

Legal Theory Workshop  
UCLA School of Law

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*“IMPERFECT CONSTITUTIONAL DUTIES”*

**Thursday, January 30, 2020, 5:00-6:50 pm**  
**Bruce H. Spector Conference Room, Law 1314**

Light refreshments will be available at **4:45 pm** and you are welcome  
to come a little early to mingle.

*Draft, January 15, 2020. For UCLA Workshop. Please  
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## IMPERFECT CONSTITUTIONAL DUTIES

Larry Sager

A

I want to begin in the domain of morality, not law, and consider a special sort of moral duty. Some philosophers believe that the sort of duty I have in mind deserves separate analysis, and have given the duties that fall in this group a name, “imperfect duties”.<sup>1</sup> The irregular shape of imperfect duties encourages examination, in part to resist the mistake of overlooking them as moral obligations on account of their shape.

A common example of an imperfect moral duty is the duty of beneficence. For my purposes, this is a somewhat misleading example, because it encourages the view that what makes a duty imperfect is the absence of a reciprocal rights holder. This failure of Hohfeldian symmetry is viewed by some as a reason for doubting that beneficence is a moral duty at all. This seems odd: Hohfeld’s conceptually tidy field observations about legal regulations are just that, and the apparent logical necessity of a duty having a correlative right dissolves upon application. The question of whether we as a people have a moral obligation to offer a secure national home to refugees who are the victims of violence and repression, for example, is not helpfully informed by the observation that this obligation would not attach in neat Hohfeldian fashion to individual rights-holders. In a contest between Hohfeld and our moral judgment about the rights of refugees, it is the closed field of normative possibilities offered by Hohfeld that ought to be the loser.

But while the failure of Hohfeldian symmetry is a readily observed feature of some imperfect duties, it is not true of all; and it is not that failure that for my purposes is the most interesting or important feature of imperfect duties. I want to encourage attention to a different and more general sense in which some moral duties — including beneficence — belong to the class of imperfect duties.

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<sup>1</sup> At this stage, this draft essay lacks footnotes. But one is necessary. Throughout these thoughts about imperfect duties and their role in constitutions, I am deeply in Professor Barbara Herman’s debt. Her writing and our conversations have been invaluable.

Consider the duty of parents to provide support and guidance to their children. Hohfeldian symmetry is fully satisfied here. There is nothing hazy or complex about who are the beneficiaries of the duty of responsible parenting, and we can easily conceive of children as rights-holders; nor is there any particular difficulty in identifying who bears its burden, or in recognizing the duty of parents to their children as a moral. What is distinct and interesting about the moral obligation of parents is the open texture of that obligation.

Imperfect moral duties — like the duty of parents to their children — offer significant discretion and impose concomitant burdens of judgment as to the choice of behaviors which appropriately respond to them. They specify values or goals, and they insist on constancy those values or goals, and where called for — as in the case of parents and children — to a sustained commitment to the project of advancing those values or goals.

The discretion and judgmental burdens that come with imperfect duties may run along several lines. To begin with, imperfect duties will often require choices among strategies and tactics. There are many different sorts of concerns that conscientious parents may have about their children for example, and many different means of addressing those concerns that may seem best. To make matters more difficult and complex, there will almost certainly be trade-offs among these choices, trade-offs that are internal to the enterprise of parents doing their very best on behalf of their children.

Beyond the choice of strategy and tactics to fulfill imperfect duties, there will be judgments of extent. An imperfect duty may require the holder to undertake projects that are very demanding indeed they may not be fully achievable even were the holder to exhaust all their resources. But the imperfect duty to undertake a demanding project does not require that all of the holder's resources be devoted to its success. There a number of limiting conditions on the scope of an imperfect duty, however demanding the project to which it points. First, imperfect duty-holders are entitled, possibly obliged, to lead their own lives, attend to their own interests, and pursue projects outside the ambit of the imperfect duties to which they are subject. Second, Imperfect moral duties (or components within a duty) may compete with one another for the limited resources that can

reasonably be demanded of the duty-holder. And third, imperfect moral duties may be jointly held by some number — perhaps many — duty- holders. It may be that we have a duty to help those far less well off than we...but we don't necessarily need to do more than our share.

Adding to the discretion/judgmental-burden of imperfect duties is the typically dynamic quality of their appointed projects. Children may change as they grow, with different interests and capacities emerging over time. The economic, educational and social circumstances surrounding the family, the community, and the culture of which they are a part may change. Parenting is almost certainly an experimental art, with successes and failures offering reasons to change or stay on course. All this makes a nimble capacity for change an ironic requirement of constancy of value and commitment.

