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Book Proposal

Limits of Legality: Adjudication, Practical Reason, and the Rule of Law

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I. Title

My working title is *Limits of Legality: Adjudication, Practical Reason, and the Rule of Law*. Other possibilities include, for example:

- *Judicial Heresy*
- *Judicial Infidelity*
- *Heterodox Adjudication*
- *When Judges Bend the Law*
- *Bending the Law*

II. Synopsis

When judges decide cases in courts of law, are they ethically obligated to apply the law correctly? Many people who think about legal systems believe so. The conviction that judges are “bound” by the law is common among lawyers, judges, legal scholars, and members of the general public. One of the most severe accusations one can make against a public official is that she has deviated from the law in her official capacity. The principle of *judicial fidelity* figures centrally in one of the most celebrated Western political values: the rule of law. This is an ideal which some Western powers, notably the United States, aspire to export on a global scale.

The principle of judicial fidelity implies many basic norms of adjudication. These vary from one legal system to another, but in Anglo-American systems they include the following: trial judges must take all admissible evidence into account; judges must follow recognized sources of law, such as constitutions, legislation, and common-law rules; inferior courts must follow superior court rulings on matters of law; courts should give at least substantial weight even to “horizontal” precedent; et cetera.

Limits of Legality is a scholarly monograph, in progress, that advances our understanding of the principle of judicial fidelity and defends a refined and unorthodox version of it. **The book draws on my background as both a lawyer and a philosopher**, addressing issues at the intersection of legal philosophy and ethical theory. It breaks new ground in the normative theory of adjudication – the branch of legal philosophy that concerns how judges in courts of law should decide cases. Mine is one of the first projects to apply the resources of contemporary normative ethics to central questions concerning the rule of law and judicial obligation. I model the normative presuppositions of existing theories of the rule of law in terms that take into account developments in ethical theory over the past two decades. I defend a theory of adjudication on the assumptions of what is called “law as practical reason,” but I rebuild a sophisticated legal instrumentalism on those assumptions.

Limits explores tensions between the autonomy of the judge, as an individual moral agent, and the demands of her institutional role. It studies the interaction between the rule of law and the principle of judicial independence. Finally, it develops an original philosophical framework for assessing adjudication and an associated conception of the rule of law. This framework draws principled distinctions between permissible and impermissible types and patterns of judicial deviation from the law. It specifies, with unprecedented precision, the conditions under which judges may deviate from the letter of the law without neglecting their professional duties or betraying the public trust. *Limits* contributes to ongoing debates involving such figures as Larry Alexander, Joseph

Raz, Frederick Schauer, Alan H. Goldman, Cass R. Sunstein, Heidi M. Hurd, Stephen J. Burton, and Justice Antonin Scalia of the U.S. Supreme Court.

My basic question is: under what conditions, if any, is it rationally and morally permissible for a judge to reach a result that conflicts with the law, properly understood? This question is normative, not descriptive or empirical. Everyone who believes that the law can have determinate content recognizes that judges sometimes do, in fact, deviate from it, where ‘deviation’ means disregarding either admissible evidence presented or controlling sources of law. The latter include statutes, constitutional provisions, and decisions of other courts, such as common-law rules.

Politicians and commentators often accuse judges of misunderstanding or misapplying the laws they have sworn to uphold. These accusations seem to become more frequent and vociferous with the passage of time. In some cases of alleged judicial deviation from the law, the error is attributed to negligence or incompetence. These are mistakes which judges sometimes recognize, admit, and correct. In other cases, judges willfully disregard or “nullify” the law, although they will rarely admit to this heterodox behavior. Corrupt judges, for example, seek to profit financially from their decisions, to reward friends or family members, or to settle personal scores. Of course, acting from these motives is morally blameworthy and violates codes of judicial conduct. Judges are legally and ethically bound to decline bribes, and to recuse themselves from cases presenting conflicts of interest.

Limits does not focus on judges who deviate from the law for such reasons. Instead, it addresses cases in which a judge deviates from the law because she disapproves of the legally required result, as a matter of morality or public policy. These are cases of “judicial heresy.” Consider the following court decisions, each of which invited accusations that the presiding judges either misunderstood the law, or knowingly deviated from it because they believed that justice or public policy considerations justified doing so:

- In 1996, United States District Judge Harold Baer suppressed the results of a drug search because he believed, contrary to binding precedent, that running from police officers, in neighborhoods where police are distrusted, fails to generate the probable cause required for a legally warranted search. President Clinton’s Press Secretary stated that the White House disagreed with Judge Baer’s ruling, and had not ruled out asking him to resign on account of it. Senate Majority Leader Robert Dole (R-Kan.) called for Judge Baer’s impeachment.
- In 2003, the United States Court of Appeals for the Ninth Circuit ruled that inviting public school students to recite the Pledge of Allegiance violates the Establishment Clause of the First Amendment, as the Pledge contains the words “under God.” Senator Tom Daschle (D-S.D.) derided the decision as “just nuts,” a sentiment also expressed by many of his fellow legislators.
- In the 2005 case of *Kelo v. New London*, the United States Supreme Court upheld municipal authority to demolish private residences for the purpose of largely private redevelopment projects. Senator F. James Sensenbrenner, Jr. (R-

Wis.) called the ruling “the *Dred Scott* decision of the 21st century” (referring to the notorious 1857 decision that returned an escaped slave to his master).

