

**Rules that Bend without Breaking**

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## I.

In the State of Bernstein, operating a motor vehicle on a suspended license is a misdemeanor, punishable by permanent loss of one's license. Officer Krupke arrests everyone who does this, as Tony has. But Tony says, "Gee, Officer Krupke, can't you *bend the rules*? I went to your high school, you know."

Tony's using a euphemism. He's really asking Krupke to *break* the rules. Is there, however, a non-euphemistic way to bend a rule of law, without breaking it? More precisely, can we ever bend a rule while still applying it, in some sense, or is this just doubletalk?

Consider the case of Maria, whose driver's license has also been suspended. Maria lives with her mother in a remote area, twenty miles from the nearest doctor. Maria's mother comes down with a fever of one hundred two. It's not life-threatening, but Maria wants to spare her mother suffering and hasten recovery, so she drives to the hospital herself, rather than waiting for an ambulance to make the trip out and back.

Unfortunately for Maria, the statute contains no applicable exception. I stipulate that this statute is not unjust or otherwise defective, as written. Suppose there are conclusive reasons for legislators not to complicate the statute with exceptions broad enough to cover cases such as Maria's. Writing such exceptions would encourage sub-optimal misapplication of the exception by judges and sub-optimal misconduct by legal subjects who would anticipate (rightly or not) judicial misapplication of the statutory exception.

Nevertheless, most will agree that Maria has strong reasons to act as she does. Rare is the writer who insists that rules of law trump all other reasons that bear on legal subjects. Some will insist that we give Maria's mother a condition more life-threatening before they'll assent,

but that's a detail. The point is that a "gap" exists between what legal rules the legislator has reason to prescribe and what legal subjects have reason to do, all things considered.<sup>1</sup>

Gap cases have increasingly captivated philosophers of law in recent years.<sup>2</sup> In the theory of adjudication, controversy surrounds whether public officials have conclusive practical reasons to *enforce* rules in gap cases. But the more basic question concerns theories of legal reasoning, so I'll focus on these.

We can classify theories of legal reasoning with respect to their differing positions on the rational or epistemic permissibility of bending the rules in gap cases. *Deviationists* hold that, in at least some gap cases, agents are rationally permitted to bend the rules, though deviationists disagree amongst themselves regarding reasons for deviation.<sup>3</sup> *Anti-deviationists* hold that agents are rationally forbidden to bend the rules in all gap cases, so they insist that Maria breaks the law when she drives her mother to the hospital.<sup>4</sup> At least some deviationists disagree.<sup>5</sup>

In this paper I evaluate some major anti-deviationist arguments. I present a new deviationist theory of legal reasoning and argue that existing objections don't apply to it. I suggest that previous writers have neglected this position because they fail to make their theories of inferential reason as sophisticated as theories of practical reason can be.

## II.

Anti-deviationism is implicit in the pioneering work of Joseph Raz.<sup>6</sup> Raz treats rules as *exclusionary reasons*, which are second-order reasons not to consider certain first-order reasons. Raz argues that legal rules are preemptory exclusionary reasons. Absent the statute, the fact that Maria's driving spares her mother unnecessary suffering might constitute a reason not to classify Maria's driving as illegal. According to Raz, however, the statute gives us a preemptory reason not even to consider this reason in assigning legal consequences to Maria's driving.<sup>7</sup>

Likewise, in their recent book, Larry Alexander and Emily Sherwin defend what they call “serious rules.” These are “prescriptions to be followed in all cases that fall within their terms, without further consideration of the reasons that led [the lawgiver] to issue them.”<sup>8</sup>

Frederick Schauer takes a similar position, though he permits a bit more deviation than do Alexander and Sherwin or Raz. He allows legal reasoners to take a “peek” or “glimpse” behind a rule in order to see whether this case is one in which “the result it indicates is egregiously at odds with the result that is indicated by this larger and more morally acceptable set of values.”<sup>9</sup> Schauer also claims, distinctively, that the reason for serious rules is the allocation of decisional jurisdiction, not the reduction of uncertainty.<sup>10</sup> He argues that we have reason to want legislatures, not judges, to make certain kinds of decisions, regardless of epistemic considerations.

