

The Normativity of Law

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Introductory Note

I include here an extract from a draft of Chapter Six and a draft of Chapter Seven of a book I am writing on the nature of law. The main focus of the book is competing theories of the grounds of law—the considerations relevant to determining the content of the law in force. There are a range of views, but for the most part I have in mind just two. By “positivism,” I mean the view that the grounds of law are entirely matters of social fact, that moral considerations are never relevant. By “nonpositivism” I mean the view that moral considerations are always in principle relevant to determining the content of law. Ronald Dworkin’s legal theory is the most important example of nonpositivism, but it comprises several strong commitments that are not essential to nonpositivism in my undemanding sense of the term.

I argue that these two views reflect different foundational understandings of the kind of thing law is and that compelling arguments for either view are unlikely to be found. However, this does not leave us never having a unique answer to a question about the content of law because despite appearances the two approaches overlap considerably in particular cases. In most cases, the difference in the eligible grounds of law makes no difference to the factors that are actually playing a role in determining the content of law.

In some cases, however, the different theories of law do require different conclusions about the content of law. I discuss various ways of describing this result. But the extract from

Chapter Six relates to a different issue: Does it matter that we have this standoff about the grounds of law that in some cases leads to different answers to questions about law's content? The standoff matters only if knowing what the law is matters—and that, perhaps surprisingly, is something many have doubted. One motivation for doubt is the observation that judges and others whose role it is to resolve disputes according to law do not need an account of the grounds of law. What judges need is a theory of adjudication, of what considerations it is appropriate for them to take into account in resolving disputes. And it is a striking fact that positivists and nonpositivists could agree entirely about what the best theory of adjudication is. One excellent way to characterize the debate is by posing this question: When a conscientious legal decision-maker appropriately appeals to moral considerations in order to reach a decision, has she in so doing gone beyond the mere application of existing law and in part also made new law? One side says Yes, their opponents No. Though it affects the correct description of what they do, the dispute about the nature of law is not about what judges should do. Which may suggest that it doesn't matter very much. The extract from Chapter Six addresses this issue.

Supposing that it does matter that we can figure out what the law is. In what way does it matter? Does it, in particular, matter because we are morally required to follow the law?

The normative force of law is the topic of Chapter Seven.

To save time, Sections 1 and 2 in Chapter Seven could be skipped. The endnotes are sketchy and can be ignored.

I look forward to our discussion.

Chapter Six: Law

Eliminativism

For the reasons given in previous sections of this chapter, I am skeptical about the availability of substantive argument that might have the power to move either side in the debate over the grounds of law closer to the other. This result is hardly surprising for those who all along have thought that our dispute was purely verbal, that the two sides are merely using the term “law” in different ways and that’s all there is to it. What has made this conclusion seem implausible is the simple thought that the dispute about the nature of law must be important because it is important to know the content of the law in force. Unlike the case of democracy, it hasn’t seemed that we do just as well talking about adjacent issues and leaving the content of law aside. But perhaps now we should reconsider.

The proposal that we should simply stop talking about the content of law is more radical, though more plausible, than the proposal that we should replace talk about law with talk about, say, positivistic law. The suggestion is that in place of inquiry into the content of the law in force—we need nothing at all.¹

Of course, there is no chance that people will stop talking about what the law is, so the proposal really amounts to the claim that this talk plays no important role in legal practice and social life generally—it is a wheel spinning on its own. We can get on perfectly well by discussing a range of other questions, in particular the following. Within legal practice, judges and other legal officials need a theory of legal decision-making, which is a political theory setting out what textual materials and other considerations it is appropriate to take into

account and in what way. As we saw in Chapter Two, such an account can be expressed without reference to the content of the law in force prior to the decision and it is entirely possible that positivists and nonpositivists will agree about the best theory of adjudication. Legal practice also requires a theory of legal counsel, of how lawyers should advise clients. This is where Holmes's "bad man" theory of law can seem plausible: Lawyers should advise clients on the assumption that all they care about is how the legal system will affect their interests and so offer predictions about what it is most likely to do to them.² Whether or not the "bad man" description is necessary, the idea that lawyers do and should advise clients based on predictions about what will happen, as opposed to considered judgments about the content of current law, is not novel. Finally, considering legal practice in the broadest political sense, we need a theory of what legal systems should strive for if they aspire to realize good governance. In addition to legitimacy and justice, there are the distinctly legal issues associated with the ideal of the rule of law, such as the separation of powers, procedural fairness and respect for the agency of subjects, along with questions of legal design such as whether it is better for legislatures and judges to produce texts and pronouncements made up so far as possible of formally realizable rules.³

We can say and do a lot with these accounts of legal decision-making, legal counsel, and good governance. What we cannot do is discuss what the law now is: Any such question must be paraphrased into a moral question about what a person ought to do or a descriptive question about the state's likely responses to people's decisions.

We need not pursue the details of eliminativist rephrasings of familiar discourse about law. Even if coherent paraphrases were available for every familiar kind of claim about the law, it would not be plausible to think that nothing important had been lost in the translation.

As I have said, law governs the categorization of rules and standards into those which are presented by the state to its subjects as legitimate demands and those which are not. For the criminal law, in particular, it seems ridiculous to propose that, properly understood, there are no crimes, just good or bad decisions in criminal cases, and better and worse predictions about our interactions with the criminal justice system. There is, at the very least, an expressive significance to the criminal law that this redescription cannot capture. Consider the situation in Singapore with respect to Section 377A of the *Penal Code*, which criminalizes sex between consenting adult males. This provision is not currently enforced. In other words, police and prosecutors are not dragging sexually active gay men off to court. Were they to do so, the right decision by a conscientious court, in the overall context of Singapore law, would be to convict.⁴ But a political decision has been made not to present this issue to the courts. Does that mean that gay men in Singapore have nothing to complain about until the government changes its mind and starts arresting people again?⁵

But more important than law's expressive function is the role of law in people's practical lives. Consider first the legal subjects that are the typical focus of legal philosophy—individuals in more or less well-functioning states. Many people “accept” the law in Hart's sense: for some reason or other, they treat valid law as giving them reasons for action.⁶ The point Hart wanted to make with his notions of acceptance and the internal point of view was that for many or most people legal norms do not simply set prices on possible actions, where the price varies

from context to context. We do not typically deliberate about the costs and benefits of following the law “for this case only,” but adopt a standing policy about the reason-giving force of law in general. This standing policy might, but need not, be based on a sense of moral obligation. We might, for example, accept legal norms out of a sense of self-interest or a mere preference to conform with the conduct of others.

Suppose that I accept legal norms out of a belief that, in general, my life goes better if I comply. If all I am worried about is the effect of compliance on my welfare, it might seem that I would do better with a Holmesian theory of legal counsel than a theory of law. What I need to know is how my welfare will be affected if I do certain things, and since legal norms are not magically enforced, that might suggest that I need a predictive theory about the behavior of judges and the executors of law. So if concern with my self-interest leads me to accept the law, the eliminativist may claim that I am making a mistake, that the only rational thing to do is regard legal rules as setting prices for particular decisions.

This is not, however, an obviously compelling claim, since it may very well be that I generally do better simply following the law as I understand it rather than deliberating about the effects of compliance in each particular case. This seems particularly evident when we take into account reputational factors, the good that comes my way, as I might plausibly believe, from being generally regarded as a law-abiding character. I cannot reliably predict or control these effects, nor the success of efforts to conceal noncompliance. So a sensible course would be to adopt a deliberative “rule of thumb” according to which I will follow the law unless some special reason presents itself to me that might justify my taking the time to think about whether I would in fact do better not complying in a particular case. Now of course whether all

this makes sense will depend on the circumstances. If I am very badly off without a career to protect, the Holmesian approach may well be appropriate, since relatively speaking I have more to gain from certain forms of noncompliance and reputational effects are less important to my welfare. But if my circumstances are fortunate, the gains from noncompliance in particular cases will not, relatively speaking, be so important. If I can assume that other people, officials and ordinary legal subjects alike, have mostly the same views about the content of law as I do, or will form after I consult a lawyer, it cannot be asserted, a priori, that it is irrational to accept the law for self-interested reasons.

Suppose now that I accept legal norms because I believe that they are morally binding. Here too it could be claimed that I am confused. Isn't the judicial decision that authoritatively declares my legal duties and rights really what I should be concerned about? So wouldn't I would actually get closer to my target if I accepted instead the outputs of good adjudication, actual or hypothetical?⁷

We will consider the strength of the moral reasons there in fact are for accepting the law in the next chapter. But supposing that there are moral reasons to accept the law, is anything lost if we say that what people do or should treat as reason-giving are good legal decisions, what those with authority to resolve disputes ought to decide? For those who accept the adjudicatory view of law that would in any case be equivalent to treating the law as reason-giving, since on that view the law just is what a judge, acting in her professional capacity, ought to base her decision on.⁸ But for positivists and for nonpositivists who reject the adjudicatory view, the proposal would obscure something of importance: the ability to be able to say, for example, that while I accept the law as it is, I believe that the courts ought to

overrule the relevant precedent or invalidate what has until now has been valid legislation. It is an important aim of positivists to bring to the surface the “fact” that judges have the authority to change the law. And it is not as if this idea were exactly revolutionary, at least in the common law world. Sometimes even (lower court, common law) judges announce that they and the litigants before them are bound to one set of norms (current law) though the case for the highest court to reach a different decision (and thus change the law) is strong.

