AUTHORITY AND LEGAL OBLIGATION

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Abstract

This dissertation addresses the nature of legal obligation and the so-called dilemma of authority, which asks how authority can be both content-independent, meaning authoritative without respect to the substance of the directives, and legitimate, a normative judgment that necessarily depends on the content. Contemporary accounts of law’s authority, often because they build on the work of HLA Hart and Joseph Raz, are largely inadequate. Hart, on one hand, identifies obligation as the central feature of law, which distinguishes it from criminal coercion, but, on the other hand, characterizes law as rules based in social practice, which do not necessarily entail an obligation to obey. Raz, while also a positivist, tries to account for law’s normative authority, locating it in the conformity of laws with the reasons subjects already have for action. This form of legitimacy, however, explains only when obedience to the law is permissible, not when it is obligatory. Indeed, Raz concludes that there is no obligation to obey the law just because it is the law. Furthermore, with a theory of law as expertise, Raz cannot say why the law, among all other schemes, is authoritative. Instead, a legal system should be seen as a set of commands oriented on the whole to the common good. Conceptually, legal obligation is composed of both commands and reasons, drawing on models of religious obligation and moral obligation, respectively. The descriptive aspect, command, captures law’s intention to obligate and refers to the commander (in whatever institutional form), who is the one designated to bear the authority. The normative aspect, the common good, supplies the justification for law’s authority through people’s obligations to the common good. In this way, the law has general authority and can obligate even when it is not good in all its particulars. The views of Yves Simon and John Finnis strongly support this connection between law, authority, and the common good. In addition, the work of Carl Schmitt on sovereignty and political theology, which emphasizes the importance of authoritateness yet rejects positivism, offers a complementary parallel to the concept of law in this dissertation.
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One of the great contemporary advances in the field of jurisprudence is to think about authority not in terms of power but in terms of legitimacy. Of course, legitimate authority is not a new concept, yet jurisprudence was, for a time, dominated by positivists who saw authority essentially as a reflection of power. But later positivists, starting especially with HLA Hart, observed that people do not relate to the authority of law in the way they relate to other forms of coercion, including criminal coercion, because, unlike with those other sorts, they understand themselves to have an obligation to obey. This type of observation set the thinking about the nature of law and legal obligation on a new course.

If Hart is right about the sense of obligatoriness carried by law, then the concept of law is inseparable from notions of legitimacy since law without legitimacy is just coercion. But law as coercion is the old positivists’ model that cannot account for the unique feature of law: obligation. The problem, however, is that Hart’s theory, like the theories of those who follow him, leaves no room for legitimacy. Because law, for Hart, is strictly a sociological phenomenon, it is impossible to construct upon that foundation a normative aspect to law. This error carries through to the present day.

The most influential attempt to account for the authority of law (in the sense of legitimacy) within the contemporary positivist framework comes from Joseph Raz. But whereas Hart ultimately offers an account of authority without legitimacy, Raz offers an account of legitimacy without authority. Indeed, Raz, despite his intention to account for obligation, only demonstrates the circumstances under which it would be permissible to obey authority but not
the circumstances under which it would be obligatory. Given this, one unsurprising result of his theory is the conclusion that there is in fact no prima facie obligation to obey the law, that is, no obligation to obey the law because it is the law. In other words, there is no obligation to obey authority just as such; the say-so of authority is never enough alone to generate an obligation. That, in turn, is another way of saying that authority itself never offers independent reasons for action. Instead, authority only serves to point the subject to reasons the subject already has for action. When, on balance, the reasons for action are compelling, the authority’s directive is legitimate because it corresponds to what the subject ought to do, but there is no meaningful sense in which it is authority rather than advice.

As such, it appears a theory of “real” authority must show that authority generates a special kind of second-order reason, which Raz calls an exclusionary reason, to obey the law: a reason to act on the say-so of the authority without a weighing of the underlying first-order reasons for and against that particular action. This would mean that authority would generate a content-independent obligation to obey, an obligation to obey irrespective of the content of the particular directive. By the same token, however, it appears that there must also be first-order reasons for obedience to authority. That is, it appears that obedience to authority must be its own reason for action. There seemingly needs to be something good about authority itself, which is a counterintuitive proposition since authority can clearly be used for good and for bad. Otherwise, it would be hard to explain why there is an obligation to obey authority regardless of the content of the directive. If authority entailed no first-order reasons, then the obligation to obey, as Raz has it, would depend on the content of each directive.

One way of looking at the problem of describing legitimate authority is the tension between these two faces of authority as a first-order reason and as a second-order reason. The
basic outline of the solution to this problem is that the legitimacy of authority depends on the
goodness of the authority as a whole. If the authority serves the necessary functions that
authority alone can fulfill—particularly, if authority advances the common good—then
obedience to authority constitutes its own reason for action. Since authority can only function as
authority if it is authoritative regardless of the particulars, authority presents a reason to obey just
as such. It is a first-order reason that necessarily functions also a second-order reason.
Nevertheless, if the content of the directives were not oriented to the common good on the
whole, then obedience to the authority per se would not constitute a first-order reason, and,
consequently, it would not yield the second-order reason to obey that attaches to legitimate
authority. Furthermore, this explains how legitimate authority generates a general (prima facie)
but defeasible obligation to obey. As a second-order reason, legitimate authority creates an
obligation to obey just because it is legitimate authority. As a first-order reason, the obligation to
obey sits on the scales with the rest of the reasons for and against action and can be outweighed
by a stronger, contrary obligation. This is captured neatly by John Finnis when he writes, “The
equal obligation in law of each obligation-imposing law is to be clearly distinguished from the
moral obligation to obey each law.”¹ There is an obligation to obey the law that applies equally
to each law, but the all-things-considered obligation to obey each law depends on the balance of
competing considerations, only one of which is the general obligation to obey the law.

The task at hand, then, is to present a theory of authority that entails legitimacy and
obligation. Specifically, the focus here is on the authority of law, and the central claim is that a
legal system is best described as a set of commands that is oriented, on the whole, to the common

“NLNR”). Emphasis in original in all cases.
good. Such a legal system generates a moral obligation to obey the law just because it is the law though this obligation is not absolute and can be overridden by other obligations. Accordingly, on this model, the authority of law is a normative concept, and, as such, the validity and legitimacy of a legal system are coextensive. The purpose of law, as one form of authority, is the advancement of the common good, and, therefore, if it fails to meet that purpose, one could say that it is not legitimate, but one could also say that it is not a legal system. Finally, because a legal system is just one institution among many for advancing the common good, there must also be a descriptive criterion in the model that identifies which scheme is authoritative. As such, the model refers to law as a set of commands, which reference suggests that the directives originate from a commander (the sovereign), the recognition of which depends upon a social practice that designates a particular office to bear the authority. Although Hart’s choice of rules rather than commands can also serve this function of identification, commands, unlike rules, capture the sense that law comes from an authority and, moreover, entails obligation, in intention if not in effect.

Unfortunately, because the leading current accounts of authority build off of the flawed theories of Hart and Raz, they cannot quite do the job. For all of the tinkering that has been done, the foundational flaws carry through in the latest work. For this reason, it is necessary to recover a different (different from Hart’s) positivist description of law, law as command, before marrying it to a better (better than Raz’s) normative account of the legitimacy of that authority. In doing so, a key challenge will be to show why both the descriptive and normative components are necessary and why neither alone sufficiently account for the authority of law. Ultimately, this leads to the conclusion that legal obligation is indeed its own concept, neither entirely a species of another form of obligation nor a fiction.
In the human realm, at least, normative authority is an elusive concept. The conflict between justification and content independence appears to be an irresolvable one. If there is to be authority at all, it suggests that the very say-so of the authority should have the power to obligate; if not, it is hard to say why the sayer-so is properly called an authority. But at the same time, that authority must be legitimate, that is, tied to reasons that underlie the normative power. In that case, the power to obligate would depend on the content of the directive (and therefore on conformity to the reasons that grant the legitimacy). Or, as Andrei Marmor explains the “dilemma of authority”:

In other words, either an authoritative directive identifies reasons for action its subjects have anyway, regardless of the authority’s directive, or else the directive purports to constitute such reasons. The former option makes it difficult to explain what practical difference authorities make, and why their say so matters. The latter option makes it difficult to explain how an authoritative directive can constitute a reason for action without assuming, as it were, that one ought to comply with the authority’s directives.\(^2\)

If, in the end, authority depends entirely on the reasons for action that subjects already have, then it is hard to identify any “real” authority.

Therefore, part of the search for authority includes an investigation into the need for authority, meaning why authority might be necessary even among intelligent, virtuous citizens. If authority is necessary in society, then there is room for content independence. Even so, the search for total content independence is probably futile. Strictly speaking, authority is not a

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basic good; although authority can yield many benefits, some of which can be realized only through the exercise of authority, morally bad acts are not made better or worthwhile just because of having been done under authority. In the same way, autonomy is not a basic good; morally bad acts are not made better or worthwhile just because of having been chosen and executed freely. Still, authority, like autonomy, can generate reasons for actions because of the benefits it uniquely confers (and can only confer as authority). These benefits flow, for example, from the ability of authority to coordinate action and to otherwise enable subjects to do that which they could not do for themselves.

As such, the content independence of authority must be circumscribed by legitimacy, namely by the attainment of the ends that authority serves. Again, any such attempt moves dangerously close toward falling back into the dilemma Marmor describes. The solution, or perhaps the closest that one can get to resolving the dilemma, is to think about content independence not for individual directives but for the authority as a whole. This is reasonably intuitive. For an authority to fulfill its purpose, to serve the good as only authority can serve it, it need not be correct in all of the particulars. That is, authority can sometimes require that which subjects do not already have reasons to do or even that which subjects have reasons not to do yet still remain legitimate, provided that, on the whole, it requires that which subjects do already have reasons to do (or, provided that it acts for the common good). It might seem that a better solution would simply be to deny that authority is legitimate where it is not justified in the particulars of its directives, that is, simply to deny content independence. But to deny content independence is to deny authority altogether. If authority is only legitimate when it requires citizens to do that which they already have reasons to do, then it is not really authority. On that view, the determination of whether to obey rests, and can only rest, with the subject in judging
whether or not the directive conforms with the reasons the subject already has. If that is the case, then it is not authority but advice, even if it is expert advice.

The dilemma of authority has a close parallel in the paradox of obedience. On one hand, if one obeys, one must have reasons to obey, whether because what is required is good or even because obedience itself is good. On the other hand, as soon as one has reasons to obey (namely the good that is entailed), then acting so is not, strictly speaking, an act of obedience. In other words, if obedience means doing something on someone else’s say-so just because it is that, then once one has reasons for doing so other than the fact of being commanded, it is no longer obedience. Whenever obedience is (recognized as) good, obedience vanishes. This problem admits of a similar solution. There is a difference between doing something for the independent reasons and doing something for the dependent reasons (on the authority’s say-so) while knowing or believing that there are independent reasons for doing so. That is, one can still obey an authority simply because the authority is legitimate even if one is aware of other reasons for doing that same action. The purpose in such an act of obedience would either rest in the goodness of obedience itself or in the belief that one was obligated to obey, two reasons that collapse into each other since obedience is only obedience if there is obligation. So if obedience is good, that good can only be realized if there is an obligation to obey; otherwise it is just a voluntary act taken with the guidance of the “authority.” Because authority and obedience are essentially two sides of the same coin, obedience could be good in the same sense that authority could be good: obedience could yield unique benefits that could not be attained without it.

Nevertheless, many prominent theorists conclude that there is, in fact, no prima facie obligation to obey the law, which is to say, no justification for general authority, meaning the power to obligate just by virtue of being the authority. In a well-known article, “Is There a
Prima Facie Obligation to Obey the Law?,” MBE Smith convincingly rejects various arguments for authority based on fairness, consent, and so forth. He is correct that none of these other theories adequately account for the obligation to obey the law. Yet, failing to find any adequate theory, he concludes that there is no prima facie obligation to obey the law, that is, no general, if defeasible, obligation to obey the law just because it is the law. Nevertheless, he undermines his conclusion that there is no prima facie obligation to obey by trying to have it both ways, writing, “The government of the United States counts as having legitimate authority over its subjects because within certain limits there is nothing wrong in its issuing commands to them and enforcing their obedience.” He thinks he can claim this because “the questions ‘What governments enjoy legitimate authority?’ and ‘Have the citizens of any government a prima facie obligation to obey the law?’ both can be, and should be, kept separate.” But claiming that there is “nothing wrong” with the government issuing commands and enforcing them, that the government is morally justified in coercing its citizens to obey the law (within certain limits), suggests that people do have a prima facie obligation to obey. And if they do not have an obligation to obey the law just as such, in what sense is the authority of the government legitimate? In what sense is the coercion legitimate?

If Smith is proposing that the legitimacy of the government in coercing citizens extends only to obligations they already have independent of the law, then he is not really dealing with the legitimacy of government per se. Rather, he would just be arguing that it is sometimes legitimate to coerce people to fulfill their obligations. Then he would face one of the problems that Raz faces, namely what this has to do with government and law and why the authority to

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4 Smith 976.
coerce would rest with one body over another. Moreover, in limiting the government’s prerogative to issue commands in this way (if this is what he means by “within certain limits”), then his concept of legitimate authority is too narrow to shed any light on the nature of legal obligation. Without the prima facie obligation to obey, the legitimate authority of the government to coerce stands apart from the concept of legal obligation since the obligation to obey could be accounted for in every case by something other than an obligation to obey the law per se. In other words, if Smith wants to separate legitimate authority from legal obligation, then legal obligation vanishes altogether, which is essentially Smith’s conclusion.

It is, therefore, no surprise that, according to Smith, there is no obligation to obey when “obedience to the law often benefits no one.”

“Perhaps,” Smith continues, “the best illustration is obedience to the traffic code: Very often I benefit no one when I stop at a red light or observe the speed limit.” Although Smith is speaking there in the context of the argument from fairness, he accepts this conclusion ultimately as well. Smith maintains that there is no obligation to obey in these circumstances even if there is an obligation to fairness because of the lack of any benefit from complying. At the same time, Smith’s own argument about the obligation to obey centers on the claim that “if there is a prima facie obligation to obey the law, it is at most of trifling weight.” This is, notably, not the same as showing that there is no prima facie obligation, yet Smith concludes that:

considerations of simplicity indicate that we should ignore the supposed prima facie obligation to obey that law and refuse to count an act wrong merely because it violates some law. There is certainly nothing to be lost by doing this, for we shall not thereby

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5 Smith 958.
6 Smith 958.
7 Smith 971.
recommend or tolerate any conduct that is seriously wrong, nor shall we fail to recommend any course of action that is seriously obligatory.\textsuperscript{8} Moreover, Smith adds, “there is much to be gained, for in refusing to let trivialities occupy our attention, we shall not be diverted from the important questions to be asked about illegal conduct.”\textsuperscript{9}

There are several problems with this view. First, as just noted, Smith does not show that there is no prima facie obligation, only that it is, on his view, trivial. This is not especially devastating to his opponents since the importance of the prima facie obligation is not necessarily rooted in its weightiness. It is more consequential whether there is or is not any obligation to obey the law than whether that obligation is weightier or lighter. Second, Smith may be underestimating the weightiness of the prima facie obligation. He sets it up, conveniently, against wrongs like murder, and it is true that the obligation to obey the law is trivial compared to the obligation not to murder. But the triviality of the obligation to obey the law is less apparent when that obligation is compared to less severe wrongs. In addition, Smith may be underestimating the poverty of judgment with which people discern which of their violations are sufficiently trivial. Part of Finnis’s view is that people should not break the law even when they believe the harms to be nonexistent or trivial precisely because people are, as experience has always taught, bad judges in their own cases. This cannot be avoided by saying that people can exempt themselves when their violations are truly harmless or undetectable since the judgment of that fact is precisely what is in question.

\textsuperscript{8} Smith 971.
\textsuperscript{9} Smith 971.
Third, Smith’s view leads him to miss the point about civil disobedience, which he thinks is better understood this way. According to Smith, “We can then treat civil disobedience just as we regard many other species of illegal conduct,” meaning “judge it in the same way we judge most other kinds of acts, that is, on the basis of their character and consequences.”¹⁰ Although Smith wishes to “escape the air of mystery that hovers about most discussions of” civil disobedience, he fails to see that civil disobedience is in fact unique because part of its expressive value is precisely in the breaking of the law. Civil disobedience is not merely a protest against, say, racial discrimination. It is a protest against the legal enforcement of racial discrimination. And it generally entails an intentional, public violation of the law just to make that point. If not for the obligation to obey the law just as such, it would be harder to make sense of this. Smith is right that civil disobedience is treated differently in theory, but that is because it presents a unique kind of case.

For Smith, the legitimacy of the government (and, therefore, the obligation to obey) extends only to cases where there are other reasons to comply, meaning reasons independent of the fact that the law says so—notwithstanding his conclusion that “the government of the United States counts as having legitimate authority over its subjects because within certain limits there is nothing wrong in its issuing command to them and enforcing their obedience.”¹¹ Excepting that conclusion, he seems to share Raz’s view of authority, which contains a much fuller treatment of the subject. Therefore, a more complete argument, indirectly addressing Smith, deals with Raz and aims to show that his view of legitimate authority, like Smith’s, cannot be sustained.¹²

¹⁰ Smith 972.
¹¹ Smith 976.
¹² This is the subject of the next chapter.
Two other prominent expressions of this view follow a similar path. In Moral Principles and Political Obligations, John Simmons considers and rejects the standard accounts of political obligation. Contract and consent theories fail, as do those based on duties of justice, fair play, and gratitude. In the end, he concludes that there is no prima facie obligation to obey the law, or no general political obligation. Like most others, he does maintain that there are, “even in the absence of political obligations, still strong reasons for supporting at least certain types of governments and for obeying the law.”13 Nevertheless, those reasons, which may generate moral obligations, can always be understood independent of legal obligation. For this reason, for example, “The reasons we have for obeying the law will be the same reasons we have for obeying the law when we are in foreign countries.”14

The consequence of this, plainly, is that there is no distinct normative concept of legal obligation. On the contrary, Simmons writes, “The fact that I have a ‘legal obligation’ or a ‘duty of citizenship’ will be a morally neutral fact,” and, furthermore, “We will want to distinguish between ‘the obligation to obey the law,’ which is a moral requirement, and our ‘legal obligations,’ which are not.”15 If Simmons is correct, then he only strengthens the question of why people believe themselves to have an obligation to obey the law, if in fact they do. This sense of obligation is Hart’s central observation and a significant part of what catalyzed his revolution in contemporary jurisprudence. From Simmons’s perspective, people do not have an obligation to obey the law; at most they have separate moral obligations that overlap with what the law requires. All that legal obligation can mean, then, is that the law requires certain

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14 Simmons 194.
15 Simmons 23.
behavior and may punish (or otherwise censure) noncompliance. What it cannot mean, however, is that there is an obligation to obey the law. Therefore, it must be the case either that people do not believe that they have an obligation to obey the law just as such or that they do believe they have an obligation to obey but are mistaken. Assuming the former, their law-abiding behavior must be motivated by coercion, whether subtle or overt, or by a recognition of overlapping but independent moral obligations to exhibit that behavior. Either way, it undermines the key move by Hart and his followers to distinguish law from both coercion and suggestion because of law’s characteristic obligatoriness, real or perceived. And without this insight, positivists have a hard time explaining why law is not merely orders backed by threats, as the older positivists’ command model had it.

Even as he dismisses the idea of a prima facie obligation to obey the law, Simmons does reveal the contours of what such an obligation would look like. Simmons cites Pitkin: “It is part of the concept, the meaning of ‘authority,’ that those subject to it are required to obey, that it has a right to command. It is part of the concept, the meaning of ‘law,’ that those to whom it is applicable are obligated to obey it.”\(^{16}\) Though Pitkin’s statement requires normative backing, it highlights the point that authority must be tied to legitimacy if the concept is to be anything more than a descriptive term sharing a meaning with power. While it is possible that, as the philosophical anarchists believe, legitimate authority is a contradiction in terms, if there is such a thing as legitimate authority, then it suggests some measure of content independence. Without content independence, there is no authority per se, since the authority’s say-so does not make a difference in one’s practical reasoning, meaning it has no moral force.

\(^{16}\) Simmons 39.
In the same way, Simmons does not see that for authority to have normative meaning it must be judged as a whole (say, the legal system as opposed to individual laws) in order to have a place for content independence. Unless the authority’s directives are obligatory just because they are the authority’s commands, then it is not really authority. He asks, “Why does Rawls only disqualify unjust schemes, rather than all schemes which promote or aim at immoral ends?”

The reason is that the legitimacy of the authority depends on an evaluation of the scheme as a whole. An authority might promote some immoral ends yet still be, on balance, just. If the obligation to obey depended on a case-by-case analysis of the independent reasons for obeying in each case, then there would not be any authority in the true sense, which is to say, a concept of authority distinct from what is dictated by the balance of reasons that already apply to the subject. Similarly, in the context of rejecting the argument from gratitude, Simmons quotes Murphy, who says that “those people who are systematically excluded from the benefits of a society do not have any moral obligation to obey that society’s laws as such.” Simmons is right that gratitude is insufficient to generate general political obligations, but he fails to see the way the construction of the argument from gratitude tracks the correct answer. Because the purpose of law is to secure the common good, those who are not included in the common good secured by the law are also not obligated to obey it. By the same token, those who are part of that common good are obligated.

In his conclusion, Simmons unveils his preference for this state of affairs, an absence of an obligation to obey the law. He believes that the widespread belief in an obligation to obey the law is all a bit of government propaganda, for “what belief can better serve the interests of one’s

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17 Simmons 110.
18 Simmons 158.
19 The explication of this claim is the subject of a later chapter.
political leaders than the belief that all are specially bound to support their government and obey the law?"\textsuperscript{20} It is the result of "not very subtle policies of political indoctrination to which we are all subjected."\textsuperscript{21} In the absence of authority, Simmons prefer that we merely "distinguish between governments that deserve our support, or that are worthy of it, and those that do not (or are not)\textsuperscript{22} with "no presumption in favor of obedience."\textsuperscript{23} For Simmons, the belief in an obligation to obey is in fact pernicious. He writes, "surely a nation composed of such ‘dutiful citizens’ would be the cruellest [sic] sort of trap for the poor, the oppressed, and the alienated."\textsuperscript{24}

It may be unfair to say that this revealing statement exposes Simmons’s political motivation for his conclusion; better to assume that he reaches his preferred conclusion on the philosophical merits. Still, his normative evaluation of his own analytic conclusion rests on empirical assumptions that may not hold. In the society Simmons imagines, the problem is too much deference to government. But it could just as easily be the case that the problem of any given society would be insufficient deference. In fact, Simmons’s perspective may be abetted by the very widespread belief he decries. Perhaps Simmons only has the luxury of attacking the presumption in favor of obedience because the presumption is so prevalent sociologically, enabling society to comfortably endure additional disobedience. But in a world that embraced his Razian conclusion of an absence of an obligation to obey where each citizen exercised individual judgment about each law, there might be an entirely different set of problems, perhaps worse than ones he perceives, leading to circumstances not necessarily more salutary for the poor, the oppressed, and the alienated.

\textsuperscript{20} Simmons 195.
\textsuperscript{21} Simmons 196.
\textsuperscript{22} Simmons 198.
\textsuperscript{23} Simmons 200.
\textsuperscript{24} Simmons 201.
Leslie Green takes a very similar line to Simmons in The Authority of the State. He, too, concludes that there cannot be a content-independent obligation to obey the law. A habit of obedience, as he describes the attitude properly associated with a prima facie obligation to obey the law, “will therefore have to be, in some sense, a discriminating one, for it must not encourage acquiescence in the face of serious injustice.” And he insists, with some merit, that it is “wildly implausible that the range of tolerability can in fact be identified in a content-neutral way.”

Green is right that there cannot be a content-independent way to identify the justice of individual laws; that would be a contradiction in terms. But there can be a content-independent obligation to obey the directives of a legitimate authority. The normative assessment takes place on the system level, which is where the authority’s legitimacy rests. Although this may be a novel suggestion in the relevant literature, it accords with the way that authority is commonly understood. A parent or an official is not authoritative in virtue of the content of the directives issued. Rather, that person is authoritative in virtue of occupying a particular station (parenthood, officialdom) that bears legitimacy. To be sure, the station as a whole need not bear legitimacy, and the station-holder could exercise authority in such a way as to negate the legitimacy of the station (which is to say, fail to fulfill the functions that justify the station’s authoritativeness in the first place), but in the normal case, the parent or official does wield content-independent authority. In cases of severe injustice, which rightly worry Green, the obligation not to commit the injustice would outweigh the obligation to obey the law, for it is only prima facie, but content independence is preserved because the obligation to obey the law does not vanish; it is merely overcome.

26 Green AS 263.
Despairing of finding any formula for legitimate, content-independent authority—
“obedience cannot be the virtue we seek”\footnote{Green AS 263.}—Green counsels the “virtue of civility,” which “at no point requires a surrender of judgment.”\footnote{Green AS 265.} Because civility is marked by self-restraint, it provides stability and “in circumstances of imperfect motivation and moral uncertainty it helps to sustain valuable institutions.”\footnote{Green AS 266.} But, in a way, Green falls into the same trap as Simmons. Of course civility is valuable and, where it is closely associated with self-restraint, perhaps essential for a free society. Civility, however, only suffices against a background of obedience. Where people generally obey the law, it is easy to rest obedience on individual judgment; the danger is low when most of the people obey most of the time (even for reasons unknown). Yet Green may be too sanguine about the prospects for law and order in a society where obedience rests first and foremost on people’s individual judgments of the balance of reasons in each case. Green believes that civility will provide for “mutual tolerance of minor and occasional injustice,” which are “an essential part of a shared commitment to political institutions.”\footnote{Green AS 266.} But there is an opposing danger as well, which might manifest as a decline in the shared commitment to political institutions, meaning not that people will fail to excuse minor injustices but that they will fail to contribute to the promotion of justice. As it is, they are not bound, in Green’s view, to the scheme as a whole but only to the individual directives they find worthy. Finally, like Simmons, Green may appreciate insufficiently the need for and good of authority, even in a virtuous society, in which case an answer to Green would focus not just on how authority can be rationalized but also why it is a positive good.
Although the literature is dominated by those who reason in the Razian mode, some newer theories try to locate the normativity of law in ways that would suggest a general obligation to obey. Unfortunately, they, too, come up short. One instructive example is the work of George Klosko in his article “Multiple Principles of Political Obligation,” in which he addresses “the currently widespread view that there is no satisfactory theory of political obligation.”31 As the title of the article suggests, Klosko attempts to construct a theory of obligation that rests on multiple moral principles. Green, too, takes into account multiple principles, writing, “Some of us have natural duties to obey, others duties of consent, still others may have only weak prudential ties, and some may have none at all.”32 But Green’s theory, to the extent that he even recognizes the applicability of these different sources of obligation, is different because he sees different principles applying to different individuals. For Klosko, multiple principles apply to the same individual, combining in force to obligate where none of them alone suffices. That is not to say that Green would deny that multiple principles could apply to the same person, but Klosko’s theory is predicated on the confluence of multiple principles.

Examining some of the standard accounts of obligation, Klosko determines, for example, that neither duties of fairness33 nor of mutual aid34 suffice to ground political obligation generally. Instead, he proposes a “multiple principle theory,” arguing that “a stronger theory can result from employing multiple principles of obligation, allowing them to work in combination,

31 George Klosko, “Multiple Principles of Political Obligation,” Political Theory 32.6 (December 2004) 802.
32 Green AS 246-47.
33 Klosko 807.
34 Klosko 809.
rather than attempting to develop a theory on the basis of a single principle.”35 Klosko recognizes that authority just as such entails a prima facie obligation to obey the law. “A successful theory,” he explains, “establishes a strong presumption in favor of obedience.”36 Thus, Klosko is looking for the right thing, but he does not quite get there. For one thing, his multiple principles may not be additive in the way he wishes. Klosko assumes that each of the principles, while insufficient on its own to establish political obligation, combines, as he says, with the others in such a way to make them sufficient as a whole. But it may very well be that principles that are insufficient on their own do not combine in the way that Klosko assumes. Instead of imagining Klosko adding fractions to a sum of one, perhaps the more apt mathematics metaphor is that he keeps halving the distance to the goal without ever quite reaching it.

This overarching problem notwithstanding, Klosko does point in the right direction. Referring to the common good principle (CG) in what appears to be a curious concession, Klosko asserts, “CG does establish moral requirements to support the full range of governmental actions.”37 Nevertheless, he insists on his multiple principles theory (MP) because “MP is a more convincing theory with the additional principles than without them.”38 This very strongly implies that, although MP is more convincing that way, CG might be enough to explain political obligation. And since the real task is to discover what is minimally necessary to ground political obligation, Klosko undermines his purpose a bit here. In fact, the best response to Klosko might be that while multiple principles might make for a more convincing theory, a more parsimonious theory, with fewer moving parts, is preferable.

35 Klosko 801.
36 Klosko 802.
37 Klosko 818.
38 Klosko 818.
Either way, it is significant that Klosko lands upon the common good as the central driver of political obligation. He articulates the common good principle as follows: “The mechanism in place in society X to provide indispensible and other necessary public goods and to aid the unfortunate can also take reasonable measures to promote the common good in other ways.”\(^{39}\) In whatever formulation, this is the foundational principle because political authority (and the authority) of law are necessarily rooted in the common good since the common good is the very end for which such authority exists. Without an orientation to the common good, the normative authority of law is unintelligible.

The connection between authority (and the general obligation to obey) and the common good leads next to the conclusion that the application of the common good principle depends upon the overall orientation of the political or legal system and not the justice of individual directives. In Klosko’s words, “The appropriate standard is tolerable or reasonable justice. A government’s actions must be on the whole defensible, though exceptions should be accepted.”\(^{40}\) Klosko may go too far in trying to accommodate exceptions, but his basic points stands. At the same time, he must be mindful of accounting for why only the government is authoritative and not just any agent that provides necessary public goods and so forth. When he says that those who “could not lead acceptable lives without public goods supplied by joint cooperation . . . should be viewed as members of the community that furnishes them,” he runs the risk of multiplying authorities, encompassing with this theory all those who provide for the common good.\(^{41}\) He alludes to the needed limiting account when he refers to “the mechanism in place in society X,” but he leaves it undeveloped. He remains on the right track, though, suggesting that

\(^{39}\) Klosko 812-13.  
\(^{40}\) Klosko 816.  
\(^{41}\) Klosko 813.
there is a descriptive, or positive, component along with the normative principle that identifies which provider for the common good generates obligations.

Like Klosko, David Estlund offers a theory of general obligation. Unlike Klosko, fortunately, in Democratic Authority he focuses on a single principle to justify it. Estlund’s theory contains essentially two parts: first, the claim that democratic decision-making yields epistemic advantages and, second, that those advantages matter normatively. This second part revolves around a concept he calls “normative consent.” “Normative consent,” he writes, “establishes the system’s authority.” 42 The argument is best summed up by Estlund as follows:

In light of all this, citizens would be morally required to consent to the new authority of such a democratic arrangement if they were offered the choice. Non-consent would be null, and so the fact that no such consent is normally asked or given makes no moral difference, and so any existing democratic arrangement that meets these conditions has authority over each citizen just as if they had established its authority by actual consent. 43

Although Estlund’s account is problematic, he, too, is on the right track. For one thing, he clearly recognizes the importance of a content-independent theory of authority or, as he says, “the moral power to require action (to borrow a phrase from Raz) . . . just because you said so.” 44 Otherwise, there is no authority per se but only obligations one already has that overlap with directives from the law. Estlund further recognizes one consequence of content independence, namely that “wrong” directives still obligate. In Estlund’s words, “We should not assume that authority and legitimacy lapse just whenever the procedure gets a wrong answer.” 45 With regard

43 Estlund 157.
44 Estlund 118.
45 Estlund 7.
to democratic authority, he adds, “Owing partly to its epistemic value, its decisions are (within limits) morally binding even when they are incorrect.” Of course, the major difference, however, is that Estlund’s theory of authority is in fact limited to democracies. His central emphasis on the epistemic advantages of democracy notwithstanding, a close examination of Estlund’s theory shows that democracy is not a necessary feature of legitimate authority.

The main problem with Estlund’s theory is his recasting of legitimate authority in terms of consent. Many theorists, including several of the ones mentioned above, have demonstrated that consent cannot account for a general obligation to obey the law. The presence of consent insuffices in both its breadth and depth (that is, in terms of who has consented and to what). Estlund, of course, is aware of this and therefore makes an adjustment with his concept of normative consent, meaning consent that is valid not because one has given it but because one is morally obligated to give it, whether or not one has given it and even whether or not it has been requested. In part, this sounds like a version of Rawls’s original position, not suggesting that people have in fact agreed to any particular principles but only that these are the principles to which people would agree if they were being reasonable. Estlund’s theory is different, however, because he goes even further in saying that one would have an obligation to consent to the authority (which could be the same as Rawls’s position, depending on one’s view about the obligatoriness of doing what is reasonable).

This addition of normative consent is an unnecessary complication, however. Why derive political obligation from an obligation to consent (normative consent) rather than from a more straightforward obligation to comply with legitimate authority? Normative consent cannot be both the source of legitimacy and its consequence. Instead, for Estlund, the source of

46 Estlund 8.
legitimacy is the epistemic advantages of democratic decision-making. If that part of the theory holds, why not just say that democratic authority creates an obligation to obey instead of an obligation to consent? In practice, this is what Estlund is saying. Essentially, he is arguing that the obligation to obey obtains whether or not people consent. In describing his “hypothetical consent theory of authority,” Estlund admits that “authority can simply befall us.” In that case, the focus ought to be more on the source (and entailments) of political obligation and not on cramming it into a model of consent.

Indeed, Estlund’s concept of normative consent is noticeably unstable. The idea of required consent is a curious one since it eliminates the very thing that consent accomplishes: self-binding. If one is required to consent—and especially if one is obligated regardless of whether one consents, as with normative consent—then it is the source of that requirement, and the assent of one’s own will, that explains the obligation. Indeed, for consent to serve any function here, there must be the possibility of valid non-consent, even if such non-consent is valid but illicit. If non-consent is impossible here, then the theory is really just positing the existence of an obligation, and the role of consent vanishes. Estlund tries to carve out a middle position, proposing symmetry between consent and non-consent. According to this view, the subject begins in a morally neutral position between consent and non-consent such that normative consent can be binding even in the absence of consent since one is not in a state of non-consent when consent is not given. But Estlund provides no good reason to reject the conventional, common sense understanding of consent, namely that one begins in a state of non-consent, normatively, and remains there until granting consent.

47 Estlund 117.
In fact, Estlund offers his own counterexample from the case of sex, where non-consent is valid even if it is wrongful, meaning even when there is an obligation to consent. Under such circumstances, sexual contact is prohibited even if it was morally impermissible to refuse consent. This suggests that normative consent, the obligation to act as though one has consented even when one has not, does not necessarily work. One way out of this for Estlund is to show that political obligation and sexual relations are disanalogous in this way. Perhaps wrongful non-consent, while valid with respect to sex, is invalid with respect to the law. If so, the law would be justified in coercing compliance in a way that the person who received the valid but illicit non-consent would not be justified in coercing sexual contact. Alas, Estlund is not sure whether the disanalogy exists, conceding, “I do not know what the criterion is for when wrongful non-consent is, or is not, null.” Accordingly, Estlund accepts that the two may be the same, writing, “Maybe law is like sex in this way: even impermissible refusals are successful at forbidding the proposed action.” Searching for a different way out, he continues, “In any case, normative consent is an account of authority, saying nothing about anyone’s being permitted to do anything. Normative consent (without actual consent) can establish authority even if it cannot establish legitimacy.” That is, because normative consent is not normative (apparently?), it creates authority without creating legitimacy. Problematically, he provides no solid account of what the authority of law is without legitimacy. And he skips over any explanation about how this distinction between authority and legitimacy could apply to the case of normative consent in sexual relations, where its meaninglessness seems evident, at least facially.

48 Estlund 126.
49 Estlund 127.
50 Estlund 127.
Thus, Estlund’s theory really unravels when his premises and conclusions come together. At the outset of his work, Estlund defines authority as “the moral power of one agent (emphasizing especially the state) to morally require or forbid actions by others through commands.” Yet he concludes that, thanks to normative consent, authority, or “the moral power to require action—can, in principle, be established even without a generally acceptable justification.” In other words, “There can be authority without legitimacy.” On its face, this is incoherent. If Estlund defines authority as the moral power to require action, which he does, then he cannot separate authority and legitimacy. People can only be morally required to obey authority if that authority is legitimate. Without legitimacy, authority is just power in the coercive, not moral, sense.

Despite the theory’s heavy reliance on democracy as the explanation for legitimate authority, there are intimations of a different path. Estlund argues, “Democracy is better than random and is epistemically the best among those that are generally acceptable in the way that political legitimacy requires.” The suggestion here, though, is that democracy is better because of its output, the results it produces, rather than because of its input, the willing participation of its citizens. Normative consent, that is, the obligation to give one’s consent, which binds whether or not one actually gives it, exists (and creates obligations) because democracy has the advantages that Estlund specifies, namely that it is epistemically better than the alternatives. But if it is the output that is of concern, then any system that produces the appropriate results should have legitimate authority. Estlund’s point, naturally, is that democracy produces better results,

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51 Estlund 2.
52 Estlund 134.
53 Estlund 134.
54 Estlund 8.
but this is a disputable empirical claim. In principle, any arrangement that advances the desired ends should qualify. Therefore, it might make more sense to define legitimacy by the ends the authority achieves. One possible such end, a very plausible goal for the law, is the advancement of the common good. As Estlund describes it, normative consent means that “you are under my authority because you would be morally wrong to refuse to consent,” and, because it is hypothetical, that “you would have consented if you acted morally correctly when offered the chance to consent.” Estlund has the right contours of the argument because he is nearly explaining just what obligations are (when they are not derived from consent): requirements to comply regardless of consent. He would be better off to realize this and focus on explaining the obligation to obey rather than inventing an unstable version of consent. The “duty to act as you would have been morally required to promise to act if you had been asked” might be associated with the epistemic advantages of democracy, insofar as democracy contingently advances the common good or other ends, but not necessarily. Other sources of obligation might generate the same duty. To be sure, democracy can be an extremely useful proxy since, in many cases, its epistemic advantages may mean that democratic decisions track the common good. Yet it is neither democracy nor consent that ultimately accounts for Estlund’s conclusions. On the contrary, his insertion of consent is, at best, unsuited for the phenomenon he wishes to explain.

In contrast to the foregoing theories, some new works have attempted to account for authority without appealing to the kind of normative explanations just presented. One obvious reason for such attempts is that normative accounts seem to always come up short: hence the conclusion by so many that there is no general obligation to obey the law. More importantly, these newer works have followed in the line of thinking initiated by Hart, who wished to identify

55 Estlund 10.
law’s authority without justifying it. In recent writings, others have tried to import quasi-normative content by turning to the nature of law itself while remaining within the positivist confines of Hart’s theory. These advances represent a noble, if inadequate, effort to close the gap left by Hart between authority and legitimacy. They are all the more significant in light of the fact that the justifications that come in the spirit of the arguments made by Raz, the most prominent exponent of law’s authority, buckle under the weight of what Andrei Marmor identifies as the dilemma of authority. If legitimacy, as Raz has it, depends on a confluence of the authority’s directives with the reason for actions that the subject has already, then it is difficult to see what practical difference the authority makes. If, on the other hand, the authority’s authoritativeness is content independent, it is hard to see how that content independence could be squared with any theory of legitimacy since any meaningful theory of legitimacy would restrict some content. In the face of this dilemma, Marmor adopts the Hartian option, choosing to encompass all de facto authority within his theory rather than supply an argument that establishes which instances of de facto authority are normatively legitimate.

Consequently, reminiscent of Hart, Marmor argues for understanding authority in terms of social or institutional practices and thereby avoids the need for an independent normative explanation; to wit, “What it takes to have practical authority is determined by some social or institutional practice.” Though he risks sounding circular, Marmor claims that the normative power of an authority is rooted in the norms of the institution of which the authority is a part. He spells this out in “three theses: (1) to have practical authority is to have normative power of a certain type; (2) power, in this sense, is granted or constituted by norms, that is, some rules or

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conventions; and (3) power-conferring norms are essentially institutional—they form part of some social practice or institution.”\textsuperscript{57} Essentially, Marmor’s claim is that the power-conferring norms just are part of the social practice or institution. The social practice or institution exists, and one feature of it is that it confers normative power upon an authority. While it is true that those who participate in the social practice or institution may understand it to confer “normative power of a certain type,” the identification of such practices and institutions is not enough to explain their legitimacy or the legitimacy of their power-conferring norms. Nevertheless, Marmor’s work introduces several helpful aspects of a sound theory of authority and obligation.

One important aspect of Marmor’s theory is the implicit assumption that authority generates a prima facie obligation to obey the law. That is, once an authority is identified, the normative power of the authority entails the ability to obligate those who are under it in a content-independent fashion. “Once these social practices are in place and conventionally practiced,” Marmor explains, “voluntary participation is not a precondition of the reasons to participate in them.”\textsuperscript{58} This is an important counterclaim to the normative theories of the Razian mode, which suggest that authoritativeness ultimately depends on the individual subject’s assessment of legitimacy in each case. In contrast, Marmor understands that a proper theory of authority and obligation must entail some obligation to obey just as such, before any second-guessing takes place. As always, the obligation to obey can be overridden by stronger competing obligations. But a major motivation for resolving the dilemma of authority in the first place is to arrive at an explanation for the authority of law (or of other social practices or institutions) per se. As Marmor says, he is aiming at “harmonizing a long standing divide in the literature about

\textsuperscript{57} Marmor ICA 241.
\textsuperscript{58} Marmor DA 22.
political obligation, that I think many have found unsatisfactory, between the question of the conditions for the legitimacy of practical authorities, and the question of the general obligation to obey the law.”

Furthermore, Marmor’s theory is extremely useful in pointing to the need to identify particular practices or institutions that are authoritative. One problem with many normative theories, including Raz’s, is that it does not explain why particular individuals or groups meeting the normative criteria are authoritative (that is, have the power to obligate) while others do not. There could be any number of individuals or groups that possess the expertise that, for Raz, confer authority by enabling the subject to better comply with the reasons that subject already has for acting. In Marmor’s words, taking an example from those who see law’s authority in its ability to solve collective action problems, “Not every solution to a collective action problem—even if it is a collective action problem that the relevant parties are morally obliged to solve—amounts to an authoritative relation.” In fact, Raz’s theory seems to suggest that any individual or group with the requisite expertise (or, in the case of collective action problems, coercive power) could be authoritative, in which case the theory contains a gaping inadequacy and fails to even remotely describe authority as it is understood in practice. Marmor is sensitive to this problem when he writes that “power conferring norms must assign the power ex ante, designating certain individuals or a body of individuals the right to alter the obligations or rights of others.” Similarly, taking a page from Hart, he states:

For A to have authority over B in matters C, is for A to have the normative power to alter the rights and obligations that B has in matters C. To have authority, in other words, is to

59 Marmor DA 25.
60 Marmor DA 23.
61 Marmor DA 12.
have normative power. Power, in the relevant sense, is essentially an institutional
construct: its existence and scope is constituted by rules or conventions.\footnote{Marmor DA 12.}

Without this institutional aspect, a theory of authority could not specify where the normative
power applies. Therefore, Marmor adds, “My main point was to show that there must be some
institutional setting that mediates between the general reasons for having the relevant kind of
authority, and the practical difference that the authority makes on particular occasions.”\footnote{Marmor DA 25.}

The central problem, unsurprisingly, is that Marmor cannot really explain authority
without recourse to a more fully normative source or, failing that, without abandoning the very
normativity that he seeks to explain. In setting out his definitions, Marmor writes that “to have
practical authority is to have the normative power to impose obligations on another.”\footnote{Marmor ICA 240.} This is a
fully normative claim. Clearly, like in Hart, Marmor uses this terminology in its moral sense. If
by “obligation” he means anything short of moral obligation, then he is not speaking of a
normative power to impose moral obligations but a coercive power to impose obligations just in
the sense of compelling certain behavior. But if political and legal obligations boil down to what
one can be forced to do, then there is no need to explain or even refer to the normativity of law.

Marmor is absolutely clear that he intends the moral usage of the terms “authority” and
“obligation,” describing his concept of “systemic power” (or “S-power”)\footnote{Marmor ICA 246.} as the “moral right to
rule,” or the “moral right to have authority under certain circumstances.”\footnote{Marmor ICA 247.}

Because Marmor adopts a Hartian positivist approach, he cannot account for this moral
usage. In doing so, he runs into the same problem as Estlund and even employs similar language
in his own defense. Much as Estlund writes, after what appears to be a long effort to justify legitimate authority, that “there can be authority without legitimacy,”\(^{67}\) Marmor claims that his points “pertain only to the question of what it is to have a certain practical authority; they establish nothing about the question of legitimacy.”\(^{68}\) This is extremely problematic given his definition of practical authority just a few pages prior as “the normative power to impose obligations on another.”\(^{69}\) There is no coherent way, for these purposes, to distinguish between legitimacy and the normative power to impose obligations. Unfortunately, this is something of an inevitable outcome as Marmor adheres to a positivistic framework while also acknowledging the normative component of practical authority. It is a difference that cannot be split. It is therefore similarly unsurprising that Marmor undermines his own statement about the separation of authority and legitimacy shortly afterward, saying:

> The more we recognize the dependence of practical authorities on social practices or institutions, the easier it becomes to realize that the legitimacy of authorities is bound to depend on the legitimacy of the practice or institution in which they operate, each authority’s specific functions in it, and, importantly, the general terms of participation in the practice or institution.\(^{70}\)

This is surely correct. And it, too, is a helpful observation because he sees that the obligation to obey, which comes from legitimacy, depends on the legitimacy of the authority (the social practice or institution) as a whole. Because of the institutional character of law—it serves a purpose as a system—the authoritativeness of individual directives depends on the

\(^{67}\) Estlund 134.
\(^{68}\) Marmor ICA 241.
\(^{69}\) Marmor ICA 240.
\(^{70}\) Marmor ICA 248.
authoritativeness of the institution as a whole. At the same time, the passage highlights the impossibility of separating authority and legitimacy: the authoritativeness of the practical authorities or of the social practices or institutions on which they depend, rests on the legitimacy of those social practices or institutions. As Marmor set out in his own definition, practical authority itself is meaningless without legitimacy.

In a similar way, Marmor gets himself into trouble when he tries to separate authority and the moral right to rule (S-power). In Marmor’s view, “A moral right to rule, however, is not tantamount to having authority; it only means that one should have it or that it is good that one has it. Perhaps, all things considered, X should be in charge, not Y. But if the relevant powers are granted to Y, then Y is the one who has the relevant authority, even if Y should not have it (morally speaking, that is).”\(^7\) Of course it is true that one could have the moral right to rule yet lack de facto authority. As Marmor says, one might be entitled to rule without anyone actually obeying (for any of a number of reasons). But this is a puzzling point on which to rest his distinction between authority and legitimacy since the whole point of his work here is to unpack practical authority as a normative power to impose obligations—and that power exists whether or not anyone obeys. Whether the obligations obtain does not depend on whether people in fact obey. Using Marmor’s terms, someone with the right to rule has, by definition, S-power, meaning the power to change the normative situation: in other words, legitimacy. Even if having de facto power to force compliance were a necessary condition for S-power, it would clearly not be a sufficient condition, in which case, contra Marmor, the one possessing such power (Y) would not have “the relevant authority.” Or, if de facto power to enforce were sufficient for S-power, then Marmor would need to explain why this constitutes the power to

\(^7\) Marmor ICA 247.
change the normative situation. Lacking this, Marmor would be hard-pressed to distinguish between a government and a gang that ruled through coercion. That might be acceptable if Marmor were seeking merely to describe just any de facto authority (situations in which there are rules and people in fact obey), but it would not extricate him from the dilemma of authority. The bottom line is that if, as Marmor insists, authority is institution based, then it is difficult for him to sustain the concept of a moral right to rule apart from some de facto authority.

Obviously, Marmor does not mean that anyone has a natural right to rule by birth or other inheritance. Nor does he mean that the right to rule attaches to the most virtuous or intelligent individual or group. He recognizes that there must be some institutional designation that selects among potential authorities that meet the normative criteria (virtue, intelligence, and so forth—just to take an example). Again, that is the main thrust of his theory. Moreover, he has already ruled out such definitions of the moral right to rule by claiming that it is not equivalent to authority. So he finds himself in an impossible position. If he equates authority and the moral right to rule, he contradicts his statement that authority requires de facto power. If he separates them, he contradicts his definitions of each because they appear to entail each other. Therefore, he should concede that the moral right to rule is the same as legitimate authority and that social practices or institutions might play a role in the designation of authority but that de facto authority is not required for the normative power to exist.

Instead of trying unsuccessfully to split authority and legitimacy, Marmor ought to focus on accounting for the normative value of authority in his institutional conception. At base, he does recognize this, but, unable to accept a fully normative approach, he pulls back, claiming that he is speaking of authority but not legitimacy. When he does address legitimacy, however, he writes, “To determine when an authority is legitimate or not, we need a normative account for
sure, but not about authorities in general; we need a normative theory about the legitimacy of social practices and institutions, what makes them good and just and worthy of our support.”\

He is terribly close to getting it right here: he sees that the kind of authority he is talking about, generated by social practices or institutions, depends on the legitimacy of those social practices or institutions. In this respect, he takes the opposite approach of Raz, who constructs a justification for authority in general, of which the law might be one instance. But Raz gets into trouble because, among other problems, he cannot explain which qualified “authority” actually counts as authoritative. This is a major part of what Marmor’s institutional conception is meant to resolve. In another formulation of the point, Marmor states, “The legitimacy of practical authorities depends on the nature and legitimacy of the particular social practice or institution that grants the authority the normative powers that it has.”

Though he muddles it a bit when he claims to be discussing authority in general but not legitimacy, Marmor’s intention is not to legitimate authority in general but to link authority to social practices or institutions (and, by extension, the legitimacy of authority to the legitimacy of the particular social practices or institutions that give rise to it). He is correct because, unless “authority” means “legitimate authority,” in which case he is already assuming what he is trying to prove, it is not trying to justify all authority in the sense of power. Rather, it is worth justifying the social practices or institutions behind certain authorities.

Furthermore, for Marmor’s purposes here, as he sets forth at the outset, the kind of authority worth discussing is authority with normative power; that is the puzzle that needs explaining. Since the existence of authority with normative power, which is to say, legitimate

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72 Marmor ICA 260.
73 Marmor ICA 239.
authority, depends on the legitimacy of social practices or institutions, the key question is what confers that legitimacy. In other words, the question is how social practices or institutions create an obligation to obey the authority. Marmor falters when he nearly suggests that it comes down to consent. Taking an example from his familiar university setting, Marmor asserts, “I am bound to comply with the dean’s instructions because I have agreed to do so.” He is quick to specify that this is not consent in the sense of having directly given the dean his consent. Rather, his obligation is born of “a commitment to the institution, its members, and beneficiaries.” But this still depends on having made that commitment, that is, on having given consent, albeit not in the narrowest sense. What Marmor really needs to explain is whether the authority could be legitimate even if he had not made such a commitment. In contrast to this weak spot, Marmor is on much firmer ground when he approaches his conception of authority this way: “The arguments about the obligation to obey the law pertain to the kind of institution law is, its functions in society, the moral obligations we may have in supporting these functions, and the extent to which the support needs to be realized by an obligation to obey.” Focusing on obligations, Marmor can account for authority even in the absence of consent since at least some obligations exist without consent. Moreover, this framework for addressing the problem reveals why the law’s authority depends on its legitimacy as a whole, because it is about the function of law as an institution. The institution is either legitimate or illegitimate, and the parts follow.

And this, finally, exposes the central underlying question, namely what “kind of institution law is” and what “its functions in society” are. While Marmor does not attend entirely to this question, the answer that provides the most coherent account of law’s authority is one that

74 Marmor ICA 254.  
75 Marmor ICA 254.  
76 Marmor ICA 260.
centers on its role in securing and advancing the common good. This, in turn, provides the basis for answering the question of who is obligated. The simple answer is: all those who are part of the institution. But a more nuanced presentation of that answer is that it is all those who are part of the institution insofar as the institution fulfills its function for those people. In this case, the law obligates all those whose good it contemplates. Without filling out the substance, Marmor still acknowledges the general point. “Practical authorities,” he says, “always have limited jurisdiction: their authority binds only those who are participants in the practice or institution in which they operate.”\textsuperscript{77} Those who are bound have a prima facie obligation to obey. But “such obligations are always conditional: They presuppose that there are valid reasons to participate in the relevant institutional practice and comply with its rules.”\textsuperscript{78} For Marmor, that is what it means to be a participant in the practice: to have valid reasons to participate. This is important because it does not strictly depend on choosing to participate. But it is also important because it means that those who do not have valid reasons to participate, those whose good is not considered in the common good, are not bound. They do not “belong” to the social practice or institution in the way that Marmor means when he says that “authorities obligate only those who belong to the practice or institution that grants them the power they have.”\textsuperscript{79}

Marmor’s theory, even in its best light, raises the importance of the functions or purposes of law but does not engage that issue directly. This issue, however, is at the heart of Scott Shapiro’s new work Legality. In particular, Shapiro offers a description of the nature of law that emphasizes law’s role in enabling planning. In his version of positivism, Shapiro wishes to avoid what he sees as the fundamental conceptual errors of two predominant ways of thinking

\textsuperscript{77} Marmor ICA 254.
\textsuperscript{78} Marmor DA 15.
\textsuperscript{79} Marmor DA 15.
about the law. One target is Hart and his fellow positivists, who “derive normative judgments about legal rights and duties from descriptive judgments about social facts.”\(^8\) Summing up the problem, Shapiro writes, “Normative judgments come out, but none have gone in.”\(^8\) These positivists (Marmor among them, presumably) think they account for obligation based solely on the existence of rules based in social practice. But this cannot be done without an independent moral assessment of whether those social practices generate obligations, meaning it cannot be done merely by showing that the practices exist. As Shapiro rightly insists, in the legal sphere “there are no amoral concepts of authority and obligation and hence no middle ground between the descriptive and the moral that positivists can call their own.”\(^8\) For this reason, Shapiro calls “Hart’s attempt to preserve the distinction between legal and moral thought and discourse . . . an unstable compromise.”\(^8\) Unfortunately, Shapiro’s own theory suffers from the same basic weakness. Ultimately, like Marmor, he tries to split the difference between authority and legitimacy in a way that just cannot be done.