I shall not insist that any of these decisions did, in fact, represent deviation from the law. My point is that even those who believe that the judges in the preceding cases misapplied the law do not accuse them of corruption or conflicts of interest. Rather, the judges stand accused of 1) carelessness or incompetence, or of 2) promoting their own values and policy preferences at the expense of the law. These are the kinds of cases that concern me in this book.

How should morally reflective people think about and respond to such cases? These are questions of great public importance. They are central to our conception of the rule of law. They bear on our standards of judicial selection, oversight, and discipline. But philosophers have not addressed the topic of judicial deviation with much care. When they have addressed it at all, their arguments have depended on contestable ethical premises. They have not acknowledged the underlying controversies or considered reasonable alternative premises. For example, many reason that judicial deviation from the law is unethical because judges swear an oath to uphold the law. I argue that one is not entitled to this conclusion until one has examined closely the moral significance of oaths and countervailing considerations that might support a judge’s decision to deviate.

Cases of judicial deviation raise two related questions. First: is it always objectively wrong for a judge to deviate from the law, even when the law requires objectively bad results? Secondly: is it always subjectively wrong for a judge *knowingly* to deviate from the law, even when she believes that the law requires bad results? The second question asks whether a judge who knowingly deviates is always *blameworthy* for doing so.

Affirmative answers to these questions are often suggested by the rhetoric of politicians and pundits who criticize judges for deviation, in cases such as those mentioned above. According to an absolutist conception of judicial fidelity, deviation from the law is never morally permissible, even when the law mandates extreme violations of basic human rights. It is unclear how common this view really is, despite the prevalence of rhetoric that suggests it. Critics of the bench do not always distinguish clearly between disapproval of a result, as a matter of policy, and belief that the judge has deviated from positive law. One wonders if critics would complain about judicial deviation if they were otherwise pleased with the results. Historically, laws have authorized genocide, slavery, penal torture, and other horrors. Perhaps the critics do not have these laws in mind when they insist that deviation from the law is wrong.

In opposition to the objective absolutist position, one might claim that the ethical permissibility of deviation depends, in some way, on whether the result in a certain case is desirable, overall, as a matter of justice and public policy. This would be to assert that a judge can have decisive moral reasons to disregard the law, reasons that trump whatever legal or moral reasons she may have to adhere to it. Some commentators believe that disregarding the law is sometimes what a judge ought to do, all things considered.

Similarly, in opposition to the subjective absolutist position, one might claim that the subjective ethical permissibility of knowingly deviating from the law depends on whether the judge believes (or reasonably believes) that the legally required result in a

certain case is desirable, overall, as a matter of justice and public policy. Some legal writers reject absolutism, both subjective and objective. However, they hasten to add that cases of justified deviation are extremely rare, in reasonably just legal systems such as ours.

My project has both an interpretive dimension and a revisionist or “error-theoretic” dimension. It is interpretive in that it aims to capture the central features of the practice of adjudication in modern legal systems. However, it also demands substantial revision of some hoary ideas about adjudication that remain popular with lawyers and theorists, alike. I defend non-absolutist adjudication principles and argue that deviation from the law may be justified more often than other non-absolutists have claimed.

I argue that prevailing theories of adjudication misrepresent the relationship between the moral agency of the individual judge and the system in which she functions. The book has two recurring motifs related to this argument. The first concerns the status of *agent-relative* principles (also known as *agent-centered*). These are principles which give different agents different ends, in contrast with *agent-neutral* principles, which give all agents common ends. The second motif concerns causal conceptions of moral responsibility, which limit each agent’s moral responsibility to the causal effects of his actions. I argue that existing theories of adjudication invoke agent-relative values and causal conceptions of responsibility in unprincipled, inconsistent ways. My theory resolves these inconsistencies by assigning subordinate roles to agent-relative values and causal conceptions of responsibility.

Because I argue that deviation may be justified more frequently than others have recognized, my project will strike some readers as a labyrinthine defense of “judicial activism.” This characterization of my project may be appropriate, although I maintain that my theory is compatible with virtually any position on substantive issues of public policy, from far left, to moderate, to far right. I advance a distinctive understanding of how judges are morally permitted to promote sound policy objectives, whatever these may be.

III. Chapter Summaries

Limits of Legality will comprise thirteen chapters, ranging from ten to thirty pages each, plus introduction and conclusion. It will run approximately 250 typeset pages (110,000 words) and include five to seven figures (simple tables). The anticipated chapters include:

- I. Natural Rights and Natural Duties
- II. Legal Systems
- III. Optimality and Indeterminacy
- IV. Judges and their Duties
- V. Ignoring the Law
- VI. Imperceptible Effects

- VII. Judicial Complicity
- VIII. Agent-Relative Principles
- IX. Selective Holistic Optimization
- X. Comparative Justice
- XI. Guidance Standards
- XII. Jurisprudential Implications
- XIII. Applications

An introduction draws the reader into the central question of the book: whether judges are ethically obligated to apply the law. I explain why this question is important in value-pluralistic societies, and how I intend to answer it. I review the range of existing answers and how they relate to the ideal of the rule of law. I introduce the principle of judicial fidelity and explain what it requires, in practice. I then summarize the remaining chapters and my conclusions, much as I do in this proposal.