However we defend it, anti-deviationism entails unwelcome legal conclusions in gap cases.<sup>11</sup> The main alternative is *particularism*, which permits agents to reexamine the background reasons for having a rule in the process of deciding whether to bend it. The only potentially viable form of particularism is *rule-sensitive particularism*, which requires agents to include, among their reasons, “the value of having a rule and the harm their failure to comply might cause to the value of the rule.”<sup>12</sup> Given familiar defects of human rationality, deviation in gap cases will, to some small extent, encourage others to deviate in non-gap cases. The agent must weigh the harm her deviation would do to the rule against the harm that will occur if she follows the rule.

Critics argue that rule-sensitive particularism (which I’ll just call “particularism”) either collapses into anti-deviationism or proves self-defeating. Alexander and Sherwin argue that

considering the values behind a rule, as particularism permits, reintroduces the uncertainty and controversy that rules are designed to resolve.<sup>13</sup>

Here's one way to understand Alexander and Sherwin's point, though this isn't how they present it. The reason particularism is self-defeating is that any given act of deviation will have only the most miniscule tendency to encourage others to deviate in non-gap cases. We can't point to any individual whom Maria's driving harms as much as it benefits her mother. The harm of fidelity to rules in any one gap case usually outweighs the harm that one could directly trace back to the act of deviation in that case. However, the cumulative effect of deviation in many gap cases is to encourage others to engage in widespread deviation in non-gap cases.

Although Alexander and Sherwin don't make the connection, we have here a case of "imperceptible effects," much discussed since Derek Parfit's classic treatment.<sup>14</sup> To recall Parfit's example, no one of the Harmless Torturers causes any suffering although jointly they cause a lot of it. Act-consequentialism fails to condemn the Torturers. Similarly, particularism fails to condemn sub-optimal levels of deviation. This just reflects its incorporation of act-consequentialist reasoning.

One might wonder why the critics don't consider more sophisticated versions of particularism, corresponding to more sophisticated theories of practical reason. Consider, for example, a version of rule consequentialism stating that

an act is wrong if and only if and only if it is forbidden by the code of rules whose internalization by the overwhelming majority . . . has maximum expected value . . . .<sup>15</sup>

Codes that forbid harmless torture have higher expected value, *ceteris paribus*, than those that permit it. Hence, rule consequentialism can condemn the Harmless Torturers (whatever other problems it may have).

Shifting to indirect consequentialism is a step in the right direction for particularism, but it's a step too far. Just as rule consequentialism forbids all harmless torture, a version of particularism that incorporates rule consequentialism will forbid deviation in all gap cases. Codes that forbid deviation have a higher expected value, *ceteris paribus*, than those that permit it. So a version of particularism that substitutes rule for act consequentialism turns out to be no particularism at all.

### III.

To carve out a coherent position in between particularism, as described so far, and anti-deviationism, we must modify particularism in a second way. Instead of defining reasons for deviation exclusively in terms of expected harm, we should define them in terms of a new concept, the *deviation density threshold*.<sup>16</sup> Consider any region of space and time containing a legal system, such as Connecticut from 1990 to 1999. Compute the *deviation density* of that spatiotemporally delimited legal system as the fraction of cases in which deviation occurs, relative to the total number of cases heard in that system, and weighted, perhaps, by the average degree of deviation per case. Then define the deviation density threshold as the point of diminishing marginal returns: the level of deviation density such that any increase in density is expected to produce additional deviation in non-gap cases without additional benefits sufficient to compensate.

In simple form, *responsible particularism* comprises the following meta-legal rule:

In gap cases, deviation is rationally permissible if and only if deviation is permitted in such circumstances (where these include the system's expected deviation density) by a code whose internalization by the overwhelming majority is compatible with sub-threshold deviation density.

So responsible particularism differs from primitive particularism in two respects. First, it makes the permissibility of deviation turn on generalized hypothetical effects, not actual effects.

Secondly, the effects which responsible particularism considers directly relevant concern the deviation density of the system, not the immediate harm caused by an instance of deviation.

