

Challenging Authority

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When in that house M.Ps. divide,
 If they've a brain and cerebellum too,
 They've got to leave that brain outside
 And vote just as their leaders tell 'em to.

But then the prospect of a lot
 Of dull M.Ps. in close proximity,
 A-thinking for themselves, is what
 No man can face with equanimity.

W.S. Gilbert, *Iolanthe*, Act II

The inquiry into the nature of legal authority and the foundation of legal obligation has enjoyed a recent revival that has made it one of the most seductive topics in contemporary jurisprudence.¹ In large part its allure derives from

1. For an appreciation of its current popularity, see generally G. CHRISTIE, *LAW, NORMS AND AUTHORITY* 83-146 (1982); R. FLATHMAN, *THE PRACTICE OF POLITICAL AUTHORITY* (1980); L. GREEN, *THE AUTHORITY OF THE STATE* (1988); K. GREENAWALT, *CONFLICTS OF LAW AND MORALITY* (1987); H.L.A. HART, *ESSAYS ON BENTHAM* 127-61, 220-68 (1982); M. PERRY, *MORALITY, POLITICS AND LAW* 105-20 (1988); J. RAZ, *THE AUTHORITY OF LAW* 3-33 (1979) [hereinafter J. RAZ, *AUTHORITY*]; J. RAZ, *THE MORALITY OF FREEDOM* 23-109 (1986) [hereinafter J. RAZ, *MORALITY*]; J. RAZ, *PRACTICAL REASON AND NORMS* (2d ed. 1990) [hereinafter J. RAZ, *PRACTICAL REASON*]; A.J. SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* (1979); P. SOPER, *A THEORY OF LAW* (1984); A. WOOZLEY, *LAW AND OBEDIENCE* (1979); Lyons, *Soper's Moral Conception of Law*, 98 *ETHICS* 158 (1987); Moore, *Authority, Law, and Razian Reasons*, 62 *S. CAL. L. REV.* 827 (1989); Perry, *Second Order Reasons, Uncertainty and Legal Theory*, 62 *S. CAL. L. REV.* 913 (1989); Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 *S. CAL. L. REV.* 995 (1989) [hereinafter Regan, *Authority and Value*]; Regan, *Law's Halo*, in *PHILOSOPHY AND LAW* 15 (J. Coleman & E. Paul eds. 1987) [hereinafter Regan, *Law's Halo*]; Sartorius, *Political Authority and Political Obligation*, 67 *VA. L. REV.* 3 (1981); Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 *YALE L.J.* 950 (1973); Soper, *Legal Theory and the Claim of Authority*, 18 *PHIL. & PUB. AFF.* 209 (1989); Soper, *The Moral Value of Law*, 84 *MICH. L. REV.* 63 (1985); Tuck,

the fact that the traditional concept of the authority of law—that of practical authority—according to which governmental institutions are thought to enact laws which by themselves bind citizens to obedience, appears irresolvably paradoxical. For, crudely put, it appears to require an abandonment of reason. If it is a canon of practical rationality that we act on the balance of reasons available to us,² and if a government only has authority if it can command us to act in ways that may not comport with the balance of reasons as we see it, then civic obedience violates a central principle of rationality.³ The temptation to grapple with the horns of this dilemma, to have one's philosophical cake and eat it too, has prompted a legacy of attempts to dissolve the paradox of practical authority.⁴ But despite the substantial and sophisticated attention that it has received, the paradox remains very much intact. And as such, a new theory of the law's authority is demanded.

In what follows I propose to examine the foundation of legal authority. In Part I I lay out, in some detail, the traditional theory of the law's authority as well as the persistent dilemma with which it is plagued. I then examine and ultimately challenge the most persuasive contemporary attempt to defeat that dilemma. I conclude that the traditional theory of legal authority is fundamentally incoherent, and thus, that our obligation to obey the law, if we have one, must be based upon an alternative account of the authority of the state. In Part II I take up such an alternative theory of legal authority, that of influential authority or "as if" practical authority. I argue that while this theory is conceptually coherent, it fails to provide a foundation for obligations that are distinctively legal. In Part III I examine a third theory of legal authority under which laws must be thought to possess theoretical authority if they possess any authority at all. I have begun a full defense of this third theory of legal authority elsewhere.⁵ My project in Part III is thus the conceptually preliminary and philosophically more modest one of establishing that theory's coherence—of demonstrating that a defense of the concept of theoretical authority escapes the dilemma that plagues the traditional theory of legal authority and thus provides a promising account of the source and content of our obligations to comply with the law.

Why is Authority Such a Problem?, in PHILOSOPHY, POLITICS AND SOCIETY 194 (4th series 1972).

2. For defenses of the commonly held view that reason requires one to act on the balance of the reasons of which one is aware, see J. RAZ, PRACTICAL REASON, *supra* note 1, at 36; Davidson, *How is Weakness of the Will Possible?*, in MORAL CONCEPTS 93 (J. Feinberg ed. 1969).

3. This paradox has been given a host of formulations. See, e.g., C. FRIEDRICH, TRADITION AND AUTHORITY 45 (1972); W. GODWIN, ENQUIRY CONCERNING POLITICAL JUSTICE 90 (K. Codell Carter ed. 1971); L. GREEN, *supra* note 1, at 23-26; J. RAZ, AUTHORITY, *supra* note 1, at 3; R. WOLFF, IN DEFENSE OF ANARCHISM 18-19 (1970); Friedrich, *Authority, Reason, and Discretion*, in NOMOS I: AUTHORITY 28, 28-29 (C. Friedrich ed. 1958); Hendel, *An Exploration of the Nature of Authority*, in NOMOS I: AUTHORITY 3, 4-6 (C. Friedrich ed. 1958); Moore, *supra* note 1, at 830-31.

4. See, e.g., C. FRIEDRICH, *supra* note 3, at 45-56; L. GREEN, *supra* note 1, at 29-42; J. RAZ, AUTHORITY, *supra* note 1; J. RAZ, MORALITY, *supra* note 1; Friedrich, *supra* note 3; Wolff, *In Defense of Anarchism*, in IS LAW DEAD? 110, 120-28 (E. Rostow ed. 1971).

5. See Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945, 1007-24 (1990).

At stake throughout this discussion is the very concept of our duty to obey the law. If I am right and the theories of practical and influential authority fail to provide a foundation for the law's authority, then it follows that legal obligation, as it has been traditionally conceived, is an illusion. If laws are to be more than words, we must search for a new reason to think them important—a reason that relies on something other than the time-honored claim that they obligate. Such a reason is available, but it will surely require that contemporary jurisprudence undergo an unprecedented facelift.

I. PRACTICAL AUTHORITY: THE TRADITIONAL THEORY OF LEGAL AUTHORITY

Let us begin with a simple thought experiment motivated by an experience that we no doubt have all had. Imagine that one has pulled up to a red traffic light at 2:00 a.m. on a deserted boulevard.⁶ The night is clear, visibility is perfect, and there is not a moving object in sight. And yet one simply sits there, staring at a mechanical device that lacks the good grace to be green or flashing yellow. Why does one feel compelled to sit there? Why not take its redness to be bad advice, or to be an ill-conceived request, and so continue on one's way devoid of the residual guilt which seems to plague us when we give in to such a temptation? The answer seems to be that a red light appears to do more than advise or request: it functions as a command, and as such, it seems to bar us from engaging in the sort of deliberation and action that is consistent with the receipt of a piece of advice or a request.

That the laws of a state, including the directive of the simple traffic signal, have the power to command, as opposed to merely advise or request, has been the cornerstone of the traditional theory of legal authority.⁷ Thus the question that has already taken a toll on so many legal and political theorists is just what the nature of a command is and how a command differs from a piece of advice or a request. In the interests of exacting an answer to this question, let us begin by examining the simpler cases of advising and requesting; we will then be in a better position to understand the complex nature claimed on behalf of laws.

6. The same example, and ones closely analogous to it, have been invoked by Raz in J. RAZ, *MORALITY*, *supra* note 1, at 16; Regan, *Law's Halo*, *supra* note 1, at 18-19.

7. "Authority yields (authorities issue) commands to be obeyed or rules to be subscribed to, not statements to be believed. . . . This . . . theory of authority can fairly be said to be dominant at the present time." R. FLATHMAN, *supra* note 1, at 14-16. "Orders and commands are among the expressions typical of practical authority. Only those who claim [practical] authority can command." J. RAZ, *MORALITY*, *supra* note 1, at 37. "[T]hat one is entitled to command entails that one has authority over the addressee of the command." J. RAZ, *AUTHORITY*, *supra* note 1, at 15.

A. *Three Models of Authority*

1. *Theoretical Authority*

One in a position to give good advice concerning how another ought to act in certain circumstances possesses theoretical authority, at least over some range of deontic propositions. The utterances of a theoretical authority provide reasons for belief, not reasons for action. They function, that is, evidentially. When a theoretical authority makes a claim concerning right action, its utterance provides a reason to think that there are *other* reasons (besides the sheer fact that the authority has spoken) to act as recommended. The prescriptions of such a theoretical authority are thus heuristic guides to detecting the existence and determining the probable truth of antecedently existing reasons for action.⁸ If, for example, one is advised by a reliable theoretical authority to take one's umbrella, one has every reason to think that there are good reasons to do so, such as the fact that it is raining, that an umbrella will prevent one from getting wet, and so forth. The effect of the advice is to weight as more probable the likelihood that such other reasons exist. But it is these other reasons, and not the advice itself, that serve in one's practical reasoning concerning the content of desirable action.

That a reliable theoretical authority has issued a piece of advice thus does not itself serve as a new reason in one's practical deliberations concerning how one ought to act: rather, it merely functions to make more probable the truth of antecedently existing reasons for action which do function as premises within one's practical reasoning. Simplistically, the advice to take one's umbrella, if given by one possessed of theoretical authority concerning the weather, functions as new evidence for the truth of the belief that without it, one will get wet. When one couples this belief with a desire not to get wet, one has a sufficient reason to take one's umbrella.⁹ The fact that one was advised to do so by a reliably situated theoretical authority does not enter as a further reason

8. For similar analyses of the dynamics of theoretical authority, see R. FLATHMAN, *supra* note 1, at 16-17; L. GREEN, *supra* note 1, at 26-29, 108-09; H.L.A. HART, *supra* note 1, at 262; J. RAZ, *AUTHORITY*, *supra* note 1, at 13-14; J. RAZ, *MORALITY*, *supra* note 1, at 29-31; DeGeorge, *The Nature and Function of Epistemic Authority*, in *AUTHORITY: A PHILOSOPHICAL ANALYSIS* 76 (R.B. Harris ed. 1976); Hurd, *supra* note 5, at 1007-10.

9. Individuals may well function as theoretical authorities concerning inner mental states as well as events in the world. Our friends often claim to know us "better" than we know ourselves, and to the extent that they are right, they may function as theoretical authorities about our desires, preferences, and emotions. Similarly, the claim of a psychotherapist is to an authority concerning the mental states of her patients that is solely theoretical. Were one to take seriously a therapist's claim that one's behavior towards one's parents is in fact a result of latent anger, one would be taking that therapist as a theoretical authority about one's unconscious emotions. Thus, the therapist's advice concerning how best to deal with one's parents in the future would function not as an independent reason to change one's behavior towards one's parents, but as a reason to think that there are reasons to change one's behavior which existed antecedent to that advice. When coupled with a desire to rid oneself of one's unconscious hostilities, these antecedently existing reasons (to which the advice is a mere heuristic) provide one with sufficient reasons to change one's behavior.

to so act; it merely gives one a better reason to think that the premises of one's practical reasoning which express one's reasons for action are true.

The utterances of a theoretical authority thus leave untouched the balance of reasons that one antecedently has to perform or not to perform a certain action. Prior to another's suggesting the use of an umbrella, there exist all the reasons one will ever have to take an umbrella. The advice of a reliable theoretical authority concerning what one ought to do merely makes it the case that those reasons more probably pertain. It illuminates, that is, antecedently existing reasons to act, but it does not contribute a new reason to act. The basis of theoretical authority is thus *content-dependent*.¹⁰ One is a theoretical authority if and only if one is capable of determining the content of at least some of the reasons that another has for acting. This can be formulated more rigorously as follows: *X* has theoretical authority for *Y* if and only if as a result of *X*'s stating that *Y* ought to ϕ , *Y* has a reason to believe that there are (content-dependent) reasons that *Y* ought to ϕ .

If a theoretical authority fails to affect the balance of reasons for or against an action, it immediately follows that the utterances of a theoretical authority fail to obligate us. What may bind us is the antecedently existing balance of reasons which the advice of a reliably situated theoretical authority merely evidences. While it may well be irrational to disregard the evidence for that balance provided by a reliable theoretical authority, and while the dictates of rationality may well bind us, the mere issuance of advice in no way obligates us. Put another way, if we are bound to act as we have been advised to act by a reliable theoretical authority, our being bound is not a result of the fact that the theoretical authority has issued advice, but a result of the fact that rationality requires that we act on a balance of reasons of which the advice is mere evidence.