Part of Shapiro’s motivation to do so comes from his second target, natural law theory, which, in his interpretation, “rules out the possibility of evil legal systems.”\(^8\) Like Hart, Shapiro cannot accept a definition of legal systems that entirely fuses legality and legitimacy since there plainly are evil legal systems. To deny the name “legal system” due to the system’s injustice would, in Hart’s and Shapiro’s view, simply be to deny what is plainly in front of one’s face. They prefer to identify legal systems by descriptive criteria. A set of rules containing the appropriate non-normative features (for example, a set that is, in Hart’s terminology, a union of

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\(^8\) Shapiro L 48.
\(^8\) Shapiro L 116.
\(^8\) Shapiro L 116.
\(^8\) Shapiro L 49.
primary rules—rules about duties, permissions, and the like—and secondary rules—rules about those rules) constitutes a legal system whether it is virtuous or vicious and no matter how thoroughly so. In explicating just what descriptive criteria define a legal system, Shapiro focuses on the planning function of law, which exists in both (morally) good and bad legal systems, because “we cannot understand what laws are unless we understand how and for what purposes legal systems produce them in the first place.” The immediate problem this raises, though, is that the purpose of planning, as the end of a legal system, itself is a normative goal. That is, planning is for the purpose of achieving certain ends that are preferred over other ends, for if the intended ends were not preferred, then there would be no point in planning.

The moral dimension of planning is immediately clear in Shapiro’s theory. He defines his “Planning Theory of Law” as follows: “Legal systems are institutions of social planning and their fundamental aim is to compensate for the deficiencies of alternative forms of planning in the circumstances of legality.” He then goes on to say, quite reasonably, that “the aim of the law is not planning for planning’s sake.” “Rather,” he adds moments later, “the law aims to compensate for the deficiencies of nonlegal forms of planning by planning in the ‘right’ way, namely, by adopting and applying morally sensible plans in a morally legitimate manner.” The surprise here is not the introduction of moral concepts as part of the nature of planning but that he ever proposes to do without them in the first place. But, following Hart’s lead and hoping to avoid the trap that the natural lawyers fall into by combining law and morality, Shapiro also

85 Shapiro L 7.
86 Shapiro L 171.
87 Shapiro L 171.
88 Shapiro L 171.
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wants to say that “the existence of legal authority can only be determined sociologically.”\(^{89}\) Since, in his view, “the fundamental rules of legal systems are plans,” “the question of whether a body has legal power is never one of its moral legitimacy; it is a question of whether the relevant officials of that system accept a plan that authorizes and requires deference to that body.”\(^{90}\) As he says similarly later on, “To build or operate a legal system one need not possess moral legitimacy to impose legal obligations and confer legal rights: one need only have the ability to plan.”\(^{91}\) But that is difficult (which is to say, impossible) to square with what he says about “adopting and applying morally sensible plans in a morally legitimate manner.” Again, it will not do to say that planning is only moral in the limited sense of being directed toward some ends. What is moral about being directed to any ends is the preferability of those ends, and that preferability cannot be established without reference to the morality of those ends.

Of course, people could intend very bad ends, too, but what makes their plans law is at least in part their belief in the legitimacy of those ends. This problem of trying to describe plans without reference to legitimacy is exactly parallel to the problem of trying to describe authority without reference to legitimacy. (This is no surprise since Shapiro’s theory is that the planning function of law is what gives law its authority.) To be sure, there is authority without legitimacy, but this is just de facto authority. The obligation to obey depends upon the legitimacy of the authority. In the same way, the authoritativeness of the plans, that is, the obligation to go along with those plans (namely, to obey the law) depends upon the legitimacy of the plans’ ends. Surely Shapiro does not intend to say that there is an obligation to go along with plans just because they exist, completely irrespective of their content. And if he means to say nothing at all

89 Shapiro L 119.
90 Shapiro L 119.
91 Shapiro L 156.
about the obligation to obey, then the authoritativeness of the plans must be rooted in coercion or voluntary compliance. It is only in that respect that Shapiro can eschew what he calls normative jurisprudence in favor of analytic jurisprudence, which “by contrast, is not concerned with morality.” That is manifestly not possible if legitimacy matters.

Even Hart, the godfather of contemporary positivism, concedes that law has a moral component insofar as it must at least secure some minimal ends, such as survival. Indeed, a similar element is reflected in Shapiro’s discussion of the nature of law, itself an elaboration of what it means to plan. “What makes the law the law is that it has a moral aim, not that it satisfies that aim,” Shapiro writes. And, more broadly, “A legal system cannot help but have a moral aim if it is to be a legal system.” Leaving aside for a moment the issue of whether the law satisfies its moral aim, Shapiro is perfectly clear that the law cannot be understood without this moral referent. Nor can it be argued on his behalf that this remains purely in the descriptive realm since it is just a definitional feature of plans that, in the self-understanding of the planners, plans have moral aims but that nothing in the nature of law as plans depends on the actual goodness or badness of those aims. Shapiro avers, “It is part of the identity of law to have a moral mission, whereas it is not in the nature of nonlegal criminal syndicates to have such a mandate.” Clearly criminal syndicates do have plans, even if they do not have moral missions. But equally clearly, some legal systems are evil, as Shapiro says. So Shapiro has painted himself into a corner whereby legal systems that plan toward bad ends still have moral missions but gangs that plan toward bad ends do not. If this is the case, then Shapiro appears to uphold the

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92 Shapiro L 3.
93 Shapiro L 214.
94 Shapiro L 215.
95 Shapiro L 215.
distinction by assuming what he wants to conclude: that it is possible to identify legal systems, both good and bad, with respect to descriptive criteria that distinguish them from nonlegal systems where de facto authority is also exercised. This is a poor way to solve the problem of being able to identify legal systems as such even when they are evil.

Shapiro’s attempt to account for the authority of law as a positivist draws heavily on his understanding of “perhaps Hart’s greatest contribution to jurisprudential theory,” the internal point of view. Shapiro defines it as follows: “The internal point of view is the practical attitude of acceptance—it does not imply that people who accept the rules accept their moral legitimacy, only that they are disposed to guide and evaluate conduct in accordance with the rules.” In adopting Hart’s concept, however, he also adopts Hart’s problems, namely an inability to explain why people who do not accept the moral legitimacy of the law would be disposed to guide and evaluate their conduct in accordance with its rules. While Shapiro, like Hart, can protest that he is only describing the fact of acceptance, this escape from the challenge would leave Shapiro without any claim to be distinguishing this kind of authority from de facto authority, or coercive power. Without at least the acceptance of moral legitimacy (to say nothing of actual legitimacy), there would be no reason for a belief in an obligation to obey (to say nothing of an actual obligation) to be a feature of the law at all. Expounding on Hart’s view, Shapiro agrees that “one can accept a rule for any type of reason, even a nonmoral one.” But it significantly weakens the conceptual force of the term “rule” if the judge, to take the example in question, accepts a rule “because it is in his long-term interest” such as “to advance his political

97 Shapiro WIPOV 1157.
98 Shapiro L 96.
career, or simply make a living.” Shapiro’s other language; it is not necessarily the same thing for the judge to accept something as a rule and to “treat” it as a rule. Though the practical outcome may look the same in most cases, when a judge merely treats something as a rule, it means that he does not necessarily see the rule (or the source of the rule) as requiring him to treat it as such whereas if he accepts it as a rule then he at least believes he is bound by it (whether or not he in fact is, morally speaking). That distinction is a fundamental difference. It may also bear out empirically if the rule-treating judge deviates when he believes that disregarding the rule will better advance his long-term interests. The rule-accepting judge does not have the flexibility to do this.

Furthermore, Shapiro thinks that he avoids the Humean critique that accuses Hart of deriving normative judgments from descriptive facts by claiming, “To discover the content of law, one must begin by approaching social facts in a practical vein and forming normative judgments.” Thus, because of these normative judgments, it is possible for law to have its normative character even though law itself is identified solely on the basis of descriptive, not normative, facts. Showing that this solution traces back to Hart’s theory, Shapiro turns to Hart’s insight that “those who respond to the rule of recognition practically will form a normative judgment expressed as follows: ‘What the Queen-in-Parliament enacts is law.’” As Shapiro has it, to respond practically is to adopt a practical attitude of acceptance, which, as the example of the judge shows, does not entail accepting the rules as law in the normative sense. It is entirely possible that one who responds practically to the rule of recognition treats it as law only

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99 Shapiro L 96.
100 Shapiro L 96.
101 Shapiro L 101.
102 Shapiro L 100-1.
in the sense of complying in order to receive certain benefits or, at a minimum, to avoid punishment. But this is insufficient to constitute a judgment that what the Queen-in-Parliament enacts is law in the normative sense. A normative judgment would entail at least believing that there is an obligation to obey. Such a belief does not arise simply from adopting a practical attitude of acceptance as Shapiro describes it; that is, this practical attitude of acceptance is not a normative judgment in the relevant sense.

To be sure, insofar as law gets its salience as a form of planning, Shapiro is right when he writes, “It would defeat the purpose of having plans if I were to review their wisdom without an otherwise compelling reason to do so.” To a limited extent, that is true regardless of the content of the plans. But even then, the norm cannot be explained without recourse to deeper normative judgments. Of course the purpose of a plan is to achieve the plan’s ends. It is only worth sticking to the plan, though, if the ends are worthy. In other words, the normative judgment based on social facts that one ought to keep to a plan (or, equivalently, that one ought to obey the law just because it embodies some plan) rests on a normative judgment based on normative facts about the choice-worthiness of that plan. Without that choice-worthiness, the content-independent reason for sticking to the plan withers. Furthermore, even if Shapiro is right that there is a general, content-independent reason to adhere to one’s plans (in the absence of a compelling reason to deviate), that reason would not necessarily amount to an obligation. Alternatively, the bar for reconsidering might be so low as to make it effectively meaningless. If the planner, for example, simply decided that he felt like reconsidering, this would seemingly be enough reason to do so in Shapiro’s construction. If the plan’s ends are no longer desired, then even the basest reasons are sufficient to warrant a reconsideration of the plan.

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103 Shapiro L 124.
In sum, Shapiro is not able to sustain the solution to the problems that jurisprudence has inherited from positivism and natural law. On one hand, as a committed positivist, he strives to keep the identification of law’s authority strictly sociological, which not only means not passing judgment on the moral merits of particular systems but in reading normativity out of the definition of such systems altogether. Consequently, Shapiro offers statements such as, “Since laws are plans, or planlike norms, they do not claim moral force either.”\textsuperscript{104} On the other hand, sensitive to the incoherence of the modern positivists’ account of authority shorn of an account of legitimacy, Shapiro explains his Planning Theory as “affirming that it is part of the nature of law to have a moral aim, while at the same time denying that the failure to attain this end undermines the law’s identity as law.”\textsuperscript{105} This does not quite get Shapiro all the way to a full explanation since a legal system that completely fails to achieve its moral aim would presumably have no more legitimacy than a system that has no moral aim, unless Shapiro provided an account of why simply having a moral aim confers legitimacy. Since legitimacy entails the obligation to obey the law, which could only follow from the participation in some moral ends, it is unlikely that any formulation of Shapiro’s theory would suffice.

What emerges, however, is a dispute in the theories that yields a further insight. As suggested famously by Hart, a proper concept of law allows for a distinction between the coercive power of a gunman, who obliges his victim to obey, and the authority of the law, which obligates its subjects. Put another way, a worthy theoretical definition of a legal system is capable of distinguishing between gangs and governments even though both exert coercive power over groups of people, sometimes in an ordered fashion. For Raz, a hallmark of a legal

\textsuperscript{104} Shapiro L 231.
\textsuperscript{105} Shapiro L 392.
system is that it claims legitimacy. For Shapiro, in a legal system those who are part of the system, or at least those who administer it, believe it has legitimacy. This is why Shapiro can distinguish between the system having a moral mission and achieving it. But these frameworks are insufficient because neither a claim of legitimacy nor a belief in it actually establishes legitimacy. If a belief in legitimacy were enough, Shapiro would be hard pressed to explain the authority of a government that lacked a moral mission or a gang that had one. In contrast, a better theory would define a legal system as actually having legitimacy, that is, as generating an obligation to obey the law—the full normative claim.

As Shapiro indicates, the foundation of his theory is the search for an answer to the question, “What is law?” Shapiro rejects the natural law approach precisely because it goes wrong on that critical question, denying the truism that legal systems are legal systems even when they are evil. Shapiro is looking for the theory that “better accommodates the entire set of considered judgments about the law.” Since the natural law approach, which links authority and legitimacy, “amounts to no more than the defiant declaration that evil legal regimes are not possible,” he prefers positivism. Shapiro is entitled to pick his poison. But the price he pays for being able to identify the legal systems of evil regimes is the inability to account for obligation as a central feature of the law. Others might prefer a theory that explains what even Hart sees as the defining feature of law—obligation—and accept that irredeemably unjust regimes (perhaps regimes not oriented to the common good) could not be said to have legal systems properly so called. Better, one might say, to get the core definition of law correct (correct because it captures the notion of obligation) and accept some murkiness surrounding the

106 Shapiro L 17.
107 Shapiro L 50.
peripheral cases of the very worst regimes. Shapiro writes: “Augustine famously asked: ‘Justice removed, then what are kingdoms but great bands of robbers?’ Morally speaking, the answer may be nothing. But from a conceptual point of view, there is all the difference in the world.”¹⁰⁸ The most immediate response to this is that there is all the difference in the word from a conceptual point of view because there is a difference from the moral point of view. Shapiro thinks the difference is that the robbers do not have a moral mission, yet he does not offer a convincing argument for this. He suggests that it is the lack of a moral mission that makes them criminals and not legal officials, but it is not hard to imagine a criminal syndicate with a more lofty self-conception—a Robin Hood-type affair.

More broadly, the response to Shapiro is that political and legal philosophy, unlike, say, sociology, ought to be able to demonstrate the moral difference between a kingdom and a band of robbers. That difference, of course, is one’s legitimacy and the other’s lack thereof, the former deriving from the content of the moral mission, perhaps, as suggested, the advancement of the common good. Perhaps, then, evil legal systems are in fact not legal systems but just the instrumentalities of great bands of robbers. In this respect, an evil legal system is like a hospital that intentionally kills people instead of curing them. The “hospital” may look the same in its physical plant, employ staff trained with all the same scientific knowledge and skills, and so forth, but it would be a hospital in name only. What distinguishes the hospital and the “hospital,” naturally, is their ends, that is, what they actually do, what purposes they serve. If the very definition of a legal system is understood in terms of its purposes, as it must be if obligation and legitimacy are to be meaningful parts of the concept of law, then the evil legal system is no more a legal system than the killing hospital is a hospital.

¹⁰⁸ Shapiro L 217.
A final voice to add in this context is that of John Rawls. Directly or indirectly, a good deal of Rawls’s most prominent work touches on the question of political legitimacy. Most notably in the Law of Peoples, Rawls tries to work out what it means for a regime to be morally good, or at least acceptably so, with the implication that such regimes are legitimate and therefore authoritative. One important contribution of Rawls in this regard is that he recognizes that the assessment of legitimacy, and therefore of the obligatoriness of laws, takes place on the system-wide level. Rawls argues in *A Theory of Justice*, “The injustice of a law is not, in general, a sufficient reason for not adhering to it.” This is because Rawls recognizes that if the authority is legitimate, then its authoritativeness extends to all of its directives. As Rawls puts it, “When the basic structure of society is reasonably just, as estimated by what the current state of things allows, we are to recognize unjust laws as binding provided that they do not exceed certain limits of injustice.” Otherwise, it would not be a matter of the legitimacy of the regime but only a question of the coincidence of individual laws with other obligations to do what the law says, that is, obligations rooted in anything other than the say-so of the regime.

Rawls’s explanation for the obligation to obey a just regime is the subject of varied criticism. Smith, for example, is skeptical of some of Rawls’s earlier formulations. In Smith’s understanding, according to Rawls, “Everyone who is treated by such a government with reasonable justice has a natural duty to obey all laws that are not grossly unjust, on the ground that everyone has a natural duty to uphold and to comply with just institutions.” Simmons has related doubts, rejecting arguments both from the natural duty of justice and from the duty of fair

110 Rawls TJ 308.
111 Smith 959.
play. Simmons writes, for example, that “it follows from his (unacceptable) claim that all obligations are accounted for by the principle of fair play.”\(^{112}\) Indeed, fairness does not suffice, neither to explain why people have obligations based on benefits to which they did not consent nor why one particular scheme that instantiates is authoritative over any other.

Rawls does better, therefore, in the Law of Peoples when he describes the members of a minimally decent society as recognizing “these duties and obligations as fitting with their common good idea of justice and do not see their duties and obligations as mere commands imposed by force.”\(^{113}\) Rawls must be careful here not to assume what he is trying to prove. That is, the laws are not authoritative because the people understand them to be obligatory (because then Rawls would need to explain why they understand them to be obligatory); they are authoritative because they are obligatory. But Rawls basically has his finger on it with his reference to the people’s “common good idea of justice,” which he refers to again when he sums up the characteristics of a decent society.\(^{114}\) In addition to the people’s obligations to the common good underpinning their obligations to obey the law, the focus on the common good helps to explain how authority is circumscribed to particular political communities. A natural duty of justice, for instance, might extend well beyond the boundaries of the polity. Obligations

\(^{112}\) Simmons 109.


\(^{114}\) Rawls writes:

The meaning of decency is given in the same way. As I have already said, a decent society is not aggressive and engages in war only in self-defense. It has a common good idea of justice that assigns human rights to all its members; its basic structure includes a decent consultation hierarchy that protects these and other rights and ensures that all groups in society are decently represented by elected bodies in the system of consultation. Finally, there must be a sincere and not unreasonable belief on the part of judges and officials who administer the legal system that the law is indeed guided by a common good idea of justice. Laws supported merely by force are grounds for rebellion and resistance. They are routine in a slave society, but cannot belong to a decent one (Rawls LP 88).
to the common good might extend to a global common good, too. But it is also easier to see how the obligations to obey a particular authority pertain to the people for whose common good it exists. The relationship between the authority and the wider common good is far more attenuated.

One thing that this means, however, is that a decent regime probably does not need the political representation that Rawls suggests. If there is an obligation to obey the law and if it derives from obligations to a “common good idea of justice,” then it should not matter for the question of obligation whether the regime is representative or not. A regime that meets the requirements of justice is authoritative, anyway. Representation might aid the regime in meeting those requirements, but it is not a necessary condition of legitimacy unless Rawls’s view is actually a theory of consent, in which case it is inadequate for other reasons. In the end, while Rawls also points in a helpful direction, his work does not much address what legitimacy means for law and the nature of legal obligation. He does refer, as above, to a general obligation to obey the law in the case of a just regime, but there is much more to be said in light of the developments in jurisprudence over the last half-century and especially owing to the denial of the general obligation to obey the law, and especially of Rawls’s specific arguments, by some of the most prominent theorists.
Hart and Obligation

The imperative, or command, model developed by early positivists such as Jeremy Bentham and John Austin, conceives of law as “orders backed by threats.” For man-made law, this means a directive given by a political superior to a political inferior and enforced with coercive sanctions. That directive is authoritative in virtue of having been given by a superior capable of imposing such sanctions. In Austin’s words, “Command, duty, and sanction are inseparably connected.” HLA Hart, in his seminal work, The Concept of Law, decisively rejects the command model for insufficiently capturing the nature and scope of law. Hart argues that the command model cannot account for the so-called internal point of view of law’s subjects, who understand themselves to be acting out of an obligation to obey, as opposed to being “obliged” by coercion. Nor, according to Hart, can the command model account for the variety within the law, which includes both duty-imposing and power-conferring (non-imperative) forms. With his repudiation of the command model, Hart revolutionized the contemporary study of jurisprudence.

117 Austin 17.
118 Hart 6.
Hart’s contributions in jurisprudence are a major step forward in the understanding of the law, but, in another respect, they constitute a step backward as well. While Hart’s theory is meant to be descriptive, even a descriptive theory ought to accommodate the concept of obligation. This is a point Hart invites when he turns to the internal point of view in order to critique competing theories. It was Hart himself who set the field off in a new direction by observing that law, unlike other forms of coercion such as armed robbery, is characterized by the sense of obligation that attaches to the law’s directives. On this basis, a descriptive theory must at least gesture at a normative theory by pointing to where the normative case might fit in. This is not to say (just yet) that positivism cannot work. But it is to say that a theory that ascribes the law’s distinctness in some way to obligation must admit some explanation about where that obligation comes from. Though it might be tempting to argue that Hart’s theory is compatible with some adequate normative account, his insistence on a wholesale rejection of older ways of thinking about law means that he deprives his new way of any basis for grounding legal authority and obligation. In contrast, the older positivist concept of command is a better concept for describing law because, while it does not in itself justify authority, the concept of command suggests obligatoriness insofar as commands at least intend to obligate, and, as Hart teaches, obligatoriness is the central characteristic of law. Additionally, Hart’s critique notwithstanding, the concept of command is capacious enough to capture the essence of law despite the many forms that law takes.

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Hart’s theory is flawed first and foremost due it its inability to account for law’s authoritativeness. To be sure, Hart deals extensively, if generally, with the topic of how to know what counts as authoritative within a legal system. This is the role of the all-important rule of
recognition, which serves to identify sources of law.\textsuperscript{119} But although the rule of recognition answers the question of what counts as authoritative, it is silent on the question of why the law, or any law, is authoritative. If it is the very nature of law that it imposes an obligation, then any complete picture must address that. To be sure, Hart describes his masterwork, The Concept of Law, as an “essay in descriptive sociology,” which gets Hart off the hook with respect to actually providing an account of law’s normativity (or lack thereof).\textsuperscript{120} Instead, Hart’s purpose is to characterize how law functions in society and how society relates to the law. This being the case, however, Hart (or his interpreters) cannot have it both ways, eschewing a direct normative assessment yet implicitly rejecting the normative basis for law supplied by the command model. If law, in all its dimensions, can be described without respect to normativity, then it cannot be obligatory as well since there is no essential basis for its normativity. As an essay in descriptive sociology, Hart’s work appropriately re-envisions law’s role in society, but it goes too far if it ultimately recasts the normative foundations of law, which, in contrast, are built into the command model, even though that theory is on its face descriptive as well.

This central problem with Hart’s theory stems from the fact that, in his rejection of the notion of command in favor of a notion of law as rules, he sheds any basis for a notion of obligation to the law. This is especially problematic, not to mention ironic, in light of Hart’s key insight that the law differs from “orders backed by threats.” Hart recognizes that “a command is primarily an appeal not to fear but to respect for authority.”\textsuperscript{121} Because he knows that “to command is characteristically to exercise authority over men, not power to inflict harm,” Hart

\textsuperscript{119} Hart CL 100.  
\textsuperscript{120} Hart CL vi.  
\textsuperscript{121} Hart CL 20.
distinguishes between Austin’s concept of law as command and the demands of a mugger. He is right to fault Austin for classifying the mugger’s demands under the idea of command. Yet Hart errs in declaring that a “command is, however, too close to law for our purpose,” which is to say, in rejecting that law is properly understood as command. He writes, “The element of authority involved in law has always been one of the obstacles in the path of any explanation of what law is. We cannot therefore profitably use, in the elucidation of law, the notion of a command which also involves it.” In excluding the notion of command and, with it, authority, Hart excises the explanatory power of his own theory with respect to the most important sociological feature of the law: the sense of obligation to obey the law that underpins its widespread acceptance and fundamentally characterizes the internal point of view. Shorn of obligation rooted in command, law must derive its force from coercion, or else the law is merely a version of custom or habit.

Unlike the concept of rules, the concept of command accounts for obligation because that is the very nature of the relationship between the commander and the commanded, and it is in this obligation-imposing sense that “a command is primarily an appeal not to fear but to respect for authority.” The substance of the command may or may not be respectable, but law, in its general form, makes a claim on its subjects’ respect in that it proposes to impose obligations upon them that are obligatory just as the dictates of law, whether or not there is any fear of the consequences of disobedience. Without this obligation to obey, the authority of law is not authority in the relevant sense, and obedience to the law is not respect for authority as authority.

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122 Hart CL 20.
123 Hart CL 20.
124 Hart CL 20.
Rather, it is a more Razian form of authority, in which directives serve more as suggestions or expert advice.

Therefore, the command model should be retained. Unfortunately, Hart’s over-reading of the centrality to the command model of concepts such as sanctions and habits causes him to reject the theory entirely. Leaving aside these typical but unnecessary features of the command model as traditionally presented, the command model depicts law as a directive from a superior to an inferior that demands obedience precisely in virtue of what it is, the command of a superior. This is the way in which law makes its claim to authoritativeness.

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Hart’s theory must account somehow for obligation if he is to make sense of the internal point of view, which he helpfully introduces into the analysis of law. The external point of view is:

the view of one who, having observed the working of a traffic signal in a busy street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic will stop. He treats the light merely as a natural sign that people will behave in certain ways, as clouds are a sign that rain will come. In doing so he will miss out a whole dimension of the social life of those whom he is watching, since for them the red light is not merely a sign that others will stop: they look upon it as a signal for them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behaviour and an obligation.\(^{125}\)

This is terribly astute, but the theory is incomplete, strictly in descriptive terms, if it stops before asking why people take the law as a standard of behavior and an obligation, not least because

\(^{125}\) Hart CL 90.
Hart himself uses the term “obligation.” Presumably, the red light is not a signal for them to stop merely in the sense that it warns that danger is ahead or in the sense that a fine will be imposed for failure to stop; rather, it is a signal of an obligation to stop under ordinary circumstances, regardless of whether the driver considers the danger of going through the light an acceptable risk or the fine an acceptable price to pay for the convenience of not stopping.\(^{126}\) In this way, the law is most certainly a command, and the internal point of view reveals that the laws’ subjects regard it as such.

This internal point of view is the starting point for Hart’s critique of the command model. If the law is essentially orders backed by threats, then the law is like a mugger. Just as a mugger compels his victim to turn over his wallet at gunpoint, so, too, the law secures the desired behavior with the threat of sanctions. Yet, Hart observes, people do not obey the law because they feel “obliged” to comply in the same way they feel obliged to turn over their wallet to the mugger. Rather, they obey the law because they feel “obligated.” This difference can be seen in the common-sense fact that one who escapes the mugger without giving up his wallet has not violated any sort of obligation, even though, staring down the barrel of the gun, he may have felt obliged to turn over his wallet. In contrast, a person who does not obey the law and manages to evade punishment has violated an obligation.\(^{127}\) To put it in terms of the internal point of view, people understand themselves to be in a relationship with the law unlike the one they are in with a mugger despite the fact that, in both cases, compliance is generally assured through the threat of coercion. While it is an open empirical question to what extent people’s fear of punishment

\(^{126}\) More to be said later about the law presenting a command and not a choice.  
\(^{127}\) Hart CL 82.
drives obedience to the law, Hart supposes reasonably that many or most people understand themselves to have an obligation to the law apart from their desire to avoid punishment.

Owing to this important insight, however, Hart’s theory falls short because it shows that people feel an obligation to obey the law but not why people feel they have that obligation. Nor does it show, of course, why they actually have an obligation (if in fact they do) though that omission is perhaps forgivable in an essay of descriptive sociology. Hart could say that he is agnostic with respect to why people see themselves as having an obligation to obey the law, but he cannot avoid the fact that, in its reliance on the internal point of view, his theory insists that there is such a perception. The internal point of view presupposes some sort of motivation other than mere avoidance of sanctions because that is what distinguishes the law from a mugger. For this reason, Hart’s descriptive theory must at least be compatible with an adequate normative theory, that is, with a theory that could underlie people’s sense of obligation.

To be sure, Hart’s focus is on identifying the validity of the law, and therefore he need only go as far as examining the law’s popular acceptance (or lack thereof) and not its legitimacy. This is because, on Hart’s terms, a law is valid if it is widely accepted even if none of the people obeying the law believe they have an obligation to obey it. There is nothing logically inconsistent about this in itself, but it flies in the face of Hart’s emphasis on the internal point of view in legal analysis. It is precisely because most people feel themselves to be under an obligation to obey the law that Hart distinguishes the law from criminal coercion, and this leads Hart to reject “orders backed by threats” as an adequate characterization of the law. It is somewhat surprising, therefore, that Hart writes, “What makes ‘obedience’ misleading as a description of what legislators do in conforming to the rules conferring their powers, and of what courts do in applying an accepted ultimate rule of recognition, is that obeying a rule (or an order)
need involve no thought on the part of the person obeying that what he does is the right thing.\textsuperscript{128}

Of course, Hart is correct that people need not believe they are doing the right thing when they follow the law. But if they are not doing it because they believe it is the right thing, meaning not because they believe they have a moral obligation to conform to those rules, then they are doing it for other reasons such as anticipation of reward or punishment.\textsuperscript{129} Even if their motivations are more altruistic, such as a desire to promote order and stability, the law then can still be reduced to the image of a mugger: if they are not acting out of obligation, then they can be no more than obliged. On the contrary, Hart, in his reliance on the internal point of view, seems correct when he says that most people relate to the law as though they have an obligation. That is what makes Hart’s critique so compelling in the first place.

This sense of obligation that motivates obedience to the law seems to be just what Hart is getting at when he argues that “those who reject the rules except where fear of social pressure induces them to conform . . . cannot be more than a minority” whereas “the majority live by the rules from the internal point of view.”\textsuperscript{130} While Hart’s focus is on obedience to the law as a social practice, the internal point of view suggests that people ought to be able to give an answer to the question of why they participate in that practice and that that answer ought to rely on more than habit or custom. Technically, the internal point of view could be explained by habit or custom, but this seems an improper limitation given that Hart understands people to be taking the law as a standard for their behavior. Unless people feel free to disregard the law when they have competing non-moral reasons, which Hart seems to think they do not, then it must be that the

\begin{footnotes}
\item[Hart CL 115.]
\item[128] Even if the officials do not think that the rule ought to be the one in place, they must at least think that they ought to follow the rule because it is the one in place.
\item[129] Hart CL 92.
\end{footnotes}
standards of the law are rooted in something deeper that produces a notion of obligation that should not arise from habit or custom alone. In other words, if Hart defines the internal point of view as “the view of those who do not merely record and predict behavior conforming to rules, but use the rules as standards for the appraisal of their own and others’ behavior,” then he ought to be able to offer an account of why they do so, which necessarily entails a justification, at least in their own minds, of why they ought to do so.\(^{131}\) Neither habit nor custom would be sufficient to justify this because neither carries the sense of obligation implicated here.

Indeed, this key insight of the internal point of view is an important part of what motivates Hart’s project. Stepping back from the technical analysis of the law, Hart argues that the command model is deficient because it obscures, for example, what is interesting about the questions that post-war German courts faced concerning those who committed evils in conformity with Nazi law.\(^{132}\) If those who committed crimes in obedience to Nazi law claimed that they had done so out of fear of punishment, there would only be a question of whether they were justified in doing harm to others in order to avoid harm to themselves (though that is not a small question, to be sure). And it would be even less interesting if they merely claimed that they obeyed in conformance with social practice, meaning that they obeyed because the laws were valid in virtue of being widely followed. Rather, the question is truly interesting when those who obeyed Nazi law claimed to be justified in doing so on the basis of having had an obligation to obey the law. Only in that last case is there, at least prima facie, a case of conflicting obligations: the obligation to obey the law and the obligation not to harm others. If Hart’s theory misses this point, it obscures more than it illuminates.

\(^{131}\) Hart CL 98.
\(^{132}\) Hart CL 211.
Similarly, recognizing that people do not relate to the law as a mugger, that is, out of fear of punishment, but instead see obedience to the law as a matter of right and wrong helps to make sense of other features of the law such as civil disobedience. Civil disobedience is not about shirking one’s responsibility because one can get away with it but instead knowingly (and usually openly) breaking the law in acknowledgment of a contrary duty. It is precisely the thought that obeying the law is generally “the right thing” that makes civil disobedience meaningful. On this view, obedience to the law cannot merely mean compliance but rather compliance with a belief in the rightness, generally, of compliance.

In the end, then, it should not come as a surprise that, rejecting Austin’s theory, Hart writes that Austin “treats statements of obligation not as psychological statements but as predictions or assessments of chances of incurring punishment or ‘evil’.” Leaving aside for the moment the question of whether a better version of the command model still would be, in legal-realist style, a theory of prediction, it is revealing that Hart envisions obligation as a “psychological,” rather than “metaphysical” or “ethical,” reality. Strikingly, under Hart’s analysis, the sense of obligation to the law can be no more than a psychological phenomenon since the theory possesses no tools for going beyond that. At the same time, the psychological phenomenon is, importantly, one of being under a non-subjective obligation to obey the law. The question, then, is whether that belief is an illusion or whether it has a real normative basis. Furthermore, even as a purely descriptive matter, Hart cannot describe obedience to the law as merely a social practice since, even absent a true normative justification, the people who obey generally understand themselves to have an obligation. Thus, at the very least, a good descriptive theory will account for the obligation to obey the law that appears to exist.

133 Hart CL 83.
For Hart, the distinction that “is crucial for the understanding of law” is the “distinction between social rules and mere convergent habits of behavior.”¹³⁴ This is fine as far as it goes; surely Hart is correct that obedience to the law cannot be the same as that which people do alike more by accident than by design. Yet the notion of “social rules,” displacing the concept of law as command, cannot account for why people take the law as a reason for action. It is perfectly possible for people to act a certain way because they know there is a social rule requiring that behavior, but the theory is complete only if it answers the question of why they believe they ought to follow that social rule, meaning not why that particular rule was chosen but why there is an assumed obligation to obey the rule that was chosen. So, too, if officials carry out their duties not with a sense that they ought to follow the rules but instead with simply an awareness of doing so, then the theory is nearly back to prediction. If the theory cannot give a reason why officials should take the law as a reason for action—that is, if officials do not believe they are doing the “right thing”—then the best the theory can do is give a description of what they are likely to do under any given circumstances.

In this light, it is difficult to credit Hart’s preference for the label “social practice” over “habits of obedience,” the former of which he believes explains more about legal systems. Among other features of the law, “Continuity of legislative authority which characterizes most legal systems depends on that form of social practice which constitutes the acceptance of a rule, and differs, in the ways we have indicated, from the simpler facts of mere habitual obedience.”¹³⁵ But if this is because Hart believes “habits are not ‘normative,’” he should notice that neither are

¹³⁴ Hart CL 12.
¹³⁵ Hart CL 59.
social practices. In the relevant sense, namely from the perspective of obligation, a social practice is just an elaborate habit. Hart notes the important distinction between rules and habits, specifically that a “social rule has an ‘internal’ aspect, in addition to the external aspect which it shares with a social habit.” On this view, rules are more than habits because, under rules, people “have a reflective critical attitude to this pattern of behaviour: they regard it as a standard for all.” But on the question of what justifies the behavior, or why people take the rule as a standard for behavior, Hart’s theory has nothing to say.

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In addition to the so-called internal point of view, another major innovation of Hart’s theory is the classification of secondary rules. The role of secondary rules is so important that Hart sees their introduction into society (historically or not) as “a step from the pre-legal into the legal world,” suggesting, not unfairly, that secondary rules are necessary characteristics of any legal system. Without secondary rules, a (pre-)legal system suffers from being uncertain, static, and inefficient. As Hart explains, “The remedy for each of these three main defects in this simplest form of social structure consists in supplementing the primary rules of obligation with secondary rules which are rules of a different kind.” Uncertainty arises when there is no clear standard “as to what the rules are or as to the precise scope of some given rule.” This uncertainty is resolved by a rule of recognition, which “specif[ies] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a

136 Hart CL 60.
137 Hart CL 56.
138 Hart CL 57.
139 Hart CL 94.
140 Hart CL 92-93.
141 Hart CL 94.
142 Hart CL 92.
rule of the group.” The system is static when it lacks a “mode of change” other than the gradual evolution (or devolution) of rules, leaving it with “no means . . . of deliberately adapting the rules to changing circumstances.” This defect is remedied with rules of change, which, as per the name, specify procedures for altering the rules. Finally, inefficiency results from the absence of rules for definitively determining when violations have occurred and, separately, of an authoritative body for meting out punishment. Rules of adjudication provide these capacities.

This contribution of Hart is extremely important to the field of jurisprudence. But it only goes part of the way to solving the problem. For Hart, the ultimate rule is the rule of recognition, by which other rules can be identified as valid:

By providing an authoritative mark it introduces, although in embryonic form, the idea of a legal system: for the rules are now not just a discrete unconnected set but are, in a simple way, unified. Further, in the simple operation of identifying a given rule as possessing the required feature of being an item on an authoritative list of rules we have the germ of the idea of legal validity.

The rule of recognition is meant to be a useful tool of analysis in that everything it identifies is law and only that which it identifies is law. Or, put in terms of validity, “the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of

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143 Hart CL 94.
144 Hart CL 92.
145 Hart CL 95.
146 Hart CL 93.
147 Hart CL 97.
148 Hart CL 95.
recognition." Nevertheless, Hart is unable to offer any legitimating source of the rule of recognition itself other than social acceptance. For this reason, although the rule of recognition can include or identify rules of change, meaning rules that specify what counts as valid changes to laws, the rule of recognition cannot explain changes to itself or changes to the rules concerning changes to the rule of recognition, if there are such things, except by appeal to social acceptance (or, in other words, to another rule of recognition).

Taking the logic further, though, the rule of recognition would itself need to be subject to a rule of recognition. The recursive nature of this reasoning is problematic because it demonstrates that, at some level of recursion, there must just be a fiat acceptance of an ultimate rule of recognition. And that rule of recognition will be subject to all of the problems Hart attributes to a pre-legal system. Hart describes a key shortcoming of a society without secondary rules as being that “the rules by which the group lives will not form a system, but will simply be a set of separate standards, without any identifying or common mark, except of course that they

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149 Hart CL 103.
150 If so, Hart runs the risk of burdening the rule of recognition with some of the same problems he attributes to law in the form of habits. Moreover, Hart writes:

> There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. (Hart CL 116)

The fact that a legal system requires obedience to the law and acceptance of the rules of change and adjudication does not address why anyone needs to obey the law. If Hart’s answer is that no one does need to obey the law, then it seems he is collapsing the distinction between law and custom, seeing as how both can constitute widespread, socially accepted practices. While Hart might still claim important differences between them, obligation could not be one of them, and this partly defeats the purpose.

151 There would also need to be rules of change and rules of adjudication that applied at least to the lowest-order rule of recognition as well as a rule of recognition that applied to those.
152 Or, in other words, turtles all the way down.
are the rules which a particular group of human beings accepts.” It is hard to see, though, why
the same shortcoming would not be true of a legal system under Hart’s view. At bottom, there is
a rule of recognition—and quite possibly more than one—that a particular group of people just
happens to accept. This is why Hart’s work can be no more than descriptive sociology; it can
give an account of what the legal system happens to be but not why or whether it should be that
way.

In order to grasp the full picture of Hart’s scheme, it is necessary to see that not all
secondary rules are created equal, for rules of change and rules of adjudication must ultimately
be subject to some rule of recognition that identifies them as valid rules in their respective
spheres. That is, there must be some standard by which those rules are themselves identified as
legally valid, where that standard serves as the basis for the popular acceptance of the decisions
of those who institute change or adjudicate. This, however, invites the problem of what is to be
done when there is a dispute, for example, over an interpretation of a rule of adjudication. If the
rule of recognition is unclear for some reason, or, more precisely, if the application of the rule of
recognition to the rule of adjudication is unclear, then there would be no adjudicating body
before which to bring the matter since the authority of that body or the manner in which it is
meant to execute its duties is the very subject of the dispute. In fairness, Hart may think that
such a situation is unlikely to arise. But on closer inspection, the problem runs deeper. If there
must be an ultimate rule of recognition that rests not on a prior rule of recognition but simply on
the fact of its acceptance, then, theoretically, there could be multiple, even conflicting, rules of
recognition that are variously accepted within a group. Put another way, secondary rules are a

153 Hart CL 92.
useful analytic tool but also a limited one, as they only push the question up one level. This is
further reason why an account of the law also needs an account of what justifies authority.

The absence of any framework for justifying obligation is particularly clear with respect to Hart’s discussion of legal validity. In the bigger picture, Hart’s project centers on establishing
criteria for identifying not the legitimacy but the existence of a legal system. His conclusion,
succinctly put, is that a legal system exists when there are valid laws that are widely followed:
“So long as the laws which are valid by the system’s tests of validity are obeyed by the bulk of
the population this surely is all the evidence we need in order to establish that a given legal
system exists.”\footnote{Hart CL 114.} At the same time, because the “system’s tests of validity”—the rules for
identifying valid rules—are themselves merely a sociological phenomenon, any account of their
legitimacy would be self-referential. That is, the tests of validity are themselves valid because
they are widely accepted, and they are widely accepted because they are valid. What this means,
then, is that Hart’s theory cannot offer an account of the legitimacy of the authority that he
deems “valid.” Once again, this is not a direct challenge to Hart if he seeks a “concept of law
which allows the invalidity of law to be distinguished from its immorality.”\footnote{Hart CL 211.} But it does call
into question the usefulness of Hart’s approach.

Without any claim about legitimacy, Hart is left to distinguish between legal pressure and
moral suasion in the following way: while society exerts legal pressure often, or even primarily,
with threats, “with morals on the other hand the typical form of pressure consists in appeals to
the respect for the rules, as things important in themselves.”\footnote{Hart CL 180.} If there were a moral obligation
to obey the law, then laws, too, would be important in themselves. Short of that, however, Hart’s
distinction comes as no surprise. Lacking a moral element to it, legal pressure must consist mainly of fear of “unpleasant consequences” or other material incentives. Without an obligation to obey, the law can coerce and cajole, but it cannot make a principled claim to obedience. It is theoretically possible to have a legal system in which respect for the rules plays little or no part, but this model either fails to account for why people take the law to be a standard of behavior or, in falling back on coercion to explain that phenomenon, presents a picture that is at best unsatisfying.

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If the first part of Hart’s critique of the command model rests on competing views of the nature of law, the second part focuses on the scope of law. Hart believes that the command model cannot accommodate the full variety of rules that are appropriately characterized as law. In this part of the argument, “what really is at stake is the comparative merit of a wider and a narrower concept or way of classifying rules, which belong to a system of rules generally effective in social life.” This wider concept comprises “all rules which are valid by the formal tests of a system of primary and secondary rules.” Hart explains, “Nothing is to be gained in the theoretical or scientific study of law as a social phenomenon by adopting the narrower concept: it would lead us to exclude certain rules even though they exhibit all the other complex characteristics of law.” Hart thereby contends that the command model is too narrow because many laws cannot be fairly characterized as commands. Although many laws can best be seen in

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157 Hart CL 179.
158 Again, coercion cannot be Hart’s explanation for why people take the law as a standard of behavior since that was the very notion he rejects in introducing the internal point of view.
159 Hart CL 209.
160 Hart CL 209.
161 Hart CL 209.
this way, many others cannot. For this reason, Hart wishes to resist the strong “itch for uniformity in jurisprudence.”162

Instead, Hart proposes that the law be seen to comprise duty-imposing rules and power-conferring rules.163 Anything short of a clean division between the two types, for Hart, would be a distortion of how power-conferring rules function because “other devices, such as that of treating power-conferring rules as mere fragments of rules imposing duties, or treating all rules as directed only to officials, distort the ways in which these are spoken of, thought of, and actually used in social life.”164 Thus, Hart denies that power-conferring rules are essentially a form of duty-imposing rules and asserts, rather, that each is a distinct type of rule that cannot be assimilated to the other type.

As such, Hart argues that the command model is entirely insufficient for describing rules and therefore for describing laws. Hart writes, “The ideas of orders, obedience, habits, and threats, do not include, and cannot by their combination yield, the idea of a rule, without which we cannot hope to elucidate even the most elementary forms of law.”165 This is the fundamental challenge to the command model in its most direct form. In this regard, the argument turns on whether Hart is correct that the command model lacks the resources to elucidate all forms of law. Contrary to Hart’s claim, the command model, at least in modified form, is up to the task. Whether Hart fails to see this because of his own narrow view of the theory or because the theory itself was presented in misleading or even mistaken form is a separate matter.

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162 Hart CL 32.
163 Hart CL 32.
164 Hart CL 80.
165 Hart CL 80.
One of the central features of Hart’s theory and one of his most notable contributions is his categorization of rules into two types: duty-imposing and power-conferring. Unlike duty-imposing rules, power-conferring rules “provide individuals with facilities for realizing their wishes.” The variety within the law represented by these two different types makes it impossible, in Hart’s view, to retain the command model. According to Hart, “The power thus conferred on individuals to mould their legal relations with others by contracts, wills, marriages, &c., is one of the great contributions of law to social life; and it is a feature of law obscured by representing all law as a matter of orders backed by threats.” Because power-conferring rules create possibilities for people and do not “require persons to act in certain ways whether they wish or not,” Hart does not think they can be captured by the notion of command; after all, there is no duty to do anything. Instead, he prefers a rule-based model where some rules impose duties and others offer opportunities.

But probing beneath the surface, it is clear that there is more going on here than Hart acknowledges. Although it is true that no one need enter into a legal relation of the sort made possible by power-conferring rules, it is also the case that, having entered into one, the law does not present a choice. A contract, for example, is not a choice to abide by the terms of the contract or to accept the consequences. This is not the way the law understands itself, nor is it the way that parties to a contract understand the law. Rather, a contract creates an obligation to fulfill the terms of the agreement and imposes a penalty on those who fail to do so. This can be seen in the ordinary legal language that refers to non-fulfillment of a contract as a “breach.”

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166 Hart CL 27.
167 Hart CL 28. Presumably Hart would hold the same position even if the matter of “threats” were eliminated from the equation.
168 Hart CL 27.
Similarly, it would be surprising to find a party to a contract who had no expectations about whether the other party intended to meet the terms of the agreement but instead believed that the latter was equally likely to fulfill the contract or pay the penalty for breach. In its most general terms, a contract is a duty to fulfill certain obligations under certain circumstances. While it is true that such duties are not imposed upon everyone—one would first need to voluntarily enter into such an arrangement—that does not make it any less of a duty.

Another way to grasp the duty-imposing aspect of power-conferring rules is to consider, as in the case of a contract, that the law merely adds enforcement to an agreement that already has morally binding force. Hart nearly makes this point when he states that “an elementary form of power-conferring rule also underlies the moral institution of a promise.”\(^{169}\) A better way to look at it is that, just as a promise is a form of agreement, so, too, a contract is a form of agreement given force by a power-conferring rule. This is not unlike the way in which duty-imposing rules, such as a law against murder, add a legal obligation to an existing moral obligation. The key, though, is to see that, just like a promise, any reasonable agreement is morally binding on some level, even outside the context of the law. The power-conferring rule creates the possibility of adding to the agreement the force of law, but the possibility of entering into such an agreement and the morally obligatory nature of the agreement once it is entered into both exist prior to and independent of the power-conferring rule. This is because one has a moral obligation to abide by agreements whether or not they are enshrined in a legal contract. In this light, power-conferring rules “provide individuals with facilities for realizing their wishes” not by imagining arrangements they could not otherwise create but by offering to enforce arrangements they do create. This point elucidates the way in which power-conferring rules

\(^{169}\) Hart CL 96.
really do impose duties. Where contracts (wills, marriages, and so on) are the form which agreements take, there is a legal obligation that is coextensive with the moral obligation that obtains. Indeed, Hart seems to suggest this when he accepts the idea of “thinking of the operations of making a contract or transferring property as the exercise of limited legislative powers by individuals,” highlighting the affinity between agreement-making and law-making.170

Although Hart’s focus is on the differences between the two types of rules, duty-imposing and power-conferring rules function in fundamentally similar ways that eclipse those differences. To be sure, there are plenty of superficial differences. For instance, duty-imposing rules are often in the negative: do not murder, assault, steal, and so on. Fundamentally, though, all the rules create legal obligations on the foundation of some preexisting moral obligation or, alternatively, do so where an equivalent non-legal decision would create a moral obligation where none existed previously. In the former case, the law adds a legal obligation not to assault, for example, on top of a preexisting moral obligation to the same. In the latter case, the law might create a legal obligation to drive on the right side of the road, for example, even though there was no prior moral obligation to drive on the right before that practice was settled upon. In the relevant aspects, though, the law functions in the same way in both cases since a decision for everyone to drive on the right creates a moral obligation to conform, to which the law adds a legal obligation.

The tricky part is that in such a situation the power-conferring rule actually serves as the occasion for making that decision, which there is no moral obligation to make in the first place. (There is no moral obligation to make that particular decision, and neither is there a moral obligation to make any decision.) The rules that create the possibility for making such a decision

170 Hart CL 96.
are power-conferring rules and, in this light, seem quite different from rules that impose duties. That is, while there is a duty to obey decisions made under power-conferring rules, power-conferring rules do not themselves impose a duty to act. For example, the power-conferring rules here might authorize a transportation commissioner to decide which side of the road to drive on or might require a majority vote by the citizenry. Either way, such a conferral of power is itself implicitly a fulfillment of duties of fairness or justice or right. Even in the case of a dictator, the power to make decisions necessarily rests on a claim of right, legitimate or not. A law that says “Do not assault” is clearly a duty-imposing rule that replicates a moral obligation. A law that says “Legislate by a majority” is a power-conferring rule, but, seen another way, it imposes a legal obligation on top of the moral obligation to justice, irrespective of the fact that other schemes might have also satisfied the requirements of justice. This can be seen by the fact that a law that says “Drive on the right side of the road” is clearly a duty-imposing rule even though a law that says “Drive on the left side of the road” would acceptably fulfill the same purpose. In other words, where the law confers powers by specifying one mode of behavior among multiple morally permissible options for discharging a duty—in the case of majority legislation, it is a duty to justice, or a duty not to act unjustly—the law gives shape to a moral obligation, and in this way it also adds a legal obligation where a moral obligation already exists.

171 In claiming there are certain moral features of law per se, this is akin to Lon Fuller’s logic regarding the moral requirements of legal validity in The Morality of Law. See: Lon Fuller, The Morality of Law (New Haven: Yale University, 1969).

172 There is already a duty to refrain from acting unjustly. The power-conferring rule about how to legislate specifies one way of not violating that duty in the exercise of power. Different societies could have different standards that all meet the abstract requirements of justice. But this is not because power-conferring rules are different from duty-imposing rules. Duty-imposing rules against assault could also vary according to cultural norms, which could all be
Chapter 2

There is one further difference that needs to be addressed. Laws concerning how to legislate do not appear to impose duties in the way that ordinary duty-imposing laws do because a law that says “Legislate by a majority” does not create a requirement to legislate but only to act according to certain procedures just in case one is legislating. But following those procedures is a duty nonetheless, and the fact that it only applies under certain circumstances is beside the point. No one has a duty to drive and then to drive on the right side of the road. One only has a duty to drive on the right side of the road if one wishes to drive. If so, Hart might transform the rule that says “Drive on the right side of the road” into the form of a power-conferring rule that says “If you wish to drive, drive on the right” akin to the rule “If you wish to legislate, legislate by a majority.” But this is more of a distortion of “Drive on the right side of the road” to fit with “Legislate by a majority” than the other way around. The same is true for marriage, wills, and other contracts. The law sets forth how those arrangements must be struck if one wishes to strike them.

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In this vein, Hart distinguishes explicitly between legal duties and legal disabilities, arguing that a constitutional limitation on legislative power cannot be seen as a duty because it does not work “by imposing . . . duties on the legislature not to attempt to legislate in certain ways; instead it provides that any such purported legislation shall be void.”\(^{173}\) A legal limitation, according to Hart, “implies not the presence of duty but the absence of legal power.”\(^{174}\) But this distinction does not hold up. At bottom, the rules that specify both the form and substance of

\(^{173}\) Hart CL 69.  
\(^{174}\) Hart CL 69.
valid enactments create a duty not to do things otherwise. Although this may seem at first like a
convoluted way to portray such limitations, it is important to consider what a legal limitation
really is. Hart gives the example of a constitutional restriction on imprisonment without trial.\textsuperscript{175} Now, it is true that this represents the absence of legal power to imprison without trial. But this
absence of power is really rooted in the duty not to imprison without trial, which is a subset of
the duty not to punish (or otherwise harm) unfairly. The requirement to follow certain
procedures that are recognized as legitimate separates government from gangsterism. Following
such procedures is what makes detention by the government an act of lawful imprisonment rather
than an act of assault and kidnapping. The government might have a moral duty to abide by fair
procedures in any case, yet it also has a legal duty to do so when so instructed by the
constitution. So, too, if there were a requirement that the legislature pass all laws with a
majority, this would constitute a legal disability in the sense that the legislature lacked the power
to pass laws with less than a majority. But it would equally be a duty not to pass laws with less
than a majority; doing so would be a violation of that duty. This is true whether it would be
wrong in every case for a minority to pass laws or whether it were simply determined in this
society that valid laws require a majority vote in the legislature. Either way, there is a duty to
abide by the settled procedures of that system, a duty that is a specification of the duties of
fairness, justice, and so on. Only if Hart stops at the level of the rule and fails to ask what is
behind the rule or what justifies it is he unable to see that even procedural requirements are not
just limitations but specifications of duties.