It follows from all this that imperfect duties are not restatable as categorical rules of things that must be done or must be avoided. They do not tell the holder what to do now or next but rather what values, goals and projects to make the holder's own. In turn, the performance of an imperfect duty-holder at a moment in time or in a narrow substantive space will seldom be amenable to third person evaluation. There may be vivid instances of failed will or gross bad judgment, but they will be at the tail of the distribution. In the first person, from the vantage of the imperfect duty-holder, charting the best course will be an uncertain enterprise; in the the third person, from the outside, reliable evaluation of the duty-holder's performance while it is in train will seldom be possible.

All this may be true, but these are still duties—important duties. It might be tempting to think that because of the discretion – the judgmental space – that imperfect moral duties allow, and the degree to which they elude evaluation from the outside, they are more forgiving or lay a lighter hand on the duty-holder. This would be a mistake: To the contrary, imperfect moral duties bring with them the special burdens of ongoing responsibility and judgment.

Imperfect duties may in this sense be irregular — imperfect — but they are not rare. Beneficence; the duty of parents to their children; the duty to protect an object that has been lent to one by a friend who values it greatly; the duty to aid those who are

much worse off. Once we start looking, the list is likely to be long, and the moral stakes often high. Imperfect duties may, in fact, be among our most important moral duties.

## **B**

With this very rough sketch of imperfect duties in the domain of morality in hand, we can now turn to constitutional law. There is a surprise waiting: Imperfect duties have an important place in constitutional law; and recognizing their presence will give us a better grasp of important but misunderstood aspects of modern constitutional practice.

I am going to give two examples of imperfect constitutional duties to make the case that such duties present themselves in constitutional law, and then discuss the implications of their presence. The first example is a familiar feature of many modern constitutions, like those of South Africa and many countries in Latin America. The second is less well-recognized, and involves the United States Constitution.

Many modern constitutions have explicit provisions guaranteeing social, or material rights. Prominent inclusions are rights to education, to health care, and to housing. Correctly understood, the duties these provisions impose on governments and officials have precisely the qualities we have observed in imperfect moral duties,

Consider the right to health care. Few if any states can provide the best available medical care for all citizens. Not all demands can be satisfied, nor all urgent demands, and not even all existential demands. What choices should be made, and on what rationale? Should the state provide extremely expensive treatments for cancer, or broad programs of preventative medicine? Dialysis or mosquito nets and annual check-ups? How will these changes be paid for? If taxes are implicated which taxpayers will bear the burden? Will government underwrite the changes with direct provision of services and supplies? Will it support private entities doing so? Will it fund the needy so they can purchase these goods and services themselves? What level of government should be responsible? Where should the funding come from – taxpayers, businesses?

There will also be difficult choices among the material rights that compete for a state's constitutionally-imposed attention, involving other necessities of well-being. Housing, nutrition, and education are all very much of a piece with health care, and they compete for many of the same scarce resources. Responsible governance will insist on resource-dependent attention to national and domestic security, and economic development as well, of course.

Less obviously, but no less importantly, there will be choices between generations. A state which is stingy in meeting the constitutionally-embraced material needs of this generation could be so in order to do far better for the next, by plowing funds into infrastructure and jobs, for example. Conversely, a state that extended itself precariously far on behalf of this generation could impoverish the material prospects of the next.

All this is far from a static picture. Changes in the ambition and capacity of medicine, in the nature of threats to good health, and in the robustness of the national economy, will provide new challenges to national judgment on an ongoing basis. Surrounding these changes in the domain of healthcare will be changes in circumstances outside that domain, including weather, migration, and armed conflict.

I have gone on too long. The point is that material constitutional duties demand an ongoing commitment to value driven projects of the government. They not only provide space for, they insist on, ongoing official judgment. They do not map onto straight-forward behavioral requirements, conformity with which can be assessed at a given moment of time, except for vivid instances of a government failing in its obligation to undertake the projects demanded by its Constitution. They are, nevertheless, constitutional duties of the highest order. Material constitutional duties are public manifestations of imperfect moral duties; they are imperfect constitutional duties.

## **C**

My second example of imperfect constitutional duties comes from the United States. It is meant to connect with more traditional forms of constitutional justice.

