

Legitimacy Is Not Authority¹

Jon Garthoff
Northwestern University

1. Introduction

There is something approaching consensus among political philosophers that a law or policy's legitimacy is closely related to its normative authority. A law or policy is legitimate, on this understanding, just in case its enactment meets the conditions necessary for it to serve as a normative authority for those whom it regulates, where its normative authority is understood as its capacity to render citizens morally obligated to do as it prescribes. Liberal theorists typically endorse this view because they see the need for legitimacy as arising from potential conflicts between legal requirements that are coercively enforced and individuals' independent judgments about what to do. They accordingly seek to ground claims of legitimacy in the consent – whether expressed, tacit, or hypothetical – of the governed. On this account the legitimacy of a law or policy consists in its having been legislated by individual citizens, considered severally, although this self-legislation may be instantiated in a circuitous fashion.² Deliberative democrats, who maintain that the legitimacy of a law of policy consists in its procedural soundness, also typically assert a close relation between legitimacy and normative authority. They maintain that political procedures are sound only when all citizens have an appropriate say in the formation of laws or policies. This requirement is motivated by a perceived need for laws and policies to reflect a public political will, conjoined with the claim that an authoritative public political will can be

¹ [*citation omitted for anonymity*]

² Liberals trace their tradition to John Stuart Mill (1859), John Locke (1690), and often also to Immanuel Kant (1785, 1797). Chief among recent contributions is John Rawls (1971, 1993). Other important works include Brian Barry (1995), Ronald Dworkin (2000), Charles Fried (2006), Charles Larmore (1987, 2008), Thomas Nagel (1991), Onora O'Neill (1996), Joseph Raz (1986), and Jeremy Waldron (1993, 1999).

Legitimacy Is Not Authority

constituted only when all citizens have a say. On this account the legitimacy of a law or policy consists in its having been legislated by the citizens considered together as a corporate body or democratic polity.³

In this essay I oppose these understandings of legitimacy, arguing instead that a law or policy's legitimacy is largely unconnected to its normative authority. Hand-in-hand with their conception of legitimacy as the criterion of normative political authority, liberals and deliberative democrats tend to emphasize coerciveness as the feature of law by virtue of which the need for legitimacy arises. This contention too I reject. I argue instead that law is not, strictly speaking, the locus of normative political authority; and I argue further that there are constraints of legitimacy which apply to social processes regardless of whether these processes are coercive.⁴

In so arguing I am not motivated by opposition to either liberalism or deliberative democracy. I endorse both the liberal project of grounding political rights in individual moral rights and the liberal impetus to limit the extent of normative political authority; but in this essay I reject the claim that these attractive features of liberal theory entail that the normative authority of laws and policies is grounded in any form of individual consent. I also endorse both the deliberative democrats' claim that aggregative models of democracy are normatively inadequate

³ Perhaps chief among recent contributions is Jürgen Habermas (1992); other important recent contributions include Seyla Benhabib (1996), James Bohman (1996), Joshua Cohen (1989, 1996), David Estlund (2008), Samuel Freeman (2000), Amy Gutmann and Dennis Thompson (1996), Anthony Laden (2001), William Rehg (1994), and Henry Richardson (2002). As Cohen (1996), Freeman (2000), Richardson (2002), and others have observed, there is considerable overlap between liberalism and deliberative democracy; they are not well-understood as opposed traditions. An especially prominent example is Rawls (1993, 2001), whose theory is explicitly liberal but also fruitfully understood as an instance of deliberative democracy.

⁴ I thus follow H. L. A. Hart (1961) in emphasizing the continuity of law with other social practices, rather than emphasizing the discontinuity which consists in the fact that law is typically coercively enforced while other social practices are typically not.

and their conception of politics as a vehicle of deliberative collective action; but in this essay I reject the strategy of grounding these attractive features of deliberative democracy on the claim that government laws and policies, to be normatively authoritative, must issue from a public will in which all citizens have had an appropriate say.

Although I seek to resist central claims of the leading traditions of democratic legitimacy, my purpose in this essay is not only negative. I propose an alternative strategy for grounding the attractive features of liberalism and deliberative democratic theory. This positive proposal makes use of a conception of legitimacy that applies to laws and policies but is largely unconnected to normative authority. On this alternative understanding, legitimacy is a sub-domain of the theory of justice and hence of substantive normative theory. Thus I argue that the most philosophically fruitful conception of legitimacy differs from the understandings most prevalent in philosophical discourse today.

2. The Anarchist's Chimera

It will help, in introducing my proposal, to begin in a different corner of the philosophical literature, with theorists who refer to themselves as “philosophical anarchists”. These theorists deny that there is such a thing as normative political authority; they deny that there is ever a duty to obey the law for the reason that it is the law.⁵ They deny in particular that a law or policy’s public acceptability or status as an expression of a public political will makes it authoritative for those whom it purports to govern. Like skeptics of other varieties, philosophical anarchists’ best work is destructive. While I will not attempt to reproduce their arguments here, philosophical anarchists have argued persuasively against attempts to ground general duties to obey the law in debts of gratitude owed by the governed, in the tacit consent of the governed, and in a putative

⁵ The most prominent expositions of philosophical anarchism are Robert Paul Wolff (1970) and A. John Simmons (1979, 1999).

duty of fair play of the governed to do their part in mutually beneficial schemes.⁶ They also argue with plausibility, though less conclusively, against attempts to ground duties to obey the law in the hypothetical consent of the governed or in a natural duty of the governed to support just institutions.⁷ Assessing these latter arguments is a complicated and controversial matter, but I believe the philosophical anarchists have shown at least that these strategies are not completely successful in their current form.