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\textsuperscript{175} Hart CL 68.
Denying the conjunction of duty-imposing and power-conferring rules, Hart also rejects the idea that nullity can be construed as a sanction for the violation of power-conferring rules. Although duty-imposing rules can exist without sanctions because the existence of an obligation does not depend on the presence of sanctions, power-conferring rules depend strictly on nullity because, as Hart explains, “If failure to comply with this essential condition did not entail nullity, the rule itself could not be intelligibly said to exist without sanctions even as a non-legal rule.”

If a legislature, for example, were required to pass laws by majority vote but laws took effect even short of a majority vote, then the power-conferring rule requiring a majority would be effectively meaningless. Or, using Hart’s analogy to sport games, “If failure to get the ball between the posts did not mean the ‘nullity’ of not scoring, the scoring rules could not be said to exist.” Thus, “The provision for nullity is part of this type of rule itself in a way which punishment attached to a rule imposing duties is not.” But if sanctions are not a necessary part of duty-imposing rules, then it is not a problem that nullity with respect to power-conferring rules does not function as sanctions ordinarily do with respect to duty-imposing rules. Nullity is merely a feature of power-conferring rules.

It is theoretically possible that laws passed by a minority in a majority-rules legislature could be treated as law by those in power, but in enforcing those laws, they would be doing so unjustly. Hart’s proposal is that such laws would be invalid rather than immoral, never taking effect in the first place. What is behind the problem of such laws taking effect without warrant is not that they are technically invalid but that they take effect in violation of a moral (and legal) obligation for laws not to be passed in that way, which is created by the rule that specifies the

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176 Hart CL 35.
177 Hart CL 35.
178 Hart CL 35.
proper procedure for legislating. As such, Hart may not even be right that power-conferring rules cannot exist without a provision for nullity, at least in some cases. Accordingly, he may also be incorrect about whether nullity, if not essential, can be understood as a penalty assessed for failure to comply with the rule about how to legislate (because it would be possible for such a law, if enforced, to be immoral but not invalid).

The concept of nullity can also be illuminated in the context of contracts. Contracts provide a good avenue for exploring the closeness of duty-imposing and power-conferring rules because they exemplify the way in which power-conferring rules also entail obligations, in this case the obligation to fulfill the terms of the contract. Yet the focus on the duties imposed by contracts could seem to be a misleading way to make the point inasmuch as contracts are not themselves power-conferring rules but instead the creations of power-conferring rules. For those power-conferring rules, the law includes both rules about how to create a contract and rules (for officials, usually) about how to enforce that contract. It is the latter part that is more clearly duty imposing, but a keener view shows that the two are inseparable. What makes a contract more than a private agreement is that it has the force of law; shorn of that force, the idea of a legal contract would be effectively meaningless. Therefore, if nullity is an essential feature of power-conferring rules as Hart suggests, it is because nullity plays an important role in the duty-imposing aspect of the rule. A power-conferring rule could offer the possibility for citizens to create contracts by specifying the requirements of creating valid contracts, meaning what counts as a binding agreement, even if it did not provide for the enforcement of those contracts in the event of a breach. If so, the law would be adding a condition that agreements that might ordinarily otherwise be valid are not valid for failure to meet the requirements for forming legal
contracts.\textsuperscript{179} That is to say, without a provision for enforcement, all the law would be adding is a nullification of agreements that do not meet the specified terms. In this case, nullity would be the sole force of the law, and in this respect, the prospect of nullity does impose a duty on the parties to abide by certain standards in creating contracts. Therefore, it would not just be the contract formed under the power-conferring rule that imposes a duty but the power-conferring rule itself.

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To the extent that Hart wishes to separate duty-imposing and power-conferring rules but still consider them equally law, he is guilty of the very thing for which he faults Kelsen, namely reducing all law to instructions to officials.\textsuperscript{180} Hart examines Kelsen’s view that “law is the primary norm which stipulates the sanction”\textsuperscript{181} and therefore that “there is no law prohibiting murder: there is only a law directing officials to apply certain sanctions in certain circumstances to those who do murder.”\textsuperscript{182} Hart’s main objection to this is that “the theory involves a shift from the original conception of law as consisting of orders backed by threats of sanctions which are to be exacted when the orders are disobeyed. Instead, the central conception now is that of orders to officials to apply sanctions.”\textsuperscript{183} Taking the internal point of view, it is clear that, sociologically, the law does not function primarily as instructions to officials. Citizens consider

\textsuperscript{179} So, for example, the law might say that agreements are binding unless one of the parties has his fingers crossed on his left hand while the two parties shake hands with their right hands. Ordinarily, the other party might insist that the shook-upon agreement is binding regardless of any silly gestures the first fellow made with his other hand. But, under this power-conferring rule, it would be understood that such an agreement is not binding irrespective of whether the law provided enforcement for similar, binding agreements.

\textsuperscript{180} Hart CL 35-36.

\textsuperscript{181} Hart CL 35, quoting Kelsen.

\textsuperscript{182} Hart CL 35-36.

\textsuperscript{183} Hart CL 37.
themselves to be under an obligation to obey the law. This can be seen in the fact that the law does not, in the eyes of its subjects, present a neutral choice between compliance and noncompliance along with instructions to officials about how to react in response to each choice. Instead, the law requires one mode of behavior and exacts a penalty for the other.

But if power-conferring rules are not to be seen primarily for the duties they impose, then they must be seen for the way in which officials respond to them. The difference between a private agreement and a legal contract is the intervention of officials in the event of a breach of the latter. Thus, the rule that offers the possibility of making a contract is ultimately an instruction to officials to enforce an otherwise private agreement in a certain way. But Hart would be hard-pressed to accept such a conclusion, having already argued that seeing law as rules for officials “conceal[s] the characteristic way in which such rules function if we concentrate on, or make primary, the rules requiring the courts to impose the sanction in the event of disobedience; for these latter rules make provision for the breakdown or failure of the primary purpose of the system. They may indeed be indispensible but they are ancillary.”

To be sure, there is no duty on the part of the citizens to enter the contract, so the law confers the power to create a contract rather than imposes a duty to do so.

If so, however, Hart must reconsider which element of this power-conferring rule qualifies as “law.” Again, what separates a contract from any private arrangement is the non-optional aspect, both because the law can specify ways in which the arrangement must be made and because the law attaches a legal obligation to the terms of its fulfillment. Custom or social convention can also confer powers by providing rules for behavior, and this is no less true with private agreements than with anything else. In one culture, for example, it might be understood

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184 Hart CL 39.
that a handshake seals an agreement between two individuals, creating a shared understanding between them of mutual obligation. In another culture, an oath might be taken when one man places his hand under another man’s thigh. Cultural norms can also allow for a marriage to be realized without the intervention of law; the moral obligations of marriage do not depend upon the presence of a corresponding legal obligation. This is not to say that duty-imposing rules and power-conferring rules function in exactly the same way, but it is to say that the feature of legal obligation is what enables both types to be meaningfully seen as “law.”

Furthermore, Hart explains early on that the “distinction between social rules and mere convergent habits of behaviour . . . is crucial for the understanding of law.” But what really underlies the difference between social rules and convergent habits of behavior? Presumably it is the obligatory nature of social rules. But if obligation is what distinguishes law from convention, how can Hart insist that power-conferring rules are in fact law while insisting that they are not a species of duty-imposing laws? They are laws because they are rules, which is to say they are standards that spell out the requirements about how certain things must be done under certain circumstances. In other words, it is the duty-imposing element of power-conferring rules that enables Hart to distinguish them from convergent habits of behavior. Hart can deny this and thereby concede that power-conferring rules are not law in the true sense, or he can admit that power-conferring rules and duty-imposing rules are closer than he would like to think. So, too, it cannot be that what distinguishes power-conferring rules from habits is the rules’ internal aspect (or their reflective nature) since other social practices, such as customs, can possess an internal aspect without being law.

185 See, for example, Genesis 24:2,8.
186 Hart CL 12.
In general, this interpretation suggests that, despite Hart’s insistence to the contrary, power-conferring rules are a species of duty-imposing rules. Alternatively, Hart might accept that power-conferring rules, unlike duty-imposing rules, are in fact primarily instructions to officials. Hart’s concern is that such a view cannot make sense of the way law actually functions in society. This goes back to his analogy between the law and a game: just as the rules of a game are not primarily instructions to referees about how to score the game but instruction to players about how to play, laws are not primarily instructions to officials about how to react to certain behaviors by citizens but instructions to citizens about how to behave. This is reinforced by the internal point of view, which reveals that the law is not merely a prediction of (or even a guide for) how officials will (or should) react but a standard for citizens to assess and shape their own conduct. Nevertheless, to the extent that power-conferring rules facilitate the actualization of goals by providing legal force to arrangements that would already have moral standing, their very nature is to serve as instructions to officials about how to enforce agreements made between the parties. Two people can enter a marriage without the aid of the law, but legal marriage reinforces the arrangement by presenting incentives for honoring it (including disincentives for violating it). In a way, the only duties that are solely created by power-conferring rules are the duties of officials to enforce otherwise private arrangements in a certain way. Hence, while it would be wrong to conceive of duty-imposing rules mainly as instructions to officials, the same need not be true for power-conferring rules.

Even so, Hart may object that this contradicts what is revealed by the internal point of view, namely that citizens do not understand contracts mainly as instruments that specify how officials ought to react to their compliance or noncompliance with the terms; rather, they see contracts as standards governing their own behavior. But if that is Hart’s view, then he ought to
be willing to follow that logic to its conclusion and recognize that the citizen’s view of a power-conferring rule is of a rule that says “If you wish to do X, you must do it in the following way,” even if that “following way” includes numerous possibilities.

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Hart is not wrong to be skeptical of the “itch for uniformity in jurisprudence” in identifying two fundamentally distinct types of law.\(^{187}\) His desire for a taxonomy of law “free from the prejudice that all must be reducible to a single simple type” is reasonable given that the old formulation of the command model does seem to constrict the true scope of law and distort the way in which some rules function, or, in Hart’s words, “distort[] the different social functions which different types of legal rule perform.”\(^{188}\) On the other hand, in elucidating the concept of rules, Hart scratches the itch too vigorously, failing to satisfactorily explain why both types of rules (duty-imposing and power-conferring) belong together under the same heading of “law.” That is, in relieving the itch for uniformity, Hart obscures what the two types of law do have in common. Hart groups the two types together only insofar as both “constitute standards by which particular actions may be thus critically appraised.”\(^{189}\) “So much,” he says, “is perhaps implied in speaking of them both as rules.”\(^{190}\) But, as Hart well knows, there are lots of standards that qualify as law and lots that do not; merely naming legal standards “rules” does not capture what is unique about them and therefore exclusive to the law.

One possibility, then, following more closely on Austin’s model, which Hart rejects, is that power-conferring rules are not “law” in some critical respect. Clearly Hart wishes to resist

\(^{187}\) Hart CL 32.
\(^{188}\) Hart CL 38.
\(^{189}\) Hart CL 32.
\(^{190}\) Hart CL 32.
this approach, as much as he wishes to resist the assimilation of power-conferring rules to duty-imposing ones. At the same time, if power-conferring rules are not to be excluded from the category of “law,” even Hart must concede that the itch for uniformity in jurisprudence has some merit. Any analysis is going to require a unitary definition at some level, and, if so, the dispute is not really about whether it makes sense to have a unitary definition of law but over the degree of abstraction at which a definition of law ceases to be useful. In this case, Hart’s definition may be useful on the level of identifying when a legal system exists, that is, on the level of descriptive sociology. Nevertheless, it may be unhelpful as a definition of law that permits normative analysis to proceed because it abstracts completely from concepts like legitimacy and obligation. That is not to say that Hart’s theory is flawed because it does not give a full account of the normative basis of law; after all, that is not its task. Yet it cannot be a complete theory in this respect, suggesting no basis for obligation and even perhaps ruling out the notion of obligation with respect to power-conferring rules.

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In his rejection of the command model, Hart seeks to advance a middle path that resists the “oscillation between extremes, which make the history of legal theory.”\(^{191}\) On one hand, he rejects natural law theories and even Austin’s positivism that “leave insufficient room for differences between legal and moral rules and for divergences in their requirements.”\(^{192}\) On the other hand, he equally rejects the overreaction of the legal realists, for whom law is merely a prediction of what officials, especially courts, will do.\(^{193}\) In their place, Hart seems to be in search of a place between the complete union and complete disunion of law and normativity.

\(^{191}\) Hart CL 8.
\(^{192}\) Hart CL 8.
\(^{193}\) Hart CL 8.
dismissing realism, Hart contends that law cannot fairly be seen as prediction because “the judge, in punishing, takes the rule as his guide and the breach of the rule as his reason and justification for punishing the offender.”\textsuperscript{194} Hart’s theory, unfortunately, offers no ground for supposing why the judge takes the law as a reason for action, why he takes it as a guide. In this way, Hart’s theory is in danger of sliding into the very realism he rejects.

At first glance, it could seem that Hart’s theory incorporates some explanation of the normative force of rules. On this, it would appear, turns his distinction between legitimate and illegitimate directives. For instance, Hart distinguishes the orders of a military officer, where there is an implied “right or authority,” from the orders of a mugger, which are orders only insofar as they are directives with coercive force.\textsuperscript{195} In this way, it would seem possible to say that an unjust law is not a law, much as the victim is not obligated (though perhaps obliged) to relinquish his wallet. Hart even points out the way in which language usage reflects these distinctions: “We might properly say that the gunman ordered the clerk to hand over the money and the clerk obeyed, but it would be somewhat misleading to say that the gunman gave an order to the clerk to hand it over.”\textsuperscript{196} Thus, while one might be inclined to consider Nazi law to be like the gunman’s coercive orders, the problem with Nazi law is not the ordering per se but the injustice of the orders.\textsuperscript{197} There is nothing misleading about saying that the Nazi officer gave an order to his subordinate, and that is because the officer’s order, unlike the mugger’s, is legitimate. This may be troublesome inasmuch as calling Nazi law valid seems to open the door

\textsuperscript{194} Hart CL 11.
\textsuperscript{195} Hart CL 19.
\textsuperscript{196} Hart CL 19.
\textsuperscript{197} Elsewhere it will be necessary to reconcile this explanation with the claim that legitimate authority must be oriented to the common good. It will turn out that there may not be an obligation to obey any law in an unjust regime, including its just laws, whereas the could be a prima facie obligation to obey the unjust laws of a generally just regime.
to the just-following-orders defense of German soldiers, but the proper response there is not that Nazi law had no presumptive validity but that it was immoral and perhaps demanded disobedience.

Beyond this, though, Hart’s theory has nothing to say about the normative implications of law’s validity or about what role legal validity should play in deciding whether to obey the law. To be clear, this is not, in itself, a criticism of Hart’s theory since it is Hart’s objective to identify law just as such, regardless of whether it is Nazi law or anything else. Nevertheless, this point is worth emphasizing because it demonstrates that Hart’s positivism has no moral advantage, or no advantage in moral analysis, over legal realism. Hart’s version of what constitutes a legal system, which he contrasts with the command model, comprises “obedience by ordinary citizens” and “acceptance by officials of secondary rules.”198 As such, he accepts that, despite all the sophistication of his theory in describing the form of law, “in an extreme case the internal point of view with its characteristic normative use of legal language (‘This is a valid rule’) might be confined to the official world. In this more complex system, only officials might accept and use the system’s criteria of legal validity.”199 Hart’s verdict follows: “The society in which this is so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of legal system.”200 If it were possible to contemplate the effects of the internalization of Hart’s theory in an actual socio-legal context, it might appear that, in shifting the focus from the morality of law to the validity of law and excluding questions about the morality of law, it facilitates the rise of a society that is deplorably sheeplike.

198 Hart CL 117.
199 Hart CL 117.
200 Hart CL 117.
Moreover, Hart’s legal positivism nearly collapses into the legal realism it is meant, at least partly, to supplant. Elsewhere, Hart writes that officials need not act with any belief that the execution of their offices is the right thing to do. But if officials do not obey the law because it is the right thing to do, which is to say, because they have an obligation, then law is mostly prediction: a prediction of which incentives officials will respond to in the execution of their “duties.” Some may be more high-minded and some less, but in all cases it will be for reasons that swing free of obligation and therefore can be lawfully (and probably morally) disregarded according to the officials’ will.

In addition, it should be clear that, insofar as it abstains from moral analysis, Hart’s form of positivism offers no advantage in being able to distinguish Nazi law from any other. On one hand, such distinctions may not be Hart’s purpose. On the other hand, Hart thinks that a “concept of law which allows the invalidity of law to be distinguished from its immorality” is a better framework for addressing the questions that confronted the post-war courts in Germany. While the theory may have an advantage over those that fully conflate valid law and morally legitimate law, it is deficient compared to the command model, which does not do so and which at least offers the possibility of introducing moral criteria because it points to a theory of moral legitimacy, something Hart explicitly wishes to exclude.

Furthermore, Hart proposes a theory of legal validity that comes down to acceptance. Again, his work is an essay in descriptive sociology, which understandably limits his purview. But the interesting parts of the questions that Hart believes are illuminated by a better theory, such as those faced by the post-war courts, are matters of moral legitimacy, not of legal validity.

201 Hart CL 115.
202 Hart CL 211.
For Hart, there could be a regime whose law is legally valid, internally speaking, but also morally monstrous. Hart spells out the criteria for identifying a legal system:

There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.203

Since this description could apply to Nazi law as much as to any other—a legal system is a legal system—it only highlights the fact that the theory provides no tools for addressing the important questions Hart identifies, namely whether people can be held accountable for injustices they commit at the behest of or with the permission of unjust regimes. Thus, while Hart suggests that his theory provides a better framework for analyzing the difficult questions raised by the legal systems of unjust regimes, his analysis actually offers no more and no better resources for parsing those questions than the legal realism upon which it was meant to improve.

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Indeed, it is not just that Hart’s theory has little to add to the analysis of such issues; it cannot account for what is in fact so interesting, which is to say difficult, about the hard cases. One of Hart’s main tasks is to divorce questions of legal validity from questions of morality and justice. For instance, the question of “Are we to punish those who did evil things when they were permitted by evil rules then in force?,” according to Hart, “cannot be solved by a refusal,

203 Hart CL 116.
once and for all, to recognize evil laws as valid for any purpose,” for “this is too crude a way with delicate and complex moral issues.”204 Instead, Hart advocates a “concept of law which allows the invalidity of law to be distinguished from its immorality” and thereby “enables us to see the complexity and variety of these separate issues.”205 Otherwise, “A narrow concept of law which denies legal validity to iniquitous rules may blind us to them.”206 Hart makes a powerful argument against the simple unjust-law-is-no-law approach since the validity of a law and the morality of a law seem intuitively separable, as long as the relevant rule of recognition does not include moral criteria that rule out all unjust laws, which seems highly unlikely, not least because there would be disagreement about which laws count as unjust. As Hart sees it, there is “no contradiction in asserting that a rule of law is too iniquitous to be obeyed, and that it does not follow from the proposition that a rule is too iniquitous to obey that it is not a valid rule of law.”207 For this reason, one might be inclined to reject the natural law approach.

Earlirer, however, Hart notes a better understanding of the natural law approach, which is not that an unjust law is also invalid but that all (valid) laws entail a moral obligation to obey.208 Instead of focusing on the coincidence of legal rules and moral rules, the central claim of this approach is that “for a legal system to exist there must be a widely diffused, though not necessarily universal, recognition of a moral obligation to obey the law, even though this may be overridden in particular cases by a stronger moral obligation not to obey particular morally

204 Hart CL 211.
205 Hart CL 211.
206 Hart CL 211.
207 Hart CL 209.
208 “Valid law” is somewhat redundant in this context since, according to Hart’s view, the guiding maxim would be “an invalid law is no law” (since validity is the test of whether it is a law at all).
iniquitous laws.”\textsuperscript{209} This is a better interpretation of the natural law view because the unjust-law-is-no-law maxim generates more confusion than it resolves. On this favored view, there is only a prima facie obligation to obey, which can be outweighed by a contrary moral obligation. Iniquitous laws, therefore, might best be thought of, to borrow a term from canon law, as valid but illicit. So the partial separability of law and morality in this manner is equally compatible with natural law thinking as it is with Hart’s.

Returning to the hard cases faced by the post-war courts, there is probably no denying that Nazi society had a legal system, even if many or most of the laws were bad. Hart’s theory has nothing more to say about this beyond confirming the existence of a legal system. The natural law consideration of morality, however, raises the question of whether there is a moral obligation to not follow certain Nazi laws or perhaps whether the injustice of the regime as a whole means that none of its laws are obligatory. If there is to be any separation between law and morality, the second option is harder to sustain because it would mean proposing a legal system in which some of the laws were valid but none of which were binding. Such a position would seem to vacate legal validity of any meaning since, if the term is to have any meaning, it ought to carry a sense of presumptive legitimacy, whereas regarding the Nazi system, the claim would be that all the laws were presumptively illegitimate in virtue of being part of the Nazi system. Therefore, the more sensible approach would be to say that valid laws are presumptively legitimate but lose their ultimate authoritativeness if the obligation to obey the law comes into conflict with weightier moral obligations.\textsuperscript{210} Following this line of reasoning, there would be an

\textsuperscript{209} Hart CL 157.

\textsuperscript{210} It may be a source of discomfort for some that the argument gives Nazi law prima facie validity, but it is necessary to bite this bullet in order to make sense of the relationship between law and morality.
obligation for ordinary German citizens to obey Nazi traffic laws even when there might be no obligation to obey or even an obligation to disobey other Nazi laws.

In this respect, Hart’s version is actually deficient when addressing the “delicate and complex moral issues.” For if a law’s validity and its morality are completely divorced, then Hart’s theory obscures what is actually interesting about the question that faced the post-war German courts. This is because the question is interesting precisely because of the conflict between the moral obligation to obey the law in general and the moral obligation not to do what those particular laws require. Anything short of that would merely be the opposition of moral obligation and self-interest. Depending on the nature of that self-interest (for example, the desire to protect one’s family as opposed to the desire for professional advancement, as in the painful opening scene of Inglourious Basterds), the court might be faced with significant mitigating factors but not a moral quandary of the same sort. In other words, unless validity, which is to say legal obligation, somehow implicates moral obligation, then the concept of validity adds nothing of interest to the analysis of such moral issues.

Taking the point more broadly, validity would not mean much of anything in legal analysis except the recognition that the thing in question can be identified as a legal rule in that society. Whether or not to follow the law, though, would depend entirely on an independent analysis of the morality of that particular law. This would be disastrous for Hart’s theory because it would introduce a disconnection between legal validity and the internal point of view, which Hart takes as a fundamental characteristic of law. To say that the law’s validity entails an obligation to obey would necessarily be a moral claim. Of course, validity means there is a legal obligation in the sense that the law requires obedience, but to say that a legal obligation means one truly ought to obey is question-begging since the issue is whether a legal obligation includes
a moral obligation. If it does not, the most that can be said is that the law can be anticipated to hold people accountable for disobedience but nothing about whether it does so justifiably. But if law does not, in general, coerce justifiably, then once again Hart fails to sufficiently distinguish between the law and the mugger.

This is where the command model is instructive as a more useful positivist framework. A moral obligation to obey is not a logically necessary feature of the command model since identifying commands could simply be a way of identifying legally valid rules. And this is how it seems in the work of Austin and others. But a revised and improved version of the command model shows that the notion of command embodies the sort of obligation that helps make sense of the normative force of legal validity and the real quandary embedded in a valid but illicit law. This is so because it is the same nature of the relationship between the commander and the commanded that allows a command to be identified as such that also refers to the morally obligatory nature of such directives, unlike social rules, which do not.

Hart is right that thinkers from the natural law school, who see a close connection between law and morality, “might not be concerned to dispute our criticisms of the simple imperative theory” and “might even concede that it was a useful advance.” In many respects, Hart’s critique of the prevailing theories is a useful advance. But because he goes further and rejects the command model entirely, thereby depriving the law of any real basis for authority, Hart goes further than any sound natural law theory could permit. This is because, on the natural law view, there is an obligation to obey the law, and, therefore, there must be a normative justification for law’s authority.

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211 Hart CL 155.
Nevertheless, Hart’s theory represents a thoroughgoing rejection of the command model of law. Putting it quite directly, Hart argues, “The theory is not merely mistaken in detail, but that the simple idea of orders, habits, and obedience, cannot be adequate for the analysis of law. What is required instead is the notion of a rule conferring powers, which may be limited or unlimited, on persons qualified in certain ways to legislate by complying with a certain procedure.” While Hart’s theory has much to recommend it, it goes too far in rejecting the essential core of the command model. That is, although Hart is correct to critique some of the prominent features of the command model, including some of the key vocabulary associated with its understanding of law, he is wrong to reject the theory entirely. In doing so, Hart jettisons the framework necessary for a complete and proper analysis of law. Hart’s new model, though an improvement in many ways, fails to account for law’s central feature: its authoritativeness. Instead of rejecting the command model as Hart does, a better approach would be to produce a revised version of the theory that accommodates his substantial critique without sacrificing the elements necessary for a complete picture of the law.

Stripped to its bare essentials, the command model fills an important gap left by Hart’s theory, namely grounds for obligation that a valid legal system ought to desire if it is to claim any normative force. Even though the command model is also a descriptive theory, embedded in the command model is a claim about the source of authority in the relationship between the commander and the commanded. This fundamental aspect of the theory can be obscured by the emphasis on sanctions by some of its proponents and certainly its critics, but it is essential. A revised version of the command model that incorporates important parts of Hart’s critique would more clearly place the emphasis where it belongs: on the “command” part of law. In trying to

\[212\] Hart CL 77.
remain agnostic with respect to the basis of authority, or the source of the authority’s legitimacy, Hart loses this critical element.

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In several respects, Hart’s critique of the command model is correct and valuable. Perhaps his most important corrective is to Austin’s insistence on the centrality of sanctions. Austin is mistaken here, for sanctions are not an essential feature of law, even if they are a ubiquitous one. One of Hart’s concerns is that reducing law to punishment also reduces law to prediction. For Hart, behavior in violation of the law is not simply “grounds for a prediction” of how officials will react but also “a reason or justification for such reaction and for applying the sanctions.” That is, the law conveys a standard and, more specifically, a standard that is not reducible to a desire to avoid punishment—because it is a justification for the punishment. That standard for behavior, in principle, could apply whether or not any sanctions attached for noncompliance. The subject could believe himself to be under an obligation to obey whether or not he believed there were a punishment for disobedience. This is often how moral obligations are understood, and if the law creates obligations, too, then it is no different in this respect.

A related worry of Hart’s is that an overemphasis on sanctions reduces law to being primarily about guiding how officials react to behavior and not primarily about guiding how people behave. Hart compares the law to a game for these purposes, illustrating that it would be equally wrong to see the rules of the game being more about how referees should keep score and assign penalties than about how the players ought to play. This is a useful analogy, and Hart is right that such a model is devoid of (or at least deficient with respect to) the internal point of

\[213\] Hart CL 84.
\[214\] Hart CL 80.
view, an analytic device which reveals that people relate to the law first and foremost as a
standard for judging their own and others’ behavior rather than as a guide to how officials will
react to their behavior (though they might do that, too, secondarily). What this analogy further
suggests is that sanctions are not an essential feature of the law. The players are no less bound
by the rules of game when there are no penalties for infractions, even if they are less likely to
follow them. And if they do follow the rules, sans penalties, and play the game to its conclusion,
no one would say they were not playing that particular game. In contrast, if there were no rules
or if the players were free to make up rules as they wished, they would not be playing the same
game.

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In the command model that Hart criticizes, sovereignty is explained by habits of
obedience. To wit, on that theory, the sovereign is habitually obeyed and habitually obeys no
one.215 Accordingly, the sovereign makes law “from a position outside any law” and has “no
legal limits on his law-creating power.”216 Hart is right that it is improper to think of obedience
to the sovereign in terms of habits. Although habitual obedience can be helpful in identifying the
sovereign, it is also not an essential feature of law’s authority. Even for those who are argue that
law must have de facto authority in order to have de jure authority, that is, to be legitimate,
popular acceptance need not necessarily be characterized as habits of obedience. Instead, a
better version of the command model would describe the sovereign as one to whom obedience is
owed and who owes obedience to no one. On such an account, the law’s authority, which is to

215 HLA Hart, “Commands and Authoritative Legal Reasons,” Authority, ed. Joseph Raz (New
York: New York University, 1990) 100.
216 Hart CL 66.
say legitimacy, would rest on normative features of authority itself and not on sociological trends.

The main thrust of Hart’s attack is that, practically speaking, it is nearly impossible to predicate sovereignty and the authority of law on habits of obedience. Most obviously, a sovereign whose sovereignty rests upon being habitually obeyed could not command with authority until habits of obedience were established: “There is nothing to make him sovereign from the start. Only after we know that his orders have been obeyed for some time shall we be able to say that a habit of obedience has been established. Then, but not till then, we shall be able to say of any further order that it is already law as soon as it is issued and before it is obeyed.” But habits are irrelevant. In fact, Hart does not even offer a plausible construction of the role habits of obedience might play in establishing sovereignty. If sovereignty in the command model depended on habits of obedience the way Hart construes it, the problems would run even deeper than the fact that orders would need to be obeyed “for some time” before a habit of obedience could be established. For one thing, there is the question of what would impel people to start obeying in the first place if the would-be sovereign could not yet properly claim authority. Short of coercion, it would be difficult for this sovereign-to-be to cultivate habits of obedience to himself before any such obedience were owed. For another thing, what if after a period of obedience, habits of obedience were in decline? Sovereignty would disappear, it seems. Presumably, it would be impossible to know at any one moment whether the habit had eroded, especially if there were a gradual decline. (The same is true in the positive direction: it would be difficult to know when casual compliance became a habit of obedience.) What this really reveals, though, is that habits, as Hart understands them, could never serve as an

\[217\] Hart CL 53.
appropriate marker for sovereignty since habits can only be judged retrospectively. At any given moment, if the behavior characterizing the habit were not repeated into the future, the habit could be said retroactively to have disappeared (and vice versa). But this can only be judged in hindsight. Therefore, if sovereignty depends on a present habit of obedience, sovereignty is always in doubt.

And this is just the beginning of the questions raised by reliance on the concept of habits. Even if habits were not so complicated to observe, there would be doubt about sovereignty if many commands were obeyed habitually but some or even one were disobeyed habitually, such as jaywalking, for example. Would this undermine sovereignty? Perhaps just with respect to that area? All of this is beside the point, though, since habits are indeed an untenable way of explaining sovereignty. Instead, sovereignty is about right, such that those who occupy a certain office are owed the obedience that is owed to that officeholder. That is, the sovereign’s commands are authoritative because the office he holds confers that authority. There needs to be a normative justification for the authority just as such, but there also needs to be this positivistic designation of a commander, such that not just any proposal concerning the common good, for example, is authoritative. Importantly, this aspect of the theory still need not commit Hart to a particular normative view of sovereignty because he need not be committed to a particular account of what justifies the office. Rather, Hart need only be committed to a descriptive account of sovereignty that acknowledges that obedience is rooted in a claim of right, regardless of which claim it is and whether he agrees with it.
Thus, Hart is correct to eschew the language of habits when it comes to understanding the law and “conceive of the situation in terms of rules rather than habits.” Yet the focus on social practice improperly limits the discussion. Without explaining why it is the case, Hart describes that the “ordinary citizen manifests his acceptance largely by acquiescence in the results of these official operations.” If Hart means that the ordinary citizen acquiesces despite not recognizing an obligation to do so, then Hart describes a state of affairs that is both puzzling (because it leaves the acquiescence wholly unexplained) and clearly at odds with his own account of the internal point of view. If, on the contrary, Hart means that people obey out of a sense of obligation, then a better description would tell where that sense of obligation comes from, justifiably or not. There can be many good reasons for obeying (financial interest, physical safety, respect for tradition, and so on) that fall short of obligation. But none of those answer the objection of the internal point of view, which reveals that the law motivates compliance through something more than appeal to “material” incentives. If people do obey out of a sense of obligation, as Hart suggests, then there ought to be a theory of obligation.

Furthermore, Hart’s construction of the argument leaves his own theory vulnerable to some of the criticisms he levels against the command model. Under Hart’s theory of legal validity, obedience is found in this acquiescence to a rule that “constitutes a standard of behaviour for the group.” But if validity depends on popular acceptance, the concept has many of the same problems as the concept of habits. At what point is there sufficient acquiescence in the results of official operations? And why would anyone begin to obey the law before there were sufficient acquiescence to prove legal validity? Put simply, if sovereignty only

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218 Hart CL 67.
219 Hart CL 61.
220 Hart CL 67.
obtains once habits of obedience have been cultivated, validity also only obtains once there is acquiescence in the official operations. So Hart’s theory suffers from the same chicken-and-egg problem as one based on habits.

Similarly, whereas Hart worries that an emphasis on sanctions makes the command model chiefly about instructions to officials, his depiction of his own theory suffers from the same flaw. Hart acknowledges that the theory of sovereignty-by-habitual-obedience illuminates the “relatively passive aspect” of the legal system but also finds that it “obscures or distorts the other[,] relatively active aspect” of the law, “which is seen primarily, though not exclusively, in the law-making, law-identifying, and law-applying operations of the officials or experts of the system.” He even writes that “in a modern state it would be absurd to think of the mass of the population, however law-abiding, as having any clear realization of the rules specifying the qualifications of a continually changing body of persons entitled to legislate.” In other words, while the command model indeed captures how the aforementioned ordinary citizen relates to the law, the added value of Hart’s theory is in the realm of how officials relate to the law. This is curious considering how concerned Hart is that a concept of law should not be seen primarily as instructions to officials. From here, however, such a view is precisely the unique contribution of his theory. That does not necessary mean that Hart is wrong, but it does mean that his critique applies to his own theory as much as it does to others.

Hart concedes that it is the “the strength” of the concept of “habitual obedience to orders backed by threats” that it highlights the “relatively passive aspect” of a legal system, namely how most people relate to the law. What Hart has his finger on, even if he does not get it quite right,

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221 Hart CL 61.
222 Hart CL 60.
is that, habits and sanctions aside, the command model captures a fundamental feature of the law: obedience. This may be obscured by earlier formulations of the command model, but it is the essential core and must be retained. A theory of rules is not incompatible with obedience, of course, but the concept of rules gives no ground for that obedience, which instead follows much more naturally from command.

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Hart’s alternative to law as command is law as social practice, specifically “that form of social practice which constitutes the acceptance of a rule.” Hart considers social practice to have an advantage over “habitual obedience” because the latter cannot account for various features of the law. Another area in which Hart finds the command model deficient is with respect to succession, writing, “Habits of obedience to each of a succession of such legislators are not enough to account for the right of a successor to succeed for the consequent continuity in legislative power.” Once again, while it is true that the notion of habits of obedience is insufficient for a full analysis of the law, a modified version of the command model can accommodate Hart’s critique without abandoning the critical elements brought along by the notion of command. In contrast, a theory based on social practice offers no satisfactory account of the authority of law. In this case, with respect to succession, it is clear that social practice serves no better. Social practice in the form of adherence to a set of rules that specifies the selection of legislators would explain how it is that authority-holders can be identified, but it would not explain why they have the “right” to be such. Even if they have attained their

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223 Hart CL 59.
224 Hart CL 59.
positions by following a set of widely accepted rules, there is nothing to ground the legitimacy of those rules; they are merely accepted.\textsuperscript{225}

Habits cannot account for a right of succession because, as Hart correctly says, “habits are not ‘normative.’”\textsuperscript{226} Features of the law such as the “continuity of law-making power through a changing succession of individual legislators” are, for Hart, “a new set of elements of which no account can be given in terms of habits of obedience.”\textsuperscript{227} Habits of obedience are to a particular sovereign, and there is nothing about them that automatically translates into the authority of a successor. Rather, succession requires the establishment of new habits of obedience to a new sovereign.

A closely related point of attack for Hart is the role of habits in the enduring nature of laws. Laws, Hart observes, “pre-eminently have this ‘standing’ or persistent characteristic,” which is to say they persist despite changes in the person of the sovereign or in the legislators.\textsuperscript{228} According to Hart, the idea of a sovereign who is habitually obeyed cannot account for “continuity of the authority to make law” and “persistence of laws:” “the idea of habitual obedience fails . . . to account for the continuity to be observed in every normal legal system, when one legislator succeeds another.”\textsuperscript{229} The physical person of the sovereign, however, is irrelevant to the authority of the law. Instead, citizens are subject to the office of the sovereign, regardless of who occupies that office and regardless of whether it is a single individual or all the

\textsuperscript{225} Widespread adherence to a particular practice should not be confused with consent. The fact that everyone knows who the officials are in North Korea and behaves accordingly does not mean that those officials govern with legitimacy.

\textsuperscript{226} Hart CL 60.

\textsuperscript{227} Hart CL 54.

\textsuperscript{228} Hart CL 23.

\textsuperscript{229} Hart CL 51, 54.
people acting collectively as sovereign. In this light, there is no difficulty in explaining the enduring nature of laws because the office persists regardless of changes in the officeholder.

It further follows from this that obedience is owed not due to some intrinsic quality of the person or people serving in the capacity of sovereign but instead because of the necessary relationship between those serving in the capacity of commander, whoever it is, and those serving in the capacity of commanded (even if those are the same people). If this is the case, then a command can surely persist across changes in the personal identity of the commander. No one supposes that an order from a military officer is void if he dies in battle, unless his superior or the next in command countermands the order. This common sense understanding is probably true in many cases of peaceful succession, where loyalty is to the office of the sovereign (or the throne, as the case may be) rather than to the person of the sovereign. In other cases, sovereigns may be obeyed in virtue of who they are and not in virtue of the office they occupy, but this is not the kind of authority it is necessary to explain since that sort of authority does not inform the question of why people have an obligation to obey.

In his denial of the explanatory power of habits, Hart proposes to ground these phenomena, such as succession and the persistence of laws, in social rules, toward which people “have a reflective critical attitude to this pattern of behaviour: they regard it as a standard for all.” This reflective critical attitude is the difference, Hart explains, between observing that chess players tend to move pieces according to certain patterns and understanding that the players are guided by rules that require them to do so. In Hart’s terminology, a “social rule

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230 Hart CL 57.
231 Hart CL 56.
has an ‘internal’ aspect, in addition to the external aspect which it shares with a social habit.”

Hart is certainly onto something in shifting the analysis from habits to rules, for habits alone do not properly account for how people relate to the law.

But Hart’s reliance on rules is also inadequate, for it fails to explain why the rules have any force. Hart’s position, that the “continuity of legislative authority which characterizes most legal systems depends on that form of social practice which constitutes the acceptance of a rule, and differs, in the ways we have indicated, from the simpler facts of mere habitual obedience,” provides no explanation for what lies behind the acceptance of those rules. In light of Hart’s critique of the concept of habits, he offers surprisingly little to guard his theory against the same attack. Hart suggests, “The notion of an accepted rule conferring authority on the order of past and future, as well as present, legislators, is certainly more complex and sophisticated than the idea of habits of obedience to a present legislator.” Thus, the authority of the sovereign persists because it is conferred by the acceptance of the rule. While it is true that authority is tied to a rule and not to any person as it might be thought with habits of obedience, there is no reason to think that acceptance of the rule will persist at any time, let alone in the absence of the rule-giver. The source of the rule’s authority is completely mysterious in Hart’s account. Hart seems to take the acceptance of the rule for granted, but, in doing so, he passes over the question of its “internal aspect.” As a result, an observer could say that the people appear to take the rule as a standard but could not say why.

If the authority of the rule is unaccounted for beyond social practice, then there is no basis for believing that the acceptance of the rule will persist beyond any particular moment.

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232 Hart CL 56.
233 Hart CL 59.
234 Hart CL 63.
That is, if Hart wishes to vindicate rules over habits, he has no choice but to presuppose some sort of normative underpinning for the rules. Ultimately, there must be a normative justification for the rule conferring authority on the sovereign; if so, one sovereign who succeeds another can be said to exercise authority by right. This is because the normative justification for that rule persists regardless of who is the sovereign. But where the rule is the rule merely because of social acceptance, there is no reason to believe that the social acceptance will persist and, similarly, no way to reliably anticipate whether it will. Like with habits, the fact of a rule’s social acceptance from one sovereign to the next or from one period to another could only be ascertained in retrospect.

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One significant difference between Hart’s theory and the command model is the question of the limitability of the sovereign. Hart correctly point out that, according to the command model, while the sovereign might wish to restrain himself for moral or political reasons, there are “no legal limits” on his power. For his own part, though, Hart rejects this as “a general theory of law” because “the existence of a sovereign . . . , who is subject to no legal limitations, is not a necessary condition or presupposition of the existence of law.” Instead, “supreme legislative power” can very much be restricted, for example, in the form of constitutional limitations on legislative power and, indeed, not just on the form of legislation but on the substance as well. Yet Hart’s view of sovereignty is improperly narrow because there must be some constitution-

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235 This does mean that the rules need to in fact be justified, but it does mean that the people who accept them need to believe they are.
236 Again, this is true whether or not that normative justification succeeds.
237 This assumes, of course, that the sovereign claims authority according to that rule.
238 Hart CL 66.
239 Hart CL 68.
240 Hart CL 68.
making body, whether the people or otherwise, that imposes these restrictions upon the legislature. That is, if there are legal limitations, the limitations have to come from somewhere. And wherever that limiting power lies, there is the sovereign. Moreover, that sovereign will be, by definition, legally illimitable since the body with the power to make the rules, including the rules about rules, would have the power to reverse any legal limitations. If the sovereign is legally illimitable by definition, then the sovereign will in some cases be the people themselves, who stand behind the authority of officials and limit it. This is important because it begins to address the question of whether the command model can be squared with popular rule. That is, can the people command themselves?

It is the notion of capacities that makes sense of the way in which the same people can be both commander and commanded. The challenge is whether the command model is indeed compatible with one set of people playing both roles. For example, it may be true that if “one identifies such a sovereign with the public then the distinction between sovereign and subject, essential to Hobbesian theory, collapses,” but there is no reason to rely on the Hobbesian view of sovereignty, indebted though the command model is to it. Instead, it is necessary to explore the ways in which people can act in different capacities as both the creators and subjects of legislation.

241 It will be necessary to consider, separately, whether it makes sense to say that the people are sovereign when those same people are the subjects of the law. 242 Another possibility is that the law itself, such as a constitution, is the sovereign, but this is, at turns, metaphysically difficult or question begging (where does the law come from?). 243 Robert Ladenson, “In Defense of a Hobbesian Conception of Law,” Authority, ed. Joseph Raz (New York: New York University, 1990) 45. 244 This need not require a democratic view, either. There could be a single ruler who is limited by the same laws he makes for his subjects. In that case, it would be improper to think of the ruler as the sovereign. Alternatively, the ruler could be the legally illimitable sovereign.
Hart contends that the idea of the people as the sovereign makes “the distinction between revolution and legislation untenable.” What Hart seems to mean is that if there are no legal limits on what the people can do, then the term revolution does not carry the extralegal status that seems to define it. But a revolution entails going outside the rules the people have set for themselves. While it is true that the people can, through legislation, effectively achieve the same results as a revolution by changing the rules as they please and even by changing the rules about how to change the rules (though they would still have to follow the rules about how that is done), such action would not constitute a revolution. At most, the term revolution is used figuratively to describe such events. As long as there are rules about how to change the rules, whether explicit or implicit, it is not difficult to tell the difference between revolution and legislation.

But there is reasonable skepticism about whether the command model, which is predicated on the relation between a superior commander and an inferior commanded, can accommodate a scheme where the person of the commander and of the commanded reside in the same being or beings. Hart believes that his own theory can easily accommodate self-government. As he writes, “Legislation, as distinct from just ordering others to do things under threats, may perfectly well have such a self-binding force. There is nothing essentially other-regarding about it.” But, for Hart, this is precisely because he does not think of law as command, which, unlike self-binding, is inherently other-regarding in his view. Yet the law needs to be more than just a form of self-binding if it is to rise above the level of a complex promise. If not, it is surely no more distorting to think of the law as a self-command than as an aggregated promise.

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245 Hart CL 78.
246 Hart CL 42.
Hart objects to the idea that the self that binds with a promise can be seen in two parts, one part doing the binding and one part being bound. For this reason, legislation by the people can be understood through the lens of self-binding but cannot be understood through the lens of command, which in Hart’s view requires two distinct entities, one who binds and one who is bound. As such, Hart argues that “this complicated device” of an individual acting in two capacities “is really quite unnecessary” because “we can explain the self-binding quality of legislative enactment without it.”

Like with legislation, with promises, he says, “We make use of specified procedures to change our moral situation by imposing obligations on ourselves and conferring rights on others.” Nevertheless, unlike with respect to promising, there is nothing strange about the same people acting in different capacities with respect to legislating. Perhaps this is because a promise does in fact make sense in two parts or, more plausibly, because the legislation may differ from promising in this regard. The latter possibility is compelling because if the law were sufficiently similar to a promise, then Hart would have a hard time accounting for the variety within the law that is critical to his theory. A practice of self-binding does not capture well the nature of power-conferring rules as Hart wishes to understand them. Self-binding appears to entail an element of obligation that Hart prefers to avoid. To the extent that power-conferring rules do entail an element of obligation, they can be more smoothly interpreted as promises or commands, but this is just the sort of understanding Hart is at pains to reject.

Fundamental to the command model is the creation of legal obligations (and the attendant moral

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247 Hart CL 43.
248 Hart CL 43.
249 Furthermore, while it is intuitive to see how one might impose duties on oneself in an act of self-binding, it is less clear how one might confer powers on oneself in an act of self-binding (or why it would make sense to do so).
obligations, as the case may be), in which case understanding the way in which promising is akin to legislative self-binding only strengthens the case.

Hart’s objection, though, is clearly more about the self- versus other-regarding natures of these actions than about the duty-imposing nature of them. For instance, he writes, “There is no reason, since we are now concerned with standards, not ‘orders’, why he should not be bound by his own legislation.” But Hart offers no convincing reason why it makes any more sense to say one can set a binding standard for oneself than to say one can order oneself. If the essence of ordering is command, which is to say, imposing a duty, then a self-binding commitment might as well be understood as a command. Indeed, it is the element of duty that distinguishes a promise or other commitment from a mere intention, such as a personal goal or a New Year’s resolution. If the emphasis is on the imposition of duty, then there is really no difference between ordering oneself and binding oneself. At the same time, Hart is not entirely off in questioning the awkward usage of ordering or commanding when it comes to oneself. But this is only so because of the analogy to promising, where it makes far less sense to think of the self in two parts: the promisor and the bound. There is an important difference between promising and legislating that is highly relevant to this issue. In promising, the goal is to bind the self, and the reason promising works is that the self that does the promising is the same self that is bound. In legislating, the goal is not to bind the self qua self; the goal is for the commander to bind the commanded, whether the commander and the commanded are the same or not. This is why the idea of different capacities makes perfect sense here. Even if all the people legislating are the

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250 Hart CL 58.
251 It might also be worth noting that promises are different than laws because promises generally have a promisee whereas the natural form of legislation is for the subjects of the law to be bound to the law but not in a way that creates an entitlement for a party distinct, in principle, from those who are bound.
same as all the people bound by the legislation, the purpose of the people doing the legislating is to bind the people who are subject to the legislation. Put another way, even if the legislators and the subjects are the same, the subjects are bound by the legislation in virtue of being the subjects and not in virtue of being the ones who made the legislation. Therefore, while the analogy to promise-making is illuminating, it does not undermine the utility of the command model even in understanding power-conferring rules.

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Even a modified version of command model that drops sanctions and habits must grapple with whether it can make sense of the role of judges in a legal system. Hart takes the view that many of judges’ decisions take place when the law runs out, as it were. Hart argues, “In most important cases there is always a choice. The judge has to choose between alternative meanings to be given to the words of a statute . . . . It is only the tradition that judges ‘find’ and do not ‘make’ law that conceals this.”\textsuperscript{252} If the judge has a genuine choice, though, it is difficult to say that the law the judge is relying upon is a command (though it may be no easier to say the law is a rule). After all, the standard set by the law is indeterminate until the judge makes a ruling. One possibility, of course, is that the command comes from the judge, meaning that the judge is a partner with the legislators, authorized by the sovereign, in creating the law. Hart’s notion of the open texture of the law seems to support this line of reasoning. Hart explains the open texture of the law in this way:

\begin{quote}
In fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues,
\end{quote}

\textsuperscript{252} Hart CL 12.
and the need to leave open, for later settlement by an informed, official choice, issues
which can only be properly appreciated and settled when they arise in a concrete cases.\textsuperscript{253}

It would be important in specific systems to develop a concrete view of how each system
intended to provide for such official choices; there is no factor that intrinsically makes such
decisions the province of judges. Nevertheless, on such an understanding, where judges do make
these decisions, it appears that judges fill a quasi-legislative function. This point is emphasized
when Hart distinguishes judges from scorers in a game, stating, “The open texture of law leaves
to courts a law-creating power far wider and more important than that left to scorers, whose
decisions are not used as law-making precedents.”\textsuperscript{254} The fact that judges’ decisions not only
bind the parties involved but serve as precedent is evidence that they are in fact creating law,
meaning standards to be followed in the future.\textsuperscript{255} To be sure, it is possible that judicial
decisions serve as precedent for the sake of the reliance interests they necessarily create, but this
recalls the very earliest points that Hart made about the law, namely that people take law,
whether judicial precedents or legislative enactments, as a standard for guiding their behavior,
and they do so as if it is obligatory rather than merely as a prediction of how judges will behave
the next time. Therefore, even if Hart is right that judges create law, there is no problem
assimilating their function to the command model.

\textsuperscript{253} Hart CL 130.
\textsuperscript{254} Hart CL 145. Hart may be wrong about scorers. Where scoring is subjective (such as in the
case of a strike zone, with rules of interference, or in pugilism), referees or umpires can and do in
fact take decisions as precedent—and the more they can do so, the better. But even if scorers are
more like judges than Hart realizes, it does not mean he is wrong about judges.
\textsuperscript{255} At the same time, this should not mistakenly be taken to mean that Hart or the command
model is committed to a view in which judges may create law as freely as legislators (presuming
even that legislators are fairly free to do so).
In fact, if Hart is right, the command model probably makes more sense of what judges are doing than Hart’s own theory. Hart argues against both natural law and legal realism and tries to position himself in the middle. Hence, judges remain “parts of a system the rules of which are determinate enough at the centre to supply standards of correct judicial decision” and which, on the judges’ own understanding, “they are not free to disregard.”256 In describing the standards that limit judges, he adds, “This circumscribes, while allowing, the creative activity of its occupants. Such standards could not indeed continue to exist unless most of the judges of the time adhered to them, for their existence at any given time consists simply in the acceptance and use of them as standards of adjudication.”257 This exemplifies the central flaw in Hart’s argument. Because the system he describes rests on social practice, Hart can give no account of why judges take such standards as guides to their behavior: he can only observe that they do. This is an especially problematic way to think of precedent since the very idea of it is based on a presupposition of prior decisions having some force, that is, serving as a standard in virtue of what they are rather than an accident of convergent behavior. It is always possible that judges will abandon a rule, rightly or wrongly, but Hart’s view suggests that judges would have no reason to abide by the rule; it would be known to be a rule just in case the judges continued to abide by it. This flies in the face of what Hart says in the very same section, that “the basis for such prediction is the knowledge that the courts regard legal rules not as predictions, but as standards to be followed.”258 But if law is understood as social practice, then Hart cannot show why laws are taken as standards to be followed or even why any judge would act with

256 Hart CL 145.
257 Hart CL 145.
258 Hart CL 147.
confidence that they would continue to be taken as such.\textsuperscript{259} Once again, Hart’s theory lacks grounds for explaining obligation.

Notwithstanding these difficulties in Hart’s theory, Hart is probably right that the understanding of the judicial role is less than crucial to the wider project. As Hart repeats many times, law is not primarily about rules for officials. Hence, even if what judges do is a deviation from the model, it need not detract too severely from the central case. In Hart’s words, “The principal functions of the law as a means of social control are not to be seen in private litigation or prosecutions, which represent vital but still ancillary provisions for the failures of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court.”\textsuperscript{260}

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Hart does not believe the command model can be salvaged if it is modified to accommodate his critique. In any sufficient revision, “We may find that the notion of general orders backed by threats has been transformed out of recognition.”\textsuperscript{261} For example, instead of the simple notion of a sovereign who commands and subjects who obey, a revised command model presents a “blurred image of a society in which the majority obey orders given by the majority or by all. Surely we have neither ‘orders’ in the original sense (expression of intention that others shall behave in certain ways) or ‘obedience.’”\textsuperscript{262} If it is in this sense that the old version must be dispensed with, then so be it. The goal is not to defend the command model in

\textsuperscript{259} Commands, in contrast, can account for precedent because they mean to obligate, that is, to become standards against which behavior is be measured. Such precedents can be overturned for adequate reasons just as the law can be disobeyed for adequate reasons. In neither case is it a question of validity.

