

## **Are Judges Morally Obligated to Apply the Law?**

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### **Introduction**

As a conscientious moral agent, a judge in a court of law often finds herself in a difficult position. She is confident that the law requires a certain result in the case before her, but she is at least as confident that this legally required result is unjust or otherwise morally objectionable. Consider some examples of cases in which a reasonable judge might consider herself to be in this position:

- The law of landlord and tenant can require a judge to evict an impoverished, elderly widow from her apartment for missing rent payments.<sup>1</sup>
- A student in a poor school district sues his state for providing a much lower caliber of education than students receive in wealthier districts. Binding legal precedent requires the judge to dismiss the student's lawsuit.
- Binding precedents construing the Fourth Amendment require judges to exclude evidence obtained without a search warrant. As a result, a child molester is acquitted, and, predictably, strikes again.

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<sup>1</sup>Richard A. Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* (Stanford, CA: Stanford University Press, 1961), p. 140-44; Alan H. Goldman, *Practical Rules: When We Need Them and When We Don't* (Cambridge: Cambridge University Press, 2002), p. 43.

- “Three strikes and you’re out” statutes have required judges to sentence convicts to life in prison without parole for committing third felonies that are non-violent, such as stealing golf clubs or videotapes.

- Federal sentencing laws specify mandatory minima that have forced judges to give twenty-year prison terms to the wives and girlfriends of men who deal drugs out of the home, without evidence that the women were much involved in the business.

One could define these moral dilemmas out of existence by insisting that any result required by positive law is, by definition, morally acceptable. This would involve biting the bullet and agreeing that slavery and genocide are moral wherever positive law requires them. Alternatively, one could deny that positive law, properly understood, ever requires slavery, genocide, or other immoral results. Readers who take either of these positions will have no interest in this paper.

For the rest of us, court cases such as these raise the question whether judges are morally obligated to apply the law. We might hope to gain insight into this question by consulting the hundreds of philosophical discussions of the duty to obey the law. Many contemporary philosophers have defended *philosophical anarchism* – the position that we have no moral duty to obey the law, just because it is the law.<sup>2</sup> Although there are prominent defenders of the duty to obey, anarchism is now a mainstream position, and arguably the dominant one.

Disappointingly, almost all of these discussions concentrate on private parties deciding whether to obey. They largely neglect to ask about public officials, including judges. Steven

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<sup>2</sup>See, e.g., A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979); Rolf Sartorius, "Political Authority and Political Obligation," *Virginia Law Review* 67 (1981): 3-17; Joseph Raz, "The Obligation to Obey: Revision and Tradition" in *Ethics in the Public Domain*, rev. ed. (Oxford: Clarendon Press, 1994); M.B.E. Smith, "Is There a Prima Facie Obligation to Obey the Law?," *Yale Law Journal* 82 (1973): 950-76; Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper and Row, 1970); A. D. Woozley, *Law and Obedience* (London: Duckworth, 1979).

Smith notes that “[a]lthough everyone assumes that courts normally have a duty to follow duly-enacted statutes, it is curious that hardly anyone bothers to articulate the basis of that duty.”<sup>3</sup> Even the most radical anarchists never deny that presiding judges have a duty to apply and enforce the law in their decisions. Nor have the defenders of a general duty to obey often bothered to extend their conclusions to judges, although perhaps they have assumed that the extension is obvious. This neglect of the judiciary must frustrate anyone who wants to know how judges should decide cases in which law and morality appear to conflict.

In this paper, I evaluate critically several arguments in favor of a judicial duty to apply the law, and present what I think is a better argument for that duty. My argument has some unexpected implications. It implies that, when the judicial duty to apply the law competes with other moral reasons, it does not prevail as consistently as one might expect. A viable argument for giving the duty some weight also supports an argument against giving it as much weight as many have wanted to give it. I conclude that judges’ moral reasons to disregard the law can be decisive more often than most writers have assumed.

### **The Duty to Obey the Law**

First, I shall explain what philosophers mean by “a duty to obey the law.” They don’t mean a legal duty. That one has a legal duty to fulfill one’s overall legal duties is tautological.<sup>4</sup> A private party can have legal grounds for disobeying a particular law, as when one faces a state law that conflicts with federal law. However, that’s just to say that his *overall* legal duty is to violate the state law for the sake of the federal, under the Supremacy Clause of the U.S. Constitution.

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<sup>3</sup>“Why Must Courts Obey the Law?,” *Georgetown Law Journal* 77 (1988-89): 113-64, 113.

<sup>4</sup>Raz, “The Obligation to Obey: Revision and Tradition” in , p. 342.

The duty to obey the law is not a legal duty, but a moral duty. However, it is not a conclusive or all-things-considered moral duty, but one that can be overridden by other considerations. W.D. Ross called it a “prima facie duty,”<sup>5</sup> although I shall follow contemporary writers who call it a *pro tanto* duty.<sup>6</sup> We have no all-things-considered moral duty to obey a horrendously unjust statute. Parents have no duty to injure their children, even if the law requires them to do so. Even if one has a *pro tanto* duty to obey the law, one’s natural duty not to injure human beings would at least override, if not undermine it, in that situation.

How is the moral duty to obey the law relevant for judges? Of course, judges are also private citizens, so whatever duty to obey the law may exist, it has its ordinary relevance for them as they walk downtown and shop for groceries. That’s not my concern. I’m interested in the relevance of the duty for judges, *qua* judges – judges in their professional capacities.

