THE GAP

LARRY ALEXANDER*

I.

In the last pages of his article, Professor Fred Schauer gets to the heart of the problem of rules and thus to what I consider the heart of the problem of law.[1] I believe that under any conception of law, rules in Schauer's "entrenched generalizations" sense[2] are essential, if only to identify the authorities whose non-rule-based decisions shall be authoritative.[3] The heart of the problem of rules and law is this: There is an always-possible gap between what we have reason to do, all things considered (including the value of rules and the effects of our conduct on preserving valued rules), and what we have reason to have our rules (and the officials who promulgate and enforce them) require us to do. A rule may not allow for an exception where, all things considered, we should violate it, and yet be an ideal rule for all that. We may not trust others—really, ourselves in the role of rule-followers rather than rule-authors—to apply the exception correctly. In other words, an exception may lead to an unfavorable balance of incorrect versus correct applications

* Professor of Law, University of San Diego. B.A., 1965, Williams College; LL.B., 1968, Yale University. I want to thank Gail Heriot and Emily Sherwin for commenting helpfully on drafts of this article.

1. *See* Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 691-94 (1991).

2. *See id.* at 647-51.

3. Professor Jules Coleman's brand of legal positivism might appear to make rules of the type with which Schauer and I are concerned dispensable. *See* Coleman, *Rules and Social Facts*, 14 HARV. J.L. & PUB. POL'Y 703 (1991).

Coleman's weak positivism includes a negative thesis, the separability of law and morality, and a positive thesis, that law is a matter of social fact. Coleman's position does not entail a limited domain for law, as does the positivism of Joseph Raz and Schauer. *See id.* at 723-24. Nor is Coleman's rule of recognition, unlike Raz's, epistemic as opposed to semantic (ontological). For Raz, though not for Coleman, law has a function in practical reasoning: It is authoritative. And it cannot be authoritative unless it can be identified apart from the moral issues it is designed to settle authoritatively (Raz's sources thesis). Therefore, for Raz, the rule of recognition must be epistemic as well as semantic.

One might argue that even Coleman's weak positivism requires an epistemic rule in the sense of a proposition that identifies the rule of recognition or that identifies the authorities on whose acceptance the rule of recognition depends. In any event, I believe that Razian authority, and therefore rules of the type with which Schauer and I are concerned, will be *morally* required for any complex society. Therefore, even if the rule of recognition is "Law is correct moral principles," rules and "the gap" will emerge at the next level down.

of the exception. But without the exception, we end up with "the gap."

The upshot of this is that in one role we occupy, that of authority, we should impose sanctions on ourselves for actions that are correct in another role we occupy, that of subjects of rules. It may be morally good that we punish ourselves for breaking morally good rules for morally good reasons.

II.

There are two reasons for "the gap." First, we as rulemakers are fallible in crafting rules; nevertheless, to avoid even worse consequences than our imperfect rules produce, we need to have some finality attached to our decisions. Second, we as the subjects of rules are fallible, and we are more likely to produce those consequences demanded by our moral principles if we are governed not directly by those principles but by blunt (over- and under-inclusive) rules that are relatively easy to follow and to monitor. The first reason is really only an instance of the second: A rule of finality is one of the morally optimal blunt rules.[4]

How can we as rulemakers know enough to prescribe the indirect strategy of decisionmaking under rules rather than the direct, all-things-considered strategy? That question is especially difficult because the reasons for preferring the indirect strategy are based on our fallibility. If we are fallible in deciding how to act in particular cases, and thus need the guidance of blunt rules, will we not be equally fallible in formulating such rules? I think not. The reason why the indirect strategy seems plausible despite its potentially self-undermining reliance on fallibility probably lies in either differential expertise or relative favorableness of decisionmaking environments (promulgating a general rule versus making a particular decision). As rule prescribers we may be in a better position to estimate consequences than we are as subjects of the rules.

III.

The problem of rules is a problem of consequentialism.

4. *See* Alexander, *The Constitution as Law*, 6 CONST. COMMENTARY 103, 107-09 (1989) (discussing how fallibility-based arguments for ideal rules, though over- and under-inclusive, relate to the argument for giving finality to non-ideal rules).