The first chapter following the introduction lays essential groundwork. First, I classify our natural rights and duties, building on recent extensions of W.N. Hohfeld's framework. These include *duties of nonmaleficence*, *samaritan rights*, and *rights of justice*. I explain why the rights and duties upon which my arguments depend do not presuppose the controversial tenets of the natural law tradition. I examine, comparatively, how these rights and duties apply to each of three groups: 1) agents in a state of nature who must do justice for themselves, 2) legal subjects in civil society who take justice into their own hands, and 3) public officials, such as judges, in imperfect legal systems. This discussion sets the normative background for the remainder of the book, in which I will argue that assuming public office does not extinguish one's pre-existing moral rights and duties, although it changes their practical implications. I consider and reject arguments for the view that judges derive their moral authority from their office.

I begin Chapter II by arguing that judges have a moral duty to adhere to the law in cases in which the law dictates morally optimal results. I then examine the more important class of cases: those in which the law requires judges to reach morally suboptimal results ("suboptimal-result cases"). I pay special attention to what Larry Alexander dubs *gap cases*: those in which a good rule dictates a bad result.

Suboptimal-result cases, especially *gap cases*, present judges with a practical dilemma. Some writers, notably adherents of Critical Legal Studies, once tried to dissolve the dilemma by insisting that legal rules are radically indeterminate, and hence cannot dictate particular results. I explain why this resolution is unsatisfactory, building on the work of Jules Coleman, Brian Leiter, Kenneth Kress, Lawrence Solum, Andrew Altman, Brian Bix, Stephen J. Burton, Dennis Patterson, Wilfred Waluchow, and many others. (Ch. III)

Rejecting the skeptical ramifications of radical indeterminacy, as most legal theorists now have, I ask whether judges have a moral duty to adhere to the law in suboptimal-result cases. I consider various possible reasons for adherence, devoting separate sections to reasons deriving from 1) the nature of the judicial office; 2) role morality; 3) the judicial oath; 4) reliance interests; 5) separation of powers; 6) fair play; 7) natural duties; 8) gratitude; 9) efficiency; and 10) community. These sections engage the work of Frederick Schauer, Philip Soper, Alan H. Goldman, Heidi M. Hurd, Larry Alexander, Kent Greenawalt, Steven D. Smith, William Edmundson, George Klosko, and others. (Ch. IV) I also examine the relationship between different conceptions of the rule of law and different possible adjudication norms. To this end, I consider important recent studies of the rule of law by Jeremy Waldron, Stephen Macedo, Andrei Marmor, Joseph Raz, Steven J. Burton, Robert S. Summers, Timothy A. O. Endicott, Brian Z. Tamanaha, Margaret Jane Radin, and Richard H. Fallon, Jr.

The preceding discussion motivates one of my major theses, which is that the only adequate moral reasons for adhering to the law in suboptimal-result cases concern the *systemic effects* of deviation. Simply put: however justified a deviant decision might be, considered in isolation, patterns of deviation by some judges could encourage less sophisticated judges to deviate inappropriately. Such patterns might also encourage non-judicial legal actors to adapt their behavior in suboptimal ways. This section intersects with economic studies of adjudication and the literature on slippery-slope arguments by Frederick Schauer, Douglas Walton, Mario J. Rizzo, and Douglas Glen Whitman. (Ch. V)

I defend at length my thesis that systemic effects provide the best rationale for judicial adherence in suboptimal-result cases. However, in the next chapter I raise a basic problem for this rationale: the systemic effects of a single deviant decision are typically imperceptible. I consider several possible principles that assign adequate weight to systemic effects, including theories that assign moral significance to imperceptible effects and theories that hold individuals accountable for subjecting others to small risks of harm. I draw upon treatments of imperceptible effects by Derek Parfit, Frank Jackson, Larry Temkin, Donald Regan, Jordan Howard Sobel, Torbjorn Tannsjo, George Klosko, Garrett Cullity, and Michael Otsuka. Discussions of small risks that prove useful include those of Michael Smith, Judith Jarvis Thomson, David McCarthy, Peter Railton, Kristin Shrader-Frechette, and Dennis McKerlie. Much of this literature is very recent and has never been used in studies of adjudication, despite its relevance. (Ch. VI)

I converge on a theory that holds an individual accountable for her participation in a collective enterprise, even when her actions make no perceptible causal contribution to the outcome. I advocate abandoning causal conceptions of moral responsibility in favor of a participatory conception, building upon the theories of Christopher Kutz, Michael Bratman, Margaret Gilbert, Christopher McMahon, and Larry May. I conjoin this theory to a principle of fair play, inspired by the work of Garrett Cullity, Liam Murphy, and Timothy Mulgan on the demands of beneficence. Together, these principles support the conclusion that judges have at least presumptive reasons to adhere to the law, even in cases in which the law requires morally suboptimal results. (Ch. VII)

