

COMMENTS ON LARRY ALEXANDER'S *LAW AND POLITICS: WHAT IS THEIR RELATION?*

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Professor Alexander is a provocateur, which is altogether a good thing. And today, in giving us a capsule version of a problem he has thought about for a very long time,¹ he has not failed to provoke.

I, on the other hand, am coming to this problem for the first time, and my tentative reply to his very interesting remarks is that the “gap” of which he speaks is more starkly a problem in theory than it may prove to be in practice. It is an explanatory prism, yes—but an intractable problem? Maybe not.

“The gap” is this with respect to first-order moral reasoning: the difference between what the law requires and what you think you should do. As Alexander puts it, “rules . . . will prescribe conduct that some first-order practical reasoning rejects.”² If they agree, the law is unnecessary, as we would do as it bids without its bidding. If they disagree, no good reason can be adduced to do as law bids, and so law fails.

Professor Alexander considers and rejects various possibilities for closing the gap. I am not quite convinced by each of his rejections. For example, when he speaks of “rule violators who the judges know acted on their first-order practical reasons and *for that reason* do not deserve punishment,”³ I know of no reason to accept—without more—the conclusion that a rule violator acting on a conviction that a rule is wrong does not deserve punishment.

Be that as it may, what seems insoluble in theory is something we muddle through for the most part successfully in

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1. See Larry Alexander, *Can Law Survive the Asymmetry of Authority?*, 19 QUINNIPIAC L. REV. 463, 467 (2000); Larry Alexander & Frederick Schauer, *Law's Limited Domain Confronts Morality's Universal Empire*, 48 WM. & MARY L. REV. 1579 (2007).

2. Larry Alexander, *Law and Politics: What Is Their Relation?*, 41 HARV. J.L. & PUB. POL'Y 355, 360 (2018).

3. *Id.* at 360–61 (emphasis added).

practice. Professor Alexander himself admits that some strategies “narrow[] but do[] not close the gap” and taken together they may narrow it considerably.⁴ As much as his paradox may trouble us, nonetheless we may observe that most people are lawabiding most of the time, that the instances in which they are scofflaws (for example, jaywalking) are of little consequence, and that the great clashes between the law and the truly conscientious moral reasoner are not high-frequency phenomena.

Moreover, his stark statement of the gap strips away some potentially important nuances. Is the law’s command to us that we violate what we hold to be exceptionless prohibitions? This, thankfully, will be rare. Is the law’s command that we fulfill a legal duty that is, for us, a matter of moral indifference? This is far more usual. And in all the space between that and the command to do a wrong our morality prohibits, there is a wide zone of greater and lesser conflicts.

When the gap opens up, there are also resolutions of the conflict it engenders that can themselves generate new legal rules or preserve the one at stake in the instant case. Among such modes of resolution are the rule of lenity in criminal law, the executive pardon power, the application of equity jurisprudence to “hard cases” or manifest absurdities, the controversial but practically unstoppable power of jury nullification, as well as more rarefied mechanisms such as federal and state religious freedom restoration acts and the power of judicial review itself. The last of these leads me to a further observation.

Professor Alexander’s passing remark about a judge treating a rule violator’s moral reasons as a ground to conclude he deserves no punishment⁵ and his closing vignette about bankruptcy judges⁶ suggest something about where the gap is truly problematic: namely, in the real-world behavior patterns of the judiciary, not in those of the citizenry generally. To put the matter baldly, Alexander-fashion: on a proportional basis, one may say with high confidence that practical rule-flouting occurs with greater frequency among judges than among the population as a whole.

4. *Id.* at 360.

5. *Id.* at 360–61.

6. *Id.* at 363.

This, in particular, is a gap very much worth pondering, particularly as we come to the end of a week (at the time of this symposium) spent in Washington on an inconclusive, frustrating conversation between senators and a Supreme Court nominee, Neil Gorsuch, on the subject of the relation between law and politics. One of the things that makes the spectacle of this week so disheartening—with senators who want to know what results a judge will choose in future cases, and nominees who won't even comment on past ones—is that we are operating in an environment in which virtually everyone agrees that the Constitution simply is what judges say it is.⁷ So the stakes are very high.

Professor Alexander and his sometime collaborator, Professor Frederick Schauer, have vigorously defended the consensus view of judicial supremacy, arguing that it performs an essential “settlement function.”⁸ I do not think that argument follows from, or even coexists easily with, the Alexander-Schauer thesis on the gap or the “asymmetry of authority.”⁹ It appears rather to be an effort to close the gap by fiat in one field of law.

But in fact, it exacerbates the gap. For when judges find that the rule of the Constitution chafes them, they push it aside in favor of first-order practical reasoning of their own, and then *call that* the law of the Constitution. They are encouraged to do this by the institutional armor provided by the doctrine of judicial supremacy and finality, as well as—in the lower courts—by the Supreme Court justices' determination in recent years to do as little work as possible and that work only of their choosing.¹⁰

So perhaps Professor Alexander can offer us some thoughts on how the putative settlement function of judicial supremacy can in practice lead to such unsettling results. Can this gap be closed?

7. See, e.g., Eric J. Segall, *The Constitution Means What the Supreme Court Says It Means*, 129 HARV. L. REV. F. 176 (2016).

8. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 467 (2000).

9. See Alexander & Schauer, *supra* note 1, at 1587–88.

10. See Matthew J. Franck, *The Problem of Judicial Supremacy*, 27 NAT'L AFF. 137, 140–42, 148 (2016).