2. Influential Authority

Let us now turn to the intermediate case of a request. There appears a genuine and important difference between the effect of a piece of advice and the effect of a request. For unlike advice, a request purports to provide one with a new reason for action. One who makes a request implicitly claims to possess what might be called "influential authority." When one requests that a friend administer aid one intends not only to alert that friend to one's need for aid, a need which may be perfectly apparent, but to influence that friend's actions

10. The notion of a content-dependent reason referred to here is a theoretical offspring of the notion of a content-independent reason. See *infra* text accompanying note 11. Content-dependent reasons made their appearance in J. RAZ, *AUTHORITY*, *supra* note 1, at 297, and J. RAZ, *MORALITY*, *supra* note 1, at 41. Content-independent reasons were first explicated by H.L.A. Hart, and later put to more rigorous use by Joseph Raz. See H.L.A. HART, *supra* note 1, at 254-55; J. RAZ, *MORALITY*, *supra* note 1, at 35-37; Raz, *Voluntary Obligations and Normative Powers*, 46 *ARISTOTELIAN SOC'Y PROC.* 79, 95-98 (Supp. 1972).

by providing her with a new reason for providing assistance, namely, that one has requested it. In addition to all the reasons that one's friend had to provide assistance prior to one's request, such as reasons stemming from considerations of distributive justice, good samaritan obligations, principles of friendship, etc., one's request purports to provide her with a new reason to act. Such a reason is *content-independent*. It stems from the very fact *that one has issued a request*. As Joseph Raz explains:

A reason is content-independent if there is no direct connection between the reason and the action for which it is a reason. The reason is in the apparently 'extraneous' fact that someone . . . has said so, and within certain limits his saying so would be reason for any number of actions, including (in typical cases) for contradictory ones.¹¹

Were the friend to ask why she should comply with what is asked, it would not be inappropriate to say, "Because I asked you to," and to expect that this should be added to the list of reasons that she otherwise has to render assistance.¹²

A request thus does in fact alter the balance of reasons that one has to act. Prior to a request one has one less reason to do the act in question. The very fact that a particular course of action has been requested is thus itself an additional premise in one's practical inferences concerning what one ought to do. Yet insofar as the request functions as just one more reason to act in a particular manner, it can be overridden by other reasons to act in a contrary manner. One's friend might well conclude that, while there are reasons for providing one with aid, one of which is the fact that aid has been requested, there are nevertheless countervailing considerations which tip the balance of reasons for action in favor of a refusal to help. Thus, while a request is to be distinguished from a piece of good advice in that it gives us a new reason for action, not just evidence for antecedently existing reasons for action, it, like advice, does not by itself obligate. It does not, that is, by itself override reasons that we might have to refuse compliance with the request. If we are obligated to act, it is by virtue of the fact that the balance of reasons, of which the fact that there has been a request to act is but one, favors action. One can thus define the conditions of influential authority as follows: *X* has influential authority over *Y* if and only if as a result of *X*'s trying to get *Y* to ϕ , *Y* has a new (content-independent) reason to ϕ .

11. J. RAZ, *MORALITY*, *supra* note 1, at 35.

12. *See also infra* note 55 (theoretical authority cannot explain our response to beggars).

3. *Practical Authority*

Let us finally turn to the quite different case of a command. One who utters a command certainly purports to give another a new reason for action. The mother who instructs her son to take his umbrella intends her son to take the very fact that she has issued such a command as itself a reason for using an umbrella. If the mother is asked by her son why he must carry the despised object, the mother can well be expected to invoke the time-honored reason, "Because I told you to," and to anticipate that this very fact will be a reason above and beyond the ones that the child antecedently had to take his umbrella. Yet the "Because I told you to" purports to give more than just a new reason for action. For the mother does not intend the son to add her utterance to the reasons that he antecedently had to carry his umbrella, and to weigh these against what he takes to be very good reasons for abandoning the object. Rather, the mother's "Because I told you to" purports to give the son, by itself, a normatively sufficient reason to take his umbrella: it implicitly claims, that is, to bar action on his part in accordance with the reasons that he previously possessed not to take his umbrella. The very fact that some course of action has been commanded is thus thought to function, by itself, as a sufficient reason to act as commanded: it is thought, that is, to render impotent the reasons that one had antecedently to avoid the action commanded.¹³

One who issues a command thus purports to be a practical authority. The reasons for action provided by a practical authority are thought to be what Joseph Raz has called "protected reasons": they are both *content-independent* and *exclusionary*.¹⁴ As a result of being commanded, one is thought to have both a new reason to act as commanded *and* a reason to refrain from acting upon the reasons that one previously had not to act as commanded.¹⁵ If one

13. "[T]he commander characteristically intends his hearer to take the commander's will instead of his own as a guide to action and so to take it in place of any deliberation or reasoning of his own: the expression of a commander's will . . . is intended to preclude or cut off any independent deliberation by the hearer of the merits pro and con of doing the act." H.L.A. HART, *supra* note 1, at 253. It was this theory of authority that was famously appealed to by Alfred Lord Tennyson in *The Charge of the Light Brigade* when he wrote: "Theirs not to reason why/ Theirs but to do and die." Tennyson, *The Charge of the Light Brigade*, in *THE POETIC AND DRAMATIC WORKS OF ALFRED LORD TENNYSON* 226 (W. Rolfe ed. 1898).

14. J. RAZ, *AUTHORITY*, *supra* note 1, at 18. While this terminology is distinctive to Raz and his followers, the notion that certain principles and rules prohibit us from giving weight to certain types of reasons for action is commonly invoked in anti-utilitarian moral philosophy. See, e.g., R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 28-35 (1974) (discussing rights as "side-constraints"); J. RAWLS, *A THEORY OF JUSTICE* 150-61 (1971) (arguing that benefits of slavery are not to be considered in setting up just society).

15. An institution is thought to possess practical authority if it can generate or alter protected reasons for action. Raz explicates three ways in which a practical authority is thought to have the "normative power" to change protected reasons. First, the authority can issue an exclusionary instruction which provides the addressee with a new reason to act as instructed, and a reason for not acting on the reasons for not acting as instructed. Second, the authority can issue "cancelling permissions" which grant the addressee permission to act on the basis of reasons which had hitherto been excluded by an exclusionary instruction. Finally, an authority can confer power to issue both exclusionary instructions and cancelling permissions on another, and so indirectly alter the protected reasons for action possessed by those whom the person possessed of such delegated normative power addresses. See J. RAZ, *AUTHORITY*, *supra* note 1, at 18.

has no (content-dependent) reasons to act as commanded prior to receiving the command, then the very fact that the command is issued provides one with the only reason that one has to so act. But since the command further bars one from acting on the basis of the reasons that one has to avoid the act commanded, one is left only with this singular (content-independent) reason for action. Thus the mother's "Because I told you to" may be the sole reason that the child has to take his umbrella. It nevertheless displaces the many other reasons that he has not to take his umbrella, for it bars him from weighing those many reasons against the sole reason for action provided by the fact of the mother's command. The child is thus "forced" to comply with his mother's command. Such are the dynamics of obligation. These dynamics may be defined as follows: *X* has practical authority over *Y* if and only if as a result of *X*'s stating "Let *Y* ϕ ," *Y* has a new and sufficient (content-independent) reason to ϕ .

We are now in a position to see clearly the distinction between advice, requests, and commands. One who issues advice does not tip the balance in favor of acting as advised by adding a new reason for action or by excluding deliberation or action based upon countervailing reasons. One merely claims to function as a theoretical authority providing *content-dependent reasons for belief* concerning the existence or weight of reasons antecedently existing for or against a certain course of action. One who requests another's performance of some particular action, however, claims to possess influential authority—the power to tip the balance of reasons in favor of that action by providing a new reason to so act, but not by barring action in accordance with the genuine merits as calculated by the individual to whom the request is made. The very fact that one makes a request gives another a *content-independent reason for action*, but this is to be added to the antecedently existing content-dependent reasons for action and to be but one factor in the other's practical deliberations. Yet when one issues a command, one both purports to alter another's reasons in favor of a particular course of action and to exclude action in accordance with the reasons against that course of action. One claims, that is, to possess practical authority by giving both a *content-independent reason for action* and an *exclusionary reason* for acting in accordance with that content-independent reason, and not in accordance with the reasons against that action.

Legal theorists have long thought that the authority of the state—of legislative institutions, regulatory agencies, and courts—is of the practical sort.¹⁶ When one sits at a traffic light in the middle of the night despite the blatant

16. As Flathman has written:

From anarchist opponents of authority such as William Godwin and Robert Paul Wolff through moderate supporters such as John Rawls and Joseph Raz and on to enthusiasts such as Hobbes, Hannah Arendt, and Michael Oakeshott, a considerable chorus of students have echoed the refrain that the directives that are standard and salient features of practices of authority are to be obeyed by [those over whom authority is exercised] *irrespective of [those individuals'] judgments of their merits.*

R. FLATHMAN, *supra* note 1, at 90 (emphasis added).

fact that it would be safe to cross its path, one is appropriately thought to take its color as both a (content-independent) reason to sit there and an (exclusionary) reason not to act on the overwhelming reasons to run the light. When one receives an adverse judgment in a court of law requiring payment of compensation to an injured plaintiff the fact that the court has issued such a judgment is itself thought both to be a (content-independent) reason to pay compensation and an (exclusionary) reason to refrain from acting upon the reasons that one presented during the trial for not paying such compensation. And when the legislature enacts a particular statutory provision barring the prosecutorial use of character evidence to prove a defendant's criminal conduct, a judge is thought to have both a new (content-independent) reason to exclude such evidence and an (exclusionary) reason to refrain from second-guessing the wisdom of the legislature and admitting such evidence on the ground that the legislature's decision is thought by the judge to be mistaken.

Yet despite the plausibility given by common practice to the traditional notion that governmental institutions possess practical authority, it is not at all clear that obeying traffic signals, paying compensation, and barring particular sorts of testimony is rational if done *because* a citizen or official has been so instructed. In short, it is not at all clear that the contemporary concept of legal obligation is coherent. For it appears that to act *because one has been told to*, and not because the balance of reasons favors such action, is definitional of irrationality. How could it ever be rational to act contrary to the balance of reasons as one sees it solely because one has been told to do so?¹⁷ Such is the paradox of practical authority.

B. *The Paradox of Practical Authority*

1. *The Paradox as Illusion*

Having now equipped ourselves with the elementary theoretical machinery with which to understand the dilemma confronting one who posits practical authority as the foundation of legal authority, we are now in a position to examine what has become perhaps the most celebrated of attempts to explain both the source of and the solution to that paradox. Joseph Raz has argued that one who thinks the concept of practical authority incoherent is fundamentally

17. Anarchists have often put this quandary in slightly different terms. For example, on Robert Paul Wolff's formulation, the principle of autonomy, which he took to be of supreme moral value, requires action on the basis of one's own judgment on all moral questions. See R. WOLFF, *supra* note 3, at 12-14. Since the exercise of practical authority may require action contrary to one's own judgment, it may require the forfeiture of one's moral autonomy. On Wolff's account, then, the dilemma of practical authority arises from its fundamental immorality, not, as I have cast it, from its fundamental irrationality. See *generally id.*; Wolff, *supra* note 4. Since, however, Wolff's notion of autonomous judgment is parasitic upon the principles of practical rationality, the dilemma confronting the defender of practical authority is ultimately better reduced to a conceptual one.

confused about the dynamics of practical reasoning.¹⁸ His claim is that a sophisticated view of what it is to engage in practical deliberation renders the paradox of practical authority merely apparent. Raz's appeal to a so-called sophisticated view of practical reasoning has been hailed by many contemporary legal theorists as the definitive means of escaping, once and for all, the difficulties that have long been thought to plague the traditional view of legal authority and obligation.¹⁹ As Leslie Green has said, "Joseph Raz has offered an explanation of [legal authority] which is both elegant and substantially correct. According to him, the dilemma of authority is an illusion created by an oversimple view of practical reasoning in general."²⁰

Those in the Razian tradition agree that if what ought to be done, all things considered, were identical to what ought to be done on the balance of *first-order* reasons, then the demands of a practical authority would indeed violate the principles of rationality. For the demands of authority would then require that we refrain from acting on precisely those reasons which must be acted upon in order for a particular course of action to be rationally justified.²¹ Razian defenders insist that reason never justifies abandoning one's conclusions concerning what ought to be done, *all things considered*. They argue, however, that what ought to be done, all things considered, is not identical to what ought to be done on the balance of first-order reasons. Decisions concerning what ought to be done, all things considered, involve complex deliberations that include an appeal both to first-order and to second-order reasons for action. For it is often the case that reason itself requires that we act contrary to the balance of first-order reasons—that we act on the basis of second-order reasons which prevent us from considering or acting upon the balance of first-order reasons.

First-order reasons for action are, on the Razian view, both those content-dependent reasons that determine the merits of a particular action, of which the utterances of a theoretical authority are mere evidence, and those content-independent reasons for action which are given by the performative utterances of one who possesses influential authority (e.g., requests, commands,

18. See J. RAZ, PRACTICAL REASON, *supra* note 1, at 65-84.

19. For some appreciation of the widespread and explicit endorsement of the Razian strategy, see L. GREEN, *supra* note 1, at 36-37 ("The solution I propose is one whose elements appear first in Hobbes and which is elaborated with greater sophistication in the writings of modern jurists including H.L.A. Hart and Joseph Raz."); H.L.A. HART, *supra* note 1, at 262 ("I certainly think that a shift from the notion of a command to the notion of a content-independent peremptory reason for action is needed to . . . explain the 'normativity' of law."); N. MACCORMICK, LEGAL RIGHT AND SOCIAL DEMOCRACY 232 (1982) ("My argument runs parallel to some of the points made by Joseph Raz in the concluding sections of his *Practical Reason and Norms*." (footnote omitted)); Regan, *Law's Halo*, *supra* note 1, at 15 n.2 ("Indeed, from the point of view of the reader who likes his questions and answers writ large, it may seem I have little to say that Raz has not already said."); cf. J. LUCAS, THE PRINCIPLES OF POLITICS 16 (1966) (describing similar conception of authority). *But see* R. FLATHMAN, *supra* note 1, at 112 ("[A]n analysis of such [authoritative] practices must reject Raz's proposed distinction."); Moore, *supra* note 1, at 873 ("Raz's account of our obligations is morally inferior to the alternative (first-order only) conception.")

