

# Imposing Rules

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The literature on rules, like the literature on authority, is a literature of the subjects. Although the practice of rule-based governance requires, at the least, both a rule-imposer and a rule-subject, it is the rule-subject who attracts the bulk of our attention, or so one would infer from looking at the philosophical and jurisprudential literature. Within this literature, the subjects of rules loom large, with the most concentrated attention being devoted to exploring the moral, political, and legal responsibilities of those whose decisions and actions would be constrained by the rules that others impose upon them.<sup>1</sup>

Yet although the issues surrounding the morality and rationality of rule-following are indeed important, the parallel issues of rule-imposition are no less so. When we examine the morality and rationality of rule-imposition, however, we discover structural differences between the standpoint<sup>2</sup> of the rule-imposer and that of the rule-subject, differences

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1. See, e.g., HEIDI M. HURD, *MORAL COMBAT* (1999); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979); PHILIP SOPER, *THE ETHICS OF DEFERENCE: LEARNING FROM LAW'S MORALS* (2002); Donald H. Regan, *Law's Halo*, 4 *SOC. PHIL. & POL'Y* 15 (1986); Scott J. Shapiro, *The Difference That Rules Make*, in *ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY* 33 (Brian Bix ed., 1998).

2. The importance of standpoint in legal theory has been persistently urged by William Twining. See, e.g., WILLIAM TWINING & DAVID MIERS, *HOW TO DO THINGS WITH RULES* 64–74 (3d ed. 1991); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 3–4, 172–74, 375–84 (1973).

that make the morality and rationality of rule-imposition considerably more divergent from the morality and rationality of rule-following than is commonly appreciated. It is just that divergence—the divergence between the perspective of the rule-imposer and the perspective of the rule-subject—that I seek to explore here.

## I.

As I shall emphasize throughout these comments, much of the literature on obedience to (or disobedience of) rules<sup>3</sup> assumes that the subject's proposed act is either beneficial or, if not positively beneficial, then at least harmless, or, if not harmless, then at least harmful only to the subject herself. Perceived from the standpoint of the subject, the worst we can imagine of any action is that it is harmful only to the subject, and the best we can imagine is that the act is somewhere between morally neutral and morally advantageous. Yet the universe of human actions is not exhausted by the categories of beneficial, harmless, and harmful only to the actor. There is still another category, and it is a highly significant one, for some actions are harmful to others—murder, rape, assault, price fixing, the sale of tainted foods, and the dumping of toxic waste, for example—and it is in the realm of such other-regarding and harmful acts that questions about the morality and rationality of rule-imposition become important.

With respect to other-regarding and harm-producing actions,<sup>4</sup> the primary question is the question of intervention.<sup>5</sup> If Sid perceives Rick about to commit an assault against Barbara, for example, what should Sid do? Putting aside Sid's concerns for his own safety, a moral and rational Sid should intervene if he perceives it right to protect Barbara against Rick, but should of course not intervene if he perceives Barbara as being in no danger—Rick and Barbara might be play-acting for example. This is obvious, and verges on the tautological, but what is important about this scenario is that rules need play no part in Sid's

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3. And so too on the obedience to law and the obedience to authority.

4. As should be apparent, I take the category of harm-producing actions to be a subset of the category of other-regarding actions. Some harm-producing actions are harmful only to the actor and are thus not other-regarding, and some other-regarding actions produce consequences for others that are not harmful (such as being beneficial), but here I concentrate on those actions that produce harm to others. If we think of rule-imposers as "first" parties, and rule-subjects as "second" parties, then what I am concerned with here are the actions of first parties with respect to the actions of second parties that have harmful consequences to third parties.