Promulgating, obeying or disobeying, and responding to disobedience are all acts that we will judge, at least in part, by their consequences. And it is quite possible that the best consequences are obtained as follows:

(1) As authority, *promulgate* an absolute rule, "do x," or a presumptive rule, "do x unless doing x is outweighed by reasons of weight w."
(2) As a rational subject of the promulgated rule, engage in Schauer's "rule-sensitive particularism" (RSP)[5]—take the course of action that is morally best, all things considered, including effects on valued rules—and *disobey* the rule promulgated in (1).
(3) As authority, *respond* to this rule violation by a separate, non-publicized, decisional rule that
    (a) says "do not criticize and/or punish those who justifiably disobey"; or
    (b) says "criticize and/or punish only class c of those who justifiably disobey"; or
    (c) (in a published decisional rule) says "criticize and/or punish all of those who justifiably disobey."

Furthermore, it is possible that the responders in (3), who also, as rational agents, employ RSP, could justifiably conclude that they should disobey the decisional rule in some or all cases. It also might be optimal for others to criticize and/or punish *them* in some or all cases in which they justifiably disobey the decisional rule. And so on.

IV.

The situation just described, the rejection of what Sartorius has labelled the Reflection Principle,[6] is highly unstable. Schauer's "solution" is to punish those whose rule violations, though motivated by good faith beliefs that they were morally warranted, do not appear so to us as officials, but not to punish those whose violations appear to us to be justified.[7] Schauer's solution, however, does not solve the problem of "the gap." (Note: Schauer's solution is similar to the Model Penal Code's general "lesser evils" defense,[8] except that Schauer's solution

5. *See* Schauer, *supra* note 1, at 649-50.
6. *See* R. SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS 55-57 (1975).
7. *See* Schauer, *supra* note 1, at 691-94.
8. *See* MODEL PENAL CODE § 3.02(1) (Proposed Official Draft 1962). The provision reads as follows:

applies even in the face of a clear legislative intent to exclude the defense.) Schauer's solution may lead to too many unjustified violations by those who in bad faith or in good faith mistakenly believe they are justified in violating the rules (and will get no punishment) when they are in fact *not* justified in violating the rules. And punishing those who in good faith mistakenly violate the rules smacks sufficiently of strict liability to cause the psychological instability associated with "the gap": It is difficult to bring ourselves to punish those who have done what we acknowledge was the correct thing to do, even when we understand the consequentialist warrant for punishing them.[9]

V.

Schauer's presumptive positivism cannot eliminate "the gap." Presumptive positivism consists of adding a weight (w) to the rule-following side of the moral balance. Under presumptive positivism, one may violate the rule if, and only if, the balance of moral reasons, including the effects of undermining valued rules, tips in favor of rule violation by more than weight w.[10]

But what if the balance of reasons tips in favor of rule violation, even if we include in support of rule obedience the effects of disobedience on undermining valued rules, but it tips in favor of rule violation by an amount less than w? Presumptive positivism would dictate obedience, but reason dictates disobedience. If amending the rule is not indicated, then reason suggests that we as authority should keep the rule and as subject should violate it, even though presumptive positivism would dictate obedience. Therefore, presumptive positivism fails to eliminate "the gap."

---

(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
   (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
   (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
   (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

9. *See* Alexander, *Pursuing the Good—Indirectly*, 95 ETHICS 315, 324-25 (1985).

10. *See* Schauer, *supra* note 1, at 674-77.

VI.

Although presumptive positivism cannot eliminate "the gap," it can be an implicit part of every rule, unlike Schauer's "rule-sensitive particularism" (RSP).[11] Schauer's treatment of presumptive positivism and RSP masks this important asymmetry.

Compare (1) "follow the rule" with (2) "follow the rule unless the reasons in favor of following the rule, including the reasons for adopting a rule and the effects of violation on undermining rules, are outweighed by the reasons against following the rule." Formulation (2) is Schauer's RSP. Rules cannot be formulated in terms of RSP. A rule so formulated would say, in effect, "Follow me unless the reasons for following me, including the reasons for adopting a rule of my type and the destabilizing effects of violation on rules of my type, are outweighed." The value of that rule *as a rule* is de minimis. Such a rule would be self-undermining and collapse into pure particularism. RSP is and can only be the proper decisional framework for those subject to rules that are *not* formulated in terms of RSP.