\textsuperscript{260} Hart CL 40.

\textsuperscript{261} Hart CL 26.

\textsuperscript{262} Hart CL 75.
its old form but to preserve the core that is necessary for any satisfactory theory to make sense of
the law, not least on Hart’s own terms.

In order to preserve this core, however, “The relationship with law involved here,”
according to Hart, “can be called obedience only if that word is extended so far beyond its
normal use as to cease to characterize informatively these operations.”263 In Hart’s view, there is
nothing to be gained by understanding lawful behavior as “obedience to a ‘depsychologized
command’ i.e. a command without a commander.”264 If people can function in different
capacities, as both commander and commanded, this is not quite the problem Hart makes it out to
be. But it is true that the revised command model does not envision commander and
commanded in the same way as the original. Hart’s position is that even a revised command
model does nothing to explain features of the law that can be otherwise explained, and any
explanatory value it does have comes at the expense of distorting concepts like command and
obedience beyond recognition, which is to say, beyond analytic usefulness. In Hart’s own
theory, the connection between social practice and authority is based on “the notion of an
accepted rule conferring authority on the order of past and future, as well as present, legislators,”
which Hart takes to be “certainly more complex and sophisticated than the idea of habits of
obedience to a present legislator.”265 Hart fails to see, though, that obedience is necessary as the
central aspect of the legal system, even if it is a complex one with many moving parts. In any
case, it is not clear that Hart’s “depsychologized rules” fair any better on this score. Either Hart

263 Hart CL 113.
264 Hart CL 113.
265 Hart CL 63.
must recognize that such rules have no normative force, being based strictly on social acceptance, or Hart must accept that these, too, are obligations without an obligator. 266

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Ultimately, questions about what justifies authority are unavoidable. Hart believes that the coercion of some is justifiable for the sake of the survival of the rest: “‘Sanctions’ are therefore required not as the normal motive for obedience, but as a guarantee that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall. Given this standing danger, what reason demands is voluntary co-operation in a coercive system.” The coercion presumably extends even to people who do not assent to being part of this system or who believe that they are not obligated by all parts of the system. 267 Nor does Hart seem to think that this applies only when the malefactors threaten to directly endanger the others. For the voluntary cooperators would also risk going to the wall when it came to paying taxes if they knew that some small minority could avoid paying with no consequences. Hart can explain where the coercion comes from: “Without their voluntary co-operation, thus creating authority, the coercive power of the law and government cannot be established.” 268 Those who wish to cooperate force the regime on everyone else. But this view sheds no light on the justification for such coercion or even whether the voluntary cooperators have any reason to believe that what they are doing is justified. Indeed, in a similar passage, Hart is even more revealing, adding, “A necessary condition of the existence of coercive power is that some at least must voluntarily co-operate in the system and accept its

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266 Neither consent nor utility gives the rules normative force.
267 From this, it is also clear that Hart does not think that the justification of authority rests on consent.
268 Hart CL 201.
rules. In this sense it is true that the coercive power of law presupposes its accepted authority. Given what Hart says throughout the book, it is safe to assume that the acceptance to which he refers is social practice and not any robust normative justification. This is specifically corroborated by other statements from Hart, such as when he writes, “Not only may vast numbers be coerced by laws which they do not regard as morally binding, but it is not even true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so, though the system will be most stable when they do.” Thus, the acceptance of the authority of the law is merely instrumental. This is a particularly provocative remark by Hart because it suggests that even the people who are responsible for the coercion do not necessarily believe that the coercion is justified. For it is one thing to say that the people who do not accept the system do not believe they have a moral obligation to do so, but it is another thing to say that those who effectively force others to accept the system also do not believe it.

These claims notwithstanding, Hart’s theory is motivated heavily by the claim that people take the law to be a standard by which to guide and judge their own behavior and others’. It is nearly impossible, though, to separate the notion that they do take the law as a guide from the notion that they believe they should take the law as a guide because it is, of course, the latter that explains the former. Moreover, it is improper to defend Hart by arguing that people believe they should take the law as a guide only in the instrumental sense of having judged in particular cases that they are better off for doing so. This is not the kind of standard that Hart has in mind because, if it were, his obliged-obligated, gunman-government, external-internal distinctions would collapse. In other words, if compliance were merely instrumental to the incentives in a

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269 Hart CL 203.
270 Hart CL 203.
271 If they do not believe it for themselves, surely they do not believe it for others.
particular instance, then obedience to the law could be reduced to a response to sanctions, which Hart emphatically wishes to avoid. Put simply, if Hart thinks that the law is about acceptance of certain rules, he needs to offer a reason for the acceptance of those rules or at least acknowledge that his theory depends on some normative explanation of it.

To be clear, none of this yet suggests that the form or substance of the law be constrained by any particular normative content. Even so, all of this does point to the need for greater normative content in his theory than Hart is willing to allow. If obligation is correctly a central feature of the law, then any adequate theory must suppose there is some justification for that obligation. Otherwise, it is merely coercion. This need not necessarily commit advocates of the command model to a particular normative view, but it must commit them to the position that the command model depends on some normative view. In approvingly discussing what he calls the “minimum content of Natural Law,” Hart explains that the argument for “specific content” of law and morals derives from the claim that “without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other.”

But if Hart accepts even these very basic premises, he must commit himself to a theory of the good that enables him to speak of what people’s purposes are or what makes survival a worthy goal. (It also makes it all the more surprising that Hart seems fairly sanguine about the possibility of a legal system that produces a populace that is “deplorably sheeplike” and that “might end in the slaughterhouse.”) Indeed, looking a bit further, Hart might see that the same premises that enable him to recognize survival as a good would point toward other goods that are equally natural and basic. Nor can the talk about the law’s purpose be shrugged off as part of

\footnote{Hart CL 193.}
\footnote{Hart CL 117.}
Hart’s analysis of natural law theory, rather than his own concept of law, since he writes explicitly, “Our concern is with social arrangements for continued existence, not with those of a suicide club.” Hart recognizes that “to raise this or any other question concerning how men should live together, we must assume that their aim, generally speaking, is to live,” and concludes that “there are certain rules of conduct which any social organization must contain if it is to be viable.” Hart does not appear to be saying that this is merely one way to think about the law; he seems to be saying that this is the right way to think about the law—that the viability of the society is what gives the law purpose. Thus, if Hart’s concept of law cannot stand, not least in light of his own observations about the nature and purpose of law, then the search must go on for a better concept of law or, more precisely, legal obligation. It may be ironic that Hart, the great positivist, spurs on the search for a normative concept of law, but it is his emphasis on obligation as the characteristic feature of law that requires the authority of law to be based in something more than coercion or prediction or custom.

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274 Hart CL 192.
275 Hart CL 193.
Raz and Authority

What is the source of law’s authority? Hart shows that the command model does not properly describe the content and function of law. But, as a descriptive theory, his book does not directly address the question of whether there is, in fact, an obligation to obey the law and, if so, where it comes from. That question, instead, is the work of a normative theorist like Joseph Raz, who offers the most influential contemporary account of law’s authority. Austin explains law’s authority, writing, “Whoever can oblige another to comply with his wishes, is the superior of that other,” which, as a purely descriptive matter, may as well be correct.276 There is no reason to deny that someone in a position to impose sanctions on another can, in practice, compel obedience. For obvious reasons, however, such authority is not necessarily legitimate. While Hart rejects Austin’s approach, he goes no further than Austin the explaining the obligatoriness of law. This is problematic, however, if the whole point is to justify law’s authority, including the use of coercion—to explain why the authority of law is distinct from criminal or other forms of coercion where, in Hart’s terms, one may be obliged but not obligated to obey. In an early work, Raz puts it this way: “A person needs more than power (as influence) to have de facto authority. He must either claim that he has legitimate authority or be held by others to have legitimate authority. There is an important difference, for example, between the brute use of force to get one’s way and the same done with a claim of right.”277

276 Austin 24-5.
The justification of such claims is an important subject of Raz’s legal philosophy. The problem, though, is that Raz fails to produce an adequate account of law’s authority. While he succeeds in showing that there is often good reason to comply with the requirements of the law, he never shows that this amounts to an obligation to obey the law. There are, sometimes, moral obligations to act in ways that overlap with what the law requires. But even in those cases, there is never a moral obligation to obey the law just as such—never an obligation to comply simply because the law requires it. This is fully consistent with Raz’s denial of a general moral obligation to obey the law. Nevertheless, without this general obligation, Raz cannot show that there is ever a moral obligation to obey the law qua law: the authority of law vanishes. Instead, his account of authority, such as it is, is limited to what in simple cases is fairly obvious: that there is sometimes a moral obligation to do what the law also happens to require.

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As Raz makes clear, his chief concern about authority is not only the obvious one, namely that power, wielded through force alone, is not the same as legitimate authority. Instead, Raz’s main preoccupation is with the conflict between authority and autonomy. In one work, Raz opens his treatment of authority this way:

The paradoxes of authority can assume different forms, but all of them concern the alleged incompatibility of authority with reason or autonomy. To be subjected to authority, it is argued, is incompatible with reason, for reason requires that one should always act on the balance of reasons of which one is aware. It is the nature of authority that it requires submission even when one thinks that what is required is against reason. Therefore, submission to authority is irrational. Similarly the principle of autonomy entails action on one’s own judgment on all moral questions. Since authority sometimes
requires action against one’s own judgment, it requires abandoning one’s moral
autonomy. Since all practical questions may involve moral considerations, all practical
authority denies moral autonomy and is consequently immoral.\textsuperscript{278}

In other works, Raz’s theory of authority is framed specifically as a response to the philosophical
anarchists and particularly to Robert Wolff, whose work he addresses directly. In Wolff’s view,
“Taking responsibility for one’s actions means making the final decisions about what one should
do.”\textsuperscript{279} Furthermore, “The moral condition demands that we acknowledge responsibility and
achieve autonomy wherever and whenever possible.”\textsuperscript{280} This sets up an opposition between man
and the state because the “defining mark of the state is authority, the right to rule” while the
“primary obligation of man is autonomy, the refusal to be ruled.”\textsuperscript{281} Therefore, according to
Wolff, “Anarchism is the only political doctrine consistent with the virtue of autonomy.”\textsuperscript{282}

Introducing his edited volume on authority, which includes Wolff’s above-cited essay,
Raz wonders, “Can I not have absolute right to decide my own action while conceding an equal
right to all? That is anarchy. But it may be that only anarchy avoids the problem of
authority.”\textsuperscript{283} Continuing, Raz summarizes the problem:

The duty to obey conveys an abdication of autonomy, that is, of the right and duty to be
responsible for one’s action and to conduct oneself in the best light of reason. If there is
an authority which is legitimate, then its subjects are duty bound to obey it whether they

\textsuperscript{278} Raz AL 3.
\textsuperscript{279} Robert Wolff, “The Conflict between Authority and Autonomy,” \textit{Authority}, ed. Joseph Raz
(New York: New York University, 1990) 27. See also: Robert Wolff, \textit{In Defense of Anarchism}
(Berkeley: University of California, 1998).
\textsuperscript{280} Wolff 28.
\textsuperscript{281} Wolff 29.
\textsuperscript{282} Wolff 29.
\textsuperscript{283} Joseph Raz, “Introduction,” \textit{Authority}, ed. Joseph Raz (New York: New York University,
1990) 4 (hereafter “Intro”).
agree or not. Such a duty is inconsistent with autonomy, with the right and the duty to act responsibly, in the light of reason. Hence, Wolff’s denial of the moral possibility of legitimate authority. This is the challenge of philosophical anarchism.\textsuperscript{284}

Raz’s theory of authority is a response to this claim, an attempt to rebut the philosophical anarchists by arguing that authority can be consistent with autonomy under the right circumstances. His task, in other words, is to demonstrate that authority can be consistent with acting “in the best light of reason.”

Raz’s theory of authority comprises three main theses. First, there is the preemption thesis: “The fact that an authority requires performance of an action is a reason for its performance which is not added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.”\textsuperscript{285} Authoritative directives are meant to preempt the reasons to do or not do an action by excluding them from consideration. In this way, the authoritativeness of a directive is not weighed against the reasons for action but preempts them. In Raz’s locution, a reason for action is a first-order reason while a reason to act or not act for a reason is a second-order reason. More narrowly, a reason to not act for a reason is a special kind of second-order reason called an exclusionary reason because it excludes at least some first-


order reasons.\textsuperscript{286} This is generally how law’s authority is meant to work. Of course, the preemption thesis only describes the function of authority; it is the other two theses that justify it.

Second is the dependence thesis. The dependence thesis states, “All authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive.”\textsuperscript{287} Such reasons are called dependent reasons, a category that includes the reasons for action that apply to the subject and any decisions that “sum them up.”\textsuperscript{288} Because the dependence thesis is “a moral thesis about the way authorities should use power,”\textsuperscript{289} it “does not claim that authorities always act for dependent reasons, but merely that they should do so.”\textsuperscript{290} Adherence to the dependence thesis is one condition for legitimate authority.

The other condition for legitimate authority is the third thesis, the normal justification thesis:

The normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.\textsuperscript{291}

\textsuperscript{286} Joseph Raz, \textit{Practical Reason and Norms} (New York: Oxford University, 1999) 39 (hereafter “PRN”).
\textsuperscript{287} Raz MF 47. Raz is quick to point out that the dependence thesis does not entail the no difference thesis, which he rejects and which says that “the exercise of authority should make no difference to what its subjects ought to do” (Raz MF 48).
\textsuperscript{288} Raz MF 41.
\textsuperscript{289} Raz MF 53.
\textsuperscript{290} Raz MF 47.
\textsuperscript{291} Raz MF 53.
As such, authority that meets the terms of the dependence thesis and the normal justification thesis is legitimate because it does not require a sacrifice of autonomy. That is, since the directives are based on reasons that the subject already has for acting, and since the subject will better fulfill his own purposes as established by those reasons, the subject is not doing anything other than that which he ought to do on the balance of reasons that apply to him. Accordingly, though the normal justification thesis is “not the only” justification for authority, it is, eponymously, “the normal one.”

The central problem with the Razian justification of authority, for the purpose of understanding law’s authority, is that it can never produce an obligation to obey. The best that it can do is show when it is legitimate to defer to authority but never that there is an obligation to do so. The reason for this emerges from the setup of the question: If the problem is that authority jeopardizes autonomy, then the solution requires that autonomy be preserved. But autonomy is preserved anytime it is merely morally permissible for the subject to defer to authority. On this understanding, autonomy and authority exist in harmony whenever it is permissible to comply with the law, even if it is never obligatory to comply. Of course, Raz recognizes this in his denial of a general obligation to obey the law. In no uncertain terms, Raz writes:

I shall argue that there is no obligation to obey the law. It is generally agreed that there is no absolute or conclusive obligation to obey the law. I shall suggest that there is not even a prima facie obligation to obey it. In other words, whatever one’s view of the nature of

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Note 292: Raz MF 53.
the good society or the desirable shape of the law it does not follow from those or indeed from any other reasonable moral principle that there is an obligation to obey the law. 293

If so, Raz’s theory shows when authority is morally unproblematic, but, despite the implications otherwise, it never generates an obligation to obey the law just as such.

In addition to the core problem with Raz’s account, which is addressed in detail below, there is a preliminary problem concerning Raz’s understanding of autonomy that allows him to accord it insufficient weight in his calculations. Raz argues that deferring to authority is not an improper sacrifice of autonomy when the authoritative directives conform to reasons that the subject has for action, anyway. But this assumes, crucially, that what is relevant about autonomy is the outcome that results from deciding what to do according to the best light of reason—emphasis on the best light of reason. Raz provides no explanation, though, for why the emphasis should not be placed on the deciding. Perhaps true moral responsibility, and particularly the form of moral responsibility that concerns the philosophical anarchists, is found not in successfully acting according to the reasons one has for action but in independent decision-making. This is a highly plausible interpretation of the philosophical anarchists’ problem with authority. After all, if their main concern were for outcomes, then the anarchists’ key point

293 Raz AL 233. For further examples, see also: “My starting point is the assumption that there is no general obligation to obey the law, not even a prima facie obligation and not even in a just society” (Raz AC 103); “A good deal of common ground seemed to have been established among many of the political and moral theorists who did and still do attend to the issue. It is summed up by the view that every citizen has a prima facie moral obligation to obey the law of a reasonably just state. . . . I have joined several theorists who challenge this consensus” (Raz TOTO 139); “The final section of the chapter . . . denies the existence of a general obligation to obey the law even in a reasonably just society, though it is argued that just governments may exist, and that in certain circumstances their existence is preferable to any alternative method of social organization” (Raz MF 70); “The fact that normative language is used to describe the law helped to perpetuate two of the great fallacies of the philosophy of law. One is the fallacious belief that laws are of necessity moral reasons (or that they are morally justified or that there are always moral reasons to obey each one of them)” (Raz PRN 154-55).
would not be the illegitimacy of all states but instead an empirical doubt about whether governments are more likely to “get it right” than are ungoverned societies. If that were the question, then Raz and the anarchists would simply be on the two sides of that empirical question, Raz having more confidence than they about states’ likelihood of getting it right. Yet it does not appear that the debate centers on this empirical disagreement. If the philosophical anarchists are defending autonomy in principle and not only when authority leads to worse outcomes, then Raz may have autonomy wrong.

Raz acknowledges this critical assumption (that the compatibility of autonomy and authority depends on outcomes, not process) once in passing:

So long as this is done where improving the outcome is more important than deciding for oneself this acceptance of authority, far from being either irrational or an abdication of moral responsibility, is in fact the most rational course and the right way to discharge one’s responsibilities. But it may very well be that, for the philosophical anarchists, the choice to not decide for oneself is the real abdication of moral responsibility. At the very least, the burden lies with Raz to explain why autonomy is primarily valued because it enables individuals to more successfully act on the reasons that apply to them (to get better outcomes) rather than because it consists in deciding for oneself even when it means getting things right less often than if one deferred to authority.

In response, Raz’s argument may be that choosing to decide for oneself despite knowing that deferring to authority offers better outcomes is not to take moral responsibility but to act

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294 Raz MF 69.
295 “Better outcomes” serves as shorthand for what Raz means when he says “more likely to act successfully for the reasons which apply to him” and “better to conform with reason,” as below.
irrationally. That is, if Raz maintains that it is not merely imprudent but irrational to knowingly choose a course that produces worse outcomes (defined as a less successful conformance to the reasons one has for action), then it makes sense for Raz to argue that there is no loss in deferring to authority in those cases. There is no loss because the exercise of autonomy in those cases is not valuable.

But this dismissal of deciding for oneself is a questionable defense of Raz’s position. To illustrate what it means for authority to produce better outcomes, Raz occasionally uses the example of a stockbroker whose success rate is twenty percent better than his client’s. In that situation, if the client wishes to maximize his profits, he ought to defer to the broker’s advice one hundred percent of the time. Occasionally substituting his own judgment for the stockbroker’s would, on average, result in lower returns. Nevertheless, the irrationality of ignoring the broker’s advice assumes that the client’s only aim is to maximize profits. It is hardly a stretch, though, to imagine an investor who sometimes wishes to win or lose on his own bets. He might value the “sport” of the actual decision-making—and not only because he believes he will learn the markets better from his own trial-and-error investing or because of the added thrill he gets from picking a winner himself but also because he finds intrinsic value in making decisions for himself. To be sure, this example has its limits since as the goal of investing, for most people most of the time, is to secure the best returns regardless of who makes the decisions. But there are many activities (including investing, sometimes) where part of the satisfaction and benefit come from the activity itself, win or lose, succeed or fail.

Even so, it would not be wholly unreasonable for Raz to maintain that consciously choosing a path that yields worse outcomes is reckless to the point of being irrational and, accordingly, forfeits any moral value that might otherwise be found in free choice. Yet this
counterargument already builds in assumptions about what counts as better and worse outcomes or, in other words, what counts as a reason for action. Therefore, Raz can reconcile authority and autonomy only by assuming that each is valuable only in securing better outcomes.

Framing the problem in terms of autonomy thus reveals the absence of a distinct concept of law’s authority altogether. If the source of law’s authority is the supposed irrationality of acting contrary to the law in certain situations, that is, of acting autonomously, then the driving force behind one’s compliance with the reasons one has for action is not authority but rationality. It is conformance with reason, not deference to authority. To be sure, authority plays a role in identifying what is to be done in order to comply with one’s own reasons, but, with that limited function, the law is really no more than a glorified stockbroker, an adviser who knows better, and cannot properly be seen to obligate.

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The central, theoretical problem—that Raz never actually grounds an obligation to obey the law—stems in part from Raz’s focus on answering the challenge of the philosophical anarchists, as seen above. In defending the concept of authority against them, Raz only needs to define the circumstances under which it is morally permissible (though not necessarily obligatory) to substitute the judgment of the authority for one’s own. As such, Raz’s main theory does not reach the question of obligation, strictly speaking. The normal justification thesis specifies the conditions under which it is morally permissible to defer to authority, but it does not logically follow that there is a corresponding obligation to do so.²⁹⁶ Raz often implies

²⁹⁶ That is true unless Raz believes there is a moral obligation to choose better outcomes over autonomous decision-making (and that having made a decision autonomously cannot itself be constitutive of a better outcome). But it may be rational to decline expert advice, and it may be morally permissible even if it is irrational.
that the two go together, and his occasionally ambiguous use of terms like “legitimate authority” to mean either “authority that it is permissible to obey” or “authority that it is obligatory to obey” reflects this confusion. In fairness, the question of the permissibility of deferring to authority may be conceptually prior to the obligation to obey, in which case it is understandable for Raz to address that first. But the question of obligation remains unanswered.

Either way, the criticism here is not one of sloppiness; it is a much more fundamental point about Raz’s failure to offer a proper account of legal obligation. It is not just that there is in Raz’s account no general obligation to obey the law but that, even when he defends obligation more narrowly, it is never to the law itself. But this leads him into difficulty since, despite his denial of a general obligation to obey the law, Raz does speak as though there is an obligation to obey the law under certain circumstances. In other words, he needs an adequate account of legal obligation that covers at least those specific instances, but he does not have one. It would be a different matter if there were never an obligation to obey the law.

And Raz does indeed argue for an obligation to obey the law in some cases. He states:

Those who do not voluntarily or semi-voluntarily place themselves under the authority of relatively just governments are under a partial and qualified obligation to recognize the authority of such a government in their country. In particular its authority should be recognized to the extent necessary to enable it to secure goals, which individuals have reason to secure, for which co-ordination is necessary or helpful, and where this is the most promising way of achieving them.297

This must refer to obligation and not just the permissibility of yielding to authority. Similarly, Raz writes, “We are forced to conclude that while the main argument does confer qualified and

297 Raz MF 100.
partial authority on just governments it invariably fails to justify the claims to authority which these governments make for themselves.”^298 The “claims to authority which these governments make” are claims about an obligation to obey the law. After all, no government merely claims that it is morally permissible to comply with its laws. If the failed claims to authority are claims of obligation, then, by the same token, the qualified and partial authority, which is justified, also refers to obligation. What fails is the claim to general authority. There, the question is about the scope of authority, and Raz’s point is that the obligation to obey the law, while extant, is not as general as governments claim. Nevertheless, even this limited obligation to obey the law is more than Raz’s theory can bear.

The normal justification thesis, in combination with the dependence thesis, essentially means that law’s authority is a matter of expertise, broadly construed. As Raz writes, “The main argument for the legitimacy of any authority is that in subjecting himself to it a person is more likely to act successfully for the reasons which apply to him than if he does not subject himself to authority.”^299 Or, simply put, “the normal justification of authority is that following it will enable its subjects better to conform with reason.”^300 This produces what Raz refers to as “the service conception of the function of authorities, that is, the view that their role and primary normal function is to serve the governed.”^301 By “serve the governed,” Raz means that “the service conception establishes that the point of having authorities is that they are better at complying with the dependent reasons.”^302 In yielding to authority in such cases, people can better comply with the reasons that apply to them than if they try to comply on their own without

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^298 Raz MF 78.
^299 Raz MF 71.
^300 Raz MF 73.
^301 Raz MF 56.
^302 Raz MF 67
the assistance of the authority. This, of course, is why in Raz’s view authority does not conflict with autonomy.

Authority can fulfill this function by virtue of its expertise, which is to say its ability to cause people to more successfully act on the reasons that apply to them. Raz, for one, disfavors the term “expertise,” claiming that it is a misunderstanding to say that “the legitimacy of an authority rests on its greater expertise” like a “big Daddy who knows best.” But taking the term more broadly, it is entirely appropriate and useful for characterizing Raz’s view. Raz identifies five main ways in which authority can produce better outcomes. First, authority can just be “wiser.” That is, the authority may have greater knowledge or expertise in the relevant area. If so, the authority may know better than the subjects how they should act in order to comply with the reasons that apply to them. This is the classic example of expertise. But authority can have other advantages as well. The second advantage of authority, for example, is “a steadier will less likely to be tempted by bias, weakness or impetuosity,” whether because the authority is not an interested party or because it is more insulated from countervailing pressures. Third, Raz suggests, subjects can often best “follow right reason” through “an indirect strategy,” especially the indirect strategy of deferring to authority, whereby they “guid[e] their action by one standard in order to better conform to another.” Fourth, authority can aid an individual in avoiding the “anxiety, exhaustion, or . . . costs in time or resources” of deciding

303 The phrase “the reasons that apply to them” signifies the reasons that apply to the subjects before (apart from) receiving instructions from the authority. For clarity, it is also rendered sometimes as “the reasons that already apply to them” or “the reasons that apply to them, anyway.”
304 Raz MF 74.
305 Raz MF 75.
306 Raz MF 75.
307 Raz MF 75.
for oneself.\footnote{Raz MF 75.} Fifth and finally, the authority is sometimes “in a better position to achieve . . . what the individual has reason to but is in no position to achieve.”\footnote{Raz MF 75.} That “some of these reasons are currently out of fashion in discussions of political authority” does not bother Raz; he maintains that “they all have their role to play.”\footnote{Raz MF 75.} In all of these cases, the role of authority is in exercising the distinct advantages it has in virtue of being an “expert”: more knowledgeable, stronger willed, better positioned to formulate a plan, and so on. In this most general sense, authority is about “expertise” simply insofar as the authority is better at getting the subjects to act for their own reasons than they are at doing so on their own.

A key feature of such an account of authority is that it does not produce a general obligation to obey the law. Crudely put, if authority is based on expertise, then there is no obligation to obey when the subject knows better.\footnote{Raz MF 75.} But this is not a concession of Raz’s theory: rather, it is a main point. As Raz explains, the scope of authority:

depends on the person over whom authority is supposed to be exercised: his knowledge, strength of will, his reliability in various aspects of life, and on the government in question. These factors are relevant at two levels. First they determine whether an individual is better likely to conform to reason by following an authority or by following his own judgment independently of any authority. Second they determine under what circumstances he is likely to answer the first question correctly.\footnote{Raz MF 75.}

\footnote{Another inevitable conclusion is that the government “may have more authority over one person than over another” (Raz MF 74).}

\footnote{Raz MF 73.}
On this score, Raz offers some instructive examples. In one case, Raz writes, “An expert pharmacologist may not be subject to the authority of the government in matters of the safety of drugs, an inhabitant of a little village by a river may not be subject to its authority in matters of navigation and conservation of the river by the banks of which he has spent all his life.”

Similarly:

One person has wide and reliable knowledge of cars, as well as an unimpeachable moral character. He may have no reason to acknowledge the authority of the government over him regarding the road worthiness of his car. Another person, though lacking any special expertise, knows local conditions well and has great insight into the needs of his children. He may have no reason to acknowledge the government’s authority over him regarding the conditions under which parents may leave their children unattended by adults.

Importantly, Raz is quick to point out that the laws in these situations are in no way unjust. The lack of legitimate authority here over those subjects is not about unjust laws and civil disobedience. Nevertheless, where law’s authority rests on its ability to produce better outcomes, that authority is absent when the benefits conferred by the exercise of authority are absent. Although the law is just when “based in reasons which apply to its subjects,” those particular laws have no authority over the particular subjects who “are able to do better if they refuse to acknowledge the authority of this law.”

Moreover, in its full generality, the exemption from authority, as it were, does not necessarily have to do with any special knowledge, skill, or position of the subject, as in the case

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313 Raz MF 74.
314 Raz MF 78.
315 Raz MF 78.
316 Raz MF 78.
of the pharmacist or villager. Instead, the lack of authority has primarily to do with the law’s failure to overlap with reasons that already apply to the subject. Even when the law requires something that the subject would have a moral obligation to do (or refrain from doing) under other circumstances, the subject is free to disregard the law in specific cases where that moral obligation, apart from the demands of the law, does not obtain. In a striking hypothetical about a law prohibiting river pollution, Raz argues, “If a sufficiently large number of people refrain from polluting the rivers, they will be clean, and each person has a moral reason to contribute to keeping them clean. But if most people pollute them and they are badly polluted there is normally no reason why I should refrain from polluting them myself.” In Raz’s analysis:

It matters not at all to one’s moral reasoning whether the practice of keeping the rivers clean is sanctioned by law . . . . It is the existence of the practice that matters, not (except in special circumstances) its origin or surrounding circumstances. On the other hand, suppose that the law requires keeping the rivers clean but that nobody obeys and the rivers have turned into public sewers. The moral reasons for not throwing refuse into them that we have been considering do not exist in such circumstances notwithstanding the legal requirement not to do so. According to Raz’s theses, if the law does not correspond to reasons that already apply to

\[317\] Raz AL 248.  
\[318\] Raz AL 249. Though he is making a different kind of point, Raz’s reliance here on the existence of a social practice as the source of obligation hearkens to Hart’s concept of law as well.  
\[319\] There are possible exceptions, which is why Raz, too, uses the word “normally.” For example, if the government were off to a successful start in a campaign to change the current
the subject—if the law does not overlap with a moral obligation apart from the one that would be
generated by the law if the law could do so (what was referred to above as an “independent
moral obligation,” meaning independent of the law)—then it has no authority over that subject in
that case. In sum, there is no obligation to obey the law just because it is the law; there is only
reason to conform when the requirements of the law overlap with what one already has an
obligation to do. As before in relation to autonomy, Raz is left with no concept of the authority
of law per se. Law on its own can advise but never obligate.

Once again, the absence of any obligation to obey the law does not mean that authority
makes no difference for one’s practical reasoning, but it does mean that Raz is not speaking of
authority in a meaningful way. Authority can make a difference:

The intrusion of the bureaucratic considerations is likely to lead to solutions which differ
in many cases from those an individual should have adopted if left to himself. Reliance
on such considerations is justified if and to the extent that they enable authorities to reach
decisions which, when taken as a whole, better reflect the reasons which apply to the
subjects. That is, an authority may rely on considerations which do not apply to its
subjects when doing so reliably leads to decisions which approximate better than any
which would have been reached by any other procedure, to those decisions best supported
by reasons which apply to the subjects.\textsuperscript{320}

Raz later explains, “This, to repeat a point made earlier, does not mean that their sole role must
be to further the interest of each or of all their subjects. It is to help them act on reasons which

\textsuperscript{320} Raz later explains, “This, to repeat a point made earlier, does not mean that their sole role must
be to further the interest of each or of all their subjects. It is to help them act on reasons which

practice of polluting the river, there could be a moral obligation to refrain from polluting because
the subject’s actions might make a difference for others’ actions (Raz AL 248, footnote 13).
\textsuperscript{320} Raz MF 52.
bind them.” Hence, it is the preexisting reasons and not the law that binds the subjects. And if
the law does not make a difference by creating obligations, then, if it makes any difference, it
does so by compelling obedience through force. While this de facto authority may be a
necessary condition for de jure (legitimate) authority on Raz’s view, it is certainly not a
sufficient one. Therefore, Raz cannot speak meaningfully here of legitimate authority, either
because law’s authority is based on coercion, in which case it is not really legitimate, or because
the law merely provides advice, in which case it is not really authority. In both cases, there is no
moral obligation to obey.

This result, that there can be reasons to conform with the law but no obligation to obey it,
is confirmed by what Raz says about the “paradox of the just law.” Raz explains the paradox
as follows:

The more just and valuable the law is, it says, the more reason one has to conform to it,
and the less to obey it. Since it is just, those considerations which establish its justice
should be one’s reasons for conforming with it, i.e., for acting as it requires. But in
acting for these reasons one would not be obeying the law, one would not be conforming
because that is what the law requires. Rather one would be acting on the doctrine of
justice to which the law itself confirms.

This leads to a puzzling situation in which there are two categories of people whose
actions conform with the requirements of the law, yet for neither does the question of legitimate

\[ \text{321 Raz MF 56.} \]
\[ \text{322 Raz TOTO 141.} \]
\[ \text{323 Raz TOTO 141-42. To be sure, Raz believes the paradox is “oversated” because “sometimes the law makes a moral difference.” There are some cases where “it is morally obligatory to act as the law requires because it so requires,” but “in some fairly central cases there is no such obligation” (Raz TOTO 142).} \]
authority matter in their practical reasoning. First, there are people who recognize an independent moral obligation to act in a certain way and do so. Those people cannot meaningfully be said to be deferring to authority because they are doing that which they understand themselves to have reason to do, anyway, without necessarily any intention of acting that way because the law requires it. Second, there are people who do not recognize the moral obligation but follow the law under coercion. They comply only because they are forced and not because they recognize the legitimacy of authority. If they recognize the legitimacy of the authority, it is because they understand it to require what they already have reason to do, in which case they are back in the first category: hence the paradox.

Raz makes this particularly clear in the river-pollution example, where “the moral reasons affecting such cases derive entirely from the factual existence of the social practice of co-operation and not at all from the fact that the law is instrumental in its institution or maintenance.”\(^\text{324}\) The law plays a role in creating those moral reasons insofar as it fosters the social practice from which the moral obligation stems. But the moral obligation exists with or without the corresponding law.

At the same time, Raz has no problem with the law coercing those who fail to recognize their moral obligations.\(^\text{325}\) This is unsurprising given his thesis that authority is justified when it enables its subjects to better act upon the reasons that apply to them. Where moral obligations are those reasons, authority’s legitimacy need not depend on whether the subjects recognize

\(^{324}\) Raz AL 249.

\(^{325}\) Raz MF 103-4. In the case of the river pollution, this assumes that the social practice of not polluting the river creates an independent moral obligation where none existed before (when everyone did pollute the river), but that assumption is not at issue here.
those obligations. What is surprising, though, is that this, too, has nothing to do with law’s authority per se.

This can be seen in what Raz says about law’s function in another respect: law as insurance (or, perhaps better, assurance). Although it is not the full story of authority, Raz writes that, simply speaking, “law’s direct function is to motivate those who fail to be sufficiently moved by sound moral considerations” because “it forces them to act as they should by threatening sanctions if they fail to do so.” In this way, the law “reassures the morally conscientious. It assures him that he will not be taken advantage of, will not be exploited by the unscrupulous.” Importantly, though, Raz presents this “oversimplified picture” as a depiction of “the good a government without authority can do.” This is “government without authority” because government need not possess legitimate authority over those subjects in order to justifiably coerce them. The justification for coercing those would-be lawbreakers is not found in a moral obligation to obey the law but in their independent moral obligation to act in a way the law also requires. For such purposes, the government need not have authority over the people it coerces.

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326 As in some of the earlier examples, though, the reasons need not be duties.
327 Raz TOTO 143.
328 Raz TOTO 143.
329 Raz TOTO 143. Emphasis added.
330 The moral obligation is “independent” in that is does not exist because the law requires it, even if the law also requires it. It exists apart from the law’s requirements.
331 Raz makes the same point elsewhere using the example of legal enforcement of anti-defamation laws. His formulation, denying the need for authority, is unambiguous:

It is worth pausing here momentarily to observe that such legally provided remedies can be morally justified even when applied to people who are not subject to the authority of the government and its laws. . . . One need not invoke the authority of the law over the defamer to justify such action. The law may not have authority over him. It makes no difference. The importance of the law in such matters is in creating a centre of power which makes it possible to enforce moral duties. It does so through the authority it
Despite the limited claims he makes about the obligation to obey the law, Raz’s analysis here fails to cohere. It is hard to account for what exactly he means by “authority.” Common sense dictates that either the government has legitimate authority over certain subjects in certain situations and can justifiably enforce the law in those situations, or the government does not have legitimate authority and cannot. But Raz argues that government can justifiably coerce those not subject to its authority, or, put another way, coerce without authority. Surely Raz does not want to suggest that the government is the same as any third party that enforces moral obligations inasmuch as anyone can enforce moral obligations against anyone else.\textsuperscript{332} If Raz’s argument were that the government is simply a third party enforcing moral obligations because it can, then law’s authority would have nothing to do with moral legitimacy and everything to do with the government’s superior strength. This, of course, is not Raz’s view.

This incoherence notwithstanding, Raz defends the law’s enforcement of moral obligations without authority in the following way:

The upshot of the discussion in this section is that the law is good if it provides prudential reasons for action where and when this is advisable and if it marks out certain standards as socially required where it is appropriate to do so. If the law does so properly then it reinforces protection of morally valuable possibilities and interests and encourages and supports worthwhile forms of social co-operation. But neither of these legal techniques exercises over government officials, and because the population at large is willing to see morality enforced, even in matters in which they are not subject to the authority of the government. (Raz MF 103)

Even more straightforwardly, Raz writes, “It is important to remember that a government’s power can and normally does quite properly extend to people who do not accept its authority. They are subject to its power partly because those who accept its authority are willing to obey its instructions, even when they affect people who do not accept its authority” (Raz MF 102).

\textsuperscript{332} This is probably not Raz’s argument even if it is true that anyone can enforce moral obligations against anyone else, which, too, is unlikely.
even when admirably used gives rise to an obligation to obey the law. It makes sense to judge the law as a useful and important social institution and to judge a legal system good or even perfect while denying that there is an obligation to obey its laws.333

Yet, in light of this reasoning, the case of the polluted river raises an important practical difficulty about the possibility for the law to motivate social change. In Raz’s hypothetical, everyone pollutes the river, and therefore there is no moral obligation to refrain from doing so, regardless of what the law says. When one’s actions can make a difference, though, such as when people do generally refrain from polluting the river, in which case an individual’s pollution may affect the river appreciably, or when the government has successfully begun reforms, in which case one’s cooperation may influence others and contribute to a general change in public behavior, then there is a moral obligation to refrain from polluting. Without that underlying moral obligation, however, an anti-pollution law would have no legitimate authority. From what source could such an obligation arise? If enough people happen to change their behavior, the new social practice could confer an obligation to refrain from polluting. But that has nothing to do with law and authority. In that example, law is not the source of the change and cannot be the source of an initial obligation that motivates the change since there is no obligation, law or no law, until there is a social practice to refrain from polluting. If, on the contrary, people do not change their behavior—which is precisely the case in which the law’s intervention is most needed—then government-led reform can only begin by forcing people to comply. This cannot be justified on Raz’s terms, though, because even government with authority, let alone government without authority, is only justified in enforcing moral obligations that people already have. Since everyone pollutes the river, no one has an obligation to do otherwise, even when the

333 Raz AL 249.
law changes. The situation forms something of a catch-22 whereby, for lack of a certain social practice, there is no moral obligation, and, for lack of the moral obligation, the authority cannot justifiably coerce the behavior that would create the social practice. There are no dependent reasons to which the authority can appeal for justification because, as Raz clearly states, there is no reason to refrain from polluting the river when polluting the river is the norm. As a result, there seems to be no place for the law to effect change.

Therefore, it must be that Raz, in spite of this analysis, believes the law can catalyze this sort of change. But, even if there is such hope, the law is unlikely to be efficacious if there is no general obligation to obey the law. Presumably, reforms such as the law banning pollution of the river only work if people believe there is an obligation to obey the law since, as stipulated in Raz’s example, they have no other reason to refrain from polluting. Yet Raz insists there is no general obligation to obey the law. So there must be a different obligation to refrain from polluting the river that motivates the change. In the absence of an obligation to obey the law, it would have to be an independent moral obligation to contribute to the creation of a new social practice that would be beneficial, and indeed morally binding, if it existed. But if it were the case that everyone always had a moral obligation to start creating such social practices, then there would always be an obligation to refrain from polluting the river. Yet Raz explicitly says this is not so, so he evidentially does not count an obligation to start beneficial social practices among the reasons people already have for action.

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334 Of course, a belief in the obligation to obey the law need not entail an actual obligation to obey the law. But there is no indication that Raz favors widespread deception about the obligation to obey the law in order to get a social practice off the ground.

335 If there actually were such a moral obligation (and not just a belief in one—though for these purposes the two coincide), then the law could legitimately enforce it, too.
In any event, there is something strange, if not incoherent, about a moral obligation to contribute to an as-yet nonexistent social practice that, if it existed, would generate a moral obligation to conform to it. For one thing, on this understanding, moral obligations multiply impossibly. There are infinitely many non-existent but potentially beneficial social practices, but that cannot confer an obligation on everyone to start participating in all of them, perhaps even when it is reasonable to expect others will go along. And if, on the contrary, people do indeed always have a moral obligation to create such social practices, then the practical difference between Raz and his opponents vanishes because then there is always an independent moral obligation coinciding with the law. In that case, even if there were no general obligation to obey the law in principle, there would be one in practice.

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Alternatively, Raz offers an argument for authority and the obligation to obey the law rooted in the notion of respect. He develops this through an extensive analogy to friendship. Friendship itself, Raz claims, provides reasons for action, and the correctness of relevant actions derives from those actions’ suitability to such a relationship. The reasons for action created by friendship are called expressive reasons “because the actions they require express the relationship or attitude involved.” So, too, respect for the law or consent to its requirements can be expressive of a relationship of loyalty to or identification with one’s society, what Raz calls “an attitude of belonging and of sharing in its collective life.” Respect for the law follows naturally from this attitude because “a person identifying himself with his society, feeling that it is his and that he belongs to it, is loyal to his society. His loyalty may express

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336 Raz AL 253-58.
337 Raz AL 255.
338 Raz MF 91.
itself, among other ways, in respect for the law of the community.” And although respect may follow naturally, Raz is quick to point out that “even if loyalty to one’s community is obligatory, respect for law is not.”

In these passages, Raz’s language evinces the same ambiguity discussed earlier between reasons to do what the law says and an obligation to do it. In another treatment of the topic, Raz speaks of “acceptance” of an authority: “Identification is a common and often proper ground for accepting authority. . . . Acceptance of an authority can be an act of identification with a group because it can be naturally regarded as expressing trust in the person or institution in authority and a willingness to share the fortunes of the group which are to a large extent determined by the authority.” In that rendering, there is no notion of obligation. Much as acceptance of another person’s guidance can be an expression of trust without implying an obligation to obey that person, acceptance of authority can express trust without entailing obligation.

Elsewhere, however, Raz speaks very directly of respect for the law engendering an obligation to obey it:

Yet those who respect the law have a reason to obey, indeed are under an obligation to obey. Their attitude of respect is their reason—the source of their obligation. The claim is not merely that they recognize such an obligation, not merely that they think that they are bound by an obligation. It is that they really are under an obligation; they are really bound to obey.

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339 Raz AL 259.
340 Raz AL 260.
341 Raz MF 55.
342 Raz AL 253.
Even though Raz does not mean here a general obligation to obey the law, he obviously does understand there to be some sort of obligation, probably what he calls elsewhere a partial and qualified obligation. The problem, though, is that Raz does not account for how respect produces this obligation.

The closest thing to an explanation that Raz offers is his comparison of respect for the law to consent. Raz writes, “But in a reasonably just society this belief in an obligation to obey the law, this attitude of respect for law, is as valid as an obligation acquired through consent and for precisely the same reasons. . . . Therefore, people who share it have an obligation to obey the law that they acquire through their conduct of their own lives, as part authors of their own moral world.”343 At the same time, he is careful to say that an attitude of respect is not the same thing as consent. While consent to the law is another way to express an attitude of loyalty or identification, respect, Raz insists, “is not consent. It is probably not something initiated by any specific act or at any specific time. It is likely to be the product of a gradual process as lengthy as the process of acquiring a sense of belonging to a community and identifying with it.”344

Indeed, not only does respect not necessarily entail consent, consent is not even necessary to generate an obligation to obey. Respect alone is sufficient. Because the legitimacy of authority depends upon its ability to enable subjects to better act according to the reasons that apply to them:

a just government can exist even if its subjects are not bound by a general obligation to obey it. Therefore, consent cannot be justified as a necessary means to establish a just government. Moreover, to the extent that in order to establish or preserve a just

343 Raz MF 98.
344 Raz MF 98.
government a qualified recognition of authority is necessary, such recognition in itself, independently of consent, is sufficient to establish a suitably qualified obligation to obey.\(^{345}\)

Nevertheless, in distinguishing between consent and respect, Raz undercuts his claim that the obligation to obey the law generated by respect “is as valid as an obligation acquired through consent and for precisely the same reasons.”

The argument from respect raises several problems. First, there is a question of whether recognition is not in fact the same thing as consent, despite Raz’s protestations to the contrary. Raz writes, “Identification with one’s community is, though not morally obligatory, a desirable state, at least if that community is reasonably just. Of course consent to obey the law is not a necessary condition of such an attitude.”\(^{346}\) At the same time, according to Raz, respect for the law, which may follow from identification with the society, constitutes a reason to obey and a source of obligation. Yet how does respect function in this role? If it is something other than consent, then Raz must show how respect creates an obligation. Consequently, Raz falls back on the language of consent in describing the connection between identification with (and the ensuing respect for) one’s society and the obligation to obey the law:

Undertaking an obligation to obey the law is an appropriate means of expressing identification with society, because it is a form of supporting social institutions, because it conveys a willingness to share in the common ways established in that society as expressed by its institutions, and because it expresses confidence in the reasonableness

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\(^{345}\) Raz MF 89. Presumably, the recognition and the obligation are qualified since one’s respect may be qualified and since the law itself may be respectable only in certain aspects.

\(^{346}\) Raz MF 93.
and good judgment of the government through one’s willingness to take it on trust, as it were, that the law is just and that it should be complied with.\textsuperscript{347}

Language such as “undertaking an obligation” and “willingness” strongly suggests some form of consent, if not the discrete act of consent classically envisioned.

So, too, when Raz says that “to the extent that in order to establish or preserve a just government a qualified recognition of authority is necessary, such recognition in itself, independently of consent, is sufficient to establish a suitably qualified obligation to obey,”

the term recognition strongly suggests some form of consent. If not, Raz needs to explain what it means to recognize authority without consenting in a way that legitimates that (qualified) authority. To wit: If, on one hand, Raz intends to say that one recognizes the already-existent legitimacy of the authority, then the argument is circular since the legitimacy is meant to rest on the recognition. If, on the other hand, Raz intends to say that one recognizes the authority’s satisfaction of the terms of the dependence and normal justification theses (the satisfaction of which is the source of legitimacy), then all the questions about law as expertise arise again, and it turns out that the argument for authority from respect is not a separate argument at all.

The main problem, however, as with the argument from expertise, lies in connecting the dots from respect for the law as a reason to obey the law to respect as the source of an obligation to obey. Raz attempts to do this by equating belief in an obligation to obey the law with respect for the law. This equation is unconvincing, but even granting the equation, believing in an obligation is still not the same as having an obligation. Moreover, it is unconvincing in part because Raz himself argues that no one has an obligation to respect the law. In explaining the “proper attitude to the law,” Raz asserts:

\textsuperscript{347} Raz MF 92.
There is no general moral obligation to obey it, not even in a good society. It is permissible to have no general moral attitude to the law, to reserve one’s judgment and examine each situation as it arises. But in all but iniquitous societies it is equally permissible to have ‘practical’ respect for the law. For one who thus respects the law his respect itself is a reason for obeying the law.\textsuperscript{348}

If there is no obligation to respect the law, those who do respect it are unlikely to translate that into a belief that they have an obligation to obey it. Rather, they are likely to see themselves as having the option to express their respect by doing what the law says when and where they believe that conforming to the law will express that respect. In introducing his argument about respect, Raz explains:

\begin{quote}
that there is an attitude to law, generally known as respect for it, such that those who have it have a general reason to obey the law, that their reason is their attitude, the fact that they so respect the law, and that it is morally permissible to respect the law in this way (unless it is a generally wicked legal system).\textsuperscript{349} In other words, “respect is itself a reason for action.”\textsuperscript{350}
\end{quote}

In other words, as before, respect for the law is a reason to obey, but it still falls short of creating an obligation to obey.

At first, Raz seems to acknowledge this difference between reasons for action and obligations when he writes:

\begin{quote}
A person who respects the law expresses in this way his attitude to society, his identification with and loyalty to it. Such a person may find it appropriate to express
\end{quote}

\textsuperscript{348} Raz AL 260.  
\textsuperscript{349} Raz AL 250.  
\textsuperscript{350} Raz AL 259.
these attitudes to society, among other ways, through his attitude to the law. He may feel
it is a fitting expression of his loyalty to acknowledge the authority of the law. He will
then obey the law as it claims to be obeyed.351

But Raz continues, “In any case, for the person who respects the law, there is an obligation to
obey. His respect is the source of this obligation.”352 This begs for explanation because an
attitude of respect explains why it makes sense for subjects to act as if they have an obligation to
obey the law, but it does not self-evidently account for the existence of an actual obligation. As
with friendship, other relationships (and one’s attitude toward them) give reasons, perhaps strong
reasons, to act a certain way but do not confer an obligation to do so. Indeed, this may be the
very nature of expressive reasons. In a different way, the same holds for law as expertise: law’s
expertise provides a reason to defer to it but not an obligation.353

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One line of defense for Raz is that having an all-things-considered reason to act is just
what it means to have an obligation and, accordingly, that this is what Raz intends when he talks

351 Raz AL 260.
352 Raz AL 260.
353 It is instructive to see the way Raz elides this difference between having a reason to do
something and having an obligation to do it. In one case, Raz first writes, “It is not difficult to
see why practical respect might be thought of as a proper expression of loyalty to the society. It
is a manifestation of trust. A man who is confident that the law is just and good believes that he
has reason to do as the law requires” (Raz AL 261). This is plausible because one who trusts the
judgment of the law would do well to follow it, no less because he believes it requires the right
things of him than because it is one way of expressing his trust. In nearly the same breath,
though, Raz adds:

If a person places absolute trust in the law then he will acknowledge the authority of the
law. It is natural therefore that loyalty to one’s society can be expressed by behaving as
one would if one trusted the law implicitly. Hence the attitude of respect is a
manifestation of loyalty since it gives rise to such an obligation to obey, to such an
acknowledgment of authority. (Raz AL 261)

But behaving as though one has an obligation and actually having that obligation are different;
Raz conflates them too easily.
about the reasons generated by the law’s expertise or by respect for the law. If that is Raz’s meaning, then it closes the gap between reasons to act and the obligation to obey. Yet, on Raz’s terms, there can never be an all-things-considered reason to obey the law just as such. An all-things-considered reason to obey the law just because it is the law is, in essence, an all-things-considered reason to be law abiding, but Raz necessarily excludes the possibility of such a reason existing. To the contrary, Raz’s argument assumes that being law abiding is never its own reason for action. If being law abiding were its own reason for action, not only would there be an obligation to obey the law in some cases, there would also be a general obligation to obey the law (if an easily defeasible one), which Raz denies. Nor can Raz suggest that respect for the law generates an all-things-considered reason to be law abiding since that, too, would support unqualified authority. If one respects the law of a good society just because it is the law of a good society (which, as Raz teaches, is one way of expressing loyalty to and identification with that society), then one has an all-things-considered reason to obey all of the laws; it does not show respect for the law as law to obey only some of the laws while denying the obligation to obey the rest.

In the end, Raz’s theory does not provide a sufficient account of authority. To the extent that law does have authority, it is only in the sense of giving people a reason to act but not an obligation to obey. One possible conclusion is that there is less of an obligation to obey the law—that is, to obey it just because it is the law—than even Raz imagines, and perhaps none at all. Another possible conclusion, though, is that Raz’s theory is incomplete because he fails to consider other sources of authority. The challenge, though, is to identify a justification for law’s authority that neither evacuates it of all meaningful content by attributing the authority to other moral obligations that overlap with the law nor strips law’s authority of its legitimacy by
attributing its force entirely to coercion. Finding a justification for law’s authority, however,
first involves breaking free from the framework set out by Hart, which has had a decades-long
hold on jurisprudence.
Standing at the poles of theories of authority and obligation are the command model, often associated with Bentham and Austin, and the Razian rationalist approach. The critique of the command model is fairly straightforward. Older versions of the command model are inadequate because they treat all forms of political authority alike, which is to say, they treat all of them as authoritative. But this creates a dilemma because it must mean either that even the worst dictator is as legitimate as the most worthy liberal order or that authoritativeness is unrelated to legitimacy. In the latter case, though, authoritativeness would be reduced to simply the fact of having power, of being able to cause others to comply. This is unhelpful from a normative perspective because it says nothing new other than attaching the name “authority” to coercion; it simply describes who wields power. On a more sophisticated level, it is unhelpful because it fails to explain why, short of fear of punishment (or desire for reward), anyone should or would obey the authority. In that respect, such a view fails to take into account the fundamentally different relationship a person has with a government than with a mugger, the former of which he believes he is “obligated” to obey and the latter of which he merely feels “obliged” to obey (to use Hart’s terminology).