#### IV.

So what are legal rules, for responsible particularists? They're neither serious rules nor mere rules of thumb, but something in between, which doesn't have an established name. To be highly metaphorical, I'd call them *solar rules*. They function as fixed points in the space of reasons around which deviant legal conclusions *orbit* at varying distances. A solar rule fixes the point of zero deviation and exerts "gravitational force" on legal conclusions from that point. Solar rules demand more than the mere consultation we give to rules of thumb, but less than the total disregard of background justifications demanded by serious rules.

#### V.

Recent arguments against particularism don't apply to the responsible version. Alexander and Sherwin argue that we can't narrow the gap without sacrificing the unique virtues of serious rules.<sup>17</sup> Now we can see why they're mistaken. If we accept responsible particularism then rules can do what serious rules are supposed to do, without being serious. This is possible so long as the fact that a certain decision would constitute deviation plays a deliberative role, even if that role isn't to prohibit the deviant decision. Alexander and Sherwin insist that reopening background normative issues reintroduces the uncertainty and controversy the rule was designed to resolve. That would be the case if agents reopened the moral issues for the purpose of reconsidering the rule itself. But responsible particularism doesn't direct agents to reconsider rules themselves. It doesn't authorize them to announce "this rule is invalid." Rather, it has them consider what legal conclusion to reach *in this case*. When the agent reopens a moral issue which the legal rule resolves she doesn't do this for the purpose of ascertaining whether

refusal to bend the rule would constitute deviation. Rather, she reopens the issue for the purpose of ascertaining whether she has reason to deviate. Moreover, she has *indexical* information that the rule-framers didn't have: information about the proximity of her legal system to the deviation density threshold. If she chooses to deviate, the fact that she's done so must still factor into her deliberative economy, according to responsible particularism. So the rule doesn't become superfluous just because agents reexamine background normative questions, as Alexander and Sherwin seem to believe. The rule remains relevant as the calibration point by reference to which the fact and extent of deviation is computed. Whereas, Alexander and Sherwin make it seem as though, if one reopens the moral issue and decides to deviate, one's deliberations thereafter are no different than they would have been had the rule itself dictated one's decision. This needn't be the case.

Alexander and Sherwin assert that "particularism in regard to coordination rules narrows the gap only when most people avoid particularism and treat legal rules as serious rules."<sup>18</sup> This may be true regarding primitive particularism. But responsible particularists do treat the *meta-legal* rule as a serious rule, and that's enough. They needn't treat *legal* rules as serious rules in order to narrow the gap. Responsible particularism narrows the gap if most people adopt responsible particularism.

## VI.

Responsible particularism also meets Schauer's concerns. Schauer may be correct that we have non-instrumental reasons for legislatures, not judges, to decide what the content of rules will be. But I don't think our preferences concerning decisional jurisdiction really trump all competing values. Perhaps they would if the only alternative to total allocation to the legislature of decisions concerning both the content of rules and permissible deviation patterns were total



allocation to the *judiciary* of all these decisions. In fact, the possibility of responsible particularism reveals this as a false dichotomy.

True, we want the legislature to *make* rules of law. But we don't necessarily want the legislature to have total jurisdiction to define the general function of rules. Schauer effectively gives legislatures both roles, without distinguishing them. The function of rules isn't necessarily "to be followed." Nor does the judiciary usurp legislative function when it deviates, so long as the judiciary as a whole responsibly monitors its own deviation patterns. A judge usurps legislative function only if she acts in either of two ways. Either she transgresses the deviation density threshold, or she literally rewrites the rules, thereby contradicting the legislature's pronouncements concerning what *constitutes* deviation. Perhaps we should, indeed, give the legislature absolute jurisdiction with respect to formulating rules.<sup>19</sup> But the legislature should have only partial jurisdiction with respect to determining permissible deviation patterns.

## VII.

Why have premier philosophers of law failed to entertain the conceptual space between anti-deviationism and primitive particularism? I'll now offer a diagnosis. Most of these philosophers accept what I'll call *internalism* with respect to legal rules.<sup>20</sup> Internalism states that if a rule is legally valid then reasoners have at least prima facie reasons<sup>21</sup> to follow the rule in every token of every case type to which the rule applies.<sup>22</sup> Suppose Bill and Amy commit crimes in legally identical circumstances. Internalism states that the applicable rule of law provides reasoners with at least prima facie reasons in both Bill's and Amy's cases. But internalism doesn't imply that the reasons in one of these case tokens are equal in strength to those in the other token. For all that internalism says, the reason to infer a legal conclusion in Amy's case

may be stronger or weaker than the reason to infer the isomorphic conclusion in Bill's case, even though the legally relevant intrinsic facts are identical.