### **Rules of Adjudication**

In modern legal systems, the professional duties of judges are specified in certain secondary legal rules, which H.L.A. Hart calls *rules of adjudication*.<sup>7</sup> These duties include appearing in court, supervising courtroom proceedings, hearing evidence and argument, researching the law, deliberating about cases, writing opinions, et cetera. Unlike the rest of us, judges have a legal duty to perform these functions. The next question is: do they have a *pro tanto* moral duty to do their legal duty?

As mentioned, many philosophers have concluded that private parties have *no* *pro tanto* moral duty to obey the law. One might suppose that such a conclusion entails that judges have no *pro tanto* moral duty to obey adjudication rules. But most philosophers in this area seem to reject that inference. To determine whether they’re correct, we must examine the conclusions

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<sup>5</sup>W.D. Ross, *The Right and the Good* (Oxford: Clarendon Press, 1930), p. \*\*.

<sup>6</sup>Shelly Kagan, *The Limits of Morality* (Oxford: Clarendon Press, 1989), p. \*\*.

<sup>7</sup>H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), p. \*\*.

defended by philosophical anarchists. Many are merely concerned to deny a completely general duty to obey the law – one that applies to everyone just in virtue of his physical presence within a jurisdiction. These anarchists don't deny that certain individuals, in certain capacities, have duties to obey the law. Perhaps that includes judges.

I shall now examine some arguments for a general duty to obey and consider whether they might support a judicial duty to obey adjudication rules. We can divide these arguments into two categories: retrospective and prospective. The most popular arguments have been retrospective, including arguments from consent, fair play, natural duty, and gratitude. Prospective arguments include arguments from community, allocation of authority, efficiency, and systemic effects.

### **The Judicial Oath**

A classic retrospective argument for a duty to obey the law is the argument from actual consent. This argument is famously problematic as applied to natural-born citizens, most of whom never give actual consent to the state.<sup>8</sup> However, the argument applies straightforwardly to judges. Judges in most legal systems swear a public oath to uphold the law. An oath either implies or constitutes a promise, and promises create duties. There are familiar defeating conditions, but these conditions are absent when judges take their oath of office. There is no duress or coercion, for example. Judges always have reasonable alternative occupations. Therefore, the oath gives judges a pro tanto moral duty to obey adjudication rules.

A promise can override or undermine reasons of prudence, preference, and partiality. Judges often have prudential reasons to disobey adjudication rules. For example, many judges would prefer playing golf to appearing in court, and they could make good money by practicing law on the side. However, adjudication rules forbid them to do either of these things, and their

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<sup>8</sup>But see Gilbert 1999; Mark Murphy.

oath gives them a strong moral reason to obey the rules. This reason at least overrides (and probably undermines) judges' reasons of prudence, preference, and partiality. Therefore, judges have all-things-considered moral reasons not to skip trials or practice law on the side.

The fact that judges take an oath may explain why philosophers have not thought it necessary to defend judicial duties. It seems too easy!

### **The Adherence Duty (the Duty to Apply the Law)**

My main concern, however, is not with the judge's duty to appear in court or to refrain from practicing law, or anything like that. I'm interested in his duty to apply the law correctly. I call this *adhering* to the law, to distinguish it from the generic concept of obeying the law. The opposite of adhering I shall call *deviating* from the law. Before continuing, I must note that I shall assume, *arguendo*, that at least some legal questions have legally correct answers. If they don't, then the principle that "ought" implies "can" entails that there is no judicial duty to adhere to the law, and my paper is otiose.

Codes of judicial conduct typically state that "judges shall be faithful to the law."<sup>9</sup> These codes are incorporated by statute into adjudication rules, giving judges at least a *pro tanto* legal obligation to apply the law. Let me be clear what this means. I'm not saying that judges face legal sanctions for misapplying the law in their decisions. In fact, judges aren't fined or incarcerated, or even subjected to judicial discipline, for deviating from the law. Nor are they subject to civil damage awards.<sup>10</sup> People are often surprised to learn that judges aren't

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<sup>9</sup>See, e.g., CALIFORNIA RULES OF COURT, APPENDIX DIVISION II, Code of Judicial Ethics, Cal Rules of Court Canon 3 (2006); NY CLS Jud Appx Code Jud Conduct CANON 100.3 (2006) CANON 3 [100.3]; United States v. Callender, 25 F. Cas. 239, 257 (Circuit Court, D. Virginia 1800) "No position can be more clear than that all the federal judges are bound by the solemn obligation of religion, to regulate their decisions agreeably to the constitution of the United States, and that it is the standard of their determination in all cases that come before them."; Bradley v. School Board of the City of Richmond, 324 F. Supp. 439, 448-49 (E. Dist. Virginia, 1971) ("A judge has a duty to decide whatever cases come before him to the best of his ability. 28 U.S.C. § 453")

<sup>10</sup>Lewis v Green (1986, DC Dist Col) 629 F Supp 546 28 (28 USCS § 453, which sets forth oath of allegiance to Constitution taken by federal judges, does not create substantive cause of action against federal judges for violating

disciplined for misapplying the law, but only for *judicial misconduct*, which is limited to things like criminal activity, sexual harassment, conflicts of interest, and intoxication on the job.