Even after clearing away the brush of sanctions, habits of obedience, and other unnecessary accoutrements that were seen as critical flaws in the theory, the command model appears to ground obligation in nothing more than sheer will. The commander’s commands bind because he stands in a relation of superiority to the commanded. If the commander’s superiority does not derive strictly from his ability to enforce the commands, it is rooted more fundamentally
in the nature of the relation between commander and commanded. It is the very fact of superiority that makes the commands binding. But if, following its positivist pedigree, the command model prescinds from prescribing just what establishes that superiority, then it seems to be an invitation to dictatorship. This is what is meant by sheer will. Commands would be justified simply by virtue of being the will of the commander. Thus, the command model is a theory of authority that offers insufficient justification for authority or no justification at all. It merely sets out that superiority entails authority. This is squarely at odds with contemporary liberal norms that demand an answer as to why the will of the commander binds. By what right does the commander bind the commanded?

At the same time, theories that abandon the command model altogether are also inadequate because they cannot account for or accommodate the normativity, which is to say the authoritativeness, of particular authorities. For Raz, there may be reasons to comply with, for example, the law, but saying that it is rational to do what the law says (such that it is not a violation of one’s autonomy to comply) is not the same as saying that there is an obligation to do what the law says. One could be equally free to choose an irrational course or, better yet, one among other rational courses. Similarly, for Hart, since the law finds its basis in social rules, there can be lots of good reasons to follow the law, but nothing in the theory leaves open the

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354 Some might say that, as a descriptive theory, the command model has neither the responsibility nor the resources to account for the normativity of authority. Nevertheless, without going too much into the argument against the possibility of a non-normative theory of authority, it should be said that any theory that purports to identify when authority exists implicitly suggests the idea of authority being justified; otherwise it would be making a bare empirical claim about whether people obey or not in particular cases.
possibility of showing how there could be an obligation to do so. In other words, on these views, there is no real authority, meaning no obligation to obey.

For Raz, authority is justified insofar as its directives conform to the reasons one has, independent of the authority, to act. The problem with this theory is that it is really not a theory of authority at all. To the extent that Raz’s project is to reconcile authority with autonomy, he shows how it can be rational, and therefore morally permissible, to defer to another’s judgment. Here, though, while there may be a substitution of another’s judgment for one’s own, there is no substitution of another’s will for one’s own because the deference is justified only by reference to the fulfillment of one’s own purposes. At least, to put it less controversially, for Raz there is no taking of another’s reasons (known or unknown) for one’s own. Raz’s version of authority requires, at some level, that the subject form a judgment about whether complying with the authority is consistent with his own reasons for acting. As such, Raz’s theory can never produce an obligation to obey, only a reason to obey, or a reason to act as though one has an obligation in the sense of complying with the authority despite not having an obligation to do so. Thus, Raz bequeaths a notion of authority devoid of obligation, or no authority at all.

Raz’s obligation-less theory of authority can be seen as a natural, if not inevitable, extension of Hart’s work in jurisprudence. Hart’s work is so central to contemporary thinking.

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355 Other normative factors, such as democratically legitimacy, cannot account for authority in Hart’s theory, except orthogonally. Hart’s theory could not explain the authoritateness of social practices that were not democratically legitimate nor the legality of democratically legitimate rules that were not socially practiced.

356 In the command model, there is effectively a substitution of the commander’s will for the subject’s since the fact of the command being the commander’s will alone suffices to justify it. In Raz’s model, the fact of the law being anyone’s will in particular is irrelevant to its authoritateness. Ultimately, though, this appropriate corrective to the command model also points to the weakness of Raz’s theory since, despite Raz’s best intentions, it offers authority to anyone with the requisite expertise.
about jurisprudence in part because he identifies the internal point of view, the idea that subjects do not merely obey as one who is coerced but view themselves as having an obligation to obey the law, and thereby trounces sanctions-based theories of law, including Austin’s command theory. Simultaneously, however, Hart also concludes that the nature and variety of law makes it impossible to understand the law as command, even without sanctions, and says that law should rather be understood as social rules. But once the law becomes social rules, there are no longer grounds for obligation and, therefore, no way to explain why people have an obligation to obey the law. Then, lacking any account for an actual obligation to obey the law (indeed, eliminating the possibility of one), it becomes implausibly difficult to explain why people believed themselves to have such an obligation. In this way, Hart sets his theory, to borrow a phrase, on a collision course with itself.

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Here, two preemptive notes are in order. First, it will not do to say that Hart is off the hook because he only argues that people understand themselves to have an obligation but not that they actually have an obligation and, accordingly, that Hart has no need to identify or even leave room for any such source of obligation. Technically, it is possible that people generally understand themselves to be under an obligation even though no one is. But, for one thing, it would make something of a mockery of Hart’s theory to say that his key insight about people’s relationship to the law, widely (and justifiably) taken to be correct, captures nothing more than a grand illusion. If it were the case that the law were truly just social rules yet people understood the law as something entirely different that created obligation, then it would be important to explain the enormous disconnect between the true nature of the law and people’s understanding. On this view, Hart’s theory would only work if everyone were laboring under the illusion that
law creates obligation when in fact it does not. In any case, if Hart’s concept of law did not
match people’s understanding, this disconnect would land a severe blow against Hart’s attempt
to describe law as it is in fact, to engage in “descriptive sociology.” More pointedly, if it turned
out that people accurately understood the law to be social rules, as Hart prescribes, it would
make it all the more difficult to imagine the sense of obligation that Hart reports because people
would understand the source of law to be one that is not obligation-imposing.

Nor will it do to say that Hart’s theory simply swings free of any normative theory, any
one of which might be compatible with his (allegedly) purely descriptive account. On some
level, this charge is intuitive because Hart makes claims not just about how law functions
sociologically but about what law is. Describing the nature of law, Hart would have a hard time
getting it right if he omitted or misjudged a central feature of it. To spell out the point, though,
Hart’s theory cannot be a normatively agnostic model into which a normative theory could be
plugged because, for Hart, the very thing that characterizes law is its standing as a rule, and the
thing that makes it a rule is its social acceptance. A normative theory would necessarily set out
different and inevitably conflicting criteria for what counts as law. A law could be obligatory (or
perceived as such) either because of social acceptance or because of democratic legitimacy (or
roots in tradition, or any of a number of examples). It could also be obligatory due to both
reasons, but there is no guarantee that the two would overlap. (The law might be socially
accepted but lack democratic legitimacy, or vice versa.) For Hart, a socially accepted rule is law
regardless of its pedigree or its merits, and, contrariwise, a standard that has fallen out of use,
which can no longer be identified by the rule of recognition, is not law regardless of its
justification under some normative theory.
That conclusion is perfectly fine if one is prepared to abandon Hart’s revolution in jurisprudence and deny (or fail to explain) why people take the law as a standard against which to measure their behavior and relate to the law differently than to a mugger—that is, why they take themselves to have an obligation to obey the law. To be sure, the absence of moral obligation could be reconciled with a more limited claim for Hart, that people only think they have an obligation to obey the law while Hart himself remains agnostic as to whether they do. But such a limited claim is tenuous. First, it hardly seems as though Hart believes that most people suffer under a mass delusion about the obligation to obey. Second, it would be extremely fortunate if, however unlikely, there were no obligation to obey but most people behaved that way for a variety of distinct reasons, some believing they were obligated under democratic theory, some under tradition, and so on. Third, and most important, Hart wants to identify law based on social practice. Presumably, it is the obligation to obey that differentiates the law from non-legal rules. After all, people take the law as a standard against which to measure their behavior in a way that is different from the way they relate to habits or customs. The key problem, though, is that there is no room for obligation in Hart’s theory because law is essentially defined by social practice, and social practice cannot generate an obligation, at least not in this sense. That is, there could never be an obligation to obey the law just because it is the social practice. There could always be some overlapping reasons that would provide additional reason to act in accordance with the law, but even that would not necessarily entail an obligation to obey.

Instead, this sort of understanding of law would require or at least be open to a theory like Raz’s where each law is subject to the judgment of the individual because the fact of the directive being a law, rooted ultimately in social practice, cannot itself imply an obligation to
obey. If so, for law to entail an obligation to obey (and, thus, for law to give people a reason to
treat it as doing so—which could happen without an actual obligation to obey though it would
make law a rather unwieldy concept), there would always need to be some separate, additional
theory that justified the law, explaining why the authority had legitimacy or, in other words, why
there was an obligation to obey. In that case, it would be the features of that other theory and not
a feature of the law that explained authority, legitimacy, and obligation. That is, whatever gives
a law or legal system authority in a particular case would be entirely distinct from the law or
legal system itself, meaning that obligation is not an intrinsic part of law. But a key point of
Hart’s theory is to link law and obligation in a way that the command model failed to do.

One candidate, among many others, for what could supply legitimacy in the minds of
citizens, external to the concept of law itself, is democratic theory, possibly related to features
like consent or majoritarianism. On this understanding of Hart (where law and obligation are
separate), there could be a democratically-reached decision that is authoritative (since it is some
feature of democracy, under this theory, that creates obligations to obey) but not law (if it does
not conform to social practice). Alternatively, there could be directives that count as law on
Hart’s view for conforming to the relevant social practices but are not obligatory for lacking the
relevant democratic features. Of course, Hart believes that there could be illegitimate laws, that
is, laws that are valid but not normatively legitimate. But this example shows how complicated
it is for Hart to propose his concept of law if it is necessarily distinct from an obligation to obey
since one of his central points is precisely that people do see the law as conferring upon them an

357 It would be weak to say that every decision that was accepted counted as social practice since
then Hart would not be saying anything interesting, just that what is accepted is accepted. For
example, if a democratic society held a referendum outside of the normal political and legal
processes, the majority’s decision should not count as law for Hart just because many people
went along with it afterward.
obligation to obey. It would be strange, therefore, if the obligation to obey did not come from the law but from one of any of a number of other theories that swung free of the concept of law (or, put another way, if law swung completely free of obligation). It would even be a stretch to say that law, by definition, entails some secondary justification, whether it be democracy or tradition or anything else, because even then there would be little reason to view law as a separate concept in which laws were the standards by which people judged their own behavior when the explanation for such were entirely parasitic on some underlying normative criteria (for example, if it were the fact of it being democratic and not the fact of it being law that made it authoritative). Plus, that interpretation is further problematic because then the law’s authoritativeness would depend on whether the terms of the underlying normative theory were met, bringing Hart’s theory all the way back around to an old-fashioned natural law (unjust-law-is-no-law) understanding of law, regardless of whether justice were construed as adherence to democratic norms or tradition or whatever. In other words, if such a normative theory is part of the definition of law, then the presence of law depends upon satisfying the terms of the theory and not on any independent features of the law. On the other hand, if it is not part of the definition, then there could be some laws that met the criteria and some that did not, but then Hart would be at pains to explain why the law, just as such, is taken as a standard against which to measure one’s own behavior.

To be sure, although a theory with the correct view of law and authority would explain why people have an obligation, it would not necessarily explain why people behave as though they do. That is, the correctness of a theory is no guarantee that everyone knows about it; even if it is true that people believe they have an obligation to obey the law (and act accordingly), it does not mean they truly know why they have an obligation. Rather than being a theory about how
people treat the law, though, this is a theory about the nature of law, meaning a theory about what law is. At first, this would seem to separate it from Hart’s theory since this theory addresses the sources of obligation while he is dealing with the fact (or practice) of obedience. On closer examination, however, Hart’s theory is not merely descriptive sociology, as he says, because it is really an argument about what makes law law—about what law is. While it is true that the answer for Hart lies (primarily?) in sociological observations, the sociology is put in the service of claims about what law is (and how one knows it). And those are the claims that this theory attempts to critique.

So, while the command model is insufficiently justificatory, Hart and Raz, too, are unable to capture the true sense of law. The key question is whether there is any conceptual space between the two types of theories, space for a theory that accounts for obligation without collapsing into a brief for authoritarianism on one hand or philosophical anarchism on the other. In explaining what counts as legitimate authority—the explanation of which entails both that authority is necessary and that it can obligate—there is something fundamental to be discovered about the nature of law. That is, there is something about the nature of law itself that makes it fundamentally different from what Raz has in mind and, as such, explains why there is indeed a prima facie obligation to obey the law.

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Though not generally associated with this literature, Carl Schmitt’s political theology helps to explain why command is an indispensible part of legal obligation. Schmitt’s understanding of sovereignty provides a foundation for the modified version of the command

358 More specifically, it is a claim that social practice determines what counts as law. Although the differentiation between things that are law and things that are not depends on social practice, the claim that social practice alone determines what counts as law is a philosophical one.
model that also, through his understanding of law, avoids the pitfall of positivism to which it is prone (more on this later). Embracing the command model while rejecting positivism is a tricky task. Austin’s version of the command model, for instance, is thoroughly (and intentionally) positivist. At the same time, it would be a mistake to entirely dismiss Austin since he does successfully grasp important features of the law. In setting out his definition of law, that is to say, the province of jurisprudence, Austin writes, “Laws proper, or properly so called, are commands,” and, further, “Every positive law or every law simply and strictly so called, is set by a sovereign person.” Moreover, like Schmitt, Austin acknowledges a fundamental relationship between divine command and human command, in respect of which both are law: “In the comprehensive sense above indicated, or in the largest meaning which it has, without extension by metaphor or analogy, the term law embraces the following objects:—Laws set by God to his human creatures, and laws set by men to men.”

In these ways, Austin provides a strong rebuke to Hart. Hart stands in an interesting relation to Austin. On one hand, Hart revolutionized the field of jurisprudence by recognizing some key respects in which the command model was lacking and therefore rejecting it. On the other hand, Hart rejected aspects of the command model that he should have kept, with the result that he moved even further than Austin from being able to close the gap between law and obligation. Austin offers the simple (if not uncontroversial) proposition that “a law is a command which obliges a person or persons.” The extended version of this, which Hart of course denies, is: “Every law or rule (taken with the largest signification which can be given to

359 Austin 1.
360 Austin 9.
361 Austin 10.
362 Austin 24.
the term properly) is a command. Or, rather, laws or rules, properly so called, are a species of commands.”³⁶³ Hart argues that some types of law do not function as commands at all. Following on his definition of law, Austin explains that “whoever can oblige another to comply with his wishes, is the superior of that other”³⁶⁴ and therefore that “superiority (like the terms duty and sanction) is implied by the term command.”³⁶⁵ Naturally, Hart rejects this as well because law, as command or not, derives not from a superior commander but from social practice. Indeed, for Hart there is no need for anything that goes by the name of sovereignty. The law is simply rules that are identified by other rules that are, in turn, determined by social practice. By implication, then, Hart would also clearly reject Austin’s claim that “being a command, every law properly so called flows from a determinate source, or emanates from a determinate author. In other words, the author from whom it proceeds is a determinate rational being, or a determinate body or aggregate of rational beings.”³⁶⁶ Hart’s rule of recognition or any other social practice certainly need not emanate from any determinate individual or group. On the contrary, Hart’s writings imply the opposite; it is far more likely that such practices would develop organically. Now, Hart is right to reject Austin’s conclusion that command entails sanctions in the same way it entails obligation. Austin’s observation that “whoever can oblige another to comply with his wishes, is the superior of that other” should be taken to mean “create a moral obligation to obey” and not “coerce,” even if one would do well to adopt Hart’s language of “obligate” over “oblige” and even if Austin himself did not see it this way.

Nevertheless, by eschewing command altogether as a central feature of law, Hart made it

³⁶³ Austin 13.
³⁶⁴ Austin 24-25.
³⁶⁵ Austin 25.
³⁶⁶ Austin 133.
impossible to account for how law qua law confers obligation upon its subjects. Therefore, a complete theory would preserve this essential element while incorporating Hart’s successful critiques and moving away from the positivism that caused this mess in the first place.

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The central question, put plainly, is whether there is room between the two poles, one that is all authority and no reasons and the other that is all reasons and no authority. The difficulty with a middle position is that any compromise seems to always threaten to collapse into one of the extremes. Any positivist view would seemingly need to be devoid of normative criteria, and any substantive (normative) view risks devolving full bore into the “unjust law is no law” maxim or being unable to account for the authority of a particular individual or group among qualified possibilities. A middle position that balances elements of each must deal with vulnerabilities at both ends. An adequate theory of authority combines the two with a view toward the necessity of each. First, there must be the aspect of command. The authority to command is located, by definition, in the relation between a superior and an inferior. It is the very nature of the relation between the superior and inferior that makes the directive authoritative, that makes it a valid command. That is what it means for there to be a superior and an inferior, that a directive from the former to the latter is authoritative. If the inferior issues a directive to the superior or one to his equal, the command is invalid, which is to say it is not authoritative—not a command. It may appear that this begs the question, or is circular, since there would need to be separate criteria that establishes the positions of superior and inferior. But this question will have to remain to the side for a moment.

The second aspect is the orientation to the common good, which applies not strictly to individual laws but to the laws as a whole: to the legal system. This substantive criterion
ensures that not just any commanding is authoritative. This aspect of authority depends upon the relationship between a legal system and individual laws. That understanding will reveal that this second aspect of authority is, in fact, embedded in (and, therefore, inseparable from) the first. This view sees the validity and the legitimacy of authority converging upon one another, and this in turn is predicated on the view that a theory of authority always presupposes some theory of the good. At the same time, this does not achieve identity with the “unjust law is no law” view since a law could be a valid law stemming from a legitimate authority yet ultimately be an unjust law. Furthermore, it need also be said that this second aspect of authority concerning the common good is not doing all the work under the cover of a descriptive criterion like the first one. The evidence for this is that not every instance of a directive oriented toward the common good is authoritative. Instead, those features must be wedded to the aspect of command, such that only a directive in a system oriented to the common good from a superior to an inferior, that is, from someone authorized to command, is authoritative. And, of course, it cannot be that orientation to the common good that renders one of the parties the superior and one the inferior, or else the substantive criterion really would be doing all the work.

Another way to see this same point is to consider an important flaw in the natural lawyers’ (and others’) account of law as fairness. The argument, roughly, suggests that law is essentially an arrangement for the fair distribution of benefits and burdens in society. When one breaks the law, one violates an obligation of fairness to one’s fellows citizens by taking an unfair benefit for oneself that others have foregone for the sake of the common good. While everyone would like to park at the fire hydrant, everyone refrains from doing so and spends extra time looking for a different parking spot so that the space in front of the hydrant can remain clear in the event of an emergency. To park at the fire hydrant is to benefit unfairly from everyone else’s
forbearance or to fail to share fairly in the burden. Yet, while fairness can account for some features of legal obligation, it also falls short as an explanation of law’s authority. First, and most importantly, fairness does not explain why one particular fair scheme is authoritative over another. Like an orientation to the common good, there could be many ideas about how to fairly distribute the benefits and burdens in society, but only one is treated as authoritative—as law. Therefore, there must be a further component in the understanding of law that reflects the designation of a particular scheme as authoritative. Second, on a related note, fairness cannot make sense of the non-binary nature of law. On what one might call the economists’ view of law, and especially of law as fairness, it makes no difference whether one complies with the law or pays the penalty since the penalty ensures that the fair distribution of benefits and burdens is restored when one, for example, takes an unwarranted liberty by parking at a fire hydrant. But from its own perspective, the law does not offer a neutral choice between compliance and restitution. Rather, the law quite obviously requires one course of action and holds out the alternative course (a fine, jail time, and so on) as a response to non-compliance that restores the distribution of benefits and burdens. If the point were merely to avoid unfairness, one could choose any number of courses of action that preserved the balance of benefits and burdens but did not comply with the law’s directives. Finally, law as fairness seems to depend on consent, which is an inadequate basis for other, well-worn reasons. Consent seems necessary for law as fairness to work because it is unclear that one can legitimately force benefits upon a person and thereby demand that that person share equally in the associated burdens. And where there is no

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367 Special thanks to Eliav Danzger for inspiring the name.
368 The retributivist view that sees the law in this way justifies punishment, but it cannot explain why, from the perspective of the law, one cannot blamelessly opt for the punishment in lieu of compliance with the law, meaning why the law is not simply offering a choice.
consent, one might be tempted to claim that there is tacit consent, that by accepting the benefits one also accepts the burdens. But tacit consent, too, has been examined and found wanting. If it did work, most authority would be easily justified since there is always at least some benefit from authority.

In sum, the definition of a legal system contains two parts, which address its form and substance. It needs the form of law, command, or a directive from a superior, because not every suggestion or even system that conduces to advancing the common good obligates. Obviously, it is not authoritative simply because it is oriented to the common good. It also needs the substance of law, an orientation to the common good, because commands do not simply carry a moral obligation wherever coercion is possible. Rather, an orientation to the common good is in the very nature of law, what gives law its purpose or, one might say inartfully, its “lawness.”

To be sure, the descriptive side of the theory, defining “command,” relies on a positivistic approach in order to answer the question of whose directives count as commands, meaning whose directives are authoritative. For this aspect of the theory, there must be an appeal to social practice insofar as the commander must be designated as such (whether via democratic processes or not). Even so, the theory does not reduce to positivism because the directives as a whole must be oriented to the common good, or, put better, must be part of a set of commands oriented to the common good.

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Although the theory does not require democracy since a non-democracy might also be oriented to the common good, its compatibility with democracy is important because Raz, and many others, might critique the theory on the ground that even if Finnis has it right about law and authority, it all sounds a bit authoritarian—and this in two senses. Such a theory of authority
could seem to be authoritarian structurally or, if not, then by tendency. First, it appears possible that this conception of authority, as command, is structurally incompatible with democracy. “Command” suggests a commander and a commanded. Yet this is a mistaken understanding of the notion of command. The persons of commander and commanded can reside in the same individual or group. There need not be any physical distinction between the authority and its subjects. In the starkest case, one of a direct democracy, “The requirements of the concept of authority are entirely fulfilled in the case of a community governing itself directly, without any distinct governing personnel. Authority is not lacking; it resides in the community.”\(^{369}\)

Considered in this light, it is hardly odd, intuitively, to accept the authoritativeness of the directives of a self-governing community. The people can be the authority.

As for the metaphysics of it, so to speak, Yves Simon explains that, in assembly, “men undergo a qualitative change;” that is, “they are no longer a collection of private citizens minding their own affairs, they are the people minding common affairs.”\(^{370}\) More plainly, this can be thought of quite sensibly as people acting in different capacities. This is common in theory, where a person, serving as a legislator, might vote against a piece of legislation, believing it to be bad policy, while that same person, serving as a judge, might vote to uphold the same legislation, believing it to be constitutional. The analogy is not a deep one, but it illustrates the ordinariness of conceiving of persons acting in different capacities, sometimes even opposed to one another but without contradiction or inconsistency. Indeed, this may be a near approximation of what any citizen does when he obeys a law despite opposing it or even having voted against it: “A citizen is considered law-abiding if, and only if, he considers his obligation independent from his

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\(^{370}\) Simon PDG 151.
personal opinion.”\textsuperscript{371} That is, a citizen serves in one capacity when rendering a judgment about the desirability (or other feature) of a law as a voter, or quasi-legislator, but in a different capacity when deciding whether to obey the law, which is evident in the way that different factors weigh on those respective decisions. If the citizen simply consulted his own opinion about the law in both cases—if the question of whether to follow the law were subject to no greater constraints than the question of whether to have the law in the first place—he could not be said to be obeying the law in any meaningful sense. Put more directly, the fact that it is the law must change the citizen’s relationship to it. If not, law would not be authoritative. Thus, the notion of capacities renders law as command compatible with self-rule, whether direct democracy or otherwise. The citizen serves in one capacity as commander and another as commanded.\textsuperscript{372}

Nevertheless, even if the command model is structurally compatible with democracy, it might seem contrary to it at least in spirit. They very notion of command seems to suggest something more authoritarian-leaning than self-rule. In the same vein, there could be the worry that such an understanding of the law—law fundamentally as command—might promote a tendency toward authoritarianism that would undermine self-government over time. Such a possibility, of course, would depend on how much this legal-philosophical concept affected the political and legal culture (and it might be unwise to overestimate such effects), but it is not an unreasonable concern for that reason. Fortunately, the command model is not an invitation to authoritarianism. Such a theoretical underpinning does not set a legal system down a path...
toward dictatorship. Because, in the dispute between Raz and Finnis, Finnis tries to make authority more than just an epiphenomenon of the subject’s reason or will—obligatory, or actually authority—more normative, as it were—it would be unsurprising if some saw this type of thinking as tending toward authoritarianism. Yet it would be a misunderstanding of the modern natural law view of authority to draw such a conclusion. This is evident in the work of both Finnis and Simon.373

Strikingly, Finnis considers the obligation to obey the law to be of a piece with limited authority, writing:

The reason (I suggested) for taking the law seriously to the full extent of its tenor and intended reach—and never regarding it as giving no reason for doing what it commands—is a reason connected with that irreducible multiformity of human goods (and that plurality of human persons) which imposes intrinsic limitation on human practical reasoning and makes nonsense (and injustice) of totalitarian projects.374

The limitations of practical reasoning account for both the need for authority and its limits. Concerning their responsibility for the common good, officials would “do well to regard it as quite other than a goal which could be defined and attained by skillful disposition of efficient means, like a bridge or an omelet.”375 Thus, the common good is not an objective to be accomplished, a state of existence that could be reached if only the government wielded enough power with enough wisdom. On the contrary:

Attempts to absorb the individual or particular groups into a vast overall co-ordination ‘solution,’ so as to eliminate all private purposes and all enterprises launched for reasons

373 More on this in the next chapter.
375 Finnis LC 103.
other than the advancement of the public co-ordinative scheme, confuse the idea of a national common good with the idea of a national common enterprise or scheme of co-ordination. Such attempts, indeed, thereby do grave damage to the common good. Their injustice is a reason for regarding laws made pursuant to them as morally ultra vires and devoid of law’s generic moral authority.\textsuperscript{376}

Such a claim invites the critical question of just when such schemes lack law’s generic moral authority, when such a claim against authority could go into effect, for Finnis is not speaking here of moral obligations that outweigh the obligation to obey the law but cases where there is no obligation to obey in the first place. A closer examination, for a later time, is important in order to confirm that a true difference exists between Finnis and Raz and that it is not simply a matter of Raz including more laws than Finnis in the category of “morally ultra vires” in virtue of exceeding what government is meant to do.

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In a way, these two aspects of authority—command and the orientation to the common good—evoke the traditional distinction between being “in authority” and being “an authority.” Though the emphasis in analyses of authority often focuses on the difference between the two, this theory insists on their close relatedness. Being “in authority” suggests the ability to attain compliance with one’s directives. But, plainly, simply having power, that is, being able to obtain compliance through threat of punishment, is not the same as having legitimate authority. Rather, de facto authority is a useful concept here insofar as it complements de jure, or legitimate, authority. This can be seen in two similar ways. First, if it is true that there can be obligation without enforcement (without promise of reward or threat of punishment), then an authoritative

\textsuperscript{376} Finnis LC 103.
directive would be no less legitimate for the authority’s inability or unwillingness to enforce it. If a government were elected through fair, acknowledged procedures but the previous administration refused to step down and the newly elected officials proceeded to govern in exile, their directives would be authoritative, which is to say, legitimately requiring of compliance, even if the recalcitrant regime controlled the military and made enforcement impossible. Second, if there is a normative aspect to authority, then it would be peculiar for a directive’s authoritativeness to depend upon compliance. A legitimate command should be authoritative whether or not it is obeyed.

At the same time, even though legitimacy does not depend strictly on power, de facto authority is still important in some sense. First, there is always the problem of who authorizes the authorizers. If consent-based theories are insufficient, which they are, then somewhere back up the line there must be an initial seizure of power that swings free of all subsequent power-conferring (to use a loaded term) procedures. Finnis argues that “those general needs of the common good which justify authority, certainly also justify and urgently demand that questions about the location of authority be answered, wherever possible, by authority,” but he recognizes that this is not always possible because authority must originate somewhere. Indeed, historically speaking, it is likely that in most cases there was no initial authorizing event; instead, de jure authority traces back somewhere to de facto authority. On that point, Finnis describes the difficulty of establishing the initial authorizing procedure: “Whose say-so, if anyone’s, are we all to act upon in solving our coordination problems?” In theory, unanimity might be required for such a decision since no authoritative framework is already in place. Given the unlikelihood

377 Finnis NLNR 249.
378 Finnis NLNR 249.
of unanimity in most cases, an initial, unauthorized act of authority may in practice be necessary to ensure that the procedure for locating authority in the future is authorized.\textsuperscript{379}

Second, and much more profoundly, with orientation to the common good as a central component of authority, it must be recognized that de jure authority without de facto authority severely undermines the authority’s ability to instantiate the common good. For example, authority plays a key role in solving coordination problems; an inability to impose solutions or otherwise gain compliance calls into question the very sense in which the authority can be said to be such. This ability to enforce coordination distinguishes authority from all other proposals about how to advance the common good. As Finnis writes, the “first and most fundamental” requirement of “practical reasonableness in locating authority” is that it “is to be exercised by those who can in fact effectively settle coordination problems for that community.”\textsuperscript{380} For this reason, “The sheer fact of effectiveness” is “presumptively” though “not indefeasibly” decisive for understanding authoritativeness.\textsuperscript{381} In a way, though, this need for de facto authority (power) bolsters the case for the de jure aspect of authority which requires an orientation to the common good. For, as Finnis notes, the directives of an authority who offers “schemes thoroughly opposed to practical reasonableness” are not authoritative; the authority cannot claim to be fulfilling the role that makes authority necessary in the first place and, therefore, cannot claim legitimacy.\textsuperscript{382} If it were only de facto authority that mattered, then it would depend merely on whether the authority could compel or coax obedience. But merely having power must be insufficient.

\textsuperscript{379} Finnis NLNR 249.
\textsuperscript{380} Finnis NLNR 246.
\textsuperscript{381} Finnis NLNR 247.
\textsuperscript{382} Finnis NLNR 246.
Nevertheless, this does not deal a deathblow to authority without power, which is to say there can still be legitimate authority even without power, since its directives can be oriented to the common good in intent even if not in effect. Authority’s legitimacy cannot depend on whether people obey but on whether they ought to. Though different, this is not entirely unlike the fact that the authority’s orientation to the common good is not fatally undermined by the inevitability of mistakes in advancing the common good. Those mistakes are to be accepted. As Simon writes, “A man of good will may well err as to the thing which is right . . . . Such occasional failures are compatible with moral perfection,” and in such cases there is still a “steady tendency” toward the good.\(^3\) This is true no less for the authority than for the private individual. So if an authority can still be legitimate despite such mistakes (commands that go against the justifying purpose of authority), perhaps it can also be legitimate if it is lacking in another aspect, namely the ability to enforce its directives.\(^4\)

This last point about power informing legitimacy also helps to illuminate the role of the second prong of the distinction, being “an authority.” Being an authority implies neither any actual power nor any legitimacy in the sense of being able to obligate others. Rather it implies a sort of expertise, as the term is commonly used. Even so, it remains connected to the idea of being “in authority” if being “in authority” is a function that serves the common good. Certainly being an authority on the common good would equip one well to fulfill the conditions of legitimate authority. To be sure, this does not mean that a legitimate authority would necessarily require any kind of philosophical, sociological, or other expertise. One’s directives can be


\(^4\) To be sure, if the flaw in question were that the authority completely lacked an orientation to the common good, similar to the complete lack of power contemplated here, then it would not be a legitimate authority, and the analogy would not hold.
oriented toward the common good without any such expertise. Nevertheless, knowledge of how to better advance the common good can certainly be an important component of authority, much as the power to implement can be as well, though neither is essential for legitimacy. For this reason, Simon explains, the “truly able leader . . . is supposed to be a man of higher excellence”\textsuperscript{385} and, similarly, “Responsibility is in the hands of the most able.”\textsuperscript{386} Celebrating the virtues of authority, Simon states, “To work under a leader whose qualifications are equal to his task is a happy experience,”\textsuperscript{387} noting later on that authority resolves the “antimony between form and matter because, under authority, “the man of good will who wants to do the thing that the common good demands, actually knows what that thing is and does it.”\textsuperscript{388} Thus, being “an authority” can be the full complement of being “in authority.”

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The two aspects of authority distinguish real authority from the many cases that come to challenge any single-sided definition. At one end, there is the case of the dictator. Neither early positivist theories like the command model nor contemporary ones like Hart’s or those based on him offer sufficient basis for distinguishing a liberal order from a dictatorship, whether benevolent or cruel and capricious. For Austin, all would be equally authoritative if their directives took the form of orders backed by threats and were obeyed. For Hart, all are the same if they have the backing of social practice. For both, the law itself would have no more of a claim on legitimacy in its good forms than in its bad ones because the positivists all divorce the concept of a legal system from the obligation to obey the law. In this way, they deny the

\textsuperscript{385} Simon GTA 145.
\textsuperscript{386} Simon GTA 146.
\textsuperscript{387} Simon GTA 143.
\textsuperscript{388} Simon GTA 145.
intrinsic relationship between the law and the common good. This theory, however, would treat
as authoritative only those regimes oriented toward the common good. So, too, the theory can
explain why individuals who rise to the occasion in moments of urgency do not possess authority
even if they do, as Andrei Marmor fruitfully describes it, display leadership. 389 When a patron
takes charge directing people to the exits when there is a fire in a theater or when a passenger
organizes entry into lifeboats on a sinking ship, he most certainly is acting for the common good,
but there is no authority per se. There is no meaningful sense in which he could be characterized
as a superior issuing directives to an inferior. 390 The test for whether he possesses authority is to
ask whether anyone has an obligation to do as he says. The answer is plainly no. It may very
well be that everyone in the theater or on the ship has very good reason to listen, for instance, in
order to facilitate an efficient escape. But the leader in those situations cannot (morally) obligate
anyone to obey. If, for example, some people had to be sacrificed for the common good, those
sacrifices would either have to be voluntary or physically coerced because the leader could not
obligate anyone to play that role. By contrast, a government regularly and, one hopes,
legitimately decides whose life, liberty, or property is to be sacrificed for the common good.
Once again, prudence may strongly recommend obedience, but this is markedly different from
the obligation to obey.

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Granting this understanding of law’s authority, what, if anything, changes in practice?
(That is not to say, of course, that anything needs to change in practice. One could say that

389 Marmor ICA 245.
390 This is why Marmor believes there needs to be an institutional relationship. He is correct to
argue that authority must entail this conventional component, but, by stopping there, he too
cannot explain why the conventional authority can obligate.
Hart’s revolution in legal philosophy had everything to do with the way law is understood and almost nothing to do with the way it is practiced.) Is there anything currently understood as a legal system under the prevailing theories that would be excluded under this one? Or anything included that is not? What would a “legal system” look like so thoroughly opposed to the common good that it would be unworthy of the name? After all, the whole question started with the reasonable assumption that the Nazis obviously had a legal system. An observer might wonder, if Nazi Germany and the antebellum American South both represent legal systems sufficiently oriented to the common good, what would not meet that standard?

One answer is that the main thrust really is about arriving at an improved understanding of the law and not about ending up with a different classification in practice. Recalling Hart’s helpful point, it is about understanding, for instance, what is at stake in the post-war German trials. Hart gets it wrong in the end, but that is only because he is limited by his own framework. Although Hart cannot go this far on his own terms, it is the prima face obligation to obey the law that gives some weight to the claims of those who were “just following orders.” Such obligations might have been in all cases defeated by contrary obligations, but it is the conflict between the two that makes the situation interesting and difficult (even if, as a matter of fact, knowing what is the correct thing to do in many particular situations is easy).

A second reply is that it would rule out a truly arbitrary or brutal tyranny, a government that existed for the benefit of the few and oppressed most of the people rather than just some. Of a legal system in such a regime it might be said that it either could not (because of its caprice) or would not (because of its cruelty) serve the common good. This would extend to, but probably not be limited to, the kind of legal system that Fuller depicts in The Morality of Law, where retroactive laws and the like make it impossible for the legal system to serve its functions.
One important implication of this restriction on the definition of a legal system pertains to the apparent limitability of the sovereign. Morality limits authority, but a coherent theory of sovereignty seems to require legal illimitability. Logically, there cannot be legal constraints on the individual or group that makes the rules, if only because that sovereign can also change the rules that impose any limits. But if there are directives that are “not law,” then there must be an implicit limit on what the sovereign can do legally. If, however, the question of validity applies to legal systems as a whole more than to individual laws, then the sovereign is indeed legally illimitable within a valid legal system. In an invalid legal system, which is not a legal system at all, or at the point at which the sovereign’s directives drives the entire system into illegitimacy, then the proper view is not of a legally limited sovereign but the absence of a legitimate sovereign altogether. The authority of the sovereign disappears with the legal system.

There is a danger here of sounding too similar to Hart if law is identified by social practice—the commands of the individual or group designated for that purpose—just with the caveat that there is no obligation to obey when the legal system is not oriented to the common good. But this is not Hart’s position since he wants to argue that even the worst laws or legal systems can still be identified as such, irrespective of any normative judgments. Even Nazi law is law for Hart and not because he has judged any normative requirements to have been met but because no such judgments need be made. The innovation here is to say instead that a legal system failing to measure up to certain moral standards is not a legal system at all—an important departure from Hart. Whether this applies to Nazi Germany or to Saddam Hussein’s Iraq or Muammar Gaddafi’s Libya is another matter. The same sort of evaluation holds for distinguishing the legal system of a state from the internal rules of street gangs or organized crime.
Is, then, there any benefit to pressing such terms for the concept of law? For one thing, it may be worthwhile to just get the “definition” right. For another thing, to the extent that one could imagine any practical benefit of theory, placing an emphasis on the intrinsic relationship between law and the common good, noting that a legal system that strays too far from the common good is not worthy of the name, could help to refocus lawmakers on their central task. Individual laws that do not serve the common good still retain the title of law, but each one weighs down upon the system and erodes its legitimacy.

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Having said all of that, there is a second way of looking at the attempt to find law’s authority “in between” reason and commands. To take a somewhat stylized version of the debate (but usefully so), there are essentially two different models of law’s authority. One, associated famously among moderns (though in different ways) with Austin and Bentham, is the command model of law, where the obligation to obey is rooted in the superiority of the commander over the commanded. The other, for these purposes best associated with Raz, locates the obligation to obey in the reasons for the law and, more specifically, in Raz’s normal justification thesis. According to Raz, law has authority when it requires what the subject has reason to do, anyway. Neither of these models, on its own, is sufficient to account for legal obligation. Instead, the command model best fits religious obligation, at least on some plausible understandings, whereas the reasons-based model is most apt for explaining rationally apprehended moral obligations.

The claims about religious obligation are not an argument for the existence of God nor, therefore, for any actual religious obligation. Instead, they are claims about a kind of authority that is best captured by at least one plausible conception of divine authority. Thus, for the sake of argument here, God’s true nature (or lack thereof) is not important. What is important is the
usefulness of the example as a model of law and obligation. On this conception, divine law is authoritative exactly because of God’s superiority. That is, the fact of the law being commanded by God is what makes it authoritative, namely what generates an obligation to obey. This is a way of saying that it is in the very nature of God’s transcendence for His directives to be binding on those whom He commands. This is a view reasonably associated with biblical religion, even if thinkers in that tradition actually disagree about the basis of divine authority. One simple reason for the biblical association is that the original commands of God to man in the Bible presuppose man’s understanding of the nature of commandedness. The Bible offers no suggestion as to how or why man understands himself to be obligated by God’s commands. This is highlighted by the fact that those first directives are obscure in their purpose, offered without clear reason. Rather, God’s authority to command seems to be implicit in the nature of the relationship. God intends man to take divine law as authoritative just because it is divine, that is, just because of the superiority of the commander over the commanded. In this regard, some may find the analogy to parental authority as useful, insofar as parents possess an acknowledged superiority over their children that confers upon them the authority to make decisions for their children, but this analogy admittedly has its limits.

One limit to the analogy of parental authority is that parents’ are thought to have authority only insofar as they make decisions in the interests of their children. But the same can also be said for divine authority, in which case the problem is not with the analogy but with the idea of locating God’s authority in His sheer superiority. In some religions, there is a belief that God is always and only good, which means in turn that His commands are always good. If this is the case, then it is possible that divine authority is not rooted in the nature of the relationship between commander and commanded as superior and inferior but in a more rationalist notion of
reasons. If God cannot but be good (in addition to omniscient and omnipotent), then His subjects always have reason to follow His directives, resting assured, as Raz would require for authority, that the directives instruct them to do that which they have reason to do, anyway.

Nevertheless, even on this understanding, divine authority is a difficult fit for Raz’s model. Obeying authority when knowing the reason is different than obeying authority when one merely knows there is a reason. Applying the same choices to political or legal authority demonstrates the difference. Much as Razian-minded people (not to mention many others) would object if the government told them to do something for which there was no reason, they would also object if they were told that there was a reason but that the government could not tell them it. There are exceptions, for example, in the realm of defense and security, but this is different in part because the reasons are known generally even if the particulars are not and more so because the withholding of certain information is necessary for the achievement of the end itself; that is, the reason for withholding the reasons is intrinsically linked to those reasons, or, put another way, the reasons for the directive are moot if they are revealed.

More importantly, even the commands of an unfailingly good God do not fit the Razian model because the whole logic of obligation, according to Raz, must entail the assent of one’s judgment or will, whether to the first-order to reasons or to a second-order rule of thumb rooted in yet further reasons. For Raz, it is the understanding of the reasons that generates the obligation, which cannot be said to be present in the case of the unexplained command of an omnibenevolent God. Taking it on faith that there are reasons is different from having reasons because, in the former, there is no actual access to the reasons. Furthermore, while it is true that people who obey political and legal authority do not obtain or examine the reasons in every case, they certainly have access to them in principle and, like in the security case, are aware of their
general contours whereas this is not necessarily the case with divine authority. One conclusion, then, is that Raz’s theory cannot accommodate divine authority. Raz’s response may simply be one of agreement: perhaps on his view obeying divine authority is irrational. But if it is rational for some other reason, then Raz’s theory is incomplete.

Despite Raz’s probable rejection of divine authority, it would be difficult for him to argue that it is strictly irrational to obey a superior being unless he also held that it was irrational to posit such a being. Arguing that, he would have to argue that metaphysics is altogether irrational. Raz, though, is no nihilist or relativist, so he at least accepts appeals to some first principles. Nevertheless, he could deny the possibility of a superior being, but that would leave him without explanation for a widely accepted form of authority. Of course, the pervasive acceptance of divine authority does not in any way prove its legitimacy; history is long on illegitimate rulers. The point, however, is not at all to prove that there is a being possessing authority simply by virtue of its superiority. The point is only to show how divine command could be a model for authority: if there were such a superior being, then its commands would be authoritativeness. To be sure, this sounds circular insofar as it says that “the commands of an authoritative commander are authoritative” and that the commander here is authoritative by stipulation. That is precisely to be expected, however, given that this model rests on a claim about the nature of authoritativeness, namely that superiority of a certain sort entails the power to obligate through commands. What kind of superiority? The kind possessed by a supreme being. If so, the issue is just pushed back one level to the question of whether that sort of being, superiority, and authoritativeness have corollaries apart from the divine.

The challenge is even starker, and the possibility of assimilation to Raz’s model even less plausible, with religions that do not presuppose the perceptible goodness of God’s commands,
which is to say, the ability to understand their goodness through human reason. On a strongly voluntarist view of this sort, obedience to God’s will is obligatory strictly because it is God’s will, and the reasons for God’s commands, should there be any, need not be accessible to man even in principle. Certainly Raz would have difficulty explaining this kind of obligation (and, indeed, he would likely deny it). There are no reasons to which one can appeal outside of God’s will. If Raz prefers to concede that obeying God is good for its own sake, meaning that obeying God is something that people have reason to do just as such, then he would have no choice but to concede as well that the goodness of obeying God is somehow rooted in the nature of God’s being and, thus, in His relationship to His subjects. There would be no “reasons,” in the ordinary sense, to which to appeal since this view of divine authority extends obligation to commands that defy rational explanation. They are authoritative only because they are God’s will.

The question, then, is whether obedience to God can be reasonable just as such. The natural law theorist John Finnis indirectly provides support for the reasonableness of obedience to God, that is, of treating God’s commands as authoritative, in his elaboration of religion (or as he says, “religion”) as a basic good. The basic good in its most general terms need not entail any particular kind of deity or higher power, but in his closing chapter of Natural Law and Natural Rights, Finnis examines the basic good in light of more conventional notions of God. Although he would surely favor the first version of divine authority, where God is reasonable, over the second, where God’s ways are entirely inscrutable yet his will authoritative nonetheless, Finnis’s view here is at least loosely compatible with the voluntarist view.

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391 This is, for example, the understanding of Islam that the Byzantine emperor holds in Pope Benedict XVI’s famous Regensburg address.

392 It does no harm to the argument here, however, if Finnis’s take is not compatible with the voluntarist view of divine authority.
In Finnis’s construction, the correct concept of God (or the placeholder, D) who is to be obeyed is “an entity and state of affairs that by its existing explains the existing of all entities and states of affairs in all four orders of contingent being.” Furthermore, Finnis adds, “How D (or God) thus is the explanation of all this is not known; what is considered to be known is simply that D (or God) is whatever is required to explain them. Already, therefore, it should be clear that to ask for an explanation of D (or God) is to miss the sense and reference of claims made about D (or God).” Finnis goes on to say that there are further beliefs “beyond what can be affirmed about D on the basis of philosophical argumentation” that underpin claims for obedience to God. He writes, “In the context of such beliefs—and it is only in such a context that claims about the authoritativeness of God’s will for man to be are plausibly made—the question ‘Why should God’s will be obeyed?’ has no bite.” But the possibility of God’s authoritative superiority already seems to follow from the previous part even before the beliefs in question are added. In the same way that it misses the point to ask how God is the explanation for existence, since He is posited as that explanation, meaning as whatever is needed to explain it, so, too, God’s superiority is entailed in his nature. That is, as a model for authority, God (or D) is that thing that is superior enough to command authoritatively. The model loses nothing to claims that such a being does not exist; the only relevant challenge would be that such a being could not exist, but such a claim seems to entail metaphysical premises no less difficult than the ones it wishes to repudiate.

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393 Finnis NLNR 404.
394 Finnis NLNR 404.
395 Finnis NLNR 404.
396 Finnis NLNR 405.
In explicating the good of “religion,” Finnis suggests that the good of “religion” could entail a relationship with God, in which case one might cooperate with God as an aspect of that relationship in addition to the other reasons one has to pursue the other goods instantiated through that cooperation (such as the well being of other people). On this understanding, cooperation with God, or participation in his will, might also be equally well termed obedience. By nature, just as one might say the point of “religious” life is to serve God, to be in harmony with Him, rather than to earn reward or avoid punishment, all the while knowing that those consequences attach, one might also say that obeying God’s commands is the proper mode of relating to Him.\footnote{Given the transcendent nature of such a God, the commands would be His instructions of how to properly engage in that relationship.} If every kind of relationship has a particular mode most appropriate to it, then the mode most appropriate to the God-man relationship is one of command and obedience, or at least it could be. This might seem an ill fit for a relationship Finnis refers to as “friendship,” but surely it is a unique sort of friendship. This notion is embedded in the commonplace theological observation that a transcendent God would not need people’s praises or animal sacrifices. They are only good for God insofar as they are acts of obedience. God does not need obedience, either, just as friend does not need favors or other tokens of friendship. Instead, these are expressions of, or, better, instantiations of, the relationship. To be sure, none of this necessarily means that the obedience that is a proper response to divine authority is also a proper response to human authority, that is, to any relationship other than the one with God. Nevertheless, it is a good starting point for the argument and especially for Carl Schmitt since he claims the derivation of political concepts from theological ones.

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On its own terms, Finnis’s argument provides the structure for understanding the value of obedience to God for its own sake. If the relationship with God can be compared to a friendship, and if God, in His own goodness, favors the common good, then there is an additional reason for man to favor the common good, namely God’s will. Finnis writes, “This would not entail that we no longer favoured the common good for its own sake, nor that we no longer loved our friends for their own sakes. Rather, it would mean that ‘for their own sakes’ would gain a further (and explanatory) dimension of meaning.” For the argument about authority, the concern is not primarily about obedience to God specifically as participation in friendship with Him; rather, the takeaway point here from Finnis is that cooperating in or fulfilling God’s will can be its own reason for action, without appeal to further principles, apart from the reasons that already exist for favoring the common good. It is true even in an ordinary friendship that going along with the will of the friend is one constitutive part of the friendship, but here such “going along” is ostensibly obligatory. There are, of course, already reasons to participate in the common good, but if this is to be a reason that obligates, then there must be something about the relationship with God, the “friendship,” that renders it different from a friendship with another person who also favors the common good. God’s perfect knowledge means that what he favors definitively is the common good, rather than the usual approximations, but this alone does not seem to be source of obligation since the common good does not oblige whenever it is (relatively) definitively known. Finnis’s question remains: “In what sense are we to take it to be necessary to favour that common good, which after all will end, sooner or later, in the death of all persons and the dissolution of all communities?” He continues, “In friendships one values what one’s

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398 Finnis NLNR 406-7.
friends value . . . for no other reason than that they value it.”  Once again, as in the case of Raz’s argument, this generates a reason to value it but not an obligation.

Later, drawing on the good of play, Finnis explains obeying God this way: “The requirements of practical reasonableness (which generate our obligations) have a ‘point’ beyond themselves. That point is the game of co-operating with God. Being play, this co-operation has no point beyond itself, unless we wish to say that God is such a further ‘point.’” Thus, in explaining obedience to God in terms of basic goods, Finnis can fold obligation to God into the requirements of practical reasoning. But, again, unless this is a special kind of relationship, the relationship with God would generate no more obligation than any other friendship, including a friendship with someone very wise about the common good. In other words, if there were an obligation to obey God just because He knows the common good, then that same authority would, in Razian fashion, extend to others as well. Moreover, if the obligation to obey God entirely collapses into the obligation to act for the common good (whatever that is), then it is never really a matter of divine authority, except insofar as one believes that God has an epistemic advantage in knowing what best conduces to the common good. So, too, it would never really be a matter of law’s authority but, as in Raz, a question of whether the law overlapped with reasons that already exist. Therefore, with divine authority, there must be something about this particular friendship (with God) that generates obligation. Of course, what distinguishes this friendship is that it is with God, that is, a relationship with a different kind of being. And, in this case, the relevant difference is God’s superiority.

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399 Finnis NLNR 407.
400 Finnis NLNR 409.
401 Even in a case of coordination, where law might create additional reasons for action that did not exist before the law proposed a coordinating solution, the reasons that the law provides are not necessarily to be privileged over the reasons provided by anyone else who offers a solution.
But this very fact, the reliance on God’s superiority to explain the obligatoriness of his commands, is an important difference between divine and human authority. Another difference between the commands of God and of, say, the government lies in the issue of whether one must bring one’s will in line with the authority’s will (or at least strive to). It might seem that in the realm of politics and law, one might yield to the judgment of the majority (for example), that is, act according to the majority’s will, without attempting to bring one’s own will into conformity with the majority’s, meaning without seeking the ends for which those actions are intended. With religion, on the other hand, it might be implicit that one is meant not just to obey commands but to take God’s commands themselves as one’s reasons for action, that is, to will (or want to will) whatever God wills, granting even that God’s reasons are not or cannot always be known. This helps to illuminate, if not resolve, the paradox of obedience, because it shows at least one way in which obedience is not undermined by reasons. If one takes an authority’s will as a reason for action just because it is the authority’s will apart from any independent judgment about what is willed, then it is still obedience, notwithstanding the fact that one does so because one judges it good to take that will as a reason for action. Indeed, this is nearly definitional since it would be hard to explain the decision to take that will as a reason for action otherwise (namely if one did not judge it good to do so). At the same time, there is an important similarity between divine and legal authority in the nature of the obligation. In deferring to the majority, one could simply do so instrumentally, or, perhaps better said, cynically, in which case one might try to cheat when violations of the law would go undetected. But if the authority is legitimate, then there is an obligation to obey in the sense of being bound by the decision. There is, in other words, a substitution of the judgment of the majority (for example) for the judgment of the
individual that does not admit of exceptions, as far as the prima facie obligation goes. In Finnis’s language, it is a substitution of public judgment for private judgment that in its very nature rules out individual discretion.

The law’s capacity to bind in this way is what in fact makes it law. If it were permissible to break the law when such violations would not cause negative consequences, then the law would not truly be authoritative because then the reason for obedience would be the consequences and not the law (meaning it would be the consequences and not the violation of the law as such that would make disobedience wrong). So, too, if it were mainly punishment that stood behind the priority of the public judgment, then the concept of law would reduce to coercion. In contrast, a proper approach is what produces the insight known as the internal, or legal, point of view. Even as a social phenomenon, it is the notion of the law providing more-than-merely-instrumental reasons to obey but rather an obligation that is a reason in itself that can explain why people take the law as a standard against which to measure their behavior.

To be sure, the obligation to obey is always conditional in some sense. While there is a prima facie obligation to obey the law, there is never an absolute obligation since there could be competing moral obligations that trump the legal obligation (and the moral obligation it entails). The difference is that, for theorists like Raz, the obligation to obey (which, in truth, is not even really an obligation) always depends on an assessment of the conditions; that is, the obligation is never part of the law just as such, whereas on this view there is an obligation to obey just as such, albeit one that can be overridden. This understanding accounts for how the law can require people to put the public good before their own private good. On Raz’s terms, the law is authoritative when it corresponds to the reasons one already has for action. If so, the case for sacrifice over self-interest is harder to make. Of course, Raz could offer some attenuated
explanation of how the public good is always implicated in the private good, but there would seem to be some cases where the “math” would not work. In any case, it would be surprising if Raz’s theory effectively yielded all the same practical conclusions as the theories he wishes to reject, if only because he at least seems to be trying to say something different.