I hold the view – not common among American constitutional scholars – that governments in the United States are constitutionally obligated to ameliorate structural injustice. By structural injustice, I mean deeply entrenched patterns of disregard and discrimination – patterns that are enduring, pervasive, and tentacular. African-Americans, Women, and members of LGBTQ community are the most prominent victims of structural injustice in the United States. The entrenched patterns of injustice to which they have been subject include private behavior, but the constitutional obligation of repair falls on government officials.

The case on behalf of this constitutional duty of repair is more plausible than might be supposed, and offers an improved understanding of some otherwise perplexing features of constitutional jurisprudence in the United States. But, for our purposes here, I am content to speak in the subjunctive: If the United States Constitution obliges governments to undertake the repair of structural injustice, that obligation is an imperfect constitutional duty.

The repair of structural injustice is not as simple as making all private forms of discrimination against members of protected groups illegal. There are significant concerns of private and associational autonomy that call for a somewhat complex mapping of anti-discrimination provisions. There is an important line to be drawn, not between private behavior and state action — as in the direct application of the United States Constitution — but between that which is to be treated as truly private and beyond the appropriate reach of state control in this regard and that which is appropriately open to public regulation. Personal dinners, private parties, clubs, churches...all are contenders for immunity from state anti-discrimination laws, but all need careful definition. This is not a matter of balancing, nor strictly analytical. There is an element of the arbitrary in this mapping, with the goal of making progress against entrenched injustice while leaving space for human flourishing in autonomous domains. Details of many sorts may matter: Physical venue, membership requirements, volunteer or compensated status, the numbers of employees or principals or rooms are merely examples of these.

Nor is the project of repairing of structural injustice plausibly confined to formally banning those private forms of

discrimination that are within the appropriate ambit of state authority. There are substantial, ongoing questions of enforcement, encouragement and persuasion. Will there be special oversight mechanisms like commissions or administrative agencies? Special mechanisms of complaint and investigation? Civil and/or criminal enforcement? Programs to educate judges, police, citizens at large? The withholding of public funds from non-compliant institutions, or the funding of special programs to encourage compliance? More generally, will there be special resources devoted to the enforcement of laws aimed at the repair of structural injustice? If so, what will be the amount of those resources, and how within the panoply of enforcement objectives and mechanisms will they be deployed? In the United States there is the additional question of what level of government — federal, state or municipal — will play what role in these processes.

The point of all this, remember, is the repair of structural injustice. I have been speaking as if structural injustice consists of a set of recognizable delicts, and the problem is rooting those out without veering too far into domains of personal or associational autonomy. In fact, the intolerable subordination entrenched in structural injustice is woven deeply and complexly into attitudes and institutions, and the duty to aim at its elimination is laced with ongoing burdens of judgment, set against a goal that is elusive, demanding and beyond confident reach.

If there is a constitutional obligation to repair structural injustice — as I believe there is, and as there almost certainly should be — it too is an imperfect constitutional duty.

## **D**

Important values — quite reasonably attached to constitutions and constitutional law — underwrite imperfect constitutional duties. Like imperfect moral duties, imperfect constitutional duties are complex, involving a large judgmental space, extending forward in time — possibly endlessly. But, like imperfect moral duties, they are nonetheless duties, and very important ones at that.

The judicial enforcement of constitutional rights and duties is perhaps the single most prominent feature of modern constitutional practice throughout the world. While it is not our

question here, there are good reasons for making courts the primary agents of constitutional interpretation and enforcement. But imperfect constitutional duties lend themselves poorly to judicial enforcement, and where they are at stake, a radically different division of constitutional labor is called for.

With regard to imperfect constitutional duties, legislatures — with executive and administrative support — of necessity take the laboring oar, and Courts have a much diminished role. This is not a small issue of cognitive technology, like familiarity with empirical data or medical science. Nor is it a matter of judges enjoying the support of insufficiently large staffs. It goes to the heart of what Courts do and how they do it, and to the nature of imperfect duties. Courts are good at many things but not at assessing from the vantage of a moment in time or an adjudicated controversy whether a complex set of behaviors by a complex array of governmental institutions — all set against events and circumstances in the past, and anticipated events and circumstances in the future — are consistent with a diligent commitment to an ongoing, imperfect constitutional duty. Moreover, where the question is what steps ought to come next in moving to satisfy an imperfect constitutional duty, courts lack grounds for making absolutely critical choices — choices between or among competing priorities, present or future generations, levels of government, alternate sources of public funding, and uncertain strategies.