Misconduct is not legally defined to include deviation from the law. So a judge's incentive to adhere to the law may be weaker than a private party's incentive to obey the law. Nevertheless, I suggest that adjudication rules give judges a legal duty to apply the law. Since H.L.A. Hart, legal theorists have recognized that the law can impose genuine legal duties without sanctions, just as it can grant legal powers without any sanctions being involved at all.<sup>11</sup>

So adjudication rules give judges a legal duty to apply the law. If judges have a moral duty to obey adjudication rules, then they have a moral duty to apply the law. The stronger their moral duty to obey adjudication rules, the stronger their moral duty to apply the law.

This is significant because judges often have reasons not to apply the law. Identifying and applying the correct law can be difficult and time-consuming. Judges have prudential reasons to simplify their job, even when doing so involves deviating from the law. Moreover, a judge may develop a personal dislike for the party whom the law favors, and anticipate taking pleasure in ruling against him. When a judge swears her oath, however, she promises to disregard whatever prudential reasons she may have to deviate. The fact that she has taken the oath gives her a reason that undermines such prudential reasons.

If my only goal were to defend the claim that judges sometimes have a pro tanto moral duty to apply the law, then my task would be complete. However, I have yet to ask how this pro tanto duty interacts with a judge's other moral reasons, as opposed to her prudential reasons. It is widely recognized that a promise does not attenuate one's other moral duties, and that other

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oath by acting contrary to Constitution.); the well settled law that a judge enjoys absolute civil immunity from suit so long as the contested action was judicial in nature and was not taken in the complete absence of jurisdiction. See *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978); *Bradley v. Fisher*, 80 U.S. 335, 347 (1872) (stating that "[a] judge shall be free to act upon his own convictions without apprehension of personal consequence to himself").

<sup>11</sup>Hart

moral reasons can undermine or override reasons generated by promises. I suggest that the same principle applies to oaths. Bruce has a natural duty not to inflict gratuitous pain on animals. He gets on the radio and swears a solemn oath before his fellow citizens that he will kick his dog on Saturday. Most people would agree that taking this oath gives Bruce no reason whatsoever to kick his dog, and does not attenuate his reason to refrain from doing so. Bruce's natural duty undermines whatever reasons his oath might otherwise have given him.<sup>12</sup>

A new question now arises: do judges' moral reasons to deviate from the law ever override or undermine their reasons to adhere?

### **Optimal Versus Suboptimal Results**

In order to answer this question, I must distinguish between *optimal-result* cases and *suboptimal-result* cases. A suboptimal-result case is one in which the controlling legal authority requires the judge to rule in favor of a certain party, although she would otherwise have an all-things-considered moral reason to rule against that party, *ceteris paribus*. All other cases are optimal-result cases.

The distinction between optimal and suboptimal results is a conceptual distinction, like the philosopher's distinction between "justice" and "injustice." To evaluate my arguments, you need only be prepared to distinguish, for yourself, between optimal and suboptimal results. We need not agree regarding the proper classification of any particular result. The cases described at the beginning of this paper were intended as plausible examples of suboptimal-result cases. For illustrative purposes, I shall now add some details to one of these cases. Mary is an impoverished widow who is renting an apartment from Mike, a wealthy landowner who inherited the property and has never worked a day in his life. Mary has missed several rent payments, and Mike has filed an eviction petition before Judge Jack. I stipulate that Mary is morally innocent.

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<sup>12</sup>Accord, Alexander & Sherwin, p. 75.



She is too old and frail to work, and her pension does not cover her rent. Neither retributive nor corrective justice requires a judgment against Mary. She has done nothing to deserve eviction. Nor does Judge Jack violate anyone's moral rights if he rules for Mary. That decision violates Mike's legal rights, but Mike was not morally entitled to Mary's rent in the first place, absent the law. Nor will Mary's eviction maximize the combined utility of Mary and Mike, as Mary needs her apartment more than Mike needs her money. If the law did not require eviction, then Judge Jack would have an all-things-considered moral reason to deny Mike's petition. However, the regulating statute requires him to grant it, thereby evicting Mary. I'm using this as an example of a suboptimal-result case, but again, my point is not to persuade you that evicting Mary is definitely a suboptimal result. You can imagine some other case, if you prefer, one in which the law requires what *you* consider to be a suboptimal result.

Bearing in mind the distinction between optimal-result and suboptimal-result cases, I shall now reexamine the judge's duty to apply the law. If Judge Jack grants Mike's petition, then he commands the sheriff to force Mary from her apartment. No one, with the possible exception of Jack, has an all-things-considered moral reason to command anyone to do this to Mary. Indeed, everyone else has a strong pro tanto moral reason not to do so. If the law did not require it, then even Jack would have an all-things-considered reason not to do it.

I suggest that, just as Bruce's oath gives him no reason that competes with his natural duty to refrain from kicking his dog, likewise Judge Jack's oath to uphold the law gives him no reason that competes with his natural duty to deny the eviction petition.

I should emphasize that I'm not insisting that Judge Jack's moral situation is identical to Bruce's. It is not, and I shall explain later why it is not. My point here is simply that an oath, as such, generates no reason to adhere to the law in suboptimal-result cases. The judicial oath is not

the non-derivative or self-sufficient source of adherence reasons. It generates such reasons only in conjunction with enabling conditions that I shall presently identify.