It may seem that these destructive arguments, if they are indeed successful, have absurd implications. Living in a society where no one believes in a duty to obey the law may seem intolerable, even frightening; and consideration of the prospect of living in such a society may seem to constitute a reduction to the absurd of philosophical anarchism as a serious political position. But as philosophical anarchists are quick to observe, in order to stave off this concern, their position entails neither that citizens should typically flout their governments' laws and policies nor that they should typically seek to abolish their governments. The philosophical anarchists' claim is only that citizens have no duty to obey the law *for the reason that it is the law*; philosophical anarchists deny, that is, that the normative authority of law can derive from its status as law. They affirm conformity to the law in typical circumstances, however, maintaining that this conformity is required by a background moral theory as applied in a particular social context. If a law or policy effectively resolves a coordination problem (such as which side of the street an individual should drive on) or a prisoner's dilemma (such as the extent to which an individual should limit his production of waste), for example, philosophical anarchists typically

⁶ For an argument from gratitude, see Plato (c.360 B.C.E.); for an argument from tacit consent, see Locke (1690); and for arguments from fair play, see Hart (1955, 1958) and Rawls (1964). For the anarchist case against these arguments, see Simmons (1979).

⁷ For an argument from hypothetical consent, see Thomas Hobbes (1651); and for an argument from a natural duty of justice, see Rawls (1971), 333-342. For the anarchist case against these arguments, see Simmons (1979, 1999).

maintain that the balance of reasons favors *conformity* to the law even though they claim there is no requirement of *obedience* to it.

It is important to take note of the distinction anarchists deploy here between conforming to a law and obeying the law. An individual has an obligation to conform to a law just in case he has an obligation to do what the law prescribes. We have obligations, for example, to conform to laws forbidding murder and battery; but in these cases the law reflects what we are independently obligated to do, and so the anarchist plausibly maintains that the putative authority of the law itself plays no role in shaping the content of these obligations.⁸ To show that the law should be obeyed, we would need to find a case where we have an obligation to do what the law prescribes for the reason that the law prescribes it, rather than an obligation to do what the law prescribes because this action is independently morally required.

The fact that philosophical anarchism does not entail that citizens should flout laws or abolish the government exposes that “anarchism” is a misleading label for the position. But of greater significance for this essay is exposing the promissory note philosophical anarchists must issue to keep their position from absurdly entailing political anarchism: they posit a moral theory that explains why citizens typically have obligations to conform to the law even though they have no obligation to obey it, but they do not spell out the details of this theory. This moral theory needs to yield plausible results not only in easy cases like prohibitions of murder and battery, but also when applied to the whole range of situations where laws and policies apply to individuals: it must give an account of when individuals are obligated to pay taxes, to perform national service, and so forth.

⁸ It is not clear that the law is normatively inert even in these cases. What constitutes a murder or battery may be in part a function, at the margins, of actually adopted legal definitions of these categories. I have in mind late-term abortion as a marginal case of murder, for instance, and pushing past someone on a crowded sidewalk as a marginal case of battery. Below I consider cases where it is clearer that the law specifies the content of individuals’ moral obligations.

I label this promissory note the “anarchist’s chimera”, for I do not believe philosophical anarchists can plausibly redeem it without undermining their own anarchism. What is chimerical, in my view, is not the possibility of a substantive moral theory that underlies and explains duties to conform to the law or to obey the law. I think we can and must produce such a theory, and that philosophical anarchists do a service by pushing us to produce a normative theory that integrates its claims about politics into a broader set of claims about morality. What is chimerical is the possibility that a moral theory could accomplish this task without entailing that any law or policy has normative authority. In the following section I elaborate on this claim by sketching an account of why any plausible theory of morality among individuals entails that some social structures, including structures that are sustained by government laws and policies, have the normative authority of moral obligation.

3. Moral Coordination Problems Among Individuals

The principal reason why the anarchists’ promised moral theory is a chimera is that in some moral domains values underdetermine what individuals are obligated to do; within these domains, as a result, social conventions must specify the content of individuals’ obligations in response to and within the bounds set by these values. There are domains, that is, within which morality, understood in abstraction from actual social structures, is insufficiently specific to guide individuals’ actions. Within these domains individuals face what I will call “moral coordination problems”.⁹

I will illustrate the phenomenon of a moral coordination problem with the example of obligations to respond to extreme poverty. An individual with ample resources, I assume, has an

⁹ While I coin the term “moral coordination problem”, related phenomena are discussed in O’Neill (1996) and Arthur Ripstein (2004). There is also an important precursor to this family of views in Henry Shue’s work on rights; see Shue (1983, 1988).

obligation to provide aid to at least some of those who live in extreme poverty. Under conditions like ours where a large number of people are obligated to provide this aid and a large number of people are entitled to receive it, however, abstract principles of morality fail to specify how much each individual should provide and to whom she should provide it.¹⁰ There are limits on the extent of these obligations, in part because there are latitudinal obligations of fairness among providers that constrain the extent of each provider's obligation. But even these latitudinal obligations fail to render obligations to relieve poverty specific enough to guide individuals' actions.¹¹ The only way to specify the content of these obligations so they *can* guide action is for providers of aid to coordinate their provision.

¹⁰ I here assume without argument that a straightforwardly utilitarian answer to the question of how much to provide and to whom – provide where providing will do the most good, and provide until providing fails to do more good than not providing – is an excessively demanding account of obligations of aid. For such a utilitarian account, see Peter Singer (1972); for what I regard as the strongest version of the demandingness objection to utilitarianism, see Seana Shiffrin (1991).

¹¹ Thus I doubt the strategy pursued by many Scholastics and many Kantians – treating the provision of aid as an *imperfect duty* – is satisfactory; for Kantian accounts of imperfect duty, see Thomas E. Hill, Jr. (1971) and Marcia Baron (1987). Briefly, I see two principal problems with an imperfect duty understanding of obligations of aid: (i) this understanding does not ensure lateral fairness among providers, for it fails to recognize that the content of any given provider's obligation depends not only on her resources and the extent of need but also on what other similarly situated persons will do; and more significantly (ii) this understanding does not tie the content of the obligation sufficiently closely to the needs giving rise to it, since it allows individual providers to specify the contents of their own obligations unilaterally. For related reasons I am skeptical of the strategy pursued by Liam Murphy (2000), who claims a person's obligations to provide aid are limited to the extent of her share of the total provision that would optimally promote welfare, were everyone to provide who is in a position to do so. In my view Murphy's view implausibly entails (i) that there is a specific fact of the matter, for each individual provider, about what her share of the total provision consists in, and more significantly (ii) that the extent of each provider's obligation cannot

