When Can We Do What We Want?*

Heidi M Hurd**

There are many reasons why the law ought not to regulate all aspects of our conduct — why we ought, that is, to be left at liberty to make choices about how and with whom to live our lives. This essay is an exploration of the most primitive of those reasons. While there are surely good moral reasons for lawmakers to tolerate genuinely immoral choices on the part of citizens,[1] this essay argues that there may be many instances in which morality itself does not speak to citizens' conduct, and hence, there may be many instances in which liberty is the necessary compliment not of tolerance but of the inability on the part of lawmakers to pass moral judgment. We should be allowed to do what we want to do when what we want to do is without moral significance. In short, if morality ever leaves us at liberty, the law cannot justifiably do otherwise.

This thesis will turn out to be a robust one only if at least three things are true. First it must be the case that the law's legitimacy depends upon its coherence with the demands of morality. The claim that morality can sometimes be silent is important to law only if law cannot justifiably prohibit what morality, by its silence, permits. I shall not defend this assumption here, although I have done so elsewhere.[2] My interest here is in exploring just how much liberty might be made available to us by morality alone *if* we take the justification for any legal regulation to depend upon a finding that the act regulated is in some manner immoral.

The second condition that must hold true if we are to derive liberty from an absence of morality is that morality must sometimes be absent. If all choices are either moral or immoral, then given the above discussion, all

---

* This article is a quite modified excerpt of Part II of Heidi M Hurd, 'Liberty in Law' (2002) 21 *Law and Philosophy* 385.

** Dean and David C Baum Professor of Law and Professor of Philosophy, University of Illinois College of Law.

1 I have explored such reasons at considerable length in Heidi M Hurd, 'Liberty in Law' (2002) 21 *Law and Philosophy* 385; Heidi M Hurd, 'Is it Wrong to Do Right When Others Do Wrong?' (2001) 7 *Legal Theory* 307.

2 See Heidi M Hurd, 'Moral Rights and Legal Rules' (2000) 6 *Legal Theory* 423.

choices are *prima facie* eligible for regulation. There may be good reasons not to regulate them, but these reasons cannot include the claim that inasmuch as such choices are amoral, they cannot be of legitimate concern to anyone. Only if there are, in fact, amoral choices can we appeal to amorality as a source of liberty. This essay is devoted to exploring the ways in which morality might be silent concerning certain conduct.

The third condition for deriving a robust notion of liberty from an absence of morality is that morality must not always be absent. If there is no such thing as morality (to put the sceptic's view crudely), then law cannot be justified, or justifiably constrained, by it; but, then, neither can we be liberated by its absence. Now it is an infamous freshman mistake to argue that (1) all moral truths are relative to individuals' beliefs, and hence, that (2) all persons' beliefs are deserving of equal respect.[3] For, of course, not only is the meta-ethical claim in (1) probably false, but the normative claim in (2) does not follow from (1). If all people's beliefs are equally true (for them), then it must be moral for the person who thinks that tolerance is immoral to prevent others from acting as they choose.[4] Neither meta-ethical subjectivism nor meta-ethical conventionalism has the resources by which to constitute a source of liberty that makes it right for otherwise-intolerant state actors to respect the choices of citizens. On the contrary, were state actors looking for a license to be intolerant, they could do no better than to argue that truth is relative to their own beliefs (or those of their carefully specified community), and that such beliefs do not include the value of tolerance. If defensible, such a moral theory would then license any amount of intervention in the lives of others. It is for this reason, then, that a theory of liberty that relies on moments of moral absence cannot deny morality altogether.

The arguments for political liberty that I shall explore in this essay insist that certain actions cannot be given a moral pedigree, and hence, cannot justifiably be regulated by law. But these arguments do not depend

---

3 Regrettably, it is not a mistake committed solely by freshmen. See, eg, Melville Herskovits, *Cultural Relativism: Perspectives in Cultural Pluralism* (1972) 31 ('[I]n practice, the philosophy of relativism is a philosophy of tolerance'); Melville Herskovits, *Man and His Works* (1948) 76 (Relativism 'is a philosophy which, in recognizing the values set up by every society to guide its own life, lays stress on the dignity inherent in every body of custom, and on the need for tolerance of conventions though they may differ from one's own.')

4 Or as Bernard Williams puts it, the relativist reaches a conclusion 'about what is right and wrong in one's dealings with other societies [or individuals], which uses a *nonrelative* sense of "right" not allowed for by [the theory of relativism].' Bernard Williams, *Morality: An Introduction to Ethics* (1972) 21 (emphasis in original).

upon meta-ethical scepticism. Rather, these arguments presuppose that there is a truth of the matter concerning the morality of any given action which is not given by anyone's beliefs about it; they deny, instead, that such a truth entails that all actions possess a moral status that can be declared by the state as a justification for regulation. I shall consider in this essay four such arguments. On the first of these arguments, the truth of the matter is that morality is 'gappy'. Actions that fall within the gaps of morality are either amoral or in some other manner immune from praise and blame, and hence, their regulation cannot be justified morally. (In the sections that follow, I shall explore seven distinct sources of such moral gaps.) On the second of these arguments, while there is a truth of the matter concerning the morality of all actions, there are often good grounds to doubt the judgment of that matter by the state. According to this argument, there are systemic reasons why lawmakers lack the competence accurately to detect, assess, and articulate the morality of many citizens' choices, and in the face of this institutionally-generated uncertainty, lawmakers are without a justification for regulating those choices. The third argument draws not on doubt, but on disagreement. On this argument, the state cannot justifiably regulate the conduct of its citizens absent an overlapping consensus among the citizenry concerning the morality of that conduct. In the face of persistent moral disagreement, the state lacks a moral justification for regulation. The fourth argument for political liberty draws on the inability of law (rather than lawmakers) to regulate moral matters that are highly individualized. According to this argument, inasmuch as law is (and must be) general in its applicability, it is altogether too clumsy a means of regulating actions which are made moral or immoral by the highly specific circumstances and attributes of individual citizens. While lawmakers might come to know what a person ought to do (all things considered), and while there may be no disagreement within the community concerning the morality of that conduct, lawmakers cannot use the law to specify her obligations, because those obligations are unique to her circumstances, talents, and tastes, and therefore cannot be laid down in a manner that is properly generalizable to others. In each of the following sections, I shall flesh out these arguments in an attempt to assess the degree to which they require state actors to refrain from adjudicating between competing conceptions of the good.

I. Moral Gaps

One might plausibly believe that, whatever its form or content, morality is inherently 'gappy'; that in some, and perhaps many circumstances it either does not speak or it does not speak definitively, and that, therefore, there are arenas in which one is free of any morally-constraining reasons to choose one course of conduct over others. On a gappy view of morality, some choices are of no moral significance; some actions lie outside of the bounds

of praise and blame; some actions are no better or worse than their alternatives, and hence their choice is a matter of moral indifference. If law cannot justifiably regulate conduct that is not, in some sense, immoral, then it cannot extend its authority over actions which fall within the gaps of morality.

In what follows, I shall take up seven arguments (some, but not all of which, are compatible) which are designed to demonstrate that in one manner or another, morality possesses gaps which provide persons with opportunities to make morally unconstrained choices. These arguments can be helpfully summarized as follows: (1) in certain circumstances morality is silent; (2) in certain circumstances morality is contradictory; (3) in certain circumstances morality yields 'ties' which make two or more choices equally moral; (4) in certain circumstances morality makes choices incommensurable; (5) in certain circumstances one goes beyond the 'threshold' of morality's obligations, and so, one finds oneself without morality; (6) in certain circumstances only 'agent-relative' reasons for action apply to one's choices, and inasmuch as those reasons are not reasons for others, they cannot be used by others to criticize one's choices; (7) in certain circumstances one is subject only to 'imperfect duties', the nature of which affords one blameless discretion concerning their satisfaction. If these seven claims help us to locate significant moral gaps, then we shall be able to conclude that some, and perhaps many actions are simply not of a sort that can be morally criticized, and hence, they are not of a sort that can be justifiably regulated by law.

(1) Moral Silences

Some are inclined toward a gappy view of morality because they have the (non-Kantian) intuition that morality is itself a threat to liberty — that one cannot be thought to be at liberty when practical reason dictates that there is something one ought to do. In the interests of locating liberty outside the reach of practical reason altogether, they maintain that there are circumstances in which persons are freed from all constraints of reason, and are hence, in Sartre's existential sense, at liberty simply 'to choose'.[5]

To embrace the view that morality is sometimes silent is to believe that, in certain circumstances, persons enjoy what might be described as moral analogues of Hohfeldian 'privileges' or 'liberties'.[6] As Wesley Newcomb Hohfeld insisted, it is crucial to keep the concept of a privilege or liberty distinct from the concept of a right or permission. On his analysis,

---

5 Jean-Paul Sartre, 'Existentialism is a Humanism' in George Novack (ed), *Existentialism versus Marxism* (1966) 70, 81.

6 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions,* (first published 1919, 1978 ed) 39.

when one has a privilege or liberty to do an act, one is under no duty not to do the act; but, similarly, others are under no duty not to interfere with one's commission of the act. Hohfeld's analysis was of *legal* privileges or liberties. But one might think that morality, too, contains Hohfeldian privileges or liberties of a particularly liberating sort, such that in some, and perhaps many circumstances persons are free not just of obligations towards others, but also of any reasons for action. In such circumstances, persons (necessarily) act with moral impunity.