5. For my own earlier thoughts on this question, framed largely in terms of the justifications for not *tolerating* the other-regarding and harm-producing the actions of others, see Frederick Schauer & Richard Zeckhauser, *Cheap Tolerance*, 9 SYNTHESES PHILOSOPHICA 439 (1994).

decision whether to intervene. Sid should intervene when it is the right thing to do, but not when it is the wrong thing to do, and rules do not come into the equation. So if it happens that a rule tells Sid to intervene when intervention is the right thing to do, then the rule is superfluous, and if a rule tells Sid to intervene when nonintervention is the right thing to do, then it is pernicious, and, arguably, ought to be disregarded.<sup>6</sup> And so too in reverse, with rules that would mandate nonintervention when it is not right to intervene being superfluous, and rules that would mandate nonintervention when intervention is indicated being perverse. When we are talking about single acts of intervention or nonintervention, therefore, rules turn out to be either superfluous or perverse, and it is thus difficult to perceive their virtues.

## II.

Things look dramatically different, however, when we move beyond single acts of intervention or nonintervention, for here there is an important asymmetry. Even though a rule will regulate a multiplicity of events—that is just what rules do,<sup>7</sup> and it is what distinguishes rules (or standing orders) from particularized commands—the subject of the rule sees only one. From the perspective of the subject, the generality of a rule disappears, and she sees only a particularized conflict between what she wishes (rightly, from her perspective) to do (or not to do), and what the rule indicates with respect to this particular action. And from this perspective, as Scott Shapiro rightly emphasizes in his remarks here,

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6. I do not deny that there may often be good reasons for following rules even when they indicate wrong actions, for every instance of authority presents just such a scenario. See LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 34–36, 53–59 (2001); Donald H. Regan, *Reasons, Authority, and the Meaning of “Obey”*: Further Thoughts on Raz and Obedience to Law, 3 *CANADIAN J.L. & JURISPRUDENCE* 3, 20 (1990); Donald H. Regan, *Authority and Value: Reflections on Raz’s Morality of Freedom*, 62 *S. CAL. L. REV.* 995 (1989). I assume the absence of authority here because it is the absence of authority from the subject’s standpoint that makes the problem interesting and hard. If there is a case for authority from the authority’s point of view even when there is no case for authority from the subject’s point of view, then there is an *a fortiori* case for authority from the authority’s point of view when there *is* a case for authority from the subject’s point of view.

7. Understanding rules as necessarily general and thus encompassing a multiplicity of relevantly different particulars is the central theme of FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991).

rules once again are either superfluous or perverse.<sup>8</sup>

From the perspective of the putative intervener with respect to harmful action, however, the generality of a rule hardly disappears. If the putative intervener is considering intervening with respect to a single action, rules are either superfluous or perverse, but there is no reason to believe that intervention, unlike obedience or disobedience, must necessarily be particular rather than general, singular rather than multiple. As a potential intervener looks out upon the world, she may well see not only one but rather numerous opportunities for intervention. In theory she could intervene one intervention at a time, making the intervention or nonintervention decision on a case-by-case or particularistic basis. But life is short, resources are scarce, and time is limited. From the perspective of the intervener the challenge is pressing—so much evil, so little time. So the intervener often intervenes wholesale rather than retail, deciding to intervene for a class of cases rather than one case at a time. And of course we rarely refer to this as wholesale intervention; we simply call it policymaking. Sometimes we simply call it rulemaking.

### III.

The question is now transformed. No longer are we concerned with whether a rational rule-subject should follow a rule on *this* occasion, and no longer are we concerned with whether a rational putative intervener should intervene on *this* occasion. Rather, we are concerned with how a person with power (not the same as authority) rationally intervenes in multiple other-regarding and harmful events, and thus how such a person (or institution) exercises control over multiple misbehaving agents. And because rules are generalizations, with all of the under- and overinclusiveness that necessarily attaches to rules, the rational intervener imposes rules even as he recognizes that those rules will in effect mistakenly intervene on some occasions and mistakenly fail to intervene on others. But in considering the imposition of rules, the rule-imposer will consider the issue in the aggregate, and will impose rules whenever she perceives that the harm she prevents by imposing rules in the area of their accurate application exceeds the harm she produces by imposing rules in the area of their inaccurate application.