Moral coordination problems share some features with their more familiar cousins, decision-theoretic coordination problems.¹² In a decision-theoretic coordination problem, multiple persons have an interest in coordinating their actions for mutual benefit, and there are multiple schemes of coordination that would enable the achievement of this benefit. The classic – perhaps now hackneyed – example of such a coordination problem is the choice of which side of the street to drive on. Each driver has an interest in driving on the same side of the street as other drivers, but is relatively indifferent about which side this is. Each driver’s interest in driving on the same side of the street as the others thus fails, on its own, to guide the driver’s action. To solve this problem, reliable mutual expectations of behavior must be generated and sustained, so that each individual can coordinate his action with the actions of the others. The standard mechanism for solving coordination problems is to establish a social convention, such as driving on the right side of the street, which makes it possible for individuals to have the relevant reliable expectations about each other’s actions.¹³

rise as a result of other providers’ noncompliance. This latter implication in my view fails to connect the content of the obligation closely enough to the needs giving rise to it.

¹² For a classic discussion of decision-theoretic coordination problems and their solution by conventions, see David Lewis (1969).

¹³ Chaim Gans (1981) claims, to my mind implausibly, that the normative authority of law arises from its ability to solve decision-theoretic coordination problems. For criticisms of this approach, see Leslie Green (1983) and John Finnis (1984, 1989). Finnis himself (1980, 1984, 1989) speaks of the authority of law arising from its ability to solve a kind of coordination problem distinct from those of decision theory, and so in that way anticipates some of the claims I make here. I depart from Finnis, however, in at least two crucial respects: (i) I have a much less ambitious and hence much less controversial account of the content of abstract morality; and more importantly for present purposes (ii) I deny Finnis’s view that “[t]he law presents itself as a seamless web” so that “[w]here burdened by a legally enforced co-ordination scheme he thinks misguided, each can reflect that he has been or at some time will be benefited by the burdens which

In a *moral* coordination problem, by contrast, the goal is not for the individuals involved to achieve a mutually beneficial result; the goal is, rather, for the individuals involved to be able to discharge their obligations. But the solution to a moral coordination problem is the same: if individuals' obligations to alleviate poverty are to guide their actions, these obligations must be specified by conventions that enable reliable mutual expectations of action.¹⁴ There is a crucial difference, however, between conventions that solve moral coordination problems and those that solve decision-theoretic coordination problems: the value of the former, unlike that of the latter, is not purely instrumental. The latter conventions enable individuals to achieve desirable outcomes, and so they affect what individuals have reason to do. But the former conventions are able, more strongly, to specify *what justice consists in*, within a particular social context. This is a normative category intermediate between *what justice is*, which is expressed in abstract principles of morality, and *what happens to be just* in a particular social context. In an adequately just society, the conventions specifying what each individual must provide and to whom they must provide it

the law has in other respects ... imposed and will impose on others." See Finnis (1989), 101. In my view it is crucial to understanding the normative authority of law to distinguish among the law's various functions, and so not treat it as a "seamless web", for some of these functions can transmit the normative authority of obligation to legally sustained conventions and some are cannot. In advancing this criticism I follow Raz (1984). Furthermore, in my view Finnis's approach, while superior to one which appeals only to decision-theoretic coordination problems, is itself too dependent on mutually beneficial outcomes as a source of the normative authority of law.

¹⁴ It is important to forestall two potentially misleading connotations of the term "convention". First, I claim only that conventions solving moral coordination problems have the normative authority of moral obligation; I deny that other conventions can do this. Second, while conventions often arise from below, they can also be created and sustained by large institutions, including especially the government. We do not normally think of government laws and policies as establishing conventions, but they do, and in my view it is only because they do (and only when they do) that they can have the normative authority of obligation.

do not merely help determine what happens to be just, in the way that the de facto distribution of goods helps determine this. They also provide a part of the very content of justice in that social context. On the model I propose, one of the most important functions of society is to establish and sustain conventions that enable individuals to discharge their obligations, and one of the most important functions of government laws and policies is to help constitute these conventions and to enforce individuals' compliance with them.

The tripartite distinction introduced in the prior paragraph is somewhat subtle. To help illustrate it, consider the difference between the normative force of the law in the case of the driver problem and the normative force of the law in the case of taxation for the purpose of funding programs like Social Security and Medicare in the United States. In the driver problem, the principal purpose of the law is non-moral: it is to enhance the efficiency of travel. Insofar as this is the law's purpose, its role is purely instrumental. But in this case the law also has the moral purpose of enabling each individual to discharge her obligation to drive safely, to drive so as to avoid undue risk of injury to individuals or damage to property. The law directing drivers to the right side of the road accomplishes this by providing reliable expectations about other drivers' actions. But in fulfilling this purpose too the law plays only an instrumental role. Accordingly I suggest there is no obligation to drive on the right side of the road as such; there is, rather, an obligation to drive safely that can typically be discharged only by driving on the right side. This is why, when an individual faces an atypical circumstance where right-side driving is less safe (a car approaches from the opposite direction in one's lane) or equally safe (one is in the middle of a desert with clear visibility and there are no other cars around for miles), there is no obligation to drive on the right side of the road. Safe driving in the United States is typically *achieved by* right-side driving, but it does not *consist in* right-side driving.

Contrast this with taxation for Social Security and Medicare. Here part of the purpose of the law is to render specific both the entitlements of those with inadequate resources to receive

aid from others and the obligations of those with ample resources to provide aid to others.¹⁵ A variety of systems of taxation and transfer would accomplish this in a way that is adequately fair; the extra-legal content of morality, I assume, fails to pick out a unique system as fair.¹⁶ This is thus a case where individuals face a moral coordination problem, where the contents of their obligations to provide aid and entitlements to receive aid need to be coordinated by a social convention. As in the driver problem, in this case also the law enables individuals to discharge their obligations; but in this case the law's role is not only instrumental. In this case the law (or more precisely, the convention the law creates and sustains) constitutes individuals' obligations and entitlements by specifying the content of these moral relations. Thus in this case an individual's obligation consists in *exactly* what the law says it is, even if another system where somewhat more or less was required of that individual would also have been fair. Accordingly in the case of poverty relief it is appropriate to say that the law has normative political authority, for so long as what it prescribes is within the bounds of adequate fairness, individuals are obligated to do exactly what the law says for the reason that this is what the law prescribes.