On such a view, political liberty would naturally derive from the fact that state actors would have no reason of a moral sort that would justify them in intervening in the exercise of a citizen's liberties or privileges. That is, because the manner in which a citizen exercises his liberties or privileges is of no moral consequence, there can be no moral objection to how the citizen makes such choices, and hence, no justification for interfering with those choices.

Before I turn to other accounts of why morality might be thought to have gaps, let me raise two problems for anyone who seeks to predicate political liberty *solely* on the claim that morality is sometimes altogether silent. First, while some will be attracted to the notion of Hohfeldian moral liberties because they provide arenas in which morality exerts no pressure, such liberties must surely be puzzling both to consequentialists and to those deontologists who conceive of agent-relative duties and permissions as exemptions from a general duty to maximize the good. For these theorists, all choices (or at least all choices that are not subject to deontological constraints) are properly judged by their consequences — by the degree to which they maximize the good (however that is unpacked). On such a view, morality is never silent; persons never enjoy circumstances in which reasons of normative importance do not bear on their choices; and practical reason is never without work.[7] While there may be circumstances in which morality permits persons to make blameless choices (for one or more of the six reasons to which I shall turn in the following sub-sections), there are

---

[7] As Loren Lomasky argues:

> [T]he act of commitment does not generate personal value out of thin air. Unless one perceives a course of activity as holding out realizable value, it cannot be viewed as a potential source of personal value for oneself. ... That is, if whatever is chosen thereby comes to have value simply by virtue of being chosen, reflection preceding choice will not be deliberation at all but rather will be a curious kind of predictive activity: prediction of what one will eventually choose, and thus of what does not yet but *will* have value-for-oneself? ... Nothing could be further from our experience of the agonizing appraisals that precede major turning points in our lives.

Loren Lomasky, *Persons, Rights, and the Moral Community* (1987) 233.

never circumstances in which reasons of normative importance do not bear on their choices. Those who think that morality is never silent — that persons always have reasons for action that are of moral consequence — will thus have to find a place for liberty *within* morality, not apart from it.

The second problem for those who would locate political liberty within moral silence is this: To say that one has a Hohfeldian *legal* liberty to perform an act is *simply* to say that one has no legal duty not to do the act. But this does not mean that one has what Hohfeld called a 'claim-right' to do the act — a *legal* right that is correlative with a legal duty on the part of others not to interfere with one's doing of the act. If Hohfeldian *moral* liberties function analogously, then to say that one has a Hohfeldian moral liberty to perform an act is *simply* to say that one has no moral reason not to do the act. But this does not mean that one has the moral analogue of a Hohfeldian claim-right to do the act — a right that is correlative with a moral duty on the part of others not to interfere with one's doing of that act. On the contrary, while a moral liberty allows one to act with moral impunity, it cannot make wrong others' interference with one's actions. It may be true that since one's exercise of one's liberties is not of moral significance to others, how one chooses to exercise one's liberties cannot give others any moral justification for interference. But the fact that one enjoys a moral liberty does not, by itself, give one any basis for objecting to others' interference. If citizens have Hohfeldian moral liberties, then, necessarily, the state can have no moral objection to their exercise of such liberties; but simultaneously, if *all* that citizens have are Hohfeldian moral liberties, then citizens have nothing that makes wrong the state's interference. In short, it would appear that to predicate political liberty (solely) on Hohfeldian moral liberties is to leave open the possibility of state intervention for any reason, and for no reason at all.

(2) Moral Conflicts

Deontologists who would insist that morality is never silent may find moral gaps in circumstances in which morality says too much — that is, in circumstances in which morality issues conflicting categorical obligations. On such a view, one is morally free in circumstances of moral conflict — in circumstances in which choice is the only arbiter amongst options.

It may not be logically possible for a deontological moral system to contain contradictory maxims (maxims that simultaneously obligate an agent to do act A and to not do act A), but it is logically possible for a deontological system to contain simultaneously binding maxims that, as a practical matter, cannot be mutually fulfilled. A deontological system might, that is, simultaneously obligate an actor to do act A and act B, where A and B cannot both be done within the actor's circumstances. Thus, to recall Sartre's famous dilemma, a son might be simultaneously obligated to

care for his mother and to join the Free French, when he cannot practically fulfil both of these obligations. If moral obligations of this sort can genuinely and irresolvably conflict, then it would seem that persons must be morally free to choose between them, for no choice can be thought to be either better or worse than its equally demanding alternative(s). Such circumstances thus promise moments of moral freedom — moments in which persons can do no wrong (so long as they choose to satisfy one obligation within the set of inconsistent obligations that bind them). And if choices between conflicting obligations are neither right nor wrong — if they are without moral pedigree, that is — then it would seem that the law would lack any justification for substituting its own choice for that of the individual. Moral conflicts would thus provide deontologists with loci of political liberty, for in the face of such conflicts the state cannot claim to be morally justified in requiring a citizen to satisfy one obligation rather than another.[8]

Just how plentiful a supply of political liberty can be harvested from this source depends upon a good many things. It depends, for example, on just how many moral conflicts persons in fact confront (assuming, for the moment, that they ever confront any). If moral life is ripe with conflict, then the state may be without justification for regulating a great many choices. If, on the other hand, persons confront true moral conflicts only in the most bizarre Hollywood-like situations, then the state may be entitled to substitute its judgment for that of its citizens on a regular basis.

More importantly, however, this argument for political liberty turns on one's tolerance for moral conflict to begin with. Many deontologists believe that moral conflict is an illusion — that in the face of apparent conflict, there are principled means by which to resolve the conflict. Some, for example, maintain that obligations are uniquely weighted, so that in any case of apparent conflict one does the right thing by fulfilling the most weighty of inconsistent duties. Thus, for example, in a case of self-defense, while one has an obligation not to take the life of one's aggressor, one also has an obligation to defend one's loved ones. Inasmuch as the latter obligation is more weighty than the former obligation, one does the right thing when one employs deadly force to repel an attack, even though one has done a 'prima facie wrong' by taking the aggressor's life. Proponents of

---

8 Those who have a taste for double-binds might argue, however, that rather than freeing persons to make choices with moral impunity, moral conflicts commit persons to making morally condemnable choices. In the face of conflict, whatever a person chooses is wrong, and hence, the state is fully entitled to intervene in, and to punish, her choice. Such an argument makes clear that moral conflicts can be used to purchase a philosophical source of freedom only if they are not bought by those who celebrate moral tragedy. I am grateful to Michael Moore for this inversion of the argument.

this view would argue, then, that the son in Sartre's example must determine whether his duty to his mother is outweighed by his duty to fight against the Nazis (or vice versa), for there is a right answer to that question that fixes the morality of his choice. Those who are fans neither of the possibility of moral conflict nor of talk of prima facie obligations believe instead that, rather than outweighing one another, obligations interlock, so that in any case of apparent conflict, one must determine which obligation makes an exception for the satisfaction of the other. On this view, for example, one has an obligation not to kill except in a circumstance in which one is confronted by a culpable aggressor who threatens one with imminent deadly peril. And in Sartre's famous case, either duties to those near and dear give way to duties to countrymen or vice versa, so the son who confronts the prospect of having to abandon his mother is not, in fact, damned if he does and damned if he doesn't (prima facie or otherwise).

If either of these views of morality are more plausible than one that contemplates Kafkaesque double-binds, then deontologists who seek to locate political liberty within moral gaps will have to look for other kinds of gaps. For on the two alternative views just outlined, apparent conflicts are not real conflicts, and hence, they do not provide instances in which persons' choices can be neither blamed nor praised.

(3) Moral Ties

The analogue to moral conflicts for consequentialists are moral ties. If there are circumstances in which several alternative actions all yield the same net balance of good and bad consequences (whatever the theory of good and bad consequences), then a consequentialist morality is silent as to the choice among such actions, and an actor cannot go wrong in choosing one over others. Ties thus constitute gaps in a consequentialist moral system — moments in which morality itself affords persons opportunities to make choices, no one of which is better or worse than any other. Like all arguments about moral gaps, this argument locates political liberty in an absence of justification for state intervention. Choices among equally good actions are equally good, and hence, they can provide no justified basis for state intervention.