At the same time, this defense of obedience represents a departure, perhaps, from the Kantian reading of Simon in which authority and autonomy converge, owing to the bringing of one’s own will into line with the law. Doing so would be more demanding than deferring to the judgment of the law, more demanding than yielding to the obligation to obey the law without necessarily substituting the law’s reasons for action for one’s will. On this interpretation, obedience to the law for Simon would be more like obedience to God. In addition, Simon would have less to say in the face of the obedience paradox even with respect to divine authority. If obedience to God is rooted fundamentally in taking God’s reasons for one’s own, then religious obligation would be more about acting for reasons that also stand independent of God’s will than about obeying God’s commands just as such. From one angle, this appears to be an even higher form of obedience, integrating God’s will into one’s own until authority and autonomy become indistinguishable, which is perhaps the Kantian dream. And, indeed, though it may be a grand expression of piety, it is not best described as obedience; piety and obedience need not be coextensive. This observation may in fact be another way of bringing out this key distinction between divine authority and human authority: with divine authority, there is something better than obedience, namely the forming of one’s will according to the will of God, whereas with
government there (perhaps) is nothing more than yielding to its judgment that could or should be asked.  

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Rooting religious obligation in commandedness does not imply that there is no additional moral obligation to obey divine authority. That is to say, religious obligations may entail every bit as much of moral obligation as other moral obligations. On the contrary, the whole point is that every true obligation, in the normative sense, must include a moral obligation, which is to say, an obligation to perform or abstain from a certain act (or thought) such that the failure to do so can be properly termed “wrong.” If there is no moral obligation, then in failing to obey, whatever one has done, one has not done something “wrong.” The difference with religious obligation is that, on one possible model of divine authority at least, it is the command and not the reasons for the command that generate the obligation. Therefore, to one side, there are non-religious (which is to say, non-commanded) moral obligations where the obligation comes strictly from reason, that is, from the reasons behind the obligation (meaning that the reasons are sufficient to create the obligation, not necessarily that there is no related command). To the other side, there are religious obligations where the obligation comes from command in addition to, if not instead of, coming from reason.

The question is where legal obligation fits in. If fellow persons lack the superiority of a divine authority, which is an uncontroversial assumption (not least because God in this argument

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402 Whether the shaping of one’s will in such a way is the appropriate course may depend on whether one takes God to be always good in addition to being superior in the sort of way that can support obligation through command.

403 Here, it is easier to speak of religious obligation, rather than divine authority, in parallel to moral obligation since moral obligations do not stem from an authority, properly speaking, in the way that religious or legal obligations do.
Chapter 4

is posited as the being possessing such superiority), then non-divine command alone is insufficient to generate an obligation. At the same time, reason alone is inadequate as a general basis for legal obligation because the reasons behind the laws (besides laws that are coextensive with preexisting moral obligations) might provide reasons to act but not obligations to act. And reason alone might not provide for a definitive choice between various proposals regarding how to achieve law’s aims. Neither command nor reason is enough on its own: not every reason for action (even good ones) is authoritative and not every command is justified.

Furthermore, legal obligation cannot simply be its own category, sui generis, without containing the moral obligation that makes disobedience wrong. Otherwise, legal obligation reduces to one of two unacceptable forms: coercion or suggestion. On the former, one has done something wrong only in the sense of being punished for failure to obey, an interpretation which would fatally undermine Hart’s argument for the internal point of view. Similarly, in a legal system without moral obligation that did not even punish but only censured or condemned, the expectation of obedience would be no more than custom. There might be good reasons to adhere to customs, but that is different from saying one has violated an obligation by breaking them. On the latter possibility of law as suggestion, the law advises and even goads, but one has done nothing wrong, morally, by disobeying any more than one has done something wrong by failing to heed a piece of sound advice. Indeed, without moral obligation, legal obligation is no more than a prediction of punishment or censure.

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With neither moral obligation nor religious obligation alone an adequate model, a third way must be found for legal obligation. If the moral law represents reason without command and divine law represents command without reason, then positive law (or what is often just
called “law”) is in the middle, combining aspects of both. Legal obligation requires both command and reason because not every good reason is authoritative and not every command is legitimate. In this case, the “reason” is an orientation to the common good, which is the animating principle of law. “Command” is trickier because there is no inherently superior individual or group akin to God in divine authority. Rather, there needs to be a designation of an individual or group as superior for the purpose of issuing laws. Under those conditions, the legal system is legitimate, and there is a prima facie obligation to obey the law.

Importantly, legal obligation does not reduce to moral obligation in the form of reason without command. Command remains necessary in order to generate the law, that is, the directive that entails the obligation; unlike moral obligations, legal obligations do not specify themselves. Indeed, this claim goes further to say that command is part of the nature of law. Although Raz perhaps cannot account for religious obligation (and perhaps has no interest in doing so), can he account for legal obligation as he does for moral obligation? This would work if both could be explained as reason without command. And if reason is enough to generate moral obligation, why cannot reason generate legal obligations, too? Since legal obligations can extend further than reason alone can require, something more is necessary. Even so, is it not the case that the obligation to obey the law is a moral obligation? After all, that is the whole point of talking about an obligation to obey the law that makes the law more than just coercive or suggestive. If so, it should be possible to account for legal obligation on the terms of moral obligation, meaning on reason alone.

Nevertheless, even though the force of the obligation is a moral obligation, the source of the law must be a lawgiver, in whatever form. Non-legal moral obligations do not require such a provenance because they can, in some cases, be self-specifying, or be identified through reason
alone. Hart might object that some laws evolve organically, as customs, for example, that became legal rules. But this would only raise the same problem of accounting for obligation: customs are not morally obligatory merely because they have become deeply entrenched.

Another possibility is to imagine a dichotomy between laws, for example in the form of statutes, and obligations. The statutes themselves would specify particular modes for common action, irrespective of any moral claims, and then the moral obligation to obey would attach separately. But, even leaving aside the conceptual difficulty of sustaining such a division, this approach fails to see that the creation of the law is itself the imposing of obligation. Obligation is intrinsic to the law. Therefore, to say that there cannot be law without a moral obligation is also to say that there cannot be law without command. Since legal obligations generally are not self-specifying, without command there is no moral obligation, and without moral obligation, law is just coercion or suggestion (and which of the two it is depends on how and whether the law is enforced).

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In so-called practical terms, the central difference with Hart’s theory is that, for Hart, the fact of something being law says nothing about whether there is an obligation to obey it. There might be, or there might not. In contrast, if command is part of the nature of law, which is to say, if law necessarily entails an obligation to obey, then there is a prima facie moral obligation to obey the law. Once again, it is only a prima facie obligation to obey because there could be stronger moral obligation to disobey the law for whatever reason. This view is supported, for example, by the ordinary usage of the phrase “lawful orders” in the sense of citizens being required to obey lawful orders of the police or soldiers of their commanders. At first, the phrase seems redundant. But all it means is that there is an obligation to do what the policeman or commander says unless there is a stronger obligation not to do so, in which case there is also a
corresponding obligation on the officer not to order it in the first place. That stronger obligation
is necessarily a moral one since it makes no sense to have a strictly legal obligation in the face of
a contrary order by an officer. That is why it is legal to go through the intersection at a red light
when directed to do so by an officer. In those situations, the law is whatever the officer says it
is, and the obligation to obey extends until it meets a moral obligation not to obey. If the
required action were already in the law, then the order would be unnecessary. Instead, the law’s
reach is extended by the requirement to obey lawful orders. Furthermore, it cannot mean that
there is a moral obligation to obey lawful orders until those orders run up against a contrary legal
obligation since the law cannot and does not even attempt to specify all the circumstances under
which one is supposed to disobey; rather, it means to obey orders until there is a moral obligation
not to. Finally, to the extent that the obligation to obey lawful orders means to obey all orders
that are within the scope of the officer’s jurisdiction, as defined by the law, even that is a moral
judgment. That is, both the judgment of which things are or are not within the scope of the
officer’s powers is a moral judgment, and the very idea or fact of certain things being outside
that scope is itself a moral judgment (since it is not spelled out by the law), which is to say it
cannot be explained without moral reasoning.

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What emerges is that there is, quite clearly, a tight relationship between the nature of law
and the common good because law is the form that authority takes in the polity. Law is
necessitated by the demands of the common good and serves it. Indeed, the orientation to the
common good is part of the definition of law. This raises the question of what constitutes the
common good. Finnis defines the common good in general as:
the factor or set of factors (whether a value, a concrete operational objective, or the conditions for realizing a value or attaining an objective) which, as considerations in someone’s practical reasoning, would make sense of or give reason for his collaboration with others and would likewise, from their point of view, give reason for their collaboration with each other and with him.\textsuperscript{404}

More specifically, as Finnis uses it throughout the work, the common good is “a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community.”\textsuperscript{405} Finnis differentiates this use of “common good” from the separate though related uses in which the good is common by virtue of the basic goods being good for all people and by virtue of “inexhaustible” possibilities for participation by one and all.\textsuperscript{406} The different senses of “common good” closely entail one another because the shared goodness of the basic goods for all people means that it is possible to instantiate a set of conditions that enables the attainment of each person’s individual objectives (though likely not all of them).\textsuperscript{407} In the case of a political community, “which (subject to the principle of subsidiarity) excludes no aspect of individual well-being and is potentially affected by every aspect of every life-plan,”\textsuperscript{408} advancing the common good requires “securing of a whole ensemble of material and other conditions that tend

\textsuperscript{404} Finnis NLNR 154.
\textsuperscript{405} Finnis NLNR 155.
\textsuperscript{406} Finnis NLNR 155.
\textsuperscript{407} Finnis NLNR 156.
\textsuperscript{408} Finnis NLNR 233.
to favour the realization, by each individual in the community, of his or her personal development.”

One could be forgiven for seeing Finnis’s theory as somewhat individualistic in the sense of seeing the common good as the aggregation of the good of all individuals. In one sense, this must be the case since it is the good of persons as such, whether as individuals or in groups. In another sense, though, it might be reasonable to speak of the common good as the good of the community distinct from the aggregate good of individuals. Finnis alludes to this when he notes the overlap between “common good” and “general welfare” or “public interest.”

While Finnis perhaps intends the same meaning, it is Simon who emphasizes the general, or public, character of the common good. He calls the “pseudo-common good” that which is the “sum of private goods which looks like a common good but is not” because “it lacks of the defining features of the common good, viz., the intelligible aspect by which the common good calls for communion in desire and common action.” Continuing, Simon explains, “In order that a good should be common, it does not suffice that it should concern, in some way or other, several persons; it is necessary that it be of such nature as to cause, among those who pursue it and in so far as they pursue it, a common life of desire and action.” This is critical to Simon’s theory of authority because he argues that “whenever the good interesting several persons or groups causes (or, more precisely, is of such nature as to cause) such common life, it is a genuine common good and renders authority necessary.” Like for Finnis, this commonness of the good is most vivid for Simon with respect to the state since “the state is the community which is

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409 Finnis NLNR 154.
410 Finnis NLNR 156.
411 Simon PDG 49.
412 Simon PDG 49.
413 Simon PDG 49.
so complete and self-sufficient that its good is not that of a particular subject—individual, family, township, etc.—but, unqualifiedly, the common good of men assembled for the sake of noble life.”

This, in turn, shows how authority plays a role in a common good that is truly common. First, there is the multiplicity of means for pursuing the common good, which creates the need for imposed unity of action, whether through unanimity or authority. Even if each individual wills and acts toward the common good, “functional diversity causes a need for an agency relative to the common good as a whole.” But such an agency, namely authority, is necessary only if there is truly a common good that transcends the aggregate private good. This is because “the ground for the constitution of a society is either the attainment of a common good or that of interdependent private goods; in the first case there is need for authority; in the second, contract suffices.” In that case, there is mere disagreement about how to arrive at the common good, which nevertheless requires authority for its resolution. Second, however, there is the possibility of genuine opposition between the common good and some private good, which, as Simon writes, “Aquinas considers altogether sound and honest.” This opposition is an important part of what renders authority necessary: “It is the proper concern of the public person to procure the common good materially understood, which the private person may virtuously oppose.” If such virtuous opposition is possible, then authority would be necessary in a fully virtuous society. Despite the possibility of virtuous opposition to the requirements of the common good, “the primacy of the common good demands that those in charge of particular goods should obey

414 Simon GTA 61.
415 Simon GTA 62.
416 Simon PDG 50.
417 Simon PDG 41.
418 Simon PDG 42.
those in charge of the common good” with the result that “formal conformity may well be compatible with material disagreement.” In either case, it seems, one would be required to submit to the common good because, if it were indeed that, its authoritativness would not depend on its coincidence with any particular individual’s desires. Simon explains, “This rule of common action may coincide with my own preference, but this is of no significance, for the common rule might just as well be at variance with my liking, and I would be equally bound to follow it out of dedication to the common good, which cannot be attained except through united action.” This, of course, is where authority comes in: “The most essential function of authority is the issuance and carrying out of rules expressing the requirements of the common good considered materially.”

The upshot of Simon’s view is that the promotion of the common good requires sacrifice in that “excellent citizens, fully prepared to make all sacrifices required by the common good, should take one more step and, without assuming any new capacity, should will and intend the common good materially considered.” As Simon’s view makes clear, this requires a view that sees the good located in something more than the individual—in communities:

The best way to perceive the ethical character of politics is to realize fully the political character of ethics. Indeed, whenever we achieve any understanding of man’s social destiny, whenever we go beyond the cheap illusion that things social and political are

419 Simon PDG 57.
420 Simon PDG 42. Clearly Raz could not account for such a situation. Insofar as he could accept a case where an individual’s good genuinely conflicted with the common good, there would be no accounting for the primacy of the common good. Perhaps Raz denies it could ever occur, but more likely he just thinks that individuals need not submit to the common good, which may be another undesirable feature of his theory.
421 Simon GTA 47-48.
422 Simon GTA 57.
423 Simon GTA 60.
merely means to the welfare of individuals, we virtually uphold the proposition that the ultimate accomplishments of prudence, of justice, of fortitude, and of temperance are not found in the individual man, but in the greater good of human communities.\textsuperscript{424}

There is, of course, plenty of room for disagreement with Simon’s view, but he does offer the strongest case for the close connection between authority (and the obligation to obey) and the common good.

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In addition, focusing on the relationship between the authority of law and the common good brings into relief the legal system’s central place in advancing the common good and the common good’s dependence upon it. When the primary assessment of whether to obey takes place on the level of the individual law, the relationship of the law to the common good is at best a secondary consideration. For example, if a law required a person to kill unjustly, the first problem would be not the damage to the common good but the injustice to the intended victim. That strong reason to disobey defeats competing reasons to obey regardless of how one thinks about the nature of law. But if the starting point is a question about the legal system, then the matter of law’s necessary connection to the common good cannot be avoided. And even if this unjust law is part of a valid legal system, this fundamental point about law has not been missed. Furthermore, the proper understanding emphasizes the way in which the common good is part of what makes a legal system a legal system and not merely one consideration in deciding whether to obey the law. The same idea helps to make sense of the conclusion that a law that advances the common good but damages the private good of an individual subject to the law can still be obligatory. It is hard to see how this would be the case on Raz’s view. While he might suggest

\textsuperscript{424} Simon GTA 141-42.
that the individual’s reasons to support the common good outweigh the reasons to protect his own good, such an outcome, at least in difficult cases, would seem to depend on rigging the calculation in advance for the common good. For example, Raz’s theory cannot explain why any given individual would have to comply with a draft order, especially if losing the war would not have a disproportionately negative impact on his own life.

The consequence of all of this is an important correction in the understanding of unjust laws. The critics of the “unjust law is no law” maxim are correct that some unjust laws are part of what is plainly identifiable as a legal system, as in the case of the Nazis. As part of a legal system, even unjust laws impose a prima facie obligation to obey. Of course, such an obligation can be overridden by other considerations. As Finnis explains, “The equal obligation in law of each obligation-imposing law is to be clearly distinguished from the moral obligation to obey each law,” and thus, “Like the obligation of promises, the moral obligation to obey each law is variable in force.”\textsuperscript{425} Crucially, that is different than saying that there is simply no obligation to obey because the unjust law is “not law.” It is only “not law” if the directive is not part of a valid legal system (which is probably better than saying an “invalid legal system” since the whole point is that it is not a legal system at all).\textsuperscript{426}

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Needless to say, any theory of authority, including this one, points to the question of what it means to have an obligation to obey the law. The debate between Raz and Finnis revolves, in part, around the question of whether there is a prima facie obligation to obey the law, with Raz

\textsuperscript{425} Finnis NLNR 318.

\textsuperscript{426} In this sense “valid legal system” is redundant, and it would probably be more precise just to speak of legal systems and systems of rules that are not legal systems.
arguing in the negative and Finnis in the affirmative. Another way this arises is in the form of the question of whether there is an obligation to obey the law even when there are no harmful consequences, which includes, by stipulation, that no one else will know (so that the lawbreaker is not caught, so that no one else’s respect for the law is improperly diminished, and so on). Finnis’s main argument is that one of the “features which are characteristic of ‘the law’” is that “the law presents itself as a seamless web by forbidding its subjects to pick and choose.”

There are instrumental reasons for this, such as a prudent distrust of individuals’ ability to exercise sound judgment in determining when they ought to exempt themselves from the law. It is a maxim as old as law itself that people are notoriously bad judges in their own cases. But there are deeper, intrinsic reasons why the law cannot be obeyed piecemeal, in principle. The very nature of law itself entails a decision to substitute public judgment for private judgment and thereby exclude the possibility of individuals judging themselves to be outside the law’s authority in particular circumstances. That is to say, the very meaning of being law-abiding is to follow each applicable law, where each law is part of “a set coherently applicable to all situations and which exclude all unregulated or private picking and choosing amongst the members of the set.”

One who determines on a case-by-case basis which laws are authoritative, meaning which are legitimate and generate a prima facie obligation to obey, cannot be said, in a true sense, to be law abiding. In Finnis’s words, “Your allegiance to the whole set is put on the line: either you obey a particular law, or you reveal yourself (to yourself, if not to

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427 More deeply, Finnis and Raz must have different views about the nature of the common good and, therefore, about the relationship between law and the common good.

428 Finnis LC 101.

429 Finnis used this language of “public judgment” and “private judgment” in a personal conversation with the author at Princeton University on 14 October 2010.

430 Finnis NLNR 317.
others) as lacking or defective in allegiance to the whole, as well as to the particular.” On this view, an individual who judges himself to be outside of the authority of the law, by definition, denies the authority of law just as such.

Raz, it is clear, has an entirely different conception of law. Because for Raz the authority of law depends entirely on reasons, that is, the law’s conformity with the reasons one already has independently for action, legitimacy indeed depends upon a case-by-case analysis. In his view, when the reasons for a particular law do not apply in a particular case, there is simply no reason to obey. The preemption of private judgment by public judgment depends entirely on the reasons for doing so in that case (subject to limitations, but those only amount to rules of thumb, not obligations). Therefore, if a pharmacist knows better than the drug regulators or if a potential polluter knows that everyone else is violating the environmental regulations, then there is no obligation to obey—the law has no authority in that case—because the reasons for the law do not apply. Similarly, in any case where no one will know and there will be no harm done, such as the mythical traffic light in the middle of the night in the middle of nowhere, there is no obligation to obey. That is, when the reasons for the law do not apply, there is no obligation to obey it.

Raz’s challenge is not without some intuitive merit. For example, Finnis sees a role for law in promoting the common good in “the need for individuals to be able to make reliable arrangements with each other for the determinate and lasting but flexible solution of coordination problems and, more generally, for the realizing of goods of individual self-constitution and of community.” Yet Raz wants to insist that those goods can be realized by obeying or by

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431 Finnis NLNR 317.
432 Finnis NLNR 306.
disregarding the law, depending on the circumstances, and if the disregarding is justified not by a separate, countervailing reason but by the inapplicability of the law in that case or to that individual, then the law does not supply even a prima facie obligation to obey. And so when Finnis writes that “the existence of the legal order creates a shared interest which gives everyone moral reason to collaborate with the law’s co-ordination solutions, i.e., moral reason to regard the law as (morally) authoritative,” Raz responds that that is true only sometimes. Raz is prepared to view the law as authoritative only when the coordination solutions actually advance the purposes of the shared legal order, which is highly contingent. But, for Raz, the fact of a shared legal order itself does not have any purchase when the underlying reasons are not in play. If Raz were to concede that an overarching legal order always created a shared interest that gave everyone a moral reason to comply (that is, if law-abidingness were its own reason for action), then his position would collapse into Finnis’s position because all directives that were part of a broader scheme would necessarily entail a prima facie obligation to obey. If Raz wished to retreat to a theory about individual directives apart from a legal order, he could not claim to be meaningfully speaking about law at all since the relevant (and interesting) concern is with the laws of a legal system (as though there could be any other kind) as opposed to directives detached, mysteriously, from a wider system.

Finnis maintains that there is reason to obey the law in general even when the reason for a particular law is absent, meaning that he sees a prima facie obligation to obey all particular laws as part of the institution of law. Finnis draws an analogy between obeying the law and keeping a promise, which he argues, contra Hume, there is an obligation to do even when no one

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433 Finnis LC 102.
else will know.\textsuperscript{434} Promise-breaking is impermissible even in such situations because “the practice of promising gains much of its value, as a contribution to the common good, precisely from the fact that the obligations it involves hold good even when breach seems likely to be undetectable.”\textsuperscript{435} The implicit trust between the promisor and promisee could not be there if the institution of promise-making did not entail an obligation to keep the promise even when failure to do so would go undetected. The mutual trust fostered by this practice is itself part of the common good rather than merely a means to other ends, so its absence would damage the common good.\textsuperscript{436} Moreover, the good of the promisee is part of the common good itself since respect for that person, like respect for all persons, is “one of the conditions for the well-being of each and all in community.”\textsuperscript{437} Failure to keep the promise, solely based on the breach’s undetectability, would indeed be a failure to respect the promisee.

Raz, on the other hand, would likely say that there is no obligation to keep the promise if the promisee will never know because, in effect, the reasons for the promise no longer apply. It appears, then, that Raz has a much more narrow view of the common good. Presumably Raz would not deny that the common good figures into one’s reasons for action. If so, he would have to deny that the common good includes these kinds of considerations, such as the importance of promise-keeping even when no one will know; otherwise, he would have to accept the obligation to keep promises even in such circumstances and, mutatis mutandis, the obligation to obey the law even when there are no negative consequences. Raz must take a “what he doesn’t know can’t hurt him” approach such that undetected breaches do not impair the common good.

\textsuperscript{434} Finnis NLNR 302.
\textsuperscript{435} Finnis NLNR 304.
\textsuperscript{436} Finnis NLNR 306.
\textsuperscript{437} Finnis NLNR 305.
Instead, for Raz, the institution of promises could only be damaged if people knew that they could not trust each other, but this could be established only by detectable breaches. Even for the skeptic who said that the very knowledge of the rule that permitted undetectable breaches would undermine the trust at the center of promise-making and, more broadly, the common good, Raz, drawing on his more narrow view of the common good, could respond that people do not care about promises that are broken when no one will know. If the obligation behind promises rests solely on the reasons for the promise in the first place, then people might feel free to break promises undetectably, but they would likewise know that people could be trusted in all cases where detection is possible, which are the only cases they care about.

Finnis, however, insists that this cannot be the proper understanding of these institutions:

Part of the law’s point is to maintain real (not merely apparent) fairness between the members of a community; and this aspect of law’s point is unaffected by the detection or covertness of breaches of law. The institution of law gains much of its value, as a contribution to the common good, precisely from the fact that the obligations it imposes hold good even when breach seems likely to be undetectable.\(^{438}\)

Similarly, the “common good . . . can be realized with reasonable impartiality only if the individual performs on his promise; and this necessity is the obligation of his promise.”\(^{439}\) Thus, with respect to both promises and the law, their very nature entails an obligation to fulfill their terms. Of course, neither imposes an absolute obligation; the obligations can always be outweighed by other factors. For instance, Finnis acknowledges that “in some circumstances an individual can serve fairness or other aspects of the common good better by breach than by

\(^{438}\) Finnis LC 102.
\(^{439}\) Finnis NLNR 307.
conformity.” As a general matter, though, keeping a promise or obeying the law provides a reason for action just insofar as it is the kind of thing it is. The value it possesses through its relation to the common good exists precisely because it necessarily entails an obligation. Therefore, even though the obligation is not absolute, in cases of undetectable breaches, “Raz’s claim that in those situations the law gives ‘no reason’ for doing what it commands, i.e., has no moral authority at all, seems extravagant.”

Reprising the point but with an added explanation, Finnis adds:

The reason (I suggested) for taking the law seriously to the full extent of its tenor and intended reach—and never regarding it as giving no reason for doing what it commands—is a reason connected with that irreducible multiformity of human goods (and that plurality of human persons) which imposes intrinsic limitation on human practical reasoning and makes nonsense (and injustice) of totalitarian projects.

For the same reason that, contra Raz, private judgment cannot be permitted to trump public judgment in particular cases, totalitarian projects are wrong and doomed to fail. The limits of practical reason guarantee that individuals will err and that the state (or anyone else) cannot succeed in truly comprehensive planning and control. Furthermore, even in the hypothetical case of a society of perfectly intellectual and virtuous people, prediction remains impossible and so, too, perfect planning. Yet this defense of authority, that it is necessary in all cases, is a bit beside the point for two reasons.

First, this all points to a deeper disagreement between Finnis and Raz. In order for Raz to reject Finnis’s claims, he must deny that law has meaning beyond its role in advancing particular

440 Finnis LC 102-3.
441 Finnis LC 103.
442 Finnis LC 103.
purposes. More technically, in terms closer to Raz’s own, the law has no authority over an individual if it does not serve the reasons he has for action (or better serve those reasons than he might on his own). To be sure, as just mentioned, promotion of the common good could be among those reasons for action. But this cannot be construed by Raz in the general way Finnis understands it, or else there would always be a reason—i.e., a prima facie obligation—to obey the law. Therefore, unless Raz wishes to deny acting for the common good as a reason for action, he must deny that acting for the common good entails an obligation to obey the law just because it is the law. In other words, he must claim that the law’s value is relatively narrowly limited to advancing the more particular purposes of individuals (or groups), stemming from the law’s potential to contribute expertise or efficiency to the furtherance of one’s own purposes. In this light, Raz might say that there is no such thing as “law,” just laws. That is, there isn’t anything about law that makes it special as a whole or even makes it a whole at all; instead, there are particular directives that are either rationally justifiable or not. In contrast, Finnis understands the very nature of law to entail obligation because it is the obligation to obey that enables—and indeed embodies—the law’s contribution to the common good. In this respect, all directives bind precisely in respect of being “law,” or part of the whole known as “the law.”

Second, and even more fundamentally, all of this illuminates the meaning of the command aspect of law. There is a temptation to get caught up in the debate as framed by the mythical traffic light example: what if the reasons for the law don’t apply? It may be, as Finnis explains it, that there is always some reason to obey because human judgment is prone to error and because the justice or fairness of the whole scheme depends upon people not making

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443 If Raz held, however, that an individual always had reasons to comply with the law for the sake of the common good regardless of the particular circumstances, then his position would collapse into Finnis’s and offer no practical difference.
exceptions for themselves even when breaches will not be detected. But it is far more instructive to follow Finnis down the route that points to obligation as part of the nature of law. Law as command conveys the sense in which obligation is necessarily part of law’s form, that law cannot be understood without obligation. Substantively, this is another way of saying that the obligation to obey the law, prima facie, does not depend upon the circumstances of particular laws; rather, there is an obligation to obey all laws as part of a legal system oriented toward the common good. This means that, while the orientation to the common good provides the normative justification, obligation is part of the form of law, and law cannot be understood without it. But not just any directive oriented to the common good is authoritative. Indeed, from Raz’s point of view, not every exception damages the common good, so the law does not have normative force in those cases. This is why law must take the form of command, a directive from a political superior to a political inferior. On this understanding, the status of law as “law” preempts questions about the prima facie obligation imposed by particular laws. As a set of commands, the law is authoritative apart from the reasons for particular laws, even though the legal system as a whole requires normative justification. For this reason, Raz’s contingent arguments about the applicability of certain laws in certain cases do not hold. Ultimately, this is not in disagreement with Finnis’s position, but it clarifies further why, rooted in the nature of law, there is a prima facie obligation to obey the law.

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If the prima facie obligation to obey the law depends upon the legal system’s orientation to the common good, then it would appear that one challenge is to determine when a legal system is oriented to the common good. Since the idea of a prima facie obligation to obey the law seems binary (either there is or there is not such an obligation), it also seems that orientation to the
common good would be binary. But it is easy to imagine that legal systems might exist along a sliding scale of being relatively more or relatively less oriented toward the common good. Even so, there could be a cutoff point dividing legal systems sufficiently oriented to the common good and those insufficiently so, still acknowledging the variation on both sides of the line.

Theoretically, it is possible to conceive of different degrees of legitimacy, conferring different degrees of a prima facie obligation to obey, but this is an unnecessary complication since the important claim is just that there is some prima facie obligation to obey of whatever strength. The fact that competing moral obligations might come up against prima facie obligations of varying strengths is, at least for the moment, beside the point.

The key point, though, is that the difficulty of such line drawing (or otherwise categorizing) with respect to legal systems is no worse than with individual laws. Deciding whether, on the balance of reasons, an individual law is “worth” obeying is no less opaque than determining whether a legal system is sufficiently oriented to the common good. As such, this theory does not introduce a further difficulty; it just moves the central question to a different level. In one sense, it does add an additional question insofar as there is a question of whether the legal system is oriented to the common good before there is the question of how the reasons to obey the law stack up against the reasons not to. This charge proves the larger point about authority, though. If there is no force to the law other than the independent assessment of its merits, irrespective of the source (meaning without treating the source as authoritative), then there is no real authority in the system in question.

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Simon’s characterization of authority, which rests with the people and devolves to officials in an act of transmission, further supports the notion of a prima facie obligation to obey
and thereby helps to make sense of content-independence with response to obligation and obedience. For Simon, what is transmitted is the power to rule, but this is not unlimited power, for “the people, after having transmitted power and having placed itself in a position of mandatory obedience, retains a power greater than the power transmitted.”\footnote{Simon PDG 179.} Nevertheless, the power retained by the people is a latent power because “in order for the transmission of power to be genuine, it suffices that the superior power of the people should be suspended by the act of transmission and should remain suspended until circumstances of extreme seriousness give back to the people the right to exercise it.”\footnote{Simon PDG 182.} This is what makes the official(s) an actual authority rather than a “secretary or manager” as in the coach-driver theory.\footnote{Simon PDG 182.} The mechanics of this may be difficult to grasp at first since Simon’s theory comprises the claims that the people possess superior power and that the transmission of power to the officials (king or otherwise) is “genuine.”\footnote{Simon PDG 182.} In practice, this plays out through a very careful balance. On one hand, “The actual possession of a power does not necessarily entail the right to use it actually;” on the other hand, “The suspension of the right to use a certain power does not necessarily entail the loss of this power.”\footnote{Simon PDG 183.}

So how do the possession of a power and the suspension of the right to use it usefully coexist? Simon elucidates the thought by way of analogy to emergency powers, which “are given to the governor not by the emergency but by the constitution.”\footnote{Simon PDG 183.} In turn, “What the
emergency effects is the releasing of powers given by the constitution.” As such, the authority possesses the power to take extraordinary measures, but that power remains suspended until such time as its use warranted by the circumstances. “Similarly,” Simon continues, “the people who transmitted power to a king would be guilty of criminal disobedience if they decided to depose the king for no extraordinarily grave reasons. It would be like a constitutional ruler fancying to exercise emergency powers when there is no emergency.” So the people, too, retain “emergency” powers, the prerogative to defy the government when necessary—but only when necessary. Simon puts it thus: “Transmission is so genuine as to bind the superior power of the people, to tie it up in such a way that extraordinarily serious circumstances alone can untie it.” This ultimate power, which the people retain, is sometimes called revolution. In this sense, the authority is always tracked because the people, who may sit aside silently most of the time, have the authority to remove the officials from power should the threat become sufficiently grave. Moreover, because the possibility of revolution is not just a brute fact but also a right—a normative fact, as it were—this latent power is not just de facto but de jure, making it all the more real as a constraint on authority. Revolution, here, remains extralegal as it is not governed by anything found in the law, but it is still legitimate by virtue of the same principles that make authority legitimate.

Of course, the parameters of what constitutes such circumstances are another matter. Notably, in Simon’s view, “The common right of deposition, which the transmission theory grants to every politically organized people, cannot be lawfully exercised without extraordinary

450 Simon PDG 183.
451 Of course, if the power to determine that such circumstances obtain rests with the same authority, then prudence will be of the utmost importance.
452 Simon PDG 183.
453 Simon PDG 183.
circumstances, without dire and immediate threat to the common good.\textsuperscript{454} Obviously, this rendering supports the claim that an orientation to the common good is essential for legitimate authority, based on the notion that the raison d’être for authority is the promotion of the common good. Once authority no longer serves the common good, the power that has been transmitted to it is effectively nullified: in principle it is nullified by illegitimacy, and in practice it is nullified by revolution, which is the justly exercised power of the people to depose the officials. This formulation is significant because it means that the right of revolution depends on more than widespread dissatisfaction with officials. If authority depended on consent, then, all else being equal, consent could be withdrawn at any time and revolution justified. On Simon’s alternative view, though, the right of revolution is in fact suspended until such time as it is released by the circumstances. If there is to be an appeal to a principle that is in any sense more than a subjective judgment by the people of when they have had enough, then this criterion of orientation toward the common good fits well. Understanding revolution without some normative criterion of this type makes it difficult to explain when it is justified and when not, or how it would even be possible to compose such distinctions.

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A central question for any contemporary theory of authority, especially a theory like this, is whether and to what extent it is compatible with democracy. Simon favors an understanding of authority akin to the transmission theory whereby the people “have designated the ruling person, and they have transmitted to him the power given by God to the people.”\textsuperscript{455} Simon traces this understanding back at least as far as Aquinas for whom “power belongs primarily to

\textsuperscript{454} Simon PDG 180.  
\textsuperscript{455} Simon PDG 158.
the people, who can use it to make laws for themselves. Even without God in the picture, this transmission functions equivalently in a democracy. For Simon, the key element is a true transmission of authority which, in its very nature, requires obedience. This follows from a fairly intuitive point about majority rule, that “everyone is bound to obey” and that “it is only by accident that one happens to be in the majority and to follow one’s own judgment as one acts according to the decision of the majority.” If one only obeyed when in the majority, then there would be, of course, no majority rule. This much is fairly uncontroversial. But, for Simon, it also follows that “transmission of sovereignty to a distinct governing personnel leaves to the people the character of a merely consultative assembly.” Lest one think that this is merely a restatement of the fairly uncontroversial view that citizens must obey authority, Simon goes further and critiques even expressions of opinion by the people that are, in intent or in effect, “calculated to deprive men in power of their right to command, of their duty to have a judgment of their own, of their responsibility, of their conscience.” All of this should serve to emphasize the fullness of the transmission of authority from the people to the governing personnel.

As Simon makes clear, transmission of authority not only disables the people’s direct authority but even limits behavior that appears or aims to control the governing personnel: “Intense campaigns of opinion, which imply that the people has the power of decision, are lawful only when circumstances are so grave as to give the people a right to exercise, albeit in limited fashion, the power greater than that of the governing personal which was suspended, but not

456 Simon PDG 159. 
457 Simon PDG 186. 
458 Simon PDG 189. 
459 Simon PDG 187.
nullified, by the act of transmission.”460 This is not, to be sure, an invitation to tyranny. This transmission does not render the people entirely powerless. Simon’s view is fully consistent with his assertion that “every government has a duty to see the maximum of voluntary cooperation, to explain its purposes and methods,” and so on.461 This is important because authoritarianism is the characteristic danger of a theory that seeks content independence. But the government’s responsibility to explain itself is not to be mistaken for power held by the people, for “ungenuinely transmitted sovereignty implies constant rebellion.”462

Set against this version of authority is “coach-driver theory,” according to which the citizen believes, “I really obey myself alone, and this is all that society needs and wants me to do.”463 Even if there are elected officials, they really obey the people all of the time. The contrast between transmission theory and the coach-driver theory is important for understanding just how robust Simon’s idea of authority is. Under the coach-driver theory, “authority belongs not to the leaders but to the led,” “not to the government but to the governed.”464 For Simon, such a position is flawed down to its core, for “the obligation to obey has its roots in the nature of things.”465 Moreover, this is true for any political arrangement: “In a direct democracy as well as in any other organization the nature of society demands that man should obey man.”466 Simon recognizes the appeal of the coach driver theory, as it “draws considerable power from its apparent ability to explain a number of phenomena pertaining to regular democratic practice.”467

460 Simon PDG 190.
461 Simon PDG 194.
462 Simon PDG 187.
463 Simon PDG 146.
464 Simon PDG 146.
465 Simon PDG 154.
466 Simon PDG 154.
467 Simon PDG 149.
Even so, despite its explanatory power, “The coach-driver theory is unlikely to be popular where there is a strong belief in a law of nature independent of the whims of man.”\textsuperscript{468} That is, authority’s essential role in society recommends it against the simulacrum of authority presented by the coach-driver theory.\textsuperscript{469} Indeed, in holding forth authority in appearance only, the coach-driver theory can be downright dangerous, for it “flatters an instinct of disobedience from which no human heart is entirely free,” an instinct which, when “uninhibited,” “may lead to anarchism.”\textsuperscript{470} Although Simon sees the coach-driver theory as an “outlet” for this malign instinct, it can be inferred that such a self-understanding would render a society weak and vulnerable at its core.

The need for genuine authority is, therefore, a “demand of the common good.”\textsuperscript{471} When a community or society satisfies that demand by establishing a constitutional government “sanctioned by fundamental law, every attempt at corrupting transmission of power into an ungenuine process is sheer revolt against the fundamental law of the country.”\textsuperscript{472} For this reason, Simon emphatically rejects government by consent where it means that the people “are never obligated to obey.” In such cases, “The theory that government demands the consent of the governed expresses neither a political nor a democratic necessity but mere revolt against the laws of all community.”\textsuperscript{473} Likewise, a theory of genuine authority that stands against this sort of government by consent also ought to stand against a theory of authority based strictly on

\begin{footnotes}
\item[468] Simon PDG 154.
\item[469] Such a statement depends, of course, on a prior view about the nature of man and society. This is noteworthy in evincing the way in which theories of authority unavoidably depend upon prior theories of the good. A certain view of the good demands genuine authority; a contrary view of authority entails a denial of that same theory of the good.
\item[470] Simon PDG 149.
\item[471] Simon PDG 186.
\item[472] Simon PDG 186.
\item[473] Simon PDG 194.
\end{footnotes}
reasons like Raz’s. It could be said similarly about Raz’s theory that people are never obligated to obey. Because people must always ultimately judge the balance of reasons (or judge the balance of reasons for suspending such judgment), Raz’s theory can suggest when authority is rational but never that obedience is obligatory. In this way, each person fully remains his own master, and compliance with the law can never be obedience. While the contrary might sound authoritarian, it is necessary if there is to be any real authority. Simon’s transmission theory is useful because it suggests just such authority. And the concept of command, which entails obligation (in the sense of intending obligation), supports content independence even with the background justification of a system oriented to the common good.
Although command, as a concept, entails the idea of obligation since commands plainly intend to obligate, not all commands (or sets of commands) are necessarily authoritative. Clearly, there needs to be some additional normative component that distinguishes a command as authoritative. And, if law is to be understood as authoritative, meaning if law creates a prima facie obligation to obey, which it must if law is to be more than just a prediction of behavior, then this additional normative component must be part of the definition of law. This is why law must not be just a set of commands (or, on Hart’s terms, a set of rules) but set of commands oriented to the common good. The difficulty, however, is in reconciling the normative basis for law’s authority with a content-independent obligation to obey. Making law’s authority normative suggests that, when the normative criteria are not met, the law has no authority. Conversely, a content-independent obligation to obey suggests that the law is authoritative without reference to normative criteria. The beginning of the solution is to see that a legal system is legitimate or illegitimate as a whole: once legitimate, there is a (prima facie) content-independent obligation to obey its individual directives. If this is to be the case, though, it must be shown that obedience to a set of commands oriented to the common good is good just as such. That is, it must be shown that authority and obedience are good and even necessary. There are two ways of looking at how obedience to authority can be obligatory. The more common way,

474 To be sure, the orientation to the common good alone does not characterize authority. Authority must have not just the right substance but the right form, namely command, as well. Otherwise there would be no way to distinguish between different proposals for advancing the common good.
following Anscombe in “On the Source of the Authority of the State,” is to argue that authority is necessary for the benefits it brings, such as protection, and that it is obligatory because it is necessary. Without obedience, authority would not be able to achieve its necessary ends.\footnote{See: GEM Anscombe, “On the Source of the Authority of the State,” \textit{Authority}, ed. Joseph Raz (New York: New York University, 1990) (hereafter “OSAS”).}

Another way, which is related, focuses on the good of obedience itself, namely the idea that complying with authoritative directives can sometimes be better when it is a form of obedience than when it results merely from coinciding what one happened to be doing or ought to be doing, anyway. If there are distinct benefits that come from obedience, per se, then securing those benefits depends upon the obligation to obey because, without obligatoriness, there is no true obedience. Rather, in the absence of an obligation to obey, compliance only appears to be obedience but is in fact more akin to volunteering or taking advice.

Therefore, the central question for this section is whether and how authority and obedience are good and necessary. After all, perhaps true authority is unnecessary or even unjust in a world where people are to be guided by their own reason. At least for Raz, this would be a straightforward way out of the problem. Certainly there is nothing in Raz’s own words to indicate that this is the sort of way out he desires; the flaw in his work is not that he wishes to abandon obligation but that he undercuts obligation without realizing it. Nevertheless, if authority were at times salutary but never necessary, Raz’s position could hold together. If authority is necessary, however, then descriptive theories like Hart’s and prescriptive theories like Raz’s that evacuate authority of meaning are unsatisfactory. For even if their theories turn out to be self-contradictory or unable to sustain the weight of their own claims, there is no need for an identification or justification of authority if there is no need for authority. There would
only be a need to explain why people sometimes behave as though they have an obligation to obey authority. But if there is a need for authority, then there is a need for a theory of authority, one that locates and accounts for authority’s autoritativeness.

Thus, the goal of authority (in the form of law) is necessary in order to attain certain goods and that authority is therefore good. If the authority is not oriented to these goods (altogether the common good) on the whole, then it is not law and it is not authoritative, meaning not legitimate. Such an understanding of law makes possible a distinction between government and gangs that goes beyond simply questions of scope and so forth. Furthermore, it shows how law’s authority can be content independent because authority attaches to the legal system, which is oriented to the common good, as a whole. This content independence is necessary for the functioning of authority and is part of what makes it authority in the first place. Without content independence, authority is not general, in which case it is something other than authority.

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Legitimate authority entails a prima facie obligation to obey in part because it creates new reasons for action, specifically with respect to the advancement of the common good. In Finnis’s words, law gives:

all those citizens who are willing to advance the common good precise directions about what they must do if they are to follow the way authoritatively chosen as the common way to that good (it being taken for granted that having a defined and commonly adhered-to ‘common way’ is, presumptively, a peculiarly good way of advancing the common good).476

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476 Finnis NLNR 325.
Of course, it is not authority that creates the common good; the common good and possibilities for its instantiation exist independent of authority. That is to say, the common good (in its specifications) already gives reasons for action without authority because each individual has a reason to advance the common good whether or not there is a legal obligation involved. But authority creates unique possibilities for its advancement, unique in that those possibilities are impossible, or absent, without authority. Therefore, authority creates new reasons for action for the sake of the common good, which are reasons to obey authority. Critically, it is the obligation to obey that makes authority significant in this way. A non-authoritative coordinating agent could offer various suggestions for advancing the common good, but authority, in virtue of the obligation to obey, creates possibilities not available to such agents.

At the same time, this obligation is only a prima facie obligation to obey. This means that if the authority is legitimate, if the legal system is oriented to the common good, then there is a contingent moral obligation to obey the law, contingent, that is, upon the absence of a stronger moral obligation not to do what the law demands. Furthermore, this also means that the prima facie obligation to obey the law exists even when there is in fact a competing moral obligation not to do what the law says. In other words, the prima facie obligation to obey is an obligation to obey the law qua law. As long as the directive can be identified as part of a valid legal system, then each particular law carries the prima facie obligation to obey, even if that obligation is ultimately defeated. (To be sure, this is not the positivists’ route because, here, the validity of the legal system depends on its morality, understood as the system’s orientation to the common good, without which the system could not be meaningfully said to be law.)

In contrast, if there were no prima facie obligation to obey the law qua law, then authority could not be said to have meaningfully added anything to the equation as authority (certainly not
in the sense of being “in authority” as opposed to being “an authority”). If the obligation to obey each law stemmed only from an assessment of the merits of the individual law itself, as Raz seems to understand things, then authority would not truly be playing a role as authority. That is, individuals would only be doing that which they had reasons to do, anyway, and authority could not be said to be creating new reasons for action. The very point of authority is that it creates new reasons, that due to authority there is a point in doing things there was not a point in doing before. Therefore, another way to understand what it means for authority to create reasons for actions that entail an obligation to obey is that if authority did not entail a prima facie reason to obey, then it would not be authority. It would be, at best, a suggestion. This is most easily seen in the example of undetectable, victimless violations, such as the case of the mythical traffic light. If there is no obligation to obey in such cases, then the law cannot be said to have authority qua law. Compliance with the law depends entirely on having independent reasons for stopping at the light (reasons, in other words, that have nothing to do with the law being authoritative).

A more practical way of putting this is that individual decision-making about the law, of the sort Raz has in mind, largely defeats the purpose of authority. If such decision-making did take place, it would be hard to say there was anything that could be meaningfully called a prima facie obligation to obey (because with a prima facie obligation to obey the starting point or default position is one of obedience rather than assessment). And, in turn, it would be hard to say there was anything that could meaningfully be called authority since the nature of authority is that individuals do not and cannot make such assessments, otherwise known as content independence. To be sure, none of this precludes the possibility of individual judgment with
respect to civil disobedience and so forth, when there might be a stronger moral obligation not to obey the law.

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A main question that hangs over this, though, is whether human authority can generate obligations in the same way as divine authority, which is the prime model for content independence. If legal obligation cannot rest on reason alone like moral obligation, how can there be commands akin to the kind that stand behind religious obligation? In the divine authority model, God possesses, by stipulation, the requisite superiority to obligate through His commands. Implicitly, no such superiority exists outside of God. Indeed, Yves Simon, himself a believer, writes that such human authority actually derives from God.\textsuperscript{477} For him, the problem is that “on the one hand, it seems impossible to account for social life without assuming that man can bind the conscience of his neighbor; on the other hand, it is not easy to see how a man can ever enjoy such power.”\textsuperscript{478} While directives from one’s fellow man can provide reasons for action, they can never be binding just as such because one can choose to act otherwise for other reasons, no matter how bare. (Even “I feel like it” would suffice. Acting for even the basest pleasure might be wrong or damaging, but it would not be unintelligible. More commonly, acting for simple relief, such as scratching an itch, would not be unintelligible and not wrong in itself, even if it only provided a very weak reason for action.)

In Simon’s words, “there is something paradoxical about having the power to bind the conscience of another man,” continuing: “Of course, a man cannot do such a thing. God alone can. And God can bind a man to obey another man. This he did by the creation of the human

\textsuperscript{477}Simon PDG 154. More on this below.
\textsuperscript{478}Simon PDG 145.
species, which is naturally social and political; for the necessity of government and obedience follows from the nature of community life.” Notably, Simon does not say that God commanded man to obey his fellow man. Rather, Simon claims that the obligation to obey is built into humanity in virtue of man’s social and political nature. This means Simon’s position can also be argued by those who deny that God exists or that any feature of human existence comes from Him. That is, if man’s “boundedness” is part of his nature, it does not particularly matter where it comes from, for the purposes of this argument. Simon essentially makes this point himself, recapping from an earlier section that “the need for government is so rooted in the nature of society that government would be needed even in the ideal case of a society made only by enlightened and virtuous people.” He adds, “If government, as distinct from unanimity, is made necessary by the very nature of things, the obligation to obey has its roots in the nature of things, in the very nature of man and of human society.” In this expression of the argument, it does not seem to depend on whether God is responsible for this nature or not.

Some rooting of authority in human nature is necessary because, even if the religious obligation serves partly as a model for legal obligation, there are important differences between God’s commands and the government’s. First, because government never possesses the intrinsic superiority that God does, “just because” is never enough; that is, the government’s authority needs to rest on something more than mere command. It makes more sense to imagine a divine law than a positive law that had no purpose other than to cultivate in its subjects a habit of obedience. It would be uncomfortable if the government constructed an arbitrary rule just for the sake of promoting obedience to the government. Government does not seem to be the sort of

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479 Simon PDG 154.
480 Simon PDG 154.
481 Simon PDG 154.
thing that should be obeyed just for the sake of obedience. Moreover, habits of obedience to the

government, in the sense described here, seem unnecessary if the government has reasons to
offer for everything else it requires. Even when reasons cannot be offered under special

circumstances, this is not meant to be the norm; furthermore, even in those cases, they are not
reasons that cannot ever be known or cannot be known in principle. In contrast, such an example
makes more sense in the realm of divine authority since there could be reasons that cannot be
known in principle, owing to the impossibility of taking God’s perspective on matters.

Furthermore, unlike with government, obedience of God could be good for its own sake just
because of the kind of being God is. Obedience, in that case, is the mode most appropriate to the
kind of relationship that the God-man relationship is. Indeed, the desirability of developing
habits of obedience presupposes the goodness of obedience (that obedience is good for its own
sake) because it can only be good to develop habits of obedience if it is good to be obedient.

Otherwise, it would be better to judge each command on the merits. On the surface, this makes
sense with God but not with government. Some might argue that, instrumentally, it is better for
citizens to have habits of obedience to the government so that they err on the side of obeying
when they might otherwise underestimate the importance of obeying in a particular case or
simply be lazy. Others would dispute this, of course, but, either way, it would only be an
instrumental justification, not a claim that obedience of the government is good for its own sake
in the way that obedience to God could be.

This understanding of the relationship with God and what it properly entails also fits with
Finnis’s introductory description of the good of “religion.” Careful not to assume too much,
Finnis characterizes religion broadly as bringing “one’s life and actions . . . into some sort of
harmony with whatever can be known or surmised about that transcendent other and its lasting
order” if there is indeed “a transcendent origin of the universal order-of-things and of human freedom and reason.” Even those who begin with an atheistic premise often appeal to principles that amount to “a recognition (however residual) of, and concern about, an order of things ‘beyond’ each and every one of us,” or “concern for a good consisting in an irreducibly distinct order.” Although at this level there is clearly no need for God as a commander or any sort of divine command, it does suggest the goodness of bringing one’s actions or even one’s will into line (into harmony) with something transcendent outside of oneself. Depending on the nature of that transcendent other, obedience might be the proper mode of that harmony. This possibility is brought into sharper relief in the previously quoted section where Finnis expands on his notion of religion, where the question of obedience to God “has no bite” because it is simply the behavior proper to the relationship: it is its own reason for action. Again: “The requirements of practical reasonableness (which generate our obligations) have a ‘point’ beyond themselves. That point is the game of co-operating with God. Being play, this co-operation has no point beyond itself, unless we wish to say that God is such a further ‘point.’” Cooperating with God means being in line with, or obeying, his will. Finnis’s view here is helpful in two further respects. First, as shown above, Finnis roots cooperation with God in a concern for the common good, both in itself (the value of the common good that each person can recognize) and as the object of God’s concern (the value that a person attaches to the common good as an expression of cooperation with God who values the common good). This is important because it highlights the dual nature of the law, for which this serves as a partial model. Law, too, must

482 Finnis NLNR 90.
483 Finnis NLNR 89-90.
484 Finnis NLNR 90.
485 Finnis NLNR 409.
incorporate the will of the commander and a concern for the common good. Lacking either
feature, it cannot be fully explained. Second, Finnis’s view helps illustrate that the emphasis on
command in this theory is not a return to positivism but part of its critique. The utility of the
command model, as taken from a theoretical example of divine authority, is not to advance rules
for rules’ sake but rather to bring out a necessary component of legal rules. In the law, there still
must be an underlying point to the rules, and that point is the common good.

If any of this is right, then it points to the impossibility of a descriptive, or non-
normative, theory of authority. For a theory to speak of authority, it must be speaking of an
obligation to obey, which necessarily depends on the authority being legitimate. If, on the other
hand, the theory merely identified de facto authority, then it would just be an empirical question
of when and whether people happen to obey. This is problematic for Hart because if he wants to
say that people obey the law, motivated by something other than habit or fear, then he must
speak of obligation, which he does. While Hart may wish to avoid taking a position on whether
there really is an obligation or why, such a position would, perforce, reduce his concept of law
back to prediction because there would be no accounting for why people take the law as a
standard against which to measure their behavior.