20. L. GREEN, *supra* note 1, at 37-38 (footnote omitted).

21. See J. RAZ, AUTHORITY, *supra* note 1, at 27.

promises). Second-order reasons, on the other hand, are those reasons that we have either to act on the basis of certain first-order reasons or to refrain from acting on the basis of certain first-order reasons. Those in the latter category of second-order reasons were called above "exclusionary reasons." The reasons given by a practical authority—those previously called "protected reasons"—function, on the Razian view, at both the first-order and second-order levels: they function both as content-independent reasons for action, to be added to the balance of first-order reasons which bear upon the wisdom of a particular action, and as exclusionary reasons which bar action based upon the first-order reasons that one antecedently had not to engage in the commanded conduct.²²

According to those within the Razian camp, one who thinks that the exercise of practical authority is inconsistent with rational choice-making wrongly assumes that there are no valid protected reasons for action—that is, that one is never justified in not doing what ought to be done on the balance of first-order reasons. One wrongly assumes, that is, that there are no second-order exclusionary reasons for action. If there is an example which makes intelligible the manner in which one might refuse to act on the balance of first-order reasons for action, then one must admit the existence and force of second-order exclusionary reasons. And with such an admission the dilemma of practical authority is rendered illusory and the traditional theory of legal obligation is vindicated.

2. *The Paradox as Reality*

Two related problems confront this account of how a complex theory of practical reasoning dissolves the paradox of practical authority. The first is that it is extremely difficult to generate an example of a case in which some principle clearly functions in a manner consistent with the canons of rationality as a protected reason that excludes one from acting on the first-order balance of reasons. The second and more significant problem provides the reason that it is difficult to construct such an example: namely, the concept of a protected reason is conceptually incoherent, and, as such, the Razian solution to the dilemma of practical authority is no solution at all.

22. This account of the reasons provided by a practical authority captures commonly held views concerning the role of rules in practical reasoning. As G.J. Warnock states, "What the rule does, in fact, is to *exclude* from practical consideration the particular merits of particular cases, by specifying in advance what *is to* be done, whatever the circumstances of particular cases may be." G. WARNOCK, *THE OBJECT OF MORALITY* 65 (1971) (emphasis in original).

a. *The Problem of Examples*

Consider the example that both Raz and Green employ to explicate the exclusionary feature of the protected reasons for action which laws are thought to provide.²³ Suppose that one has had a long and strenuous day and that one is both physically and psychologically exhausted. Suppose further that one is presented with a business proposition which must be considered by the end of the evening and which promises both significant benefits and a worrisome amount of risk. Were one to conclude that even if one tried to compute the balance of reasons in favor of accepting the proposition one could not be sure that one would reach an accurate conclusion, then one has a (second-order) reason to refrain from acting on the balance of (first-order) reasons as one sees it. That is, the fact that one is tired is a reason to turn down the business proposition—to refrain from action based on the reasons to accept it. Even if on the balance of (first-order) reasons as one then computes it one ought to accept the business proposition, the second-order principle dictating that one ought not to make business decisions when overly tired, makes it rational, all things considered, to refuse to act on that balance.

Despite its intuitive plausibility, this example is an unfortunate one. What the Razian theorist needs to show is that there exists a plausible case in which one has a reason not to act on what one takes to be the balance of first-order reasons. But that one is tired is not a reason to refrain from acting on the balance of first-order reasons. Indeed it is not a reason for *action* at all. Rather, when one judges oneself incompetent to make wise decisions, one has a reason for *belief*, one functions, that is, as a theoretical authority about the likely truth of one's conclusions concerning the balance of first-order reasons for and against a particular action. That one is tired is mere evidence of the fact that the premises which one is employing in one's practical inferences may well be false. Exhaustion gives one a reason to believe that there are *other* reasons for not engaging in the business deal that, if apparent, would show the deal to be a poor one. Insofar as exhaustion makes it probable, or at least possible, that the balance of reasons for action as one sees it is inaccurate, one has a reason to think that there are other reasons for action which are at the present elusive, but which, if added to the balance, would result in one's finding the business deal an unwise proposition. Thus, knowledge of a condition of incompetence merely makes one a theoretical authority about the truth of inferences involving complex sets of premises. As such, it does not purport to preclude one's deliberation about or action on the first-order reasons for disregarding one's incompetence. While the only rational course of conduct may well be to refrain from entering a complex contract, this course of conduct is dictated by the

23. L. GREEN, *supra* note 1, at 38; Raz, *Reasons for Action, Decisions and Norms*, in PRACTICAL REASONING 128, 130 (J. Raz ed. 1978).

balance of first-order content-dependent reasons. One's condition of incompetence is but evidence of the fact that in working out these content-dependent reasons, one may not be employing true premises.²⁴

To take an example that seemingly better captures the exclusionary feature of protected reasons that can purportedly be defended with a complex theory of practical reasoning, consider the case of a promise. Let us suppose that a brother has promised his sister to look after their mother so that his sister can take a vacation. His sister has refused to leave their mother because their mother does not like to be alone, has no close friends, and is frightened of having a stranger hired to care for her. Her needs, however, are minimal. She requires only that someone write her occasional letters, do difficult maintenance work, and provide her with some company. The son, who has always disliked his mother, promises to meet these needs during his sister's absence, in the hope that in doing so he can improve his relationship with his mother. However, after a few days of shouldering this responsibility, he tires of the task and hires a home companion to relieve him of his duties.

In many people's view, the brother has failed to take seriously the force of his promise to his sister. As the Razian would describe it, the promise gave the brother a new, content-independent reason for assisting his mother—a reason above and beyond his desire to improve their relationship—for the very fact that he promised was itself a reason to act as promised.²⁵ The promise also gave him an exclusionary reason to disregard the first-order content-dependent reasons that he would otherwise have not to render aid to his mother, such as inconvenience, frustration, anger, etc. Thus, upon promising to look after his mother, the brother was not entitled to weigh and act upon the balance of antecedently existing first-order reasons affecting the provision of required assistance, even if that balance (including in it the content-independent reason given by the sheer fact that assistance was promised) weighed in favor of hiring another to take over the responsibility. The brother estopped himself, that is, from concluding that the benefits of the promise were not worth its costs, even

24. Leslie Green acknowledges this "troublesome" response: "Why then shouldn't the various incapacity cases just be treated as expressions of doubt about the validity of one's assessment of the balance of reasons? Isn't that just what it means not to trust one's own judgement?" L. GREEN, *supra* note 1, at 53. The answer to such queries, claims Green, will fall out of an analysis of how content-independent reasons can have practical force even though they are not ultimate reasons. But while Green goes on to a discussion of the validity of content-independent reasons, *see id.* at 54-62, he fails to explicate just how his discussion overcomes the objection which he recognizes as so troubling to any attempt to provide an example of protected reasons by appealing to cases of incapacity.

25. For a rich discussion of the theory of promising which this formulation reflects, see generally P. ATIYAH, *PROMISES, MORALS AND LAW* 106-122 (1981); H.L.A. HART, *THE CONCEPT OF LAW* 42-43 (1961); J. RAWLS, *supra* note 14, at 344-50; Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989); Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1954); Rawls, *Justice as Fairness*, 67 PHIL. REV. 164 (1958) [hereinafter Rawls, *Justice as Fairness*]; Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955) [hereinafter Rawls, *Two Concepts of Rules*]; Raz, *Promises and Obligations*, in LAW, MORALITY AND SOCIETY 210 (P. Hacker & J. Raz eds. 1977). *See also infra* text accompanying note 83.

if such a conclusion were true. His promise thus made him a practical authority over his future actions, for it gave him a protected reason to render aid to his mother, however distasteful the task. Such, claim those in the Razian tradition, are the dynamics of practical authority.

Of course, the problem with this example is that it fails to do the work that needs to be done. For while we all tend to think that there is something especially important about promising, the example fails to show that promising is rational. The point of an example here is to illustrate how it might be rational, all things considered, to refrain from doing what the balance of first-order reasons dictates. And in the scenario with the brother, it is no more obviously rational to act against the balance of first-order reasons for action than it would be to so act in the face of a law. In their ability to give protected reasons for action, both laws and promises stand or fall together.²⁶ Raz and Green thus invoked the example that they did (that of the tired business person), rather than an example that appeals to promising or any other performative utterance that is thought to generate a protected reason for action, precisely because such an example appears to make more plausible the manner in which their sophisticated theory of practical reasoning makes rational what a simple theory of practical reasoning makes irrational. They thus found it necessary to appeal to an example in which reason in a sense judges itself and finds itself lacking. But in all such cases in which we have a reason to doubt our ability to think reasonably—to determine and balance the first-order reasons for and against action—that doubt functions only as a reason for belief concerning the validity of those reasons, not as a reason for action. It thus functions theoretically authoritatively, giving neither content-independent nor exclusionary reasons for action.

b. *The Conceptual Problem*

The difficulty which one faces in attempting to construct a persuasive example of a situation in which it is rational to refrain from acting upon a balance of first-order reasons is but the tip of the philosophical iceberg. The deeper and much larger difficulty to which this problem points is the failure of those in the Razian tradition to dissolve the paradox of practical authority. For the Razian “solution” depends fundamentally on one’s failure to be clear about what is entailed by the concept of a protected reason for action. Consider what one would be left with if one were in fact to have a protected reason to

26. It would thus seem to follow that if the traditional concept of practical authority is found to be conceptually incoherent because the notion of a protected reason upon which it depends (under the Razian formulation) is confused, then the concept of promising must also be found incoherent if unpacked by reference to protected reasons. Such a result is not disastrous, as I shall argue. *See infra* text accompanying note 83. But it may well require that the philosophy of promising undergo the same theoretical overhaul that contemporary jurisprudence will be forced to undergo if the notion of practical authority is indeed indefensible.

pursue a particular course of action. Raz claims that a protected reason for action leaves one with both a new (content-independent) reason to pursue that action and a new (exclusionary) reason not to act on the reasons for not pursuing it. But Raz explicitly slurs this formulation of the force of an exclusionary reason with a different and quite revealing account. Rather than claiming that an exclusionary reason gives one a reason not to *act* on the (first-order) reasons against the commanded course of action, Raz often claims that an exclusionary reason gives one a reason not to *consider further* the (first-order) reasons against the commanded action.²⁷ He apparently considers these two accounts to be interchangeable. But why would Raz be entitled to assume that if one is barred from *acting* on a certain set of reasons, one is thereby barred from *considering* those reasons for action? Two reasons present themselves. First, if one is barred from acting on certain reasons, it is unnecessary, at least as a pragmatic matter, to continue one's consideration of their merits.²⁸ Second, if one were to continue to dwell upon the reasons for action that one is barred from acting on, one may be led to act contrary to the exclusionary reason provided by the practical authority. For one cannot pick the reasons on which one acts—that is, one cannot make it be true that one is motivated to act for one reason rather than another²⁹—and hence, to continue to consider the reasons for action excluded by a protected reason risks the possibility that one

27. "The whole point and purpose of authorities . . . is to pre-empt individual *judgment* on the merits of a case." J. RAZ, *MORALITY*, *supra* note 1, at 47-48 (emphasis added). "[T]hrough the acceptance of rules setting up authorities, people can entrust *judgment* as to what is to be done to another person or institution . . ." *Id.* at 58-59 (emphasis added). Authorities "have the right to replace people's own judgment on the merits of the case." *Id.* at 59. "[O]nly by allowing the authority's judgment to pre-empt mine altogether will I succeed in improving my performance and bringing it to the level of the authority." *Id.* at 68.

Raz's repeated equation of a reason not to act on certain reasons with a reason not to consider certain reasons is initially surprising, since he explicitly disavows this equation on several occasions. Thus he insists that "no surrender of judgment in the sense of refraining from forming a judgment is involved. For there is no objection to people forming their own judgment on any issue they like." *Id.* at 40. And in reply to Hart, who formally construes authority as a power to bar deliberation, Raz maintains:

Surely what counts, from the point of view of the person in authority, is not what the subject thinks about how he acts. I do all that the law requires of me if my actions comply with it. There is nothing wrong with my considering the merits of the law or of action in accord with it. Reflection on the merits of actions required by authority is not automatically prohibited by any authoritative directive

Id. at 39; see also J. RAZ, *AUTHORITY*, *supra* note 1, at 26 n.25.

The dissonance that this criticism strikes, given his documented predilection for talk analogous to that which is criticized, can be resolved by distinguishing between the respective points of view held by commanders and subjects. While, as Raz's point suggests, a commander's order may not, from the commander's point of view, preempt a subject's own deliberation concerning the merits of the order, that order may well preempt such deliberation from the recipient's point of view, since if that recipient is barred from acting on the results of her deliberations, she may wisely find it either pointless or risky to engage in such deliberations. See *infra* text accompanying notes 28-29.

28. As he puts it, "One may form a view on the merits but so long as one follows the authority this is an academic exercise of no practical importance." J. RAZ, *AUTHORITY*, *supra* note 1, at 24-25. An alternative account of why these formulations are frequently conflated might rest on the claim that the mental *act* of contemplating such reasons is itself among the actions barred by the exclusionary feature of a protected reason.