Yet while consequential ties are surely at least conceptually possible, it is hard to assess just how frequently they in fact occur, and hence, it is hard to measure the wealth of liberty that is available from this source. Moreover, to observe that consequentialist theories leave persons at liberty to choose between equally good options is to say nothing of comfort to those who seek a moral basis for according citizens legal rights to do wrong.[9] Those who believe that the state ought to permit citizens to choose

[9] 'Any liberty worth having has to give us the right not to be interfered with

certain bad options will be nonplussed by the consequentialist's offer of a moral right to choose among good options. What these theorists seek is some guarantee that citizens will be left alone even when their actions do not maximize good consequences; and such theorists understandably harbour the suspicion that consequentialists simply cannot give consequentialist reasons for tolerating consequentially bad actions.[10]

(4) Moral Incommensurability

An alternative means of denying that there is a determinate right answer concerning how a citizen should make any given life choice — an answer which, if reached by the state, might properly be coercively imposed — is provided by those who embrace the view that there is a plurality of incommensurable goods. In the view shared by John Finnis, Robert George, and Joseph Raz, for example, there is a plurality of goods that are 'basic' or 'intrinsically' valuable. As George argues, goods

> such as human life and health, friendship, knowledge, and skillful work and play, are incommensurable because they provide ultimate reasons for choice and action, i.e., reasons whose intelligibility as motives for action are not derivative of other, more fundamental reasons.[11]

As such, these goods 'cannot be weighed and measured in accordance with an objective standard of comparison.'[12] In Finnis's terms,

> [e]ach [basic good] is fundamental. None is more fundamental than any of the others, for each can reasonably be focused upon, and each, when focused upon, claims a priority of value. Hence, there is no objective priority of value among them.[13]

On this view, while one can intelligibly pick between non-basic goods (eg, money and fame) on the basis of their consequences — that is, on the basis of how well those lesser goods serve the realization of basic goods — one cannot seek to choose among basic goods by asking into the importance of each relative to the others. As Joseph Raz puts it, '[i]t is crucial to avoid the misleading picture of there being something,

---

as we do wrong... If our liberty ends where our obligations begin, in an important sense we have no liberty.' Michael Moore, *Placing Blame: A Theory of Criminal Law* (1997) 766.

10 But see Hurd, 'Liberty in Law', above n 1, Pt III A.

11 Robert George, 'A Problem for Natural Law Theory: Does the "Incommensurability Thesis" Imperil Common Sense Moral Judgments?' (1992) 36 *American Journal of Jurisprudence* 185,187.

12 Ibid.

13 John Finnis, *Natural Law and Natural Rights* (1987) 93. See also Lomasky, above n 7, 235–7 (arguing that choices can be incommensurable, and hence, that rational choice cannot consist of selecting what is, on balance, *the* best choice).

enigmatically known as 'value,' the quantity of which is increased by people having rewarding friendships, enriching occupations, etc.'[14]

This view cleverly deprives consequentialists of their ability to generate singular right answers concerning how persons ought to act without denying either of the two principles to which consequentialists subscribe — that is, without denying that consequentialists can generate a theory of what is good, and without denying that, as a moral matter, the good should be maximized. Incommensurable pluralists deny the conceptual possibility, not the moral desirability, of measuring and comparing the consequential implications of actions that realize basic goods. By postulating a plurality of basic goods that simply *cannot be compared* to one another, they deny that one inherently good action (that is, an action that realizes a basic good) can be better than another. Choices between incommensurable goods are thus like choices in situations in which the consequences to be weighed against one another are tied: no determinate answer follows from applying the maximizing principle of consequentialist ethics. Choice then becomes the sole arbiter between incommensurable goods (as between tied consequences): it alone makes the pursuit of one good over others right for an individual. As Finnis maintains:

> Of course, each one of us can reasonably choose to treat one or some of the values as of more importance in his life. A scholar chooses to dedicate himself to the pursuit of knowledge, and thus gives its demands priority ... over the friendships, the worship, the games, the art and beauty that he might otherwise enjoy... That chosen plan made truth more important and fundamental for him... But one's reasons for choosing the particular ranking that one does choose are reasons that properly relate to one's temperament, upbringing, capacities and opportunities, not to differences in rank between the basic values.[15]

Once again, on this theory, political liberty falls out of the state's inability to judge that its citizens' choices are wrong. While the state might properly condemn citizens for adopting inefficacious means by which to realize basic goods (and might, perhaps, properly intervene in order to coerce its citizens to adopt more useful means to achieving those goods), the state is estopped from criticizing how citizens choose between the basic goods. Inasmuch as citizens cannot choose wrongly between such goods, the state lacks any justification for intervening in the choices that citizens make concerning how to live their lives, so long as their lives realize such goods.

---

14 Joseph Raz, *The Morality of Freedom* (1986) 344.

15 Finnis, above n 13, 93–4.

There is surely much that is attractive about this view. But it is not without its costs. First, incommensurable pluralists leave those who seek a right to do wrong as empty-handed as do consequentialists who promise moral ties. For incommensurable pluralists simply accord persons liberty to choose among basic goods. Those who seek political liberty usually seek something more robust than a right to make choices between good options. They commonly think that persons have a right to pursue certain bad options (eg, drugs, pornography, membership in racist organizations) free from state intervention. And they usually think of the bad options in question not just as inefficacious means of achieving basic goods, but rather, as acts that are, in some sense, inherently bad (that is, as acts that do not participate in any significant way in any basic goods). Whether these champions of liberty can make moral sense of a political right to do inherently bad acts remains to be seen. What is clear, at this point, is that incommensurable pluralism offers them no aid.

Even those who do not seek a robust right to do wrong, and who are content with the prospect of being left at liberty only when the available choices are all morally good, may believe that incommensurable pluralism purchases that liberty at far too high a price. For R George Wright has argued that if basic goods are incommensurable, then choices between them are necessarily arbitrary. There cannot be a conclusive moral reason for choosing to interrupt 'one's recreational coffee drinking in order to rescue one's friend from a painful accidental death.'[16] While it is admittedly the job of moral theory to correct moral intuitions, theoretical conclusions that depart from common sense moral judgments as greatly as does this one surely bear sceptical scrutiny. The challenge then is to determine how incommensurable pluralists reconcile their theory with deep-seated convictions that persons are sometimes morally obligated to sacrifice play, work, worship, knowledge, aesthetic enjoyments, friendship, and sometimes even their own lives. And whatever the answer, Robert George's will not do.

According to George, persons are sometimes obligated by moral norms that function as conclusive second-order reasons 'not to choose certain possibilities, despite the fact that one has, and is aware of, first order reasons to choose those possibilities.'[17] In particular, he argues, the recreational coffee drinker's choice in Wright's hypothetical is governed by the Golden Rule, which defeats the reasons to continue drinking coffee (given by the basic goods of recreation and aesthetic satisfaction) and

---

16 R George Wright, 'Does Free Speech Jurisprudence Rest on a Mistake?: Implications of the Commensurability Debate' (1990) 23 *Loyola Los Angeles Law Review* 763, 772–3.

17 George, 'Does the "Incommensurability Thesis" Imperil Common Sense Moral Judgments?' above n 11, 191.

compels him to rescue his friend.[18] In George's view, we are each enjoined 'to treat others as we would have them treat us,' and from this it follows that the coffee drinker should forgo his coffee to save his friend.

According to George, moral maxims like the Golden Rule will sometimes force us to sacrifice some basic goods in favour of others, but they do not do so on the basis that, for example, '"play" is not a basic good or that "life" is a greater good than "play".'[19] But one must ask, then, on what basis *do* such rules adjudicate between basic goods? Why is it obvious to George that the Golden Rule requires the coffee drinker to save his friend? After all, if life is in fact no greater good than is play, then it appears that the coffee drinker who places greater priority on coffee than on life or friendship, and would happily have others do so as well, is free to conclude that the Golden Rule permits (or requires) him to continue drinking coffee. George's assumption that one would have others save one's own life instead of drink coffee, and his resulting conclusion that one must therefore save another's life rather than drink coffee, belies his insistence that the two goods at stake are incommensurable. By insisting that principles like the Golden Rule determinately dictate how persons ought to choose between basic goods, George appears to smuggle in the assumption that goods *are* commensurable. For without that assumption, it is utterly mysterious how one could ever criticize another's application of the Golden Rule except on grounds of hypocrisy; how one could ever condemn another person for playing golf instead of turning over a baby who was drowning in a mud puddle, so long as that person would himself universalize that choice to others — and why would he not if play is as good as life?

But how an incommensurability theorist like George extracts determinate answers from second-order moral rules without contradicting the incommensurability thesis is only one question. A second question is whether any such strategy does not take back with one hand the liberty that it offers with the other. For if choices between incommensurable basic goods can be dictated by second-order moral principles, then it would appear that incommensurability does not necessarily buy liberty. We will need to know the scope and limits of these second-order moral principles in order to know how often, and under what circumstances, we are genuinely free to choose between incommensurable goods. Consider, again, George's application of the Golden Rule. He maintains that while the Golden Rule would require a golfer to abandon his game for an hour in order to risklessly save an imperilled child, 'a professional golfer who lives in Scotland does not violate the Golden Rule (or any moral norm) when he declines to

---

18 Ibid 193.

19 Ibid 194.

abandon his career in order to, say, join the relief effort in Bangladesh.'[20] But why not? If the Golden Rule can require the golfer to part with an hour of golf, why can it not require him to part with a lifetime of it? Without a principled answer, we cannot possibly assess the degree to which George's second-order moral maxims will eat up the liberty that we might otherwise have to pursue our own choices among the basic goods of life. As such, we can have no confidence that incommensurable pluralism guarantees us any significant freedom concerning how to pursue our own lives. And incommensurable pluralists who reject George's solution to the challenge advanced by Wright are returned to the challenge: Inasmuch as incommensurable pluralism entails an inability to make rational choices between conflicting goods, such as play and life, it appears to be an unduly expensive means of purchasing political liberty.

