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DIREITO E POLÍTICA: QUAL É A SUA RELAÇÃO?

LARRY ALEXANDER

University of San Diego School of Law

5998 Alcala Park, San Diego

CA 92110, EUA

larrya@sandiego.edu

Abstract: In this paper I distinguish politics—deciding what a group should do based on first-order practical reasons—and law, the norms those in the group with authority have decided should obligate those to whom the norms are addressed. I further elaborate on the distinction between rules and standards, the desirability of rules, the nature of legal interpretation, and “the gap” between what the legal rules may require and what all-things-considered a rule-subject should do.

Resumo: Neste artigo, procuro distinguir política — decidindo aquilo que um grupo deve fazer com base em razões práticas de primeira ordem — e direito, as normas que aqueles que fazem parte do grupo com autoridade decidiram que deveriam obrigar aqueles a quem as normas são dirigidas. Em seguida, tratei da distinção entre regras e *standards*, a conveniência das regras, a natureza da interpretação jurídica, e o “fosso” entre aquilo que as regras jurídicas podem exigir e aquilo que os destinatários de uma regra, tudo-considerado, devem fazer.

Keywords: politics; law; rules; standards; interpretation

Palavras-chave: política; direito; regras; standards; interpretação

That is the topic about which I have been invited to speak. As a professional matter, I'm afraid that although I know a few things about law, I know really nothing about politics. What I remember from my college courses in political science can be boiled down to the Harold Lasswell view that politics is about who gets what, when, and how.¹

So I come to this topic with a very limited toolkit. Nevertheless, I shall take out my hammer and see if I can turn the topic into some nails. My forte, if I have one, is taxonomy and analysis. Not exciting perhaps, but I hope clarifying. And clarity is, in this as in so many matters, a necessary pre-condition for wise policy, and confusion is a recipe for disaster.

I. Stipulations

I begin with some stipulations.

(1) Politics, as I shall be using the term, is the process of deciding what a group, or a part thereof, should do based on first-order practical reasons. First-order practical reasons are all-things-considered reasons, moral and prudential. Those reasons may dictate that a particular action should be taken (or omitted) by a particular actor in a particular situation. But they may also dictate that all or many actors should take (or omit) a particular action in a range of situations.

(2) Law, as I shall use the term, is those norms that, through the first-order practical reasoning of politics, those who have the authority to do so have decided should obligate those to whom those norms are addressed. Although it is perhaps not the only outcome of politics, it is the most significant outcome. The primary aim of politics is to produce the norms that are law.

(3) Legal norms can either be rules or standards. When they fully and relatively clearly determine what the law's subject should do in a range of situations, they are rules. When addressed by rules, law's subjects are supposed to do what the rules require rather than what they believe their first-order practical reason dictates that they do. When those norms do not fully determine what the law's subjects should do, but instead leave open a domain in which those subjects should follow the dictates of first-order practical reasoning, then those norms are to that extent standards.

(4) Why have rules at all? In other words, why not decide everything by means of first-order practical reasoning? Put differently, why is not our only law what I call the Spike Lee law: "Do the right thing."² The Spike Lee law is the queen of standards. Lesser standards are circumscribed by rules. But what is the problem with the Spike Lee standard? To repeat, why have rules at all?

1. HAROLD LASSWELL, *Politics: Who Gets What, When, How*, New York, 1936.

2. Spike Lee, *Do the Right Thing* (Universal Pictures, 1989).

The answer is obvious. When I ask my first-year law students this question in their very first law school class, they have no trouble coming up with the right answer. In a society such as ours, people cannot agree on what “the right thing” to do is. There are many reasons why they cannot. First, they differ about what the correct moral principles are. Second, even when they agree about moral principles at an abstract level, they disagree about how those principles apply. For they disagree about the factual matters on which correct applications of moral principles depend. And that means that at least some of the people, even if well motivated, will end up doing “the wrong thing.” Moreover, because of these disagreements, they cannot coordinate their actions with those of others, and the lack of coordination will produce huge moral costs from everyone’s perspective. Thus, settlement of what ought to be done is necessary to avert the moral costs of mistaken moral views, mistaken applications of correct moral views, and lack of coordination. And settlement is achieved by determinate rules. Even first-semester law students understand this when asked “Why not just the Spike Lee standard?”