This is not because courts should not generally remain the primary fora for constitutional interpretation and enforcement, and not because these imperfect constitutional obligations are in any way of diminished importance. It is a brute and severe question of institutional capacity and the distinct shape of imperfect constitutional duties. Of necessity, the primary locus of enforcement for imperfect constitutional duties is legislative, not judicial.

We see this in the lived experience of social or material rights in modern Constitutions. Early on, Brazilian courts tried to more or less directly enforce the right to medical care, going so far, for example as to threaten the health official of a Brazilian beach community with contempt if he failed to provide an expensive medicine for skin cancer; this became a consuming expenditure for the community, leaving little funds for any other municipal expenditures. More recently, the lead in Brazil has been taken by

the legislature with regard to health care, and Brazilian courts find themselves in a more familiar and constructive role in responding to the here and now, specific stipulations of legislation.

In contrast, the Supreme Court of South Africa has from the outset played a more careful and inhibited role. The Court has insisted that the South African government demonstrate a sustained concern for the satisfaction of material rights, that it have a plan for advancing towards the satisfaction of constitutionally specified material necessities. But it has consistently declined to establish quotas, benchmarks, or other concrete measures of performance. There are individual decisions that maybe too restrained, but the Court's general stance has proved workable, and it can be best understood as a response to the special nature of the material rights claims before it: They are imperfect constitutional duties, and the Court has responded by requiring the government to commit to the project of their achievement, while withholding close substantive scrutiny of the project's success.

This is not to say that courts have no role of importance with regard to material constitutional rights, or that the marked reticence of the Supreme Court of South Africa is the only appropriate response to the difficulty intervening in governmental effort to respond to the imperfect constitutional duties such rights impose. But the role of courts in "enforcing" these imperfect duties will inevitably be limited. More importantly, the responsibility of legislatures, agencies and heads of government grow all the more important in the absence of robust judicial oversight. The imperfect nature of these constitutional duties — as in the case of imperfect moral duties — increases the burden of judgment and thereby the ongoing responsibility of non-judicial officials.

More surprisingly, perhaps, it is possible to see the institutional division of labor induced by imperfect constitutional rights in the lived experience of anti-discrimination law in the United States. The common view of efforts in the direction of political and social equality in the United States spotlights the Supreme Court and the federal judiciary it superintends wielding the Constitution on behalf of the equal treatment of protected groups. We teach court-sculpted constitutional law in the United States as though it were the summus locus of justice through law. But at least with

regard to the undoing of structural injustice, it is legislation rather than adjudication that actually occupies center stage.

In part, this is the product of the state action doctrine, which — put very roughly — narrows the application of the Fourteenth Amendment’s equal protection clause to governmental, as opposed to private, behavior. Since the Supreme Court depends on the warrant of the Constitution unless it is enforcing legislation or its administrative byproducts, the state action doctrine largely prevents the Court from addressing private discriminatory behavior on its own.

In a modern state, private transactions take place within, and depend upon, a thick matrix of law. This makes the idea of a state action requirement sketchy at best, since the state is always implicated in the behavior complained of, if only by way of having given legal permission. Not surprisingly, the state action doctrine in operation has been ragged and incoherent. Many scholars have observed that the doctrine’s demise should be welcomed; but it endures. It endures, arguably, precisely because it is doing the work of imposing responsibility for the repair of structural injustice on legislatures.

This thought is reinforced by a corner of state-action related constitutional jurisprudence that is only explicable in these division of labor terms. The Thirteenth Amendment of the United States Constitution abolishes slavery, and gives Congress the authority to enforce that abolition. Slavery does not require state action, but the Supreme Court has never held that, say, the mere refusal to sell or rent real estate to someone because they are black constitutes slavery and violates the amendment. However, the Court has held that, in the name of enforcing the Thirteenth Amendment, Congress can outlaw discrimination in the sale or rental of real estate — on the rationale that discrimination of this sort constitutes a “badge”, “incident” or “relic” of slavery. How does the Amendment come to have one meaning as spontaneously enforced by the Court, and a much enlarged meaning when enforced by Congress? The Court has never said, but a radical division of constitutional enterprise of repairing structural injustice is obviously what drives these outcomes.