(5) Moral Thresholds

Those who defend 'threshold theories' of deontology may believe that whenever persons find themselves 'beyond the threshold' of categorical constraints, their actions cannot, or should not, be condemned by the state. There are two distinct understandings of the moral significance of deontological thresholds — both of which provide reasons for legislative restraint, but only one of which does so by arguing that whenever persons go beyond deontology's thresholds they are beyond morality, and hence, free of normative concerns. It is on this 'gappy' view of threshold deontology that I shall concentrate, although I shall say a word about the alternative version at the close of this section.

Threshold deontologists share the view that when consequences become extremely grave, what would otherwise be categorically forbidden becomes morally possible. Thus, while one is categorically prohibited from killing innocent persons, one may be beyond the threshold of this deontological constraint if one can save an entire city of people by killing an innocent person. On the gappy view of threshold deontology, once one crosses the threshold of categorical obligations, one is altogether without moral constraints — one is beyond morality. One's actions are thus without moral significance; one's choices are made with moral impunity. One can either save the city or save the innocent person, and morality is without anything to say on the matter.[21]

---

20 Ibid.

21 As Bernard Williams writes:

> [T]here are certain situations so monstrous that the idea that the processes of moral rationality could yield an answer in them is insane: they are situations which so transcend in enormity the human business of moral deliberation that from a moral point of view it cannot matter any more what happens.

J J C Smart and Bernard Williams, *Utilitarianism: For and Against* (1973)

On this conception of threshold deontology, to go beyond the threshold of categorical constraints is to find oneself in a moral vacuum within which one's actions can be neither blamed nor praised. Such a view is a special case of the first argument for moral silence, because beyond the threshold of deontology, morality is silent. As some would say: All is fair in love and war. As an account of when persons ought to be left alone by the state, this view invites the same problems and confronts the same limitations as did the argument for moral silences. But its ironies are perhaps greater. For on this account, when the moral going gets tough, morality runs out. When moral conundrums become crises of conscience, morality leaves us to our own counsel. When we need its lessons the most, it speaks to us the least. Thus, morality forbids us from taking our neighbour's land; but it does not speak to the question of whether a nation can conquer a primitive people and usurp its territory for the greater benefit of its own people; it forbids the torture of a terrorist as a means of extracting information about the cause of a past bombing, but it does not speak to whether one can torture the terrorist's child as a means of extracting information from the terrorist about where a future bombing will take place; it requires soldiers to take precautions against harming civilians during war, but it does not speak to the question of whether an atom bomb can be dropped on a city of 80 000 innocent people. In short, while the arguments in the first subsection concerning moral silences presupposed that some matters are simply too trivial to be of moral concern, this version of threshold deontology presupposes that some matters are of such enormity as to make morality trivial.

If this view of threshold deontology is paired with the claim that the law may not speak when morality is silent, then persons are denied the two sources of guidance to which they would most naturally turn when choices become of great significance to themselves and others; namely, law and morality. In such circumstances, they can be neither morally praised nor morally condemned; and therefore, in such circumstances, the state cannot dictate their choices. Citizens may thus be legally compelled to fulfil their deontological obligations in circumstances in which the stakes of so doing are low — that is, when the consequences that derive from fulfilling their obligations are 'below the threshold' that marks the limits of those obligations. But the state must condone all individual choices when the stakes become large; for when the moral obligations of citizens are suspended by the gravity of the consequences at stake, so too is the state's ability to judge its citizens' conduct. Thus the state can regulate conduct which matters a little; but it must tolerate conduct which matters a lot.

86.

Those who believe that this view gets it exactly backwards may thus need to reconsider the moral implications of positing thresholds within a deontological morality. On the contrasting view, the deontological threshold defines the appropriate boundaries of legitimate consequentialist reasoning. Below that threshold, persons are subject to categorical obligations which cannot be breached in the name of achieving a net gain of good consequences. Beyond the threshold, however, persons may act — and indeed are obligated to act — in a manner that maximizes good consequences, even if so doing requires them to commit deeds that below the threshold are categorically forbidden. Thus, one may not kill an innocent person to prevent the killing of two other innocent persons; but one may, and indeed, must — kill an innocent person to prevent a holocaust.

On this second conception of threshold deontology, however, there are no moral gaps. There are thus no sources of moral indeterminacy from which to derive political liberty. This is not to say that this second conception of threshold deontology cannot assist in constructing a theory of political liberty;[22] it is only to say that it cannot do so in a manner that is properly tabulated within this essay.

(6) Moral Individualism

Some who are attracted to a gappy view of morality reject the notion that persons are ever without reasons to act one way rather than another; but they insist that in many circumstances, the only reasons that apply to persons are agent-relative reasons that are born of the persons' own choices of projects. On this view — a view I shall call 'moral individualism' — persons enjoy what Hobbes called 'blameless liberties' to act solely on the reasons for action that derive from their own desires and goals.[23] This theory trades on one means of distinguishing what are termed agent-neutral and agent-relative reasons for action. In this context, agent-neutral reasons for action are reasons relevant to all persons' choices: for example, it is of agent-neutral moral relevance whether someone's action causes another sentient creature pain, or reaps ill-gotten gains, or imposes undeserved punishment on another, etc. That an action risks such results is a reason for the agent not to perform it, and it is a reason for others to seek to prevent it. In contrast, agent-relative reasons for action are reasons for action that apply only to the agent from whose chosen projects they derive: for example, it is of agent-relative moral significance that an action will thwart

---

22 For an account of how this second conception of threshold deontology yields an argument for *tolerance,* see Hurd, 'Liberty in Law', above n 1, 455–7.

23 Thomas Hobbes, *The Elements of Law,* Ferdinand Tonnies (ed) (1969) 71 (Pt I, Ch 14, s 6).

a personal career goal, or do damage (but not injustice) to a valued relationship; or require the sacrifice of a private hobby; or cause physical hardship. That an action risks harm to a particular actor's personal projects will be a reason for that actor not to perform it, but according to a moral individualist, it cannot be a reason for others to prevent that action, because, by virtue of its agent-relative status, it is not a reason that enters into the balance of reasons that dictates the morality of others' conduct.

If there are circumstances in which only agent-relative reasons for action apply to persons' choices, then while those choices may fail to accord with the balance of reasons for action (and so, may in some sense, be wrongful), they cannot meaningfully be judged wrongful by others, for such reasons do not properly enter into others' practical reasoning. On this view, while practical reason is never disengaged (because it should be assessing agent-relative reasons for action even when it is not calculating agent-neutral reasons for action) there is no meaningful sense in which others can blame an agent for acting as he chooses — for the only reasons for action that are relevant to assessing his conduct are reasons that are solely relevant to him. While he may violate duties to himself, or in some other sense commit an injustice to himself, he does not violate any duties that are owed to others, and hence, he can commit no immorality that can be complained of by others. Between the gaps of *agent-neutral* morality, then, an agent is at moral liberty to pursue his own conception of the good, because his own conception of the good is the only source of reasons for action within these gaps. And inasmuch as his actions cannot offend against others, and cannot be said to be morally relevant to others, they can be of no justifiable concern to the state.[24]

Agent-relative reasons for action of the sort described in this subsection provide a fertile source of liberty, however, only if such reasons can be said to exist. And there are surely reasons to question whether decisions that seemingly concern only oneself and one's own projects are really irrelevant to others. Consider two such reasons. First, inasmuch as a person's agent-relative reasons are not reasons for others, others can have no basis for interfering with choices that implicate only those reasons for action. As such, there can be no justified instances of true paternalism. That is, if one thinks of paternalistic interventions as those motivated *solely* by an interest in protecting others from *self*-destructive conduct, rather than by an interest in preventing them from causing harm to oneself or to third persons, then it would seem that such interventions must be unjustified in

---

24 '[P]erson-relative ideals have little or no role to play in political morality. The fact that some political action would benefit me, but no one else, is hardly a compelling argument in its favor.' Steven Wall, *Liberalism, Perfectionism and Restraint* (1998) 13.

cases in which the conduct is destructive only to *self*-defined projects, which give only agent-relative reasons for the agent not to do them. While the fact that an agent's conduct might harm others generates *agent-neutral* reasons both for him to desist and for others to seek to prevent his deeds, the fact that his conduct might harm himself or his own projects generates, on the view above, only *agent-relative* reasons for him to desist, and gives others no reason at all to interfere with his conduct. In short, there are no reasons for action that make sense of one person having an interest in another's self-destruction.