(5) Having now discussed politics, law, legal norms as either rules or standards, and why rules are desirable, let me now turn to the topic of legal interpretation. Some believe that there is no one thing that interpretation is.³ And I agree that there are many things that can be called interpretation.

But we should not get hung up on the word. What we need to ask in the legal context is what is the proper approach by those subject to laws when questions arise regarding the meaning of those laws.⁴ That is the activity we should be interested in when the topic of legal interpretation is broached.

The important distinction here is between those to whom we have given the authority to determine what norms we should comply with—legislators—and those who are supposed to comply with the norms legislated by those with legislative authority. The latter group includes all the addressees of the laws, judges and ordinary citizens alike (as well as legislators in their capacity as ordinary citizens). But if judges and citizens are supposed to comply with the norms produced by those with the authority to produce them, then when those norms are promulgated and encoded in a text, judges and citizens are supposed to figure out what the norms are that the legislators encoded in that text. In other words, they are supposed to figure out what the intended meaning of that text is. Not just any meaning that the text might have were it authored by other than its actual authors or for purposes other than conveying what norms those with the authority to do so determined should govern. The legislators have decided upon such norms and have attempted to convey to the rest of us—judges and citizens alike—what those norms are in the only way possible, which is through symbols. The symbols are their code. And if we do not seek to determine what they meant by their code, then we will not ascertain what norms they intended for us. And

3. See, e.g., CASS R. SUNSTEIN, There is Nothing That Interpretation Just Is, *Constitutional Commentary*, 30, 2015, pp. 193 ff.

4. See LARRY ALEXANDER, Originalism, the Why and the What, *Fordham Law Review*, 82, 2013, pp. 539 ff.

that will be to deprive them of the legislative authority that we purported to give them. Instead, we will have transferred that authority to others or to some mindless process, such as the meanderings of linguistic usage. A text, untethered from the meaning its authors intended to convey by means of it, is just a set of marks or sounds that can mean anything whatsoever. But as the code chosen by its actual authors to communicate the meaning they intend, it means what they intended it to mean. Any other meaning attributed to it reduces its authors—in our case, legislators—to nothing more than producers of marks or sounds. They will not be producers of legal norms, and thus they will not be what they are supposed to be—legislators.

So legal interpretation, properly understood, is the attempt to ascertain the legal norms the legislators have chosen to govern us and that they have communicated to us through symbols. (How else could they communicate those norms to us? Through telepathy?)⁵ But one more thing about legal interpretation to keep in mind. When interpretation reveals that the enacted norm is a rule, the interpretive process continues to flesh out the rule's content. When, however, interpretation reveals that the enacted norm is a standard, the interpretive process is at an end. For fleshing out the standard's content is a matter of first-order practical reasoning, which is not interpretation. Rather, it is politics.

To this point I have been laying groundwork. I have introduced politics, law, rules, standards, and interpretation. And I have distinguished between following rules and first-order practical reasoning. With these things in mind, let us return to the overarching topic, the relation of law and politics. In my opinion, the most important aspect of that relation is one I have written about often. It's what my friend and occasional co-author Fred Schauer calls the "asymmetry of authority"⁶ and what I call "the gap."⁷ And both he and I believe it is the single most important and revealing prism through which to view legal phenomena.

What is "the gap," and why does it exist? Put succinctly, "the gap" is the difference between what rational legislators' first-order reasoning tells them they should require you to do and what your first-order reasoning tells you you should do. The gap arises because, as I have said, determinate rules are necessary to settle what should be done and thus avert the moral costs of uncertainty, disagreement, and lack of coordination. But rules settle by being relatively simple, blunt, and rigid. They cannot capture all of the nuance and complexity to which first-order practical reasoning will attend. Even if everyone had the same values, and even if the legislators did their job perfectly and enacted the ideal set of rules, those rules would often dictate acts that first-order practical reasoning would veto. In that case, we will face a dilemma. Our practical reasoning will tell us that the legislators' practical reasoning—politics—should lead the legislators to require

5. See LARRY ALEXANDER, *Telepathic Law*, *Constitutional Commentary*, 27, 2010, pp. 139.

6. See FREDERICH SHAUER, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision Making in Law and Life*, Oxford, 1991, pp. 128-34.