29. For a defense of the thesis that persons cannot choose or control the reasons on which they act, see Moore, *supra* note 1, at 878-83.

will be led to act on the basis of one of those reasons, rather than on the basis licensed by the protected reason.

The same can be said, however, for one's consideration of the *other* first-order content-dependent reasons that one has to pursue the commanded course of action—the reasons that one had antecedent to the content-independent reason provided by the fact that the command was issued. For the fact that the reasons against the commanded action are rendered impotent by the command makes it the case that one needs only a single first-order reason for acting as commanded and this is provided by the sheer fact that the command has been issued. Upon receiving a command, one is thus left with a single reason for acting in accordance with it: the fact that the command was uttered.

The question that must be answered, then, is this: Why would it ever be rational to act solely because one has been told to do so? Is what makes such action rational the sheer fact that one has been commanded to pursue it, or does the rationality of a commanded act depend upon something further? One is curiously reminded by this question of the centuries-old dilemma which has befuddled so many Christian theologians: Is what God says right because God says it; or does God say it because it is right? Just as this analogous inquiry appears to invite but two possible answers, so the inquiry about the rationality of action in accordance with a command invites but two possible answers. Take, first, the theological example. If the commands of God are right solely because God commands them, then any such command, however heinous it might appear (and here one should imagine a particularly egregious one), must be thought to bear the moral status of being a true deontic description of how we ought to act. Alternatively, if God issues commands because they are the right commands, then their moral pedigree comes not from God but from some "higher" authority (that is, some God-independent moral reality). Similarly, if an action is rational because one has been commanded to engage in it, then anything that can be commanded by one possessed of practical authority (and here one might think of a Gestapo's extermination orders) will have the status of being rational. On the other hand, if the rationality of an action is determined by something other than the fact that it has been commanded, then having as one's sole reason for action the fact that one has been commanded to do it is not having as one's reason for action that which is determinative of practical rationality. That is, rationality, like the moral force of God's commands, must come from a "higher" authority (some source other than the commander's authority).

Such is the true dilemma of practical authority. The dilemma in its baldest form can thus be stated as follows:

(1) If the exclusionary reason generated by a command bars action in accord with first-order reasons *against* the commanded action, then it (pragmatically) bars the consideration of those reasons.

(2) If the exclusionary reason generated by a command (pragmatically) bars the consideration of those reasons, then it (pragmatically) bars the consideration of any reasons *for* the commanded action beyond that provided by the fact that the command has been issued.

(3) HENCE: Upon the receipt of a command, the only reason for action that one should consider is the fact that some action has been commanded.

(4) But, if an action is rational solely *because* it has been commanded, then any action that is commanded is rational. (This makes it rational to stand on one's head, quit one's job, or undertake a Kamikaze mission, if ordered).

(5) If, alternatively, an action is rational *only if* it comports with other requirements, then the sheer fact that an action has been commanded cannot rationally justify the performance of the act. (This makes rationality and obligation conceptually distinct.)

(6) Since the consequent of (4) is false, the antecedent of (4) must be false.

(7) Since the antecedent of (4) must be false, then the antecedent of (5) must be true.³⁰

(8) If (5) is true, then to act rationally, one must act for reasons other than the fact that one has been so commanded.

(9) HENCE: Action pursued on the basis of an exclusionary reason is irrational.

Raz and his followers need not, at this stage of the game, roll over and admit that in construing laws as the commands of a practical authority, they have been mistaken about the dynamics of legal authority. For there is much about the argument as it is stated above that should stick in their collective craw. Indeed, it would appear that those anxious to defend the Razian strategy have at their disposal a series of five arguments, each of which can be thought to demonstrate that an exercise of practical authority does not completely curtail one's ability to engage in first-order deliberation. If true, any of these arguments would defeat the dilemma by showing that the exclusionary feature of the protected reasons for action purportedly provided by laws is consistent with enough first-order balancing of content-dependent reasons to make legal obligation rational. The first two of these arguments are usefully seen as attempts to defeat premise (4) of the above-stated dilemma, while the latter three arguments are best thought of as attempts to "soften" premise (3).

30. The suppressed premise in (7) is: If it is not the case that an action is rational solely *because* it has been commanded, then an action is rational only if it comports with other requirements.

(i) *Contesting the Legitimacy and Jurisdiction of a Practical Authority*

First, those of the Razian persuasion will no doubt seek to remind us that theirs is an analysis of what practical authority is if it is in fact *legitimately* possessed by anyone.³¹ Their argument does not depend upon a government's actually possessing it, nor does it give us reasons to suppose that any particular government should possess it.³² Thus, defenders of the Razian theory will argue that premise (4) in the above argument must be reformulated so as to make it conditional upon there already existing a legitimate practical authority. It might thus be stated as follows:

(4') If an action is rational solely *because* it has been commanded by a *legitimate* practical authority, then any action commanded by a legitimate practical authority is rational.

By making premise (4) conditional upon authoritative legitimacy, proponents of the Razian view may well think that they have carved out a considerable sphere within which rational actors are still at liberty to balance first-order reasons for action before being obligated to obey the laws enacted by a practical authority. On pain of an infinite regress, Razians readily admit that whatever the reasons that justify the exercise of practical authority, their status must be content-dependent.³³ To suggest that the reasons that legitimate the practical authority of a governmental institution are themselves content-independent would simply send us in search of why those content-independent reasons were themselves legitimate, and this would force us to search for reasons that justify the giving of content-independent reasons. Since there must be a set of first-order content-dependent considerations that legitimates the exercise of practical authority, a rational actor is fully entitled to ask, when confronted with a claim of practical authority, whether that set of considerations in fact legitimates the claimed authority.³⁴ And this query enables that actor to bal-

31. See, e.g., L. GREEN, *supra* note 1, at 23 ("The first task is therefore a conceptual one; we must seek to discover not how authority persists or how it is justified, but what it is."); J. RAZ, *AUTHORITY*, *supra* note 1, at 182 ("The analysis of authority cannot consist exclusively of an elucidation of the conditions under which one has either legitimate or effective authority. It must explain what one has when one has authority."); J. RAZ, *MORALITY*, *supra* note 1, at 46 ("It will be remembered that this thesis is only about legitimate authority.").

32. See J. RAZ, *AUTHORITY*, *supra* note 1, at 13.

33. "[T]he validity of content-independent reasons is most plausibly explained by the fact that acting on such reasons may indirectly produce conformity with content-dependent reasons of the ordinary sort." L. GREEN, *supra* note 1, at 56. For an explicit analysis of the dependence of content-independent reasons upon content-dependent ones, see Raz's discussions of his "dependence thesis" and his "normal justification thesis." J. RAZ, *MORALITY*, *supra* note 1, at 42-57; see also G. CHRISTIE, *supra* note 1, at 128-38.

34. It is on this basis that Raz reaches his piecemeal view of legal authority and obligation. As he says:

People differ in their knowledge, skills, strength of character and understanding. Since the main argument for authority depends on such factors it is impossible to generalize and indicate an area of government regulation which is better left to individuals. But regarding every person there are several such areas. One person has wide and reliable knowledge of cars, as well as an unimpeach-

ance the first-order content-dependent reasons for action in a manner that ultimately renders any subsequent compliance with the laws enacted by that authority rational.

Following close on the heels of this argument is a second argument which purports to modify further the above restatement of premise (4). According to this second argument, premise (4') must be made conditional upon the practical authority's proper jurisdiction. It will not be rational to comply with the command of a practical authority, even if that authority is found to be legitimate, unless one has also established that the command is within the jurisdiction of that authority. As Raz says, "Most, if not all, authorities have limited powers. Mistakes which they make about factors which determine the limits of their jurisdiction render their decisions void."³⁵ Thus premise (4') must be further modified as follows:

(4'') If an action is rational solely *because* it has been commanded by a legitimate practical authority *acting within the limits of its jurisdiction*, then any action commanded by a legitimate practical authority acting within the limits of its jurisdiction is rational.

Razian theorists will claim that, so formulated, the consequent of premise (4'') is no longer false. For once the practical authority claimed by a governmental institution is found to be legitimate and once its laws are determined to be within its proper jurisdiction, then the rational course of action will indeed be to obey those laws, to the exclusion of contrary reasons for action. The dilemma of practical authority is thus rendered delusive if the above reformulation is defensible. But is it? Can Raz and his followers in fact escape the dilemma of practical authority by making premise (4) conditional upon a finding of legitimacy and jurisdiction?

At the heart of the conviction that premise (4'') is true, and perhaps trivially true, is the assumption that once one has established the legitimacy and jurisdiction of a practical authority it will then be rational to take that authority's commands as singularly sufficient reasons for action.³⁶ In other words, once

able moral character. He may have no reason to acknowledge the authority of the government over him regarding the road worthiness of his car.

J. RAZ, *MORALITY*, *supra* note 1, at 77-78. It is thus the case, according to Raz, that *legitimate* governmental authority varies from individual to individual. Since the extent to which a government is a legitimate authority for a given citizen depends upon the extent to which there are content-dependent reasons to take its laws as authoritative, there is, at least initially, a need to test legitimacy by weighing first-order reasons for action. And insofar as the balance will "weigh out" differently for different citizens, a government will legitimately bind citizens differently. Hence, while there is an obligation to obey the law when it is enacted by a legitimate practical authority, there is not, as Raz admits, a general obligation to obey the law. *See* J. RAZ, *AUTHORITY*, *supra* note 1, at 233-49.

35. J. RAZ, *MORALITY*, *supra* note 1, at 62.

36. "One can be very watchful that it shall not overstep its authority and be sensitive to the presence of non-excluded considerations. But barring these possibilities, one is to follow the authority regardless of one's view of the merits of the case (that is, blindly)." J. RAZ, *AUTHORITY*, *supra* note 1, at 24.

one has modified premise (4) so as to make it conditional upon there being a legitimate practical authority whose commands are within the limits of its proper power, premise (6) will be false, for it will in fact be the case that it is rational to comply with a command.

Such a view rests squarely on the further assumption that practical reasoning in the presence of a legitimate practical authority is a hierarchical process. The rational course of action in such circumstances is first to establish the legitimacy and jurisdiction of the authority, and then to abide by that authority's directives without further examining the reasons that one had to think the exercise of that authority either legitimate or within its proper jurisdiction.³⁷ One must, that is, surrender one's judgment of the content-dependent reasons for and against action and act solely on the basis of the content-independent reason for action provided by the fact that the authority (which one antecedently found to be legitimately acting within its jurisdiction) has issued some directive.³⁸ It is the commitment to a tiered process of practical reasoning that justifies this surrender of judgment; and it is this justification for the surrender of judgment that allows those who defend a Razian theory of practical authority to dispute the truth of premise (6) upon the modification of premise (4), and so to "solve" the above dilemma. Yet the adoption of a hierarchical theory of

37. As Richard Friedman states, an individual cannot make his obedience *conditional* on his . . . personal . . . examination of the thing he is being asked to do. Rather, he accepts as a sufficient reason for following a prescription the fact that it is prescribed by someone acknowledged by him as entitled to rule. The man who accepts authority . . . surrender[s] his . . . individual judgment . . . [in that] he does not insist that reasons be given that he can grasp and that satisfy him, as a condition of his obedience.

Friedman, *On the Concept of Authority in Political Philosophy*, in *CONCEPTS IN SOCIAL AND POLITICAL PHILOSOPHY* 129 (R. Flathman ed. 1973) (emphasis in original). The effect of an authoritative rule is that "in the cases in which it applies, it is specified in advance what is to be done; that question is removed from the sphere of judgment on the particular merits of each case." G. WARNOCK, *supra* note 22, at 65 (emphasis omitted).

38. "There has been a remarkable coalescence of opinion around the proposition that authority and authority relations involve some species of 'surrender of judgment' on the part of those who accept, submit or subscribe to the authority of persons or a set of rules . . ." R. FLATHMAN, *supra* note 1, at 90; *see also* H. ARENDT, *What Was Authority?*, in *NOMOS I: AUTHORITY*, *supra* note 3, at 81, 82 ("Authority . . . is incompatible with persuasion . . . Where arguments are used, authority is left in abeyance."); T. HOBBS, *LEVIATHAN* pt. II, ch. 25, at 166 (M. Oakeshott ed. 1946) (1651) ("COMMAND is, where a man saith, *do this, or do not this*, without expecting other reason than the will of him that says it."); J. LOCKE, *Second Treatise on Government*, in *TWO TREATISES ON GOVERNMENT* § 87 (P. Laslett rev. ed. 1963) (3d ed. 1698) ("All private judgment of every particular member being excluded, the community comes to be umpire . . ."); J. RAZ, *AUTHORITY*, *supra* note 1, at 24 ("There is a sense in which if one accepts the legitimacy of an authority one is committed to following it blindly."); *accord* W. GODWIN, *supra* note 3, at 122; L. GREEN, *supra* note 1, at 37; M. OAKESHOTT, *ON HUMAN CONDUCT* 154-59 (1975); J. RAWLS, *supra* note 14, at 333-91; J. RAZ, *MORALITY*, *supra* note 1, at 38-42; R. WOLFF, *supra* note 3, at 9; Friedman, *supra* note 37, at 127-31; Raz, *On Legitimate Authority*, in *PHILOSOPHICAL LAW* 25, 25-26 (R. Bronaugh ed. 1978).

It was this coalescence of opinion which Henry David Thoreau famously challenged when he wrote:

Must the citizen ever for a moment, or in the least degree, resign his conscience to the legislator? Why has every man a conscience, then? I think we should be men first and subjects afterwards. It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which I have a right to assume, is to do at any time what I think right.

