory rationales. Thus, for instance, judges must

be considerate of the values of predictability and coordination in determining how to rule on a particular question. We might worry, though, that such reasoning is, by its very nature, a threat to the goods of the rule of law. Larry Alexander and Emily Sherwin articulate the concern:

> ...[The value of rule governance] may be undermined by errors at various levels of decision-making. Judges may err in calculating the effects of their decisions on the value of rules...If errors in judgment exceed the errors that would result from strict adherence to the rule, moral adjudication may produce morally inferior decisions. And if judges systematically undervalue the negative effects of their decisions and err in favor of leniency, actors...cannot anticipate rigorous enforcement and have less reason to follow the rule.[29]

There are two separate concerns here: one with judicial error and another with moral reasoning in adjudication resulting in unpredictable enforcement. The first I address above – in a partially-legitimate state, we should want a compelling reason for doubting generally judicial capacity to compare their epistemic position to the procedures that produced the legal rules. The second concern, however, need not be premised on the hypothesis that there will be widespread and systematic undervaluing of rule of law valuables at stake. It is likely that there will be greater divergence of opinion among judges about what precisely justifies a particular rule than there is about the meaning of that rule. This divergence would render transparent adjudication, if practiced widely, a source of unpredictability, as those falling under legal rules would be unable to predict precisely how and in what circumstances they will be enforced. Compliance would, consequently, drop as sanctions for non-compliance become less likely.

Of course, if legal rules within some domain are illegitimate, then high rates of compliance within that domain may not be desirable. Also, I think we should be careful not to overestimate the unpredictability of the kind of particularist adjudication I am advocating. Two features push towards convergence in rule application when law is legitimate. First, a sensitivity to value of predictable rule application is recognized as important. Even though different judges

[29] Larry Alexander and Emily Sherwin, *The Rule of Rules: Morality, Rules & the Dilemmas of Law* (Durham: Duke University Press, 2001), 82.

may accord different weight to that value compared to other values in particular circumstances, a common recognition of the importance of predictability will produce significant regularity of enforcement. Second, I advocate legitimacy-based moral reconstructions of legal practice – i.e., judges are to develop rationales in terms of moral norms capable of justifying the exercise of state power. If a condition of legitimacy is that state power be exercised consistent with principles that we can reasonably expect others to endorse, then judges must, on many questions, develop justifications in terms of public reason.[30] This will narrow the range of moral principles judges can rely upon and thereby reduce divergence.

Nonetheless, one cost of a general practice of transparent adjudication may be reduced predictability. I regard this cost as acceptable. Predictability is but one concern of good governance, and there are many circumstances where it is not the prevailing concern. Sometimes the realization of other political valuables (e.g., justice, rights protection, a compelling common interest) is comparatively more important, and occasionally much more important. Since the judge cannot assume that legal requirements are legitimate, a consideration of other values is crucial. A practice of treating rules opaquely exclusively out of concern for predictability simply overestimates predictability's significance – it treats predictability as morally dispositive when it is not.

C. Idealizing the Judiciary

I have claimed that theories of adjudication that ask judges to treat legal requirements opaquely overestimate the quality of actual human political institutions. It might be thought, though, that I make a similar sort of error by overestimating the quality of the judiciary. The judiciary is non-ideal also, and by assigning a responsibility for ensuring the legitimacy of a state's governance to

[30] See again, Rawls, *Political Liberalism*, 212-54.

the judiciary, it looks like I am assuming otherwise. Relatedly, judges operate under significant epistemic burdens. Sure, if the judge truly knows that the FDA has been captured, then she may have reason to question FDA regulations concerning some matter. However, things are rarely so straightforward. The evidence is usually mixed and is frequently inconclusive, and a judge may not have access to sufficient information to make a reliable determination about such things. More generally, we should wonder whether such determinations are within the institutional competence of the judiciary as presently constituted.[31]

In replying to this concern, let me first say that I do not assume that existing judicial institutions are ideal. The fact that actual judiciaries are sometimes marred by corruption, incompetence, laziness, partiality, ideology, lack of concern for the fate of litigants, and structural and procedural failures (e.g., insufficient concern with maintaining a chain of custody) is something I acknowledge. What institutional remedies are available for addressing these problems is not something that I have said a great deal about – though, I think such issues are important and they may be issues that judges must face when adjudicating on structural rules. Rather, what I have tried to explicate is the structure of responsible judicial reasoning given the limited legitimacy of state institutions. In other words, I take up the first-person perspective of the judge who desires to act responsibly and consider how he can do so given that he is surrounded by legal institutions (the judiciary included) that have probably made mistakes (sometimes quite serious) in terms of legitimacy.