Legislatures have responded to doctrinal reticence of the federal judiciary. One of the striking features of public law in the United States is the ubiquity of public accommodation statutes. These

exist at the state level in 45 of the 50 states, and in many municipalities as well. These statutes uniformly ban discrimination on grounds of race, gender and religion in virtually all commercial enterprises; in about half of the states and many municipalities, discrimination on grounds of sexual orientation or gender identity is banned as well. At the national level, federal anti-discrimination legislation with regard to employment, housing, education and more targeted public accommodations has transformed the legal landscape. The impact of judicial enforcement of the Constitution drastically pales by comparison with these legislative efforts emanating from every level of government.

I think we should regard the effort to repair structural injustice as constitutional in origin, justification and force. But it is an effort that has from the outset been heavily dependent on legislative and executive action, and gotten little help from the judiciary.

E

This is a good point at which to anticipate an objection to the claim that because some constitutional duties are imperfect they will largely elude judicial enforcement. Consider prominent liberty-bearing values that enjoy the warrant of many modern constitutions, like freedom of expression and freedom of religion. The shaping of governmental behavior to realize to these values is a project that seems deeply porous to judgment. Between the understanding that these values are appropriately assigned to a political community's constitution and the development of rules in service of those values, there are important questions of strategy and tactics involved, and important trade-offs to be made as well. But courts have assumed responsibility for providing relatively crisp doctrine in the areas of speech and religion. It looks as though common, celebrated instances of judicial constitutional enforcement involve imperfect constitutional duties.

The picture with regard to many important constitutional values is indeed porous to judgment in this way. Typically, the most that we can say of the constitution's meaning with regard to these values is that it calls for a state of affairs that appropriately respects those values. Even a thoughtful rendition of what a constitution aims at in the domain of religious freedom, for example, is likely to be something on the order of "fair terms of

cooperation for a religious, and religiously diverse, people.” (I actually think this is what a court in the United States should take to be the constitutional starting point in addressing religious freedom. But my point is not to insist on this, but rather that any given constitution that is taken to include a commitment to religious freedom is likely to be best understood as calling for a state of affairs at something like this level of generality.)

The judicial enterprise of moving from this sort of abstract constitutional commitment to a regime of complex doctrine of a recognizable sort clearly involves many judicial choices, many interconnected judgments of strategy and tactics. Some elements of constitutional doctrine may involve judgment, but not discretion or choice. It might be true of a given rule or principle that the values of the state of affairs called for by the constitution could not be realized without that rule or principle. It might also be true that for a given constitutional value there is a set of interdependent rules and principles, one or more of which are indispensable to that particular doctrinal set being able to satisfy the constitution’s call. But it is probably the case that there is more than one set of interdependent rules and principles that come reasonable close to satisfying the constitution’s call, and that history, path-dependence and conscious choice have combined to choose one among these contending doctrinal sets. Further, it is probably the case that choice among these contending doctrinal set involves various trade-offs: One set answers some aspects of the constitution’s call especially well, and others not so well; another has different strengths and weaknesses.

Given this picture, the argument would run, Courts can robustly enforce imperfect duties; we have seen them do it. This objection to my characterization of imperfect constitutional duties as poor candidates for judicial enforcement confuses the question of whether it is possible for a court to devise and apply a set of rules and principles that will do a reasonably good job of answering a constitution’s call in a given domain with the question of whether a court has difficult judgments to make in choosing among possible doctrinal sets to choose one that performs this job.

Courts can and do make hard, contingent, fingers-crossed choices. The problem with imperfect constitutional duties like the provision of adequate health care or the amelioration of

structural injustice is that no doctrinal set will make it possible for courts to play a robust guidance role.

This is not to say that areas of familiar constitutional enforcement by the judiciary are necessarily free of imperfect duties. Of any given area of robust judicial enforcement it could be the case that the state of affairs called for by the constitution involves important elements that are out of sight, precisely because these elements entail imperfect constitutional duties. What we see is only that part of the constitution's call that is judicially enforceable. It might be for example, that, on the best understanding, full freedom of expression requires significant affirmative governmental support of the speech of those who would otherwise be voiceless. It might well be — as I have suggested in passing here — that a constitution's call for equal membership involves the obligation of government to strive to ameliorate structural injustice.

## F

Finally, I want to turn to the connection between imperfect constitutional duties and my long-running disagreement with Ronald Dworkin. A standing interest of mine has been in judicially underenforced constitutional law. I believe that judges — in the United States and elsewhere — have institutional reasons for stopping short of interpreting and enforcing the constitution under which they work to its full substantive margins. The discussion in sections C and D of this essay reflects this belief, of course. I also believe that where the reasons for underenforcing the Constitution are court-specific, the meaning of the constitution should embrace its full measure, not merely the truncated margins of the judicially-enforced constitution. Finally, I believe that the judicially unenforced margins of a constitution continue to legally bind non-judicial officials.