Well, almost. Strictly speaking, individuals are obligated to do not what the law says they must do, but rather what the prevailing social convention says they are obligated to do, so long as this convention is within the bounds of adequate fairness. A social convention is needed to solve the moral coordination problem because only it can provide individuals with reliable expectations about each other's actions. Law in particular is needed merely because law is typically the only mechanism by which the relevant convention can be created, sustained, and improved over time; and coercive enforcement of law is typically needed only because it is predictable, given human

¹⁵ The programs in question no doubt have purposes apart from this; but the simplification in the text usefully isolates this purpose as that which is crucial to explaining the disanalogy between the normative force of law in this case and in the driver problem.

¹⁶ This case is thus an example of what Rawls calls "quasi-pure procedural justice"; for Rawls's account of pure procedural justice and quasi-pure procedural justice, see Rawls (1971), 84-88, 201.

fallibilities, that a convention solving a moral coordination problem will atrophy over time absent a threat of coercive enforcement. The locus of normative political authority is thus the convention sustained by the law, rather than the law itself, since it is the convention that solves the moral coordination problem and so transmits the normative authority of morality to the social structure in question.¹⁷

There are a variety of domains in which we face moral coordination problems, and thus in which individuals can have an obligation to comply with a social convention. These include obligations of aid in response to poverty or emergency and also obligations not to pollute the environment excessively. In each of these cases there is a range of possible specifications of individuals' obligations and entitlements that is adequately fair; but for individuals' actions to be sufficiently guided by a norm of fairness there must be a social convention that specifies these obligations and entitlements by coordinating their content.¹⁸ A mundane example is familiar to university instructors: the assignment of penalties to students for submitting late work. Cases like these are important, for they illustrate that moral coordination problems can arise not only among individuals considered in abstraction from their institutional relationships to one another, but also among individuals situated within particular institutional contexts. I discuss this below in Section

¹⁷ As I discuss below in Section 6, this claim entails that conventions solving moral coordination problems which are not established by law also have the normative authority of moral obligation. It also entails that illegitimate rogues can, in principle, establish conventions which solve moral coordination problems and so carry the normative force of moral obligation. It is important to note that this is a claim about the normative authority of the conventions so established, not a claim about the permissibility of establishing the relevant conventions illegitimately. I discuss grossly illegitimate laws and policies in the following section.

¹⁸ Etiquette is another important example. I will not investigate the issue here, but I believe it is important to distinguish norms of etiquette that solve moral coordination problems and so have the normative force of moral obligations (such as customs that enable individuals to manifest respect and sympathy) from norms of etiquette that merely standardize a practice and so do not (such as customary layouts of table settings).

5, where in a variety of cases I discuss the conditions under which institutional policies can be obligatory for individuals.

4. Normative Political Authority

Grounding the normative authority of law in its capacity to solve moral coordination problems helps both to explain this authority and to circumscribe its extent: law has the normative authority of obligation when – and only when – it specifies obligations of individuals that are extra-legally intelligible. Indeed, on this account normative political authority *just is* normative moral authority; an individual has an obligation to comply with a law just in case it sustains a convention that specifies the content of an obligation he has to one or more individuals.¹⁹ This account of the normative authority of a law or policy makes no reference to its legitimacy, or to the law or policy being self-legislated by the citizenry. This may seem a drawback, given the prevalent strategy of grounding normative political authority in democratic legitimacy. I suggest in this section that this account comports better with how we judge the presence or absence of normative authority in particular cases, however, and accordingly is to be preferred to the more prevalent view.

Consider an otherwise reasonable law or policy which is enacted by a paradigmatically illegitimate government like Nazi Germany or Baathist Iraq. If such a regime establishes a convention specifying a genuine moral obligation of its citizens – it enacts an emergency tax to help victims of a natural disaster, say, or it levies a fee for leaving more than two bags of garbage per week – then its laws and policies have normative authority for that purpose, notwithstanding

¹⁹ It is worth reiterating that law has purposes apart from solving moral coordination problems, and hence that law – even good law – does not in general have the normative authority of obligation. It is also worth stating explicitly that there are domains within which the extra-legal content of morality is highly specific, and so within which there is little or no role for social structures to specify its content.

its gross illegitimacy. The citizens must act as these policies prescribe, and for the same reasons, as they would if these were policies enacted by a legitimate regime. Failing to comply with the relevant policy, and hence with the convention it sustains, fails to show adequate concern for victims of the disaster or for the people whose environment is degraded by the excess garbage. Citizens are thus obligated to do their part, but each citizen's obligation is specific enough to guide action only when it is coordinated with the obligations of the other citizens. Since a convention is the only mechanism by which these obligations can be coordinated, and the government is the only social entity in a position to establish and sustain the relevant convention, the government's policy carries the normative force of moral obligation.²⁰ There is no need to appeal to individual authorship of the law by each citizen or collective authorship of the law by a democratic polity to explain its normative authority. The regime's manifest lack of procedural soundness and public acceptability is simply irrelevant to the question of whether individuals are obligated to comply with the laws in question.

It is important that the claims of the preceding paragraph not be misunderstood. There is nothing about Hitler's emergency relief workers or Saddam's trash collectors that entitles *them* to obedience. On the model I advocate, the locus of normative political authority lies neither in the government as a whole nor in the particular agencies and officers who carry out the policies that resolve moral coordination problems. The locus of authority lies in the conventions sustained by these policies, which resolve moral coordination problems. The policies of these agencies and

²⁰ Note that the model provides resources for responding to Simmons's anarchist critique of the natural duty of justice. Simmons claims that proponents of the natural duty of justice cannot explain why individuals are obligated to comply with the institutions of their own society, but not those of other societies; see Chapter VI of Simmons (1979). I would respond: this is because people expect individuals to comply with the institutions of their own society, but not to comply with those of other societies. These expectations sustain conventions in the society where the institution claims authority, but not elsewhere; and the convention, not the institution, is the locus of normative authority.

individuals carry the normative force of obligation only because, and only when, they are in a position to sustain a convention in a moral domain that calls for one.