Eliminativism implies that the norms we do or should accept are those that would be announced by a highest court even in cases where we have little reason to expect that a highest court will address the issue and every reason to expect that lower courts will, in conscientiously carrying out their professional roles, recognize different norms.⁹

What this brings out is that the very issue of the grounds of law, as opposed to the theory of adjudication, has clear significance for those who reject the adjudicatory view of law, but unclear significance for those who accept it. Another way to bring this out, in terms of Dworkin’s theory, is as follows. For Dworkin, when an individual is trying to determine the law for his own case, his process of deliberation should be exactly the same as that a judge should engage in. Each of us has the responsibility to interpret the legal materials to show them in their best light. We do not defer to authority on the content of law—thus the characterization of the theory as “Protestant.” What this means, again, is that what individuals need to know is precisely what judges need to know if they are conscientiously to discharge their obligations when resolving disputes. It is not surprising, then, that Dworkin has in effect abandoned his long standing insistence that his is a theory of law as opposed to adjudication and now holds

that legal rights and obligations just are political rights and obligations that “are enforceable on demand in an adjudicative political institution such as a court.”¹⁰

But all that is impossible to accept if there can be a difference between good interpretation of the law and good adjudication, since if that is right judges must be recognized as having law-making power that individuals of course do not have. An individual must figure out what the law is, not pretend he is a judge. In many cases, a conscientious individual and a conscientious judge can and should reach different conclusions.

The upshot is that, as with just about every other issue that connects to the issue of the grounds of law, the question of eliminativism looks different depending on what theory of law we are inclined to accept. Perhaps the adjudicatory view of law is correct. But we cannot accept the eliminativist invitation to drop the debate about the nature of law by begging the question against those who reject the adjudicatory view of law, positivist and nonpositivist alike.

Let us turn now to the kind of legal subject much less often discussed by legal philosophers—states.¹¹ As I will argue in the next chapter, states or governments are the morally most important subjects of law, in the sense that the normative significance of law is clearest for them. For now, however, the issue is how the eliminativist challenge looks when applied to the case of states as legal subjects.

Law that applies to states rather than individuals includes international law, constitutional law, and ordinary domestic law such as legislation that applies to the executive branch of government. As Chapter Eight is devoted to the additional issues raised by international law I will restrict myself here to domestic law.

A government may ignore the law, and (we hope) concern itself with good governance alone. But a government, or its officials, may also accept the law. Would they do as well accepting the outputs of ideal adjudication? In some cases, with the details depending on the legal system in question, the situation of a branch of government subject to law is relevantly similar to the situation of individuals subject to law. Courts or other adjudicatory bodies may be available to review, to a greater or lesser extent, executive and legislative interpretation of applicable law. However in all legal systems there will be limits to the justiciability of legal questions that relate to government action, having not just to do with the existence of a current (ripe, and not moot) “case or controversy” and the existence of a litigant with standing but, more relevant here, with institutional factors (such as the ability to collect the relevant information) that delimit the kinds of legal issues that can competently be addressed by courts.¹² And even apart from legal doctrine that limits courts’ adjudicatory role, there is the simple fact that a legal issue may not end up in court, for all kinds of extra-legal pragmatic reasons. So the question arises how nonjudicial branches of government should approach the matter of determining the content of the law that applies to them. The implication of the eliminativist argument that we can make do with a theory of adjudication is that the legislature and executive branches should deliberate about their legal own situation as if they were adjudicating disputes.

Once again, if we accept the adjudicatory view of law, the question will not arise. There is only one interpretive task to be found, and that is the same whether the interpreter is making a decision about the law for someone else’s case or for her own case; and if making a decision

for her own case, it makes no difference whether the subject of law is a private individual or an official of the state acting in a professional capacity.¹³

By contrast, if we reject the adjudicatory view of law, a number of interesting political questions must be confronted. Should the legislature, when attempting to confine its law-making activity to the constraints of a constitution, reason about what is and is not permitted in exactly the same way as a court charged with constitutional review of legislation? There is a current discussion in the United States about extrajudicial constitutional interpretation. One issue is whether judicial interpretation, where present, should govern.¹⁴ Along the way, several questions arise about the differences between the two kinds of interpretation such as whether legislatures need give no weight to their own precedent—prior legislative interpretations of the constitution.

Similar questions arise for the executive branch deciding whether the constitution allows, for example, a certain military action. Suppose that this is not considered a justiciable issue and that the constitutional and legislative materials leave the question unsettled within a certain range, in the manner of a Kelsenian “frame.” Should past constitutional understanding by officials of the executive branch carry weight? Must the government attempt to settle the issue by carrying forward the principles that it can uncover in the Constitution and relevant legislation (as interpreted by courts?), or should it treat the Kelsenian frame that the texts provide as a space for entirely free choice so far as the Constitution is concerned?

And if the courts give deference to statutory interpretation by an administrative agency, should the agency see its interpretive task as the same that a court would have if it were not deferring?

In every one of these three cases it is just as implausible to suggest that the legal interpreter has the authority to change the law as it is for the case of the individual subject. This is because of the obvious difference between determining the law of one's own situation and resolving a legal dispute between third parties.

Another important general point is that whether or not there is a doctrine of stare decisis, courts are thought to declare the law at least for the particular case. This is a precondition of taking precedent seriously. It also supports the thought that indeterminacy left by a plain reading of the legal materials should be resolved by courts in a way that is true to discernible underlying principles—in the manner of Dworkin's theory of interpretation—rather than by way of legally unconstrained choice. It is obvious that the conclusions of private individuals about their own legal situation should not be treated as declarations of what the law is that has weight for others. For the case of governmental legal subjects this is not obvious. It is a live issue of legal and political theory whether the conclusions of the executive and/or the legislature about the law that applies to them should be treated as authoritative declarations about the content of law as applied to the particular case, as opposed to just good faith attempts by these branches to comply with the law as they see it.

In a recent study of the role of precedent in the executive branch in the United States, Trevor Morrison concludes that the Justice Department's Office of Legal Counsel does to a large extent follow its own precedent.¹⁵ More important for current purposes, however, is his normative analysis. Morrison argues that precedent should have weight for the executive branch, but a different weight than it should have for courts. On the one hand, decisions concerning executive power should have greater precedential weight, especially when in line

with past executive practice; on the other hand the views of the Office of the President about the content of current law should have special precedent-trumping weight. “The argument here rests on the President’s democratic accountability and his ultimate responsibility for the actions of the Executive Branch.” (1511)

But perhaps the most telling difference between judicial and executive legal interpretation on Morrison’s analysis is his understanding of the President’s responsibility in the face of a controversial legal issue.

Although his oath of office obliges him to uphold the Constitution, it is not obvious he would violate that oath by pursuing policies that he thinks are plausibly constitutional even if he has not concluded they fit his best view of the law. It is not clear, in other words, that the President’s oath commits him to seeking and adhering to a single best view of the law, as opposed to any reasonable or plausible view held in good faith.¹⁶

This does amount to the view that the executive can choose within a Kelsenian frame, so long as the borders of that frame are set by plausible interpretation of the content of current law.

The issues raised here are obviously very complex, and their detail depends upon the content of constitutional law and institutional arrangements in a particular state. The point is just that eliminativism would seem to make it impossible to discuss what appear at first glance to be significant political/legal questions. The fact that they make no sense on the adjudicatory view of law would seem to impugn that view rather than the questions.

As a final point, it should be noted that my discussion thus far of “theories of adjudication” has been too simple. As Lewis Kornhauser convincingly argues, we tend to think

about adjudication on the model of an appellate judge sitting alone, whereas in fact what we need are theories of adjudication appropriate for trial judges sitting alone, on the one hand, and appellate judges sitting on collegial courts, on the other.¹⁷ Moreover different actual collegial courts will have different practices for announcing decisions—for example English collegial courts issue opinions of individual judges seriatim, while US collegial courts offer a majority opinion, together with possible concurrences and dissents. Which kind of collegial court a judge sits on will affect what it may be thought appropriate to express in an opinion. For example, judges on majoritarian courts face a strategic problem that does not arise for judges on a seriatim court. The issue is complex in its details, but I have been convinced that differently positioned judges will need different theories of adjudication. (The upshot is that the adjudicatory view of law is under specified: Which kind of judge are we all supposed to be imitating when we try to figure out the content of the law?)

In light of all these points, an eliminativist could concede that we need more than a single theory of adjudication, a theory of legal counsel, and a theory of good governance. We need multiple theories of adjudication and also theories of how different subjects should reason in trying to determine their own rights and obligations that flow from legal materials. But conceding that, it could be said, is not to concede that what individuals, executive officials, and legislators need is a theory of the grounds of law. Just as judges don't need a theory of the law in order to resolve disputes, but rather a theory of factors to take into account when discharging their obligation to resolve disputes, we could say that legal subjects need an account of how legal materials that apply to them affect their moral rights and duties. They too

don't need a free-standing theory of law, but an account of the moral significance of statutes, constitutions, and so on.