Thoreau, *Civil Disobedience*, in *CIVIL DISOBEDIENCE: THEORY AND PRACTICE* 28 (H. Bedau ed. 1969). As will become apparent, my view is not so very different from that of Thoreau.

practical deliberation itself generates difficulties of such dimensions that it cannot provide the foundation for a solution to the dilemma of practical authority.

What could possibly make one's surrender of judgment practically rational? How could it be rational to comply with the laws of a legitimate practical authority *solely because* those laws have been enacted and are in keeping with the jurisdictional limits of that authority? Raz's own answer has two parts, corresponding to the two theses which must be made out in order to defend both the legitimacy and jurisdiction of a practical authority. First, once one has established the legitimacy of a practical authority, one's "blind" obedience to the will of that authority will in general allow one to better achieve action that is consistent with the balance of content-dependent first-order reasons for action than one would achieve if one acted directly upon one's judgment of that balance (Raz's normal justification thesis³⁹). Second, once one has established that the laws of a practical authority are within the jurisdiction of that authority, one can be relatively confident that one's "blind" obedience to those laws in general comports with the reasons which would have antecedently applied to one's conduct (Raz's dependence thesis⁴⁰). Judgment thus requires its own surrender. Since in the long run, our actions will better comport with the right reasons for action if we cease to balance those reasons and act instead on the commands of a legitimate authority that do not exceed that authority's jurisdiction, practical rationality itself requires that we cease to balance the reasons for action. Practical reason thus requires that we abandon its methods in the short run in order to assure behavior which best accords with those methods in the long run.

But as those in the Razian tradition readily admit, this justification for the surrender of judgment pursuant to a finding of authoritative legitimacy and jurisdiction implies that a legitimate practical authority may indeed pass undesirable and morally objectionable laws from time to time.⁴¹ Raz writes: "Even so, it may be that regarding each individual, he is less likely successfully to follow right reasons which apply to him anyway if left to himself than if he always obeys the directives of a just government including those which are morally reprehensible."⁴² Still, as Raz says, some directives may be so immoral-

39. See J. RAZ, *MORALITY*, *supra* note 1, at 53-57.

40. See *id.* at 47-53. Raz's dependence thesis is a moral thesis about how authorities *ought* to act. They *ought* to issue directives that in general reflect the balance of reasons for action available to the subjects of those directives. Yet insofar as a rational actor would assess the likelihood that an authority would comply with the dependence thesis at the point of determining the legitimacy of an authority (via the normal justification thesis), the actor's determination of legitimacy gives her reason, thereafter, to take the authority's commands as dependent, and therefore rational.

41. "Remember that sometimes immoral or unjust laws may be authoritatively binding . . . Governments may be acting within their authority when they act unjustly or immorally." *Id.* at 78, 79. "Under the best conditions, there is no guarantee that all laws will be consistent with morality." W. NELSON, *ON JUSTIFYING DEMOCRACY* 131 (1980).

42. J. RAZ, *MORALITY*, *supra* note 1, at 79.

al—so grossly in violation of the balance of reasons for action under the circumstances—that no government may be thought legitimate that issues them.⁴³ And herein lies the crux of the trouble.

If it is rational to abide by the laws enacted by a practical authority only if that authority is *legitimate* (premise (4'') above), and if an authority is legitimate only if its laws better cohere with the balance of content-dependent reasons for action than do the judgments of those for whom it is an authority (the normal justification thesis), then it must be the case that in order to judge whether indeed an authority is acting legitimately one must oneself balance the reasons for action in each case in which a law applies so as to police the ability of the claimed authority to order action in conformity with that balance. The ability of a claimed authority to achieve action which in the long run better accords with the balance of reasons can only be measured if, at each decision, one judges for oneself the reasons for action, and compares one's judgment with that reached by the authority. Without engaging in such long-term comparisons, one has no basis for thinking the claimed authority legitimate, and hence no rational foundation for abiding by that authority's will. One lacks, that is, any foundation for thinking that Raz's normal justification thesis applies. Yet since the attribution of practical authority to governmental institutions bars one from engaging in just the sort of comparisons that practical rationality depends upon, that attribution cannot be rationally defended. If (1) the rationality of abiding by a practical authority depends upon the legitimacy of that authority, and (2) the legitimacy of a practical authority can be established only by balancing the first-order content-dependent reasons for action, and (3) practical authority bars one from balancing those first-order content-dependent reasons, then practical authority cannot be rational. Such is the difficulty that is inevitably invited by an attempt to piggyback the rationality of practical authority on the concept of legitimacy.⁴⁴

43. *Id.* Thus, as Green recognizes, "Content-independence must be construed so as to be compatible with the substantive truth that grossly immoral [laws] do not bind." L. GREEN, *supra* note 1, at 47.

44. Raz purports to defeat this objection when he denies that "the legitimate power of authorities is generally limited by the condition that it is defeated by significant mistakes which are not clear." J. RAZ, *MORALITY*, *supra* note 1, at 62. As Raz maintains, there is a significant difference between great mistakes and clear mistakes. While authoritative legitimacy is defeated by the making of a clear mistake, it is not defeated by the making of a mistake that would be laborious to discover, however great such a mistake may be. And since "[e]stablishing that something is clearly wrong does not require going through the underlying reasoning," *id.*, the admission that clear mistakes defeat legitimacy is not an admission that individuals must balance the content-dependent reasons for action in each case in which an authority commands action in order to establish the legitimacy of that authority.

Yet the analogy upon which this argument rests is its undoing. Raz asks us to consider the addition of thirty numbers. Such an addition may be only slightly but quite clearly mistaken, as when the sum is an integer while only one of the added numbers is a decimal fraction. But it may be grossly but quite undetectably mistaken, as when the sum is off by several thousand for a reason that can only be discovered by laboriously recalculating. The point of this example is to provide us with the intuition that when a calculator makes the clear but small mistake, we may consider it "illegitimate"; but when it makes the gross but undetectable mistake, we may nevertheless be entitled to take its figure as definitive of the sum, if, in general, it provides us with the correct figures.

A parallel argument can be mustered against the jurisdictional condition. If it is rational to abide by the laws of a practical authority only if those laws are within the proper *jurisdiction* of that authority (premise (4^{''}) above), and if an authority acts within its proper jurisdiction only when its laws are based upon the reasons for action that apply to one prior to the promulgation of those laws (the dependence thesis), then it must be the case that in order to judge whether the laws enacted by a government are within the jurisdiction of its practical authority one must oneself balance the antecedently existing reasons for action in each case in which those laws apply so as to ensure that in extending its authority to that case, the government has not exceeded the bounds of its jurisdiction. The propensity of a claimed authority to issue commands in keeping with its jurisdiction can only be measured if, at each decision, one judges for oneself the antecedently existing reasons for action, and then determines whether the commands of the authority in fact reflect that balance. Without engaging in such a balancing process, one has no basis for thinking that the commands of the claimed authority are in keeping with its appropriate jurisdiction, and hence no rational foundation for thinking that Raz's dependence thesis applies. Yet again, since the attribution of practical authority bars one from engaging in just this sort of first-order deliberation, that attribution cannot be rationally defended. If (1) the rationality of abiding by a practical authority depends upon the extent to which that authority acts within its jurisdiction, and (2) the jurisdiction of a practical authority can be determined only by balancing the first-order content-dependent reasons for action, and (3) practical authority bars one from balancing those first-order content-dependent reasons, then practical authority cannot be rational. Such is the further difficulty that is inevitably invited by an attempt to make the rationality of practical authority conditional upon a jurisdictional limitation.⁴⁵

The difficulties engendered by supplementing premise (4) with the conditions of legitimacy and jurisdiction cannot be avoided by claiming that one's investigation of these conditions must be temporally limited. That is, it cannot be the case that a practical authority need only undergo a probation period in which the bases for its judgments are scrutinized and that thereafter its com-

But, of course, a calculator might systematically miscalculate only when the going gets tough (when the figures get large and the computations get lengthy). It might, that is, never make a clear mistake, while making consistent obscure ones. We thus need some means of determining whether, in general, such a calculator provides us with the right results. Surely Raz could not think it rational to judge a calculator's accuracy on difficult calculations solely by its accuracy on simple ones. Similarly, Raz could not think it rational to judge a government's authoritative legitimacy by its failure to make clear mistakes. Just as a calculator that systematically but obscurely miscalculates is not much of a calculator, so a government that enacts laws which systematically but obscurely fail to reflect the right reasons for action is not a legitimate authority (on Raz's own view). And since such systematic deception can only be discovered by recalculating (or otherwise evaluating) a calculator's computations and by "rebalancing" the reasons for the laws enacted by a government, it must be admitted that legitimacy indeed requires just the sort of first-order deliberation that a practical authority purportedly bars.

45. To the extent that Raz's reply to the objection concerning legitimacy is thought to defeat that objection, the same rejoinder to that reply will be relevant here. See *supra* note 44.

mands should be accorded authority without second-guessing their foundations. For the process of comparison in which one must engage in order to establish the legitimacy or jurisdiction of a government's claim to practical authority must last as long as does the claim. One cannot test a government's authority for some trial period and conclude at the end of that period that since the laws enacted by that government in fact better achieved action in accord with the balance of reasons than would one's own decisions, one's rational course of conduct is to surrender one's judgment to that government and obey its laws without question in the future. So long as rationality depends upon an authority's legitimacy or jurisdiction—so long as premise (4'') remains true—it will only be rational to comply with the will of an authority if that will comports with the balance of reasons for action, and this can only be determined by comparing one's own judgments concerning that balance to those of the authority throughout the duration of that authority's claim to legitimacy or jurisdiction.

The upshot of this argument, then, is that even if we were to replace premise (4) with premise (4''), the dilemma of practical authority would remain intact, for since the consequent of premise (4'') is no more true than was the consequent of premise (4), premise (6) remains true. If the Razian theory is to solve the dilemma of practical authority that threatens our traditional theory of legal obligation, it must do so by contesting some premise other than premise (4).

Let us then turn to an alternative set of arguments with which those persuaded by the Razian approach might avail themselves—that set which purports to soften the force of premise (3). As a means of motivating these arguments, it will be useful to recall the lemma of which premise (3) is the conclusion. That lemma runs as follows:

(1) If the exclusionary reason generated by a command bars action in accord with first-order reasons *against* the commanded action, then it (pragmatically) bars the consideration of those reasons.

(2) If the exclusionary reason generated by a command (pragmatically) bars the consideration of those reasons, then it pragmatically bars the consideration of any reasons *for* the commanded action beyond that provided by the fact that the command has been issued.

(3) HENCE: Upon the receipt of a command, the only reason for action that one should consider is the fact that some action has been commanded.

If premise (3) can be softened—if it can be shown that a command does not exclude one's consideration of *all* first-order reasons for action except the content-independent one provided by the sheer fact that the command has been issued—then the dilemma of practical authority is solved.

(ii) *Contesting the Unstated Exceptions to a Practical Authority's Laws*

One means of contesting premise (3) is by claiming that while the commands of a legitimate practical authority indeed give sufficient reasons for action, those to whom they are addressed must nevertheless interpret just what actions those commands in fact require. For commands which apparently function as general orders may in fact carry unstated exceptions, in the same way that promises, as Rawls has argued, carry unstated exceptions.⁴⁶ One who makes a promise does not mean that it shall be fulfilled come hell or high water. And similarly, one who issues an order is not likely to intend that it be carried out if it becomes apparent that its execution will lead to unforeseen disaster. That is, insofar as unstated exceptions are indeed unstated, one who receives a general order must consider more than the fact that such an order was issued (contrary to what is claimed by premise (3)). One must consider whether one's circumstances are those within which one is excepted from action. And presumably this will require that one balance the content-dependent reasons for action as a means of determining the likelihood that one's circumstances are among those which give rise to an unstated exception. Premise (3), according to such an argument, is overstated, for it fails to allow for a substantial amount of deliberation concerning the content-dependent reasons to think that an unstated exception is implicit in the command.

Yet this means of allowing content-dependent reasons for action to enter into one's practical deliberations concerning what one ought to do in the face of a law is surely doomed as a means of blunting the force of premise (3). For if there were an unstated exception to the generality of a law in *every* case in which there existed a conflict between the action commanded by that law and the action licensed by the balance of first-order content-dependent reasons, then laws would lack the sort of normative power that those of the Razian persuasion attribute to them. By never requiring anything other than what is antecedently required by the balance of first-order content-dependent reasons for action, laws would fail to change our reasons for action, and so fail to possess practical authority as it is analyzed along Razian lines. On pain of giving up the very concept that they are seeking to defend, Raz and his followers thus cannot allow all conflicts between the commands of law and first-order reasons for action to be a result of unstated exceptions within the commands.