### **The Reliance of Parties to the Case (Retrospective Reliance)**

Let's now consider the moral significance of detrimental reliance. If agent B has relied upon agent A to act, and will be disadvantaged if A does not act, then B's detrimental reliance gives A a pro tanto moral reason to act. In many cases, someone who stands to be affected by a judicial decision has long since formed an expectation that the judge will adhere. Her reliance may be detrimental, in that she'll be disadvantaged, as a result, if the judge deviates.

In optimal-result cases, detrimental reliance gives judges an additional reason to adhere to the law. However, I suggest that detrimental reliance does not give judges a reason to adhere in suboptimal-result cases. I suggest the following principle: If agent A would otherwise have a decisive moral reason not to act, then the fact that agent B relies on agent A to act gives A no reason to do so. Rachel promises to install a computer in her grandmother's bedroom. Her grandmother relies on this promise, planning everything around it. It is subjectively reasonable for her to do so. However, Rachel overhears her grandmother's live-in boyfriend talking about how he plans to use the computer to solicit sex from children. Rachel's grandmother knows nothing about these plans. Neither Rachel's promise, nor her grandmother's detrimental reliance, gives Rachel any reason whatsoever to install the computer. However, these facts retain some practical significance. Both give Rachel a moral reason to apologize for disappointing her grandmother. Perhaps Rachel should also offer to install the computer in her own home, so her grandmother can use it when she visits.

I shall now apply my conclusion about detrimental reliance by revisiting Mike and Mary. Suppose Mary has missed ten rent payments over the past twelve months. Mike's lawyer tells

him that he has a legal right to evict Mary. Therefore, it is subjectively reasonable for Mike to predict that a judge will grant his eviction petition, and for him to rely upon that expectation. Unfortunately, Mike's lawyer misread the code. In Mike's jurisdiction, the law does not grant a right to evict until ten *consecutive* rent payments have been missed. If a tenant misses ten nonconsecutive payments, then the law merely gives the court discretion to grant or deny an eviction petition, without specifying legal considerations for the judge to take into account. Granting Mike's petition will inflict a substantial undeserved disadvantage on Mary. Denying it will inflict an undeserved disadvantage on Mike. However, I stipulate that the magnitude of the wrong against Mary is at least as great as the magnitude of the wrong against Mike, even taking into account Mike's reasonable reliance. Therefore, the court has a decisive moral reason to rule for Mary.

Now imagine identical facts, except that the law does grant a right to evict after ten nonconsecutive missed payments, as Mike was told. The law requires the judge to grant Mike's petition. This is now a suboptimal-result case. If the law did not require the judge to grant Mike's petition, then the judge would have a decisive moral reason against doing so, even taking into account Mike's reliance. The judge's *pro tanto* reason to deviate has at least as much weight as the *pro tanto* reason to adhere generated by the reliance of parties to the case.

My point is that Mike's reliance is no more reasonable or detrimental in this version of the case than it was in the original version. The fact that Mike has reasonably relied upon the judge to grant his petition does not give the judge a reason to grant it that is any stronger in the second version of the case than it was in the first version. Therefore, if judges are ever morally required to adhere in a suboptimal-result case, then they must have some other reason to do so, in addition to the reliance of parties.

This is not to deny that a judge who deviates in a suboptimal-result case may have certain residual reasons. She may have reason to apologize to parties whose expectations she has disappointed.

### **Fair Play, Natural Duty, Gratitude**

So far, I have concluded that neither the judicial oath, nor the reliance of parties, gives judges a pro tanto reason to adhere in suboptimal-result cases. However, I have yet to consider three of the most widely discussed arguments for a general duty to obey the law. These are the arguments from fair play, natural duty, and gratitude. In this section, I ask whether any of these arguments can be adapted to support a pro tanto duty to adhere.

It is important to remember that defenders of political obligation only resort to such arguments when they conclude that arguments from actual consent fail with respect to most individuals. Few natural-born citizens expressly consent to obey the law. I have already explained how matters are different where judges are concerned. Judges expressly consent to uphold the law when they take the oath. So consent arguments support a judicial duty to adhere, at least in optimal-result cases. Therefore, arguments from fair play, natural duty, and gratitude are superfluous to discussions of judicial obligation in our legal system. (However, such arguments might prove useful for defending judicial duties in legal systems very different from ours. For instance, if there were a severe shortage of judges, arguments from natural duty and gratitude might support the idea that qualified individuals have a moral duty to volunteer for judicial service. We can also imagine such a system “drafting” individuals into judicial service, in a fair procedure, but without their consent. Fair play arguments might support judicial obligations in such a system. Examining such dystopias is not my project.)

My concern is with a duty to apply the law in suboptimal-result cases, where actual consent arguments fail. Might there still be a role for arguments from fair play, natural duty, or gratitude, in these cases? I think not. None of these arguments supports a duty to adhere to the law in suboptimal-result cases. If, as I have argued, consent does not support an adherence duty that extends to suboptimal-result cases, then, a fortiori, such a duty finds no support in arguments from fair play, natural duty, or gratitude.

I have been unable to identify any retrospective arguments for a judicial duty to adhere to the law in suboptimal-result cases. Therefore, I shall turn to prospective arguments.