Take a judge in a common law jurisdiction that has historically been marred by corruption or some other serious partiality. The judge desires to decide responsibly, but recognizes that the cases that are supposed to serve as precedents for her are biased in a way that may undermine their legitimacy. Of course, concerns about predictability are still relevant – the

[31] I would like to thank Jeffrey Brand-Ballard for pressing this line of objection.

previous decisions may have elicited various expectations. Yet, as I have argued above, such considerations are not dispositive. The fact that prior judicial decisions are inappropriately partial rightly gives the currently deciding judge less reason to take them seriously in adjudication. In fact, idealizing prior judicial practice here would have a tendency to lead the judge to decide *irresponsibly*. The central point here being that my account does not idealize the judiciary, but rather offers a solution for judges dealing with the infelicities of actual judiciaries.

Granted, the judge is normally not in an ideal epistemic situation either. It may be difficult to assess levels of corruption, agency capture, or other procedural failures, and existing judicial institutions may not have mechanisms in place that improve the epistemic position of judges to make such assessments.[32] In these circumstances, the judge must make a meta-judgment concerning her ability to assess the procedures. The judge must consider to what extent she is capable of objectively assessing the procedures that produced the relevant law – she must assess her own epistemic competence. If she has reason to think that the procedure is more likely to get it right than she is, and she recognizes that she cannot determine if the procedures were conducted properly, then she may have reason to be deferent. However, deference is not always safe. *If something has prompted doubt on the part of the judge*, then she is obligated to acquire more information, insofar as it is available (she must make use of whatever institutional tools the judiciary, as presently constituted, possesses to pursue the relevant information). The judge must make the best judgments she is capable of in the circumstances since she cannot assume that the legal demands are legitimate.

[32] I agree with Coleman that assessing institutional competence, including epistemic competence, is crucial to assessing legitimacy. See Jules L. Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992), 210-11. Nonetheless, as I argued in IV.A above, I do not think we have good grounds for a general doubt that judges can assess their epistemic competence when they are, in good faith, attempting to decide responsibly.

To put the point slightly differently, it is worth noting that problems of acting under uncertainty are pervasive in ethical decision-making – this is not a problem that is unique to responsible adjudication. Even where one is certain of the relevant ethical demands, a lack of information may make it difficult to apply those requirements in the circumstances, and there may be no moral safety in the status quo. Take the parent of a young child with a life-threatening illness. The parent must decide whether pursue the potentially life-saving treatment A, which has small chance of success and a high likelihood of very undesirable side-effects, or simply let the illness run its course (option B), which will almost certainly lead to the child's death in a year or so, but will permit the child to live a decent life in the meantime. A decision must be made, the correct decision is unclear (even if we agree that the welfare of the child is the primary consideration), and the status quo is not a safe default. Here the parent certainly has a responsibility to acquire as much information as is available. Also, if some infelicity is discovered in the procedures that are delivering the information to the parent, we would expect the parent to take that source less seriously and seek additional information. (E.g., if it is discovered that a doctor has a special relationship with the company producing treatment A, we would at least expect the parent to seek additional medical opinions or other sources of information before relying on the physician's advice.)

The narrow point here is that the responsible response of judges to informational deficits cannot be to automatically treat legal requirements opaquely. The moral argument does not work that way in other circumstances made morally difficult by a lack of information (i.e., prefer the status quo because of a lack of certainty). The response is going to have to be much more nuanced and address questions of what information is available and what inferences are to be drawn on the basis of that limited information. Without specifying heuristics more precisely, I

can say that whatever moral advice we want to give generally to agents acting under uncertainty we can also give to the judge.

D. Systemic Effects

The impact of any particular judicial decision on legal practice as a whole is usually quite limited. Even so, judicial decisions can have effects on the decision-making of agents not party to the case (especially if a pattern of judicial behavior becomes apparent). Brand-Ballard has recently given careful consideration of such *systemic effects* and their implications for the permissibility of judicial departure from the law. Ultimately, he argues that judges have reasons to adhere to the law in some cases where the legally required result is morally sub-optimal but for the undesirable effects on those not party to the case.[33] The systemic effect of particular concern to Brand-Ballard is mimesis, where "a judge adheres to *or deviates from* a certain legal standard in part because he believes that anterior judges have adhered to or deviated from other legal standards."[34] A judge or group of judges deviating to produce optimal results in their own cases might encourage general deviation on the part of other judges whose deviant decisions are sub-optimal compared to adherent decisions. This concern is grounded in controversial empirical and normative assumptions (e.g., that judicial deviance encourages judicial deviance and that it is occasionally permissible to intentionally cause harm in order to prevent forseeable harm), as Brand-Ballard acknowledges.[35]

In any case, I do not view worries about systemic effects of judicial deviance, even if well-grounded, as posing a general objection to transparent adjudication. In deciding whether to enforce law in a way that will be understood as non-deviant, the judge must consider what

[33] Brand-Ballard, *Limits of Legality: The Ethics of Lawless Judging*, 181-313.
[34] Ibid., 187.
[35] Ibid., 182, 202-11.

valuables are at stake on a particular occasion of adjudication. If there is some evidence that a future good will be indirectly gained or lost because of a decision concerning some other matter *now*, then the future good is at stake on this occasion. If the distant good is significant enough to legitimate enforcement given competing considerations, then the judge may well be justified in enforcing now (again, given that serious consideration of the systemic effect is well-grounded empirically and morally).

