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LAW'S LIMITED DOMAIN CONFRONTS MORALITY'S  
UNIVERSAL EMPIRE<sup>†</sup>

LARRY ALEXANDER\* & FREDERICK SCHAUER\*\*

There is an ongoing debate in contemporary jurisprudence over whether law, properly conceived, is capable of incorporating morality. And this debate has its important practical analogues, especially in American constitutional law. For this is where lawyers and scholars argue about whether, for example, the guarantees of equal protection, freedom of speech, and the free exercise of religion, as well as the prohibitions on cruel and unusual punishments and unreasonable searches and seizures, require courts and other governmental decision makers to adhere to the correct moral principles regarding equality, freedom of speech, freedom of religion, punishment, and (locational) privacy. That these and other constitutional clauses appear to speak in moral language is relatively uncontroversial, but far more controversial is what it means for authoritative law to speak in moral language, and how, if at all, such language connects law with what is simply and pre-legally morally right (and wrong) to do.

These debates about the status of morality in legal argument are important, but our goal here is not to engage them frontally. Rather, we wish to illuminate a particular aspect of these debates. And that aspect is the logic of the incorporation by law of morality,

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and the way in which, if at all, law can retain its law-ness and its ability to perform law's essential functions while still being open to the full universe of moral considerations. In a word, we do not believe that this is possible, and thus we believe, and shall argue here, that even when law incorporates morality, law can only serve its primary and essential functions if it has a considerable degree of resistance to the pressure of at least some morally correct moral claims. In other words, we strive here to make the moral argument for law's ignoring of at least some moral arguments in legal decision making.

### I. REASONS, MORAL AND OTHERWISE

We start with the premise that morality, at least morality as we conceive of it, is the domain of practical reason that asks what one ought to do, all reasons considered. Under this view, all reasons are subordinate to the moral "ought" because the moral "ought"—or at least the strong moral ought that expresses an *obligation*—takes all reasons into account.<sup>1</sup> But even though we believe that this premise is correct, and although it makes our conclusion here starker, in fact, this premise is not strictly necessary to our argument.<sup>2</sup> For even if moral reasons constitute but a subset of the universe of all reasons, they still, tautologically, occupy the full universe of moral space. And thus from either the broad premise that morality pervades all of practical reason, or from the narrower and tautological premise that morality pervades only the entire universe of moral reasons, we can still ask what it would mean for law to incorporate

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1. We recognize that there are some who reject this view of morality, instead viewing morality as a domain of reasons that do not necessarily subsume or override (and the two are not the same) all the reasons there are. The issue is usefully discussed in ROBERT AUDI, *THE ARCHITECTURE OF REASON: THE STRUCTURE AND SUBSTANCE OF RATIONALITY* 162-64 (2001). To put the point differently, some take the set of moral reasons to be merely a subset of the set of reasons for action, in contrast to others, who take morality as a necessary component of any (good) reason. See, e.g., Douglas W. Portmore, *Position-Relative Consequentialism, Agent-Centered Options, and Supererogation*, 113 *ETHICS* 303 (2003). In the context of this Essay, we do not need definitely to resolve the question. For our purposes here, all that must be true is that reasons that bear on what one is *legally* obligated or permitted to do operate within the same domain as the reasons that bear on what one is *morally* obligated or permitted to do.

2. We are grateful to Arthur Ripstein for helping us to see this point.

morality, either as part of the rule of recognition as a necessary or sufficient condition of legal validity in a given legal system,<sup>3</sup> or as the referent of some more quotidian legal directive such as a constitutional or statutory provision. In our view of law, which posits that legal reasons are a "limited domain" of all the reasons there are, and also, and importantly, that moral legal reasons are a limited domain of all the moral reasons there are, legal incorporation of morality presents the odd case of the subset incorporating the larger set, and thus suggests the peculiar image of a mouse attempting to swallow a python.

## II. LAW'S LIMITED DOMAIN

We believe it to be a relatively uncontroversial aspect of our experiences as lawyers and, more generally, of our experiences with the law as citizens, that law has a "limited domain."<sup>4</sup> By that we mean that legal reasons for decisions make up only a subset of all the practical reasons that bear on them.<sup>5</sup> Typically, to find the

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3. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 97-107 (1961) (explaining the "rule of recognition").

4. See Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1914-18 (2004). For an interesting discussion of the idea, see Gerald J. Postema, *Law's Autonomy and Public Practical Reason*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 79, 82-88 (Robert P. George ed., 1996). We say "relatively uncontroversial" because the more extreme versions of Legal Realism would deny the existence of any space between what legal decision makers can and do take into account and what any other decision makers, in or out of a legal environment, would take into account. See generally *AMERICAN LEGAL REASONING* 170-71 (William W. Fisher III et al. eds., 1993). For present purposes, we simply assert our disbelief in such claims, and thus rely on the view that law as we experience it is a domain in which at least some reasons, arguments, and facts available in other decisional domains are not available in the domain of the law.

5. We emphatically bracket the incorporationist or inclusivist position that a society could treat all (and only) moral reasons as legal reasons and still count as a legal system, at least as long as the decision to understand a particular legal system in this way was a social decision and a social fact, and not a necessary feature of all possible legal systems in all possible worlds. See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 107-18 (2001); W.J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* 1-8 (1994); Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 141-44 (1982); Eleni Mitrophanous, *Soft Positivism*, 17 OXFORD J. LEGAL STUD. 621, 623-27 (1997). For even if we accept for the sake of argument that such a system could exist and still count as a legal system, it is not the system that exists in the United States and other advanced democracies, and it is not the system that lawyers perceive and experience in their professional lives.

law we look in the *California Reporters*, in the West Publishing Company's *Digests*, in the *United States Code Annotated*, in the *Code of Federal Regulations*, and in the American Law Institute's *Restatements*.<sup>6</sup> We do not look for it—at least as an initial matter—in Plato's *Republic*, in John Stuart Mill's *On Liberty*, in papal encyclicals, in *New York Times* editorials, in law review articles, or even in the laws of foreign jurisdictions.<sup>7</sup> And when we occasionally do consult these latter sources of practical reasons to ascertain the law, we typically do so only because judicial decisions, constitutional provisions, statutes, and other similar primary legal items purport to authorize us to do so.