Those who are convinced that one may never justifiably coerce another to act for his own good may find in this notion of agent-relative reasons for action the theoretical vehicle for expressing such anti-paternalism. But those who believe that paternalism is at least sometimes justified should be reluctant to admit into their menu of reasons for action a category of reasons that theoretically precludes paternalistic behaviour by others. And there are indeed circumstances that make at least plausible the claim that persons, including state officials, are sometimes justified in rescuing persons from themselves. Most obviously, it appears highly plausible to suggest that the state may act for the good of those who lack the rational and volitional abilities required for autonomous choice. Thus, those who suffer from the impediments of youth, insanity, mental retardation, or senility, may be properly prevented from doing things that would harm only them or their self-defined projects. Proponents of agent-relative reasons for action of the sort discussed above might maintain that they need not give up the possibility of agent-relative reasons for action in order to make sense of such a plausible claim. They might insist, for example, that when non-autonomous agents (ie, agents who lack the necessary cognitive and volitional skills to be good practical reasoners) identify goals or set projects for themselves, those projects do *not* give them agent-relative reasons for action; for agent-relative reasons are created by capable practical reasoners, but not by incapable ones. Their welfare, like the welfare of other sentient creatures, for example, is always a matter of *agent-neutral* concern; and hence, the state may protect children from their own unwise choices without implicating the thesis that when rational agents choose projects, those projects generate reasons for action applicable to them alone.

There are, however, other plausible circumstances in which the state might function paternalistically towards persons who are as rational and capable of self-control as adult human beings are generally wont to be. For example, when such persons are subjected to social rules backed by powerful 'peer pressure' that demand that they engage in self-destructive behaviour (to fight duels, for example, so as to preserve their honour) the law might plausibly ban such behaviour so as to rescue such persons from their own (rational and voluntary) submission to such rules. Or when

persons commonly find that certain passions consistently overwhelm reason in self-destructive ways (for example, by motivating them to continue smoking in the face of research that makes clear its harmful effects), the law might plausibly be employed paternalistically to redress such volitional impairments by foreclosing the possibility of indulging such temptations. Thirdly, when persons systematically fail to appreciate how long-term interests are affected by short-term behaviour (for example, by failing to appreciate the relationship between wearing a seatbelt and surviving an automobile accident) the law might compensate for such informational and cognitive failures by legislating conduct consistent with citizens' commonly held, but also commonly threatened, long-term interests. Fourthly, when the consequences of actions are both grave and irreversible (as is true of suicide, slavery pacts, organ sales, and self-mutilation), it would seem morally plausible for the state to create obstacles that would prevent hasty choices. If any or all of these examples tempt one to think that state paternalism is not always unjustified, then one should be cautious about asserting that choices that are (primarily) harmful to the realization of a person's personal goals and projects do not give others reasons for action.

The second reason to be wary of claims about agent-relative reasons is this: if persons have reasons for action that apply only to them, then persons might well find themselves in what I have called 'moral combat', in which one person's moral success turns on another's moral failure. For it might be right for person *A* to do action *X*, given all of the reasons for action that apply to her, including those that are purely agent-relative, while it might be right for person *B* to do an action that thwarts *A*'s doing of *X*, given all of the reasons that apply to him, including those that are purely agent-relative. Both would share the same agent-neutral reasons for action, and these would seemingly dictate for both that *A* either do *X* or not. But inasmuch as they would not share the same agent-relative reasons for action, such reasons might operate to require actions by each that are ultimately in conflict with one another.

I shall not dwell here on all of the reasons to think that our best moral theory, be it consequentialist or deontological, ultimately denies us opportunities for moral combat.[25] Suffice it to say here that one cannot both deny the possibility of moral combat and maintain that persons can have agent-relative reasons of the sort described above. Those who follow me in rejecting the possibility of moral combat (either for conceptual or normative reasons) thus cannot predicate political liberty on the claim that when persons act in ways that harm only themselves, they do nothing that alters the reasons for action applicable to lawmakers. And if choices that affect

---

[25] Such reasons are given book-length treatment in Heidi M Hurd, *Moral Combat* (1999).

only (or primarily) a person's own interests are nevertheless choices that generate reasons for action for others, then however often morality is silent, it would seem that it speaks to all when it speaks to any.

(7) Imperfect Moral Duties

Deontologists might insist that a final source of gaps within morality consists of those categorical duties which are 'imperfect' — duties which, by their nature, permit persons exercises of choice which cannot be impugned, and which, thus, cannot be coerced. There are two quite different accounts of imperfect duties, either one of which might be helpful to deontologists who seek to advance the claim that because the morality of many choices is itself indeterminate, the state must accord persons considerable discretion concerning how to order their lives.

(a) Millian Imperfect Duties

On John Stuart Mill's understanding, imperfect duties permit choice about both how and when to satisfy them. As Mill explained,

> though the act is obligatory, the particular occasions of performing it are left to our choice, as in the case of charity or beneficence, which we are indeed bound to practice but not toward any definite person, nor at any prescribed time.[26]

If persons have imperfect duties of the Millian sort, then there may be good reasons to think that the law cannot coerce them. First, inasmuch as an imperfect duty does not compel any *given* action, the state cannot claim that any particular act or omission on the part of a citizen is a violation of the duty. It thus cannot justifiably punish such an act (or omission) as a failure of (imperfect) moral duty. Critics might argue, however, that the state could justifiably punish persons for cumulatively failing to act in ways prescribed by imperfect duties. Thus, for example, the power of the state could justifiably be brought to bear on those who do not demonstrate adequate charity and beneficence over a given period of time, even though they were under no obligation to do so on any given occasion. But this argument, I suspect, will run afoul of the second reason why imperfect duties are plausibly resistant to legal enforcement: any attempt to enforce imperfect duties runs the risk of violating categorical obligations that derive from the principle of weak retributivism — the principle that blame and punishment is unjustified in the absence of moral desert.

To appreciate why imperfect duties cannot be enforced consistent with the obligations of weak retributivism to which most deontologists subscribe, imagine that the state enacted a law that required citizens to give ten percent of their earned income to charities of their choice over the course of each year. And imagine that a citizen were to violate that law by

---

[26] John Stuart Mill, *Utilitarianism* (first published 1861, 1957 ed), 61.

keeping all of her earned income for personal use. But imagine that she were to donate thirty hours of her time each week to assisting the elderly, volunteering at soup kitchens, and helping to run a homeless persons' shelter. Unless one believes that persons are morally blameworthy just because they violate the letter of the law,[27] one cannot maintain that the citizen morally deserves punishment. After all, the point of the law that she violates is to induce her to satisfy the imperfect moral duty of charity, and she has in fact satisfied *that* duty with all of her good works. If the principle of weak retributivism obligates officials not to impose legal sanctions on morally undeserving persons, then it precludes the enforcement of a law that mimics an imperfect duty in a case of this sort.

The point is this: Unlike perfect duties, which concern themselves with specific actions, and so cannot be fulfilled without doing those specific actions, imperfect duties of the Millian sort can each be satisfied by a virtually infinite set of actions. Consistent with the rule of law requirements of generality, publicity, and predictability, legislators could not hope to enumerate in law all of the ways in which persons might alternatively satisfy their imperfect moral duties, and judges could not, in the alternative, adjudicate general legal standards requiring 'charity', 'beneficence', and 'friendship'. In short, any attempt to coerce the satisfaction of imperfect duties would violate either the principle of weak retributivism or the rule of law. Thus if persons have imperfect duties of the sort discussed by Mill, then it would seem that the state must leave citizens at liberty to choose when and how to satisfy such duties.

(b) Kantian Imperfect Duties

The second account of imperfect duties is a Kantian one.[28] On this analysis, imperfect duties not only permit freedom of choice concerning how and when to satisfy them (the Millian criterion); they also 'are primarily duties to adopt a maxim (or, what comes to the same thing, to embrace an end).'[29] As Marcia Baron explains,

> [I]f I have a perfect duty not to make false promises, I fulfill that duty even if I refrain only because I think it prudent policy never to make false promises. But I do not fulfill my imperfect duty of

---

27 I defend against the view that legal violations are per se moral violations in Hurd, *Moral Combat,* above n 25, 62–184; Heidi M Hurd, 'Challenging Authority' (1991) 100 *Yale Law Journal* 1611.

28 I am here following the interpretation of Kant's theory of imperfect duties advanced by Thomas Hill and reiterated by Marcia Baron. See Thomas Hill, 'Kant on Imperfect Duty and Supererogation' (1971) 72 *Kant-Studien* 55; Marcia Baron, 'Kantian Ethics and Supererogation' (1987) 84 *Journal of Philosophy* 241.

29 Baron, above n 28, 242.

> promoting the happiness of others if I do good deeds for others only with the aim of impressing them or winning their favor.[30]

According to this view, some actions must be done for the right reasons in order to satisfy the obligations that concern them. If the law cannot compel the reasons with which persons act, or worse yet, if law positively corrupts the reasons with which persons act, then it cannot enforce any imperfect duties of a Kantian sort. While it may succeed in forcing citizens to *appear* moral, in the sense that it may succeed in causing persons to do actions that are typically done only by well-motivated persons, it cannot cause them to be properly motivated when doing those actions, and hence, it cannot, in fact, coerce their fulfilment of their imperfect duties.

I am not a fan of the view that law is likely to corrupt good motivations with which persons will otherwise perform certain praiseworthy actions.[31] It seems to me that those who do charitable deeds for charitable reasons absent any legal requirement are not likely to change the reasons for which they do those actions just because charity becomes legally required. That is, the motives of already moral persons are probably immune to perversion. As such, we should have no fear that by legislating imperfect duties, we will diminish the degree to which such duties are in fact satisfied.