7. See LARRY ALEXANDER / EMIL SHERWIN, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law*, Durham, 2001, ch. 4; LARRY ALEXANDER, *The Gap*, *Harvard Journal of Law and Public Policy*, 14, 1991, pp. 695 ff.

us to follow rules that our practical reasoning tells us we should not follow. Our standards tell us we need to implement them through rules that our standards also tell us to disobey.

There is, I believe, no way to eliminate this gap. The problem is not that we are not angels. The problem is that we are not omniscient gods. Omniscient gods could live by standards alone. “Do the right thing” would be the only law they need. For even if they were not angels, they would know what is “the right thing” to do when someone disobeyed.

So we, who are not omniscient gods, need rules, but rules, even ideal rules, will prescribe conduct that our first-order practical reasons reject. To put it in its near paradoxical form, our first-order practical reasons dictate that we should have rules that dictate acts that our first-order practical reasons reject. Therein lies “the gap.”

I will briefly discuss the various strategies offered to close “the gap” and tell you why I believe they all fail. One strategy—what Fred Schauer calls presumptive positivism⁸—tells us to put a thumb on the scales in favor of what the rules prescribe. The problem is that, first, this only narrows but does not close “the gap,” and second, and more fundamentally, our first-order practical reason can give no weight to such a presumption.

A second strategy, found in the writings of Joseph Raz, is to treat rules as exclusionary reasons.⁹ Once a rule applies to us, we must not act on the reasons on which the rule is based. The problem is that although rules purport to exclude acting for the reasons that the rule is based on if such an action differs from what the rule prescribes, this just restates the problem of “the gap” rather than solves it.¹⁰ Or if it solves it, it does so by fiat.

A third strategy, one that looks more promising, is closing “the gap” by imposing sanctions on rule violators. The thought is that the prospect of sanctions will align the actor’s first-order reasons with what the rules require.

Unfortunately, this strategy, too, fails. For one thing, sanctions give actors prudential reasons to abide by rules. But they do not necessarily give actors moral reasons to do so. And if the sanctions are severe enough to turn the prudential reasons into moral reasons, they need judges who are willing to apply them to rule violators who the judges know acted on their first-order practical reasons and for that reason do not deserve punishment. Moreover, the judges themselves are subject to “the gap.” The rules requiring them to sanction rule-violators may conflict with the judges’ first-order practical reasons. And who will sanction the judges who follow their first-order reasons rather than the rules? Unless judges

8. See FREDERICK SCHAUER, Rules and the Rule of Law, *Harvard Journal of Law and Public Policy*, 14, 1991, pp. 645 ff.

9. See JOSEPH RAZ, *The Authority of Law*, Oxford, 1979, pp. 16-19.

10. See LARRY ALEXANDER, Law and Exclusionary Reasons, *Philosophical Topics*, 18, 1990, pp. 18 ff.

are automatons when it comes to sanctioning rule-violators, sanctions will not eliminate “the gap.”¹¹ (Jeffrey Brand-Ballard has an entire book on the problem of “the gap” as it applies to judges.¹² And I will at the end of this talk tell you of my own experience with judges’ confronting “the gap.”)

A fourth strategy is deception. That is, close “the gap” in favor of rule-following by deceiving the public into believing that the rules align with their first-order practical reasons.¹³ Make them into rule fetishists. This strategy is similar to what Bernard Williams called “government house utilitarianism,” a reference to the idea he ascribed to Britain’s colonial rulers that it would be more utilitarian to encourage the natives to abide by their local mores than to urge them to act as utilitarians.¹⁴ The strategy is also reflected in Hare’s two level utilitarianism, in which the “archangels” were conscious utilitarians and the “proles” were rule-followers, and in other two-level forms of consequentialism.¹⁵ But the problems with deceptive theories for closing “the gap” are how to control the deceivers and how to keep the deceived hermetically sealed off from the knowledge that the deceivers possess.

A fifth strategy is just to protest that it is unfair for individuals to arrogate to themselves the privilege to disobey rules that their community has decided should be enacted and instead to act on the verdicts of their own first-order practical reason.¹⁶ But if one’s first-order practical reason tells one that abiding by the rules is unfair or immoral, in what sense is departing from the rules unfair?

The final strategy, one that might seem promising, is what Schauer called “rule-sensitive particularism.”¹⁷ The rule-sensitive particularist acts on his first-order practical reasoning, but his first-order practical reason takes into account the value of having rules and the consequent disvalue of undermining the rules by flouting them—which occurs if one’s flouting the rules leads others to follow suit. This strategy will not eliminate “the gap;” one might flout the rule undetected, or one’s flouting the rules may not affect others’ behavior for other reasons. But it should narrow “the gap” considerably, or so it might appear.