### **Systemic Effects**

The prospective arguments which seem the most promising to me are those that appeal to certain negative effects of *patterns* of judicial deviation from the law. I call these *systemic effects*. These are the effects that patterns of deviation have on the choices made by other legal actors, especially the choices made by judges in future cases. Arguments from systemic effects can support an adherence duty that applies in suboptimal-result cases because judicial deviation has systemic effects in both optimal-result and suboptimal-result cases.

Systemic effects fall into two categories: adaptation effects and mimetic effects. I start with adaptation effects. Suppose Judge Jack rules for Mary, despite the fact that the law requires him to rule for Mike. People may notice Jack's deviation. Journalists may report that Judge Jack has disregarded the law. Practicing lawyers and scholars may criticize him. Ultimately, news of this verdict might lead landlords to lower their estimates of the likelihood of winning lawsuits against delinquent tenants. This change could, in turn, lead landlords to raise rents, or to require better credit from prospective tenants.<sup>13</sup>

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<sup>13</sup>Deviation thereby diminishes what Lon Fuller calls the *prospective* character of the law. We should be able to predict with confidence that the law will be applied. We should be able to rely on these predictions, and have

A special form of adaptation occurs when judges attempt to imitate one another.<sup>14</sup> Let us assume, first, that deviation encourages deviation. In unfortunate situations, deviation, even in suboptimal-result cases, encourages misguided judges to deviate in optimal-result cases, perhaps mistaking them for suboptimal-result cases. I call this *mimetic failure*. Mimetic failure constitutes an adherence reason that applies in both optimal-result and suboptimal-result cases.

However, there are countervailing reasons. Just as deviation encourages deviation, adherence encourages adherence. Adherence by judges in optimal-result cases can encourage misguided judges to adhere in what are actually *suboptimal*-result cases.

In light of the apparent parity between deviation and adherence, so far, how might one defend a presumption in favor of adherence? One might conjecture that the probability that a deviant decision will induce deviation in optimal-result cases is greater than the probability that an adherent decision will induce adherence in suboptimal-result cases. But I see no reason to accept this conjecture.

Instead, I suggest appealing to the fact that parties can plan for judicial adherence in suboptimal-result cases more effectively than they can plan for judicial deviation in optimal-result cases. Adherence in a suboptimal-result case is suboptimal, overall, but at least it does not frustrate the loser's reasonable expectations. Whereas, deviation in an optimal-result case is suboptimal, overall, and *also* frustrates the loser's expectations. Therefore, insofar as deviation encourages deviation in optimal-result cases, systematic reasons favor adherence over deviation,

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adequate notice when the law will not be applied. These are important values. Deviation hinders our efforts to plan and coordinate. It causes undesirable adaptation. Schauer 1991, pp. 137-45

<sup>14</sup>The most direct form of imitation occurs when judges treat a previous decision as having some degree of precedential force in similar cases, leading them to render similar decisions in cases they adjudge similar to the precedent case. They may do this even if the original judge had no intention of setting precedent. However, it is important to recognize that imitation is not limited to following precedent in similar cases. A judge's choice to deviate or adhere can influence judges in entirely unrelated areas of law, by affecting their general sense of how acceptable deviation is considered to be in their legal system. Therefore, my discussion of imitation is not limited to following precedent, as lawyers understand it.

even in suboptimal-result cases. This argument does not depend on the dubious premise that the extent to which deviation encourages deviation in optimal-result cases is greater than the extent to which adherence encourages adherence in suboptimal-result cases.

### **The Objection from Magnitude**

I believe that systemic effects provide the most important reasons for judges to adhere to the law in suboptimal-result cases. However, I must confront some objections to this thesis. One objection concerns the fact that a single deviant decision typically has no perceptible systemic effects. Only in extraordinary cases will there be a non-party who is adversely affected by a deviant decision, *as such*. The causal relations between a deviant decision and its systemic effects are *diffuse*, rather than concentrated.

If an action has no perceptible effects, then its effects can't constitute reasons for or against performing it. This fact is especially significant, for my purposes, because the immediate effects of an adherent decision are typically substantial, as compared to the systemic effects of a deviant decision. The judge who adheres to the law in a suboptimal-result case substantially disadvantages the losing party, and often other identifiable individuals. Of course, adherence also benefits the victorious party, but in suboptimal-result cases the winner almost always benefits *less* than the loser suffers. So the objection from the magnitude of systemic effects has great urgency for anyone who opposes a policy of consistent deviation in suboptimal-result cases, as do most writers on the subject.

### **Imperceptible Effects**

One response to the objection from magnitude involves accepting the existence and moral significance of *imperceptible harms*. One can then assert that a deviant decision inflicts imperceptible harm on the legal system as a whole, despite its lack of perceptible effects on

identified individuals. The classic hypothetical that motivates belief in the moral significance of imperceptible harms involves one hundred bandits, each of whom steals one hundred beans from hungry villagers. Each bandit steals one bean from each villager. No villager can detect the difference any given bandit makes to his lunch, yet we still think the bandits act immorally.<sup>15</sup> One way to explain this is to claim that each bandit causes imperceptible harm, and that doing so is wrongful.

Analogously, one could argue that a deviant decision inflicts imperceptible harm on the legal system. True, the judge's decision does not directly provoke any subsequent act of unwarranted deviation, or other identifiable adaptation. This is to say that her decision inflicts no *perceptible* harm. Nonetheless, she inflicts imperceptible harm by contributing to a judicial climate and culture in which unwarranted deviation is more likely.