But by now the whole thing is starting to seem implausibly artificial. The natural thing to say about the range of nonadjudicatory contexts is that different legal subjects may stand in different relationships to the law that is force, both in terms of the normative implications of the law for them, and in terms of the effects of their decisions about how to behave on the further development of the law. For judges too, the most natural way to express the various theories of adjudication that the variously positioned judges will need will be in terms of their different relationships to the law that is in force.

Perhaps the most compelling way to bring this out is to consider the position of law makers, legislators and judges alike. If no one ever needs to reason from beliefs about the content of the law in force, law-makers should no longer think that what they are creating are legal directives or facilitating legal rules. Rather, the materials law-makers create are the grounds of moral arguments for individuals and office holders about their rights and duties as partially determined by legal materials, where, moreover, those arguments take a different form in each case—individual, executive official, adjudicator, legislator. It's not clear exactly what the law maker should have in mind when thinking about how to improve the legal materials.¹⁸

It may be helpful here to compare the case of law to something else that philosophers have generally thought plays an important role in moral argument, the idea of a person's overall welfare (or well-being). Utilitarianism holds that we ought always act so as to promote overall welfare. And any plausible moral theory will tell us that we are sometimes required to

make people's lives go better (some people's lives, to some extent, and so on). It would seem, then, that any plausible moral theory requires a free-standing theory of welfare. There is a considerable literature addressing the question of what the best theory of welfare is. The familiar options include experiential, desire, and substantive good theories.¹⁹ Experiential theories tie welfare to having subjective experiences we prefer (pleasure and freedom from pain), desire theories to the satisfaction of actual desires, and substantive good theories to the achievement of certain goods that would include pleasure and the absence of pain but also such things as close relationships, success in our rational aims, appreciation of art and nature, intellectual development, and so on—where some these things may be taken to be good for us whether or not we desire them. It would seem that figuring out the right account of welfare is essential if we want to know how to live well, either morally or prudentially.

However T. M. Scanlon has raised a kind of eliminativist argument about welfare. Just as our eliminativist about law argues that we don't need a free standing theory of the content of law in order to figure out the obligations that are in part determined by legal materials, Scanlon argues that we don't need a free-standing theory of welfare in order to figure out our moral responsibility to promote the interests of others or to figure out how to act for our own sake, where moral obligation or concerns are not engaged. The argument is complex, but the gist of it is that while we can invoke a notion of welfare in our practical reasoning, it is typically neither necessary nor the most direct way to proceed. When it comes to our own case, we do just as well, or better—since the contours of welfare are not clear—reasoning directly about the various factors that constitute welfare; we don't pursue our rational aims, for example, because they contribute to our welfare, though they perhaps do that. Similarly, from the third-

person perspective, if we have reason, moral or not, to be concerned with the welfare of others, it is plausible that not all aspects of what makes a person's life go better according to the best theory of welfare are our responsibility. In either case, it seems to that a theory of welfare need not play any role in our reasoning.

I believe that Scanlon approaches the issue in exactly the right way. The issue is whether there is a significant practical role for the theory of welfare. If there is not, there may be such a thing as a person's welfare, but we need not trouble ourselves trying to get it right. Now I think that Scanlon underestimates the practical role of judgments of welfare in a number of ways. For one thing, it seems that though parents should be concerned with the aims and aspirations of their children even beyond any contribution to their welfare, parents ought nonetheless to be thinking that a primary responsibility is to do what they can to promote all aspects of their children's welfare. Figuring that out requires thinking about what really does make a person's life go better overall.²⁰ This applies at the political level as well. A department of child welfare is aptly named. And when a family court judge decides a custody dispute according to the welfare or best interests of the child, she does need a notion of what exactly that amounts to. So though not all third-personal responsibility for the interests of others encompasses the whole of the welfare of others, some instances of that responsibility do.

The idea of welfare also plays more systematic roles in moral theorizing. Thus it might be said to a utilitarian that though it might be good for a person to build a monument to his god, we as a society are not responsible for assisting in that project—in contrast to our responsibility to ensure that he doesn't starve, for example. A natural way to understand this

argument is that the objector is saying to the utilitarian that she is mistaken in thinking that we are collectively responsible for all aspects of everyone else's welfare.

More important, there is the notion of the moral limits to required sacrifice by individuals subject to some duty to promote (some aspects of) the welfare of others. If utilitarianism is wrong and there are such limits, the only way to understand them is in terms of set-backs to the interests of the people subject to the requirement.

I might be wrong about all this and Scanlon right. I mention welfare as a comparison case because it does seem to help bring into focus what is at stake in the issue of whether we need a theory of law in our practical deliberations, or whether, by contrast, law is an abstraction that we can bypass by going directly to the moral significance for people in particular positions of certain political facts, such as that a legislature has passed a certain directive.

As I have said, there seem to be two main reasons why we continue to need a theory of law. First, debates about how different legal subjects—individuals, legislators, executive officials, (differently positioned) judges—should respond to legal materials are most naturally understood as debates about how people in these positions may stand in different relationships to the law that is force, both in terms of the normative implications of the law for them, and in terms of the effects of their decisions about how to behave on the further development of the law. Second, and perhaps more important, is the fact that law-makers cannot plausibly be thinking that what they create are political facts that have a variety of implications for a variety of different kinds of legal subject. For there to be any coherent and manageable structure to

the thoughts of those who create law, they must be thinking that they are creating directives to be presented to all relevant subjects as legitimate demands on their conduct.

Chapter Seven: The Normativity of Law

1. *Law and Motivating Reasons*

Hart's rejection of the command theory of law focused on two distinct issues. As discussed in Chapter Three, he showed that the command theory was clearly inadequate as an account of the grounds of law—primarily for the reasons that it could not explain constitutional continuity or account for nonimperative legal rules. But equally important for Hart was his observation that the equation of legal norms with threats made by those in power resulted in a distortion of the deliberative role law actually plays in the typical person's practical life. His main claim here is descriptive, though this isn't always clear from the exposition. It is that for most or many people legal norms do not simply set prices on possible actions, where the price varies from context to context. We do not typically deliberate about the costs and benefits of following the law "for this case only," but adopt a standing policy about the reason-giving force of law in general.

This descriptive observation is completely compatible with there being no general reason why anybody should accept legal norms, and compatible with a large variety of reasons why people in fact do accept them. Thus I might accept legal norms out of a sense of self-interest, moral obligation, or a mere preference to conform which, while not exactly irrational, hardly has much to recommend it.²¹ This is the sense in which law, for Hartian positivists, can well be compared to a game.²² The rules of the game are what they are, and once you decide you want to play the game, there are right and wrong moves you can make; most players will be motivated to make right and not wrong moves. But there is nothing in this account of the

way in which legal rules figure in some people's deliberations that provides any reason, moral or otherwise, why anyone should play this game.

Hart's account is similar to Philippa Foot's discussion of etiquette (and morality) as a system of hypothetical imperatives.²³ The norms of law, just as the norms of etiquette, present themselves as categorical demands. And insiders may accept that they are. But that doesn't mean that they have any good reason to do so.

Kelsen's position here is superficially different from Hart's since, as we have also seen in Chapter Three, for Kelsen a valid legal norm is one that really does provide an "ought" and so the foundation of a legal system is, accordingly, an ought—the basic norm. In fact, however, barring quibbles over whether "validity" implies ought, and without attempting an accurate characterization of the development of Kelsen's thought over more than half a century, we can say that the two positions are identical. For Kelsen facts about effectiveness determine the content of the law, but a special norm is required to animate those inert facts with obligation. That special norm has no substantive content of its own. It merely says that the norms enacted in accordance with the effective constitution ought to be obeyed. Writing as a "legal scientist," Kelsen himself can discuss the criteria of legal validity without actually accepting or "presupposing" the basic norm. The point of view of the scientist is one from which one can describe the normative system that is law *as if* the basic norm that would ground validity (obligation) were presupposed. We can make full sense of law as a normative system, a system of rules and principles, and we can note that for many people that system is a source of motivating reasons, without having to take a stand on the further question of whether there is in fact any categorical reason why anyone should pay attention to the law at all.²⁴

2. *Moral and Legal Obligation*

But doesn't the positivist too assume that where there is law, obligation must be present? Hart did write that any legal theory must explain the sense in which law makes conduct "in some sense" obligatory. But by this he clearly did not mean that legal theory must explain the moral force legal norms actually have. The closest he came to saying anything of the kind was when he repeatedly insisted on the opposite. That legal validity did not settle the issue of moral obligation was for Hart among the fundamental motivations of the entire positivist outlook.

Some contemporary positivist writers do seem to believe that they must be able to explain why law provides us with real (moral) obligations.²⁵ This is a puzzling turn in positivist theory, to put it mildly, since it is clear that if the content of law is grounded entirely in social fact it cannot be guaranteed to generate moral obligations.²⁶ More fundamentally, it is very hard to understand why anyone whose fundamental belief about law is that its content is grounded in social fact would also treat it as a fixed point that law is a source of moral obligation. The motivation for such a position is mysterious.