In the next chapter, I argue that defending the moral significance of systemic effects requires reinterpreting a family of agent-relative principles which some philosophers view as central to morality. These include 1) principles according to which intending to cause harm is worse than foreseeably causing harm, without intending to do

so; 2) principles according to which causing harm as one's means or end is worse than causing harm as an aspect or side-effect of one's action; 3) principles that assign moral significance to the spatiotemporal distance between an action and its effects; and 4) the principle of proximate causation or *novus actus interveniens*. These sections engage with the work of F.M. Kamm, Judith Jarvis Thomson, Jeff McMahan, Thomas Nagel, Samuel Scheffler, Derek Parfit, Michael Zimmerman, and many others. (Ch. VIII)

Agent-relative principles can be assigned either derivative or non-derivative roles within a normative theory. Many defenders of agent-relative principles assign them non-derivative roles, and I argue that standard theories about the permissibility of judicial deviation also presuppose this assignment. However, I argue that the moral significance of systemic effects can only be defended if we assign derivative roles to these principles. Therefore, the standard theories of adjudication must be revised to avoid inconsistency. My arguments support a new foundation for normative adjudication theory, one that shares the agent-neutrality of consequentialism, but assigns less practical relevance to facts about direct causation.

My foundational proposal leads to several conclusions, ranging from the cautious to the bold. The most cautious is that judicial reasons to adhere to the law, and to deviate from it, are more complicated and equivocal than commentators have recognized. The most familiar and formulaic principles circumscribing the judicial role prove indefensible.

A bolder conclusion I reach is that judges have good reasons to deviate from the law more frequently than most commentators believe to be justified. I agree with those who maintain that judges are permitted to deviate from extremely unjust laws, but I argue that, subject to important qualifications, judges may also disregard the law in many cases in which the legally mandated result is only slightly suboptimal. I call the emerging theory *Selective Holistic Optimization*. The basic idea is that judges may deviate from the law, in suboptimal-result cases, provided their behavior responds properly to facts about the aggregate level of deviation that prevails in their legal system. (Ch. IX)

I then defend the distinctive claim that each judge has an all-things-considered reason to deviate from the law, not in all cases in which the law requires a suboptimal result, but in *some fraction* thereof. By this I do not mean simply that the presented facts of some cases render them especially apt for deviation, although I think this is so. What I mean is that, in two cases that are morally and legally indistinguishable, a judge can have an all-things-considered reason to deviate from the law in one case, and an all-things-considered reason to adhere to the law in the other. This sounds paradoxical, but I argue otherwise. I argue that the permissibility of such selective decision-making is, in fact, implied by the other normative commitments that I have thus far defended, including my defense of agent-neutral principles and non-causal conceptions of responsibility. I place my theory in the context of familiar legal concepts, such as the traditional legal doctrine of equity.

I recognize, however, that selective deviation patterns conflict with some longstanding legal platitudes, such as the principle of comparative justice that commands judges to "treat like cases alike." My theory permits judges to engage in patterns of deviation from the law that will strike many as arbitrary. I argue that, although these patterns are arbitrary in one sense, this arbitrariness increases, rather than decreases, their overall moral defensibility. In order to make my case, I analyze in depth the ancient

principle of comparative justice, discussing treatments by David K. Lewis, Ronald Dworkin, Peter Westen, David Strauss, Alan H. Goldman, Larry Alexander, and others. I also enlist Neil Duxbury's *Random Justice: On Lotteries and Legal Decision-Making* (Oxford: Oxford University Press, 1999). (Ch. X)

In the next chapter, I address the fact that a judge can have an all-things-considered objective reason to deviate, and still have an all-things-considered subjective reason to adhere to the law. In such cases, deviating is objectively permissible, but judges are blameworthy for doing it. However, I argue that in many other cases deviating is neither objectively impermissible nor blameworthy, but rather is justifiable in terms of Selective Holistic Optimization. In defending these conclusions, I develop an original conception of the rule of law.

I then suggest, more speculatively, that real judges already engage in patterns of selective deviation that differ only in degree, not in kind, from what Selective Holistic Optimization permits. If the practice of selective deviation remains under-recognized, this may be because legal rhetoric provides judges with so many resources for concealing what they are doing, even from themselves. This may not be undesirable, from a social standpoint. I do not argue that judges should consciously internalize Selective Holistic Optimization as a heuristic for reflective application when deciding cases. My primary goal is to defend selectively deviant patterns of decision as permissible, from the standpoint of objective morality.

I then argue that the correct subjective guidance standards for judges should derive, quite indirectly, from the correct objective standard. To this end, I draw on the work of sophisticated consequentialists, Meir Dan-Cohen's theory of "acoustic separation," and the new literature on game theory and social norms by legal scholars such as Dan Kahan, Eric Posner, and Robert Cooter. I address epistemological objections and objections from the principle of judicial candor. (Ch. XI)

My conclusions have implications for many jurisprudential debates in addition to those already encountered. These debates span statutory construction, common-law adjudication, constitutional interpretation, and administrative proceedings. I address some of these topics in Chapter XII, including debates about textualist theories of interpretation, such as those of Justice Antonin Scalia, Judge Frank Easterbrook, and Michael McConnell; defenses of analogical reasoning by Cass Sunstein, Scott Brewer, and Stephen J. Burton; theories of dynamic statutory interpretation by Guido Calabresi and William N. Eskridge, Jr.; the neo-formalisms of Ernest Weinrib and Robert Summers; and the controversy over inclusive and exclusive legal positivism, involving Jules Coleman, Joseph Raz, Kenneth Himma, Wilfred Waluchow, Scott Shapiro, Andrei Marmor, and Brian Leiter. I also contrast my theories with those of Judge Richard Posner, Ronald Dworkin, Philip Soper, Richard Wasserstrom, Mortimer and Sanford Kadish, Heidi M. Hurd, and Stephen Perry.