E. The Law of Generally Legitimate States

A final worry worth discussing here has to do with the status of moderately unjust laws promulgated by generally legitimate states. It might be thought that if a state does pretty well with regards to legitimacy, then judges have reason to respect law that would otherwise be illegitimate so long as it is not excessively unjust. In other words, a somewhat unjust law can acquire legitimacy *simply by* being part of a legal system that is decently legitimate. The emphasis on "simply by" is important here, for the claim cannot be that well-conducted procedures are capable of legitimating, within limits, substantively unjust law. I have acknowledged that some procedures, e.g., democratic ones, are capable of conferring such legitimacy when properly conducted and that this gives a judge a reason to enforce the promulgations of those procedures in order to produce whatever valuables governance by those procedures is capable of producing. The objection would have to be that simply in virtue of being part of the same legal system of a generally legitimate polity, an unjust law acquires legitimacy.

I think that when the claim is articulated in this way, it becomes clear that the burden falls on the advocate of the thesis to show why it would be the case. How could common

membership of norms A, B, C, D, and E in a legal system make it the case that the legitimacy of A, B, C, and D confers legitimacy on E? If the state is acting permissibly by enforcing A, B, C, and D, and to enforce E (in a wide array of circumstances) would be impermissible, how does the enforcement of E become permissible by the state permissibly enforcing *other* norms? One point might be that we can only expect so much of human political institutions, so that when those institutions perform reasonably well, we should respect them. This might mean:

(1) *It is important that the state perform its essential functions, and do things like enforce A, B, C, and D. Sometimes the state will do what it ought not, e.g., demand E, but judges should enforce E because to not enforce E may undermine the state's ability to perform its essential functions and enforce A, B, C, and D.* If this is one's concern, however, it is one about systemic effects (see IV.D above). There will be cases in which not enforcing E will not undermine otherwise good state institutions, so why should the judge enforce E in these circumstances? In other words, the claim would not establish the needed relationship – that legitimate law confers legitimacy on otherwise illegitimate law by membership in the same legal system.

(2) The law-making institutions of the state are of relatively high quality. Consequently, the institutions themselves deserve our respect, and this implies respecting their promulgations, even when they act wrongly. Imagine that institutions are capable of deserving respect, it is still hard to know how this respect translates into deference when the institutions are acting impermissibly. If a person is owed respect, because they tend to act rightly, this does not mean that we regard that person's wrongful action as permissible. If a person is typically truthful, that does not make it permissible for her to steal. So, if the FDA frequently reviews the safety of drugs

appropriately, but fails to do so in a certain instance, why should we respect its determinations in that instance – i.e., why should we treat those regulations as legitimate? The same point, I think, can be made for other law-making procedures. Perhaps there are other reasons for thinking that a high-frequency of legitimate governance on the part of the state in some domains is capable of conferring legitimacy on otherwise illegitimate state action. It is hard for me to see, though, how common membership (by itself) in a legal system could perform this morally significant function. Anyhow, a case would have to be made for us to think that a judge has reason to enforce an unjust law simply because the state acts permissibly in other circumstances.

V. Conclusion

The central claim of the paper is that judges deciding in partially-legitimate states ought to treat law transparently, as sensitive to legitimacy-based rationales that would justify enforcement in the circumstances. I will not rehearse the central rationales for this view (summarized in III.C) here, except to say that given the high stakes of adjudication, it would surprising if moral reasoning did not inform responsible judicial reasoning in a significant way. Moreover, once we recognize the limits that a concern with legitimacy places on judicial reasoning, I think many of the worries about particularist judging are mitigated, if not entirely dissipated. To say that judicial practical reason involves moral judgment is not to say that anything goes. Judges must still be responsive to all the demands of good moral reasoning (impartiality, pursuit of accurate information, careful consideration of the interests involved, etc.) and exclusively employ standards relevant to justifying state force. Once this is acknowledged, then rule-sensitive

particularist judging becomes not a threat to the rule of law, but a method for achieving those goods that make the rule of law worthwhile in the first place.

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