What Hart had in mind when he wrote that legal theory must explain the sense in which law is a source of obligation was quite different. He believed that there was a distinct beast, a legal obligation, and that legal theory should be able to explain its existence. Accordingly to Nicola Lacey, Hart puzzled about the conditions for the existence of legal obligation until the end of his life.²⁷ This seems to me unfortunate, since disagreement about what legal obligation is, though not the same disagreement as that about the grounds of law, seems just as

intractable; and in the case of legal obligation, I do not think that anything of importance is at stake.

In his 1966 essay, "Legal Duty and Obligation" Hart insists that the concept of legal obligation is distinct from that of moral obligation; he thus rejects the position of both Raz and Dworkin that moral obligations are the only real obligations around. Hart's position seems on the face of it plausible; but what then is a legal obligation? There's one simple answer Hart could have given: a legal obligation is just what we have when we are subject to a valid duty-imposing legal rule. This would be to treat the idea of legal obligation as entirely internal to the system. It prompts the objection that on this account legal obligations, just as such, are no more real than the obligations imposed by duties of etiquette or by the rules of a game we are playing. My own view is that a Hartian positivist should be happy to accept this result, but Hart never did find it appealing.

I believe that the reason for this is that he was always attracted to an antirealist account of moral obligation, explaining moral obligation reductively in terms of social practices. If this kind of explanation is appropriate for the moral case, it seems natural to provide it for the legal case as well. From this point of view there is no normative priority to the moral; in both cases the task is to explain the conditions under which people are inclined to say that various kinds of obligations exist. If, by contrast, we are comfortable with the idea of objective moral obligation, the important question about legal obligation is simply whether legal obligation implies moral obligation or not.

In *The Concept of Law* Hart explained the existence of both moral and legal obligation in terms of his general account of social rules. "Rules are conceived and spoken of as imposing

obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten it is great.” We then distinguish between moral and legal obligation by pointing to the involvement of certain distinctive kinds of feelings, the role of coercion, the possibility of deliberate change, and so on.²⁸ Applied to morality, Hart’s account of rules and the conditions under which they generate obligation was quickly attacked by Dworkin and others, and it is one of the parts of the book that he expressly repudiated in the *Postscript*, noting that he now believed that the social-rules account is appropriate only for the legal case.²⁹ But this retreat was on technical grounds having to do with whether moral rules were in a certain sense conventional. Hart did not abandon his purely sociological, reductivist approach to both moral and legal obligation. His remarks make quite clear that for both he offers merely an account of the conditions under which it is proper to say that a certain special kind of rule exists in a society. The issue of what those with objectivist commitments would think of as actual obligation is simply not confronted.

It is, however, possible to take for granted an objectivist position about moral obligation and still benefit from Hart’s discussion of legal obligation. Leaving aside moral obligation as a separate issue, there remains an interesting question about the difference between a legal system that is merely effective, in that its subjects generally comply, and one that is (we might say) descriptively legitimate in that there is the demand for conformity and general acceptance of the legitimacy of that demand that Hart describes in his final account of legal obligation.³⁰

If this is the right way to learn from Hart’s inquiries, what we are left with is a dispute about the nature or concept of legal obligation. We have three contending accounts so far: The purely nominal account according to which legal obligation attaches to any valid duty-

imposing rule, the moralized account according to which there is no legal obligation without moral obligation, and Hart's sociological account.

Here, however, it seems clear that we do have a purely verbal dispute. It can seem plausible to restrict the idea of legal obligation to cases where there is a moral obligation, but also plausible to deny this. It can seem plausible to restrict the idea of legal obligation to cases where the facts fit Hart's sociological account, but also plausible not to. Suppose someone says that they have a legal obligation to turn in their dissident neighbors to the secret police. A variety of responses seems acceptable, so far as the nature of legal obligation is concerned. No, you have no obligation at all to do that, in fact it would be immoral. Yes, you have a legal obligation since the law is formally valid, but you ought not to nonetheless. No, you have no legal obligation because no one would expect you to follow that legal rule. These are just different plausible ways of understanding what a legal obligation is, and I don't see any scope for so much as an argument that one of them is best.

But it doesn't matter, because we really don't need the idea of legal obligation. We have legal validity and moral obligation. That the former matters is the argument of this chapter; the latter obviously does. Hart's discussion also reminds us of a third criterion that it is worth remembering: In addition to the content of valid law, and moral obligation, there is the issue of the legitimacy of the law in Weber's descriptive sense. All three issues, validity, moral obligation, and descriptive legitimacy, are important. But it is also clear that we can discuss each of them without making use of the idea of legal obligation. When claims about the conditions of legal obligation are made, it is easy enough to disambiguate, and continue the discussion using other terms. Nothing is lost in this translation, I believe.

3. *Authority, Legitimacy, and Political Obligation: Some Definitions*

By way of stipulative definition that seems consistent with the practice of most legal philosophers, we can say that to have (real, de jure, legitimate) political *authority* is to be in a position to prescribe moral obligations for others; to have the right and the ability to do this.³¹

It follows that there is no political authority without subjects' having a general obligation to obey the law, and vice versa. I have always found this notion of authority to be somewhat unhelpful for political philosophy, since it seems foreign to the way actual governments and legal subjects understand their relationship, at least since the demise of the idea of the divine right of kings. States do, I believe, typically claim the right to issue and enforce directives, but that leaves open whether a state claims in addition that subjects have a moral obligation to obey.

In any event our concern here is not what states claim, but what is morally the case. There are two issues: whether the state's issuing and enforcing directives is justified and whether subjects have a duty to obey. Some philosophers use the label "legitimacy" narrowly, to refer to the first of these issues alone; others insist that a legal system cannot count as legitimate unless both conditions are met, thus bringing the notion of legitimacy close to that of authority as defined above.³² There is an important moral issue lying behind this terminological diversity—whether justification for a practice of directing people to act in various ways and backing that up with force can be found in the absence of a general duty to obey, and vice versa. Since my own answer to this moral question is Yes, it is terminologically convenient to

use “legitimacy” in the narrow sense of the moral justification of the issuing and enforcing of directives.

A related moral issue is whether subjects have some kind of general duty to support the institutions that constitute the state. This issue is most naturally labeled one of “political obligation,” and so that is the terminology I will use. (Here again there is terminological diversity, however, as many writers understand “political obligation” as duty to obey the law.) I will not in this book pretend adequately to address the issues of legitimacy or political obligation for their own sake, but only as they are implicated in different views one might have about the duty to obey the law.

4. The Duty to Obey—Individuals

The issue of the obligation to obey the law interacts directly with the issue of the nature of law, which poses an initial problem.

Dworkin approaches the theory of the grounds of law with the premise that legal rights and obligations are generally speaking real—that is, objective, moral—rights and obligations. On this approach, the question of whether a norm is plausibly regarded as having moral force is part of the enquiry into whether it is a legal norm in the first place. Positivism, of course, doesn’t assume that law is not morally significant; but it does insist that a belief that it is morally significant cannot govern our investigation into its content.* This is true even for Raz, as although in his view law claims that it gives us genuine obligations to obey, he does not hold

* Such a stance is also compatible with nonpositivist theories of the grounds of law, just not Dworkin’s.

that we should interpret law so that this claim is more likely to come out true. In fact he argues that the claim is almost always false, though there is plenty of valid law around.

Kelsen, as we have seen, did hold that insofar as the *Grundnorm* was presupposed, law was genuinely normative. There is an interesting scholarly debate to be had about just what he meant by presupposition of a norm, and about just what legal normativity implied for him. As discussed in Chapter Three, it is possible to read him as equating legal normativity, where it exists, with the normativity of morality and justice, but also possible to read him as insisting, in line with the purity of the pure theory, that they must be distinct. For current purposes, however, there is no need to enter into the debate about how best to read Kelsen on normativity. Suppose that he believed that law is a source of oughts distinct from morality (and self-interested rationality). We can leave such a view to one side. The idea of a distinct realm of categorical reasons for action, emerging from legal practices, is both mysterious and implausible. If law gives rise to real obligations, they are going to be moral obligations. If we suppose, on the other hand, that Kelsen believed that legal oughts were not some different species than moral oughts, we have different grounds for not pursuing his position. For whatever else may be said about Kelsen's views and their development, it is crucial to remember his lifelong rejection of moral objectivity. Like Hart, Kelsen simply did not offer a view on the relation between valid law and objective moral obligation.*

Most discussions of the (prima facie) obligation to obey the law in moral and political philosophy implicitly assume a positivist position. These discussions take for granted that law

* Kelsen's moral subjectivism no doubt considerably weakened his ability to defend the constitutional order of the Weimar Republic against critics. See Dyzenhaus. But at least it saves his theory from absurdity. It is obviously not plausible, morally speaking, to claim that whatever the rules established in accordance with the effective constitution may be, they impose objective moral obligations. If legal validity implies real obligation, legally valid rules couldn't have any old content and be posited in any old way.

can have any content and be created by all kinds of regimes, democratic or despotic.³³ So it is hardly a surprise (the nonpositivist might quietly observe) that the conclusion of these enquiries is usually that there is no general duty to obey the law.