In the final chapter (XIII), I illustrate what Selective Holistic Optimization might entail for the resolution of contemporary legal controversies involving such varied issues as affirmative action, sexual orientation, socioeconomic inequality, crimes of conscience, and national security.

[For more details, consult the detailed outline of the manuscript, available separately.]

IV. Distinctive Features

I shall now explain some of the differences between *Limits of Legality* and other studies of adjudication.

A. Questions Addressed

Limits of Legality addresses questions at the intersection of several discourses, two of which merit special mention. First is the ongoing debate concerning the “problem of political obligation.” Dozens of books and articles on this topic have appeared since the early nineteen-seventies, with notable contributions by Robert Paul Wolff, A.J. Simmons, Leslie Green, Kent Greenawalt, and William Edmundson. However, most focus on the *citizen’s* duty to obey the law, often in the context of civil disobedience, conscientious objection, or political revolution. Less often have they addressed the public official’s right to enforce the law, his professional duty to enforce it, or his right to disregard it. By contrast, books that concentrate on adjudication, as *Limits* does, have not often examined the office of the judge through the lens of political obligation (see works by Stephen J. Burton, Richard A. Wasserstrom, Cass R. Sunstein, and Ronald Dworkin, mentioned below).

The second discourse with which *Limits* intersects concerns the nature of rule-based decision-making, which has increasingly occupied scholars in law and philosophy over the past fifteen years. Some of these discussions have contributed to the normative theory of adjudication. However, most such theories answer one or more of the following questions. First, how should judges interpret legal standards that are unclear or indeterminate? Secondly, how should judges decide cases to which no valid legal standard applies (judicial discretion)? Thirdly, under what conditions should judges overrule existing legal standards (unjust laws)?

Although my work has implications for each of these traditional questions, I concentrate on a fourth: *when, if ever, may judges deviate from a legal standard without overruling it?* More precisely, how should they decide cases in which determinate legal standards that should *not* be overruled dictate unjust results? Even the laws of reasonably just societies inflict injustices. As writers on equity have recognized since Aristotle, even a law that is itself just can mandate unjust results in particular cases. *Limits* asks if it is morally permissible for judges to deviate from the law in such cases, which arise in all realistic legal systems. This question has not been addressed at book length in recent decades. Most books focus on discretion, mentioning deviation only briefly, if at all. *I treat deviation as the more fundamental issue.*

Another distinctive feature of *Limits of Legality* is its defense of agent-neutral normative principles in the context of legal theory. Agent-neutral principles provide a single set of ultimate moral reasons for action that bind all agents. Some scholars in law and legal philosophy accept agent-neutral principles, although they rarely use this terminology to describe their commitments. More importantly, they use these principles very differently than I, with very different results.

First, others apply agent-neutral principles as first-order or second-order adjudication standards, claiming that judges should decide cases so as to maximize good outcomes. By contrast, *I use agent-neutral principles at the third-order level, as standards for appraising patterns of judicial deviation from the law.* This application yields very different conclusions.

Secondly, most legal writers who accept agent-neutrality insist that the primary objective of adjudication should be promoting economic efficiency. Such writers are often laissez-faire conservatives. By contrast, my theory is compatible with a range of policy objectives, assigning no special priority to economic efficiency. In the latter respect, my work resembles that of some contemporary consequentialists, including Shelly Kagan, Brad Hooker, Derek Parfit, Alasdair Norcross, and Peter Railton. However, these writers are normative ethicists, based in philosophy departments and publishing in philosophy journals. They do not write about law. *An agent-neutral theory without an allegiance to economic efficiency is extremely rare in both legal and legal-philosophic literatures* (Larry Alexander makes one exception). The combination generates surprising and provocative conclusions.

B. Philosophical Resources and Literatures Engaged

Compared to existing monographs, *Limits* makes greater use of resources from modern ethical theory and uses more current literature, including resources that others have neglected or that did not exist at the time. These include, for example:

- Theories of collective agency and shared intention
- Theories of accountability for complicitous participation
- Discussions of responsibility for causing imperceptible effects
- Discussions of responsibility for imposing small risks of harm
- The distinction between enabling and disabling wrongful action
- Defenses of agent-neutral theories that are not strictly consequentialist
- Theories of “beneficence” that permit optimization, without requiring it
- The literature on T.M. Scanlon’s contractualism
- Literatures on esoteric theories, self-effacing theories, and the publicity condition
- The legal literature on social norms

C. Conclusions Defended

In addition to asking questions that others have ignored and using unexploited philosophical resources, *Limits* defends theses that set it apart:

1. Judges are morally permitted to deviate from rules of law, for moral reasons, more often than most scholars believe.
2. Judges have moral reasons to deviate from rules of law in cases in which the legally required result is only moderately suboptimal, not just when deviation is necessary to avoid extreme injustice or violations of important moral rights.
3. Factors that are extrinsic to both the facts of the case and the applicable legal standards are relevant to the permissibility of judicial deviation in certain cases.
4. The overall level of deviation in a given jurisdiction can be relevant to the permissibility of deviation in a given case. Higher overall levels of deviation render additional deviant decisions less permissible.