Indeed, just as law's limited domain of reasons and their sources can be expanded by authorization from within that limited domain, so too is that limited domain kept limited by explicitly making some sources of practical reasons legally out of bounds. In the United States, religious sources may not be used as legal sources, though the issue is of course a good deal more complex than that flat

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6. Ruth Gavison's nice phrase—*first-stage law*—captures well this pre-theoretical, but largely accurate, way in which the initial and primary encounter with law by lawyers and citizens and officials occurs through the limited domain of largely positivistically conceived legal materials. Ruth Gavison, *Comment: Legal Theory and the Role of Rules*, 14 HARV. J.L. & PUB. POL'Y 727, 740-41 (1991); see also Ruth Gavison, *Comment*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 21, 29-32 (Ruth Gavison ed., 1987); Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1081-83, 1093-96 (1997).

7. The question of foreign law is obviously hotly contested these days. See *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005); *id.* at 622-28 (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003); *id.* at 598 (Scalia, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 316-17 n.20 (2002); *id.* at 324-25 (Rehnquist, C.J., dissenting); *Rex D. Glensy, Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 358-59 (2005); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 116-28 (2005); Laura E. Little, *Transnational Guidance in Terrorism Cases*, 38 GEO. WASH. INT'L L. REV. 1, 1-4 (2006); John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 303-09 (2006); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 143-47 (2005); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 161-67 (2005). But even those who are most enthusiastic about the genuinely authoritative reception of foreign law into the American legal canon would accept, for now, its decidedly secondary status. Still, we acknowledge that what we say about the authority of foreign law, and a host of other less central sources, is a contingent empirical claim describing a non-static state of affairs. See Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegation of Law*, 29 J. LEGAL STUD. 495, 514-15 (2000).

statement reveals.<sup>8</sup> And there are other potential, and even potentially reliable, sources of reasons for legal decisions that are legally impermissible, such as what the judge's mother, or what a major political figure, conceivably for very good moral reasons, would like the judge to decide.

Moreover, we can understand *why* law has a limited domain. Law exists against a background of moral disagreement and moral uncertainty; for if people generally agreed about what morality required, there would then not be much reason to substitute law for the direct moral decision making of citizens and officials alike. But because this is not a world we recognize, and because moral and practical disagreement seems endemic to the human condition, law must step in to settle practical controversies over what ought to be done. But law can fulfill this role only if its domain—the reasons law consults to determine what ought to be done—is less than that of all practical reasons or even of all moral reasons. In any society not made up of all-knowing gods—including societies made up of totally altruistic but not all-knowing angels—deciding what ought to be done only by recourse to the entire domain of practical reasons or moral reasons would serve more to foment disagreement than to ameliorate it. A legal system in which the law (embodying legal norms as well as legal officials and legal procedures) were coextensive with the universe of moral norms would serve primarily to embroil the citizens in never-ending and enormously morally costly controversy over what “the law” required. There would also be controversy over seemingly more procedural issues whose resolution had moral valence, such as the question even of who counted as a legal official and whether a controversy did or did not belong in the legal system. Settling such matters and avoiding the huge moral costs of controversy requires recourse to a limited domain of reasons about which there is little controversy, or, if controversial, the content of which can be authoritatively settled by officials or by procedures that can be noncontroversially identified. And that is why we have both argued that one of law's principal functions—

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8. See, e.g., Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, in *LAW AND RELIGION: A CRITICAL ANTHOLOGY* 69-70 (Stephen M. Feldman ed., 2000) (arguing that “religious arguments may be properly used in a free and democratic society in a way that neither masks their religious character nor undermines a desirable separation”).

perhaps its single principal function—is its *settlement* function.<sup>9</sup> And the settlement function necessitates, as a practical matter even if not as a strictly logical one, that law consult a limited domain of reasons.<sup>10</sup>

Let us expand a bit on why law must have a limited domain in order to fulfill its crucially important settlement function. If people were gods—if they were all-knowing—then they could determine on their own what the totality of practical reasons required of them for each practical decision they faced. That knowledge would have to include the knowledge of what everyone else was going to do—assuming that doing the right thing always requires anticipating the behavior of others—but we have stipulated that these people are omniscient. And with the benefit of this omniscience, these people would have no need of simplified guidance with respect to the dictates of morality.

In such a world, law would therefore have no moral function. Morality would be a sufficient guide, as everyone would know what was morally required in each situation. And in such a world, law would either replicate morality exactly, in which case it would be otiose, or it would diverge at various points from morality, in which case it would be immoral. Of course, the people we have imagined are all-knowing gods, and not necessarily maximally moral angels, so they might not be motivated to comply with what they know morality demands. Nevertheless, if they did not comply, morality itself would dictate how others should respond to them. After all, there are moral theories of corrective and retributive justice that have, as their subject matter, non-angelic behavior.<sup>11</sup>

In the world we inhabit, however, people are neither angels nor, more importantly, gods. And in this world law does have a function, and that function is best understood as a moral one. This is because the norms of morality are not themselves in our world a sufficient

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9. See, e.g., LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* (2001); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 167-74 (1991).

10. See Joseph Raz, *Incorporation by Law*, 10 *LEGAL THEORY* 1, 8-10 (2004).

11. See, e.g., Michael S. Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY* 179 (Ferdinand Schoeman ed., 1987) (describing and defending a retributive theory of punishment).

guide to which course of action is morally necessary. Such failure of morality to guide effectively is sometimes the consequence of the shape of morality itself, for the often abstract content of morality makes it likely to be debated and uncertain. And sometimes morality's ineffectiveness as a practical guide stems from the way in which the concrete demands of morality turn in a vast number of instances on so many factual determinations that they are beyond the ken of ordinary (or even extraordinary) people. The domain of morality, even though it may not be co-terminus with the domain of all practical reasons—moral reasons are, for example, often thought to be different from reasons of prudence or etiquette—nonetheless takes all of these practical reasons into account. So in a very real sense, morality comprehends and weighs all practical reasons, and in this sense can be thought of as unlimited.<sup>12</sup>

In the decidedly real world in which the commands of morality are both uncertain and contested, law provides much-needed practical guidance by greatly reducing the amount of knowledge required to make practical decisions. In many instances, law simplifies morality sufficiently for ordinary people to be guided by it. In other instances, law simplifies morality sufficiently for lawyers, though perhaps not ordinary citizens, to understand what conclusions they should reach.<sup>13</sup> But in all instances, law simplifies morality by giving clearer guidance than morality *simpliciter*, and in doing so it makes a practical difference.<sup>14</sup>

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12. *But see supra* Part I (discussing the relation of moral reasons to other practical reasons).