It would seem then that we cannot discuss the question of the duty to obey without first taking a stand on the nature of law.³⁴ This would be unfortunate, since the normative force of law, if such there is, would be the main reason to inquire into its nature in the first place. However this problem can be avoided if we confine our discussion to the area of overlap among plausible accounts of the nature of law described in the previous chapter. As we saw, positivist and nonpositivist accounts agree in very many cases about the factors relevant to determining the content of law. When discussing the duty to obey we should have in mind not the death penalty, same-sex marriage, and the regulation of sexual conduct among consenting adults, but rather road rules, duties of care, tax law, formation rules in contract, the law of theft, and the like.

Since the traditional question is whether there is a duty to obey the law independent of its content and the manner of its making—call this “content and context independence”—it can be objected that this narrowing of focus to only some of what, on some theories, counts as law makes it impossible to provide an answer. Any defense of a prima facie duty to obey law simply as law would need respond to this objection, but there is no need to do so here, since I believe that skepticism about a content and context independent duty to obey is appropriate even for what falls into the overlap.

I have nothing new to say about the most familiar deontological argument, that of actual contract, or consent. Both elements of Hume’s rejection of this account are convincing.

Suppose that I have promised to obey the law, perhaps when I became a naturalized citizen of my adopted country.* I agree with Hume that the duty to keep my promises is itself instrumentally grounded—I should keep promises made primarily because of the value of the practice of doing so (though other moral factors are relevant when the promise is not made to a stranger).³⁵ But if that is so, there is every reason to look directly to the instrumental case for obeying the law—the good that a practice of general obedience generally brings about. It is true that if I have promised to obey there are other instrumental benefits to add to the mix, but on the face of it they seem swamped by the direct benefits of obedience.

The second part of Hume’s argument is that most individual legal subjects have not in any case promised to obey the law; they were born into a society where obedience is simply expected of them. Tacit consent, inferred from continuing presence in the jurisdiction, is implausible because most people have no realistic alternative. In a world with free movement of people and adequate resources for all to move if they choose, perhaps the tacit consent argument would have some grip; but that is not our world.

The argument of “fair play” is subject to a similarly well-known and compelling objection. It is plausible to believe that if I have chosen to share in the benefits of a cooperative scheme it would be morally objectionable to free-ride on the burdensome compliance of others while not complying myself. But again, most individuals cannot be said to have chosen to participate in the cooperative scheme that is governance by law. And when benefits are forced on one, the fair-play argument does not have any purchase.³⁶

* It is worth pointing out that the Oath of Naturalization of the United States does not include such a promise. It does include these words: “that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same,” but all that is compatible with civil disobedience, at least of the kind Martin Luther King, Jr. advocated in “Letter from Birmingham Jail.”

Quite apart from that familiar objection, however, it cannot simply be assumed that following the law amounts to assuming the burdens of cooperation in the sense relevant for the fair play argument. There certainly can be valid legal requirements, such as some pointless bureaucratic requirement, the universal flouting of which would not reduce the benefits people receive from the overall legal scheme. Even if every legal subject had asked for the benefits of the legal system, the argument from fair play would still not support a fully general duty to obey the law. It would support a duty to shoulder one's share of the burdens of sustaining the beneficial scheme; which is not the same thing.

I believe a similar point undermines Dworkin's argument that a prima facie duty to obey the law can be grounded in associative obligations.* Dworkin's key idea is that law can transform a group of people living together by "geographical accident" into what he calls a political community. The members of a political community, in his special sense, bear associative obligations to each other akin to those held among members of a family. Law creates this political fraternity by providing a moral bond in the form of moral principles that are shared, despite disagreement about ideals of justice and sound policy.

We may accept for the sake of argument that where members of a group share principles to govern their interaction despite their moral disagreements at the level of ideal theory, their relationship acquires a special moral quality such that they owe obligations to each other that they do not owe to outsiders. We may also accept that the content of that obligation is to be true to the shared principles that constitute the community in the first place.

* *Law's Empire*. This account will not ground an entirely content and context independent duty to obey unless we presuppose Dworkin's theory of law, according to which the various conditions for the existence of an associative obligation are guaranteed to be satisfied by valid law, since the content of law will be determined with those conditions in mind as constraints.

Even if we grant all this, however, it does not follow that there is a general obligation to obey the law, because there is no reason to think that all and only the principles we share will be expressed in the law.³⁷ We do not simply enact into law our shared moral values or commitments; we enact into law rules, principles, and standards that are appropriately enacted into law, given our shared values and commitments, and given the special considerations that have to be taken into account when we are making law, not expressing our values and commitments. To take a simple example, the Anglo-Saxon world surely shares commitment to a moral principle of easy rescue. Yet, rightly or wrongly, Anglo-Saxon lawmakers have generally felt that it would be inappropriate to give that principle legal expression.³⁸ Similarly, there are very good reasons why the reach of contract law should not extend to all promises that (as we agree) have moral force.

But though not all principles we share have appropriate legal expression, wouldn't fidelity to a community of principle nonetheless *include* fidelity to those principles that do get expressed in the law? No, because legal principles may not merely fall short of shared moral principles, they may, on their surface, mislead in a more fundamental way. It would be wrong, for example, to conclude from the law of property and its related doctrines in torts and criminal law that underlying that whole scheme is some shared commitment to a Lockean theory of moral property rights.³⁹ Whatever one thinks about this one example, it cannot be denied that much of the content of law does not wear its rationale on its face. Legal principles do not all simply announce moral principles with the same content; many of them are part of an artificial normative scheme whose justification must be found elsewhere. And from the fact that some shared value is served instrumentally by enacting some principle into law, it does not follow

that that value is best promoted by each individual being faithful to that legal principle in every case.

If we are to have general moral reason to follow legal rules, the most promising source may seem to be the process of their making. Many have thought that democratically enacted legislation does bring with it a standing duty of compliance because of the moral significance of the procedure. Any argument along these lines is limited, of course, both to the case of (good enough) democracies and to legislation. But in any case, it seems to me that the argument does not go through. Consider for example Thomas Christiano's suggestion that to fail to abide by democratic legislative directives is to treat one's fellow citizens unequally and thus unjustly. "Citizens who skirt democratically made law act contrary to the equal right of all citizens to have a say in making laws when there is substantial and informed disagreement."⁴⁰ That democracy satisfies the equal right of citizens to have a say in making laws and is for that reason (if not for that reason alone) a superior mode of law-making need not be in dispute. Other forms of law-making, we may say, violate this equal right. What is unclear is why an individual's failure to obey democratically made law also violates the right. To take the simplest and best case for this view, consider a referendum on a specific legal provision. When I disobey the law that results, I am not asserting that the democratic process was not the right way to make law, nor that I have the right to tell others what to do, or even to make a special exception for myself. The moral reasons for adopting a particular process of law-making are not automatically grounds for obedience, unless we simply assume that we have an obligation to obey law made in the right way.⁴¹ Other defenses of democracy as a system of government, such those that turn on the epistemic value of democratic procedures, or on the value of public

deliberation, will, it seems evident, leave the same gap between justification and the obligation to obey the law. Habermas's account of the justification of any norm, legal or moral, closes the gap at the level of ideal theory, insofar as justification can only be found where certain ideal procedures have in fact been followed. But this does not imply a general duty to obey law under actual, nonideal conditions.

All the arguments so far considered for a content and context independent duty to obey the law have a similar structure. They are all compatible with or explicitly invoke an instrumental understanding of the moral reasons in favor of governance by law as an institution; the attempt is then made to provide a deontological account of the duty to obey.

Now by an instrumental understanding I mean that governance by law is valued in the first place because of its ability to secure certain good outcomes. Were it not for the value of those outcomes, we would not regard governance by law as morally desirable; law is not valuable just for its own sake. This position is of course compatible with legal governance being morally superior to other means of promoting security, overall welfare, and so on, even if the other forms of governance could do a better job promoting such ends. Law as a means has noninstrumental virtues; there may, in fact, be no other fully morally acceptable means available for the promotion of these ends. So the instrumental view of law is fully compatible with valuing law as one mode of governance among others because it can satisfy the values we associate with the ideal of the rule of law.⁴² It is also compatible with there being moral principles that apply to the legal order, as part of what Rawls calls the basic structure of society, but not directly to individuals.⁴³ Thus some goals of legal governance, such as social justice, may make no sense independently of the existence of some institutional governance

structures. What is ruled out by an instrumental view of law, as I understand it, is that governance by law has some kind of intrinsic morally relevant significance that it would have even if contributed not at all to security, justice, higher levels of overall welfare, and so on. On the instrumental view, though there are moral reasons to favor governance by law over other forms of governance, no form of governance, governance by law included, would have value for us if it did not bring about independent goods; the instrumental view of law is therefore compatible with the Marxist vision of the withering away of the state.