However, many have argued that assigning moral significance to imperceptible harms entails various Repugnant Conclusions, discussed at length by Derek Parfit and others.<sup>16</sup> I'm not sure these objections to the moral significance of imperceptible harms are conclusive, but they worry me enough to motivate me to look elsewhere.

### **Triggering Risks**

A second way to respond to the objection from magnitude is to treat each deviant decision as imposing a *risk* of substantial harm. Judge Karl learns about a deviant decision by Judge Jack, whom Karl greatly admires. Thereafter, Karl has to decide a case which he believes, erroneously, to be a suboptimal-result case. We need not assume that Karl's case falls in the same area of law as Jack's. The two cases could fall in totally unrelated departments. Remembering Jack's deviant decision, or subconsciously aware of it, Karl is encouraged to

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<sup>15</sup>Cite Glover

<sup>16</sup>Parfit on repugnant conclusions



deviate, and he does so. Perhaps Jack's decision reduces Karl's sense of how disreputable deviation is considered to be in his legal system, just to the point at which he summons his resolve to deviate. Had Jack adhered, so would have Karl. Jack's deviation is thus decisive for Karl. It is a *trigger*.

Any deviant decision could, potentially, function as a trigger. However, very few deviant decisions directly cause subsequent deviation in optimal-result cases. Any given deviant decision runs only a *miniscule* triggering risk.

How should we evaluate actions that impose miniscule triggering risks? Suppose Dan cuts a tiny slit in a bag of pretzels on a supermarket shelf and inserts a single peanut, without its shell. There's a small chance that someone with a severe peanut allergy will eat it and die. If this happens, then Dan's act is an unjustifiable homicide. It is, objectively, extremely immoral. (Cutting little slits in pretzel bags at the market is also wrong in itself, but it is a rather trivial offense, whatever those of us who hate stale pretzels might think.)

If no allergic person eats the peanut, then Dan's act has no *effects* that make it objectively immoral, but it might have other immoral aspects, because it runs a *risk*. There are various theories for assessing actions that run small risks: expected utility, maximin, disaster avoidance, et cetera. Some philosophers maintain that risks below a certain probability are morally irrelevant, however severe the risked harm. Others espouse principles which grant us a right not to have others expose us to risks of harm. They would claim that Dan violates the rights of allergic individuals whom he exposes to risk of death, and that Dan's act is objectively immoral, for this reason.<sup>17</sup>

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<sup>17</sup>The relevant literature includes papers by David McCarthy, Judith Jarvis Thomson, Peter Railton, Jules Coleman (1992), Kristin Shrader-Frechette, Shelly Kagan, Frank Jackson and Michael Smith, and Dennis McKerlie.

Analogously, a deviant decision in a suboptimal-result case runs a risk of provoking extremely unjust deviation in an optimal-result case. The risk is miniscule, but if we have a right not to be exposed to miniscule risks of harm, then judges have pro tanto moral reasons to adhere in suboptimal-result cases, despite the fact that a deviant decision in a suboptimal-result case rarely has harmful effects.<sup>18</sup>

### **The Relative Weakness of Adherence Reasons**

I have suggested that we can understand deviation either as inflicting imperceptible harm or as imposing triggering risks. Both of these theories are controversial, however, and I shall not attempt to defend either one. Either theory would allow me to assert that systemic effects give judges pro tanto reasons to adhere in suboptimal-result cases.

The important point is that these reasons are too weak to prevail in many suboptimal-result cases. It is easy to overlook this fact by concentrating on hypothetical scenarios in which the malefactor has no moral reason whatsoever to act as he does. The bandits have no moral reason to take the villagers' beans. Nor has the mischievous Dan any moral reason to hide that peanut. The puzzles arise because, even so, theories that hold the agent morally responsible only for harms he *causes* can't easily explain the immorality of these intuitively immoral actions. Embracing the moral significance of imperceptible harm and responsibility for risk-imposition at least allows one to condemn the bandits, and Dan, respectively. These malefactors lack even pro tanto moral reasons for their actions. But judges in suboptimal-result cases pose a much more difficult puzzle because they have strong pro tanto moral reasons to deviate. We are trying to explain why they might nevertheless have an all-things-considered moral reason to adhere.

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<sup>18</sup>David McCarthy 1996: pf's right not to be exposed to small risk gives dt reason to compensate pf; Thomson, other risk literature

Theories based on triggering risks or imperceptible harms provide reasons of the right *kind*, but these reasons are too weak to serve this purpose.

Consider, by analogy, the fact that administering a vaccination subjects the patient to a small risk of death. This risk gives the doctor a reason not to administer the vaccine, but this reason is weak. Of course, if the vaccine serves no medical purpose, then this weak reason becomes an all-things-considered reason not to administer it. But if the vaccine will reduce the risk of disease then the doctor has a pro tanto reason to administer it, which can override the opposing reason and generate an all-things-considered reason to do so.

Likewise, imagine that each bandit is a “Robin Hood” who steals a bean from one of a hundred wealthy villagers in order to contribute it to a food bank that saves much hungrier people in the next town from starvation. In that case, the imperceptible harm he inflicts may be outweighed by benefits to others.

Similarly, the negative effects of adherence, on the losing party and others, are often direct and substantial, in suboptimal-result cases. I suggest that the adherence reasons generated by systemic effects are rarely strong enough to override the judge’s natural duty to deviate, in these cases, so they don’t generate an all-things-considered reason to adhere.