It is over this last that Dworkin and I came to disagree. In his later work, Dworkin insisted that only propositions that could be appropriately enforced by judges could be valid and binding law. Indeed in *Justice for Hedgehogs*, when he undertakes to explain how his one-system view of jurisprudence improves our understanding of law, he suggests that a virtue of his view is that it exposes my mistake in arguing that underenforced constitutional norms are law.

The example that Dworkin puts on the table in *Hedgehogs* will be familiar to the readers of this essay: a national constitution that is best understood as conferring on citizens the right to minimally adequate healthcare, but which courts with good reason would decline to enforce in a direct and full-blooded manner. Dworkin correctly anticipates that I would see this as creating a legal obligation on the part of governmental actors to aim at providing citizens with satisfactory healthcare; he, in contrast, would see this judicially underenforced constitutional requirement as imposing at most a moral obligation on officials — just one non-legal moral claim for official action among many.

I find Dworkin's insistence on judicial enforceability as a necessary condition of law mysterious. His central argument to this end in *Hedgehogs* has things backwards.

In Dworkin's one-system view, law is a branch of morality, distinct from morality more generally by virtue of the role played in law of principles of fairness over time and across cases that deflect what would otherwise be the morally best outcome — he calls these structuring principles. The structuring principles of a legal system give legal propositions — emanating from the constitution, from legislation, and from judicial decisions — a distinct and weighty moral claim on the behavior of officials, just because they are law.

In *Hedgehogs*, Dworkin argues that only a positivist could believe that judicially unenforced propositions have the special force of law. Under his thoroughly moralized one-system view, he insists, only the propositions that a right-minded judge would enforce can lay claim to the special force of the structuring principles that shape and carry law. A judicially unenforceable constitutional provision could signify as law for the positivist, but not for an analyst who sees law as a branch of morality. But he never explains why this is so, why a constitutional duty to aim at the provision of minimally adequate healthcare cannot lay claim to the structuring principles that shape and elevate law simply because that duty is largely judicially unenforceable. It is that claim that has things backwards. The special moral reasons officials have for obeying a constitution — the applicable structuring principles — would seem to apply to all the provisions of the constitution. And the unavailability of judicial oversight with regard to a particular constitutional duty would seem to make the non-judicial recognition of the special legal force of that duty all the more important.

I have taken us rather far afield in order to show why I think Dworkin's insistence that law must be judicially enforceable is mysterious. In thinking about imperfect constitutional duties, I have come to wonder whether Dworkin is actually troubled by the nature of the duties that elude judicial enforcement rather than the absence of enforcement itself. The case he put on the table — a national constitution that guarantees citizens minimally adequate medical care — is, after all, a poster child for imperfect constitutional duties. On this account, it would not be the unavailability of judicial enforcement per se that deprives a constitutional provision of this sort of its claim to be law, but rather its lack of categoricity, of ruleishness — in our vocabulary, its imperfection.

For Dworkin, when there is a legal right to a particular outcome, it follows that the holder of that right presents herself to a court, the court responds by recognizing that right, and orders police and other functionaries to act in service of that right. Courts respond to and fulfill legal entitlements "on demand." This is not so much a special attribute of courts as it is an attribute of entitlements to which a courts can appropriately respond. Imperfect constitutional duties, as we have seen, are not at all like that. It may be that it is the absence of categorical snappishness that makes Dworkin skeptical of imperfect constitutional duties. The imperfect duty to provide adequate healthcare doesn't fail as law because it eludes judicial enforcement, but rather, because it is imperfect. This, I have come to think, may what Dworkin and I ultimately were disagreeing about.

Imperfect moral duties need to be rescued from the moral analyst who thinks that a valid moral claim places a direct, immediate, and determinate obligation on the holder of the moral duty in question. Imperfect duties do not do that, but they are nevertheless important moral duties. The same mistake is made by the legal analyst who insists that a proposition of law has to give its beneficiary an entitlement "on demand". Imperfect constitutional duties, like ordinary imperfect moral duties, need to be rescued from the insistence that they give on to categorical rules of official behavior. Categoricity is a common attribute of both moral and legal duty. But it is not a necessary attribute; and treating it as though it were a necessary attribute, impoverishes

our understanding of the range of both moral and constitutional duties.