A noninstrumental account of the value of governance by law could in principle provide a more direct route to the conclusion that there is a standing moral reason to obey the law. But I am not aware of any such account—at least not one that applies in the actual, nonideal world. Kant’s legal theory perhaps comes closest, since for Kant positive law plays a constitutive role making real all “acquired” rights and specifying, for the situation where people are subject to a coercive power, the content of the one “innate” right to equal freedom. Moreover, though there are grounds for criticism of the content of these rights as actually in found in positive law, no individual is in a position to act on his view that the state has got it wrong. This might suggest that positive law in some sense constitutes (some of what is) right and wrong and that Kant’s well-known view that we have a duty to enter into the “rightful condition” that is life under a state should be understood in terms of the intrinsic moral value of being governed by law. It isn’t that we need law because that is the best way to protect everyone’s independently cognizable rights, which is a good thing; it is that without law it is in some sense impossible for us to act rightly towards each other. Without law we are doomed to a life of sin. Fortunately, this does not appear to be Kant’s view. Kant does assert that we must all “obey the authority

who has power over you.” He immediately adds, however, “in whatever does not conflict with inner morality.”⁴⁴ But the most important point is that Kant’s doctrine of right is concerned with the grounds for the use of force. So while it does lead him (perhaps unnecessarily) to absurdly authoritarian views about resistance to the state, it doesn’t address in any great detail the general moral significance of governance by law, nor in particular the question of when and whether it is morally permissible passively to fail to comply with the law.⁴⁵

So far as I can see, the instrumental view of law as I have laid it out is inescapable. There is of course nothing inconsistent in offering a deontological account of the duty to obey the directives of a system whose existence is at bottom justified in instrumental terms, and no way to prove that it could not work. Notably, the consent argument has the right form for this kind of approach. Equally notably, however, the consent argument is unlike the other arguments considered above in that it doesn’t leave a gap between the justification of the system and the conclusion of a general duty to obey. This is because the consent argument applies entirely independently of the justification and indeed the quality of the system of governance by law—everything turns on the content of the contractual arrangement between subject and ruler with limits set only by considerations of contractual capacity and the absence of force and fraud. The argument applies directly to each subject but is entirely detached from the reasons anyone may have for valuing a situation of governance by law. In fact, once we leave aside the idea that governance by law has intrinsic moral significance for each subject, it is tempting to speculate that the only deontological argument that could in principle ground a general duty to obey is a voluntaristic one such as the argument from consent.⁴⁶ (The argument from consent is not the only possible voluntaristic argument. Thus Raz’s idea that

those who “identify” with or respect their legal system may acquire a duty to obey is voluntaristic, even though there is no relevant canonical moment akin to the making of a promise. In other words, he has in mind something “up to the individual.”)⁴⁷

Even if there are deontological reasons to favor certain forms of legal order over others—those that respect the autonomy of subjects, or the value of integrity, or are democratic, and so on—a further argument is required to link each legal directive to each subject’s obligations. Take the morally best, humanly feasible legal and political system we can describe. Why should each subject obey each law? Only, I suspect, if each of us has taken some step to bind us morally to all of law.

Of course if law as such has instrumental importance, we would expect there to be instrumental reasons why people should at least sometimes obey the law. Those who offer deontological arguments for a duty to obey need not and do not disagree about that. But the above points suggest that the only moral reasons to obey the law are instrumental. And with that foundation, it is clear that we cannot build a content and context independent duty for individuals to obey.

The moral reason to obey the law is that it will do (if it will) more good than not obeying. For individuals, the good that it may do is that it will support the institutions of the state and promote what, through law, the state is trying to achieve. The instrumental duty to obey the law is thus subsidiary to an instrumental duty of political obligation. This is the position not just of the utilitarian tradition that follows Hume, but also of Rawls, who characterizes political obligation in terms of a natural duty of justice—to support and promote just institutions. Rawls’s account of political obligation is clearly consequentialist, or instrumental, though it is of

course not utilitarian.⁴⁸ Another instrumental account of the duty to obey, or rather an account with a strong instrumental basis, is that of John Finnis, who sees law as the means to achieving coordination on a conception of the common good that would otherwise not be possible.⁴⁹

There are clear benefits to the existence of institutions that can provide basic security, protect rights, preserve the environment, promote economic justice and overall welfare, and so on. And law as a mode of governance is clearly superior to alternatives, from the moral point of view, in view of its potential to achieve such goals while at the same time respecting the autonomy of persons.⁵⁰ There may be law without the rule of law, but only legal systems can achieve the ideal of the rule of law, which is the best way to rule. All this is obvious enough as a matter of political theory, even abstracting from debates about what exactly the conditions for a legitimate coercive political order are, and what account of justice we should be aspiring to.

Suppose a context where the political coercive order is good enough to count as legitimate, so that revolution and overthrow is morally a worse option than supporting, while trying to improve, the content of the law, the context of its making, and the mode of its enforcement. On the instrumental account I favor, it is clear that we subjects have, by way of political obligation, a duty not to undermine but rather to support the existing order. The issue then becomes whether this implies that we also have a duty to obey the law. And the answer, of course, is that it depends. It depends on whether we do more good—in terms of our twin aims of supporting the existing order and making things better—by complying or by not complying.⁵¹

The basic structural point is this, and it applies even if the law is as good as it could be. We cannot reason from what it would be good and right to have enacted and enforced as law

to what it would be good or right for individuals to do. That we have the law in place that it is best to enforce (there is no better set of legal norms it would be better to enforce) does not imply that it is always obligatory for each person to follow the law. Of course, so long as the continued existence of the legal system is desirable, it pretty much follows that it would be bad if *everyone* disobeyed *all* the laws, since the consequence of everyone disobeying all the time, most likely, would be collapse of the system. But even disobedience by all might not undermine the overall structure, so long as it is restricted to certain parts of the legal order. Thus suppose we believe that the prohibition of recreational use of marijuana, or a requirement that undocumented persons be reported to the Department of Homeland Security, would be bad policy. Suppose also pretty much everyone fails to comply. The state will not collapse. It might actually improve, in terms of the content of its law.

I here agree with much of the writing of A. John Simmons on the duty to obey, as I have throughout this section.⁵² So it may be worth pointing out, in passing, that I do not agree with Simmons that an account of the duty to obey the law must explain why we have special obligations to obey the law of one state (our own) in particular. Simmons' motivation for this "particularity requirement," is not one that applies to my discussion: it is to challenge claims of legitimacy by the state, which he holds can only be made good if all citizens have a particularized moral obligation to obey.* As I am here simply investigating what moral obligation we have to obey the law there is no reason to insist in advance that our conclusion will have a certain content. In any event, an instrumental account of political obligation could

* It is worth noting that even the consent argument, which Simmons agrees is the only hope for a general duty to obey, could violate the particularity requirement, in that it is certainly possible to promise obedience to more than one state.

certainly impose on individuals stronger responsibility for maintaining the institutions of states to which they have closer ties. Furthermore, even if I have a fully impersonal responsibility to promote just and beneficial institutions wherever they may be, the relevance of my compliance or otherwise with law to fulfilling that responsibility will generally be restricted to law that claims jurisdiction over me, which is for the most part the law of my current country of residence.⁵³ (The formal legal category of citizenship, naturalization oaths aside, is not especially relevant to the issue of the duty to obey. Think of the Palestinian citizen of Jordan who has lived all his life in Lebanon, or the Australian or Mexican citizen who has lived most of his life in the United States.)

To return to the main theme, there is a puzzle about the case of general disobedience, of all law, that needs to be mentioned and then set aside. If no one complies, the (good enough) state falls, which, we presume, is a bad result. But it seems as if no one of us is to blame. Suppose general compliance; my becoming a noncomplier won't cause the state to fall. Suppose general noncompliance; my having stayed a complier wouldn't have saved the state. It is tempting to reason that no instrumental account can ever show why any individual ought to obey the law. But this temptation has its roots in a very general phenomenon—if we submit to it, we will conclude that no act of pollution is bad because of its effects, no failure to vote is bad because of its effects, no failure to contribute money to famine relief is bad because of its effects, and so on. The general problem is how to explain individual responsibility in a context where, as Derek Parfit puts it, “we together” cause some harm. It is a fascinating and important philosophical puzzle, but it's generality allows me to leave it aside here.⁵⁴

Suppose I know that enough others are complying such that my noncomplying act would not be part of a group of acts that together have bad effects in terms of the viability of the legal system. If I reason that my noncompliance won't make any difference, could I be said to be free-riding on the compliance of others?⁵⁵ This is not the argument from fair play. The thought is that if we together have an obligation to act so as to preserve the state, because of what it can achieve, it is unfair of any one person to count on sufficient compliance by others, taking any advantage that might result from his own noncompliance. "You only get not to comply because we are complying," say the compliers to the noncompliers, "that's not fair." "If we could count on you to comply, it would be all right for us not to comply." This seems right, but the issue is rarely going to come up in a pure way. For most people most of the time, self-interest counsels compliance; in which case the compliance of the compliers is not a sacrifice or burden for them. Equally, the reason for noncompliance might not be my own advantage, there may be none; in that case too there would be no free-riding.

In principle then, a deontological requirement of fairness to complying others is fully compatible with the instrumental case for compliance. The circumstances of its engagement, however, are rather particular, and perhaps typically not present.