There is thus some truth in the philosophical anarchists' claim that there is no such thing as a duty to obey the law for the reason that it is the law. It is not merely the authority of law that obligates individuals to comply with the relief tax or the garbage regulation; these policies have independent moral backing. The normative authority of law is thus not well understood as an authority *over* the citizens, since it is entirely borrowed from the authority of morality. But it would be misleading to suggest that extra-legal morality does all the normative work in the cases under discussion, and it would be grossly misleading to label the model I advocate as a species of anarchism. For if the agency in question changes to a new policy that also successfully resolves the relevant moral coordination problem, the content of individuals' obligations would change in accord with the new policy. This is normative political authority, if anything is.

It is important to note also that my attribution of normative authority to atrocious regimes for limited purposes should not be understood to entail that this authority cannot be justifiably violated for purposes of civil disobedience. If there is reason to believe that publicly violating the requirements of a regime as terrible as those under discussion might mobilize a broader resistance to the regime, then these violations may be justified, even within domains like emergency relief and pollution regulation that contain moral coordination problems. But when such disobedience is justified, an entire domain of moral concern – helping victims of disaster, or limiting waste – is preempted by the urgency of resisting the government. It remains true that insofar as individuals have obligations in these domains, the content of their obligations is specified by the prevailing government policy, provided that this policy is within the bounds of adequate fairness.

Conversely I would note, though I will not discuss examples at length, that the presence of legitimacy is compatible with an absence of normative political authority. Individuals have no obligation to obey the dictates of an otherwise paradigmatically legitimate regime, if it attempts to enforce conformity with a policy that lacks independent moral backing: if the regime places

gratuitous limitations on clothing, say, or on alcohol consumption.²¹ This is not a domain in which individuals face a moral coordination problem, and hence it is not a domain in which a convention can have the normative force of obligation. Therefore in this case too the procedural soundness or public acceptability of the policy is simply beside the point of whether individuals are obligated to comply with it.

These observations expose the need for a distinction not marked in the current literature on normative political authority. I earlier noted, while explaining why philosophical anarchism is not wild, the distinction between conforming to a law and obeying it. Philosophical anarchists invoke this distinction to save their position from entailing an absurd political anarchism; and I have suggested, in a similar spirit, that the laws which solve the driver problem, and indeed laws which solve decision-theoretic coordination problems more generally, produce at best obligations of conformity. If the model I propose has merit, however, then we need a further distinction, which I suggest we capture by stipulating a technical distinction between *obeying* the law and *complying with* it. An individual has an obligation to obey the law, in the relevant sense, just in case she has obligation to do as the law prescribes for the reason that the law as is normatively authoritative as such, perhaps because it is procedurally sound or because it commands each citizen's hypothetical consent. By contrast, an individual has an obligation to comply with the law just in case she has an obligation whose content is specified by a social convention which solves a moral coordination problem and is sustained by that law. Obligations to comply with the law also contrast with obligations to conform to the law, which may be based entirely on the extra-legal content of morality. Once we mark these distinctions, I concur with the anarchist position that

²¹ Perhaps some would argue here that any gratuitous limitation on individual liberty is as such a procedural unfairness, and so would deny this is a counterexample to the thesis that a law has normative authority if it is procedurally sound. I take no position on this claim about what procedural soundness consists in, but it seems clear to me the judgment that individuals are not obligated to obey such laws is driven by a judgment about individual liberty, and not by any *independent* judgment about procedural soundness.

there are no obligations to *obey* the law. But the model I propose is not a form of anarchism, for it entails in a range of paradigmatic cases that there are obligations not only to conform to the law but more strongly to comply with it.

5. Moral Coordination Problems Within Institutions

Thus far I have focused on cases where individuals have an obligation that is intelligible absent any institutional relationship with others, such as an obligation to provide aid to those in need, for I believe that these are the cases where it is clearest that the law has normative authority for the reason that it solves a moral coordination problem. But these are not the only cases where law has normative authority, and so they are not the only cases where individuals are obligated to comply with the law. As I attempt to explain in this section, moral coordination problems can also arise *within* institutional contexts.

It is important to distinguish two sorts of cases where moral coordination problems arise in institutional contexts: cases where it is obligatory for individuals to participate in the relevant institution and cases where it is not. Democratic political institutions are a paradigm of the first sort of case. Though I will not argue for the claim at length, I believe it is obligatory to establish liberal democratic political institutions whenever this is feasible. Briefly, this is because any other form of government permits objectionable relationships of subordination or domination among persons. If this is right, then individuals are obligated to create and sustain liberal democratic political arrangements, and are obligated to participate in extant liberal democratic institutions, at least to vote and advocate for the continuation of liberal democracy. No system of democratic representation is picked out in the abstract, however, as uniquely fair; and even large-scale questions of institutional design, such as whether to have a bill of rights and whether to have a robust system of judicial review, are significantly underdetermined by the abstract content of morality. As they create and reform democratic institutions, then, individuals will face moral coordination problems. Accordingly, so long as the actual institutions are adequately fair, these

institutions specify the prevailing systems of (for example) democratic representation and judicial review, and individuals are obligated to comply with these systems.

I believe many large-scale economic institutions are also obligatory both to create and to participate in. Plausible examples include a system of individual property rights, a system of contract, and relatively open markets.²² In my view these institutions are obligatory to create and to participate in because no economic system that lacks them can provide everyone with adequate economic opportunities and satisfy everyone's basic material needs.²³ There is no general moral obligation to own property, of course, nor to sign contracts or enter marketplaces. Participation in these institutions is nevertheless not optional, however, for so long as the extant institutions are adequately fair, everyone is obligated to respect the contracts and property rights of others. Just as with democratic political institutions, moreover, there are a multitude of fair systems of property and contract, and accordingly individuals are faced with moral coordination problems as they create or reform these institutions. Provided they are adequately fair, actual economic institutions thus specify what justice consists in within a particular context, in this case by specifying what counts as a just distribution of entitlements to goods.²⁴ Individuals are therefore obligated not only to conform to these institutions, but more strongly to comply with them, assuming they are adequately fair.²⁵

²² This list is not exhaustive. As a general strategy for producing such a list, I would follow the method of Kant's *Doctrine of Right*, but I would understand what Kant calls "provisional rights" in a way that Kant himself may not, as akin to Lockean natural rights. See Kant (1797) and Locke (1690).