### **Participation**

So, I’ve still not identified a reason to adhere that is strong enough to override or undermine the reason to deviate in some suboptimal-result cases. What we need, I think, is a theory of participatory reasons or complicity.

Suppose Judge Jack deviates consistently in suboptimal-result cases. If other judges also deviate consistently in such cases, then they participate in a collective practice of consistent deviation in suboptimal-result cases. One could argue that Judge Jack intentionally participates

in this collective enterprise. Is he therefore responsible for the effects of the enterprise, as a whole? He is, according to a moral principle defended recently by Christopher Kutz, called the Complicity Principle. The Complicity Principle holds that

one is accountable for what others do when one intentionally participates in the wrong they do or harm they cause. One is accountable for the harm or wrong that one does together with others, independently of the actual difference one makes.<sup>19</sup>

The Complicity Principle holds individuals accountable for driving a car that emits greenhouse gases in quantities too small to register, on the global scale. It also entails that a merchant acts immorally if he indifferently provides tools to criminals, even if the tools are widely available elsewhere. These actions make no difference to outcomes, but the Complicity Principle holds the agents accountable, nonetheless.

Similarly, the Complicity Principle links deviant decisions to the systemic effects of deviation patterns. If Judge Jack deviates in suboptimal-result cases, then he joins a collective enterprise with every other judge who deviates at least as often as he does. According to the Complicity Principle, he is accountable for more than the systemic effects of his individual contribution. He is accountable for the effects of the enterprise as a whole. Its effects give him reasons. An enterprise of frequent deviation in suboptimal-result cases encourages misguided judges to deviate in some optimal-result cases. According to the Complicity Principle, Jack is responsible for the unjustified deviation caused by this enterprise, even though he never deviates, himself, in optimal-result cases, and he contributes only minimally to the enterprise that causes other judges to deviate, unjustifiably. The reasons generated by the effects of this enterprise may be strong enough to override the pro tanto reason to deviate generated by Jack's other natural duties, the ones that require him to reach morally optimal results.

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<sup>19</sup>Kutz, p. 122.

## Free Riding

My application of the Complicity Principle remains incomplete, however. Suppose the aggregate level of deviation in Jack's legal system is so low that there is no collective harm in which Jack participates. Is it wrong, nevertheless, for Jack to deviate more frequently than his fellow judges do, in suboptimal-result cases?

Following Kutz, I suggest that Jack engages in an unusual form of free-riding, in this scenario. The most familiar forms of free-riding involve tangible benefits and disadvantages, as when collective labor produces a non-excludable resource. But the structure of free-riding also applies to intangible benefits and disadvantages. Someone who desires to act morally benefits when she satisfies this rational desire. Conversely, she suffers when she performs a pro tanto impermissible action. Performing an action that is pro tanto impermissible is worse for her than performing an action that is not even pro tanto impermissible, even if the former action is all-things-considered permissible.

By deviating consistently in suboptimal-result cases, Judge Jack avoids directly inflicting unjustified disadvantages on legally disfavored parties. He keeps his "hands clean," as the expression goes. However, as we have just seen, if other judges were to follow Jack's policy, then he would become complicit in a harmful collective practice of consistent deviation in suboptimal-result cases. If, by contrast, the other judges adhere in suboptimal-result cases, then they thereby inflict unjustified disadvantages themselves. Therefore, it is only because other judges generally adhere, in suboptimal-result cases, that Jack has the option of deviation *without* the taint of complicity.<sup>20</sup> He rides free on judges who deviate less frequently than he. Jack wipes his hands clean, but he wipes them on the hands of his fellow judges.<sup>21</sup>

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<sup>20</sup>He cannot universalize the maxim, "I will deviate in all suboptimal-result cases."

<sup>21</sup>Cite McMahon 2002

I suggest that, when pro tanto impermissible actions must be performed, there is a reason to distribute these actions evenly across agents who are disadvantaged by performing them, just as with any other unpleasant task that must be performed.

A judge who deviates less than consistently in suboptimal-result cases inflicts unjustified disadvantages when she adheres. But one who deviates consistently in suboptimal-result cases is either *complicit* in the harm of excessive collective deviation, if others also deviate excessively, or else she *rides free* on judges who deviate less frequently than she. If wrongdoing must be done, then it should be distributed as evenly as possible across moral agents.

Therefore, Jack has a strong reason not to follow a policy of consistent deviation in suboptimal-result cases, regardless of how other judges act. If they deviate consistently, then Jack has a strong reason not to do so, in order to avoid complicity. If they don't deviate consistently, then Jack still has a strong reason not to do so, in order to avoid free riding.

I can now explain the moral difference between the judicial oath and Bruce's oath to kick his dog. When Jack takes the oath, he becomes a participant in the collective judicial enterprise. As such, he is now someone whose deviant decisions participate in a decision pattern that has negative systemic effects, or else he rides free on other judges. To this extent, his oath constitutes a reason for him to adhere, but it does so only in virtue of making him a participant in the judicial enterprise. This is the condition that enables his oath to constitute a reason to adhere to the law.

By contrast, Bruce's oath does not transform him into a participant in any collective enterprise. If he breaks his oath by failing to kick his dog, his failure does not contribute to an enterprise with negative systemic effects. Therefore, Bruce's oath gives him no reason to kick his dog.