By contrast, *redundancy* is a species of internalism which states that if a rule is valid then, for every case type to which the rule applies, in every token of that type, legal reasoners have epistemic reasons (at least *prima facie*) of equal strength to follow the rule in that case. Redundancy entails that if a rule is valid then reasoners have a reason to infer a conclusion in Amy's case, and a reason *of the very same strength* to infer the isomorphic conclusion in Bill's case. Neither of these reasons is necessarily preemptive, but they have equal strength, however strong they may be.

I think legal philosophers fail to see the conceptual space for responsible particularism because they unreflectively accept redundancy, not just internalism. Perhaps they assume that rejecting redundancy entails rejecting internalism, as pure (non-rule-sensitive) particularists and radical rule-skeptics do. It doesn't. Redundancy implies internalism, but not vice versa. They're conceptually distinct theses. When philosophers fail to recognize this they artificially constrict the conceptual options and overstate the case for anti-deviationism.

## VIII.

Responsible particularism incorporates a form of rule consequentialism. Rule consequentialism may have its own difficulties. Deep philosophical questions remain about how a rule can give a rational agent reasons for belief or action in circumstances in which she understands that such belief or action will be sub-optimal. But I think those are difficulties which the anti-deviationists occupy an untenable dialectical position to press on me.<sup>23</sup> The anti-deviationists, of all people, can't coherently deny that, somehow, rules manage to provide reasons. So they're in no position to resist an alternative theory simply because it, too, makes

this undefended and controversial assumption about reasoning in general. If legal rules can provide reasons, then so can meta-legal rules such as the one advocated by responsible particularism.

However, my arguments thus far suggest a kernel of truth in anti-deviationism. Anti-deviationists may be correct that agents must treat a certain rule as a serious rule, on pain of ultimate self-defeat for the legal system. But anti-deviationists mistakenly identify *first-order legal rules themselves* as serious rules. This isn't the only option. Perhaps reasoners must treat the meta-legal rule as a serious rule. Perhaps they can't be particularists of any stripe with respect to *this* rule. After all, looking behind a rule only makes sense if there's some hope of doing good by deviating from it. From the individual perspective, there's no higher purpose to be served by deviating from the meta-legal rule. So the anti-deviationists are correct that agents can't be particularists at the ultimate level. But agents can be (responsible) particularists at a derivative level. This is very different from treating legal rules themselves as serious.

## IX.

I conclude with a caveat. Many other considerations which I have not discussed bear on the rational permissibility of deviation. The most interesting objections to responsible particularism would challenge its imbedded rule consequentialism from the standpoint of deontology or virtue ethics. I consider these objections at length elsewhere.

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<sup>1</sup>Larry Alexander coins the term in "The Gap," *Harvard Journal of Law and Public Policy* 14 (1991): 695-701.

<sup>2</sup>See, e.g., Larry Alexander & Emily Sherwin, *The Rule of Rules* (Durham, NC: Duke University Press, 2001), ch. 4; Heidi Hurd, *Moral Combat* (Cambridge: Cambridge University Press 1999), esp. pp. 186-91; David Lyons, "Derivability, Defensibility, and the Justification of Judicial Decisions" in *Moral Aspects of Legal Theory* (Cambridge: Cambridge University Press, 1993), pp. 119-40, 128; Anthony D'Amato, "On the Connection Between Law and Justice," *University of California Davis Law Review* 26 (1993): 527; Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991), pp. 223-26; Larry Alexander, "Law and Exclusionary Reasons," *Philosophical Topics* 18 (1990): 5-22; Rolf Sartorius, *Individual Conduct and Social Norms* (Encino, CA: Dickenson Publishing Co., Inc., 1975).