²³ There may be historical preconditions for being justified in believing this, of course, but that does not undermine the claim.

²⁴ I intend this position to be compatible with Rawls's conception of a theory of justice as a "social process theory" where "background justice" is secured; see Rawls (1971), 83-90, and Rawls (2001), 50-57.

²⁵ In actual circumstances these institutions are not adequately fair, of course, and so it does not follow straightforwardly that individuals must comply with the policies of actual economic institutions. There is

Legitimacy Is Not Authority

In the second sort of case, a moral coordination problem arises in an institutional context in which individuals have no obligation to participate. I alluded to this sort of case earlier, with my example of penalties instructors assign for late work within educational institutions. In this example I assume both that having no penalty is unfair because it disadvantages students who submit work on time and that failing a student for turning in one assignment one day late would be unfairly draconian. Between these two extremes lies the range of late assignment policies that would be adequately fair, but no such policy is picked out uniquely as what fairness demands. Regardless of what policy prevails, however, the penalty assigned to one student needs to be the same as the penalty assigned to another for an identical infraction. These penalties thus need to be coordinated by a social convention that thereby specifies their content within bounds set by an abstract understanding of fairness. So here again the prevailing policies specify individuals' obligations and entitlements, and all who participate in the institution are obligated to comply with these policies.

By contrast with the institutions of democracy and contract, however, there is in this case no obligation to participate in the relevant institution, and so individuals may exit it rather than comply with its solutions to the moral coordination problems that arise within it. This right to exit is present regardless of whether it is obligatory for a society to *instantiate* the institution. In our historical circumstances it is obligatory to have educational institutions, but at least in the case of higher education it is not obligatory to participate in these institutions. The policies that resolve moral coordination problems within these institutions are thus obligatory for participants but not for non-participants. The same thing goes, moreover, for institutions that are optional both to

great value in securing mutual expectations of action, however, even when this is possible only on terms that are unfair, so I believe individuals will have obligations to comply with these institutions in question unless they are grossly unfair. They will also, of course, have obligations to do what they can to reform unfair institutions, even if the unfairness is not gross.

sustain and to participate in. Fair treatment in a World Cup soccer match is not settled by the abstract content of morality alone; many of FIFA's rules solve moral coordination problems for World Cup participants.

6. Legitimacy

Thus far I have argued against the common view that there is a close connection between a law or policy's legitimacy and its normative authority. I have sketched an alternative account of the normative authority of law as arising from the social solution of moral coordination problems, and I have claimed that this account fits better with our judgments about particular cases. I have also illustrated this phenomenon in cases that presuppose no institutional context (provision of aid, limits on waste), in cases that presuppose an institutional context in which individuals are obligated to participate (democratic procedures, property rights), and in cases that presuppose an institutional context individuals may permissibly opt out of (higher education, sporting events).

This disconnection of legitimacy from normative political authority is not, however, an effort to eliminate or deflate legitimacy; in this section I sketch an alternative understanding of legitimacy, one which emerges once we divorce the need for legitimacy from the need to provide an account of the normative authority of law. I begin by noting my agreement with the judgment of most liberals and deliberative democrats that to be unobjectionable, government laws and policies must be enacted by a political procedure that countenances everyone's standing. This norm of legitimacy requires that each individual be accorded due respect and concern, and entails in particular the equal standing of all mentally capable adults under law.

On this understanding, requirements of legitimacy are a sub-domain of justice and hence also of substantive moral theory. The authority of institutions derives from their ability to solve moral coordination problems by whatever means they can, however, while the legitimacy of an institution consists in these institutions being structured to prevent subordination or domination of some individuals by others. As we have seen this analysis applies in a range of contexts, but of

special significance are democratic political institutions and other institutions that are morally required.²⁶ In these cases it is obligatory to instantiate and participate in social structures; we cannot permissibly exit or abolish these structures, and so it is especially urgent that they be legitimate. We cannot do without these social structures, morally speaking. It is therefore vital that these structures not encourage or allow relationships of domination among individuals, which is to say it is vital that these structures be legitimate.

On this account requirements of legitimacy are grounded directly in the standing of these individuals as persons, not in formal features of democracy or constitutive norms of the practice of democracy. Democratic legitimacy is thus, in a sense, as a side constraint on government. But by characterizing democratic legitimacy this way I do not intend to deemphasize it. Government is required in order (among other things) to solve moral coordination problems, and I conjecture that liberal democracy is the only form of government which can safeguard everyone against domination. Meeting the norms of democratic legitimacy is thus not morally optional, even when these norms are understood as a set of side constraints on the practice of government.

Furthermore, these constraints can be demanding. Although I will not attempt to argue for the claim here, I believe this understanding of democratic legitimacy can support a wide array of constraints on democratic procedures and discourse, in keeping with those constraints typically defended by deliberative democrats. I thus understand the position I advocate as itself a version of deliberative democracy. The difference is that, on the model I advocate, these requirements are defended as a part of the substantive content of a moral theory, rather than as presuppositions of democratic discourse or preconditions for the formation of an authoritative public will.

²⁶ There are historical roots for this idea in Jean-Jacques Rousseau (1754). Among contemporary theorists, related ideas are found in Philip Pettit's conception of freedom as "non-domination"; see Pettit (1997). I concur with Charles Larmore's contention that Pettit's view is best understood as liberal, notwithstanding Pettit's protestations to the contrary; on this point see Larmore (2008), 169-195.