Suppose we have a situation where the level of compliance is sufficient to assure the stability of the state, and the circumstances do not raise the fairness issue just discussed. If we now consider the case of an individual who is debating whether to comply with a legal rule it is easy to see that the case in favor that flows merely from the fact that it is a legal rule is likely to be weak. No one act of noncompliance will in itself bring the whole scheme down, not in virtue of its own effects, nor in virtue of the "bad example" it might provide. It may be that in this

particular context, for this particular individual, following it may actually achieve little or nothing in the way of the benefits we associate with general compliance.

Of course, there typically will be moral reasons to act in accordance with law that are not related to the benefits of maintaining a legal order. Thus suppose some scheme of environmental regulation establishes a fair cooperative scheme that has effective results in cleaning up some river. Even total noncompliance with this scheme would not endanger the legal order of course. But each potential polluter has instrumental moral reasons, supplemented by reasons of fairness, to participate in the scheme. Those reasons do not, however, turn on the fact that the scheme is put in place by law.⁵⁶ And needless to say, there are direct moral reasons to refrain from most of what is prohibited by the criminal law.

All in all, we have to conclude that the instrumental moral case, for individuals considered one by one, to comply with the law in a well-functioning state is rather weak and in any event hostage to all kinds of contingencies.⁵⁷ What seems to matter much more than the obedience of individual subjects of law is their seeking reform of the state and the content of its laws to make it more legitimate, more just, and all around better. In a more or less effective state, where effective coercive measures in any event provide adequate reasons of self-interest for most people to obey most of the time, the issue of the morality of obedience to law just doesn't seem to be that important. It is true, as I argued in the previous chapter, that we cannot rephrase people's acceptance of law in other terms, but if there is only a weak instrumental moral reason to accept the law, one still may wonder just how important this entire inquiry is.

5. The Duty of States to Obey the Law

Everything changes when we turn to the law that applies to the state itself. Here we cannot restrict our focus primarily to the content of law and the mode of its making, assuming more or less effective (and legitimate) enforcement. There is no further set of institutions that will enforce the law that applies to states themselves. Once again, I will focus here on domestic law, especially constitutional law, leaving international law to the next chapter.

Though it is obvious, it is also often forgotten that there is no coercive apparatus that will enforce law against the government itself. In countries such as the United States the institution of judicial review may blind us to this, since for justiciable constitutional and statutory questions the court is there to pronounce that some legislation is invalid or some executive act was contrary to law. But pronouncement, obviously, is not enforcement.⁵⁸ Enforcement of law happens when the executive branch of government uses coercive means to ensure compliance by individual subjects of the state. When a highest court finds executive or legislative illegality, we rely on the relevant branches simply to comply. Of course, the executive branch may enforce the law as against lower-level officials of that branch. But if the executive branch as a whole is not complying—in practice, if the highest level officials are not complying—there is no further enforcement mechanism available. (I leave aside the possible case of high-level members of the executive branch being prosecuted by a later government for violation of the criminal law. Apart from the fact that such prosecution rarely if ever happens,⁵⁹ in situations of stable democratic transition at any rate, the issue government compliance is obviously not limited to the criminal law.)

A related issue here, that will be discussed more fully in the next chapter, is the idea that coercive enforcement is a condition of the existence of law. Most legal philosophers now reject the idea that sanctions must be present before we can talk sensibly of law. But few emphasize that if we took that view, we would have to conclude not only that states are not subject to international law, but that they are not subject to law at all.⁶⁰ Of course that conclusion was enthusiastically embraced by command theory of law, from Hobbes to Austin, but we tend to lose sight of this crucial aspect of Hart's repudiation of that theory of law. Though, as I will argue in the next chapter, it would be wrong to deny the importance of the possibility of coercion when distinguishing law from other normative systems, it is disastrous to insist that the presence of an actual coercive apparatus is a requirement for the existence of legal norms. That would lead us in exactly the wrong direction, away from the domain in which law has its greatest normative significance.

What moral reasons do legal officials in the executive, judicial, and legislative branches have to follow constitutional and ordinary domestic law? They may have promised to do so, either by an explicit oath, or perhaps by an implicit promise that can be inferred from their action in accepting office or seeking it through the electoral process. This will not necessarily apply to all legal officials, such as those in a hereditary monarchy. But even where there is an express promise I do not believe, for the reasons given earlier, that this can provide a quick foundation for the duty to obey. Even if some deontological account of the morality of promise were available, it should still be clear that the really weighty reasons why legal officials should obey lie elsewhere.

The main reason why legal officials should obey the law is again instrumental. US constitutional electoral law has some glaring imperfections: such as the Electoral College, the overrepresentation of residents of low-population states in the Senate, and the ridiculously short electoral term for the House of Representatives. Wouldn't it be good if somehow the relevant officials could conspire simply to change the practice, without amending the law? It would be in one way good, but in another way extremely bad. When it comes to individuals, the "bad example" claim about noncompliance seems silly. When it comes to government officials setting examples for each other, and for the rest of us, it does not. Moreover, and more important, the very idea of the state being subject to law being taken seriously depends upon states taking that idea seriously. Once the decision whether to comply starts to be treated as a matter of deciding whether or not there is a better way to do things, we quickly end up with the state not binding itself to law at all. The benefits of the constitutional state, in terms of continuity, stability, transparency, the avoidance of usurpation, and so on, are tolerably obvious.⁶¹

The importance of the various branches of government following the law is not limited to the structural parts of a constitution, or even to constitutional law itself. Suppose that the executive branch of some government deliberately flouts a statute requiring legislative authorization of the use of military force. Leave aside the moral considerations that count on the one hand in favor of quick action and on the other hand in favor of a more broadly democratic and public discussion of the decision to use force. The issue is whether there is additional moral reason against what the government does, stemming from the legal prohibition. The answer is yes, for instrumental reasons. The bad effects of official lawlessness

are simply of a fundamentally different order of magnitude from those of individual noncompliance. And the effects are more severe, the higher up the political hierarchy you go. If the head of government flouts the law, or is found out subsequently to have done so, it is not so much a bad example we are dealing with but a reasonable ground for wondering whether the very existence of the legal order is, after all, a good thing, or at least whether there is any long-run reason for having patience with the existing legal order, attempting to make it better, and so on, rather than expecting the worst and trying something new. Official lawlessness greatly increases the case for revolution and overthrow, which is not a good thing.

Modern political coercive orders are understood in good part in terms of their structural legal features (the separation of powers, the electoral system, if there is one, and so on). We do not have to follow Kelsen so far as to identify the state fully with law as a conceptual matter in order to see the central role law has in defining the substantive nature of our state.⁶² If the most fundamental structural law is not complied with, then while we may have a state, in the sense that we can point to those individuals and groups with a monopoly over the use of force, we will not have an institutional structure we can point to that might or might not deserve our allegiance, only rulers. But noncompliance with ordinary law that applies to government has a similar effect, if extensive and flagrant enough. Any law that applies to a branch of government is an instance of the structure of the political order in operation. If the legislature legally can control the executive, within some areas, or there are constitutional limits on executive power, then those are defining features of the system. If we, the subjects of that system, cannot count on the executive to comply with law that applies to it, we cannot properly assess our

reasons for supporting the overall political coercive order. The grounds for political obligation become opaque.

Now of course there is a more direct moral reason for the executive to follow law if we conclude, as a matter of political theory, that we get better results within a system where the executive is constrained. This remains the dominant view in Western democracies, despite post- September 11, 2001 efforts by some to defend a political system in which the executive branch is unconstrained by law.⁶³ If a system of constrained governance by the executive is superior, then the executive has direct moral reasons to constrain itself. The situation is not similar to that of the individual subject. In that case, we cannot reason directly from what it would be best for the law to be to what it would be best for individuals to do; the conclusion about what the law should be is a conclusion about what should be enacted and enforced—it leaves open the question of compliance by individuals. For the case of the executive to conclude that the law should constrain the executive just is to conclude that the executive should follow the law.

The above remarks concern legal duties that apply to officials in their official capacity, rather than as private individuals. The instrumental case for compliance with law that applies to a person in his private capacity is perhaps also stronger for those who happen to be high officials than it is for the rest of us, but this difference is not the one to which I am attaching so much importance. It should also be noted that in arguing for a strong instrumental moral case for officials in the executive branch to follow the law that applies to them in their official capacity, there is no suggestion that these officials ought to *enforce* the law in all particulars as

against individuals. There are good and familiar reasons why the executive should, in accordance with law, due process, and so on, exercise discretion in the enforcement of law.

Consider next the legislature, and constitutional restrictions on valid legislation that are not reviewable by a court—either because of some doctrine of justiciability or because there is no judicial review in the system. Here the relevant law has only one subject. If there is any good case for constitutional limits on legislative power at all, strict compliance by the legislature is required.

That the judicial branch should resolve disputes according to law, in all but the most extreme circumstances—such as would warrant an attempt to undermine a grossly unjust or illegitimate system from within—is not something that needs much argument.

