BOOK REVIEW

MORAL WRONGS, NONLEGAL SANCTIONS, AND THE AFFIRMATIVE DUTY TO LEGISLATE

THE RIGHT TO DO WRONG: MORALITY AND THE LIMITS OF LAW. By Mark Osiel. Cambridge, MA and London, England: Harvard University Press. 2019. Pp 502. $45 (hardback).

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INTRODUCTION

In *The Right to Do Wrong,* Professor Marc Osiel probes the relationship between law and morality and contributes more to the literature than a provocative title. In explaining why we govern ourselves to allow our conduct to be "lawful but awful,"[1] Osiel brings to our attention an undertheorized aspect of this relationship. As the book explains with more than a dozen examples, legal systems at times confer rights so broad as to grant us legal protection to behave in ways our community regards as gravely immoral. As the author argues, overly broad entitlements confer on us legal rights to transgress deeply held moral standards. When lawmakers create legal rights to behave deplorably, they do so by relying on their community's "common morality" and associated nonlegal sanctions to deter us from fully exercising these entitlements.

The book's central contention is that lawmakers create something the author calls "rights to do wrong." In doing so, they assume their community's nonlegal sanctions will constrain the full exercise of broadly defined rights. Lawmakers create broad legal rights with the expectation that the governed will not exercise them fully.

The reader should understand what the book is and is not. *The Right to Do Wrong* does not present a substantive theory of morality. It is not a critique of existing moral theories. It does not offer a theory of when law should be imbued with moral principles. It does not inform the choice we must make when a law commands us to behave immorally. It does not help us prioritize moral norms, and it is not meant to contribute to the literature on law and social norms.[2] The book is for those interested in the relationship between nonlegal sanctions and *moral* norms.

Professor Osiel challenges us to investigate a community's existing morality and asks, "when do societies incorporate their common morality into their laws?" (p. 10). The book describes how legislators calibrate formal legal sanctions and their community's nonlegal sanctions in arriving at what one might call optimal compliance. Osiel argues that conscientious lawmakers do this with some frequency. His proof lies in examples from contemporary American law, contemporary European law, civil law legal traditions, the English law of equity, and international law.

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1. *See* Rosa Brooks, *Cross-Border Targeted Killings: Lawful but Awful,* 38 HARV. J. L. & PUB. POL'Y 233 (2014).

2. *See e.g.,* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1994) (arguing that people largely govern themselves by social norms rather than formal laws); Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (demonstrating the effectiveness of social norms in a small community of diamond merchants).

He also draws on scholarship in constitutional law, criminal law, human rights law, legal theory, and political philosophy.

The literature on nonlegal sanctions is, of course, voluminous. The author draws on this existing literature, but his main interest is in lawmaking that produces overly expansive legal rights. This review engages with the book's descriptive account, suggests refinements to it, and identifies challenges in moving from the descriptive to the normative.

I. THE DESCRIPTIVE ACCOUNT

Central to the book's description of lawmakers'[3] reliance on nonlegal sanctions to deter morally transgressive behavior are his definitions of three terms of art: legal rights, behavioral wrongs, and common morality. The author organizes the book into thirteen chapters which flow from defining these terms to providing detailed examples of their use, explaining the sources of law's convergence with and divergence from common morality, and his criticism of other explanations, such as the impossibility of "devising a legal rule that clearly distinguishes prohibited from permitted conduct" (p. 16).

A. *Legal Rights*

Osiel considers rights created in two ways: "rights intentionally created by lawmakers" (p. 13) and "rights arising only from the absence of prohibition" (p. 13). This reviewer understands these two ways of creating rights as follows: When a parking sign says, "parking permitted from five p.m. to eight a.m.," the conferral of rights is explicit. We understand the sign to mean that a driver parked during these overnight hours has a right for the car to be there. The city cannot lawfully tow the car. If it does, the owner can invoke a legal process to reclaim it. Lawmakers also define rights and prohibitions implicitly. We understand the same parking sign to mean that we cannot park during the daytime between the hours of eight a.m. and five p.m. A car owner has no right to park during this period because when we define a right (parking overnight), we also implicitly define a corresponding prohibition. This prohibition flows from a linguistic default rule, a rule based on how we understand and interpret language.