5. The permissibility of deviation in a given case can depend, in part, on factors that are morally arbitrary or random, from the perspective of the parties to the case.

V. Competition

Seven excellent monographs merit individual comparison with *Limits of Legality*. The first three address the topic of rules. The next three address political obligation, including some treatment of the obligations of public officials. The last concerns the ethics of adjudication.

- Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (New York: Oxford University Press, 1991)

Schauer's book lays important groundwork, offering an account of rules as "entrenched generalizations" that resist efforts to penetrate them in the service of their justifications. His view stakes out an intermediate position between "particularism" and Raz's theory of rules as exclusionary reasons. Against particularism, he argues that rules serve to allocate power. Against Raz, Schauer defends "presumptive positivism," which permits "peeking" behind the rule to see whether there is an extremely strong reason to deviate, and permits one to deviate in such extreme cases, while still maintaining the rule for less extreme cases in which there are weaker (but still decisive) reasons to deviate. Chapters 8 and 9 discuss adjudication and the judicial interpretation of rules.

One limitation of Schauer's book lies in his choice to begin his analysis with standards to guide conscious deliberation by an agent who is reflectively transparent to herself: *subjective guidance standards*. He proceeds to concentrate exclusively on guidance standards. By contrast, I give equal consideration to standards for use by third-party observers in evaluating patterns of decision. These are *objective appraisal standards*.

When I finally prescribe guidance standards, in Chapter XI, my prescriptions are informed by my discussion of appraisal standards. By concentrating exclusively on guidance standards, from the outset, Schauer forecloses conceptual options that I open and explore as I develop Selective Holistic Optimization. Selective Holistic Optimization may not be defensible as a guidance standard. It may be self-defeating when cast in that role. But that does not entail that guidance standards informed by a Selective Holistic Optimization appraisal standard are self-defeating or indefensible. I argue that they are not.

Partly on account of his choice to begin and end with guidance standards, Schauer's conclusions also diverge from mine. Schauer forbids deviation in cases in which the rule requires a result that is only moderately suboptimal. He also allows only case-type-specific factors to contribute to the justification of deviation. He does not discuss the possibility of token-selective deviation, although I gather he would reject it. *Limits* explores these possibilities and finds them defensible.

- Larry Alexander and Emily Sherwin, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* by (Durham: Duke University Press, 2001)

The first two parts of this book ask what rules can do and why lawmakers should institute them. The authors justify rules as mechanisms for achieving authoritative settlement of disputes about what ought to be done. In Chapter 4, they argue that there is an ineliminable “gap” between what rules prescribe and what agents ought to do, all-things-considered, concluding that it is right to issue authoritative rules, but sometimes wrong to follow them. This thesis is one of my starting points. I agree with Alexander and Sherwin that the gap cannot be eliminated. They also criticize several proposals regarding how subjects ought to treat rules. Alexander and Sherwin reject these proposals because they prevent rules from serving their functions, including settlement.

Limits challenges the authors’ application of this reasoning to the domain of adjudication. First, as does Schauer, Alexander and Sherwin discuss only guidance standards, ignoring appraisal standards. Secondly, they argue that particularism defeats the purpose of rules, but they evaluate only the crudest version of particularism, one that shares the flaws of act utilitarianism. They present authoritative/serious rules as the only viable alternative. *Limits* develops a more sophisticated version of particularism, which avoids their criticisms. My version of particularism does not defeat the purpose of rules, although it casts rules in a role that differs from the role envisioned by Alexander and Sherwin. Just as there is a gap between what rules the lawgiver has reason to institute and what legal subjects have reason to do, so there is a gap between what rules the lawgiver has reason to institute and what judges have reason to do. Alexander and Sherwin assume that the reasons to institute rules translate into reasons for judges to adhere to rules, once instituted. This assumption governs Parts III and IV of their book, leading Alexander and Sherwin to oppose deviation in suboptimal-result cases. Although they permit judges to overrule horizontal precedents, subject to a defeasible presumption against doing so, they forbid judges to deviate without overruling or distinguishing, and they assert that judges must simply follow vertical precedents. They also appear to take for granted that judges must follow constitutional provisions and statutes that are constitutionally valid. Alexander and Sherwin never ask if judges are morally obligated to follow such legal standards. *Limits* asks, and answers, these questions.

- Alan H. Goldman, *Practical Rules: When We Need Them and When We Don’t* (New York: Cambridge University Press, 2002)

Goldman’s book makes several important contributions to our understanding of rules. For my purposes, the most important is his justification for instituting rules. His justification applies to rules forbidding a set of acts that are individually morally permissible, but that have unacceptable cumulative effects. He concludes that the application of rules is not typical, and is not often necessary, in moral or legal reasoning. With moral particularists, Goldman believes that particular moral judgments can be justified and coherent, without support by universal rules. He favors practical reasoning by analogy and difference from settled cases.