The problem is that the rule-sensitive particularist narrows “the gap” in the direction of compliance with rules only if most others are *not* rule-sensitive particularists but are rule fetishists. For the value of the rules that goes into the rule-sensitive particularist’s calculus is highest when others are rule-followers.

11. See ALEXANDER / SHERWIN, *supra* note 7, at 77-86.

12. JEFFREY BRAND-BALLARD, *Limits of Legality: The Ethics of Lawless Judgment*, New York, 2010

13. See ALEXANDER / SHERWIN, *supra* note 7, at 86-91; LARRY ALEXANDER / EMILY SHERWIN, The Deceptive Nature of Rules, *University of Pennsylvania Law Review*, 142, 1994, pp. 1191 ff.

14. See BERNARD WILLIAMS, A Critique of Utilitarianism, in *Utilitarianism: For and Against*, edited by J.J.C. Smart / Bernard Williams, Cambridge, 1973, pp. 134-35.

15. See R. M. HARE, *Moral Thinking: Its Levels, Methods and Point*, Oxford, 1981, pp. 44-64.

16. See, e.g., ALAN GOLDMAN, The Rationality of Complying with Rules: Paradox Resolved, *Ethics*, 116, 2006, pp. 453 ff.

17. SCHAUER, *supra* note 8.

As more people become rule-sensitive particularists and are aware of that fact, the less value they will attach to the rules. And if everyone were a rule-sensitive particularist, the value of the rules would be zero in their first-order practical reasoning.¹⁸

So here's the upshot. If we equate first-order practical reasoning, the reasoning we engage in under standards or when deciding what rules to enact, with "politics," and equate rules with "law," then while politics may tell us we should have law, politics seems simultaneously to tell us that we really cannot have it. Law may be for us like the intention to drink the vile liquid in Kafka's Toxin Puzzle: It would be good to have it, but perhaps we really cannot, at least without deceiving ourselves.¹⁹

As I said, I think this gap between rules and first-order practical reasoning—between law and politics—is the most powerful prism through which to view legal phenomena. It can explain the fact that some judges prefer rules and some prefer standards—preferences frequently reflected in the opposition of the majority and the dissenters. It can explain changes in legal doctrines over time. When standards prevail, there is a movement to translate them into rules. But when rules prevail, there is a movement to wipe them away in favor of standards. This is a "grass is always greener" phenomenon because we want both the virtues of rules and the virtues of standards, and we cannot have them simultaneously.

I should add that "the gap" also explains our opposed reactions to bureaucrats. When they act under vague standards, we feel like Kafka's Joseph K.—totally at sea—and want to know what the rules are.²⁰ But when they act under rules and make no exceptions when first-order reasoning favors exceptions, they become caricatures in our eyes, soulless rule-following martinets. We want clear rules, except when we don't.

Finally, let me briefly relay the results of my experiment with judges and "the gap." I was on a panel at both the west coast and the east coast conferences of federal bankruptcy judges. There were about 150 judges in my panel's audience at each conference, and no judges in the audience at the first conference were in the audience at the second. Our panel gave the audience three vignettes involving clear bankruptcy rules and fact patterns in which application of those rules would seem terribly unfair to a party. We asked the judges to consider whether in those vignettes they would follow the rules or depart from them and do what appears fair. We precluded all other options, including novel reinterpretations of the facts, dissembling, resigning, and so forth. Interestingly, in both conferences approximately half the judges said they would follow the rules and half said they would not. Half stood on one side of "the gap" and half on the other.

So here is the bottom line. I equate "law" with rules that settle determinately what must be done. And I equate "politics" with first-order practical reasoning—the

18. See ALEXANDER, *The Gap*, *supra* note 7, pp. 699.

19. GREGORY KAVKA, *The Toxin Puzzle*, *Analysis*, 43, 1983, pp. 33 ff.

20. FRANZ KAFKA, *The Trial*, originally published in 1925.

reasoning that produces the rules and the reasoning that standards invite. Politics leads to law, but politics then conflicts with it. The question for me is, if law is desirable, as I believe it is, is it nonetheless possible, and if so, how?