What if there were no sign? We would apply a different default rule. We would not apply a rule of language interpretation. There would be no language to interpret. Instead, we would apply a default rule grounded in

3. Osiel is largely concerned with legislative lawmaking. He says much less about judicial and administrative lawmaking.

a theory of rights and limited government: that which is not forbidden is permitted. Liberal societies understand this second default rule to mean it is lawful to park in this place on any day and at any time. We notice the absence of any posted parking regulations and conclude we have a right to park. We turn to a default rule fundamental to "[w]estern liberalism, in its classical philosophic understanding, [which] holds that everything not expressly prohibited by the law is permitted" (p. 13). One way of promoting limited government is to require municipal lawmakers to state with clarity what citizens are expected to do and not do. We do this by construing legal ambiguity in favor of individuals and against the state. The default rule also furthers accountability. Lawmakers can overcome the default rule but in doing so need to be explicit. Many of the book's examples apply this default rule.

The latter default rule at work can be illustrated with reference to the law of armed conflict (pp. 98-108). This body of international law does not prohibit all uses of military force causing civilian injury but expressly criminalizes a combatant's intentional killing of civilians, and, as such, permits combatants to target and destroy legitimate military targets without fear of legal punishment (p. 98). International law permits combatant aircraft to drop bombs on a munitions factory even though civilians in a nearby hospital likely will be harmed. Humanitarian law permits military personnel to use force that causes the death of even many civilians in efforts to destroy a legitimate target, use no more force than necessary to destroy the target, refrain from causing collateral damage that is pointless, and refrain from causing extensive civilian casualties in destroying a target of little strategic significance (pp. 98-108). In the absence of contrary domestic law, the pilot of a military aircraft who drops bombs that are very likely to kill some civilian can do so free of liability if abiding by international humanitarian law.

Osiel has a provocative way of characterizing this right. Rather than saying that military personnel have a highly circumscribed right to use destructive force, he says that combatants have a right to kill civilians. This characterization will make some readers cringe. Typically, we characterize legally permissible infliction of harm on non-combatants in terms of narrowly circumscribed exceptions to the criminal liability that attaches to those who cause the death of civilians during armed conflict. We say that the absence of liability for killing in this context is subject to the important caveats noted above. That said, Osiel's formulation is jarring but accurate; to kill is to cause death, whether intentionally or unintentionally. Combatants acting in accordance with these limitations do not face

liability so long as they do not run afoul of international humanitarian law or domestic law.[4]

Some will reject Osiel's way of defining rights as seriously misapplying a default rule meant to protect individuals from the arbitrary exercise of state power and a rule that never should serve as license for military state actors to inflict harm on civilians. Although agreeing with this criticism, this reader finds several of the book's insights very useful even for those who do not fully embrace Osiel's manner of defining legal rights.

B. Moral Wrongs

The book's title refers to moral norms, not legal norms or social norms. One understands Osiel to say, for example, that failure to pay income taxes on time is a legal wrong and perhaps is contrary to a social norm, but the failure is not a moral wrong. An employer's termination of an employee without severance pay might breach a social norm but not a legal one. In some circumstances, perhaps malignant intent to cause severe economic harm, it may be a moral wrong. A community may regard a person's strategic resort to bankruptcy to discharge debts as a moral wrong but neither unlawful nor a breach of social norms.

The book's title also is meant primarily to refer to behavior that is seriously or even gravely wrong. Grave wrongs are wrongs that implicate "profound issues of justice and character" (p.12). If one were to apply the latter definition to dishonesty, for instance, some forms of deceit would be morally wrong but not gravely so. One might regard intentionally lying about a minor matter as wrong but not gravely so. This sort of lying is not a serious character flaw unless pathologically recurrent. In contrast, perjury with the purpose of sending another person to prison is gravely wrong (p. 29).[5]

C. Common Morality

With legal rights and moral wrongs defined, the book turns to "common morality" which is "integral to the concept of a right to do wrong" (p. 43). Common morality is not a "free floating concept," (p. 25) but rather one attached to a specific community. Every community has a unique basket of moral beliefs, though the book's focus is not on the

4. The combatant's State can impose requirements on the use of force more extensive than those required by international law treaties and customary international law.