The real question is whether the law can coerce persons who are not already well-motivated to perform certain dutiful actions for reasons *other than* the fact that such actions are required by law. Can it succeed in forcing uncharitable persons both to contribute to charity and to do so *because* charity is morally obligatory? Surely it cannot do so by seeking to regulate motivations directly. For we have good grounds to believe that we cannot will the reasons for which we act. As James Brown has maintained, 'clearly there are at least difficulties in the way of accepting that it is within an agent's power, on a particular occasion, to determine which motive will be the one which moves him to action.'[32] The most significant of these difficulties emerges from the current consensus in the philosophy of mind about the necessary relation that must exist between mental states and actions in order to say of those mental states that they are our reasons for acting. Of all the various motivations (that is, belief-desire sets) that are consistent with an action, the motivation (belief-desire set) that causes the action is the motivation for that action. It is this causal account of motivation that vindicates the claims of historians and psychoanalysts to be doing empirical, rather than literary, work. But such a causal account of motivation defeats any theory that legislation should concern itself directly

---

30 Ibid.

31 For one source of this view, see Moore, above n 9, 749.

32 James Brown, 'Moral Theory and the Ought-Can Principle' (1977) 86 *Mind* 206, 210.

with persons' motivations. For if motivation consists in a causal connection between a belief-desire set and an action, then we can no more will into (or out of) existence a motivation for action than we can will into (or out of) existence any other causal relation between events in the universe. Any legislation that sought to specify the reasons for which we must do certain actions would thus call upon us to do the impossible.

Coercing the satisfaction of Kantian imperfect duties could thus be accomplished only by indirect legal means. One would have to think, with Aristotle, that the habitual repetition of an action breeds a motivation to do that action for its own sake, so that a law that required certain actions consistent with imperfect duties would ultimately cause persons to do those actions for the right reasons. Suffice it to say here that reliance on such a psychological hypothesis has two costs. First, the empirics have to bear out the hypothesis, and, contrary to Aristotle's claim, habit may merely breed habit. Second, it should be troubling to a deontologist, in a way that it would not be troubling to a consequentialist, to propose that legislators should coerce persons to do actions that have no moral worth as an instrumental means of achieving morally worthy ends. For be clear that on the Kantian interpretation of imperfect duties, such duties are satisfied only if dutiful acts are accompanied by dutiful motivations. So long as the law succeeds in coercing only dutiful acts, those acts are morally worthless. It must thus justify its means (the regulation of certain actions that do not, by themselves, satisfy any moral obligations) by its ends (the inculcation of motivations to do those actions for their own sake) in a manner that is far more consistent with a consequentialist ethic than a deontological one.

It thus appears that deontologists who seek a location for political liberty would do well to start within the arena of imperfect duties — whether conceived of in Millian or Kantian terms — for there are good grounds to believe that *if* persons have such duties, the nature of those duties is such that they cannot be regulated by the state, at least not without significant and probably undue moral costs. Inasmuch as imperfect duties themselves leave persons at liberty to choose when and how they are satisfied, and inasmuch as they may require attendant motivations that are resistant to coercion, it would appear that the state should not, and perhaps cannot, substitute its choices for those of its citizens.

The gravest difficulty with premising a deontological account of political liberty on imperfect duties (particularly imperfect duties of the Millian sort) is that, once again, such an account appears to accord persons liberty only when the choices available to persons are, in some sense, equally right. If the imperfect duty of charity accords a person moral liberty to choose between helping her neighbour now or sometime in the future, then she breaches no moral obligation if she defers her assistance to some

later point. Were the law to leave citizens at liberty to satisfy obligations when, but only when, those obligations are of an imperfect sort, it would simply be according persons freedom to choose between equally moral options — eg, to give money to this homeless person or that one; to intervene as a Good Samaritan in this accident or in another; to volunteer time for an environmental cause or a humanitarian one. While it may be that the law cannot leave persons at liberty to choose their causes without effectively leaving persons at liberty not to aid any causes at all, this argument for political liberty in principle requires only that the state not make the choices for citizens that imperfect duties themselves permit. And since imperfect duties do not permit persons to forgo their satisfaction altogether, they cannot be employed in defense of a political theory that guarantees (as opposed to coincidentally affords) persons legal rights to do moral wrongs.

II. Moral Doubt

All of the arguments for political liberty discussed so far are members of a single species. They all seek to match the limits of law to the limits of morality, and inasmuch as they collectively stand for the view that morality has gaps within which persons' choices can be neither blamed nor praised, they collectively support the claim that the law must have gaps within which persons may pursue their own projects without fear of legal interference. Yet arguments in support of moral gaps represent just the first of four possible kinds of arguments for why, in certain circumstances, the state simply cannot declare conduct either moral or immoral. There remain three further reasons — beyond the fact that some actions simply are neither moral nor immoral — for why the state may not be able to *declare* some actions either moral or immoral. If the *law* has gaps of institutional competence within which it cannot definitively declare citizens' conduct either right or wrong, then we have grounds to think that persons should sometimes enjoy political liberty even when they are not acting within any moral gap.

The first reason why the state may be unable to characterize the morality of certain conduct is simply that its officials may be in doubt about such a matter. Put differently, there may be circumstances in which the law — any law — would be a poor epistemic authority concerning how we should act. In such circumstances, lawmakers may either lack the competence to assess accurately the balance of consequences that will follow from our conduct, and so lack the authority to declare that conduct consequentially justified or unjustified; or they may lack the competence to discover or pronounce the reasons for action that categorically bind persons on a deontological moral theory (which, as we have already seen, may consist of a complex amalgam of perfect duties, imperfect duties,

consequentialist considerations at the threshold, and agent-relative reasons deriving from personal projects). Inasmuch as we have good reasons, on any moral theory, to think that the moral justifiability of many actions is a complex matter about which the state is likely to be mistaken, this argument would appear to provide a considerable sphere within which persons must be left free to make their own choices.

Like the arguments for moral gaps, this argument predicates political liberty on an absence of justification for state action. According to this argument, the fact that the state is or should be in doubt about its ability accurately to assess the morality of many actions is itself a reason for the state to refrain from regulation. For unless and until the state can be confident that it is justified in intervening in its citizens' lives, it lacks a justification for so doing. And so long as the state cannot act morally absent an epistemically well-grounded justification, citizens will be guaranteed liberty in all circumstances in which there exists doubt about how that liberty ought to be exercised.

There are many reasons, from a pedestrian to a philosophical sort, why we may have confidence in the sustained incompetence of the state to function as a reliable moral authority on all matters. While (appointed) judges may enjoy a special moral vantage point by virtue of both their relative inability to use their positions for personal gain and their insulation from political pressures, the degree to which politicians can be thought to possess moral expertise is notoriously suspect. Before such lawmakers can claim confidence in the collective moral judgments reflected by particular enactments, and before citizens accord such enactments authority, it must be possible to make out two claims. The first is a motivational one, namely, that enough legislators try to organize society in an optimal way that there is a substantial chance that they will succeed over others who might pursue the same goal. The second is a capacity assumption, namely, that legislators *can* accurately discover and describe citizens' moral obligations toward one another if they are motivated to do so. Whenever it can be said that there is substantial doubt about the truth of either of these claims, there would appear to be an 'institutional gap' within which morality might plausibly require lawmakers to be silent, even if morality is itself not.

The conventional position concerning the motivational question is a charitable one. As Dwight Lee explains,

> Most academics (including most economists) whose work concerns government policy and practice tend to assume, if only implicitly, that political decision makers are motivated by the desire to promote the interest of the general community.[33]

---

[33] Dwight Lee, 'Politics, Ideology, and the Power of Public Choice' (1988) 74

Rejecting this 'public interest model', public choice theorists assume that individual legislators are narrowly self-interested when they vote on legislation; hence, the last thing that we should expect from them is legislation that actually promotes public interests or adheres to morality's dictates.[34] Absent an ability to resolve this psychological dispute, those seeking to measure the modesty with which legislators ought to enforce the moral obligations of citizens might look to the degree to which institutional features within the legislative process are likely to temper the expression of self-interested motivations. After all, institutional design can counteract the effects of undesirable individual motivations. As Lon Fuller famously argued, legislation that comports with 'the inner morality' of law so as to be prospective, public, general, clear in meaning, free of contradiction, stable over time, judicially imposed, and within the realm of the possible, is likely to be substantively better legislation than that produced in violation of such values.[35]

Aside from the eight formal desiderata of law articulated by Fuller, there exists a second formal feature of lawmaking that may more directly blunt the expression of immoral motivations by individual legislators. Legislators, no matter how self-interested or biased they may be, must put their justifications for legislation in terms of interests that are proper to the legislative/moral point of view — to the view that each is to count for one and only one. This is not just the point that hypocrisy is the compliment that vice pays to virtue. It is rather the point that a piece of legislation motivated by pure self-interest is likely to run into difficulties at the stage of public justification as well as at the stage of enactment.

The final feature of legislation that can be thought to moderate the institutional expression of self-interest is the interpretive stance taken by courts. Courts tend to force a public interest conception onto legislation, no matter what the motivations of individual legislators might have been. By

---

Virginia Law Review 191, 191.