Prima facie duties can always be outweighed by unusual circumstances that provide a moral case for failing to comply. Perhaps during times of emergency the executive might justifiably flout settled law about the formal political process required in the conduct of war and about the means that may permissibly be used. The point is that the case in favor not only has to be strong on its own terms; it must also overcome the extremely powerful instrumental case in favor of governmental compliance with the law. We should not, I believe, become too exercised about these “exceptions.” We should regard them for what they are, if they are: justified breaches of law. Similarly, though there is considerable theoretical interest in figuring out the proper way to understand the legal regulation of emergency executive power, where the law itself suspends part of the law, and in particular the prospects of maintaining the rule of law in such a context,⁶⁴ none of this should reflect the main conclusion that, barring unusual

circumstances, members of the three branches of government have very strong instrumental reason to comply with law.

Now a typical reaction at this point of the wise skeptic would be to point out that, yes, it's all very well, but official lawlessness is widespread and the mere conclusion that governments ought to obey the law doesn't mean that they will. Of course that is so. And so it is of course extremely valuable to investigate the purely prudential reasons that may explain official submission to unenforced law. Even without complex modeling and speculation about the motives of officials, it is clear enough as a matter of common sense that officials frequently have strong self-interested reasons to comply with the law. They turn on reputation, the ability to secure their "policy aims" on so on.⁶⁵ Moreover, wise constitutional designers from Madison on have been concerned to create institutional structures that will enhance the prudential reasons officials have for compliance. All of this might suggest that although there is no institutional enforcement in the literal sense as against officials, in many or most legal systems the incentives will be arranged such that officials will typically have very strong reasons for compliance; as I will discuss in the next chapter, it may be appropriate to regard this kind of deliberate adjusting of prices attached to choices as a kind of enforcement.

None of this undermines the central importance of determining whether, morally speaking, officials ought to comply.

The question of the actual motivations complying officials have is largely beside the point. Nonetheless, it is worth noting that much of the "positive" literature of compliance simply takes for granted that moral motivations will not be sufficient explanation for official compliance. The quest is then to produce more or less ingenious models that explain why

nonetheless officials for the most part do comply. Properly understood, then, this literature asks a hypothetical question: Assuming that a desire to do the right thing isn't the answer, why do officials comply? But the truth is we simply do not know why officials comply with the law when they do; common-sense, however, would suggest that a sense of moral duty plays a considerable role, much of the time.⁶⁶ That this motive should be shored up by clever constitutional design which aligns interest with compliance goes without saying.

Another institutional feature of importance is the way in which the executive and legislative branches determine the content of law in the absence of authoritative determination by a court. Given that the content of law is not always immediately clear, government may cloak noncompliance with a disingenuous interpretation of the content of the law. This is currently the subject of some debate in the United States in the wake of the "Torture Memos" during the administration of President George W. Bush. Various proposals have been made for non-court but independent bodies whose role it would be to determine the content of law as it applies to government. In the current U.S. context, some such proposal may make a great deal of sense, but this is not the place to pursue these issues.⁶⁷

VI. Conclusion: The Focal Case

When it comes to the actions of states, individual cases of noncompliance can do great harm, especially for higher-up officials. The upshot here is that conventional thinking about what is the focal case of law, the municipal legal system effectively enforcing law as against individual subjects, is very misleading. It pushes to the margins law for states both domestic and international. Since the entire point of being concerned about the content of law turns on there

being moral reasons to obey it, our focal case should, to the contrary, be that of the under-enforced or unenforced law that applies to states. I will continue with this line of thought in the next chapter, which addresses international law.

¹ Kornhauser. Lately Brian Leiter seems to have joined this camp.

² See Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review* 10 (1897): 457.

³ This is one of the issues that "normative positivists" are most centrally concerned with. See Tom D. Campbell, *The Legal Theory of Ethical Positivism* (1996); Campbell, *Prescriptive Legal Positivism* (2004); Campbell, "Prescriptive Conceptualism: Comments on Liam Murphy, 'Concepts of Law,'" *Australian Journal of Legal Philosophy* 30 (2005): 20; Jeremy Waldron, "Normative (or Ethical) Positivism" in Coleman, ed., *Hart's Postscript*, 411; Jeremy Waldron, "Can There Be a Democratic Jurisprudence?". Methodologically, Campbell embraces the instrumentalist approach: we should stipulate the concept of law which, among other good effects, fits best with the model of law as a set of formally realizable rules (Prescriptive Conceptualism, 27). One possible interpretation of Waldron's articles has him embracing a version of Dworkin's interpretive method.

⁴ No constitutional right is at stake. Cite.

⁵ To be added: Anderson and Pildes on expressive aspects of law.

⁶ See Hart, *The Concept of Law*, 203.

⁷ Thank Sager

⁸ We can leave aside cases where the law is so bad that the judge has moral reason to abandon her professional obligation.

⁹ See Waluchow, *Inclusive Legal Positivism*, for a discussion of these issues in the context of critique of Dworkin's theory of law.

¹⁰ *Hedgehogs*, 404-5.

¹¹ Levinson and Goldsmith. Thanks to David Golove in next few paragraphs.

¹² Sager, Fair Measure

¹³ Though we once again should note that on his latest view, Dworkin holds that if it would not be appropriate for a court to review the issue on demand, the issue is not a legal one. As explained in Chapter Four, I believe that this new view introduces more problems than it solves, and so will generally have in mind Dworkin's earlier position.

¹⁴ Whittington; Alexander & Schauer

¹⁵ Stare decisis in the OLC

¹⁶ 1466

¹⁷ "Designing Collegial Courts."

¹⁸ Cite, normativity of private law, by Stephen Smith.

¹⁹ I follow the terminology used by Scanlon, 113ff. The canonical discussion in Parfit, Appendix I, uses slightly different terminology.

²⁰ Cite Darwall on his account.

²¹ "Their allegiance to the system may be based on many different considerations: calculations of long term self-interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do. There is indeed no reason why those who accept the authority of the legal system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so." Hart, 203.

²² Marmor, others.

²³

²⁴ Cite Kelsen, Raz

²⁵ Coleman and Leiter in Patterson, *Companion*; Coleman, *Practice of Principle*. Note on Shapiro’s “possibility puzzle.”

²⁶ Note on Coleman’s argument. Perry review.

²⁷ *The Nightmare and The Noble Dream*

²⁸ 82-91; 167-80

²⁹ 254-9

³⁰ *Doxa* interview

³¹ See Raz, eg Authority and Justification; I agree with the discussion of the notion of authority in Buchanan, *Justice, Legitimacy, and Self-Determination*, chap. 5.

³² Simmons; Buchanan—whose objection is to the idea of authority is that obedience is thought to be owed to the government; he accepts that there is no legitimacy without an obligation to obey.

³³ Simmons, Green, Edmundson

³⁴ Soper

³⁵ “Promise, Practice, Trust”

³⁶ Nozick

³⁷ See my discussion in “The Political Question of the Concept of Law.”

³⁸ “Beneficence, Law, and Liberty: The Case of Required Rescue.”

³⁹ See the discussion of “everyday libertarianism” in *The Myth of Ownership*.

⁴⁰ 250

⁴¹ Christiano in the end seems to me to offer a distinct instrumental argument for the duty to obey, turning on the bad effects of general disobedience. 254.

⁴² Raz, Rule of Law; Green, Law as a Means; Tamahana

⁴³

⁴⁴ (A6:371).

⁴⁵ Cite Ripstein, and Hill.

⁴⁶ Simmons; but note that the issue isn’t “particularity”

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⁴⁸ Nonetheless, Rawls writes that there “is quite clearly no difficulty in explaining why we are to comply with just laws enacted under a just constitution.” TJ, rev. ed. 308. It seems to me quite clear that no instrumental account, including that of Rawls, will be able to “explain” that.

⁴⁹ *Natural Law and Natural Rights* and “The Authority of Law in the Predicament of Contemporary Social Theory.” Finnis’s account is not wholly instrumental since it includes an argument from fair play that rules out case by case assessment of the good obedience would do.

⁵⁰ Kornhauser, Raz.

⁵¹ Raz, Smith, Simmons

⁵² Cites

⁵³ For discussion of these issues, see Waldron, Rainbow Warrior.

⁵⁴ Quinn, Parfit, Murphy “What We Together Do”

⁵⁵ Thanks to Kieren Oberman. Add discussion of Wellman, Lefkowitz.

⁵⁶ The example and the point come from Raz, “The Obligation to Obey the Law,” 249.

⁵⁷ Overall I agree with Raz, papers in *The Authority of Law and Ethics in the Public Domain*

⁵⁸ Goldsmith and Levinson

⁵⁹ Cite Stephen Holmes

⁶⁰ Raz being an exception: *Practical Reason and Norms*

⁶¹ In their argument that the executive branch of the United States is not bound by law and it’s a good thing too, Eric Posner and Adrian Vermeule simply assume that the basic constitutional framework of the state will remain in place.

⁶² with the consequence that, strictly the head of government cannot act contrary to law since noncompliance would render a person no longer the head of government see Dyzenhaus

⁶³ Cite Posner and Vermeule; no space to discuss.

⁶⁴ Dyzenhaus

⁶⁵ See Levinson, “Parchment and Politics.”

⁶⁶ Discuss Schauer, “When and How (if at All) Does Law Constrain Official Action?”

⁶⁷ Ackerman; Ferejohn and Hills, “Blank Checks, Insufficient Balances.”