5. Osiel says the proposition that "one should not lie" is subject to several qualifications (p. 29).

basket. Osiel's analysis entails isolating beliefs about one distinct moral question and asking whether community members believe that specific behavior is immoral. The next step would seem to be aggregating the beliefs of all community members holding that belief. Absolute numbers are then turned into a percentage. A state's common morality about abortion, for example, consists of the percentage of citizens who would support the practice of abortion. Osiel claims we can do this for a wide variety of communities: geographic, professional, national, and global (p. 25).

Osiel directs us to pose questions about peoples' conduct and not about their beliefs; the book is concerned with the right to *do* wrong, not the right to hold beliefs that are wrong. For example, one might infer from her comments that a neighbor doubts the widespread belief that incest is immoral. Osiel's focus is not on whether it is moral or immoral for her to hold this belief.

Osiel is not interested in prescribing moral rules. When we investigate the common morality of a community, we take it as we find it. He creates and employs the notion of common morality for the purpose of identifying the nonlegal sanctions communities use to punish those who transgress community moral standards and deter those who would do so (pp. 22-43). Chapter two presents more than a dozen examples of the exercise of legal rights that conflict with a community's consensus as to moral behavior. These examples vary from the right to disinherit children to the right to die, from the right of the able-bodied to collect disability benefits to the right of multinational corporations to carry out exploitative business practices in poor countries (pp. 44-84). Osiel acknowledges that his conception of common morality may be elusive. He seeks only to "briefly entertain the possibility that common morality in some form, to some extent, may be essential to the forms of social solidarity that have historically sustained the modern state" (p. 32).

Readers may have other conceptual difficulties: Does common morality refer to the moral beliefs of a simple majority? A supermajority? Do we arrive at common morality by taking into account the intensity with which some hold a moral belief, or do we just count heads? What if some condemn conduct as wrong for one reason, but others condemn it for a different reason? Do we aggregate yes-or-no votes, or do we investigate the reasons for votes?

In addition to these conceptual challenges, Osiel acknowledges "daunting" empirical ones.[6] We might add others. Does it matter where one asks someone a moral question? Will a person's response in church

6. "An essential question here concerns the empirical scope of common morality within a given social order" (p. 27).

be different from the one articulated in a graduate seminar? If different, which vote counts? While these and other issues of empirical method may be worthy of further research, investigating common morality with a high degree of rigor is probably not necessary. The book is not a manual on conducting empirical research. We suspect savvy politicians assess the morality of their community through intuition and experience. Even without rigorous empirical guidance, the author's notion of common morality leads to useful insights.

Armed with these terms of art, Osiel takes us through several examples of what it means to possess a legal right to act in ways contrary to common morality. In chapter two, he draws on many fields of law, including bankruptcy, conflict of laws, constitutional law, contracts, international law, legal ethics, torts, and trusts and estates. In chapter three, he presents three examples in depth. One of these is the right of combatants to harm civilians, briefly touched upon above.

Osiel correctly observes that under the international law of armed conflict, nations at war sometimes may use lethal force intending to destroy legitimate targets even when it is likely that this use of military force will unintentionally harm civilians.[7] Many ways of causing civilian "incidental damage" do not violate international law (p. 98), but he persuades us that some harms to civilians transgress the international community's common morality (pp. 99-105). For empirical proof of that, we might point to mass protests, private boycotts, General Assembly resolutions (which lack the force of law), and calls for war crime prosecutions.[8] Each of these might be evidence that the international community's common morality diverges from international law.[9]

These examples inform the book's main descriptive claim: Conscientious lawmakers consider their community's common morality before creating legal entitlements. They also design enforcement regimes

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7. *See, e.g.,* INT'L COMM. OF THE RED CROSS ("ICRC"), CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 56-58 (Jean-Marie Henckaerts and Louise Doswald-Beck, eds. 2005) (ICRC Rule 17 states that parties to an armed conflict have duties to avoid or minimize incidental loss of civilian life and injury to civilians "to the extent feasible"); GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 405-09 (3d ed. 2022) 405-09; JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 85-137 (2004) (collateral or incidental damage is unlawful when "excessive").