There are several basic differences between Goldman’s book and *Limits*. First, whereas Goldman addresses the role of rules in general (moral, prudential, and legal) for agents in general, *Limits* concentrates on the role of legal rules in judicial reasoning.

Secondly, Goldman focuses on when the law should take the form of rules, and on when legal sources should be read as rules. By contrast, *Limits* addresses the question of when judges are ethically obligated to adhere to legal rules, and other legal standards. Goldman offers his own conclusion on this issue, which diverges from mine. He defends the “fundamental rule of the legal system”: that judges must defer to legal requirements even when they disagree morally with their implications in particular cases. This, Goldman insists, is a genuine moral rule that binds judges.

Limits challenges this fundamental rule, offering a much more extensive treatment of adjudication than does Goldman. I argue that Goldman is too pessimistic about the feasibility of optimization by judges. He never considers a fundamental rule that holistically refers to the overall deviation density of the legal system.

I also challenge Goldman’s argument against selective deviation, which is based on what he calls the Kantian constraint. I show that his argument against selectivity is inconsistent. His main rationale for rule-following is agent-neutral, but he opposes selectivity with an agent-relative argument, according to which selectivity is intrinsically unfair.

- Philip Soper, *The Ethics of Deference: Learning from Law’s Morals* (New York: Cambridge University Press, 2002)

In the first part of this book, Soper challenges the thesis, held by Joseph Raz and others, that law claims moral authority. In the second part, he argues that law actually has moral authority, for both public officials and private legal subjects. He argues that each agent has intrinsic reasons to defer to lawmakers who are attempting, in good faith, to rule justly, even when they err. These reasons include objective reasons, deriving from the value of respect that is required by a valuable relationship, and subjective reasons, deriving from the need to respect oneself and to act consistently with one’s understanding of the point of law. Private subjects and judges, alike, have intrinsic reasons to defer to lawmakers, he claims.

Soper’s project contrasts with mine in several ways. First, Soper’s main topic is the obligation of citizens to obey the law. He devotes only a few pages to the judicial obligation to apply the law, which is my main focus.

Secondly, Soper writes as though the respect-based reasons that he identifies demand a unique judicial response: strict adherence to law. He ignores the possibility of judges manifesting respect in other, less obvious ways. *Limits* explores such possibilities in detail.

Thirdly, although Soper’s theory entails that judges must not ignore the law in favor of their private material interests, his arguments do not support an all-things-considered reason for a judge to adhere when she has *moral* reasons to deviate. He assumes that the judge’s duty to respect lawmakers, by deferring to the law, usually overrides her natural duty not to inflict undeserved harm on a party to the case. *Limits* challenges this assumption.

- Kent Greenawalt, *Conflicts of Law and Morality* (Oxford: Oxford University Press/Clarendon, 1987)

Parts II and III of Greenawalt's classic study address the duty to obey the law, various reasons to disobey, and the conditions under which disobedience is permissible. *Limits*, by contrast, addresses the duties of judges, not private citizens. Greenawalt turns his attention to public officials only in Part IV, the final hundred pages of his 375-page book. Even in Part IV, almost all of Greenawalt's "institutions of amelioration" are internal to the legal system. These include the general justification defense in criminal law, statutory exemptions for conscientious objectors, reversals on constitutional grounds, official discretion, and executive pardon. Jury nullification receives eight pages, while judicial deviation from the law ("judge nullification") is dismissed in a single page. By contrast, *Limits* concentrates on true suboptimal-result cases. In such cases, by definition, no legal institution of amelioration exists. Greenawalt concedes that cases of justified judicial deviation from the law are "conceivable." However, following many writers, he thinks such cases are very rare. He suggests that judicial deviation is only warranted, if ever, when necessary to prevent extreme injustices. *Limits* reexamines this common assumption.

- Heidi M. Hurd, *Moral Combat* (New York: Cambridge University Press, 1999)

Hurd's book, which has been widely reviewed and translated into many languages, may be the closest cousin to *Limits*. Hurd lays important groundwork. In some respects, *Limits* picks up where Hurd leaves off, while challenging some of her claims.

Most writers on political obligation have understood their question as whether citizens have any reason whatsoever to obey the law, just because it is the law. Because many writers since the 1970s have been answering this question negatively, they have not even reached the issue of all-things-considered reasons to obey. At the same time, they have assumed that public officials have all-things-considered reasons to apply the law. This assumption has rarely been scrutinized. Hurd's is one book that asks whether judges have all-things-considered reasons to apply the law. *Limits* is another.

However, Hurd's central concern is somewhat different from mine. She wants to demonstrate the impossibility of "moral combat": situations in which one agent has an all-things-considered moral reason to punish someone else for doing what he (the latter) has an all-things-considered reason to do. If gap cases are inevitable in realistic legal systems, and it is wrong to punish innocent people, then moral combat looks unavoidable. Hurd tries to show otherwise.