13. And that is why the role of the lawyer may itself have a moral dimension in real and thus second-best societies.

14. *See* Scott J. Shapiro, *The Difference That Rules Make*, in *ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY* 33, 47-49, 54-56 (Brian Bix ed., 1998) [hereinafter Shapiro, *Difference*]; Scott J. Shapiro, *On Hart's Way Out*, 4 *LEGAL THEORY* 469, 503-05 (1998). Our argument here is partly a normative one—settlement is morally beneficial—and partly a nonnormative one of spelling out the requirements of the settlement function. With respect to the normative argument, we should not be taken to deny that specific laws or even entire legal systems might turn out to be morally hideous. Rather, what we do deny is that in a decent society not populated by gods, moral decision making unaided by processes for authoritative settlement of moral controversy will be morally better than moral decision making subject to processes for authoritative settlement. *But see infra* notes 19-20. (We thank Ken Himma for prompting the content of this paragraph.)



Law thus carries out its guidance function by limiting its domain of reasons, and in doing so furthers morality by enabling huge moral costs to be avoided. Among these costs are simply those of making erroneous decisions, a consequence of failures of guidance for real people making real decisions. In addition, morality unmediated by law is likely to produce an additional array of erroneous decisions that are the consequence of people failing to anticipate the decisions of others.<sup>15</sup> Still further, controversy itself entails a variety of moral costs (such as by making morally desirable collaboration and cooperation more difficult or more costly), and decision making under conditions of moral unclarity and moral uncertainty will itself bring high decision-making costs. All of these costs are moral costs, because all of them take us farther away from the morally best state of affairs.

Thus, what we have called law's settlement function is ultimately a shorthand for law's role in providing practical guidance and thus reducing the moral costs that would exist in its absence, even if people were maximally beneficent angels, as long as they were not maximally omniscient gods. The settlement function consequently necessitates that law's domain be a (greatly) truncated domain of all the practical reasons that bear on making morally correct decisions. In other words, law's function—its moral function, if you will—requires that its domain, unlike morality's domain, be a limited one.

In our view, law's connection to morality is thus a complex relationship whose complexity is directly a function of the role that law serves in non-ideal societies in which uncertainty and disagreement are pervasive. Thus, law's determinacy is right at the core of its moral function, and law serves its moral function of reducing the moral costs of error, of conflict, of lack of coordination, and of time and resource-consuming decision making by claiming practical authority for its more determinate commands. And this view of law applies whether those more determinate commands issue from constitutions or instead from the institutions that constitutions legitimate. When law's subjects follow the law because it is the

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15. On law as serving an important moral coordination function, see Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 182-97 (1982); Noel B. Reynolds, *Law as Convention*, 2 RATIO JURIS 105, 115-18 (1989).

law,<sup>16</sup> they substitute law's commands for the less determinate and more controversial all-things-considered oughts of morality. In the Razian conception of practical authority, that is what law, to be law, must claim, or so Raz argues;<sup>17</sup> and it is the conception of practical authority that we, too, endorse. Unlike in law, however, in (pure unmediated) morality there are no practical authorities—there are no persons or institutions whose commands preempt subjects' own determinations about what is morally required or permitted.<sup>18</sup>

Paradoxically perhaps, although not to us, law's moral function thus always puts law into potential conflict with the morality it serves. Law claims authority, and must do so in order to serve its moral function.<sup>19</sup> By contrast, morality denies this division of moral labor<sup>20</sup> and thus denies law's claim to practical authority. As a result, it may well be the case that moral agents would have good moral reasons for rejecting those claims of law that they believe to be morally erroneous, just as the law has good moral reasons for imposing its legal will on those same moral agents who, from the law's perspective, mistakenly refuse to accept the law's wise guidance. And this is the legal-moral relationship of dependence and conflict that one of us has labeled "the asymmetry of

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16. On whether our understanding of law's functions thus necessitates the existence of a moral obligation to obey the law *qua* law, see *infra* note 17. See also JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 233-49 (1979) (arguing there is no obligation to obey the law).

17. See RAZ, *supra* note 16, at 30-33, 44-45; see also Joseph Raz, *Facing Up: A Reply*, 62 S. CAL. L. REV. 1153, 1183-87 (1989); Raz, *supra* note 10, at 6-10; Joseph Raz, *The Obligation To Obey: Revision and Tradition*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 139, 140-49 (1984).

18. Or at least in the secular moral traditions we assume here. There are, of course, some religious traditions in which moral authority plays a central role, and in these traditions it might make sense to say that there are authoritative determinations of just what morality is, and just what legally unmediated morality requires. But the status of authority within various religious traditions (including the question whether such authority counts as *law*) is beyond both our expertise and our project here.

19. Some theorists deny this. See, e.g., Kenneth Einar Himma, *Law's Claim of Legitimate Authority*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 271 (Jules Coleman ed., 2001). We are not so sure that what law *claims*—as opposed to what law *is*—is important, but we let this complication pass. See Frederick Schauer, *Positivism Through Thick and Thin*, in *ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY*, *supra* note 14, at 65, 73-77.