8. "The responsibilities most vigorously urged upon states and their soldiers are today and must remain, nonjuridical" (p. 106).

9. Osiel observes: "To reduce civilian losses, Western armies today . . . employ 'rules of engagement' (ROE) that impose unprecedented self-restraint on use of force by both ground and aerial services," in efforts to bring their conduct of war in line not only with the international law of armed conflict but also with the global common morality regarding the protection of civilians (p. 105) (parenthesis in original).

only after taking into consideration whether their community "punishes" transgressors with such nonlegal sanctions as shaming, shunning, or stigmatizing. When lawmakers legislate free of politically necessary but unprincipled compromises, such as those in omnibus legislation, they make law against the backdrop of nonlegal sanctions. They assess the common morality of their community. They identify the forms and intensity of the nonlegal sanctions the community likely will impose. They choose an optimal level of enforcement. They then determine if legal sanctions are needed to supplement nonlegal ones.[10]

II. FROM DESCRIPTIVE TO NORMATIVE

The book's descriptive account is insightful in persuading us to reevaluate our understanding of a wide variety of laws.[11] Its examples show that some of our laws create broad entitlements that permit us to make gravely bad choices. Osiel's insights about the prevalence of some broadly defined legal rights and the imposition of token punishments are indeed useful but best understood as a supplement to other explanations.[12] For example, the U.S. Supreme Court announced the right to same-sex marriage at a time when stigma largely had already declined.[13] Some would argue that the decline of nonlegal sanctions rendered the need for Supreme Court jurisprudence on the subject unnecessary and perhaps counterproductive, though not all parts of the U.S. population had experienced a transformation of common morality and a decline in nonlegal sanctions. This and other counterexamples show that Osiel's explanation is more helpful in understanding some legal rights than others.

If lawmakers are willing to invest in rigor in determining their community's common morality and history of imposing nonlegal sanctions, should they make law in this way? Osiel argues they should, though his preliminary normative analysis needs further development. This review concludes with examples of some contexts in which Osiel's normative case fails to persuade.

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10. Presumably, optimization takes into account transaction costs.

11. We might add to Osiel's list: Legal regimes that do not impose liability for plagiarism confer a right to plagiarize. Countries that permit prostitution confer a right to buy and sell sex. Countries lacking extraterritorial laws against bribery confer on their nationals the right to bribe foreign officials.

12. This reader does not understand Osiel to contend that his examples are tied to the only explanation for why law fails to track morality. The First Amendment, for example, creates unregulated spaces that promote creativity. It is a refuge from suppressive power exercised at the cost of individual autonomy and serves as an outlet for political steam that, if unexpressed, might trigger more violent forms of demonstrating dissent.

13. *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

Consider election law. In the United States, citizens have a right not to vote. We can stay home on Election Day without fear of legal penalty. The existence of this right is not explained especially well by common morality and nonlegal sanctions.

Assume a large majority of Americans believe voting is a civic duty and that failure to vote is seriously wrong and, in some situations, gravely wrong. Why do we lack laws that require us to vote? Why do we have broad legal rights to refrain from voting, even when work and family obligations are not obstacles to going to the polls or mailing an absentee ballot? Osiel might argue that we have broad rights not to vote because our common morality disparages nonvoting and because nonlegal sanctions constrain us from exercising this right.

This line of argument fails to persuade. Nonlegal sanctions tend to be weak. The failure to vote is difficult to detect except, perhaps, in small towns.[14] Some secretaries of state keep records of who voted but do not widely disseminate this information. Even if nonvoting were more easily detected, there is reason to believe that communities would rarely impose sanctions.