## Conclusions

Let's recapitulate my discussion. The oath of office gives judges a pro tanto moral duty to obey certain adjudication rules. These rules give judges a legal duty to apply the law correctly. Therefore, judges sometimes have a pro tanto moral duty to adhere to the law in their decisions. But the oath generates this duty only in optimal-result cases. In suboptimal-result cases, neither the oath, nor the reliance of parties, nor any other retrospective consideration gives judges a moral duty to adhere to the law. However, there is a prospective argument for a duty to adhere in suboptimal-result cases: the argument from systemic effects. The next problem is that the systemic effects of a single deviant decision are imperceptible. We could solve this problem by accepting the moral significance of either imperceptible effects or triggering risks.

Even then, the adherence reasons generated by the systemic effects of one deviant decision remain too weak to override a judge's moral reasons for deviation in many suboptimal-result cases. To solve this problem, we could accept something like the Complicity Principle, holding each judge morally accountable for the substantial negative effects of a deviation pattern to which she makes an insubstantial contribution. We could add a principle of fair play that forbids each judge from engaging in more than her fair share of deviation, even if her individual decisions participate in no prevailing pattern of excessive deviation. If we are willing to accept these principles, then we can make the case that judges have a moral duty to adhere to the law, even in suboptimal-result cases. This conclusion matches our pretheoretical opinions.

However, it is important to remember that the duty thereby defended is still only a pro tanto duty. It can be overridden or undermined. I shall conclude by saying something about the conditions that defeat this duty, and those under which judges have an all-things-considered duty to adhere.

Many writers on adjudication accept that the judicial adherence duty is not absolute. They agree, for example, that judges in extremely unjust legal systems don't have an all-things-considered moral duty to apply extremely unjust laws. A judge in a brutal dictatorship has no all-things-considered moral duty to apply a statute that mandates sentencing political dissidents to hard labor. However, most writers assure us that neither our legal system nor our laws are extremely unjust. They summarily conclude that our judges have an all-things-considered duty to apply our laws. Although our laws often require results that are moderately suboptimal, from a moral point of view, most writers insist that judges are obligated to reach these results, unless they are extremely suboptimal.

My arguments challenge the principle that judges must not deviate in order to avoid results that are only moderately suboptimal, but not extremely so. The defense of this principle presupposes that an agent is only morally responsible for the direct causal effects of his actions. A judge who sentences a dissident to hard labor, for example, directly causes the dissident's undeserved misery, so the judge has a strong moral reason not to inflict it. By contrast, a moderately suboptimal result may not be suboptimal *enough* to override the judge's moral reason to adhere, if judges are only responsible for the direct causal effects of their decisions.

However, I've already explained why no one who opposes a policy of consistent judicial deviation in suboptimal-result cases can accept moral principles that limit judicial accountability to direct causal effects. An act of deviation in a suboptimal-result case has no direct causal effects on anyone that are more negative than the effects of adherence would have been on the legally disfavored party. Judges have a pro tanto reason to adhere, nevertheless, because deviation constitutes participation in a collective enterprise that is wrongful, in virtue of its systemic effects.



I'd now argue that, just as we must look beyond the direct causal effects of deviation, so we must look beyond the causal effects of adherence. We must consider the impact of any collective enterprises in which an act of adherence participates. Suppose the judges in Jack's legal system adhere too often in moderately suboptimal-result cases: they form an enterprise that induces future judges to adhere, mistakenly, in extremely suboptimal-result cases, with very bad results. If Jack also adheres too often in moderately suboptimal-result cases, then he participates in this enterprise, and is responsible for future judges' unwarranted adherence in extremely suboptimal-result cases, according to the Complicity Principle. Therefore, Jack has an all-things-considered obligation not to participate in collective enterprises involving excessive adherence to the law.

Also note that, if Jack adheres more often than he is required to, in moderately suboptimal-result cases, and others adhere less often than he does, then they ride free on him. Jack has no all-things-considered obligation to submit to such free riding by others. Therefore, he has no all-things-considered obligation to follow a policy of excessive adherence in moderately suboptimal-result cases, whatever other judges do.

Accordingly, I reach two conclusions. Judges aren't permitted to deviate in too many cases, but neither are they obligated, all-things-considered, to adhere in all cases in which the law dictates results that are even moderately suboptimal.

So what policy should judges adopt for suboptimal-result cases? All I have time to say today is that they should neither adhere consistently, nor deviate consistently, in such cases. Each judge should deviate no more frequently than her fellow judges could justifiably deviate. This is the threshold at which any additional deviation by all the judges of her caliber would cause inferior judges to deviate in too many optimal-result cases.

What emerges is a new picture of the practical reasons that judges have in reasonably just legal systems. First, my picture entails that the factors that determine whether a judge has an all-things-considered reason to deviate in a suboptimal-result case are much more complicated than the tradition recognizes. These factors aren't limited to the magnitude of the injustice that the judge could avoid by deviating. They include systemic factors that have nothing to do with the case at hand, such as the overall level of deviation in the system.

More importantly, the traditional picture depicts reasons for adherence as overriding reasons for deviation in all but the most extreme cases of unjust laws in unjust systems. I've depicted a much closer competition between reasons to adhere and reasons to deviate. Judicial deviation from the law on moral grounds may be morally permissible, even in legal systems such as ours, that are morally superior to many the world has known, but still far from perfect.