20. On the various complications of the very idea of a division of moral labor, see ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* 197-202 (1999).

authority,"<sup>21</sup> and the other of us has labeled, more simply, as "the gap."<sup>22</sup>

### III. ON THE RULE-LIKE NATURE OF A LEGAL SYSTEM

Under the view just presented, the limited domain feature of a legal system enables law, in the large, to function in much the same way as do individual rules, in the small. An individual rule, as is well-known, achieves its rule-ness by cutting off access, either absolutely or presumptively, to the full range of considerations bearing on some decision, and even to the background justifications whose purposes the rule was designed to serve.<sup>23</sup> Although it may well be the case that a hypothetical "No Vehicles in the Park Rule"<sup>24</sup> would have been designed to promote safety and reduce noise, the embodiment of those purposes in a concrete rule channels decision making into the question whether something is a vehicle and away from whether that something is dangerous or noisy. And, even more obviously, a "Speed Limit 65" rule limits decision making under it, again either absolutely or presumptively, to the consideration of whether a vehicle was or was not exceeding the speed of sixty-five miles per hour, thus cutting off consideration of whether this vehicle was being operated safely, properly, prudently, reasonably, or whatever.<sup>25</sup>

Once we understand that rules operate by eliminating consideration of what may well be in some particular instance actually relevant considerations, and that they do so in order to simplify and regularize decision making, we can see that the system of law as a whole, understood (in part) as a collection of rules, does exactly the same thing in a larger scale. Just as an individual rule achieves

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21. SCHAUER, *supra* note 9, at 128-34; *see also* Frederick Schauer, *Imposing Rules*, 42 SAN DIEGO L. REV. 85, 87-90 (2005); Frederick Schauer, *The Questions of Authority*, 81 GEO. L.J. 95, 110-15 (1992).

22. ALEXANDER & SHERWIN, *supra* note 9, at 53-61; *see also* Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191, 1191-93 (1994); Larry Alexander, *The Gap*, 14 HARV. J.L. & PUB. POL'Y 695, 695-97 (1991).

23. *See* Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303, 305-11.

24. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607-08 (1958).

25. *See generally* Schauer, *supra* note 23, at 309-11.

predictability, stability, and constraint on decision-maker discretion by cutting off access to even some relevant reasons and considerations, so does a legal system achieve the same goals, and achieve the virtues of moral settlement in the face of moral disagreement, by similarly cutting off access to some relevant reasons and considerations. But whereas an individual rule cuts off access by relying on the linguistically (comparatively) clear indications of an individual rule-formulation, the legal system cuts off access by relying on a conception of a limited domain of legal rules in order to block consideration of the less determinate and more variable full universe of reasons (and non-legal rules), moral or otherwise. So just as an individual rule uses its formulation to narrow the range of usable considerations, so does a legal system use its limited domain to narrow the range of usable considerations, and for the same reasons and to the same effect.

#### IV. "MODEST" INCORPORATION OF MORALITY: OF LEGISLATION AND STANDARDS

We should make it clear that there is no practical or conceptual difficulty with having legal officials consult morality's universal domain of reasons on those occasions when the officials are compelled to fill legal lacunae. If legal reasons do not decide a particular case, then there is nothing amiss in—indeed, there is everything right about—the judge's asking what would be the morally best decision *given the constraints of the settled law that the judge is not legally authorized to change*.<sup>26</sup> Plainly many would disagree with our qualification that the judge has no authorization to change the settled law, and would say that whether a judge has

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26. This practice is what H.L.A. Hart described as "discretion" in HART, *supra* note 3, at 252. And this is the characterization that Ronald Dworkin set out to challenge in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22, 33-39, 68-71 (1977) [hereinafter DWORKIN, RIGHTS]. In LAW'S EMPIRE and other more recent work, Dworkin made clear that his interpretive account of legal decision making was not limited to instances in which settled law left gaps to be filled. See generally RONALD DWORKIN, LAW'S EMPIRE 1-15, 43-44 (1986). But the earlier work, and especially Dworkin's account of what the referee should do in the legally-unprovided-for staring dispute in the Fischer-Tal chess match, is much more compatible with seeing morality as coming into the picture only when there are gaps in the law. See DWORKIN, RIGHTS, *supra*, at 101-05.

such authority is exactly the question at issue. But lest we be accused of begging the central question, we note here that allowing such authority to judges would entail allowing judges to change the settled law whenever the judge's all-things-considered moral judgment produced a superior outcome, and it is just that conception of the judicial role (or a citizen's power) that we take to be inconsistent with law's settlement function. And, of course, legislators—who *are* legally authorized to change the legal constraints (except those that are constitutional and can only be changed by another set of "legislators")—may and should ask what is the morally preferred change or set of changes in the legal landscape among those legal constraints they are authorized to change. We shall label this modest role for morality's universal domain's entrance into law's limited domain as "modest (or hard case, or gap-filling, or legislative) incorporationism." This modest role for morality is most apparent when the law is changed, for it is always or almost always some non-legal factor that provides the purchase for legal change.<sup>27</sup> And this modest role for morality is also apparent not only when law is changed in the strict sense of "change," but also when there is a gap in the law that the circumstances of the world, or of some dispute, require be filled. Moreover, it is also important to note that this modest role for morality surfaces whenever a legal norm is interpreted or understood to be a "standard" rather than a "rule."<sup>28</sup> When that is the case, the very indeterminacy (or vagueness, if you will) of the standard obligates the decision maker to make the morally best decision within the largely determinate boundaries of rules that are significantly indeterminate within those boundaries.<sup>29</sup>

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27. We acknowledge that legal change is occasionally the consequence of simple inconsistency between a superior and an inferior legal norm, or the consequence of some other condition whose remedy can be understood as largely technical or internal. But we do not believe we are being especially controversial in describing such circumstances as rare, at least when compared to the occasions when legal change is the consequence of some inconsistency between existing legal norms and some other existing or desired norms of policy or principle. See MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 80-83 (1988).

28. See generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *DUKE L.J.* 557 (1992); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 *OR. L. REV.* 23 (2000); Schauer, *supra* note 23.