Schauer's favored position, presumptive positivism, translates into "follow the rule unless there are reasons of weight w against doing so." The subject would decide whether to follow the rule by engaging in RSP, as is only rational, but the value of the rule *qua* rule in the RSP equation is reduced to the value *qua* rule of a rule with only presumptive weight w. Because that value will be lower than the value of an absolute rule *qua* rule, RSP will lead to violating Schauer's presumptive rules more often than absolute rules, though it will *not* produce the same results as pure particularism.

VII.

Professor Michael Moore argues that laws can be first-order reasons for action based on normative powers.[12] I reject this position.[13] The arguments for laws being first-order reasons are weak, especially in non-democratic legal systems. Even in democratic systems, at best it is not the law, but the majority

11. *See id.* at 649-50. *See also* Alexander, *supra* note 4, at 108.
12. *See* Moore, *Three Concepts of Rules*, 14 HARV. J.L. & PUB.POL'Y 771 (1991).
13. *See* Alexander, *Law and Exclusionary Reasons*, 18 PHIL. TOPICS 5, 15-16 (1990).

will, that most plausibly counts as a first-order reason. Even this is doubtful. As Heidi Hurd points out, an objectionable law enacted democratically may not carry any more weight in terms of first-order reasons for obedience than the same law imposed by a dictator.[14]

Nor can consenting or promising to obey transform law into a first-order reason for action. It is controversial whether promising is itself a first-order reason for action. On one view, promising is analogous to law, a valuable practice that to achieve its value must claim to give first-order reasons for action in accordance with the promise, but that in fact does not do so.[15] On another view, promising does create a first-order moral reason to act as promised, even when there has been no detrimental reliance, but only when the promise concerns matters not subject to any preexisting moral reasons. In other words, leaving aside its reliance effects,[16] promising creates moral reasons to do what is promised only when what is promised is, in the absence of the promise, a matter of moral indifference.[17] (Support for this view of promising comes from noting that promising to commit a murder cannot alter in the slightest the balance of moral reasons against murdering; for, if it could do so, then by making promises to commit murder to a sufficient number of people, one could become morally obligated to commit the murder. And what is true of murder is also true of acts that are only slightly wrong, such as stealing a dime: No matter how many people one promises, one cannot become obligated to steal a dime.)

But even if consenting and promising were first-order moral reasons, there are well known difficulties in generating the moral authority of law out of the moral authority of consenting or promising.[18] And just as with promising and consent, no other theories of legal authority succeed in showing law to be a first-order moral reason.[19]

Moreover, even if law *were* a first-order moral reason, this

14. *See* Hurd, *Challenging Authority*, 100 YALE L.J. 1611, 1646-66 (1991).

15. *See generally id.* at 1657-63. *See also* Buckley, *Paradox Lost*, 72 MINN. L. REV. 775, 775-80 (1988).

16. For a discussion of reliance as a moral basis for keeping promises, see Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFF. 199 (1990).

17. *See* Alexander, *supra* note 13, at 15.

18. *See* Hurd, *supra* note 14, at 1657-63.

19. *See generally id.* at 1649-57, 1663-66.

would narrow *but not eliminate* "the gap." For unless law were not only a first-order moral reason, but a *conclusive* moral reason as well, "the gap" would remain between what law will justifiably claim one must do and what one must do, all things considered.

VIII.

Alternative solutions to "the gap" either consist in some form of acoustic separation,[20] self-deception, or myth-making about law's authority[21] that would incline us in favor of what legal rules require beyond what we truly have reason to do, or they consist in trying to make punishments for rule-violations more automatic and less subject to the human instinct to withhold punishment from those whose violations are either morally justified or subjectively nonculpable.[22] If legal rules were not over- and under-inclusive with respect to their background reasons—and not justified consequentially by their production over time of a better state of affairs in terms of those reasons than case-by-case direct application of those reasons would produce—then "the gap" would not necessarily be a feature of legal rules. For example, if legal rules were perfect mirrors of moral rules—if they were identical to their justifying reasons, which happened to be rulelike in their formulation—then the rules would not produce "the gap." Although some legal rules may be rules of this type, most are probably of the type Schauer describes. It is highly implausible to imagine a legal system of which all rules, including rules designating procedures, were perfect mirrors of moral rules rather than blunt instruments for achieving the maximum moral benefits over a range of cases. Thus, any plausible legal system will contain "the gap."

20. *See* Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

21. *See* Alexander, *supra* note 9, at 324-25.

22. *See id.*