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A first step to understanding the correct conception of authority is in seeing that the
common good provides a reason for action. Whereas basic human goods more plainly give
individuals reasons for action, a requisite (though not unlimited) impartiality between one’s own
good and others demands that each individual care for the common good. As Finnis has it:

Every man has reason to value the common good—the well-being alike of himself and of
his partners and potential partners in community, and the ensemble of conditions and
ways of effecting that well-being—whether out of friendship as such, or out of an impartial recognition that human goods are as much realized by the participation in them of other persons as by his own.\textsuperscript{486}

Because authority plays a role in advancing the common good, this amounts to a claim that obedience to the law is reasonable and, therefore, that a prima facie obligation to obey the law is reasonable, too. On this view, law “represents to the subject an intelligible determinate pattern of action, which, having been chosen by the lawgiver to be obligatory, can actually be obligatory in the eyes of a reasonable subject because the ruler’s imperium can (for the sake of the common good) be reasonably treated by the subject as if it were his own imperium.”\textsuperscript{487}

With this understanding, Finnis mitigates Raz’s concern about the opposition between authority and autonomy. When authority is oriented toward the common good, authority and autonomy are not in opposition but rather serve the same ends. Raz would likely lean toward agreement with Finnis when he writes that a promise, “like the law, enables past, present, and predictable future to be related in a stable though developing order; enables this order to be effected in complex interpersonal patterns; and brings all this within reach of individual initiative and arrangement, thus enhancing individual autonomy in the very process of increasing individuals’ obligations.”\textsuperscript{488} Nevertheless, Raz would prefer to construe this enhancement of autonomy without the increased obligation. Raz could be read as saying that the increased obligation accompanies the enhanced autonomy, but he can only show that authority is not in conflict with autonomy here; he cannot show that it is obligatory. Moreover, Finnis would insist that this feature of the law is part of its very nature and, therefore, that the law is characterized by

\textsuperscript{486} Finnis NLNR 303.  
\textsuperscript{487} Finnis NLNR 341.  
\textsuperscript{488} Finnis NLNR 303.
this sort of imposition of obligation. Raz, on the other hand, would find law to be obligatory, even prima facie, only in certain circumstances, its obligating power not being a necessary or permanent feature.

For Simon, because the common good is known thanks to the “successful operation of wise institutions,” success requires obedience. Most plainly, this obedience, or submission to authority, is by definition what is required for unity of action in the absence of unanimity. Simon explains, “The unity of action which is supposed to be required by the pursuit of the common good will be ceaselessly jeopardized unless all members of the community agree to follow one prudential decision and only one—which is to submit themselves to some authority.” Yet, for Simon, submission to authority in the name of the common good, goes beyond practical cooperation. Simon writes that “temporal society cannot shirk concern with the thoughts of men, even on the deepest levels, and still discharge its more obvious duties” and that “the principal part of our common good is contained within our souls” and, consequently, that “the interest of society in transcendent issues—or some of them—becomes obvious.” Speaking of a “society whose duty is to protect, with a power of unconditional coercion, life, property, honor, and dignity,” Simon argues that ruling out the transcendent and limiting authority to a “positive system” means “depriving the temporal community of what is deepest, most essential, and most vital in its common action.” Just what Simon means by this will have to be deferred for a later discussion, but his view is worth noting here to emphasize that Simon

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489 Simon GTA 147.
491 Simon GTA 126.
492 Simon GTA 126.
493 Simon GTA 127.
has a rather robust notion of authority and the significance of the obedience it entails. This alone is enough to set Simon apart dramatically from Raz and likeminded theorists.

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At the same time, showing that obedience is reasonable is not quite the same as showing that obedience is obligatory. This is the problem with Raz’s theory. Each example of the goodness of obedience supports an argument for why authority is useful and salutary, and therefore, how obedience can entail reasons for action beyond the sheer fact of commandedness. As in Raz, those are all reasons to comply, but they do not generate an obligation. Nevertheless, the case for the goodness of authority and obedience is important because it begins to lay the groundwork for how obedience can ever be justified under circumstances where the superiority that characterizes God’s position of authority is absent (which is to say, in all other forms of authority). Where obedience is a virtue (good for its own sake), authority has better justification.

Therefore, the next step is to show how authority is not just helpful for advancing the common good but necessary. While it is clear that, in practice, authority is needed to secure cooperation, Finnis and Simon both examine the question of whether authority is necessary in a society comprising entirely virtuous and intelligent members. If not, then authority merely comes down to enforcement, in which case authority would only be necessary insofar as people did not conform to obligations they already had. For Finnis and Simon, however, authority is necessary in order to promote the common good. To be sure, unanimity would suffice, but, plainly, unanimity will not arise in a community of any reasonable size. Any community with a “complex common good” and an “intelligent and interested membership” will instead require
Indeed, “the greater the intelligence and skill of a group’s members, and the greater their commitment and dedication to common purposes and common good, the more authority and regulation may be required, to enable that group to achieve its common purpose, common good.” There are two basic reasons for this. First, people, in a manner neither vicious nor impious, will pursue individual or local goods that are at odds with the common good. Second, because the good is so variegated, people will, in good faith and without error, disagree about the best way to pursue the common good. In order for a decision to be made and action to be taken in the face of this multiplicity of opportunities (and to solve coordination problems), there must be authority.

As a result, authority supports the common good in at least two ways, regulating the relationship between private goods and the common good and in coordinating the disparate parts of the common good. In Simon’s words:

The proposition that authority is necessary to the intention of the common good has a double meaning. It means, first, that authority is necessary in order for private persons to be directed toward the common good; it means, second, that authority is necessary in order for functional processes, each of which regards some aspect of the common good, to be directed toward the whole of the common good.

Thus, Simon (like Finnis) rejects what he calls the deficiency theory of government, that government is only necessary because people are selfish or stupid. “A society enjoying a supremely high degree of enlightenment would, all other things being equal, enjoy much more

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494 Finnis 233.
495 Finnis 231.
496 Finnis 231-32.
497 Simon PDG 59.
choice than ignorant societies and have to choose among many more possibilities,” Simon writes, and, therefore, “It would need authority, more than ever, to procure united action, for, thanks to better lights, the plurality of genuine means would have increased considerably.”

Indeed, Simon is thoroughly explicit, and even strong worded, about this idea that “authority has essential functions, i.e., functions determined not by any deficiency but by the nature of community.” To wit, “Authority is neither a necessary evil nor the consequence of any evil, nor a lesser good, nor the consequence of some lesser good, but an absolutely good thing founded upon the metaphysical goodness of nature.” Because a “plurality of genuine means can be caused by excellence of knowledge and power,” a “society made exclusively of clever and virtuous persons” needs authority, and, therefore, “authority is not devoid of essential function,” namely “to assure the unity of action of a united multitude.”

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The model of divine authority is one possible source of a defense of obedience. But the plausibility of that model rests on the goodness of obeying that sort of authority, namely a being whose very superiority warrants obedience. In that case, obedience is good because it is the proper response to a command that is by nature obligating. Can any other version of authority fit this model? The key to the reasonableness of obedience is the ways in which other forms of (non-divine) authority are good and even necessary. Indeed, in the search for content independence, there must be some value to authority that goes beyond the benefits of sound

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498 Simon PDG 33.
499 Simon PDG 10.
500 Simon NFA 28.
501 Simon PDG 35.
502 Simon PDG 19.
503 Simon NFA 17.
advice or rules of thumb that provide shortcuts in decision-making. Otherwise, obedience would remain reasonable but not obligatory.

Both Finnis and Simon show how authority and obedience, beyond just obedience to divine authority, can be reasonable and necessary. That is, both, but especially Simon, make a case for authority that is much stronger than in prevailing theories such as Raz’s (Raz being more concerned with the challenge from the philosophical anarchists in the name of autonomy). Simon notes that “some theorists would maintain that fear and self-interest account sufficiently for the fact of obedience in civil society.” But, he adds, “Any human experience, any knowledge of history, evidences the shallowness of this explanation.” Though coming at it from a very different angle, Simon here is reminiscent of Hart, whose central innovation, the internal point of view, begins with the observation that most people do not relate to the law as to a mugger whom they obey out of fear and self-interest but instead take the law as a standard against which to measure their own behavior, which is to say, they take themselves to have an obligation to obey. Hart falls short, though, by failing to give an account of why people understand themselves to have such an obligation (or, for those who insist with some fairness that such an account is not Hart’s responsibility, by constructing an account of legal authority based on social practice that leaves no room for an ultimate defense of authority). But unless the internal point of view is a mass delusion, then there ought to be some legitimate source for the obligation to obey.

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504 Simon PDG 145.
505 Simon PDG 145.
Chapter 5

There are at least three distinct ways in which human authority serves an important role: in coordination, in the pursuit of truth, and (perhaps counter-intuitively) in the development of self-mastery. One does not need to go to Finnis’s or Simon’s robust defenses of authority to appreciate law’s role in coordination. As Finnis acknowledges, “Raz accepts that a principal function of law is to secure morally desirable co-ordination” and that “law can be instrumental in securing desirable sorts of co-ordination.” 506 Nevertheless, there remains a fundamental divide between them. For Raz, a law against pollution creates an obligation to obey only when there is a social practice of not polluting because the social practice (rather than the law) creates reasons not to pollute. (If everyone else were polluting, there would be no independent reason, apart from the law, to comply.) But that is just to say that the obligation arises not from the law but from independent reasons, which in the case of a coordination problem happen to obtain when others are participating in the same cooperative scheme. 507 This is consistent, of course, with Raz’s claim that there is no prima facie obligation to obey the law; the obligation to obey depends entirely on the independent reasons. This, however, is not really obedience to the law at all, which is why Raz has no real conception of law’s authority. It is, at best, an obligation to participate in a cooperative scheme perhaps generated by the law but not obligatory because it is the law. 508

506 Finnis LC 100.
507 Finnis puts it thus:
   But even when the law is thus instrumental in securing schemes of co-ordination with which everyone has moral reason to collaborate, it lacks moral authority. For the morally relevant reasons for complying with the scheme of co-ordination derive, he says, entirely from the practice of co-ordination, and not at all from the law; the moral situation is the same whether the practice exists by virtue of legal sanctions, government exhortations, pressure-group propaganda, or spontaneously emergent custom. (LC 101)
508 For Raz, the obligation to refrain from polluting the river would be identical whether there were a law requiring such in addition to a social practice to refrain or whether there were merely
From this, another problem emerges. Given what Finnis terms “the diversity of views about social ‘problems,’” people could very reasonably disagree about whether the reasons behind the cooperative scheme do in fact apply. With respect to the pollution example, “Some people think pollution no problem, some think it a lesser evil than the expense of avoiding it; some envisage one scheme for overcoming it, and others imagine different and incompatible schemes.”

If the law itself is not a reason to obey, someone who doubts or denies the benefits of the chosen coordination (or any) will have no reason to comply. According to Raz, when the law requires what a person, on the balance of reasons ought to do, anyway, then the authority is legitimate, and there is an obligation to obey. “But a law against pollution does, [Raz] contends, create a sufficient moral reason for even these dissenters to comply; that is to say, the law is (morally as well as legally) authoritative. But why?” Since law’s authority depends on the individual’s judgment that the reasons in favor of complying outweigh the reasons against, law cannot even necessarily solve coordination problems. One might say that the subject simply has the balance of reasons wrong since the coordination solution has created strong reasons to comply, but this makes no difference for the subject’s practical reasoning if he does not see it.

There is, therefore, a fundamental disagreement between Finnis on one hand and Raz on the other about whether there is an obligation to obey the law just insofar as it is the law. This disagreement can be illustrated by the mythical traffic light example: the driver who arrives at a red light in the middle of the night in the middle of nowhere with a clear view in every direction.

The law makes no difference, except insofar as it might in some cases generate a social practice, but even then it is only a happy accident since no one has any obligation to obey the law, thereby helping to create the social practice, before the social practice exists.

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509 Finnis LC 101.
510 Finnis LC 101.
511 Finnis LC 101 (note omitted).
and no one in sight for miles. This thought experiment is useful because it isolates the question of whether the driver must stop at the red light just because the law says so. Leaving aside all other considerations such as whether running the light will increase his chance of running lights in less safe situations or erode his respect for the law in other areas altogether, it raises the question of what is to be done when all the independent reasons for stopping at the light do not apply, and the only reason for stopping is that the law says so. Finnis thinks the driver must stop; Raz does not. Raz, though accepting the role of law in coordination, thinks that there is no reason to obey when the purposes of the coordination scheme do not obtain. Put simply, when there is no one around, none of the reasons for the traffic light apply, and there is no obligation to stop. Finnis disagrees, arguing that the very nature of law excludes such “private” or “individual” exceptions. Raz argues right back that if law gains its authority from its coordinative function, then where there is no coordinating to be done, there is no authority. Thus, there is a fundamental disagreement between the two about the nature of law and the obligation to obey.

Simon also recognizes the importance of law’s coordinative function, relating it more deeply to law’s function in promoting unity of purpose and of will. In Simon’s words, “Realizing that movement in any clear direction is better than unending idleness, we let authority decide which way we shall take, and we admire its ability to substitute definite action for endless deliberation.” This sounds a lot like Carl Schmitt’s critique of deliberation in favor of decision (see next chapter), but it is also aimed at Marx and others who believe that the perfection of the social sciences would obviate the need for authority. For Simon, authority is

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512 Simon GTA 18.
513 Simon GTA 18.
inherently necessary in society, which is important for the argument that authority is truly good and not just a necessary evil and, further, important for the argument that authority can obligate. This is true for coordination on very particular tasks as well as for more general, exalted ends: “The more effectively a society be united in its common action, the more perfect, happy, and free this society will be.”\(^5\) Authority, for Simon, necessarily plays a major role in such unity. Moreover, authority is not just necessary in the bare sense of being essential for a common project to resolve a lack of unanimity. Even without authority, one could at least imagine a strictly utilitarian form of coordination, where a dissenter obeys “to spare himself and others the inconveniences following upon the breaking of the law.”\(^5\) But such an approach has its consequences. Although “outward anarchy and the violent disruption of society are avoided”\(^5\) and “external order is not delivered up to the fortuitousness of unanimity,”\(^5\) “the inner dispositions of minds and hearts toward the law are subjected to such fortuitousness; this weakens dangerously the unity of society and corrupts the character of political life by substituting a law of utility and force for the law of voluntary co-operation whenever I happen not to be in the majority.”\(^5\) Raz’s approach is corrupting in this way because it depends, at least in principle, on the judgment of the individual in each case. (Ultimately, other approaches must depend on that as well—there is no absolute obligation to obey the law—but, in better theories, individual judgment is predicated on an initial position of deference to authority.)

\(^5\) Simon GTA 44.
\(^5\) Simon PDG 153.
\(^5\) Simon PDG 153.
\(^5\) Simon PDG 153-54.
\(^5\) Simon PDG 154.
When cooperation comes just from utility, authority must rely on bare coercion when people disagree; it has no other reason to offer them if there is no obligation to obey.\textsuperscript{519}***

Simon also makes the case for authority in the transmission and pursuit of knowledge. Simon points out, correctly, that much learning is built upon received information and wisdom. He recognizes the dangers of “intervention of society in intellectual life” but still maintains that there are “insuperable difficulties that the choice of a guide would involve if society remained silent.”\textsuperscript{520} The need for received knowledge is manifest in mundane areas (and most obviously in the sciences), but it is no less necessary in more abstract realms. In the former, it is necessary because there is neither the time nor the resources to rediscover all the background knowledge that progress requires. In the latter, it may be necessary not for lack of opportunity but because the knowledge is in principle much harder to acquire. For Simon, difficult-to-acquire truths ought to be accepted, at least provisionally, on authority. “If truth is loved, the main thing is to know it. If truth cannot be known obviously, it is good to know it by way of belief,”\textsuperscript{521} Simon says, for “only those who do not love truth would prefer ignorance to belief.”\textsuperscript{522} To be sure, at first glance, the notion of authority here is being used in the sense of “an authority,” as in, an expert. That is, someone who is an authority in a particular area, such as science, religion, and so on, is relied upon because of his knowledge of that which cannot be easily known. But the broader theory here is concerned with authority in the sense of “in authority,” that is, of being in charge, someone whose directives are binding in virtue of issuing from that individual or office.

\textsuperscript{519} In the alternative, there can still be disagreement and coercion, but the coercion rests on the claim that there is a real obligation to obey behind it.
\textsuperscript{520} Simon GTA 99.
\textsuperscript{521} Simon GTA 93-94.
\textsuperscript{522} Simon GTA 94.
A central part of Raz’s work on authority relies on the elision of these two senses of authority. Nevertheless, in the case of Simon’s statement, relying on a particular person for truth could depend as much on the person being in authority as being an authority. The two are closely related, and in some cases inseparable, but here authority stems from more than being the foremost expert. As with the authority of law, there needs to be some choice of one authority as authoritative among many who could serve that role. That is, while the choice of authority is important, Simon shows here the role of content-independence because the authority will be obeyed or heeded as a purveyor of truth just in virtue of being the authoritative agent. And, indeed, in Simon’s view this is necessary for the pursuit of knowledge. Again, like with all authority (human authority, at least), the obligation to obey is prima facie, not absolute, yet there is an initial deference to parents, teachers, or clergy that permits authority to serve its purpose.

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Third, there is a sense in which “obedience may be chosen on account of some excellence of its own.”523 Obedience, for Simon, is at the heart of self-mastery. Simon gives the example of authority’s “role in religious life,”524 where “every religious . . . is supposed to be lovingly concerned with the distinct merits of obedience, with the things it can do for him over and above the goods of spiritual training and those of community life.”525 Though religion may be a unique case (because obedience to God can be intrinsically valuable in a way that obedience to another person may not be), his example is in the context of a usefully broader discussion of the relationship between obedience and true freedom. Simon’s view on the virtue of authority is perhaps best encapsulated in his statement: “Obedience may well be the closest approximation

523 Simon GTA 154.
524 Simon GTA 154, footnote 19.
525 Simon GTA 154, footnote 19.
to a general method for dealing with the weight of subjectivity in the uppermost part of our
self."  For Simon, true freedom is "an uppermost kind of active indifference and mastery,"
which is to say, "a mastery over desire such that, for the sake of a law, for the sake of the good,
for the sake of God, a man be free to choose, if he pleases, and without a struggle against
overwhelming difficulties."  In that particular line, Simon is referring to choosing marriage
over so-called free love, but he means to make the point generally.  In contrast, Simon
unequivocally rejects "the philosophy which interprets freedom as spontaneity, and preferably as
the spontaneity of animal desires," which he understands ultimately as enslavement to
desire.

This helps to explain why Simon, as quoted above, speaks of the substitution of "a law of
utility and force for the law of voluntary co-operation" (to which he objects, of course) rather
than for a law of obedience.  For him, voluntary cooperation and obedience converge.
Obedience, paradoxically (at least on the surface), makes freedom possible by subjugating
subjectivity, by nurturing a self-mastery that enables the subject to choose the good "freely."
Such self-mastery emerges from conforming one’s choices to the good, in obedience to
authority.  On Simon’s view, “Obedience is due to God alone in the domain of interior acts.”
That is to say, only God can demand full assent of the will.  Nevertheless, “There is one kind of
judgment which is covered by a duty of obedience that man owes to man.”  “True,” Simon
continues, “this judgment is not a purely interior act, since it is the form of an external action; yet

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526 Simon GTA 153.
527 Simon GTA 150.
528 Simon GTA 149-50.
529 Simon GTA 150.
530 Simon GTA 148-49.
531 Simon GTA 156.
532 Simon GTA 156.
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its being covered by a duty of obedience implies a decisive surrender on the part of the self." Thus, obedience leads to self-mastery because “whenever an act is done out of obedience, I will that any judgment and volition of mine should yield, if necessary, to the judgment and volition of those in charge of the common good. The decisive step has been taken.” Such yielding means putting the good before one’s subjective desires, the ability to do so being necessary to be freed from enslavement to desires. Using Raz’s terminology, it means taking the will of the other, in this case the good, as an exclusionary reason, depriving base desires the power to weigh on the decision. Simon concludes the thought in this way:

Inasmuch as the practical judgments, which are the forms of my exterior actions, also are acts of my mind and will, the rebellious moods of my subjectivity are curbed, and this happens voluntarily and freely. Whatever excellence is communicated in the exercise of authority uses ways of distinguished significance, for the ways of obedience are kept in order by a constant process of emancipation from the powers which threaten most profoundly my freedom to do what I please for the sake of the law, for the sake of the good, and for the sake of God.

Obedience, then, is good because it frees a person to do what is right, and this need not apply only to obedience to God. To be sure, this sort of benefit from authority need not come from

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533 Simon GTA 156.
534 Simon GTA 156.
535 Simon GTA 156.
536 It is in a similar sense of “free” that Simon writes, as above, that a society more united in common action is also freer. The structure that facilitates good choices is liberating, not restricting. Surely Simon does not envision the sort of totalizing state for which he criticizes Rousseau, but neither does his idea of unity reduce to straightforward tasks of coordination such as bridge building. On the contrary, there is a transcendental purpose here, but an all-encompassing state (whether in the style of Louis XIV or of Robespierre) is neither the means nor the end.
the law specifically, yet the law is a good candidate not only because it is pervasive in common life but also because it is a sort of authority that balances content-independence with normative limitations. When balanced well, the prima facie obligation to obey yields the benefits of authority while the absence of an absolute obligation to obey leaves room for (or even encourages) critical reflection.

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The key for a theory of legal obligation, of course, is the reasons for acting for the sake of the good, which is the aim of the law. Even apart from his more transcendental vision of authority and obedience, Simon firmly rejects the rationalist model that characterizes Raz’s theory of authority. For Simon, authority is not ultimately “substitutional.” Skeptical of the “rationalistic enthusiasm for the possibilities of social science,” Simon insists that the “indetermination of the means” is not merely “an appearance due to our inability to identify the appropriate means.” To be sure, that is not the same as Raz’s position. Here, Simon argues against those who believe that, with progress, “thanks to social science, a rational society would be installed, in which the reign of reason would be the realization of anarchy” and, therefore, that “the progress of social sciences is, in fact, meant to enable us to do away, step by step, with authority.” Raz’s theory is a justification of authority. Nevertheless, because he rationalizes authority as helping people act on their own reasons, there is a sense that Raz points toward an ideal in which people could do just as well or better in advancing their own purposes without authority and, therefore, authority would be unnecessary. In contrast, Simon’s own position is that “if the development of social sciences ever reaches a state of perfect achievement, authority

537 Simon PDG 31.
538 Simon PDG 31.
539 Simon NFA 30.
will remain necessary then, just as it is now, as a social prudence, able to maintain the unity of
society in its common action.\textsuperscript{540} Raz could assent to this formulation because he acknowledges
the law’s role in coordination although he might maintain that, with perfect social science,
authority would have nothing to add. At the same time, Simon rejects the following view, which
sounds like something Raz might endorse: “Sovereignty should not belong to any will, be it that
of the king or that of the people. It should belong to reason alone as an impersonal interpreter of
laws which are in no sense to be issued by man, but only to be recognized by him as deriving
from the nature of social things and finally identical with it.”\textsuperscript{541} This has echoes of Raz and even
of Hart (law as social practice, not finally issued by man but deriving from the nature of social
things), and Simon comes quite strong in his rejection of that view, describing authority as an
“essential function” deriving from the “nature of society.”\textsuperscript{542}

Again, there may be a temptation, because Raz recognizes law’s role in coordination, for
example, to conflate Raz’s and Simon’s views, even if the language of the latter is more
metaphysically laden. Considering Raz’s emphasis on the need to reconcile authority with
autonomy, there might even be echoes of Raz in Simon (anachronistically, of course) when
Simon says, “When a man is governed for his own good or for the common good of the society
of which he is a member, this man is said to be free.”\textsuperscript{543} Such a statement would seem to be the
crux of an answer to Raz’s concern, via the philosophical anarchists, over the threat that
authority poses to autonomy unless it can be shown, as Raz attempts to do, that authority can be

\begin{footnotes}
\footnotetext[540]{Simon NFA 31.}
\footnotetext[541]{Simon NFA 30.}
\footnotetext[542]{Simon PDG 33.}
\footnotetext[543]{Simon NFA 32.}
\end{footnotes}
exercised without undermining autonomy. But it would be much harder to hear echoes of Raz in what Simon says elsewhere about authority:

Two capacities are at work in the bringing about of the common good; individual good will procures the right form, authority determines the right matter. And thus it is only by the operation of authority that the person enjoys the benefit of an orderly relation to the common good understood both with regard to form and with regard to matter. No wonder that men of good will will appreciate the privilege of working under a truly able leader. Thanks to his direction, the antimony is overcome; the man of good will who wants to do the thing that the common good demands, actually knows what that thing is and does it.\textsuperscript{544}

This seems to go much further than accepting authority’s role in enabling individuals to act for their own purposes.

More generally, whereas Raz sees the law as an important tool for pluralistically-minded avoidance of fundamental questions about the good, Simon sees the orientation to the common good as the essence of authority. At the very least, this is a thicker good than what Raz has in mind. For Simon, “The masterpiece of the natural world cannot be found in the transient individual. . . . Human communities are the highest attainments of nature, for they are virtually unlimited with regard to diversity of perfections and virtually immortal.”\textsuperscript{545} In the end, attempting to account for law’s authority while avoiding the deeper questions about the good leads to an impoverished notion of authority. This avoidance is the very reason why Raz can show that complying with authority can be permissible but can never show it to be obligatory.

\textsuperscript{544} Simon GTA 144.
\textsuperscript{545} Simon GTA 29.
Chapter 5

Instead, he espouses an understanding of obedience under which it is preferable to limit or eliminate it as much as possible. Authority is the enemy of autonomy, so it must be permitted only as much as absolutely necessary and is justified only when it stands in, functionally, for autonomy. Put differently, Raz does not directly deny the need for authority, but what he contemplates is hardly authority at all.

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To be sure, although Simon points to a different conception of authority than Raz, the more Kantian he sounds in this regard, the more Razian his theory seems, too. This is because Raz attempts to resolve the opposition between autonomy and authority by justifying authority when it requires that which one’s autonomy would dictate, anyway, that is, when the authority’s directives and one’s independent reasons to act coincide. Simon especially sounds this way when he speaks of the interiorization of the law. In a passage similar to what he says about freedom and obedience, Simon distinguishes between initial and terminal liberty. “Initial liberty,” he writes, “is the sheer power of choosing, I mean the power of choosing the good and the evil as well.”546 As in the classic distinction between liberty and license, initial liberty “can be used rightly as well as wrongly” and “has the value of a means rather than that of an end.”547 In contrast, “Terminal liberty,” which he calls “the glory of the rational nature,”548 is “a power of choosing the good alone”549 acquired by “our endeavor to improve our nature by supplementing it with virtues.”550 In other words, this is the same as the self-mastery that arises through obedience, so it is no coincidence that, in this context, Simon associates terminal liberty with

546 Simon NFA 40.
547 Simon NFA 40.
548 Simon NFA 42.
549 Simon NFA 41.
550 Simon NFA 40.
obedience to the law. There is, presumably, a cyclical process whereby the acquisition of virtue and obedience to the law reinforce each other. In the mature stages of the process, according to Simon: “The virtuous man is no longer subjected to the law, since the law has become interior to him and rules him from within. The prescriptions of the law are truly identical with the dynamism of the virtuous nature. Terminal liberty does not mean only freedom of choice, but also autonomy.”\(^{551}\) But if authority ultimately produces autonomy through the interiorization of the law, does this reduce Simon’s concept of obligation to a Razian model where the legitimacy of authority depends on a convergence with the reasons one already has for action?

One way to look at Simon’s concept of interiorization of the law is to say that obeying authority leads to autonomy because, once the law is interiorized, then the reasons becomes one’s own. On the other hand, perhaps the right way to understand Simon is not in the Razian mode, that the reasons behind the law become one’s own, but instead that obedience to the law becomes its own reason for action simply because the law is the law. In that case, obedience would not depend on the reasons for particular laws but instead would be more like a habit (to use that dirtiest of words in Hart’s lexicon). If so, this might seem to require the implausible assumption that all laws are good; otherwise a habit of obedience would be hard to justify morally. Therefore, it might be better to construe it not as a habit of obedience but a disposition to obey, which fits neatly with the idea of a prima facie (but only prima facie) obligation to obey. And, furthermore, it helps make sense of the role of authority altogether: the condition, as part of the definition of authority, that subjects not second-guess, at least initially, makes most sense where there is the possibility for disagreement. For the same reason that Raz is not really speaking about authority, if all the reasons were known and all the reasons were good, it would

\(^{551}\) Simon NFA 41.
not be as much a matter of authority as about reasonableness. In a way, this is to say that, any
time that compliance with authority is primarily about the reasons for acting that are independent
of the authority’s directive, it is not really a matter of authority. There is only authority and
obedience when there is some content-independent obligation to obey. In this way, it is the
possibility for obedience in the face of disagreement or ignorance of some reasons that makes
authority possible.

This understanding, however, raises a challenge for the model of divine authority, which
may be partly behind this model of legal obligation. If God’s reasons (and therefore His
commands) are always good and known to be thus, then, by the just-mentioned standard, there
would be neither real authority nor real obedience but instead a free choosing of the good by the
subject who perceives the goodness. On the other hand, as mentioned, there is a crucial
difference between acting because God commanded it (while still believing, of course, that He is
good) and acting because it is good. That is, the classification of the act as obedience (or not)
depends on the reasons for acting. Reducing all adherence to divine authority to choosing the
good shifts the character of such acts away from obedience insofar as free choices (or rational
necessity, that is, always choosing the good but choosing it freely) and obedience are never fully
compatible. In contrast, complying with God’s commands because they are His commands is
obedience, even if one believes the commands to be good. There is no possibility to construe
Raz’s theory of human authority in this way because authority would be unnecessary and indeed
superfluous where one knew a certain course of action to be best independent of the authoritative
directive.

Another way to see this distinction between Simon and Raz is to recognize that their
visions for society are, in a way, opposites. For Simon, the individual molds his will to the law
whereas for Raz, at least in broad terms, the law should be molded to the will of the individual. Although this might seem unfairly reductive regarding Raz, the basic thrust of his theory is that authority is legitimate when it requires that which the subject already has reason to do. Hence, the subject’s reasons become the law’s reasons while, for Simon, the law’s reasons become the subject’s. Authority, in Simon’s view, is not just substitutional, enabling one to achieve what one could in principle achieve independent of the authority (and it is fairly obvious that government does not merely act on people’s behalves in the sense of doing better for them what they could do for themselves). It makes sense, then, that there should not be individual exceptions to the law in the way Raz imagines it, even in cases of undetectable violations, if obedience is a necessary part of the transcendental aims of authority.

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In sum, Simon’s theory stands as a response to Raz’s in several ways. Most directly, Simon takes a strong position on the relationship between authority and autonomy, arguing not for a rather conditional compatibility but for necessary symbiosis, writing, “Autonomy renders authority necessary and authority renders autonomy possible—this is what we find at the core of the most essential function of government.”\(^{552}\) This is true not least because, absent “an over-all direction toward the common good,” “these autonomies would mean the disintegration of society.”\(^{553}\) Instead, for Simon, “The theory of authority as agency wholly concerned with the common good is connected with the excellence of particularity. Insofar as the particularity involved is that of the subject, not that of the function, the theory of authority comprises a

\(^{552}\) Simon PDG 71.

\(^{553}\) Simon PDG 71.
vindication of autonomy on all levels.” But Simon is driving at a deeper point here, as well. The incomplete appreciation of authority does not stem primarily from a denial of authority’s role in advancing the common good but, more fundamentally, from an attempt to prescind from questions of the common good altogether. This is meant to function on the micro and macro levels. For the individual, authority can be justifiable because it does not presume to impose a vision of the good contrary to his own. Simon diagnoses this as “sociological agnosticism,” which aims to “reduce the intellectual content of public life to a minimum of propositions so chosen that no normal person can disagree” and thereby avoid inflicting “any violence upon minds and consciences.” As a society this means that, “for a lack of common assent, the only possible policy is one of abstention” on transcendent issues. And this, he claims, is the hallmark of the “liberal claim for freedom of thought”: “Whoever holds that society must refrain from an act relative to transcendent truth, and that the search for such truth must be neither directed nor helped in any way by society, is a liberal.” Such an attempt, however, profoundly handicaps the search for truth and, therefore, the attainment of the good. Simon explains:

From the moment a man comes to consider that he should not bother too much about determining the matter or content of good actions—since certainly in such determination is beyond his power—we know that he is light-minded and careless. His formalism destroys everything, his adherence to the form of the good not excluded. Because he does not care enough for the matter, he has come to miss the form.

554 Simon GTA 158.
555 Here the target could be Rawls as well.
556 Simon GTA 110.
557 Simon GTA 111.
558 Simon GTA 108.
559 Simon GTA 144.
Because of authority’s role in the search for truth, there is an inextricable link between authority and the good, which means that a pure neutrality, free from judgment about the good, is impossible. An alleged neutrality of this sort will have already passed judgment on the possibilities of the common good.\(^{560}\) In this way, Simon’s theory of authority stands in contrast to Razian and Rawlsian liberalism.

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Such a theory, however, must also contend with what might be called democratic concerns. The first and perhaps most obvious of such concerns, to the modern mind, is whether legitimate authority is not best explained in terms of consent. In contrast, a theory that bases the justification of authority on its orientation to the common good seems to not require consent for legitimacy. Is this possible? Certainly it is intuitively attractive to suppose that authority’s legitimacy traces back, at some level, to consent. Yet there is the standard litany of reasons why consent cannot legitimate, or justify, authority: Most people have not actually consented. Some who have consented may have done so under conditions that might be appropriately understood as duress, particularly in the sense of a lack of adequate exit options. Among those who have consented freely, people may have consented to various different things, for instance, to different parts of the law or to different aspects of authority. And so on. Tacit consent hardly does better. If so, then there must be a normative explanation for authority other than consent, or else there is no justification for authority.

Owing to the role that consent can play in tracking the common good (more on which below), there is good reason to expect substantial overlap between the will of the people, or the

\(^{560}\) In a different way, the same theme is very important in Schmitt’s work and especially his rejection of positivism.
common will, and the common good. Nevertheless, such coincidence is not assured. In this respect, there may be no choice but to acknowledge that legitimate authority does not require consent. Offensive though this may seem, other theories that rely on consent in principle may find that it is often absent in practice. Considering that “functional diversity causes a need relative to the common good as a whole,” Simon writes, “Decision pertains to a power which, inasmuch as it is responsible for order among the functions, necessarily controls all of them and commands all the functionaries.” If this is the case, though, if this is the sort of reason that grounds authority, then it cannot be legitimate because it conforms to the common will but because it coordinates various functionaries “relative to the common good as a whole.” Nothing about fulfilling that overarching function of authority requires consent. Indeed, because the common good is more than the sum of individual goods and, more so, because the common good can conflict with particular goods, authority will sometimes need to act despite an absence of consent. In other words, another way to express the democratic-spirited concern over consent is to ask what happens when the common will comes into conflict with the common good, and the answer is that the latter trumps the former.

Sounding a rather sour note regarding the common will, Simon states, “An act of ‘democratic faith’ which would proclaim the wisdom of the many when the circumstances are such that the many cannot possibly know what it is all about would be obnoxious absurdity.” This sounds like an instrumental argument for authority based on epistemic elitism (though it is also true in practice that there would need to be people in decision-making positions with special expertise). But it serves to make the point nonetheless. Authority is not valuable simply because

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561 Simon GTA 62, 63.
562 Simon PDG 16.
it is whatever the people decided; it is valuable because it fulfills the function for which authority is necessary in the first place, namely the advancement of the good. To be sure, some might argue that a bad or even destructive course of action is still preferable over a good, productive one if that course of action is self-imposed rather than imposed from above. But this bluntly invites the question of why any coordinated course of action is necessary at all. Surely it cannot be that a group is better off making a bad decision, which is to say, acting in a coordinated though destructive fashion, than making no decision at all simply because the decision-making is in itself valuable. Put another way, just as autonomy is not a basic good, not something good for its own sake but only good insofar as it is used to choose that which is intrinsically good, so, too, for authority. Authority is not good just in virtue of some decision having been made but in virtue of a good decision having been made.\footnote{For this reason, authority cannot be justified merely by reflecting the common will, for the common will might not be aligned with the good. This is why a fully evil regime is not legitimate regardless of how large a majority supports it.}

This argument is bolstered by the observation that consent is not necessary for authority to serve its function. As Finnis explains, consent is not “needed to constitute the state of affairs which (presumptively) justifies someone in claiming and others acknowledging his authority to settle co-ordination problems for a whole community by creating authoritative rules or issuing orders and determinations.”\footnote{Instead, authority, legitimate insofar as it fulfills its purpose in advancing the common good, requires “that in the circumstances the say-so of this person or body or configuration of persons probably will be, by and large, complied with and acted upon,\footnote{This need not mean that the decision be the best possible one, but it at least needs to be better than no decision at all, for it cannot be good simply by virtue of being \textit{a decision}. This is true notwithstanding the possibility that, in many cases, almost any decision is better than none at all.}}
to the exclusion of any rival say-so and notwithstanding any differing preferences of individuals about what should be stipulated and done in the relevant fields of co-ordination problems.” In other words, authority is justified through its success as authority. Of course, this “emergence of authority without benefit of prior authorization” does not answer the antecedent question: “Whose say-so, if anyone’s are we all to act upon in solving our coordination problems?” Quite plainly, no theoretical progress is made if compliance with the coordinating authority merely traces back to power. If power (or coercion) is the reason why this person or group’s say-so is likely to be complied with, then Finnis has rediscovered authority but perhaps not legitimate authority. But on this strict analysis, authority by consent would always need to trace back to unanimity. Since “unanimity of practical judgment is, obviously, not easy to come by,” bringing everyone’s practical judgment into line “is usually very taxing and exhausting” and often impossible, especially if actors perceive that the decision-making mechanisms agreed upon unanimously will influence the substantive outcomes that result. The conclusion to draw from this is that “those general needs of the common good which justify authority, certainly also justify and urgently demand that questions about the location of authority be answered, wherever possible, by authority.” In other words, the first act of authority is often unauthorized. Finnis adds that this first act of authority is often to determine procedures for further decision-making such that future acts of authority may be authorized without unanimity. Although this all may sound a bit authoritarian, unanimity is, in practice, almost always impossible to achieve in a polity of any meaningful size. Even the most democratic institutions, by whatever definition,

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565 Finnis NLNR 249.
566 Finnis NLNR 249.
567 Finnis NLNR 249.
568 Finnis NLNR 249.
must rest upon an authoritative, if unauthorized, decision regarding which decision-making procedures to follow, whom to include, and so forth. Unappealing though this may seem, on some basic level authority must be, in the first case, justified by an ability to serve its function. This is the relevance of having authority in the form of a commander rather than a multitude of voices with proposals regarding the common good.

For better or worse, this relegation of consent is where a proper theory of authority must bite the bullet. The common will (the will of the majority) can conflict with the common good, and, for purposes of normative authoritatively, it is the latter that counts. This is less idiosyncratic that it might seem at first: such a notion is built into most democratic theory, if covertly. As Finnis observes, all or most legal systems (or political authorities, for those who care to make the distinction) begin with an original unauthorized act. Even the US Constitution, which was popularly ratified (more or less), depended upon an extralegal supplantation of the Articles of Confederation. Short of the extreme position that all polities are therefore illegitimate—not like the philosophical anarchists say because all authority is illegitimate but because unauthorized authority is illegitimate and, historically, all political authority is unauthorized—it seems best to accept the reality of such structures. This, however, is not a concession to brute power—if it were, it would be necessary to explain why people should not similarly accommodate themselves today to any power grab, why they should not “accept the reality”—but instead an observation that points to the idea that, implicitly, legitimate authority does not depend on consent.

This point is also reflected in constitutional constraints on majority rule. Although good work has been done to show why such limitations on the will of the majority may not in fact be countermajoritarian, constitutionalism, at its root, rests on the premise that some things ought to
be out of the reach of the majority. Sometimes it is for practical reasons; for example, it would be impractical or even deeply disruptive if electoral procedures were changed too easily and therefore too often. But, more commonly, constitutionalism reflects fundamental normative concerns that have little to do, at their core, with practicality. Equal concern and respect for all persons, for instance, earn protection just as such, regardless of practical considerations (even if practical benefits follow). If so, such principles are protected not because people consent to such protections but because they ought to be protected whether or not people consent. At bottom, this is uncontroversial. That people are accustomed to adopting such provisions through mechanisms of consent does not change the fact that they are matters of right and wrong independent of the will of the majority. Denying the normativity of these principles verges on being self-refuting. After all, what does the normativity of consent rely upon?

At the same time, this does not mean that there are no limitations on authority. On the contrary, that is the whole purpose of the normative project on authority. Authoritative decisions must still aim at the common good. Consent can serve as a useful proxy for the common good; it may be a good indicator of laws or a legal system being oriented to the common good though it cannot, in itself, be a requirement. Consent may serve as an extremely useful proxy since legal systems and laws that receive consent of their subjects are likely to be those oriented toward the common good, if imperfectly. Finnis speaks of using consent as a rule of thumb. Though consent is not required for authority, consent is useful in deciding when to obey according to the following rule of thumb: “A man’s stipulations have authority when a practically reasonable subject, with the common good in view, would think he ought to consent to them.”

569 Finnis NLNR 251.
good. This is because the common good comprises the good of all the individuals, at least partly. To be sure, individuals cannot always be counted on to offer or withhold their consent with an eye toward the common good. They might decide based on the aspects of their own good that are in conflict with the common good. This is why consent can serve as a proxy, an approximation, but not as an assurance of authority’s orientation to the common good. Nor does the authoritativeness depend upon whether the subject in fact believes he ought to consent. Finnis speaks only of a practically reasonable person thinking with an eye toward the common good.

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What Finnis offers is a symbiosis between true authority and its own limitations. True authority properly construed avoids anarchy in the name of self-interest and totalitarianism in the name of the common good. On one hand, authority is rather limited in what it can and should do, according to the natural law view. On the other hand, authority remains necessary as a balance against the individual will and, specifically, subsidiarity. In the (appropriate) absence of an all-encompassing scheme of coordination, people best advance the common good by pursuing their own good and fulfilling their responsibilities to others, not because “otherwise everyone suffers” but because “the common good is the good of individuals, living together and depending upon one another in ways that favour the well-being of each.”\footnote{Finnis NLNR 305} Thus, even taking into account the demands of impartiality between persons, individuals or groups, with reasonable self-regard, put their own good first. And it is this individual (and local) good that they are best equipped to know—and instantiate. Precisely because of this, though, there is also the need for coordination
at the highest level, an authority that sees to the overall common good.\textsuperscript{571} But, again, this authority is inherently limited by what it can in fact accomplish for the sake of the common good, which is far less than what it would attempt in the name of a national enterprise, where all common activity were, as Finnis says, like building a bridge or making an omelet. Under such an arrangement, not only does authority not attempt to supplant all private purposes, but it also frees individuals and groups to pursue the good in the best way they can:

Generally speaking, an individual acts most appropriately for the common good not by trying to estimate the needs of the community ‘at large,’ nor by second-guessing the judgments of those who are directly responsible for the common good, but by performing his particular undertakings and fulfilling his other responsibilities to the ascertained individuals who have contractual or other rights correlative to his duties.\textsuperscript{572}

In this way there is a complementarity that manifests as specialization between individuals or local groups and an overarching authority.

Even so, if the concern is this model’s tendency toward authoritarianism, this not-second-guessing of authority may be just what worries Raz and motivates his emphasis on what authority is not entitled to do (and, more broadly, his default position that authority must be justified against autonomy). It suggests the need for officials who “know better” and the cultivation of a civic spirit of deference to their authority. This seems to cut against the ideology of modernity, where the bumper sticker that reads “Question Authority” is far more popular than the one that reads “Obey Authority.” Indeed, it may seem unbecoming, counterproductive, or even dangerous in age of democratic self-government. The fear is that the last thing a free

\textsuperscript{571} Finnis NLNR 233.
\textsuperscript{572} Finnis LC 103.
people needs is encouragement to unquestioningly accept authoritative directives from above. Or perhaps it is a necessary corrective to the narcissism and antinomianism (or narcissistic antinomianism) of the age.

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Whether such a corrective is necessary or whether this type of thinking would offer such a corrective is, for the moment, beside the point. The concerns about the pro-authority side rely on a caricature of the view, which must be avoided. Simon’s thoughts on this theme dovetail closely with many of Finnis’s and highlight the way in which regard for authority does not amount to a brief for authoritarianism. Rather, what emerges is a picture of limited government not driven by the belief that government is evil but that the good can be best secured through private efforts. Sounding very much like Finnis (or vice versa for the chronologists), Simon offers that the state “will discharge its duty best by concerning itself indirectly with such things as the maintenance and promotion of transcendent truth.” This is critical because it demonstrates that a defense of the need for authority is, by nature, balanced with a defense of individual prerogative. As Finnis explains, the “irreducible multiformity of human goods” mandates both. Simon outlines two principles that constitute this balance. There is the principle of authority: “Wherever the welfare of a community requires a common action, the unity of that common action must be assured by the higher organs of that community.” And there is the principle of autonomy: “Wherever a task can be satisfactorily achieved by the initiative of the individual or that of small social units, the fulfillment of that task must be left to the initiative of

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573 Simon PDG 5.
574 Simon GTA 130.
575 Simon NFA 45.
Achieving the good in this way is not only a question of what is right but also of what is possible. The state cannot but fail to subsume all private action under its direction and control.

Hence, as much as Finnis and Simon might seem more on the authoritarian side of the spectrum because they are arguing for authority against those, like Raz, who would denigrate its value, they stand firmly against the opposite impulse as well. Simon closes an essay on authority by citing Thomas Jefferson. He brings Jefferson’s political thought in contrast to the “abomination” of totalitarian state, which “materializing a dream of Rousseau,” Simon says, “indefatigably pursues the destruction of every social group within the state, so as to establish an absolute domination over a crowd of individuals that no autonomic organization is able to protect.” In a striking coincidence, Raz closes his introduction to his edited volume Authority with a reference to Rousseau as well. Raz claims that “the aim of political philosophy since Rousseau” is “a theory of participatory government in a society in which conditions exist that enable each to see his own well-being as tied up with the prosperity of others.” Rendering his judgment on this aim, Raz adds, “Its achievement is eagerly awaited.” To be sure, this could be taken as an interpretive argument over Rousseau. But it is perhaps no coincidence that what Raz sees as shared prosperity Simon reads as the totalizing state. On one hand, Raz probably does not agree with Simon that Rousseau’s is a vision of a totalitarian state yet merely disagree on whether this is a good thing. On the other hand, it might be a mistake to make too much of these conflicting invocations of Rousseau. Nevertheless, the contrast is suggestive, for Simon’s

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576 Simon NFA 45.
577 Simon NFA 46.
578 Simon NFA 45.
579 Raz Intro 17.
580 Raz Intro 17.
account of authority, and Finnis’s with it, is not about what kind of authority it takes to keep men from tearing each other apart. It is about what kind of authority makes human flourishing possible. This, in turn, is an argument not just about why authority is necessary and even good but also about why authority is necessarily limited by the requirements of human flourishing.

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This conclusion about the inherent normative limits on authority is particularly salient in light of the legal illimitability of the sovereign. This fact finds expression in various ways, but one way is Simon’s comment about “the particularity of the function,” by which he means one aspect of the good that is served through specialization, which, “as ground of authority, has a negative feature of major significance: it does not, in any essential manner, set limits to the authority that it grounds.”581 Of course, authority is limited by the demands of the common good, but this does not resolve the issue entirely. For one thing, the contours of the common good still must be specified, and, in practice, that specification may fall to the authority responsible for the common good, so remaining within proper limits may depend upon the good sense of the authority. In a community, Simon writes, “Happiness depends on the ability of its head to determine exactly the right limits of his authority, together with the ability of those who must obey to recognize that their claim for freedom cannot reasonably exceed certain limits.”582 Thus, even laying aside for the moment the question of whether the common good could limit authority legally as well as morally, there is still the question of who locates the limits of authority and how. For another thing, it seems plausible that an authority could act contrary to the common good in some instances without technically exceeding moral or legal bounds. An

581 Simon GTA 63.
582 Simon NFA 2-3.
authority could fail to properly respect the principle of subsidiarity in some instances without
being wholly unjust and therefore crossing the line into complete illegitimacy. There is, of
course, much room for prudence in the exercise of such responsibilities, which is why all must be
mindful of the important balance between authority and autonomy: “Inquiring into the nature of
this ability to delineate the boundaries of one’s field of action, let us say that it consists in a
particular form of the virtue of prudence, in a wisdom which is practical in the full sense of the
term, and proceeds from the virtuous dispositions of the will, justice, moderation, and charity.”\textsuperscript{583}

This theory of authority creates something of a paradox, then, regarding the power of the
sovereign. In one respect, the sovereign is legally illimitable, technically speaking.\textsuperscript{584} Even
setting aside this particular theory of authority, if the sovereign is the ultimate authority, then
there can be no law-of-last-resort that checks the authority of the sovereign because the
sovereign can change the law or at least change the laws governing how laws are made and then
change the particular law at issue. (This is similar to the problem of the authority charged with
promoting the common good also defining the common good.) In another respect, though, the
sovereign operates under some limitation if it is true that authority is constrained by the common
good. That is, if the legitimate authority requires that its directives aim at the common good,
then authority that, on the whole, opposes or undermines the common good is illegitimate and its
directives are not law because it is not properly a legal system. Therefore, there is something of
a paradox in that the sovereign can technically make any law he wants, but sovereign can also
violate normative criteria that would deny those enactments the status and thus the force of law
(and, accordingly, the prima facie obligation to obey). To be clear, none of this amounts to a

\textsuperscript{583} Simon NFA 3.
\textsuperscript{584} This is a key insight of Carl Schmitt, to be discussed in the next chapter.

claim that the sovereign is above the law in the sense of not having to obey the same laws as
everyone else, not unless the sovereign creates a law exempting himself, but that, too, is acting
within the law.\footnote{Finnis NLNR 254.} This is perhaps most obvious where the people, collectively, are the sovereign. In their capacity as sovereign, they make the rules; in their capacity as subjects, they obey the rules. The same is the case regardless of who is the sovereign.

One lesson from this, naturally, is that proper restraint on the part of the sovereign
requires prudence borne of education and wisdom. That is to say, while even a perfectly virtuous
society needs government, good government also depends upon virtue. It is a cold fact of nature
that a majority or strongman set on abusing authority can do so, which is why virtue is the best
safeguard. Anyway, the paradox is more illusion than reality. Although it is impossible, as a
final matter, to implement institutional restraints against the sovereign (since it is the sovereign
who controls the restraints), there are normative constraints. Even so, there may be concerns
about the theory’s alleged tendency to authoritarianism, as it adds a functionally illimitable
sovereign to a spirit of deference toward authority. Nevertheless, although this theory can of
course accommodate non-democratic forms of government, it is equally open to democracy.
Although his key work predates the contemporary literature on jurisprudence, Carl Schmitt in many ways anticipates key problems and themes in the discussion over the obligation to obey the law. The political theology of Carl Schmitt is instrumental here in suggesting how divine authority can be a model for legal obligation. As with all of these topics, Schmitt was approaching them from a different angle and for a different purpose, yet his contribution to the debate ought to be better appreciated. Furthermore, in arguing strongly for authority, Schmitt points the way to a defense of a content-independent obligation to obey the law. As always, his writings are not a brief for an absolute obligation; he did not value authority and stability purely for their own sake. He believed in the need for authority in defense of certain values. Nevertheless, he envisioned a system predicated on certain values, within which there was great leeway for the sovereign to rule—not too distant from the idea of a set of commands oriented to the common good. In addition, Schmitt feared the collapse of order that followed from an absence of authority, and he surely would have felt that Hart’s positivism, along with all theories that deny the obligation to obey the law, and therefore deny sovereignty, put the state on the road to just such collapse.

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At the center of Schmitt’s argument about sovereignty is the claim that politics is both analogically and genealogically related to religion. In probably the second most famous line of his work Political Theology, Schmitt writes:
All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development—in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver—but also because of their systematic structure, the recognition of which is necessary for a sociological reconsideration of these concepts.\(^{586}\)

In this way, divine authority serves well as a starting point for thinking about political and legal authority. As before, this is not to support any claims for divine authority per se but just to by showing how religious obligation can serve as a partial model for legal obligation.

In particular, Schmitt’s political theology provides ground for an understanding of legal obligation that incorporates the command model (in its best form). With regard to its “systematic structure,” Schmitt depicts governmental authority with reference to theological conceptions of divine authority. “Looked at normatively,” he writes, “the decision emanates from nothingness.”\(^{587}\) The decision, which is the essence of sovereignty—“Sovereign is he who decides on the exception”—mirrors God’s creation ex nihilo.\(^{588}\) Sovereignty resembles God’s creation both in that it itself depends on no prior existence or creation and in its in-principle illimitability.\(^{589}\) In his introduction to Schmitt’s Political Theology, Tracy Strong explains: “Political power is to be understood on the model of God’s creation—which is how Hobbes understood it. Power is to make something from that which is not something and thus is not

\(^{587}\) Schmitt PT 31-32.  
\(^{588}\) Schmitt PT 5.  
\(^{589}\) In a perhaps unintended way, this parallels Finnis’s mention of an original, unauthorized authority. Finnis does not mean it as a reference to God’s primeval authority, but the parallel is notable.
subject to laid-down laws.”