Yet if only some laws carry unstated exceptions, one is returned to the dilemma as it is stated above. For defenders of the Razian theory must provide an account of how one is to distinguish between those instances in which the laws of a legitimate practical authority bear unstated exceptions that exempt one's compliance and those instances in which they do not. In order to deter-

46. See Rawls, *Two Concepts of Rules*, *supra* note 25, at 17; see also R. FLATHMAN, *supra* note 1, at 115 (defending view that rules and commands possess unstated conditions analogous to those possessed by statements of intentions and statements of right).

mine whether a law is accompanied by an unstated exception, one will be forced to balance the content-dependent reasons for action, concluding, presumably, that if the reasons against the commanded action overwhelmingly outweigh the reasons for that action, one is likely excepted from acting as commanded by some unstated proviso. Yet this is just the sort of full-scale first-order deliberation that one is barred from engaging in by the exclusionary reason that a law provides under the Razian analysis. And thus the dilemma: If (1) the laws enacted by a practical authority carry, in some instances, unstated exceptions, and if (2) one must balance the content-dependent reasons for and against a law in *each* set of circumstances in which that law applies in order to determine whether the law excepts action in those circumstances, and if (3) one is barred by the exclusionary nature of the laws of a practical authority from balancing these content-dependent reasons for action in each set of circumstances to which a law applies, then (4) a practical authority requires what it simultaneously prevents, and is thus incoherent. Insofar as the argument concerning unstated exceptions attempts to enable one to consider more than the sheer fact of a practical authority's command, it is in conflict with a central tenet concerning the nature of practical authority: namely, that the exclusionary aspect of protected reasons bars one from considering the content-dependent reasons for action each time one is called upon to act for those protected reasons. Premise (3) thus cannot be softened via an appeal to unstated exceptions without jettisoning the central concept of practical authority defended by Raz and his followers.

(iii) *Contesting the Scope of a Practical Authority's Laws*

Premise (3) might be attacked, however, on a somewhat different basis. Raz and his followers are likely to claim that the conclusion reached in premise (3) fails to reflect the fact that exclusionary reasons tend to be restricted in *scope*.⁴⁷ While the protected reasons for action that are provided by the commands of law indeed exclude one's further deliberation about some first-order reasons for action, they do not exclude one's deliberation about all such reasons. The limited exclusionary scope of a command thus entitles one to consider more than the sheer fact that a certain action has been commanded. If in fact there are reasons for action that lie beyond the scope of an authoritative directive, one is at liberty to weigh these against the content-independent reason for action which the authority's command otherwise makes sufficient

47. Leslie Green has written:

It is not, of course, presumed that political authority must claim or enjoy maximal *exclusionary scope*, ruling out of court all reasons but those which the law sanctions. The authority of the state may well be, and had better be, limited. Within those limits, however, it functions to control the commitments of its subjects.

L. GREEN, *supra* note 1, at 61 (emphasis added).

for action.⁴⁸ Thus, for example, the mother's command to her son to take his umbrella might well exclude him from further considering some reasons for not taking his umbrella, such as the fact that he *wants* to get wet, that he *wants* to ruin his new pants, and that he feels silly carrying an umbrella, while not excluding him from considering other reasons for not taking his umbrella, for example, that the umbrella is not in fact his own or that the umbrella is broken and so will not keep him dry. Premise (3) may thus be softened by admitting the limited scope of authoritative directives. And once softened, premise (3) fails to give rise to the dilemma of practical authority as it is played out in premises (4) through (9).

Yet just what determines the scope of a practical authority's legitimate commands? It is clear that commands themselves do not specify their own exclusionary scope. The mother's command to take an umbrella does not specify the fact that her son's embarrassment is excluded as a reason for not taking the umbrella while the true ownership of the umbrella is not excluded as a reason for not taking the umbrella. Instead, the exclusionary scope of a command must be derived from the content-dependent reasons for action that exist antecedent to the command. In keeping with the Razian normal justification thesis, the enactment of a law must be thought to exclude those reasons for action which if included would cause one to act less often upon the right reasons for action than one would if those reasons for action were in fact excluded. A law must not be thought to exclude those reasons for action which if included would result in action that better conformed with the right reasons than would action that was not based on those reasons.

Yet, once again, this test of a law's exclusionary scope requires us to engage in just the sort of first-order deliberation that is purportedly barred by the exercise of practical authority. For upon receiving a command, we must first determine the content-dependent reasons for action, and then judge which of those reasons would be best excluded from our deliberations and which would be best included. Those reasons that are best excluded can then be thought to determine the exclusionary scope of the command. This degree of first-order deliberation already exceeds that which is thought consistent with the decrees of a practical authority, but it does not stop here. For in order to know which reasons would be best included in our deliberations and which would be best excluded, we would have to have some notion of which reasons, if included in our deliberations, would enable us to act, in the long run, in a manner that comports with the right balance of reasons for action, and vice versa. The

48. As Raz writes:

[T]o maintain that orders are both first-order and exclusionary reasons is not tantamount to maintaining that they are absolute reasons. They may not exclude certain conflicting reasons, and when this is the case one must decide what to do on the balance of the non-excluded first-order reasons, including the order itself as one prima facie reason for the performance of the ordered action.

J. RAZ, AUTHORITY, *supra* note 1, at 22.

problem thus becomes analogous to that which is encountered when attempting to determine the legitimacy of a practical authority. For the extent to which one's actions in the long run better accord with the balance of reasons if certain reasons are excluded from one's deliberations can only be measured if, at each decision, one judges whether one's action in the face of excluded reasons better comports with the balance of right reasons for action than would one's action if those excluded reasons were included. But this process requires far more first-order deliberation than does the mere balancing of (all of) the content-dependent reasons for action: for we are now forced to balance our balances! In order to determine whether embarrassment functions as a reason for action that should in general be either included or excluded, we must balance all the times in which including embarrassment as a reason for action produced the right balance against all the times in which excluding it resulted in a more accurate balance. And we must compute all our balances over again and weigh them against each other in each case in which we are called upon to determine the scope of a command—for they will change with each new instance that contributes to those balances a reason either to include or exclude a particular content-dependent reason.

The Razian is thus caught in the same old bind. If he attempts to soften premise (3) by allowing individuals to limit the exclusionary scope of a law, he is forced to admit that premise (3) will license all manner of first-order deliberation. Since this deliberation is precisely what is meant to be excluded by the protected reasons for action that the commands of law uniquely give, this strategy will defeat the concept of practical authority that the Razian seeks to defend. Those who seek a means of preserving the Razian theory of practical authority are thus still stuck with premise (3) as it is stated above, and as such, they are still impaled upon the horns of the dilemma to which the Razian theory has, as yet, given no solution.

(iv) *Contesting the Force of a Practical Authority's Laws*

A final strategy remains, however. Those persuaded that the difficulties encountered above are overwhelming may indeed decide that it is high time to dispose of the Razian notion of a protected reason. They thus may be inclined to join Stephen Perry in thinking that the concept of an exclusionary reason as it is formulated by Raz and many of his followers must be modified. The modification proposed by Perry involves taking exclusionary reasons as reasons to change the *weight* of antecedently existing reasons for action, rather than as reasons to exclude those content-dependent considerations altogether.⁴⁹ On Perry's view, a protected reason excludes the antecedently existing *force* of

49. See Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD J. LEGAL STUD. 215 (1987).

certain content-dependent reasons, but it does not bar the consideration of those reasons altogether. Once their force is diminished, however, it is not surprising that these reasons fail to compete with the content-independent one that is provided by the fact that one has been commanded to pursue a particular course of action.

Does this reevaluation of the dynamics of a protected reason help to defeat the dilemma of practical authority? Perry might well think that it does, for once one is not excluded by a law from considering the content-dependent reasons for action, premise (3) appears false, and hence, the dilemma appears defunct. Yet the same questions can be asked about the diminishment of a reason for action as were asked about its exclusion. How could the sheer fact that a law has been passed reduce the importance of antecedently existing reasons for action? What would possibly be rational about reducing the weight of certain content-dependent reasons for action solely on the basis that a command has been issued? Something analogous to the normal justification thesis is called for here. But just as the normal justification thesis fails to provide an escape from the dilemma of practical authority because it depends upon what it prevents—namely, the long-term balancing of all first-order reasons for action—so an analogous thesis will fail here. For all the arguments that demonstrated the dependence of the normal justification thesis upon our ability to balance first-order reasons for action will be available to demonstrate the dependence of an analogous thesis upon our long-term ability to calculate the correct weight of those first-order reasons. And thus, diminishing the weight of certain first-order reasons will turn out to be as irrational as excluding those first-order reasons.

It thus appears that the dilemma of practical authority has proved itself to be of a particularly resilient strain. For the Razian solution to the dilemma is no solution at all. Raz and his followers have failed to show that what ought to be done, all things considered, is not tantamount to what ought to be done on the balance of first-order reasons. And as Raz himself has admitted, if what ought to be done, all things considered, is identical with what ought to be done on the balance of first-order reasons, then the demands of practical authority violate the principles of rationality.⁵⁰ By virtue of first reducing one's (first-order) reasons for action to the singular, content-independent reason provided by the fact that a law has been passed, and then requiring action in accordance with that reason, practical authority entails the conceptual divorce of obligation and rationality. Since commands do not make all commanded actions rational, even when they are issued by a legitimate practical authority that is acting within its jurisdiction, and despite their possessing unstated exceptions and limited scope, it must be conceded that what is rational to do is conceptually distinct from what one may be commanded to do. While what

50. See *supra* text accompanying note 21.

is commanded may well correlate with the balance of first-order (content-dependent and content-independent) reasons as computed in accord with the demands of practical rationality, it need not do so. But then, to act rationally, one must compute that balance of reasons—one must, that is, engage in just the sort of practical deliberation that the exclusionary aspect of a protected reason bars—and then act upon that balance. Protected reasons are thus conceptually incoherent. They require what reason prohibits. And since the concept of practical authority requires the giving of protected reasons, it too is incoherent.⁵¹

II. INFLUENTIAL AUTHORITY AS “AS IF” PRACTICAL AUTHORITY: AN ALTERNATIVE THEORY OF LEGAL AUTHORITY

A. *Influential Authority as a Solution to the Paradox of Practical Authority*

If the traditional concept of legal authority is indefensible, as I have argued, then we are compelled to conclude that the source of legal obligation must be other than practical authority (as it is most convincingly explicated by Raz and his followers). One might be tempted to argue, however, that we can preserve a rich notion of legal obligation by appealing to a modified theory of influential authority. To motivate this temptation, consider the following scenario. Suppose that in response to his mother’s command to take his umbrella, the son in our previous example trots out the above argument in an attempt to convince his mother that the sheer fact that she has issued an order is not a reason for him to act in a manner that is contrary to the overwhelming reasons that he has not

51. As is clear at this point, the incoherence of protected reasons in fact rests on the indefensibility of a hierarchical theory of practical rationality. The concept of rationality that supposedly justifies one in abiding by the will of a legitimate practical authority over the long run is parasitic upon the concept of rationality that is employed in determining whether to engage in some particular course of conduct in a particular situation: in both cases practical rationality consists in acting upon the balance of reasons for action. On the Razian account, if we are more likely to achieve action in accord with that balance by pursuing the indirect strategy of complying with the will of a legitimate practical authority, the principle that one should act upon the balance of reasons for action itself requires us to comply with the laws enacted by that authority.

But to the extent that rationality requires action in accord with the balance of first-order content-dependent reasons, it cannot require compliance with a law that fails to cohere with the balance of first-order reasons for action. In each case in which an authority fails to compute the balance of reasons for action correctly, and so enacts a law that is undesirable or morally objectionable, practical rationality cannot license action in accord with that law. Insofar as the law violates the principle of rationality that requires actions to comport with the balance of first-order content-dependent reasons for action, it will also violate the parasitic principle that requires that one act in the long run in a manner that comports with the balance of first-order content-dependent reasons for action: for in abiding by the law, rather than acting on the balance of the first-order reasons for action, one has reduced by one instance the number of times over the long run that one acts rationally. Since according practical authority to some institution requires that one give up one’s evaluation of the balance of reasons for action in each case in which one receives a directive from that institution, it threatens to result in action that does not comport with that balance, and so cannot be justified by the principle of rationality.

to take his umbrella. In short, he denies the coherence of her claim to practical authority.

The mother might reply that this is all well and fine, but that there exists an alternative account of why her son ought to take his umbrella. Such an account is two-pronged. First, the son must admit that her utterance is at least entitled to the weight of a request: it gives him a new, content-independent reason for taking his umbrella, though this reason is merely to be added to the other (first-order) reasons that he might have for such an act and weighed against the reasons that he has to abandon the object. Second, the mother might insist that while her utterance gives him but another first-order reason for action, there are a number of (first-order) considerations which make that reason a particularly weighty one. For example, children owe their parents a considerable debt of gratitude for all that their parents do for them, and honoring parental requests is a particularly good way of repaying, to some measure, this debt. On this alternative account of the mother's authority, the son is compelled to take his umbrella because, as a result of the weight which must be assigned to his mother's request, the balance of reasons favors this action. And indeed, since any request on her part is entitled to great weight as a result of arguments of the above sort, her son will always be compelled to act "as if" his mother were a practical authority.

The mother's argument, in effect, invokes just the sort of antecedently existing, content-dependent reasons that would have to be appealed to in order to make compliance with the demands of a practical authority rational. She claims, that is, to ground the rationality of her son's action on something other than the issuance of a command. There are, she claims, normative considerations that make the very fact that she has prescribed a certain act a particularly compelling first-order reason for performing that act. Instead of claiming that such a new first-order reason is also a protected reason, however, she only claims that it is a first-order reason of great weight. Insofar as this reason will generally possess sufficient weight to trump countervailing ones, her son will generally act in the manner that would be required if her reasons were of a protected sort. He will, that is, act "as if" she were a practical authority.

I think that this theory of "as if" obligation more closely approximates what most legal theorists in fact think about the dynamics of legal obligation.⁵² For

52. As Richard Flathman has argued:

Contrary to Raz, the reasons valid authority attributions provide for obedience are susceptible of comparative assessment; they are susceptible of assessment as more or less conclusive, more or less weighty, strong, convincing, etc. . . . Such comparative assessment, moreover, can lead to the conclusion that the reason "authority" provides for obedience is so much weaker than reasons for competing modes of action that it is unreasonable to act on it.