29. Some theorists, including most exclusive positivists, deny not only that morality is

In the most highly determinate versions of civil law, versions ironically better associated with the writings of Jeremy Bentham than with the actual legal systems that exist in actual civil law countries, such an interstitial role for morality would be relatively inconsequential, although even for Bentham it would not be totally absent in practice or in theory.<sup>30</sup> But in all common law systems, and in all systems that employ highly indeterminate constitutional or, less often, statutory language,<sup>31</sup> law leaves many questions legally unanswered and many decisions legally undecided; and when that is the case, this incorporative role for morality, although modest in terms of its theoretical status, nonetheless plays a significant role in actual legal practice. And this role we cheerfully

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part of the concept of law, but also that morality is part of the law even when legal officials consult it in this modest, retail way. For them, only the decisions the officials reach, or the laws the officials craft as a result of consulting morality, are part of the law because only they can serve law's settlement function, and because any mistake the officials make regarding morality is usually taken to be a moral but not a legal mistake. *See, e.g., RAZ, supra note 16, at 47-52; Joseph Raz, Authority, Law and Morality, 68 MONIST 295, 315-20 (1985); Raz, supra note 10, at 10-14; Joseph Raz, Legal Principles and the Limits of Law, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 73, 77-79 (Marshall Cohen ed., 1984); Shapiro, On Hart's Way Out, supra note 14, at 497-99, 506-07; Shapiro, Difference, supra note 14, at 56-59; see also Brian Bix, Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate, 12 CAN. J.L. & JURIS. 17, 27-28 (1999).* Others, primarily inclusive legal positivists, argue that when officials are (legally) authorized to consult morality, the morality they consult can be part of "the law" in the legal system that permits such consultation. *See WALUCHOW, supra note 5, at 114-17; Jules L. Coleman, Incorporationism, Conventionality, and the Practical Difference Thesis, 4 LEGAL THEORY 381, 408, 423-24 (1998); Kenneth Einar Himma, Incorporationism and the Objectivity of Moral Norms, 5 LEGAL THEORY 415, 415-17, 430-34 (1999).* And although the debate between inclusivists and exclusivists is about the concept of law and not about particular legal systems, neither camp denies that morality can (and, to some, should) be consulted in this modest way, although some normative exclusivists regret the circumstances that require this modest moral consultation because they view a substantial lack of legal settlement as a serious moral, as well as pragmatic, defect in any legal system. *See, e.g., TOM D. CAMPBELL, THE LEGAL THEORY OF ETHICAL POSITIVISM 125-29 (1996); see also Larry Alexander, "With Me, It's All er Nuthin'": Formalism in Law and Morality, 66 U. CHI. L. REV. 530, 531-36 (1999); Frederick Schauer, Constitutional Positivism, 25 CONN. L. REV. 797, 810-19 (1993); Jeremy Waldron, Normative (or Ethical) Positivism, in HART'S POSTSCRIPT, supra note 19, at 410, 419-28.*

30. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 281-93 (J.H. Burns & H.L.A. Hart eds., 1996) (presenting an argument for the interplay and separation of morality and legislation in punishment).

31. For example, the prohibition in the Sherman Antitrust Act of "[e]very contract, combination ... or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1 (2000).

acknowledge, although we acknowledge as well that the size of this role is itself a moral decision.<sup>32</sup>

#### V. STRONG INCORPORATIONISM I: MORALITY AS SUFFICIENT FOR LEGALITY

If modest incorporation of (or reference to) morality by law is not a problem for legal theory, because morality's universal domain appears only interstitially and accordingly cannot undermine the limited domain-ness of law, then what of thoroughgoing incorporation of morality by law? Consider a rule of recognition in some legal system that makes a norm's status as a moral norm *sufficient* for its being a legal norm.<sup>33</sup> In such a case, given morality's universal domain, morality would swamp and obliterate any attempt at having a limited domain for law. Now there are two ways to view this situation. On the one hand, we might say that because morality's domain is universal and thus comprehends all practical reasons, strong incorporation of morality by law of this type results in the necessity of consulting all practical reasons to determine legal norms. But it is not clear how ordinary posited legal norms—the norms of law's limited domain—would figure in this account if those norms could not affect morality; and thus, from this perspective, it remains difficult to perceive how there could be any role at all for law in the limited domain sense.<sup>34</sup>

There is yet another way to understand the situation. We might view strong incorporation of morality by law as producing two sets of legal norms: those determined by consulting a limited domain of materials and sources identified by the nonmoral components of the rule of recognition—that is, constitutional texts, statutes, government regulations, reported court decisions, and even some number of previously pedigreed “considerations” (principles, canons, maxims, and the like)—and those determined by morality itself. But in this case, either the morality-generated norms will conflict

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32. See *supra* note 29.

33. As it might be under some, but certainly not all, natural law theories. See Schauer, *supra* note 29, at 798 & n.1.

34. But see the discussion of Michael Moore's position, *infra* notes 35-42 and accompanying text.

with the norms of the limited domain so that “the law” will be internally contradictory, or the former norms will be consistent with the latter but outstrip them and render them superfluous. If the limited domain conflicts with the unlimited domain—and both are “the law”—then there are legal as well as moral reasons to resolve the conflict in favor of morality. And if the limited domain does not conflict with the unlimited domain, then the limited domain is not doing any independent legal or moral work. So no matter how we look at it, there will be no role for a limited domain of reasons under what we label here “strong incorporationism.”

Perhaps, however, there is another possibility. Consider the position of Michael Moore, for example, who might be understood as claiming that a norm’s status as a moral norm is sufficient for its status as a legal one.<sup>35</sup> He claims, after all, not only that consistency with morality is *necessary* for legality—law, to be law, must morally obligate—but in a variety of instances he also appears to go further and to see posited law as merely a prism through which to discover “true” law, that is, morality.<sup>36</sup> For Moore, posited law stands in relation to true law as the shadows in Plato’s cave stand in relation to the Forms.<sup>37</sup> Nonetheless, the posited law is important to Moore because it can effect a change in morality. Before a law is enacted, morality may permit (or forbid) X; after the law is enacted, morality may forbid (or permit) X. Posited law—the law of the limited domain—may do so because it affects the facts to which moral norms apply, such as by inducing reliance. In such cases, however, the moral norms themselves, as opposed to what applications they entail, remain unaffected.<sup>38</sup> But posited law may also effect a change in morality because procedural values, such as the value of

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35. See Michael S. Moore, *Authority, Law, and Razian Reasons*, 62 S. CAL. L. REV. 827, 859, 872-73 (1989); Michael S. Moore, *Legal Principles Revisited*, 82 IOWA L. REV. 867, 875-79 (1997); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 286, 376-77 (1985) [hereinafter Moore, *A Natural Law Theory*]; Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 292-94 (1981).