Legitimacy Is Not Authority

The model I advocate is also liberal, but it is a version of liberalism that calls for robust and democratic deliberation about public policy, and opposes an understanding of politics as a mere aggregation of interests or application of natural law. Although the model asserts that normative political authority just is normative moral authority, it does not assert that political theory – even the sub-domain of political theory that explicitly concerns moral matters – is well understood as a mere application of moral theory. The need for social conventions to specify individuals’ obligations and entitlements is in part a consequence of the underdetermination of these moral relations by the abstract content of morality. The processes that establish and sustain these conventions thus provide additional content to morality in particular contexts, a content not already contained in the abstract theory. This is the content I earlier labeled *what justice consists in*, as intermediate between *what justice is* (in abstraction) and *what happens to be just* (in some particular circumstances). When they engage in democratic politics, citizens must consider how best to fill in this additional content, which in turn demands they engage in a sincere, deliberative, and substantially moral discourse with one another.

The model is, furthermore, fallibilist about the content of each individual’s conception of morality. In recognition of what Rawls labeled the “burdens of judgment”, I allow that there are significant limitations to the moral matters about which humans can exercise certain judgment.²⁷ Accordingly, although the laws and policies that solve moral coordination problems borrow their authority from an abstract morality, these laws and policies are not understood as derived from more abstract moral claims that are antecedently established with certainty. Political claims may be grounded in moral claims, of course, in the sense that they may derive justification from them. But moral claims may also be grounded in political claims. There is no general justificatory priority between these two domains, though the order of explanation within a normative theory often proceeds from more abstract moral claims to more specific political ones.

²⁷ For Rawls’s account of the burdens of judgment, see Rawls (1993), 54-58, and Rawls (2001), 35-37.

Putting these observations together: in some domains morality requires specification by social conventions, but within these domains individuals' moral judgments are typically fallible. Individuals thus need to engage in moral discourse with one another when shaping laws and policies in democratic politics; and they also need the conventions that solve moral coordination problems to emerge from these political processes to have the epistemic virtues of collective deliberation.²⁸ A mere procedure for aggregation would fail to satisfy these conditions, since such a procedure would fail to characterize its subject matter as substantially moral and would fail to realize the epistemic virtues of democratic deliberation.

Notwithstanding its affinities with both liberalism and deliberative democracy, the view I have presented in this essay is novel in that it denies the pride of place typically afforded by these traditions of political philosophy to coercion and law, on the one hand, and to consent and consensus, on the other. Coercion requires a strong justification, to be sure, and law is a special social enterprise.²⁹ But law can have the normative authority of moral obligation only because it is typically the vehicle by which the conventions which solve moral coordination problems are sustained; conventions that can be sustained without legal enactment or enforcement may also be authoritative.³⁰

²⁸ Different aspects of the epistemic virtues of democratic deliberation are explicated at length in Habermas (1992), Bohman (1996), and Estlund (2008).

²⁹ Although solving moral coordination problems is an important function of law, it is not the only such function. I do not believe that it is possible to provide a unified account of the normativity of law without embedding that account in broader, more comprehensive ethical theory.

³⁰ When the law solves a moral coordination problem, there is a very close connection among the following three normative issues: the permissibility of enacting a law, the permissibility of enforcing a law, and the obligation to comply with a law. But as was observed in the previous footnote the model allows that law has functions apart from resolving moral coordination problems; it thus allows for greater slippage among these three issues when a law's enactment is justified by a different function.

Legitimacy Is Not Authority

Where liberals and deliberative democrats typically stress the coerciveness of law as the feature by virtue of which the need for legitimacy arises, I stress instead the moral inescapability of society as the relevant feature. Social conventions are morally required in order to solve moral coordination problems, so we cannot escape their reach without standing in morally objectionable relationships to others. This is why the system of conventions addressing moral coordination problems – the primary constituent of what Rawls calls the “basic structure of society” – is the appropriate locus of assessment for the legitimacy, and indeed more generally the justice, of that society.³¹ This is true regardless of the extent to which the conventions and institutions sustaining this structure are coercive.³²

The model accordingly also shifts focus away from the issue, so central to the history of democratic theory, of how an individual could be bound by a law unless she has consented to it or legislated it herself. Normative political authority is understood to arise neither from collective self-legislation by a democratic polity nor from individual self-legislation by citizens considered severally. It is understood instead as borrowed from, as *transmitting*, the authority of moral obligation: as I have tried to explain in this essay, normative political authority just is normative moral authority.

³¹ This comports with Rawls’s own statement of why the basic structure is the focus of his theory of justice; see Rawls (2001), 52-55.

³² I thus believe G. A. Cohen is mistaken when he fixes on coercion as constitutive of the basic structure; see Cohen (1997).

Works Cited

- Baron, Marcia (1987). "Kantian Ethics and Supererogation". *Journal of Philosophy* 84, pp.237-262, 1987.
- Barry, Brian (1995). *Justice as Impartiality*. Oxford: Oxford University Press, 1995.
- Benhabib, Seyla (1996). "Toward a Deliberative Model of Democratic Legitimacy". In *Democracy and Difference*. Ed. Seyla Benhabib. Princeton, New Jersey: Princeton University Press, 1986.
- Bohman, James (1996). *Public Deliberation*. Cambridge, Massachusetts: MIT Press, 1996.
- Cohen, G. A. (1997). "Where the Action Is: On the Site of Distributive Justice". *Philosophy & Public Affairs* 26, pp.3-30, 1997.
- Cohen, Joshua (1989). "Deliberation and Democratic Legitimacy". In *The Good Polity: Normative Analysis of the State*. Eds. Alan Hamlin and Philip Pettit. Oxford: Oxford University Press, 1989.
- _____ (1996). "Procedure and Substance in Democratic Theory". In *Democracy and Difference*. Ed. Seyla Benhabib. Princeton, New Jersey: Princeton University Press, 1996.
- Dworkin, Ronald (2000). *Sovereign Virtue*. Cambridge, Massachusetts: Harvard University Press, 2000.
- Edmundson, William A. (1999). *The Duty to Obey the Law*. Lanham, Maryland: Rowman & Littlefield, 1999.
- Estlund, David M. (2008). *Democratic Authority*. Princeton, New Jersey: Princeton University Press, 2008.
- Finnis, John (1980). *Natural Law and Natural Rights*. Oxford: Oxford University Press, 1980.
- _____ (1984). "The Authority of Law in the Predicament of Contemporary Social Theory". *Notre Dame Journal of Law, Ethics, and Public Policy* 1, pp.115-137, 1984.
- _____ (1989). "Law as Co-ordination". *Ratio Juris* 2, pp.97-104, 1989.