Because this is Hurd's focus, she is not directly concerned with adjudication or legal reasoning, as I am. Her book is still really a work of political theory. It nicely defends its conclusions from both deontological and consequentialist perspectives, but it does not consider the most promising agent-neutral theories, ones that are neither deontological nor strictly consequentialist. Nor is Hurd as attentive as I am to dynamic and systemic factors.

Hurd concludes that a judge is permitted to deviate by acquitting a criminal defendant if and only if the defendant's lawbreaking was morally justified, all-things-considered. Hurd is correct that a moral justification for lawbreaking is necessary to

justify a legally impermissible acquittal, but *Limits* argues that she is wrong to think it sufficient.

On one interpretation, Hurd's position entails that one is morally permitted to break the law if and only if doing so and being acquitted has morally acceptable consequences. However, her position is unsatisfactory on this interpretation. A general practice of acquitting lawbreakers, justified or not, has cumulative effects. Deviation in a smaller number of case-tokens has acceptable consequences, while deviating in a larger number has unacceptable results. A single deviant decision virtually never has perceptibly negative systemic effects. On this interpretation, Hurd's position permits patterns of unlimited lawbreaking in suboptimal-result cases, the cumulative effects of which are very bad for society.

On a better interpretation, Hurd's position entails that one is morally permitted to break the law if and only if the consequences of *any number* of individuals breaking the law and being acquitted, in case-tokens of that factual type, would be morally acceptable. However, for any case-type, there is some number of tokens such that deviating so frequently has unacceptable consequences. Therefore, on this interpretation of Hurd, no one is ever permitted to break the law. Hurd correctly rejects this conclusion.

Hurd needs a better way of making the cumulative consequences of deviation patterns relevant to the permissibility of individual decisions to deviate. She needs to recognize the relevance of what I call "deviation density" to the permissibility of deviation. *Limits* develops this view. However, it thereby reopens the possibility of moral combat, which Hurd's entire book aims to preclude.

- Steven J. Burton, *Judging in Good Faith* (New York: Cambridge University Press, 1992)

Burton's book is one of the few recent philosophical monographs devoted entirely to the ethics of adjudication, as is *Limits*. Burton targets a claim that is common to both Critical Legal Studies (CLS) and determinate-formalism – that law-bound judging is impossible when rules are indeterminate. He argues that judges can still judge in "good faith" when legal rules are indeterminate, by basing their decisions exclusively on legal reasons. For example, judges interpreting statutes should disregard values that were defeated in the legislative process.

Limits differs from Burton's book in several respects. First, Burton wrote at a time when responding to CLS was still considered a philosophically important project. Burton contributed notably to that enterprise. However, this agenda leads him to focus entirely on discretion, at the expense of deviation. *Limits* reverses these priorities, treating deviation as the more fundamental concept.

Secondly, although Burton's arguments presuppose controversial moral commitments, with affinities to Aristotle and Kant, he never articulates these commitments. He declines to engage with traditional debates in ethical theory, much less with the developments of the 1970s and 1980s. *Limits* engages this literature, as well as that of the 1990s and the twenty-first century. Burton consults law reviews and the writings of legal philosophers, but he largely ignores the work of ethicists, despite his expressed concern with "the ethics of judging."

Finally, I accept Burton's arguments against the claim that lawful judging presupposes determinate rules. However, I argue that he exaggerates the moral duty to adhere to the law. He rightly permits judges to take into account legally excluded reasons of political morality in order to compromise the enforcement of extremely unjust laws. However, in substantially just legal systems, his principles would forbid judges to deviate from moderately suboptimal rules of law, or to deviate in what I call negative-gap cases (see Ch. V). *Limits* contests these implications of Burton's position.

In addition to these seven recent books, there are two pioneering works that have long been out of print:

- Richard A. Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* (Stanford: Stanford University Press, 1961)
- Mortimer R. Kadish and Sanford H. Kadish, *Discretion to Disobey: A Study of Lawful Departures from Legal Rules* (Stanford: Stanford University Press, 1973)

These studies appeared too early to take advantage of recent developments in ethical theory. Wasserstrom's book is entirely prescriptive and does not reflect the realities of adjudication in our legal system. Wasserstrom's version of rule-utilitarianism is also dated. The Kadishes make the restrictive assumption that departures from legal rules are morally permissible only when lawful. *Limits* defends an opposing view.

Finally, one could compare *Limits of Legality* to the following books on adjudication:

- Cass R. Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996)
- Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999)
- Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986)

Sunstein does not defend judicial deviation, *per se*, although we share a tolerance for judicial decisions that do not attempt to articulate deep legal principles. Sunstein's work is more pragmatic and prudential than mine, in the spirit of Alexander Bickel and the later writings of John Rawls. Sunstein does not attempt to relate his theory of adjudication to ethical theory. In fact, he seeks to bracket from public debate many of the theoretical controversies that I engage directly.

Dworkin's is the most widely discussed theory of law in the past two decades. However, he is generally seen as blurring the line between the theory of legal content and the theory of adjudication, deriving the former from the latter. I proceed without that ambition, keeping my theory of adjudication compatible with virtually any theory of legal content. Dworkin's defense of "legal principles" and "integrity" also set him at odds with *Limits of Legality*. Dworkin is thoroughly committed to deep agent-relative principles and a traditional doctrine of comparative justice.