R. FLATHMAN, *supra* note 1, at 119. And as Michael Moore has more explicitly put it:

[T]he concept of authority ought not to be analyzed in terms of protected reasons. Rather, authoritative norms, law included, should be seen as giving first order reasons for conforming behavior; these first order reasons may well be of great weight, but they should not be seen as accompanied by an exclusionary reason that protects them against overruling . . .

most legal theorists seek a theory of legal authority that is consistent with limited obligations of obedience. Such a search is problematic for one who is convinced that legal obligations are born of practical authority. For, as the argument in the preceding section reveals, a practical authority inevitably demands action based solely on the fact that it has issued certain directives. It claims, that is, to bar our consideration of just those reasons which would define the limits of its legitimacy, jurisdiction, and scope, and so define the limits of our legal obligations.

Yet the alternative theory sketched above makes possible the weighing and balancing of reasons for and against compliance with a legislative enactment. As such, it does not give rise to the lemma which triggers the paradox of practical authority. By providing a new, content-independent reason for action, an influential authority does not exclude our consideration of countervailing reasons for action (and thus premise (1) of the dilemma is avoided). An influential authority does not render superfluous our consideration of the content-dependent reasons for action that support the content-independent reasons provided by its utterances (and thus premise (2) of the dilemma is avoided). It is not the case, then, that when one receives a request, the only reason for action that one need consider is the fact that the request has been made (the conclusion reached in premise (3) of the dilemma). And once this is clear, no question arises concerning the rationality of one's subsequent action: that is determined by the accuracy of one's assessment of the balance of the first-order reasons for action, including both the content-dependent and the content-independent reasons that are available.

Under a theory of influential authority, one is entitled to conclude that certain injunctions fail to obligate, for the fact that they have been issued is entitled to little weight, and as such, the new (content-independent) first-order reasons that they give are outweighed by the reasons that one has for contrary action. The search by legal theorists for a means of limiting legal obligation is over if it is possible to establish both that the laws of a state should be thought to give new content-independent reasons for action, and so should function in a manner analogous to parental requests, *and* that persuasive normative grounds exist for thinking that these new reasons carry sufficient weight so as to outweigh, in most cases but not all, the reasons that one has not to act as directed. Were one able to make out both of these theses, one would be in a position to claim that the state possesses influential authority of such a persuasive sort that individuals are in fact compelled to act "as if" it possessed practical authority.

Moore, *supra* note 1, at 872; see also F. SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE (forthcoming 1991) (manuscript at 191-201; on file with author); Schauer, Rules and the Rule of Law (1990) (unpublished manuscript on file with author).

Many ought to find this suggestion an attractive one, for it holds out the possibility of solving the paradox of practical authority without sacrificing the intuition that individuals can be “bound” by the laws enacted and enforced by their governmental institutions. If in fact the laws of the state provide new, content-independent reasons for action, and if there are persuasive normative arguments to be made for why such reasons are particularly weighty, then there exists a plausible account of why it *appears* that the prescriptions of the state require a surrender of judgment on the part of citizens. For if the reasons for action provided by legislative enactments in general possess substantial weight, then it is no surprise that citizens act, and must continue to act, as though they have internalized the principle that such reasons ought always to be acted upon (at least so long as they do not glaringly conflict with countervailing reasons for action). The surrender of judgment by citizens to the state, which is thought to be paradigmatically characteristic of legal obligation,⁵³ can thus be accounted for as an appearance that inevitably results from the significant weight that citizens must assign to the content-independent reasons for action provided by legislative enactments. A theory of influential authority, supplemented by a theory of why such influence is weighty, may thus be expected to produce behavior generally comporting with the commands of law, and so may be thought to explain what has long been thought of under the guise of the traditional concept of legal obligation. Moreover, such a theory allows for behavior that on occasion conflicts with such commands and so explains what has long been thought to require a theory of the limits of legal obligation.

Since this alternative theory appears to allow legal theorists to preserve a rich notion of legal obligation while accounting for how such obligation can be limited by considerations of countervailing reasons for action, the attempt to make out the dual theses required to ground a theory of influential or “as if” practical authority is worthy of considerable energy. In what follows, I propose to take up a set normative arguments that might be thought to explain why the state should be thought to generate new, content-independent reasons for action that are of a particularly compelling weight.

B. *Influential Authority as a Theory of Legal Authority*

1. *The Basis of Influential Authority*

As a means of approaching the sorts of arguments that must be made in order to establish that the state ought to be thought to give content-independent reasons for action, consider the sorts of arguments needed to show why it is that we ought to take another’s request as a new reason for action. Let us begin by supposing that we have received a request for a loan that we think lacks

53. See *supra* note 38 and accompanying text.

merit: that is, the individual who has made the request is not in need of money, is fully capable of earning money on his own, and will spend the money poorly if it is given.⁵⁴ Are there reasons, however, to give the individual money solely because he has requested it? Those who are inclined to think that there are not should recall the many occasions on which they have given money to the local beggar solely because they have been unable to avoid his request!⁵⁵ If there are indeed reasons to take requests as new reasons for action, those reasons must be of a special sort. They must justify why a request that lacks merit nevertheless functions as a reason for action of some weight.

If a request lacks merit, then the first-order content-dependent reasons for refusing to act as requested swamp the first-order content-dependent reasons for acting as requested. One who thinks that a nonmeritorious request is itself a reason for action cannot claim that it is such a reason only because, and to the extent that, it comports with the balance of first-order content-dependent reasons for action, since, *ex hypothesi*, the nonmeritorious request does not and this answer thus gives no content-independent weight to the request as a reason for action. What one must argue is that there exists a “further” consideration that justifies one in taking a nonmeritorious request as a content-independent first-order reason for action. Such a further reason must function in a manner distinct from the reasons that go into the first-order balance, but must not, on pain of inviting the paradox of practical authority, exclude one’s consideration of that first-order balance. The reasons that must be given in order to ground the claim that (nonmeritorious) requests possess influential authority must thus meet two conditions. First, such reasons must be based upon considerations that

54. It is useful to take a nonmeritorious request as the basis for one’s inquiry, for only such an example in fact tests the extent to which the sheer fact that a request has been made counts as a reason for action that is independent of the merits of that action. Were one to take as one’s example a meritorious request, that request might well appear to function only as a guide to antecedently existing reasons for action, and so might not be thought to give one a new, independent reason for action.

55. As Joseph Raz convinced me in conversation, it is very hard to account for why we feel the inclination to give to beggars only when in fact begged to do so unless we take their begging as a new reason for charity. After all, were their request but a heuristic guide to determining their need, we would not so often await it (or attempt to avoid it).

Of course, it is tempting to argue that we are all, in general, immoral. We wait to be asked for money, rather than giving it freely, because we are selfishly inclined to free-ride on the charity of others. And we can get away with doing so *until* directly asked for money. A request, on this view, does not function as a new reason for action; it functions merely as a reminder of antecedently existing reasons for action to which our own guilt is also testimony.

Invoking Occam’s razor, Raz replied to this suggestion by arguing that while this account may indeed explain our tendency to act in many instances only upon a request, it fails to provide us with the simplest of possible explanations. For there is much that this account does not explain, and thus, there is much work that must be done to prop it up. For example, it does not account for the fact that in many cases we seem to await a request out of respect for the individual in need. For it is thought to be insultingly paternalistic to bestow unwanted charity. If requests are thought to give new reasons for action, then individuals can autonomously control their “takings”—for others will then (generally) lack sufficient reasons to give until a request is made. If, however, requests are taken to be mere heuristics to the appropriate circumstances for charity, then we require a complex account of how this view is compatible with the view that individuals have a right to control the contributions that they receive. Author’s conversation with Professor Joseph Raz (May 1989).

are independent of the merits of the request (the independence condition). Their status thus cannot be that of purely evidential reasons for *belief* about the content-dependent merits of what is requested, for they would then fail to make out why requests function as content-independent reasons for action. Second, such reasons cannot be of an exclusionary sort, for otherwise the theory of influential authority to which they give rise will invite the same paradox as does a theory of practical authority (the nonexclusionary condition).

The same conditions will apply to the reasons that might be given for why the laws of a state ought to be considered influentially authoritative. Any account of why one should take the fact that the state has enacted a law as itself a weighty reason for obeying that law must (1) avoid an appeal to the merits of acting as directed (the independence condition), and (2) allow for consideration of the countervailing reasons for not acting as directed (the nonexclusionary condition).

In order to test the extent to which the laws of a state give new, content-independent reasons for action (and so meet the above two conditions), it will be useful to postulate a scenario similar to the one assumed in the discussion of requests. We must suppose, that is, that we are faced with a government that issues nonmeritorious laws: the content-independent reasons for complying with those laws are outweighed by the content-dependent reasons for disobeying them. We must then determine whether there are any grounds to think that the sheer fact that such laws have been passed is itself a reason to act as directed. What we need is thus a plausible example of a government that would give us a content-independent reason for action in accordance with its laws even when those laws are wrong on the balance of the content-dependent reasons as we compute it.

It has long been assumed that democratic governments provide us with this example.⁵⁶ Few have doubted that the fact that a government is democratic is itself a uniquely compelling reason to take its laws as particularly weighty reasons for action. When asked why it is that someone should abide by the majority's will when what is willed fails to comport with that individual's own judgment, we are inclined to appeal to the substantive principle that the majority has a right to have its way. No one is entitled to run red lights, withhold

56. The literature on the unique status of democracy is vast. To acquire some appreciation for the diversity of arguments invoked for the morality of democratic decisionmaking, see R. FLATHMAN, *supra* note 1, at 192-201; S. HOOK, *PHILOSOPHY AND PUBLIC POLICY* 16-37 (1980); C. MACPHERSON, *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* 3-23 (1973); J.S. MILL, *REPRESENTATIVE GOVERNMENT* (Everyman ed. 1910) (1861); C. PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 15-16 (1970); J. RAWLS, *supra* note 14, at 75-83; J. ROUSSEAU, *THE SOCIAL CONTRACT* (M. Cranston trans. 1968) (1762); P. SINGER, *DEMOCRACY AND DISOBEDIENCE* (1973); Barry, *Is Democracy Special?*, in *PHILOSOPHY, POLITICS AND SOCIETY* 155 (P. Laslett & J. Fishkin eds. 1979); Converse, *Perspectives on the Democratic Process*, 27 *MICH. Q. REV.* 285 (1988); Graham, *What is Special About Democracy?*, 92 *MIND* 94 (1983); Kateb, *The Moral Distinctiveness of Representative Democracy*, 91 *ETHICS* 357 (1981); Winfield, *The Reason for Democracy*, 5 *HIST. POL. THOUGHT* 543 (1984). *But see* M. PERRY, *supra* note 1, at 110 ("[N]o argument from democracy can support the claim that in every imaginable situation one has a reason to obey all laws—that there is a presumptive obligation to obey all laws.").

taxes, drive without insurance, ship toxic chemicals without proper identification, or write bad checks without taking very seriously the sheer fact that a majority of his or her fellow citizens have manifested their disapproval of such conduct through democratic legislation. That is, the fact that a majority of individuals favors a particular substantive rule is, by itself, a reason to comply with the rule.

I propose to take up what appears to be the most convincing argument for thinking that a government can function as a particularly compelling influential authority: the argument from democracy.⁵⁷ If we can make out the thesis that the laws enacted by democratic institutions provide content-independent reasons for action, then we will be in a position to conclude that at least some governmental institutions (and maybe others as well) have the capacity to possess the sort of influential authority that is sufficient to prompt citizens to act “as if” they were bound by a practical authority. On the other hand, if we are unable to make out this thesis, then it seems that almost *a fortiori* we will be forced to conclude that no government should be taken to function as an “as if” practical authority. For if we fail at the task of showing that at least some democracies give (content-independent) reasons for obedience when their directives are mistaken, it is reasonable to think that we will fail at the same task when we turn to other systems of government, such as dictatorships and aristocracies, for which we have less compelling normative arguments. Thus, the extent to which we can appeal to a theory of influential authority as a means of preserving a rich notion of legal obligation will seemingly turn on the extent to which we can defend the principle of democracy as a reason to take the laws of a state as giving particularly weighty content-independent reasons for action.

Our inquiry can now be cast in the following manner. Suppose that we are faced with a choice between a dictatorship and a direct majoritarian democracy—a democracy in which all citizens vote on proposed pieces of legislation and those pieces voted for by the majority are enacted into law.⁵⁸ Suppose

57. There is, in fact, no single argument from democracy—there are only democratic theories. See R. DAHL, PREFACE TO DEMOCRATIC THEORY 52-53 (1956). Indeed, as the rich literature on the topic suggests, there is no single concept of what a democracy is. I do not propose to spend time on this definitional question. Instead, I will follow those who insist that the proper definition of democracy will fall out of the proper justification of majoritarian decisionmaking. See *id.* at 2-6.