<sup>3</sup>Compare Alan H. Goldman, *Practical Rules: When We Need Them and When We Don't* (Cambridge: Cambridge University Press, 2001); Hurd, *Moral Combat*; Schauer, *Playing by the Rules*; Donald H. Regan, "Authority and

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Value: Reflections on Raz's *Morality of Freedom*," *Southern California Law Review* 62 (1989): 995-1095; Stephen R. Perry, "Second-Order Reasons, Uncertainty and Legal Theory," *Southern California Law Review* 62 (1989): 913-94; Moore, "Three Concepts of Rules"; Chaim Gans, "Mandatory Rules and Exclusionary Reasons," *Philosophia* 15 (1986): 373-94; M.J. Detmold, *The Unity of Law and Morality: A Refutation of Legal Positivism* (London: Routledge & Kegan Paul, 1984). See also Gerald Postema's reading of Bentham in *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986).

<sup>4</sup>Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979); Andrei Marmor, *Positive Law and Objective Values* (Oxford: Clarendon Press, 2001); Alexander & Sherwin, *The Rule of Rules*; Lyons, "Derivability, Defensibility, and Judicial Decisions."

<sup>5</sup>Anti-deviationists don't necessarily oppose deviation at the level of adjudication. For example, one can hold that Maria broke the law while denying that judges have an ethical obligation to convict her.

<sup>6</sup>See, e.g., Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1990); *The Authority of Law*; "Authority, Law, and Morality" in *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994).

<sup>7</sup>Raz usually applies his theory to practical reasoning, i.e. subject guidance and adjudication. However, legal rules constitute both practical and theoretical reasons. It is therefore reasonable to infer that, if rules generate exclusionary practical reasons, they generate exclusionary theoretical reasons, as well. This is not to suggest that anyone is morally obligated to obey exclusionary theoretical reasons, any more than one is morally obligated to engage in correct arithmetic reasoning. See Moore, "Three Concepts of Rules."

<sup>8</sup>Alexander & Sherwin, *The Rule of Rules*, p. 53. Alexander and Sherwin agree with Raz that it would be impersonally desirable for society to treat rules of law as serious rules. Unlike Raz, however, Alexander and Sherwin deny that following serious rules is individually rational. They leave this at the level of an irresolvable paradox.

<sup>9</sup>Schauer, *Playing by the Rules*, p. 205.

<sup>10</sup>Schauer, *Playing by the Rules*, pp. 158-62.

<sup>11</sup>One could avoid actually rescinding Maria's license by combining anti-deviationism with a more deviationist theory of adjudication, but I'm sure what the point of the anti-deviationism would be, in that case.

<sup>12</sup>Alexander & Sherwin, *The Rule of Rules*, p. 61. This distinguishes rule-sensitive particularism from what Schauer calls "pure particularism" in *Playing by the Rules*, p. 97.

<sup>13</sup>Alexander & Sherwin, *The Rule of Rules*, pp. 61-68.

<sup>14</sup>Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984), p. 31. Two who make this connection are Hurd, *Moral Combat*, p. 300 n.1 and George Klosko, "Parfit's Moral Arithmetic and the Obligation to Obey the Law," *Canadian Journal of Philosophy* 20 (1990): 191-214.

<sup>15</sup>Adapted from Brad Hooker, *Ideal Code, Real World: A Rule-Consequentialist Theory of Morality* (Oxford: Clarendon Press, 2000), p. 32.

<sup>16</sup>David Lyons uses the term "density" similarly in *Forms and Limits of Utilitarianism* (Oxford: Clarendon Press, 1965), p. 72.

<sup>17</sup>Alexander & Sherwin, *The Rule of Rules*, p. 61.

<sup>18</sup>Alexander & Sherwin, *The Rule of Rules*, p. 67.

<sup>19</sup>Of course, common law courts function in a legislative capacity, creating rules of law, too, but legislatures can always override these by statute, rather than acquiescing in them. So ultimately legislatures have absolute jurisdiction to create rules.

<sup>20</sup>We could further distinguish between "existence" and "judgment" internalism. See Stephen Darwall, *Impartial Reason* (Ithaca, NY: Cornell University Press, 1983), pp. 54-55.

<sup>21</sup>These are epistemic reasons, reasons for belief and inference.

<sup>22</sup>Raz calls these "regulated cases." *The Authority of Law*, p. 181.

<sup>23</sup>Alexander himself is sympathetic to indirect consequentialism. See Larry Alexander, "Pursuing the Good-Indirectly," *Ethics* 95 (1985): 315-332.