34 For some of the classics, see, James Buchanan, 'Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications' in James Buchanan and Robert Tollison (eds), *The Theory of Public Choice II* (1984) 11 (arguing that public choice theory replaces romantic ideals with realistic appraisals of human motivation); Gordon Tullock, 'Problems of Majority Voting' (1959) 67 *Journal of Political Economy* 571 (articulating the theory of log-rolling or vote-trading to explain why democratic structures will exhibit overly expansive public spending); George Stigler, 'The Theory of Economic Regulation' (1971) 2 *Bell Journal of Economics and Management Science* 3 (formalizing interest group capture theory of regulation).

35 As he declared, '[I]f men are compelled to act in the right way, they will generally do the right things.' Lon Fuller, 'Positivism and Fidelity to Law to — A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630, 643.

so doing, courts force (possibly self-interested) legislation toward a conception of what is morally required, and this may make it at least plausible to regard such legislation as a reflection of the content of morality.

The second assumption that must be made before legislators ought to be thought to possess sufficient moral expertise to make moral judgments on behalf of their citizens is what I have called the capacity assumption. Before legislators should be confident to speak to an issue (and before citizens should be required to listen to them) it must be established that they have the cognitive and empathetic skills and information-gathering capacities necessary to make them 'moral observers' of a more capable sort than most. And indeed, legislatures are comprised of a large number of individuals who are at least institutionally pressured to articulate optimal states of affairs. These individuals have extensive fact-finding capacities at their disposal. They are representative of many points of view. They have strong institutional incentives to reach agreement, but not in ways that produce checkerboard results. All of these institutional features combine to make plausible the claim that, *if* they are motivated to do so, legislators have many of the necessary capacities required for reliable moral judgment.

These considerations of legislative motivation and capacity go some distance toward suggesting why, in many circumstances, legislators and citizens alike ought to have confidence in the collective moral judgments of an elected legislature. They give us some reason to think that intellectually limited, short-sighted, self-interested, uninformed, and unsympathetic individuals might reach decisions that are of greater moral accuracy, so to speak, than the sum of their parts. But the inability to claim that institutional features can always make up for motivational, cognitive, and informational impairments commits one to making case-by-case assessments. And as to some moral matters, one suspects that the necessary motivational and capacity claims cannot be met. As H L A Hart and the legal positivists argued in response to Fuller's claim that fair legislative processes can guarantee moral results, notwithstanding the immoral motivations of legislators, surely pernicious regimes that produce pernicious results can comport with Fuller's forms of fair legislation.[36] Or, as Grant Gilmore pithily put it: 'In Heaven there will be no law, and the lion will lie down with the lamb... In Hell there will be nothing but law, and due process will be meticulously observed.'[37] And while legislatures can boast impressive fact-finding capacities, there may be many moral judgments that simply defy such capacities. For example, as I shall discuss in Part IV below, some

---

36 H L A Hart, *The Concept of Law* (1961) 202; H L A Hart, 'Book Review' (1965) 78 *Harvard Law Review* 1281 (Reviewing Lon Fuller, *The Morality of Law* (1964)).

37 Grant Gilmore, *Three Ages of American Law* (1977) 111.

moral judgments may be so 'personal' — in the sense of being so much a product of factors unique to individual circumstances (eg, the question of whether to become a parent) — that they cannot accurately be assessed by others, and certainly not by a large legislature at considerable remove, regardless of its fact-finding resources. Other moral judgments may turn on scientific facts not yet conclusively established by the scientists who seek them (eg, the point of fetal viability) so as to make legislative efforts to find such facts premature. Still other moral judgments might require knowledge of facts that cannot be obtained without adopting methods of surveillance that unacceptably invade the privacy of citizens (eg, peepholes in public washrooms, wiretaps on private telephones). Whatever the reason, there will surely be circumstances in which both citizens and legislators should doubt the ability of a legislature to make accurate judgments about citizens' obligations. And within such gaps of institutional competence, it is plausible to think that citizens should be left at liberty.

Inasmuch as liberty can be in two (or more) places at the same time, we need not worry that in locating political liberty in legislative doubt, we deprive it of a safe home. Yet many will undoubtedly hope that this does not turn out to be its only home. For while those who make this argument may be right to presuppose the intractability of doubt concerning how persons ought to live much of their lives, the argument implicitly licenses the state's progressive regulation of conduct as it sheds doubts about the morality of that conduct. Those who think that persons ought to be left at liberty to make what are undoubtedly *bad* choices (the choice to use drugs, engage in prostitution, join racist organizations, etc) may be happy to point to legislative doubt as a reason for the state to stay its hand, but they must ultimately believe that when and if moral doubt dissipates, morality will itself require the state to accord persons legal rights to do what are undoubtedly moral wrongs.

III. Moral Disagreement

Prominent within contemporary liberal scholarship is the view that persons ought to be left at liberty to make their own choices whenever (and perhaps only so long as) there is persistent disagreement amongst reasonable persons concerning how persons ought to act. One interpretation of this argument would collapse it back into the argument from moral doubt discussed above. On this (redundant) interpretation, legislators should doubt the morality of any matter about which reasonable persons irreconcilably disagree. They should be modest enough to admit that in the face of reasonable disagreement, they cannot possibly claim to have a corner on the truth. Public controversy, on this argument, thus counts as a sufficient condition, if not a necessary condition, for appropriate legislative doubt, and thus, for appropriate legislative silence.

An alternative interpretation of this argument would make it conceptually autonomous. On this second interpretation, fairness, rather than uncertainty, dictates that legislators ought not to settle matters that have not already been resolved to the relative satisfaction of reasonable citizens by public debate and discussion. It is not that state actors are necessarily ignorant about the morality of matters that are in public dispute; it is that the morality of such matters is properly something about which legislators must be wilfully blind. Thus, for example, in the face of public controversy concerning the morality of abortion, legislators are estopped from pursuing a pro-life agenda that would require state interference with the liberty of women, not because they may be wrong about the moral equality of fetuses, but because such public disagreement creates a gap within which they do not have jurisdiction to act.

While disagreement constitutes the cornerstone of a number of prominent liberal theories,[38] the most famous contemporary attempt to extract liberty from disagreement is John Rawls' 1993 *Political Liberalism.*[39] In Rawls' 'modern view',[40] just exercises of state power are those that can be justified by appeal to 'public reason' — that is, through argumentation limited to principles that enjoy a 'shared consensus' on the part of persons with reasonable conceptions of the good. Inasmuch as there is no shared consensus amongst reasonable persons concerning first-order moral, religious, and philosophical matters (such as, what constitutes a good life), persons must seek means of structuring their political institutions so as to leave such matters to private conscience, and they must argue for those political arrangements employing only those principles and ideals that are acceptable to all reasonable persons, regardless of such persons' unique conceptions of the good or private modes of reasoning.

This is not the place to take up in any detail the merits of Rawls' 1993 case for political liberty.[41] Instead, let me simply log some of the questions that a modem Rawlsian must be able to answer in order to

---

38 See, eg, Thomas Nagel, *Equality and Partiality* (1991); Brian Barry, *Justice as Impartiality* (1995); Charles Larmore, *Patterns of Moral Complexity* (1987); Bruce Ackerman, *Social Justice in the Liberal State* (1980); Jürgen Habermas, *Moral Consciousness and Communicative Action* (1990); Jürgen Habermas, *Justification and Application* (1993).

39 John Rawls, *Political Liberalism* (1993).

40 By which I mean the view that he substituted for the famous theory of liberty articulated in John Rawls, *A Theory of Justice* (1971) — a view that he took to rely, unjustifiably, on a particular substantive conception of the good about which reasonable persons could disagree.

41 For such a detailed treatment of Rawls' 1993 theory, see Heidi M Hurd, 'The Levitation of Liberalism' (1995) 105 *Yale Law Journal* 795 (reviewing John Rawls, *Political Liberalism* (1993)).

predicate political liberty on the claim that the state cannot legislatively resolve matters of controversy amongst reasonable citizens. First, in order for diversity of citizen opinion to count as a sound reason for state inaction, it must be demonstrated that many conflicting opinions can be simultaneously *reasonable*.[42] For it is not (on most views, including Rawls') unfair to impose state power on those who unreasonably resist it. So, disagreement is an autonomous basis for liberty only if it can be sustained between equally reasonable persons.

Second, disagreement theorists of the Rawlsian stripe must meet the charge that in permitting state action pursuant to an overlapping consensus by those who hold reasonable conceptions of the good, they are substituting a kind of 'liberal tyranny' for genuine tolerance. For if those who are deemed to hold *unreasonable* conceptions of the good can be coerced to comply with principles derived by consensus from reasonable conceptions of the good, and if reasonable conceptions of the good are defined as those that are 'liberal', then liberty derives less from disagreement, as such, than from disagreements amongst liberals (with whom many have disagreements!).[43]

Third, those who seek to extract a theory of state action from a theory of (reasonable) disagreement must make plausible not only their conviction that persons who disagree can agree to disagree, but their further conviction that those who indeed hold competing conceptions of the good can agree on particular principles of political justice,[44] and on the constitutional essentials to which those principles apply.[45] After all, it is one thing for persons to agree in principle to live with one another in peace, notwithstanding their disagreements; it is another for them to work out the particulars of their relationships when they do not share, and cannot draw

---

42 See Brian Barry, 'In Defense of Political Liberalism' (1994) 7 *Ratio Juris* 325, 329. See also Thomas Scanlon, 'Contractualism and Utilitarianism' in Amartya Sen and Bernard Williams (eds), *Utilitarianism and Beyond* (1982) 103 (spelling out a theory of reasonableness predicated on a contractualist account of moral motivation).