The reason for our right not to vote may best be understood as stemming from considerations different than those of interest to Osiel. Some in our society regard the refusal or failure to vote as a valuable form of political expression. Some may decline to vote because they are disgusted with the choices on the ballot. Others communicate this sentiment by writing in the names of people with no chance of winning. Some regard mandatory voting as undermining principles of limited government. Still others may believe that forced voting promotes uninformed voting and that it is better for a small but informed subset of the electorate to choose the winner of an obscure elected position than for the winner to be decided by a large number of voters who do not care. In short, a large majority of a community may think a deliberate choice not to vote is seriously wrong but that the community lacks the ability to impose effective nonlegal sanctions. Elected officials nonetheless might decline to legislate to increase voter participation. They may offer as

14. It is common for voters to leave polling stations wearing stickers that say "I voted" or something similar. Indicators of civic engagement such as these do not truly function as nonvoting detection devices. They are better understood as mild forms of encouragement rather than the community imposing sanctions on those not displaying the sticker, except perhaps for prominent government officials, such as judges, prosecutors, and political candidates. Even then, one cannot really infer from the absence of the sticker a failure to vote. More likely, this will be construed as meaning that someone has not yet voted or does not like wearing stickers. More generally, public displays of civic virtue have tended to lose meaning in recent decades; so many high government officials sport articles of clothing with the American flag that we can infer very little from their doing so.

normative justification for that decision considerations that have nothing to do with nonlegal sanctions.[15]

Osiel develops the book's normative arguments less thoroughly than its descriptive ones. Osiel contends that the lawmaking he describes performs the "essential tasks of normative ordering that law alone should not attempt and, without injurious side-effects, cannot possibly achieve" (p. 320). He further argues that "[t]here exists no other way to address the genuine regulatory problems created by conduct legally untouchable yet defensively repudiated by common morals" (p. 320). These normative justifications, if carried out rigorously, entail significant cost and delay when collecting data before law creation and at the stage of monitoring a law's effectiveness. These costs and delays can be so high that truly data-driven decision- making is cost prohibitive.

The literature on law and social norms points to an alternative.[16] Lawmaking that incorporates preexisting norms avoids other costs, such as the legislative costs of repeated amendment and repeal when power shifts from one political party to another. Other costs avoided are those entailed by legal services to interpret law and comply with capacious requirements of due process at the monitoring and sanctioning stages. Small and homogenous communities, through their informal sanctions, can thus be more efficient at detecting and penalizing than large and heterogeneous ones.

The efficiency argument does not apply with equal force to moral norms. Osiel derives his insights from lawmaking in communities that are large and heterogenous (p. 13-14). In contrast, the literature on law and social norms draws conclusions about the behavior of communities that are much more homogenous. When Osiel asks: "What kind of moral consensus is both necessary and possible in a country very large and culturally diverse?" (p. 41) and "How strongly does a national population hold common views of right and wrong?" (p. 23), he makes the reader skeptical about the likelihood of success in finding much consensus in a national community as politically polarized as the United States at present. Osiel's conclusions have most force when applied to smaller communities, such as towns that regularly vote Republican by a large supermajority or small communities defined by religion.

There are other ways in which imposing nonlegal sanctions for moral transgressions differs from violations of custom. The former tends to be more "sticky." They persist for unpredictably long periods of time. The penalty for the breach of a social norm may end once market participants

15. The right of citizens not to vote likely will benefit some candidates and political parties more than others.

16. *See, e.g.,* ERIC A. POSNER, LAW AND SOCIAL NORMS (2002).

are confident that the violator and potential imitators will comply. At that point, continued shunning may adversely affect everyone's bottom line. However, communities expect more from nonlegal sanctions designed to punish and deter moral transgressors. They demand that offenders internalize moral norms. They demand proof not only that the offender has changed behavior but has become a morally better person or that a business entity truly has transformed itself. Expressions of remorse may be self-serving and not an adequate basis for lifting penalties. Legal persons may be unable to remove themselves from private boycott lists imposed for polluting the environment even after they have changed management and paid for the cleanup. Shaming and boycotting may stick to the company for an unpredictably long period of time.

The normative case for creating rights to do wrong must confront competing normative arguments when we try to apply Osiel's normative arguments to affirmative state obligations. *The Right to Do Wrong*'s examples might fit when lawmakers have the option, but not the duty, to create legal duties or entitlements. A state legislature can permit or forbid the sale of marijuana. Often, however, legislatures have a duty to enact laws. Under these circumstances, Osiel's case for "non-legislating" in reliance on nonlegal sanctions is weak.