Sounding a similar note, John McCormick notes in his introduction to Schmitt’s Legality and Legitimacy that, for Schmitt, “the President possesses a world-making, God-like fiat of exceptional legislative authority.”

In speaking of the decision emanating from nothingness, Schmitt is not directly addressing the issue of authority stemming from a first, unauthorized authority. Rather, he is addressing the decision in every true instance, which extends far beyond the initial establishment of authority. But, for this very reason, the concept of command (as sheer will) is all the more salient in Schmitt. In Schmitt’s view, the ex nihilo character of the sovereign’s power is not just found in some distantly-past starting point but rather reproduced in each exercise of “decision.” Schmitt writes, “The exception reveals most clearly the essence of the state’s authority. The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law.” Here, too, Schmitt suggests that, with respect to legal norms, law itself is produced ex nihilo and, in its independence of legal norms, is not subject to legal limits. This is why Schmitt says that “the exception in jurisprudence is analogous to the miracle in theology.”

The miracle breaks into the world, free from natural constraints, and thus is the truest demonstration of God’s sovereignty. In an even stronger formulation, Schmitt states, “The decision frees itself from all normative ties and becomes in the true sense absolute.”

590 Schmitt PT xxvii.
592 Schmitt PT 13.
593 Schmitt PT 36.
594 Schmitt PT 12.
Such a view of sovereignty rests squarely on his political-theological model. Without that model, these sorts of claims about authority are far harder to rationalize. Along similar lines, when Schmitt describes the emergency powers in a state of exception as “unlimited,” he does not just mean it as a technicality because there is no practical way to limit the powers in that situation. Rather, the unlimited power is a feature of the nature of sovereignty in Schmitt’s political theology, where it mirrors God’s omnipotence. To be sure, none of this talk of unlimited power implies the absence of moral norms, only legal norms. Just as an omnipotent God could still be subject to moral limits found in the natural law (as it exists in the world He created), a legally illimitable sovereign is still subject to moral limits. In fact, it is not merely a matter of being subject to limits. Much more than that, even for Schmitt, the authority is justified by virtue of the moral ends toward which it aims (more on this below).

As Schmitt sets out in several places, politics and theology are not just related analogically but also genealogically. In the same vein, McCormick quotes Schmitt as saying that “the problem of legality and legitimacy must be interrogated both ‘historically and conceptually.’” The genealogical relation between politics and theology is not of the sort Simon suggests, whereby God actually delegated authority to man, though Schmitt does not explicitly rule out such a possibility, either. Instead, Schmitt concentrates not on the genealogy of the power but of the concepts, offering an intellectual history of sovereignty. For example, like in his famous line from Political Theology, Schmitt states elsewhere, “The juridic formulas of the omnipotence of the state are, in fact, only superficial secularizations of theological

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595 Schmitt PT 7.  
596 Schmitt LL xvi. Schmitt’s own sentence reads, “With regard to the concept of legality, one must keep in mind, both historically and conceptually, that it is a product and a problem of the parliamentary legislative state and its specific type of normativism.” (Schmitt LL 10).
formulas of the omnipotence of God.”\textsuperscript{597} This sort of genealogy is every bit as important as Simon’s, though, since Schmitt argues that this proper understanding in the history of ideas is necessary for properly diagnosing the problem(s) of modern politics. And it is, in turn, no coincidence that these political concepts, which are derived from theological ones, can best be described with reference to those theological terms.

Schmitt begins his account of that history of ideas (and institutions) with the transition from monarchy to democracy, which corresponds to a theological shift from a more traditional theism to deism. “The idea of the modern constitutional state,” argues Schmitt, “triumphed together with deism, a theology and metaphysics that banished the miracle from the world.”\textsuperscript{598} Just as the miracle was banished from theology, so, too, the exception, which is the keystone of sovereignty, was banished from politics: “The rationalism of the Enlightenment rejected the exception in every form.”\textsuperscript{599} This is why, for Schmitt, the modern concept of sovereignty is rootless. There is no longer the possibility of the decision that “frees itself from all normative ties and becomes in the true sense absolute.”\textsuperscript{600} An alternative modern approach would be to locate all sovereignty within legal norms, which Schmitt clearly thinks fails. As McCormick writes, “Because there is no personal authority in this system, only norms, Schmitt claims that the legislative state assumes away the issue of ‘obedience.’”\textsuperscript{601} This is problematic because, he explains, “in Schmitt’s account of legitimacy, obedience is affiliated most closely with personal

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\textsuperscript{597} Carl Schmitt, \textit{The Concept of the Political} (Chicago: University of Chicago, 2007) 42 (hereafter “CP”).
\textsuperscript{598} Schmitt PT 36.
\textsuperscript{599} Schmitt PT 37.
\textsuperscript{600} Schmitt PT 12.
\textsuperscript{601} Schmitt LL xxiv.
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As such, “Schmitt avers that contemporary legality does not account for why authority is obeyed” though, for McCormick, Schmitt can only do this by “ignoring all Kantian justifications of obedience to law as a form of self-rule.”

In Hart, a “decision” manifests outside of legal norms in the form of social practice. Although it may seem that Hart wishes to explain the entire legal system via legal norms (and legal norms that explain legal norms, and so on), at bottom it is social practice, in answering the final “why,” that accounts for why the first (or highest order) legal norm is treated as such. In this way, social practice stands instead of decisionism as the explanation of final appeal: Hart’s “because that’s the way we do things here” replaces Schmitt’s “because I said so.” The question, then, is whether this new model is an adequate foundation for authority.

Schmitt attributes the change (from decision to social practice as the source of rules and hence authority) in part to Rousseau’s “ politicization of theological concepts, especially with respect to the concept of sovereignty.” In particular, Schmitt explains, “The general will of Rousseau became identical with the will of the sovereign . . . the people became the sovereign. The decisionistic and personalistic element in the concept of sovereignty was lost.” Therefore, the question is whether the concept of sovereignty can be sustained without these elements. Schmitt, of course, thinks not. The problem is compounded by what Schmitt sees as the consequences of a move to deism, politically and theologically, namely a further slide from deism to atheism, which in the political realm is a shift from democracy to anarchy. In Schmitt’s reading of the history, “radicals who opposed all existing order directed . . . their ideological

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602 Schmitt LL xxiv.
603 Schmitt LL xxiv.
604 Schmitt PT 46.
605 Schmitt PT 48.
efforts against the belief in God altogether” while the people at large settled for “immanence pantheism or a positivist indifference toward any metaphysics.” For these radicals, “mankind had to be substituted for God,” but this could only “end in anarchic freedom.” This is the road to the fundamental challenge of the philosophical anarchists, which Raz is at pains to address in his theory of authority. But it is their presuppositions that also underpin Raz’s answer and make it impossible to truly ground authority. As Schmitt elaborates elsewhere, because real neutrality is impossible, this model of anarchic freedom only exacerbates the problems that politics is meant to address. From there, Schmitt asserts, it is a short line from de Maistre’s favoring of the goodness of authority over the goodness of the people—where the anarchists argue “the people are good,” de Maistre argued that “authority as such is good once it exists”—to Cortés’s outright endorsement of dictatorship. Coming from an entirely different angle, then, Schmitt lends support to a concept of obligation that is rooted in the commands of a sovereign, a picture of legal obligation that draws partly on religious obligation.

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To the extent that Schmitt’s political-theological model of sovereignty supports the command model of law and suggests the need for a commander, there is danger of mistaking Schmitt for a positivist. His emphasis on the need for “decision” and decisiveness could imply a non-normative understanding of legality. Command, on its own, is a perfectly positivist model of the law, as it was in the work of Austin and Bentham, since it speaks only to the form of the law but not its content. A directive from a superior to an inferior, just as such, could contain any

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606 Schmitt PT 50.
607 Schmitt PT 51.
608 See below.
609 Schmitt PT 55.
610 Schmitt PT 66.
content. But Schmitt is not a positivist; in fact, he is useful in this debate for his attack on positivism. Despite his attachment to a decision-making sovereign in whom the fact of making a decision sometimes seems more important than the content of the decision itself, Schmitt is not only not a positivist, he is decidedly anti-positivist. Indeed, an exploration of his dismissal of positivism reveals even further how Schmitt’s work supports a notion of law as a set of commands oriented to the common good.

To be sure, the notion of law as command tends toward positivism. For this reason, the concept of law also requires a second criterion, an orientation toward the common good, that explains its legitimacy (which, contra the positivists, is an inextricable part of its legality). Even though Schmitt does not write of the common good in this way, he also does not think that the authority of the sovereign is without normative substance. He does appear to leave the power of the sovereign unlimited, but this is not because law has no normative aspect. On the contrary, Schmitt is emphatic about the impossibility of true neutrality in the law and in politics. In practice, the sovereign is legally illimitable, but this must be true by definition since the sovereign makes the rules. More importantly, there are no legal limits on the sovereign because, in Schmitt’s view, the sovereign may (and ought to) do whatever is necessary to preserve the very goods the defense of which gives the sovereign legitimacy in the first place. In terms Schmitt does not use, there are no legal limits on the sovereign’s defense of the common good. But the legitimacy of the sovereign is indeed limited by an orientation to that end.

Schmitt argues most forcefully against positivism in Legality and Legitimacy. In essence, the charge against positivism is twofold. First, positivism appears incoherent for its

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\[611\] Admittedly, Schmitt’s rejection of positivism sounds very different from that of Finnis though there may also be little-noticed synergies between the two, and it is, therefore, perhaps no coincidence that both of their theories form essential parts of a proper understanding of authority.
inability to hold to the neutrality it espouses. Second, even if positivism is coherent, without a commitment to substance it is self-defeating because it lacks the resources to uphold its own form. In Legality and Legitimacy, Schmitt demonstrates that there is no such thing as true value neutrality in politics. Every choice in politics and law is a choice for some value. Even purely functionalist legality, such as bare majoritarian rule, does not make decisions without some principle. For Schmitt, there must be some reason why functionalism is the right choice in the first place. For those who favor parliamentarism, it could be for the sake of equality, or what Schmitt calls “equal chances,” or, for those with more Schmittian sensibilities (where parliamentarism has, at best, instrumental value), it could be for the sake of stability. But, one way or another, there needs to be some answer to the question of why functionalism is preferable.

On the most general level, the concept of the political rules out the possibility of neutrality because “any decision about whether something is unpolitical is always a political decision.” Indeed, Schmitt locates sovereignty first and foremost in the power to determine both when an emergency exists and what to do about it, or, as he says, “sovereignty (and thus the state itself) resides in deciding this controversy, that is, in determining definitively what constitutes public order and security.” This leaves no room for neutrality. On the contrary, the exercise of sovereignty depends on a commitment to particular substantive values, in defense of which the sovereign declares a state of exception and utilizes emergency powers. This point is at the heart of his critique of the functionalist-legislative state, which purports to uphold no more than value-neutral procedures. As he adds in the afterword to Legality and Legitimacy,

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612 Schmitt PT 2.
613 Schmitt PT 9.
“Value neutralization belonged to the general functionalization at work and made democracy into a worldview of fundamental relativism.”  

A strictly procedural system embraces relativism, lacking any mechanism to distinguish among, and defend, values.

Even the legislative state should at least adhere to substantive values that promote or ensure its self-preservation. Though not known for fondness toward the liberalism of his day, Schmitt can appreciate that, for liberals, “the bourgeois-legal system itself, with its concepts of law and freedom, is at least still sacred, and liberal value neutrality is viewed as a value, while fascism and bolshevism are openly termed the political enemy.” He contrasts this to pure functionalism, where “the value neutrality of a still only functional system of legality is taken to the extreme of absolute neutrality toward itself and offers the legal means for the elimination of illegality per se” because nothing is illegal as long as it follows procedure. Under such circumstances, there are “no unconstitutional goals,” and “value neutrality is pushed to the point of system suicide.” For this reason, McCormick understands Schmitt as advocating what might be called a Lincolnian move, where, for example, in moving to exclude antidemocratic parties, “an unconstitutional act in fact proves to be constitutionally faithful” whereas “open legality invites the triumph of absolutely illegality.” A second value to which the legislative state might appeal is equality in political participation. This is not what Schmitt recommends as the basis for legitimacy, but it does show that even purported functionalism likely depends on some prelegal value. And here, too, the Schmittian model applies:  “One can hold open an equal

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614 Schmitt LL 96.
615 Schmitt LL 48.
616 Schmitt LL 48.
617 Schmitt LL 48.
618 Schmitt LL xxvii.
619 Schmitt LL xxviii.
chance only for those whom one is certain would do the same;” otherwise it is “suicide in practical terms but also an offense against the principle itself.”\textsuperscript{620} One does not sacrifice long-term political equality in the name of giving would-be tyrants an equal chance, which is why Schmitt’s “equal chance” idea in 1932 “aimed at banishing extreme political movements from the political arena.”\textsuperscript{621} Finally, even leaving aside the question of antidemocratic actors, Schmitt has a further point about majoritarianism needing some further substantive justification, that “pure mathematics becomes simple inhumanity.”\textsuperscript{622} Justice, he argues, is not determined by the size of the majority.\textsuperscript{623}

Schmitt sounds similar themes in his Concept of the Political. There, Schmitt discusses the friend-enemy distinction, proclaiming the need for recognizing the value judgments inherent in all political choices and, as he said above in Political Theology, the impossibility of making only nonpolitical choices. As a result, Schmitt concludes, “State and politics cannot be exterminated,”\textsuperscript{624} adding further that “this allegedly non-political and apparently even antipolitical system serves existing or newly emerging friend-and-enemy groupings and cannot escape the logic of the political.”\textsuperscript{625} In a related essay, Schmitt expands on this theme using the example of technology as the tool of modernity’s futile attempt to suppress, avoid, or deny the political. Technology is not the only vehicle for ill-fated attempts to escape the political, but Schmitt believes that the pursuit of this avenue prominently characterizes the modern age. “The evidence of widespread contemporary belief in technology,” Schmitt claims in his essay “The

\textsuperscript{620} Schmitt LL 33. 
\textsuperscript{621} Schmitt PT xlviii. 
\textsuperscript{622} Schmitt LL 41. 
\textsuperscript{623} Schmitt LL 41. 
\textsuperscript{624} Schmitt CP 78. 
\textsuperscript{625} Schmitt CP 79. 

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Age of Neutralizations and Depoliticizations,” “is based on the proposition that the absolute and ultimate neutral ground has been found in technology, since apparently there is nothing more neutral.”626 Relying on technology to advance neutrality (neutrality in politics—though that is a funny phrase since politics is, by definition, non-neutral) is doomed to fail, however, because “the neutrality of technology is something other than the neutrality of all former domains.”627 Rather, Schmitt argues, “Technology is always only an instrument and weapon; precisely because it serves all, it is not neutral.”628

Nor is this an outdated or uniquely Schmittian theme. In a 2010 article, RJ Snell quotes a 2007 commencement address by Wendell Berry in which Berry explains:

his resistance to exclusively utilitarian education, arguing that the “American civilization so ardently promoted by these institutions is . . . a civilization entirely determined by technology, and not encumbered by any thought of what is good or worthy or neighborly or humane.” A university fails its purpose when in unchecked enthusiasm for technological progress it overlooks “preparing their students for responsible membership in a family, a community, or a polity,” and so become “unabashedly utilitarian.” The sort of technological civilization sponsored by the new university is, Berry thinks, fundamentally hostile to civility in all its forms.629

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627 Schmitt AND 90.
628 Schmitt AND 90.
Modern democracies can place all of the emphasis on technological progress in the hope of eschewing central moral questions, but Schmitt insists that those questions must be asked and judgments must be made—most of all the friend-enemy distinction. A society that fails to ask and answer such questions is poorer for it, eventually spelling its own demise, and a society that pretends it need not ask such questions is only deluding itself. Some may wish to dispute the terms of Schmitt’s central question, but Schmitt at least gets credit for operating with the right conceptual structure, namely one that recognizes the impossibility—or farce—of neutrality.

Schmitt’s rejection of neutrality in politics extends similarly to his discussion of law. Schmitt opposes what he refers to as the functionalist approach to law, which attempts to achieve neutrality by valuing procedure but not substance:

Comprehending law and statute without relation to any content as the present conclusion of the transitory parliamentary majority corresponds to a purely functional manner of thinking. In this way, law, statute, and legality become ‘neutral’ procedural mechanisms and voting procedures that are indifferent toward content of any sort and accessible to any substantive claim.\(^630\)

In this functionalist state, “The written constitution of the parliamentary legislative state must ultimately limit itself to organizational and procedural rules” in the name of “neutrality.”\(^631\) This position is untenable, though. McCormick sums up Schmitt’s position, saying, “Law placed in the service of democratically responsive policies of regulation and redistribution necessarily descends into arbitrariness and incoherence.”\(^632\) In what undoubtedly sounds extreme to modern ears, McCormick writes that, for Schmitt, merely following “the new legal policies of the latest

\(^{630}\) Schmitt LL 27.

\(^{631}\) Schmitt LL 25.

\(^{632}\) Schmitt LL xvi.
party or interest-group coalition that formulated them constitute a kind of revolution approximating an illegitimate assault on the very structure of state and society.” 633 Schmitt may seem to go too far here since even the functionalist state need not be neutral between functionalism and some alternative; on the contrary, functionalism apparently entails a commitment to majoritarianism. And, indeed, Schmitt acknowledges that the legislative state “may not be ‘neutral’ toward itself and its own presuppositions.” 634 Nevertheless, where value-commitment extends only to majority rule, “all guarantees of justice and reasonableness, along with the concept of law and legality itself, end in an internally consistent functionalist view without substance and content that is rooted in arithmetic understandings of the majority.” 635 In that case, there is no reason to assume that the majority will be sensitive to the common good. For Schmitt, the legitimacy of such a system depends on homogeneity in society. This “method of will formation,” he says, “is sensible and acceptable when an essential similarity among the entire people can be assumed.” 636 This is because, in the absence of homogeneity, an arithmetic approach to law is “the opposite of neutrality and objectivity;” it is, instead, “forced subordination of the defeated and, therefore, suppressed minority.” 637 Under conditions of homogeneity, “There is no voting down of the minority.” 638 Rather, “The vote should only permit a latent and presupposed agreement and consensus to become evident” because “all those similarly situated would in essence will the same thing.” 639

633 Schmitt LL xvi.
634 Schmitt LL 27.
635 Schmitt LL 27.
636 Schmitt LL 27.
637 Schmitt LL 28. Of course, consent or social contract theory attempts to deal with this, but those are subject to challenges discussed elsewhere.
638 Schmitt LL 28.
639 Schmitt LL 28.
Thus, from Schmitt there arises what appears to be a stark critique of liberal democracy. Yet the real force of Schmitt’s point here is not against liberalism per se but against majoritarianism unmoored from substantive limits. Although Schmitt certainly formulates it differently, he helps to make the case for a concept of legitimacy that depends upon the legal system being oriented to the common good.\(^{640}\) Bare procedure, majoritarian or otherwise, is insufficient to obligate. Even if one is skeptical of Schmitt’s claim that there could be a form of homogeneity under which people would will the same thing, this idea is really just another way of getting at what it means for there to be a common good in which to participate. Of course Schmitt is aware that people can disagree in good faith even when they are similarly situated. The point is just that their being similarly situated means that they have some good in common. Contemporary thinkers may want to take a wider view of the homogeneity necessary to satisfy such a condition, but that does not change the underlying point. Regardless, to avoid the incoherence of functionalism, a democracy must be oriented toward, and constrained by, certain values behind the procedural aspects. Even so, it may be possible to salvage pluralism from Schmitt if there can be a common will despite real differences between minorities. In that way, Schmitt’s decisionism could be more compatible with liberalism than his critics are willing to credit.

Schmitt’s insistence on the unsustainability of neutrality points to the observation that, beyond the so-called arbitrariness and incoherence at functionalism, the deeper problem is that even allegedly neutral systems are not truly so. In his paradoxical formulation, Schmitt asserts,

\(^{640}\) Though Schmitt is mostly taken to be an authoritarian conservative, with fascist leanings, his view actually offers protection to the minority, the rights of which cannot be secured without substantive limits on the will of the majority but which stand to benefit from a system oriented to the common good.
“Should only neutrality prevail in the world, then not only war but also neutrality would come to an end.” Schmitt explicates further:

But in the dialectic of such a development one creates a new domain of struggle precisely through the shifting of the central domain. In the new domain, at first considered neutral, the antithesis of men and interests unfold with a new intensity and become increasingly sharper. Europeans always have wandered from a conflictual to a neutral domain, and always the newly won domain has become immediately another arena of struggle, once again necessitating the search for a new neutral domain.

Thus, in the arena of the political, neutrality always gives way to non-neutrality, and, in Schmitt’s analysis, the new conflict is worse than the old one. What is the case for the political is similarly the case for the legal. At the most basic level, even a choice for neutrality is a substantive choice, much as “any decision about whether something is unpolitical is always a political decision.” Schmitt writes, “In regard to the question of neutrality and non-neutrality, whoever intends to remain neutral has already decided in favor of neutrality. Value assertion and value neutrality are mutually exclusive. Compared to a seriously intended value assertion and affirmation, conscientious value neutrality means a denial of values.”

And even if one does not take the Nietzschean route in the interpretation of functionalism, there is still the question of why neutrality: what substantive principle motivates it? Why choose neutrality? According to McCormick, Schmitt maintains that the legislative state, if not pure functionalism, can be saved by acknowledging “preconstitutional and prelegal

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641 Schmitt CP 35.  
642 Schmitt AND 90.  
643 Schmitt PT 2.  
644 Schmitt LL 47.
substantive values or concrete decisions” that undergird the system and by recognizing that “these, and not the law itself, as liberals hope, are the source of the regime’s legitimacy.”645 At the barest minimum, McCormick explains, Schmitt believes that “even the most formally neutral constitution cannot espouse neutrality toward its own existence.”646 A constitution that does not do so is a recipe for disaster. Thus, Schmitt argues that a concept of legality that can be used against itself to destroy the law (the constitution) is not only incoherent but unstable. For Schmitt, neutrality in politics and the law is unsustainable and prone to ending in oppression. A political and legal order that claims to ensure procedural fairness while remaining substantively neutral cannot endure or at least cannot remain legitimate.

In addition to the undesirability of such a regime, there is a more profound claim in this point, namely that self-preservation is embedded in the logic of the law. That is, implicit in any particular political and legal system is the idea that this arrangement is better than other arrangements, and, even if it is not the best of all possible arrangements, it is at least part of a set of possibilities that is better than all of the possibilities not in the set. While it might be technically possible to argue that a given arrangement is not superior to any other choice and that the only thing that matters is that it is some choice, this is an unrealistic objection since few would have the incentive to uphold such a system, meaning that few would have a reason to support it other than the fact of it being the one they have. Moreover, if there really were neutrality (or better, indifference) among systems, then chaos would result since there would be a constant supplanting (or better, subverting) of one system by another since no one would have any incentive to preserve the status quo. In theory, any type of system could replace any other,

645 Schmitt LL xvi.
646 Schmitt LL xix. Even the great positivist Hart has a similar line in discussing the minimum content of law: it must at least ensure its own survival. (See, for example, Hart CL 193.)
as long as it adhered to the value-neutral procedures, whatever they were. This, in turn, would undermine what is presumably the only reason for the kind of neutrality that cares only that there is a choice but not which choice: stability. So that kind of neutrality, even if it could exist, is self-defeating. Pure functionalism does not portend stability.

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Even if Schmitt is right about the disappearance of true authority with the rise of modern parliamentarism, it does call into question whether, being so dependent on the decisionistic and personalistic elements of sovereignty and being so critical of Rousseau’s equation of the will of the sovereign with the will of the people, Schmitt is compatible with liberalism and especially democracy. If Schmitt’s theory is useful as support for a model of law as a set of commands oriented to the common good, is it also limited in its usefulness because of a potential incompatibility with liberalism and democracy? Some would maintain that Schmitt, while useful for his critique of positivism, is not fully compatible with democratic norms. Is the sovereign, who, in McCormick’s explanation of Schmitt, “possesses a world-making, God-like fiat of exceptional legislative authority,” a representative or other arm of the people, or is he more like a deity? Or is there a possible combination of the two embodied in a secularized theological concept that stands opposite democracy?

In addition, relying on Schmitt for one part of the concept of law may produce self-contradiction of the very kind Schmitt rejects in Legality and Legitimacy. It would be difficult to rely on Schmitt in explaining law if it turns out that Schmitt’s understanding of law is different altogether in a way that makes his work inapplicable here. Now, in principle, it is not completely untenable to draw on portions of Schmitt’s theory but not on others. The danger is if this theory here is ultimately incompatible with Schmitt’s political-theological model, in which case the
connection between his view of authority and this one is too superficial to be of any real conceptual value.\textsuperscript{647}

Although Schmitt, like Finnis and others, rejects positivism, there is a different character to his non-positivism because his rejection of positivism is intertwined with a rejection of formalist democracy, or what he calls functionalism or parliamentarism. For this reason, Schmitt’s idea of authority is less easily reconciled with democratic norms than is, for example, a natural law understanding of authority. On one level, attempting to reconcile Schmitt’s decisionism with democracy might seem to miss the point altogether, given that his account of sovereignty locates authority in a single, decisive holder of power rather than in an indecisive, deliberating parliament. But in fact, his view is only a dismissal of a particular kind of democracy: he favors a plebiscitarian democracy that avoids the problems of parliamentarism.\textsuperscript{648}

A deliberative body, and presumably also a deliberating people, cannot offer the kind of decisiveness necessary to defend the system in times of trouble. More importantly, Schmitt’s view here highlights the centrality in his theory of true authority and the unwillingness to cede to the Razian mode.

In a way, the problem with the legislative state is twofold. First, its functionalism attempts to vest authority in rules rather than in men. For Schmitt, the legislative state is characterized chiefly by the “separation of law and legal application, the legislative and the executive,” which is the product of the “directly necessary, constructive, fundamental principle of the legislative state, in which not men and persons rule, but rather where norms are valid.”\textsuperscript{649}

\textsuperscript{647} More on this below.
\textsuperscript{648} Schmitt LL 59-66.
\textsuperscript{649} Schmitt LL 4.
This is unacceptable to Schmitt because “laws do not rule; they are valid only as norms.”

“There is no ruling and mere power at all anymore,” insists Schmitt. He condemns the legislative state as one in which there is “no longer any government or obedience in general because only impersonal, valid norms are being applied.” One can clearly see here a prospective criticism of Hart, who dramatically reoriented the understanding of law away from the personalistic element and “mere power” to the validity of rules and norms. The point about rules versus men is a critical one since, in Schmitt’s view, a rule-based state is what make pluralism possible for liberals. That is, it entails foundational claims about the nature of the state. As Tracy Strong puts it in his forward to Political Theology:

This claim is at the basis of Schmitt’s rejection of what he calls ‘liberal normativism’—that is, of the assumption that a state can ultimately rest on a set of mutually agreed-to procedures and rules that trump particular claims and necessities. Pluralism is thus not a condition on which politics, and therefore eventually the state, can be founded. Politics rests rather on the equality of its citizens (in this sense Schmitt is a ‘democrat’) and thus their collective differentiation from other such groups: this is the ‘friend/enemy’ distinction, or more accurately the distinction that makes politics possible. It is, one might say, its transcendental presupposition.

Indeed, Schmitt argues throughout his work that the formalist, or proceduralist, neutrality to which the legislative state aspires is impossible. It cannot serve as a proper basis for the state, conceptually, and in fact will end in some form of substantive distinction-making.

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650 Schmitt LL 4.
651 Schmitt LL 4.
652 Schmitt PT xvi.
Second, the legislative state is flawed because its parliamentarism places special interests ahead of the will of the people. Under an “absolute, ‘value-neutral,’ functionalist and formal concept of law,” which is the legislative state’s form of legality, the law “is only the present decision of the momentary parliamentary majority.”\textsuperscript{653} As a result, Schmitt favors a plebiscitary form of democracy, instead. It is here that Schmitt is at his most paradoxical but ultimately reveals himself to be a democrat if not a liberal.

On one hand, Schmitt maintains a certain opposition to popular rule. As Schmitt writes, “In the struggle of opposing interests and coalitions, absolute monarchy made the decision and thereby created the unity of the state. The unity that a people represents does not possess this decisionistic character; it is an organic unity, and with the national consciousness the ideas of the state originated as an organic whole.” For this reason, he is, in George Schwab’s words, “determined to reinstate the personal element in sovereignty and make it indivisible once more.”\textsuperscript{654} This is Schmitt at his least democratic sounding. But Schmitt’s ire was reserved only for non-personalistic, parliamentary forms of democracy that he believed followed from liberalism. With Donoso Cortés, he sees in “continuous discussion a method of circumventing responsibility.”\textsuperscript{655} Proponents of parliamentarism suffer under the same illusion of those who hold out hope for true neutrality and the elimination of politics: “The essence of liberalism is negotiation, a cautious half measure, in the hope that the definitive dispute, the decisive bloody battle, can be transformed into a parliamentary debate and permit the decision to be suspended forever in an everlasting discussion.”\textsuperscript{656} Schmitt knows, however, that conflict cannot be

\textsuperscript{653} Schmitt LL 25.
\textsuperscript{654} Schmitt PT xlii.
\textsuperscript{655} Schmitt PT 63.
\textsuperscript{656} Schmitt PT 63.
avoided indefinitely, that a “decision” always has to be made, eventually. And he recognizes that the outcome of indefinite, indeterminate deliberation may be dictatorship, which is “the opposite of discussion.”\(^{657}\) In the absence of some better alternative, the “logical conclusion” of “decisionism” is “political dictatorship.”\(^{658}\) Historically speaking, the rise of liberalism paves the way for dictatorship in the absence of the kind of decisionism that was possible under monarchy. In contrast to decisionism, which takes “the immediately executable directive as a legal value in itself,” the “parliamentary legislative state’s tendency toward endless discussion” is the true danger.\(^{659}\) Under such circumstances, Schmitt writes, “It still holds true: ‘The best thing in the world is a command.’”\(^{660}\) Moreover, it is not just in response to liberalism’s or parliamentarism’s failure that Schmitt advocates decisionism. As he makes clear, the decision is the true mark of sovereignty. For Yves Simon, emergency powers are precisely the kind that are ordinarily suspended, but Schmitt’s position is not that such powers must be exercised regularly. Rather, for both, the key is that the one holding such power, albeit in suspended form, is the real sovereign.

On the other hand, Schmitt does support a plebiscitary form of democracy. This is critical because it evinces Schmitt’s compatibility with popular sovereignty.\(^{661}\) Plebiscitary democracy is better than parliamentary democracy, according to Schmitt, because “the logical consistency of a system built on the idea of a representation is different than that of the

\(^{657}\) Schmitt PT 63.
\(^{658}\) Schmitt PT 66.
\(^{659}\) Schmitt LL 9.
\(^{660}\) Schmitt LL 9.
\(^{661}\) Some theories of legitimacy depend on this. Where legitimacy depends on an orientation to the common good, compatibility with popular sovereignty is helpful, not least in making it attractive for contemporary politics, but not strictly necessary.
plebiscitary-democratic sovereign people, which is directly present and thus not represented.”662

McCormick explains Schmitt’s Hobbesian position as follows: “According to Schmitt’s logic, if
the people attempt to actually participate politically, they will be merely represented by parties
that supposedly threaten popular unity. If they simply acclaim the President and his policies,
however, they can be represented, embodied, as a whole, because he is a whole.”663 Thus, while
Schmitt apparently holds to a minimalist view of democratic participation, he is motivated by a
concern for rooting legitimacy in the will of the people as a whole—or, perhaps, the common
good—rather than in the momentary decisions of transient parliamentary majorities. But for
Schmitt, McCormick claims, the key is not the depth of their participation but its directness:
“The people are more directly and thereby more faithfully represented by the President than the
parliament.”664 Rule by a parliament, says McCormick, is “a subjection to a particularistic,
legalistically empowered party” whereas rule by a president is “a subjection to the general,
democratically legitimate will.”665 Of course, for the pluralist, government is precisely
combinations of special interests. And Schmitt does not say exactly how the will of the people,
expressed through majority vote will necessarily be different. Nevertheless, he does argue that
plebiscites offer a different, and more robust, kind of legitimacy. For Schmitt, “the referendum
is always a higher form of decision.”666 Later on, he elaborates on this idea, writing, “The
meaning of the plebiscitary expression of will is, however, not norm establishment, but decision
through one will, as the word ‘referendum,’ or popular decision, aptly expresses.”667 The

662 Schmitt LL 62.
663 Schmitt LL xxxvi.
664 Schmitt LL xxxv.
665 Schmitt LL xxx.
666 Schmitt LL 63.
667 Schmitt LL 89.
expression of a singular will is channeled through a president, in whom the people are unitarily represented, or “present.” For this reason, “Plebiscitary legitimacy is the single type of state justification that may be generally acknowledged as valid today.”668 As McCormick sees it, for Schmitt, “The people are more directly and thereby more faithfully represented by the President than the parliament,”669 and, moreover, the “will of the people as a whole more closely approximates justice than that of some party in parliament.”670 Even though Schmitt’s view in this regard may be idiosyncratic, he holds the view because he considers the presidential system, like referenda, to be more democratic, not less.

Yet there is more to account for this difference than simply the difference between voting for a parliament versus voting for a president. The referendum is crucial because of the way it, too, is a reflection of decisionism: “The people can only respond yes or no. They cannot advise, deliberate, or discuss. They cannot govern or administer. They also cannot set norms, but can only sanction norms by consenting to a draft set of norms laid before them. Above all, they cannot pose a question, but can only answer with yes or no to a question placed before them.”671 In this way, McCormick argues, “Plebiscites are self-limiting and actually demonstrate a leader’s dependence on the people.”672 Even so, this does not jeopardize the sovereign’s illimitability since “Schmitt proposes as the only limit on the authority of plebiscites the faith in its administrators to ask the appropriate question.”673 These two competing themes, the dependence on the people and the seemingly meager limitation on authority, present starkly the tension in

668 Schmitt LL 90.
669 Schmitt LL xxxv.
670 Schmitt LL xxxii.
671 Schmitt LL 89.
672 Schmitt LL xli.
673 Schmitt LL xli.
Schmitt’s democracy-compatible theory of sovereignty. McCormick concludes, “If government is going to be legitimate in contemporary circumstances—circumstances of mass democracy, pluralist interests, and complex bureaucratic governance—authority must be justified plebiscitarily.”674 If there is to be any hope of resolving what Schmitt calls the “contradiction”675 between parliamentary and plebiscitary government, Schwab speculates that “the condition of his acceptance of political parties and parliament would be that they be united with the sovereign—the popularly elected president—in seeking solutions necessary for the welfare of the entire civil society.”676 Another way to put this is that the parliament would have to be realigned such that it, too, embodied the common good. Where legality means nothing more than majority rule, it is illegitimate functionalism. What Schmitt shows here is that legality and legitimacy are conceptually and institutionally inseparable. Legality without legitimacy is effectively meaningless. The common good, or what Schmitt calls the will of the people, is an integral part of sovereignty; without it, there is no real sovereignty, which is to say, no legitimate authority.

Yet this does not fully accommodate Schmitt to democracy if sovereignty lies truly with the governor and not with the people—and not just because, prudentially, the people, as a body, lack the decisiveness of a unified sovereign but because, in principle, the sovereign is legally illimitable.677 That may be acceptable, however, because, in the final analysis, a correct theory

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674 Schmitt LL xli
675 Schmitt LL 63.
676 Schmitt PT l (lowercase L).
677 This difference between the people having ultimate sovereignty or not (even if they designate a ruler) has real implications. If the ruler is sovereign and legally illimitable, then to depose him is revolution because all legal power is ultimately his whereas if it is not the ruler but the people who are sovereign, then to depose the ruler is an exercise of the people’s power and need not be considered extralegal. If the latter is correct, then perhaps there would never truly be a revolution since all such acts would be exercises of power by the people-sovereign. But since authority always begins with a first, unauthorized act, and the people need not be the ones to
of authority need not be democratic, which means that Schmitt’s theory need not be entirely reconcilable to democracy if it is to be useful.

According to Simon, it seems, sovereignty can only rest with God or the people, and God gives man authority to rule over man, not unlike people giving other people authority to rule over them. Simon’s explanation of designation theory reveals the limitations of a reconciliation of sovereignty and autonomy, where he writes that “designation theory is a more moderate, less paradoxical form of the divine-right theory; it holds that in temporal power the only thing traceable, in any sense, to human power is the designation of the ruling person.” This strongly echoes Schmitt’s idea of the people’s plebiscitary authorization of presidential power. This insight is helpful because it shows how, in designation theory, it is not the legitimacy of the exercise of power per se that comes from the people. Rather, it is the designation of the person now authorized to exercise power legitimately where the legitimacy itself derives from a separate source, such as the advancement of the common good, which is to say that the person or people designated can exercise power legitimately or illegitimately. Even if it were the case that the best arrangement were a social practice where the people designated a commander or ruler, such a practice is not necessary for legitimacy. Finnis, too, recognizes that authority in its first instance begins with an unauthorized act. Moreover, a social practice in which the people elect or otherwise select a Schmittian sovereign is not exactly what most theorists have in mind for a robust democracy; what Simon describes as designation theory is only democratic insofar as power traces back to the people etiologically but is exercised by them only in this nominal

commit that act, there could be a sovereign who is not the people yet whose authority is legitimated according to the terms of this theory.

678 Simon PDG 157.
sense. Simon confirms this when he writes that the obligation to obey, having “its roots in the nature of things, in the very nature of man and of human society,” is “completely independent of my casual belonging to the majority or the minority. This is why the coach-driver theory is unlikely to be very popular where there is a strong belief in a law of nature independent of the whims of man.”

Majorities can have an important role to play in government, but they are not the source of authority just as such.

Even so, since in the case of human authority there needs to be a designation of some individual or group as the authority, there may be many contingent reasons why the best body to do this designating is the people. Although Schmitt seems to resist this, in the ordinary case, the people could be both the authority and the subjects. For Schmitt, who holds a political-theological view of sovereignty, one analogy for the people as both sovereign and subjects could be the Trinity, about which some say that the Son obeys the Father: a single God acting in different persons, much the way the people act in different capacities as commander and commanded. Anscombe notes that Hart “attacks the notions of ‘sovereign’ and ‘subject’ where we have a democracy.” This is because he associates them more than is warranted with habits of obedience and, perhaps, coercion. But the conceptual payoff of those terms is not habits or coercion but obligation, and that is because it is not habits of obedience or coercion that makes the sovereign the sovereign or the subject the subject; it is the nature of the superior-inferior relationship and the obedience that is appropriate to that relationship in the context of a legal system, which is to say, a legitimate legal system.

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679 That might be good enough for Philip Pettit and other theorists of non-domination. If the people could act to intervene at any time, then, on such theories, they are really in charge. That is, the theory cuts both ways.
680 Simon PDG 154.
681 Anscombe OSAS 169.
In addition, there is a concern about whether Schmitt is working with sufficiently compatible concepts of politics and law for his ideas to be useful in this theory’s explanation of legal obligation. On this understanding of law, there is no meaningful difference between political and legal obligation: all commands of the legitimate authority are, for all intents and purposes, law. Any obligation due to the binding directives of the commander is the functional equivalent of a law. It may not have the form of a statute, but it is a law just the same. An order from a policeman is not a statute, but the obligation to obey him is rooted in law, implicitly or explicitly.

This definition of law, however, ought not be taken for granted. Austin, for one, argued that certain measures, depending on their features, were not properly called law. In his view, an order could be too particular to be a law. If, for example, the legislature prohibited the exportation of a particular shipment of corn, that “would not be a law or rule, though issued by the sovereign legislature.”\(^\text{682}\) It makes sense that an order that is insufficiently general would not qualify as a rule since the idea of a rule and especially of law is that it creates standards that can be applied to similar circumstances across different instances. In the corn example, the order applies only to the particular case. Nevertheless, in the sense that there is an obligation to obey and that the authorities would be justified in punishing one who did not obey, the order is very much a law and violations can be properly called “illegal.” What is relevant for understanding the authority of law is its legitimacy, or when there is an obligation to obey. In this respect, the concept of law swings free of the scope of directives as long as they are of the authoritative type.

\(^{682}\) Austin 20.
Similarly, Schmitt addresses the need for the legislative state to distinguish between statutes and measures if it is to maintain its coherence.

In terms of constitutional theory, the actual basis of confusion in both public and constitutional laws lies in the degeneration of the concept of law. There can be no legislative state without an accepted, distinct concept of law. Most importantly, such a state must insist that law and statute, statute and justice, stand in a meaningful relation to one another, and, consequently, that the legislature’s norm creation, undertaken on the basis of its legislative powers, is something other and higher than a mere measure. In a legislative state, whose entire system of legality rests in the priority of such statutory sets of norms, it is not possible to issue a measure as a statute and a statute as a measure. 683

In contrast to a statute, a measure is the “consideration of just the singular circumstances of a case.” 684 Schmitt laments that “the legislature itself has long abandoned the inner distinction between statute and measure,” having failed to see that this narrower scope is part of the “essence of the measure” and not just determined by varying statutory language. 685

Schmitt’s insistence on the distinction between statutes and measures is important because it could rule out the possibility of employing Schmitt in a modified version of the command model. Fortunately, Schmitt takes a view of decrees that leaves room for a broader concept of law. For the legislative state, in a “state of exception,” “The ‘measures’ of the office empowered for extraordinary action are not contrary to law, but they also do not have the force of law.” 686 In a presidential system, which escapes the incoherence into which the legislative

683 Schmitt LL 79-80.
684 Schmitt LL 81.
685 Schmitt LL 82.
686 Schmitt LL 73.
system has fallen, there is what appears to be a third category: the decree. In essence, the decree is to the president what the measure is to the legislature. But just as the president has far greater legitimacy for Schmitt than the parliament, so, too, decrees have higher standing than legislative measures. In fact, because decrees, insofar as they are emergency measures, emerge from the climactic expression of sovereignty, they can even surpass statutes in their legitimacy (or “lawness”). McCormick explains it thus: “In terms that recall ‘the exception’ from his Political Theology written a decade before, Schmitt declares that the extraordinary circumstances lend decrees more than normative equality with statutes; decrees have acquired a normative superiority such that ‘law’ now means a measure and not a statute.” This is, as McCormick points out, an inversion of the ordinary liberal understanding, whereby the considered judgments of a representative legislature in the form of statutes command the most legitimacy. In part, this is because “Schmitt argues that the increasing bureaucratization of society gives presidential decrees a more stable and enduring quality than parliamentary statutes that merely reflect transitory legislative majorities.” Regardless of the reason, Schmitt “justifies presidential decrees that would have a permanent and not just temporary force of law,” which demonstrates his willingness to see decrees as law, which is to say to conflate measures and statutes, if only measures of a particular sort. In turn, this means that for Schmitt the scope of a decree, whether in duration or breadth, is not determinative of whether it is “law.” This is important because there is no reason, in principle, under the command model why decrees or emergency

687 Schmitt LL xxxv.
688 Schmitt LL xxvi.
689 Schmitt LL xxiii.
690 Schmitt LL xxiii.
measures issued by the sovereign should be “law” any less than statutes ratified by a legislature, and, accordingly, it means that that Schmitt’s concept of law is compatible with it.

Even so, behind this difficulty is a further divide, represented by the decree-statute distinction but deeper: the concept of law versus the concept of the political. On one hand, Tracy Strong argues that to understand Schmitt’s view of sovereignty, one must see that “politics (or here, ‘the political’) is not the same for Schmitt as ‘the state.’”\(^{691}\) Rather, the state is just the most common modern “concretization” of the political.\(^{692}\) On the other hand, the two are intimately related. Schmitt, in his book on the concept of the political, claims, “The concept of the state presupposes the concept of the political.”\(^{693}\) Where the political takes the form of a state, the important distinction is between the state and the law. Drawing out this distinction, Schmitt writes, “What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order. In such a situation, it is clear that the state remains, whereas law recedes.”\(^{694}\) Schmitt is quick to add that the recession of the law does not mean “anarchy and chaos;” on the contrary, “order in the juristic sense still prevails.”\(^{695}\) But if decrees can be law just like statutes, then this should apply to all authority exercised in an exception, as well. Therefore, it is likely that Schmitt is referring to the law as the set of normative procedures that govern under ordinary circumstances. As he says in Legality and Legitimacy, extraordinary measures are every bit as authoritative as, if not more than, statutes. They are law, then, in the sense of being authoritative directives (rules that obligate) that come from the political system. That these directives are not law in the sense that characterizes the legislative state is not a

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\(^{691}\) Schmitt PT xv.
\(^{692}\) Schmitt PT xv.
\(^{693}\) Schmitt CP 3.
\(^{694}\) Schmitt PT 12.
\(^{695}\) Schmitt PT 12.
problem for these purposes. (After all, if it is reasonable to go along with Hart on being pluralistic about the sources of law, then the same is true for the forms of law here.) As long as the directive is authoritative, then it shares the relevant features of law. Even the absence of legal constraints does not mean the absence of law in this broader, more “pluralistic” sense. Indeed, Schmitt’s description of the exception here actually helps to make the wider point. The “principally unlimited authority” of which he speaks is authority without legal constraints, that is, not subject to the normal procedures of the legislative state. But there are still moral constraints, to which the sovereign (or the state) is always subject. As seen in Schmitt’s attack on neutrality, there must be some moral content at stake that justifies the emergency powers (which is to say, extraordinary measures for the preservation of the state) in the first place.

This is also what Schmitt is getting at in his criticism of the Rechtstaat, in which he opposes the central flaw of the legislative state, namely the “congruence of law and statute.”696 There, he writes, “Obedience will be granted only to the statute; only through the law in statutory forms is the right to resistance eliminated. There is only legality, not authority or commands from above.”697 Looking at the legislative state, with its deformed view of law, from Schmitt’s perspective, there can be law without legitimacy since following procedures is an inadequate basis for authority, which must be located for Schmitt in men and not rules. From the perspective of the legislative state, Schmitt is proposing legitimacy without law precisely because authority is vested in men and not rules, which makes it possible for decrees to carry more normative weight than statutes, a fanciful impossibility (or nightmare) to the legislative state. The correct view, however, toward which Schmitt points, is that law and legitimacy go

696 Schmitt LL 18.
697 Schmitt LL 18.
together: where there is one, there is the other. Even emergency rules are law, which is defined not by legislative pedigree but by authoritativeness. If legitimacy (and hence authoritativeness) depended on legislative pedigree, then that pedigree would matter, but Schmitt’s argument is that it does not.

For his part, he prefers the presidential-plebiscitary system. Thus, even for Schmitt, law emerges from particular forms or procedures. But it is still the sovereign’s directives that count as law, and therefore what law is depends on what sovereignty is. That is different from the parliamentary-legislative account of law, but it is nevertheless a substantive, competing account. In contrast, the prevailing contemporary accounts of law want to separate law and legitimacy. For his part, Hart offers law without legitimacy; he believes he can describe law without accounting for its authoritativeness or, more accurately (and worse), give an account of law based on social practice that leaves it without the possibility of authoritativeness. At the other end, Raz constructs a model of authority without legality. Because for Raz authority is rooted in rationality (or rational necessity, he might say), it is disconnected from any particular forms of legality. Every expert has as much authority as any other, independent of all intrinsic considerations of law, politics, and state (though allowing for instrumental ones). For that reason, he ends with a theory of authority that is not authoritative. Both of these half-theories are inadequate for grounding law’s authority and its corresponding obligations. Legality cannot be explained without authority, and vice versa.

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698 Since law and the rules that identify law (the rules that identify other rules as legal rules) depend on social practice, the definition of law cannot depend on some external normative criterion of legitimacy. If it did, then there would be normative criteria competing with the sociological descriptors of law as rules of recognition (meaning factors that would define rules as law apart from their conformity, or lack thereof, with particular social practices).
Chapter 7

Conclusion

For Hart, the test of a good concept of law is one that can identify law wherever it exists or, as Shapiro puts it, does not involve the denial of any truisms. The problem, however, as with positivism in general, is that this cannot be done without severing legality and legitimacy. On close examination, though, a concept of law shorn of moral obligation is unsustainable. Hart’s own example of the post-war German courts demonstrates this. The lawfulness of the deeds in question at the time they were committed is what, for Hart, makes this a unique and uniquely difficult case. But the lawfulness of the deeds is only relevant to the question of whether the defendants can be justly punished if the lawfulness also means something for the moral permissibility or moral obligatoriness of those actions. If it does not mean such, then the lawfulness of the deeds poses no obstacle to just punishment. To claim that this is strictly a legal question and, more generally, a question of whether the law can punish for actions the law permitted, is to claim that the coercive power of the law is detached from moral justification. More broadly, it is a claim that there is such a thing as legal questions of innocence and guilt that are not also moral questions.

In contrast, to recognize that, where there is a legal system, there is a moral obligation to obey the law, is to recognize that the defendants in such cases do have a claim that what they did was justified because of the obligation to obey the law. They may be incorrect insofar as they may have had stronger moral obligations not to do what the law required or permitted, but this does nothing to the prima facie authority of law. The difference is between those acting within a legal system, who have such claims, and those not in a legal system, who do not. There is an
intuitive difference between government officials and a crime boss’s henchmen. Even if the government officials act wrongly, their claim to have been following orders is intelligible. There is a sense in which they did have an obligation to obey those orders. But if a hit man for the mafia says he was just following orders, there is nothing to his claim. Those orders could not plausibly be said to have force merely as components of the boss’s criminal enterprise in the way that laws do have force as components of a legal system.

Furthermore, on top of this normative aspect, legal obligation is best understood as the product of a set of commands. This descriptive aspect addresses the question of where the directives come from. Rules based in social practice, too, can account for why one particular set of norms rather than another is authoritative. There could simply be social practices that designate some rules as part of the legal system and others as custom and so forth. But those rules, by definition, derive from convention and therefore cannot obligate just as such. In contrast, rules issued by a commander (in how attenuated a scheme), or commands, are meant to obligate, even if the identification of the commander is conventional, which ultimately it must be if there is no natural right to command. In this way, command better captures what the law is meant to do: to obligate. Even where the law does other than directly impose duties, the essence of the law is its ability to bind, that is, to put the coercive force of the law behind whatever arrangement it requires or permits and to do so justifiably. For those who insist that some aspects of the law simply cannot be distilled into commands, it is still preferable to see commands as the central case of law and to see other forms as peripheral. To do otherwise would be to abandon obligation as the central feature of law and thus sacrifice the ability to account for obligation as a characteristic feature of law. Without the element of obligation, both
Hart’s internal point of view and Raz’s legal perspective, which presuppose a commitment to law as law, collapse.

Positivists will protest that insisting on a normative definition means denying the presence of some legal systems where the positivists see them. So the deeper question in all of this is which definition of law has a steeper price. Is the field of jurisprudence better off defining law in such a way as primarily to make descriptive distinctions or normative ones? If, as even Hart has it, the defining feature of law is its obligation-imposing nature, then the definition of law is primarily a normative one. To speak of legal obligation in a non-normative sense makes it impossible for the concept of law to do the work Hart wishes it to do. This, in turn, is how jurisprudence connects to political theory and questions of political legitimacy.

Beyond that, a satisfactory theory of legal obligation can be rather pluralistic in its understanding of law. Law encompasses all directives bearing legal obligations, from constitutional provisions to the orders of a policeman at an intersection. There can, of course, be political obligations in the sense of moral obligations of the political sort, such as the moral obligation to vote (if there is one), that are not also legal obligations. But everything the political system requires can reasonably be construed, for these purposes, as legal obligations, whether or not they take the form of laws in the colloquial sense. In this regard, there is not much role here for a distinction between the concept of law and the concept of the political, unlike, say, in the work of Schmitt where it surely matters much more. Lacking his sharp division of the two, it is easier, too, to adopt Schmitt’s framework concerning law yet render it compatible with democracy in a way that he did not anticipate.

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Compatibility with democracy is important because a justification of authority is not a brief for authoritarianism. On the contrary, as Vukan Kuic explains in his introduction to A General Theory of Authority, Simon, a strong proponent of authority, seeks to explain “why authority and liberty are not irreconcilable and how they actually complement each other in all aspects of our lives.” For Simon, as for Finnis, demonstrating the goodness of authority does not entail any downplaying of the goodness of liberty. Rather, Simon writes, “As to their complementary character, it is quite clear that authority, when it is not fairly balanced by liberty, is but tyranny, and that liberty, when it is not fairly balanced by authority, is but abusive license. Each of these destroys itself at the very moment when it destroys the other term by its excess.”

So authority is not a basic good; it is only good because of what it is for. But authority per se can still be justified because of the unique goods that authority alone affords. The same can be seen with authority’s counterpart, obedience. Obedience is obligatory because it is necessary for the goods it secures. Yet obedience is also obligatory because if it were not obligatory, then there would be no possibility for obedience, only for voluntary participation. There are instrumental reasons why the obligation to obey the law holds even when no one will know and even when no one will be harmed. People often exercise bad judgment about when those conditions apply. More fundamentally, however, without the general obligation to obey, there is no authority—by definition. In a way, the failure to obey in such situations undermines the very idea of law, which means to be authoritative and means to rule out the prerogative of individuals to claim exceptions to the law. In undermining the idea of law of law, it also evinces, perhaps, a lack of respect for the common good, which the law secures. Kuic writes, “To find ourselves,

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699 Simon GTA 12.
700 Simon NFA 2.
therefore, as well as to find our rightful place in the community, Simon suggests, we can hardly
do better than make a practice, consciously and freely, of obedience."701

701 Simon GTA 11.
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