36. See, e.g., Moore, *A Natural Law Theory*, *supra* note 35, at 388-94. For a similar perspective, and with a similar semantic as well as moral grounding, see David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105, 119, 124-33 (1988); David O. Brink, *Semantics and Legal Interpretation (Further Thoughts)*, 2 CAN. J.L. & JURIS. 181, 190-91 (1989).

37. PLATO, *THE REPUBLIC* 220-23 (G.R.F. Ferrari ed., Tom Griffith trans., 2000).

38. Moore, *A Natural Law Theory*, *supra* note 35, at 383-86.



democratic rule, may count in favor of the morally obligatory force of a posited law that is otherwise at odds with morality. This limits Moore's interest in posited law to those legal norms that have been enacted democratically. And of course, many would dispute the claim that a democratic pedigree carries any moral weight beyond whatever epistemic value it might serve in determining one's moral obligations. But on the view that we are attributing to Moore, it is democratic enactment that has the power to make what is morally wrong morally right, and vice versa—a conclusion that strikes us and others as highly implausible.<sup>39</sup>

The most charitable reading of Moore's sufficiency thesis is that he sees posited law as serving the moral function of settlement and thus having a place in a pervasively moralized account of law and legal decision. Yet where he and we differ is that he sees this value as a value to be *weighed* against other moral values,<sup>40</sup> whereas we regard settlement as the alternative to moral weighing and not

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39. See generally Larry Alexander & Ken Kress, *Against Legal Principles*, 82 IOWA L. REV. 739 (1997).

We should also point out that just as direct incorporation of morality by law undermines law's settlement function, so too does the indirect incorporation that Dworkin's view of adjudication requires. Dworkin argues that judges should resolve legal disputes by recourse to legal principles. Because he argues that the moral value of integrity demands this, the demand should logically extend to legislators and their legislation as well. See *id.* at 774-75. Legal principles are themselves the product of "fit" with past legal decisions—judicial and legislative—and moral acceptability. Put succinctly, legal principles are the morally best principles that can justify past legal decisions.

One way to put Dworkin's conception of a legal principle is as a counterfactual: legal principles are those principles that would be morally correct in a world in which some morally mistaken decisions were morally correct. We doubt that this counterfactual question is coherent—unless, that is, its answer is "the same as those principles that *are* morally correct, but with exceptions carved out to cover past mistakes and only past mistakes." See *id.* at 764-66. So legal principles will either turn out for all practical purposes to be identical to correct moral principles, or else their elaboration will require answering an incoherent counterfactual.

Moreover, if the counterfactual *can* be answered in such a way as to avoid making Dworkinian legal principles identical to correct moral ones, those legal principles become doubly unattractive: Unlike determinate legal rules, they cannot serve the settlement function, for determining what the legal principles are requires recourse to the very moral principles whose controversiality gives rise to the need for settlement. But unlike moral principles, legal principles, not being identical thereto, do not, even correctly formulated, produce the morally correct result. Recourse to Dworkinian legal principles, in other words, possesses the worst attributes of both recourse to determinate legal rules—the possibility of incorrect applications—and recourse to moral principles—controversiality.

40. See Moore, *A Natural Law Theory*, *supra* note 35, at 390-91.

itself capable of being weighed. Law claims practical authority,<sup>41</sup> and the authority of law, being logically antecedent to law, is not something that can be weighed against the very reasons on which the putatively authoritative claim is based.<sup>42</sup>

#### VI. STRONG INCORPORATIONISM II: MORALITY AS NECESSARY FOR LEGALITY

But what about those various versions of rules of recognition that would make consistency with morality a criterion of legal validity? Such a role for morality—as a necessary rather than as a sufficient condition for legality—might appear to be consistent with law's limited domain and settlement function, because morality would operate as a side constraint, or check, and not have as central a role. Yet closer inspection reveals that even this seemingly less ambitious role for morality is inconsistent with law's limited domain and settlement function. For if consistency with morality is a necessary condition for legality, then no official's pronouncements could ever legally settle a moral controversy. If *A* believes that the judge's determination of his dispute with *B* is not in accord with morality's universal domain, he will not view the judge's judgment as *legally* binding, much less morally so. *A*'s interpretation of the rule of recognition tells him that the judge's determination is not legally valid. Someone with this view of morality's role in grounding legal validity will thus not obtain from law the particular kind of guidance that we take to be essential to law's principal function.

The reason that this problem with making morality a necessary condition of legal validity usually goes unnoticed is that we quite naturally assume that the highest official(s) in the legal hierarchy—the Supreme Court, for example—can settle what is legally the case. The parties, the sheriff, the lower courts, and everyone else must go along, so we think, even if these various agents believe

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41. See *supra* notes 16-17 and accompanying text.

42. This claim is closely related to one side of the debate about whether a serious form of rule-based constraint can be compatible with the (rule) value of the rule being weighed in every case. Compare SCHAUER, *supra* note 9, at 93-100, with Gerald J. Postema, *Positivism, I Presume? ... Comments on Schauer's "Rules and the Rule of Law,"* 14 HARV. J.L. & PUB. POL'Y 797, 813-17 (1991), and ALEXANDER & SHERWIN, *supra* note 9, at 61-73.

the Supreme Court was wrong, whether about posited law or about morality. Although consistency with morality might be taken by the Supreme Court itself as a necessary criterion of legality, what the Court itself *decides* is taken by everyone else as settling the matter legally—even if neither the Court nor anyone else can settle the matter morally. It is difficult to conceive of anything we would recognize as a legal system that did not contain some person or institution with the authority to settle what the law required—although Hart in *The Concept of Law* thought that such a system could count as a “primitive” legal system.<sup>43</sup> But if such power of authoritatively settling the law exists in any well-developed legal system, then morality itself cannot ultimately be a necessary condition of legality, at least for anyone other than the institution or person with the power of authoritative settlement.<sup>44</sup>

Indeed, if consistency with morality were a necessary condition of legal validity, then the status of the laws designating who is a judge, who is a legislator, and who is to occupy various other legal roles would be in doubt as well. And that is because there is no reason to assume that morality does not speak to these numerous institutional (and procedural) arrangements as well as to the substance of the decisions that the institutions will make and the procedures will shape. If, for example, in our legal system, the Supreme Court must take consistency with morality to be a necessary condition for legality, it is theoretically possible that it might conclude that it itself lacked legal status—perhaps because it found the method of appointing justices to be inconsistent with morality—and even if the Court did not so conclude, it would still be forced into a posture of taking its existence and mode of operation as a factor to be included in the substance of every decision it made.<sup>45</sup>

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43. HART, *supra* note 3, at 91-92.