In imposing rules, therefore, the rational imposer is considering how she should maximize her control over multiple miscreants, or, to put it more gently, over multiple potentially misbehaving (to the detriment of third parties) agents. These agents, when they do not believe that they

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8. See generally Scott Shapiro, *The Rationality of Rule-Guided Behavior: A Statement of the Problem*, 42 SAN DIEGO L. REV. 55 (2005).

are misbehaving, will have reason to disregard the rule, especially if they make the decision after taking into account the possibility of their own error. But the rational imposer of the rule may believe, rationally, also after taking account of the possibility of *her* own error, that the rule-subjects will underestimate the possibility of their own error, and, consequently, it may be rational at times for the rational rule-imposer to act on the belief that rule-subjects will act irrationally. Rule-imposition becomes rational, therefore, under circumstances in which the rule-imposer believes, rationally, that rule-subjects will act irrationally (or at least mistakenly), even while those same rule-subjects are acting rationally in believing, from their lights, that the rule is asking them to act irrationally.

#### IV.

All of this may seem like immoral arrogance on the part of the rule-imposer, but to believe that is to miss the point. For if it is not immorally arrogant for me to think that I as a rule-subject am (beneficially) right and the rule is (dangerously) wrong—and this is the perspective in almost all of the literature on authority and on rule-following—then it is no more immorally arrogant for me to think that as a rule-imposer I am (beneficially) right and that as a rule-subject you are (dangerously) wrong. And if it is not immorally arrogant to think that I am right and that you (singular) are wrong, then it is not immorally arrogant to think that I am right and you (plural) are wrong. And because life is short and I have limited cognitive resources, I consequently impose rules simply as the embodiment of the view that I am right and you (plural) are wrong.

Thus, even if, for the sake of argument, it is not rational to follow rules, and even if, for the sake of argument, it is not rational to impose rules on myself,<sup>9</sup> it still can be rational to impose rules on others, and thus to try to get others to act in ways that they perceive to be irrational, but erroneously so.<sup>10</sup> To put it differently, it is rational for me to try to

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9. See Thomas C. Schelling, *Enforcing Rules on Oneself*, 1 J.L. ECON. & ORG. 357 (1985).

10. My argument here is consistent with that in Larry Alexander, *The Gap*, 14 HARV. J.L. & PUB. POL'Y 695 (1991) (identifying a gap between the morality of imposing authority from the standpoint of the authority and the morality of accepting authority from the standpoint of the subject). See also Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191 (1994).

get you to act in ways that you think, erroneously from my perspective, are irrational, and, to sharpen the point even further, it is irrational for me to act otherwise. At the end of the day, after all of the discounting for the possibility of my own error, it is irrational and hardly arrogant for me to try to induce you not to behave in ways that I believe that you mistakenly believe to be rational.

Nor does it help for me to think in terms of your autonomy, for as long as we are in the realm of harmful other-regarding actions, then your harm-producing autonomy counts not only for no more than my harm-preventing autonomy, but also for no more than the autonomy of those third parties whose autonomy will be impaired by your actions. Yes, I want you to be suspicious of my rules, but no less than I want me to be suspicious of your suspicion of my rules. And, to put it bluntly, it is irrational of me to think and behave otherwise. Blind obedience has a bad odor about it, but I would prefer that you not think than to think wrongly, and from my perspective I would prefer unthinking avoidance of harmful behavior than thoughtful engagement in harmful behavior. My first choice would be that you knowingly do the right thing, but as a second choice I would rather have you do the right thing unknowingly than do the wrong thing knowingly. And all of this is in reality no different from the way you think of me, which is why arrogance drops out of the equation entirely.

## V.

To re-emphasize the point that I urged at the outset of these remarks, little of this analysis makes any sense if the images we have in mind are those of smokers, drinkers, dopers, gamblers, wastrels, helmetless motorcycle riders, seat beltless drivers, midnight desert red light-runners, and all of the other typical protagonists of the literature on authority and deference. But if instead we imagine the instances in which the protagonists are rule-imposers and the rule-subjects are axe murderers, child molesters, price fixers, drunken drivers, sexual harassers, polluters, defrauders, and maybe even inside traders, then the issue looks quite different. When the subjects of rules are potentially dangerous to third parties, it is not only moral and rational to impose rules, but on frequent occasion it is immoral and irrational not to.