43 See Paul Campos, 'Secular Fundamentalism' (1994) 94 *Columbia Law Review* 1814, 1817–25; Gary Leedes, 'Rawls' Excessively Secular Political Conception' (1993) 27 *University of Richmond Law Review* 1083, 1091–5; Lawrence Mitchell, 'Trust and the Overlapping Consensus' (1994) 94 *Columbia Law Review* 1918, 1933–5; Chantal Mouffe, 'Political Liberalism, Neutrality and the Political' (1994) 7 *Ratio Juris* 314, 321–2.

44 See Mitchell, above n 43, 1925–35; Lawrence Solum, 'Situating Political Liberalism' (1994) 69 *Chicago-Kent Law Review* 549, 580; Michael Sandel, 'Political Liberalism' (1994) 107 *Harvard Law Review* 1765, 1782–9 (book review of John Rawls, *Political Liberalism* (1993)).

45 See Kent Greenawalt, 'On Public Reason' (1994) 69 *Chicago-Kent Law Review* 669, 682–5.

upon, the moral, religious, or philosophical convictions which constitute the reasons for their disagreements.

Fourth, modern Rawlsians must explain how it could ever be reasonable for those who are loyal to certain contentious first-order commitments to 'check their convictions at the door' when debating how to structure their political relationships with those who do not share their commitments. Why would it be reasonable to abandon one's most basic moral and religious convictions when those convictions appear to be most needed and when others appear most in need of their lesson?[46] And even if citizens can abandon such convictions consistent with being reasonable, will not their doing so impoverish public debate by precluding them from publicly discussing, and thus publicly resolving, first-order disputes about the content of the particular conceptions of the good that generate their disagreements to begin with?[47]

While the success with which Rawlsian theorists can satisfactorily answer these and other questions remains itself a matter of rich debate, it suffices for our purposes simply to chart this debate at this point on our map. If the outcome of this debate vindicates the claim that reasonable disagreements amongst citizens create 'jurisdictional gaps' for law, then we have an additional reason to think that while morality may not be silent, there are circumstances in which lawmakers must remain so.

IV. Moral Particularism

We have canvassed thus far a host reasons to think that morality itself has gaps within which legislators are deprived of any moral justifications for state action. And we have further explored at least two reasons to suspect that there may be gaps within the institutional competence or jurisdiction of the state that, when present, render unjustified the state's interference with its citizens' liberty. There remains one more such source of institutional impotence. If morality is highly 'particularistic' — that is, if its dictates vary considerably between individuals and between the different contexts within which individuals act — then law may be institutionally incapable of reflecting (many of) its citizen's moral obligations, and so may be forced to leave its citizens at considerable liberty to violate those obligations.

---

46 See Samuel Scheffler, 'The Appeal of Political Liberalism' (1994) 105 *Ethics* 4, 16–19; Elizabeth Wolgast, 'The Demands of Public Reason' (1994) 94 *Columbia Law Review* 1936, 1942–3; Sandel, above n 44, 1777–82.

47 See Thomas Pogge, *Realizing Rawls* (1989) 214; Mouffe, above n 43, 322–4; Wolgast, above n 46, 1941–2; Sandel, above note 44, 1789–94.

Again, one interpretation of this argument ultimately collapses it back into the argument from moral doubt. On this interpretation, the fact that moral obligations are highly 'person-specific' and/or highly 'fact-sensitive' suggests that a large modern state is likely to be incompetent at assessing how individuals ought to act in many situations. Such an epistemic claim is often made by both Hayekian libertarians and modem utilitarians. Common to these different theorists is both the view that citizens' preference-satisfaction should be maximized and the view that individuals are the best judges of their own preferences. It follows from these claims that the state is simply less likely than any individual to assess accurately what that individual ought to do, for the state is less capable than that individual of determining and accurately weighting the preferences that the individual ought to maximize. The state thus ought to cede to more competent institutions, viz, the free market, the job of tabulating and satisfying preferences, intervening only when it can be absolutely confident that its meddling will, in fact, do more good than harm (eg, when it has cause to suspect a true market failure).

There is, however, an alternative interpretation which extracts political liberty from moral particularism without relying on epistemic doubt. This argument draws instead on the implications of pairing moral particularism with the institutional constraints imposed on the state by rule of law values. According to this line of argument, there is, on any given occasion, *a* right answer to the question of how an individual ought to act — of what end she ought to pursue and what means she ought to adopt in pursuing that end. But the answer is so personal as to be non-generalizable.[48] It is often a product of a complex calculation that takes into account his or her talents, skills, ambitions, interests, capacities, already-made choices, existing relationships, circumstances, opportunities, and deontologically-imposed obligations (both to self and others). Whether someone ought to be a fire-fighter or a librarian, a parent or a priest, a

---

[48] This is a view which Douglas Rasmussen shares with me. As he writes:

> [O]ur nature as human beings reveals a cluster of generic goods that we need to have fulfilled in order to flourish... Among these are sociability, knowledge, leisure, aesthetic appreciation, creativity, moral virtue, health, pleasure, self-esteem, and practical wisdom ... [T]he importance or value of these goods is rooted in factors that are unique to each person. The circumstances, talents, endowments, interests, beliefs, and histories that descriptively characterize each individual — what is called an individual's 'nexus' — determine, as much as possible, the appropriate valuation or weighting of these generic goods for each individual.

Douglas Rasmussen, 'Why Individual Rights?' in Tibor Machan (ed), *Individual Rights Reconsidered* (2001) 113, 117–18.

bicyclist or a swimmer, a cook or a gardener, and whether she ought on any given occasion to work or play, seek company or solitude, fulfil commitments or procrastinate about them, can be answered only by appeal to a multitude of facts, both moral and empirical, about the individual.

Inasmuch as law is not law at all unless it comports with the formal constraints that Fuller described as the 'inner morality of law' — the requirements that it be general, clear, predictable, and consistent — law cannot mirror morality if morality itself does not exhibit these formal characteristics. If morality is highly particularistic — if its dictates are practically as many as there are individuals in different circumstances — then the state cannot hope to specify, in the general language of the law through which it must speak, the actions that individuals (of which there are roughly 260 million in the United States) must perform in order to live moral lives.

It is tempting to think that this view is reminiscent of incommensurable pluralism; but such a comparison should be resisted. While on this view there is a plurality of good choices, no one of which can be generalized, this is because there is a plurality of people, each one of whom realizes what is good through choices that are unique to his or her circumstances. This is not to say that for any given person there is a plurality of incommensurable goods from which she is free to choose. It is rather to say that what is good for any given person is so much a product of things peculiar to her and her circumstances that the state cannot articulate what she ought to do without violating the constraints imposed upon it by the rule of law requirements. As an argument for political liberty, this clearly bears family resemblances to the arguments from institutional incompetence discussed in the previous two sections of this article: The state is simply incapable of formulating general laws that accurately capture how persons ought to act in many circumstances. It cannot simplify many of the demands of morality without grossly distorting them; and hence, it ought not to try.[49] In short, the particularities of morality generate necessary

---

[49] Fred Schauer takes this to be a logical truth about law, however general or particularistic morality may turn out to be. As he argues,

> it is logically impossible for a rule to generate a result for a particular case superior to the result that would have been generated in the absence of rules, but ... it is indeed quite possible for rules to generate results in particular cases that are inferior to those generated without them.

Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991) 101.

gaps in the law — gaps within which persons may commit moral wrongs with legal impunity.

Conclusion

I have sought to catalogue the most salient means by which to claim that legislators are sometimes, and perhaps often, incapable of declaring citizens' conduct immoral, and hence, prima facie regulable. Some of these means rely on the notion that morality itself is 'gappy'; its injunctions leaving room for considerable choice by citizens between options that are themselves of morally neutral status. Others of these means appeal to the claim that even when morality speaks clearly concerning the propriety of a citizens' conduct, there may be reasons related to doubt, disagreement, and rule of law values, why lawmakers cannot *declare* that conduct immoral. Between the gaps that may characterize morality, and the gaps in moral competence that may characterize lawmakers, we may need far fewer arguments from liberal tolerance than political theorists have thus far supposed when constructing a theory of political liberty. For arguments from tolerance are arguments about why lawmakers should stay their hand even when they have prima facie good reasons to declare citizens' conduct immoral. If lawmakers are sometimes, and perhaps frequently, at a loss to declare citizens' conduct immoral, then citizens may be entitled to a good deal more liberty than legislative tolerance demands. We may very often be entitled to do what we want, precisely because what we want to do falls within the gaps of moral concern or regulatory competence.