44. The position is a bit more contested than we suggest in the text. For our argument as to why the opposing position is ultimately unsustainable, see generally Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997). See also Kenneth Einar Himma, *Final Authority to Bind with Moral Mistakes: On the Explanatory Potential of Inclusive Legal Position*, 24 LAW & PHIL. 1 (2005).

45. We are obviously assuming throughout this Section that the legal norms of the

Moreover, there is a dynamic that will tend to collapse incorporationism of this sort (morality as a *necessary* condition of legality) into strong incorporationism (morality as a *sufficient* condition of legality). For suppose the legislators enact only part of what morality requires. Then those whose moral rights are violated will be divided into those who have legal rights and remedies and those who do not. The same goes for those who breach moral duties: they will be divided into those who are law violators and those who are not. And if morality itself forbids discriminating within the classes of those whose moral rights are violated and those who have breached moral duties, morality will forbid the law's attempt to enforce only part of morality. This means that under an incorporationist rule of recognition, lawmaking officials must show not only that the legal norms are consistent with morality *but also that the limited domain of legal norms is precisely that limited domain which morality itself would dictate*. And that requirement would destabilize law's settlement function.<sup>46</sup>

An example will illustrate the point. Suppose it is morally wrong to discriminate on grounds A, B, C, D, and E, and suppose further that morality demands that any person discriminating on such grounds shall be subject to sanctions. And then suppose that a legislature forbids, and imposes sanctions upon, discrimination based on A, B, or C, but leaves discrimination based on D and E untouched. We can then ask, if morality is a necessary condition of legal validity, whether the antidiscrimination law is legally valid? In one sense, the law is valid, because it comports with what morality requires. But in another sense it is not valid, because by discriminating among grounds for discrimination it violates moral requirements. *Consequently, the law can satisfy morality as a necessary condition of legality only by treating it as a sufficient one.*

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limited domain are clearer and more determinate, and thus less controversial, than the moral norms with which they must comply to be valid. If there were little controversy about what was morally required but a great deal of controversy over the content of the limited domain, including controversy over who was the supreme legal authority, then what we have said in this section would not be correct.

46. This is the basic logical point in Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 353-54 & n.8, 377-82 (1973). Ronald Dworkin makes a similar point in LAW'S EMPIRE. DWORKIN, LAW'S EMPIRE, *supra* note 26, at 114-15, 130-35.

The problem of making consistency with morality a necessary condition of legal validity has an analogue in the criminal law. The *Model Penal Code's* "lesser evil" defense,<sup>47</sup> which has counterparts in many criminal codes,<sup>48</sup> justifies departures from the prohibitions of the criminal law whenever violating those prohibitions is a lesser evil than complying with them. It is clear in the *Model Penal Code* that "lesser evils" refer to lesser *moral* evils. But if that is true, the following problem arises: every criminal law can be reformulated as "Don't do X unless it is morally better that you do X." And that rule can be translated into one master criminal law, the Spike Lee law—"Do the right thing."<sup>49</sup> Of course, incorporating morality in this fashion is less of a problem than it might appear if there is little controversy over what is and is not a lesser evil or an unjustified risk, and especially if people rarely commit crimes or take unjustified risks believing that they are truly morally justified in doing so. But a criminal code that had only the Spike Lee law would, for reasons we have outlined and for numerous other self-evident reasons, be morally inferior to a more specific set of criminal laws, and a set of criminal laws whose prohibitions were taken to be necessary and sufficient conditions for illegality, and not just as a possibly useful set of suggestions to the public. And if this set of prohibitions—more specific than a Spike Lee law and taken seriously in their own right—is viewed as formalistic, then so be it. Or, to put the same point differently, formalism—in just the sense of treating legal prohibitions as at least partially opaque to

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47. MODEL PENAL CODE § 3.02(1)(a) (Official Draft and Explanatory Notes 1985); see Larry Alexander, *Lesser Evils: A Closer Look at the Paradigmatic Justification*, 24 LAW & PHIL. 611, 613-17 (2005); George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975, 1034-41 (1999).

48. See, e.g., DEL. CODE ANN. tit. 11, § 463 (2001); KY. REV. STAT. ANN. § 503.030 (LexisNexis 1999); 18 PA. CONS. STAT. ANN. § 503 (West 1998).

49. DO THE RIGHT THING (Universal City Studios 2001). This reading of the *Model Penal Code's* lesser evils section is not quite accurate because following the mandates of the criminal law is always a safe harbor even in situations where doing so is the greater evil. So grafting the lesser evils defense onto the criminal law results in the mandate: "Either obey the criminal law or do the right thing."

There are other parts of the criminal law that apparently incorporate morality. For example, basal notions of culpability, such as recklessness, do so with their references to "unjustified" risks, risks that ordinary law-abiding persons would not take. See MODEL PENAL CODE § 2.02(2)(c) (Official Draft and Revised Comments 1985).

all-things-considered morality—is a defining characteristic and morally desirable feature of law itself.

#### VII. MODEST INCORPORATIONISM REDUX: THE CASE OF MORAL REFERENTS IN SPECIFIC LAWS

Can more modest versions of incorporationism be consistent with law's limited domain and thus with its settlement function? Consider the argument that many laws, both constitutional and statutory, appear to incorporate moral norms or appear to make moral norms tests for the validity of other laws. In the first category are "standards" that refer to what is "fair," "just," or "reasonable." The Fourth Amendment's prohibition on "unreasonable" searches and seizures is an example of the former,<sup>50</sup> as is the typical requirement in custody proceedings that the proper decision is the one that is in "the child's best interests."<sup>51</sup> And in the latter category are such legal norms as, arguably, the Fourteenth Amendment's Equal Protection Clause, the First Amendment's Free Speech Clause, the Eighth Amendment's prohibition on "cruel and unusual" punishments, and, slightly more controversially, the Due Process Clauses in the Fifth and Fourteenth Amendments.<sup>52</sup>

With respect to standards, they are consistent with law's limited domain only if, as we have argued in Part II above, morality functions simply and exclusively as a gap filler, leaving the norms derived from the limited domain intact. Thus, if an agency were required by law to ensure that a regulated utility makes only a "fair return," that legal prescription would have to be understood, in order to satisfy the settlement function of law, as "a fair return, accepting as unchangeable the laws of property, taxation, etc." Such a regulation could not be interpreted as "a fair return in a morally ideal universe."