- Freeman, Samuel (2000). "Deliberative Democracy: A Sympathetic Comment". *Philosophy & Public Affairs* 29, pp.371-418, 2000.
- Fried, Charles (2006). *Modern Liberty*. New York: W. W. Norton & Company, 2006.
- Gans, Chaim (1981). "The Normativity of Law and Its Coordinative Function". *Israel Law Review* 16, pp.333-349, 1981.
- Green, Leslie (1983). "Law, Co-ordination, and the Common Good". *Oxford Journal of Legal Studies* 3, pp.299-324, 1983.
- Gutmann, Amy and Dennis Thompson (1996). *Democracy and Disagreement*. Cambridge, Massachusetts: Harvard University Press, 1996.
- Habermas, Jürgen (1992). *Between Facts and Norms*. Trans. William Rehg. Cambridge, Massachusetts: MIT Press, 1996.
- Hart, H. L. A. (1955). "Are There Any Natural Rights?". *Philosophical Review* 64, pp.175-191, 1955.
- _____ (1958). "Legal and Moral Obligation". In *Essays in Moral Philosophy*. Ed. A. I. Melden. Seattle, Washington: University of Washington Press, 1958.
- _____ (1961). *The Concept of Law*. Oxford: Oxford University Press, 1961.
- Hill, Thomas E., Jr. (1971). "Kant on Imperfect Duty and Supererogation". *Kant-Studien* 72, pp.55-76, 1971.
- Hobbes, Thomas (1651). *Leviathan*. Public domain material found at <http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-contents.html>.
- Kant, Immanuel (1785). *Groundwork of the Metaphysics of Morals*. Trans. and Ed. Mary Gregor. Cambridge: Cambridge University Press, 1997.
- _____ (1797). *The Metaphysics of Morals*. Trans. and Ed. Mary Gregor. Cambridge: Cambridge University Press, 1996.
- Laden, Anthony Simon (2001). *Reasonably Radical*. Ithaca, New York: Cornell University Press, 2001.

- Larmore, Charles (1987). *Patterns of Moral Complexity*. Cambridge: Cambridge University Press, 1987.
- _____ (2008). *The Autonomy of Morality*. Cambridge: Cambridge University Press, 2008.
- Lewis, David (1969). *Convention: A Philosophical Study*. Cambridge, Massachusetts: Harvard University Press, 1969.
- Locke, John (1690). *Second Treatise of Government*. Public domain material found at <http://www.constitution.org/jl/2ndtreat.htm>.
- Mill, John Stuart (1859). *On Liberty*. Public domain material found at www.bartleby.com/130/.
- Murphy, Liam (2000). *Moral Demands in Nonideal Theory*. Oxford: Oxford University Press, 2000.
- Nagel, Thomas (1991). *Equality and Partiality*. Oxford: Oxford University Press, 1991.
- O'Neill, Onora (1996). *Towards Justice and Virtue*. Cambridge: Cambridge University Press, 1996.
- Pettit, Philip (1997). *Republicanism: A Theory of Freedom and Government*. Oxford: Oxford University Press, 1997.
- Plato (c.360 B.C.E.). *Crito*. Trans. Benjamin Jowett. Public domain material found at <http://classics.mit.edu/Plato/crito.html>.
- Rawls, John (1964). "Legal Obligation and the Duty of Fair Play". In *Collected Papers*. Ed. Samuel Freeman. Cambridge, Massachusetts: Harvard University Press, 1999.
- _____ (1971). *A Theory of Justice*. Cambridge, Massachusetts: Harvard University Press, 1971.
- _____ (1993). *Political Liberalism*. New York: Columbia University Press, 1996.
- _____ (2001). *Justice as Fairness: A Restatement*. Ed. Erin Kelly. Cambridge, Massachusetts: Harvard University Press, 2001.
- Raz, Joseph (1984). "The Obligation to Obey: Revision and Tradition". *Notre Dame Journal of Law, Ethics, and Public Policy* 1, pp.139-155, 1984.

- _____ (1986). *The Morality of Freedom*. Oxford: Oxford University Press, 1986.
- Rehg, William (1994). *Insight and Solidarity*. Berkeley, California: University of California Press, 2004.
- Richardson, Henry (2002). *Democratic Autonomy*. Oxford: Oxford University Press, 2002.
- Ripstein, Arthur (2004). "Authority and Coercion". *Philosophy & Public Affairs* 32, pp.2-35, 2004.
- Rousseau, Jean-Jacques (1754). *Discourse on Inequality*. Trans. G. D. H. Cole. Public domain material found at <http://www.constitution.org/jjr/ineq.htm>.
- _____ (1762). *The Social Contract*. Trans. G. D. H. Cole. Public domain material found at <http://www.constitution.org/jjr/socon.htm>.
- Shiffrin, Seana (1991). "Moral Autonomy and Agent-Centred Options". *Analysis* 51, pp.244-254, 1991.
- Shue, Henry (1983). "The Burdens of Justice". *Journal of Philosophy* 80, pp.600-608, 1983.
- _____ (1988). "Mediating Duties". *Ethics* 98, pp.687-704, 1988.
- Simmons, A. John (1979). *Moral Principles and Political Obligations*. Princeton, New Jersey: Princeton University Press, 1979.
- _____ (1999). "Justification and Legitimacy". *Ethics* 109, pp.739-771, 1999.
- Singer, Peter (1972). "Famine, Affluence, and Morality". *Philosophy & Public Affairs* 1, pp.29-43, 1972.
- Waldron, Jeremy (1993). *Liberal Rights*. Cambridge: Cambridge University Press, 1993.
- _____ (1999). *The Dignity of Legislation*. Cambridge: Cambridge University Press, 1999.
- Wellman, Christopher Heath and A. John Simmons (2005). *Is There a Duty to Obey the Law?* Cambridge: Cambridge University Press, 2005.
- Wolff, Robert Paul (1970). *In Defense of Anarchism*. New York: Harper & Row, 1970.