Some treaties impose affirmative obligations that countries must implement by domestic lawmaking. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for example, requires a State party to enact domestic criminal laws.[17]

A second example, one involving *constitutionally* required implementation, is also useful. The United States Constitution's Full Faith and Credit ("FFC") Clause, derived from Article IV, and FFC Statute impose affirmative state obligations more plausibly justified by normative reasons other than those Osiel advances.

The FFC Clause of the Constitution[18] does not prescribe the manner in which states must give preclusive effect to the court judgments of other

17. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]. Article 4 of the Convention requires a State party to "ensure that all acts of torture are offences under its criminal law" and make treaty offences "punishable by appropriate penalties."

18. U.S. CONST. art. IV § 1. ("Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof").

states. In the absence of federal statutory law,[19] the Constitution leaves each state discretion about the extent of preclusion it gives to the judgment of other states. Article IV also leaves wide discretion on the manner in which states go beyond applying rules of preclusion to enable judgment creditors to actually *enforce* the judgment.[20] This is because state duties under the FFC Clause and FFC statute do not require states to set aside their judicial rules of procedure in FFC actions;[21] instead, states are required only to enable out-of-state judgment creditors to pursue judgment recognition using rules of procedure that do not discriminate against them. Put differently, state FFC obligations to create procedures giving effect to both the FFC Clause and the FFC statute do not guarantee judgment creditors a favorable substantive result or specific remedy.[22]

When implementation is required – when a state or other entity has a legal duty to act – we might expect nonlegal sanctions to have relatively little impact on the choice lawmakers make. For example, the people of a state may abhor and shame deadbeat judgment debtors. Based on this, Osiel might counsel a governor not to sign legislation improving the ability of judgment creditors to enforce interstate judgments because of her belief that a new statute is unnecessary, and effective nonlegal sanctions are in place. In Osiel's language, a veto in these circumstances would confer on judgment debtors a legal right to do wrong.[23]

But a governor who persistently exercised the veto would cause the state to fail in its constitutional and statutory duties. The normative case for gubernatorial action relying on common morality and informal sanctions fails. States must act to satisfy their affirmative obligations. Informal tools for pressuring debtors do not act as substitutes for laws creating legal enforcement mechanisms. In contrast, *The Right to Do Wrong*'s normative arguments are most persuasive when states have negative obligations, such as the First Amendment duty not to suppress freedom of speech.[24] Those obligations can be satisfied by not legislating.

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19. *Id.* ("And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."); *see* 28 U.S.C. 1738-1738C.

20. States may exempt certain assets from attachment. *See, e.g.*, Fl. Stat. 222.02 (Florida's homestead exemption).

21. *See* M'Elmoyle v. Cohen, 38 U.S. 312 (1839) (the state giving full faith and credit to the judgment of another state can apply its own statute of limitations and not that of the other state).

22. *See, e.g.*, Baker v. General Motors Corp., 522 U.S. 222 (1998) (FFC duty does not require a state to enforce an injunction issued by another state).

23. The moral wrong would be grave if, for example, the right holder's flight from financial obligations were malicious and caused extensive harm, such as by forcing a creditor to lay off thousands of employees.

24. *See* U.S. CONST. amend. I.

The Torture Convention's Article III duty of state parties not to extradite torture victims requires no domestic implementing legislation.[25]

Affirmative state duties, on the other hand, cannot be met by refraining from taking action. The state must act, often by creating procedural law. Similar affirmative duties to enact laws are pervasive in many political entities. In the United States, for instance, some state constitutions require the legislature to pass laws that provide a free public education.[26] Among states party to the International Covenant on Economic, Social, and Cultural Rights, there is a duty to "recognize" a right to employment with the understanding that countries will enact domestic laws to implement this duty and create rights for individuals.[27]

The normative case for Osiel's arguments also is not strong when conduct crosses state or national boundaries. In the cross-jurisdictional context, we typically turn to conflict of laws in common law countries and private international law in the civil law world. Ideally, these bodies of law serve to choose the correct law when applying two or more laws is possible. Osiel observes this with respect to differences in public policy as a basis for refusal to recognize the judgments of other countries (pp. 176-94).

Osiel's observation is only partly true. Examples abound in which the courts of one jurisdiction readily give effect to final judgments from another.[28] In the United States, the judicial gloss on the FFC Clause greatly limits the prerogative of state courts to refuse to enforce the judgments of other states based on differences in public policy.[29] As a practical matter,

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25. Convention Against Torture, *supra* note 17 (Section 1 states: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture").