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50. U.S. CONST. amend. IV.

51. See generally David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 480-81 (1984).

52. Slightly more controversial only in that there exists the position that "due process" is a reference only to certain specific and well-settled procedural requirements. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 14-21 (1980).

But what about making specific moral norms necessary conditions for legality, as invocation of “equal protection of the laws,” “freedom of speech,” “free exercise of religion,” and “due process of law” as criteria of constitutional validity is supposed to illustrate? First, there is nothing to guarantee that when specific moral norms are made tests for legal validity, the joints at which law attempts to carve morality are actually joints that exist within morality. Suppose, for example, that on the best theory of morality there is no distinction between “freedom of speech” and “equal protection,” or between “freedom of speech” and “free exercise of religion,” or whatever. Or suppose that on the best theory of morality, there is in fact no distinct right to free speech at all, or to the free exercise of religion, or to equality as a right independent of underlying rights to liberty.<sup>53</sup> Incorporating the morally correct theory of freedom of speech or free exercise or equal protection then, on this latter account, would be self-negating (the clauses would be nullities), or on the former account, would be redundant of other clauses.

Second, there is no guarantee that the incorporationist provisions would not completely undermine or alter the nonincorporationist ones. Suppose, for example, that on the best understanding of the moral requirements of “equal protection,” equal protection is inconsistent with freedom of speech, with the United States Senate, with the geographical selection of representatives, and with much else. Indeed, suppose the entire constitutional edifice offends true equality, morally speaking.

Of course, these results would be inconsistent with the Framers’ (of the Equal Protection Clause) intent. But although the intentions of human beings may have a role to play in some accounts of legal *interpretation*, surely intentions cannot determine what is morally correct. If legal norms are meant to incorporate true morality, as opposed to translating it (fallibly) into determinate rules, then the intentions of fallible human beings cannot stanch morality’s imperialistic tendency.

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53. See generally LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION (2005); PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF ‘EQUALITY’ IN MORAL AND LEGAL DISCOURSE 240-42 (1990).

Nor can this problem be solved by an incrementalism of the following sort: "Only apply equal protection, say, to determine whether a given law is farther from the moral ideal than the legal status quo ante." The problem cannot be solved in this way because such a comparison only works if morality is one-dimensional, like simple maximizing utilitarianism (or other forms of single-value consequentialism); if morality is not of that nature, it may be meaningless to ask which of two non-ideal states of affairs is "less non-ideal." Consider, for example, whether genocide of all X's is morally worse or better than genocide of all black X's, or whether capital punishment for all convicted murderers is morally worse or better than capital punishment for all convicted murders whose last names begin with W.

Another reason the problem cannot be solved by this type of incrementalism is that the incremental account cannot explain why the legal status quo ante should be privileged as against all possible sets of laws. Incrementalism must take the legal status quo ante as the baseline by which to determine whether the law, the validity of which is in question, brings us closer to or farther away from what the moral norm requires; for once we jettison the legal status quo ante as the privileged baseline, we must morally assess the entire corpus juris and compare it to every possible alternative corpus juris.

#### VIII. THE MORAL CASE FOR (PARTIALLY) IGNORING MORALITY

Some may respond to these problems by arguing that true morality would never dictate such a freewheeling and unsettled legal system. Anarchy is not and cannot be moral, so the response would go. Rather, true morality would prize guidance and settlement, even if guidance and settlement are fallible and opaque to true morality. Thus, so the argument would go, guidance, settlement, and even stability serve moral goals, and must be incorporated into any plausible conception of morality.

There is nothing wrong with this response. Indeed, there is everything right with it. The problem is that *this response gives away the game*. It endorses the limited domain view of law in the name of the unlimited domain of morality. So the response is not



wrong; quite the contrary, the limited domain of law *is* indeed so justified. The normative argument for a limited domain view of law is a moral argument, just as the argument for a formal approach to individual rules is a moral argument. The argument *for* formality in individual rules is *not* an argument *from* formality, and so too the argument for a formal approach to law as a system—the limited domain understanding of a legal system—is an argument from morality and not from formality. The argument for limiting law's consideration of morality is inescapably a moral argument, and nothing we say here denies this.

Once we understand that the argument for a limited domain conception of law, and thus the argument for truncating the consideration of moral reasons, is itself a moral argument, we can see why the response noted above gives away the game. Any victory that the moral argument against anarchy achieves for the unlimited domain of morality is truly a Pyrrhic one. The unlimited domain of morality on this view is self-effacing. Or, to put it differently, morality is modest, and there is a strong moral case for limiting, in some domains, the use of moral considerations. Law, therefore, may in some individual cases make morally sub-optimal decisions, but those morally sub-optimal decisions are part of a larger and undeniably moral determination of how to make the morally best decisions in a world of moral conflict and moral disagreement.

#### CONCLUSION

Morality is a necessary and defining feature of human reason, but moral disagreement, although contingent and not necessary, is nevertheless a pervasive feature of the human predicament. A central task of institutional design, and a task that is moral to the core, is that of reconciling the pervasive importance of morality with the realities of moral uncertainty and moral disagreement. To treat law as always open to the full universe of moral considerations, however, is to serve only one side of this tension. But if instead we understand law as a morally motivated social institution that sees the moral value in settlement and the moral value in moral certainty, then we can see why law exists as a limited

domain, and why the moral enterprise of law is, and must be at least partially, closed to the direct consideration of morality itself. That law is such an institution, in the legal systems of the world we experience, is not a moral failing of law—rather, it is the embodiment of morality at morality's fullest, and thus of morality's best.