26. *See, e.g.,* MICH. CONST, art. VIII, § 2.

27. *See* International Covenant on Economic, Social and Cultural Rights art. 6, Dec. 16, 1966, 993 U.N.T.S. 3. Of course, lawmakers in a State party to the Convention can take into account their country's common morality relating to universal employment when they make specific choices of how to implement the treaty obligation.

28. *See, e.g.,* UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT, Sec. 4 (Nat'l Conf. Comm'rs Unif. State L. 2005) (creating a presumption that U.S. states will grant recognition of civil judgments originating outside the United States). Twenty-nine U.S. states have enacted legislation incorporating this model statute into state law: *Foreign-Country Money Judgments Recognition Act*, UNIF. LAW. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=ae280c30-094a-4d8f-b722- 8dcd614a8f3e (last visited Jan. 23, 2022).

29. *See, e.g., Baker*, 522 U.S. at 233 (distinguishing choice of law from judgment recognition and stating that "our decisions support no roving 'public policy' exception to full faith and credit due *judgments*) (italics in the original); Estin v. Estin, 344 U.S. 541, 546 (1948) (stating that the Full Faith and Credit Clause requires one State to submit "even to the hostile policies reflected in the judgment of another State"); Restatement (Second) of Conflict of Laws, § 117 (1971). In contrast, differences in public policy do play a large

this judicial exercise of statutory and constitutional interpretation functions as a bar to a morality exception to interstate judgment recognition.[30]

The rules of private international law are, whenever possible, to be neutral, procedural rules.[31] Inherent in that distinction is a key difference between transnational law and international law. The latter is meaningfully associated with Osiel's notion of a common morality for a global community. In contrast, transnational law operates on a field in which conflicts between more than one country must be resolved. When this is so, the imposition of nonlegal sanctions by two nations may over-deter. One community may have little leverage to affect lawmaking in another. *The Right to Do Wrong* would counsel lawmakers in one state to investigate the nonlegal sanctions of another. However, the normative case for doing so is weak if lawmakers in one country are ineffective in assessing another country's common morality and nonlegal sanctions. Normatively, we may prefer employing the traditional justification for private international law – the principle of comity. The traditional support for that principle is that it tends to minimize inter-state conflict and ease the burden on non-state actors caught between the laws of two sovereigns.

CONCLUSION

Osiel makes a valuable contribution to the literature on law and morality. The book's descriptive analysis has some strengths, but its normative claims need to be qualified and considered across a larger canvas. Osiel acknowledges as much when he characterizes the book

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role in state rules regarding choice of law. *See generally* SYMEON C. SYMEONIDES, CHOICE OF LAW (The Oxford Commentaries on American Law) (2016). Another caveat is that states have no duty to enforce the criminal judgments of other states. *See, e.g.,* Pasquantino v. United States, 544 U.S. 349, 361 (2005) (referring to the interstate application of the long-established rule that "[t]he Courts of no country execute the penal laws of another" (citing The Antelope, 23 U.S. 66 (1825)).

30. Supreme Court FFC caselaw bars states, absent congressional authorization, from refusing to enforce the civil judgments of other states based on differences in public policy, even those rooted in different conceptions of morality. For an example of federal statutory authorization, *see* The Defense of Marriage Act, 28 U.S.C. § 1738C (struck down as unconstitutional in United States v. Windsor, 570 U.S. 744 (2013)).

31. The difficulty of differentiating procedural law from substantive law runs through American conflict of laws. *See, e.g.,* Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 108 (1945) ("Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law"); Sampson v. Channell, 110 F.2d 754 (1st Cir.), *cert. denied*, 310 U.S. 650 (1940) (wrestling with whether burdens of proof are procedural or substantive); *see generally* The Justice Collaboratory, *Procedural Justice*, YALE L. SCH., https://law.yale.edu/justice-collaboratory/procedural-justice (last visited Jan. 1, 2022).

under review as a "first attempt" (p. 322) intended to "spur" others (p. 322). One hopes that others act on that invitation.