58. I have picked this form of government over its unanimous or representative competitors because it best provides us with a means of testing the majoritarian principle. Were we instead to adopt a model of unanimous direct democracy, we would face the same difficulty as that quite willingly faced by anarchist Robert Paul Wolff. On Wolff's account, only a unanimous direct democracy can be justified, for only under such a regime is it the case that the state's authority does not jeopardize moral autonomy. See Wolff, *supra* note 4, at 120-28. But as Jeffrey Reiman has pointed out, “A person who ‘obeys’ a command *because* it coincides with his autonomous decision is not obeying authority.” J. REIMAN, IN DEFENSE OF POLITICAL PHILOSOPHY 11 (1972). In order to test our lingering intuition that an authority binds us even when we disagree with its laws—even when the content-dependent reasons for action conflict with the content-independent reason for action provided by a law—we must adopt a model of democratic government that allows for conflicts between what we would choose (prior to the enactment of the law) and what is commanded under that law. A *majoritarian* democracy provides us with such a model. And since nothing

further that the content of the laws enacted and enforced under each of these systems is identical. Suppose finally that these laws lack merit: just as in the case of the request above, the content-dependent reasons for acting in accordance with the laws are outweighed by the content-dependent reasons for acting in a contrary manner. The issue is this: Are there reasons to obey the laws enacted by a direct majoritarian democracy that we do not possess within a dictatorship? Does the very fact that those laws were enacted by a majority of citizens give us a special reason to comply with them that we do not have in the case of their enactment by a single individual? In short, does the majority have a right to be wrong? If the answer to these questions is yes, then at least the dictates of democratic institutions give content-independent reasons for action and so possess influential authority of a sort that may be sufficiently weighty to bind citizens "as if" those directives possessed practical authority.

There are two types of theories that might be thought to give special reasons for why rules enacted by a majority give new, content-independent reasons for action, while the identical rules enacted by a minority (of one or more) do not. The first sort of theory can be characterized as act-based: theories of this sort generate content-independent reasons to act in accordance with democratically enacted laws from the performance of certain voluntary actions. The second sort of theory can be characterized as duty-based: theories of this sort generate content-independent reasons to comply with democratically enacted laws from moral requirements which apply irrespective of any acts performed. In what follows, I propose to outline three act-based theories and one duty-based theory, each of which is designed to give us a special reason for taking the rules enacted by a majority as giving new reasons to act in a manner consistent with the rules, even when we think those rules to be wrong.⁵⁹ In each case I will argue that the theory fails to give us a reason to grant influential authority (of any weight) to democratically enacted laws because it either violates the independence condition (and so collapses into an account of why democratic laws possess theoretical authority) or violates the nonexclusionary condition (and so invites the paradox that defeats accounts of law's practical authority).

except complexity is added by supposing that democracy to be representative, I have chosen to suppose that the government in question is a direct one. However, for an exhaustive discussion of the various models of democracy, see R. DAHL, *supra* note 57; A. ROSS, *WHY DEMOCRACY?* 202-43 (1952).

59. This taxonomy of the reasons that one might have to attribute influential authority to democratic states was motivated by the similar categorization of the reasons for political obedience in general that is provided by John Simmons. See A.J. SIMMONS, *supra* note 1, at 11-16. For helpful discussions of these arguments as they function in that more general context, see Greenawalt, *Promise, Benefit and Need: Ties That Bind Us to the Law*, 18 GA. L. REV. 727 (1984); Wright, *Legal Obligation and the Natural Law*, 23 GA. L. REV. 997 (1989).

2. *Act-Based Theories of Influential Authority*

Many have thought that one's performance of particular acts within a democracy gives rise to special obligations to take the rules enacted by that democracy as giving content-independent reasons for complying with such rules, even when one objects to the content of those rules—that is, even when one is in a political minority. Certain acts, that is, are thought to generate an obligation to treat democratically enacted laws as having influential authority. H.L.A. Hart has defined the sort of special obligation to which act-based theories of influential authority may be thought to give rise as a moral requirement that satisfies the following four conditions: (1) it is generated by the performance of some voluntary act (or omission); (2) it is owed by a specific person (the “obligor”) to a specific person or persons (the “obligee[s]”); (3) it generates a correlative right on the part of those to whom it is owed (the obligees); and (4) it is the nature of the transaction or relationship into which the obligee and obligor enter, not the nature of the required act, which renders the act obligatory.⁶⁰ The theories examined in this section each purport to establish an obligation to take rules enacted by a political majority as sources of new reasons for action: such an obligation is said to be based on voluntary acts performed by those who may find themselves in a political minority. These acts are thought to create special relationships between those in a minority and those in the majority, and so are thought to provide content-independent reasons for a minority to abide by the majority's will (that is, reasons that satisfy the independence condition)—even when the minority takes the majority to be wrong about the balance of content-dependent reasons for action.

a. *The Theory of Reciprocity*

Both H.L.A. Hart and John Rawls have maintained that an important source of the special obligation to abide by the rules enacted by one's government is the principle of reciprocity or fair play.⁶¹ The principle of reciprocity prohibits the unjust enrichment of those who would enjoy the advantages of others' cooperation without themselves cooperating. According to this principle, individuals who enjoy the benefits that accrue from others' adherence to rules have an obligation to follow those rules also, and those who have followed the

60. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 179-80 & n.7 (1955).

61. *Id.* at 184; J. RAWLS, *supra* note 14, at 108-14, 342-50; Rawls, *Justice as Fairness*, *supra* note 25, at 179-83. Peter Singer has advanced an argument which rests on a principle very like reciprocity. In his view, democratic procedures serve as fair means of achieving a compromise in situations of disagreement by which force is avoided. “To disobey when there already is a fair compromise in operation is necessarily to deprive others of the say they have under such a compromise. To do so is to leave the others with no remedy but the use of force in their turn.” P. SINGER, *supra* note 56, at 36. Because Singer's theory gives way to the same objections raised in this Section to the theory of reciprocity, it has not been distinguished. For a full defense of the theory, however, see *id.* at 30-45.

rules have a right to demand cooperation by those who have reaped the benefits of their compliance.

In this section, I propose to examine whether this principle can be thought to function as a reason to take the fact that rules have been enacted by a democratic government as an additional, content-independent reason to comply with those rules. In order to test whether the principle functions as a reason to confer influential authority on majoritarian democracies, it must be reformulated. On the necessary reformulation, the principle claims that individuals who enjoy the benefits that accrue from the willingness of others to attribute influential authority to democratically enacted rules have a reciprocal obligation to treat such rules as having influential authority, and so to take such rules as giving new, content-independent reasons for action.

According to Rawls, obligations of reciprocity arise in situations that satisfy the following three conditions: (1) there is a mutually beneficial and just scheme of social cooperation that yields advantages only if everyone, or nearly everyone, cooperates; (2) cooperation requires a certain sacrifice from each individual, or at least involves a certain restriction of liberty; and (3) the benefits produced by cooperation within this scheme are, to a certain extent, free—that is, if any one person knows that others will continue to do their part, she will be able to share in the gains even if she does not do her part.⁶² Yet both Hart and Rawls appear to think that mere benefaction from a cooperative scheme is insufficient to generate an obligation of reciprocity. In the language of our current discussion, mere benefaction fails to give one a reason to take the rules of a cooperative scheme as giving new reasons for action. While obligations of reciprocity need not be deliberately or knowingly incurred, a voluntary action of some sort is required: one who is obligated under this theory must have made some effort to obtain the benefit in question, or have taken the benefit willingly and knowingly.⁶³ It is this voluntary action that both gives those responsible for the benefaction rights to require reciprocal rule-following by those benefited, and gives those benefited a duty to so reciprocate.

As a theory of the influential authority of majoritarian democracies, the theory of reciprocity demands that we take the fact that a majority has enacted particular laws as a (content-independent) reason to adhere to those laws because we have accepted the benefits of others doing likewise. As members of a political majority, we benefit from the minority's willingness to add to the

62. Rawls, *Justice as Fairness*, *supra* note 25, at 179-83.

63. "He who accepts the procedures, the ideology, and the benefits of a legal system is obligated to submit to the enacted laws, even though he denies their wisdom or even their justice." Weiss, *The Right to Disobey*, in *LAW AND PHILOSOPHY* 98, 98 (S. Hook ed. 1964). It is the condition of acceptance that prompts Robert Nozick to argue that the theory of reciprocity collapses into the theory of consent. See R. NOZICK, *supra* note 14, at 90-95. For a helpful discussion of the theory of reciprocity and Nozick's criticism of it, see A.J. SIMMONS, *supra* note 1, at 101-42. As a means of determining when one has "accepted" the benefits of a political system, see the analogous discussion of what is required in order to be thought a "participant" in a political process in P. SINGER, *supra* note 56, at 45-59.

balance of reasons for action the fact that we in the majority prefer a particular course of action. The theory of reciprocity thus requires that when we find ourselves in a political minority, we reciprocally fulfill our obligation to take the laws enacted by the majority as a source of new reasons for action.

This account of why we should attribute influential authority to democratically enacted laws appears to meet the three conditions specified by Rawls for the generation of an obligation of reciprocity. First, the benefit that one receives from the democratic process is the opportunity to legislate one's will for oneself and others, but this benefit is only available if, in general, most individuals take the fact that the majority wills some course of action as itself a new reason to act as willed. One accepts this benefit whenever one participates in a political scheme that, at least some of the time, realizes (or at least has the potential to realize) this opportunity. Second, the sacrifice that one must make in order to assure this benefit amounts to taking the fact that a majority prefers some course of conduct as a new reason for action. One gives up the liberty of acting solely on the balance of the content-*dependent* reasons for action as one calculates it. Finally, the benefits of cooperation are to a certain extent free: if most individuals take the fact that a majority prefers a certain course of action as itself a reason to act in accordance with that preference, then one in the majority may enjoy the fact that the minority takes her preference as a reason for action without similarly doing so when she finds herself in the minority.

Yet despite the fact that the principle of reciprocity appears to be a reason to take democratically enacted laws as giving new, content-independent reasons for action, this account of how democracies could be thought to possess influential authority rests on a host of unacceptable assumptions. First, in order to provide a reason to think that *all* citizens within a democratic state are obligated to treat democratic enactments as having influential authority, those who hold this theory must convincingly establish that all such citizens *participate* in the political processes of such a state, and so *accept* the benefits that they receive from political minorities reciprocally benefiting the majority by taking the majority's expression of will as itself a reason for action. Yet as has long been recognized, a great many citizens of democratic states fail to engage in activities that stand a chance of realizing the opportunity to constitute a political majority (the will of which the minority must then take to be a new reason for action according to the principle of reciprocity).⁶⁴ It must thus be admitted that this large class of citizens does not accept the benefits that may come from the willingness of others to add to the balance of reasons for action the fact that a majority has expressed a preference for a particular course of

64. For similar responses to the theory of reciprocity, see *infra* note 75. While these responses read as rejoinders to the theory of consent, they are equally applicable here. For, as John Ladd notes, the theory of reciprocity differs from the theory of consent only insofar as it "provides us with a model of consent through participation rather than through contract." Ladd, *Legal and Moral Obligation*, in NOMOS XII: POLITICAL AND LEGAL OBLIGATION 21 (J. Pennock & J. Chapman eds. 1970).

conduct, and so, such a group cannot be thought to be obligated to reciprocate those benefits.

Second, and more significant, the account construes the proper aim of citizens who *do* participate in democratic processes to be the imposition of their will on others, rather than the collective pursuit of optimal ways in which to organize and regulate social relationships. "Having one's way" is construed on this account to be the benefit of majoritarian democracy and the sole basis for taking the laws enacted by a majority as giving new, content-independent reasons for action. The theory of reciprocity thus licenses moral logrolling in the interests of achieving the imposition of our preferences on others.⁶⁵

But why should one treat "having one's way" as a benefit, unless one were to take "one's way" to be reflective of how society ought best to be organized and regulated? Having one's way appears to be a value only if one's way is in fact the *right* way of doing things—that is, only if one's way comports with the balance of content-dependent reasons for action. If the rules that one prefers are in fact the wrong rules—because they are unjust, immoral, or inefficient, and so fail to reflect the balance of reasons that one has to act—then one does not want them to be enacted (or should not want them to be enacted), and so one does not benefit (or should not benefit) from others' taking their enactment as a new, content-independent reason for action.⁶⁶ But if one admits that "having one's way" counts only because one takes it to be reflective of how best to design rules to govern social transactions, then one must admit that having one's way is not, by itself, a value.⁶⁷ Similarly, if one admits that the only reason to grant the majority its way is because the will of the majority is likely to be reflective of how best to structure political arrangements, then one must admit that the fact that the majority has willed a particular rule, is not, *by itself*,

65. As Henry David Thoreau said of the sort of compromise upon which the theory of reciprocity seems to rest:

All voting is a sort of gaming, like checkers or backgammon, with a slight moral tinge to it, a playing with right and wrong, with moral questions; and betting naturally accompanies it. The character of the voters is not staked. I cast my vote, perchance, as I think right; but I am not vitally concerned that that right should prevail. I am willing to leave it to the majority. Its obligation, therefore, never exceeds that of expediency.

Thoreau, *supra* note 38, at 32.

66. This argument clearly depends upon an objective theory of preferences. What in fact benefits one may not be what one thinks benefits one. One is benefited, that is, by living in a just society—not necessarily by living in a society that one thinks just. This objective thesis, however, is implicit in people's subjective preferences. One may prefer that one's organs be donated at one's death. And one may think that death is synonymous with heart failure. But one's theory of death may turn out to be wrong. In that case, one does not want one's organs donated at the point of heart failure, but at the point of "real" death (whatever our best theory holds that to be). Anything short of this objective account of the content of preferences presupposes a shallow view of preferences, for it fails to take seriously the counterfactual thought experiment which so clearly characterizes what most persons in fact prefer: namely, if one knew what would *in fact* benefit one, one would prefer it to one's own (mistaken) view of what would be of benefit.

67. Such a conclusion is consistent with Thomas Nagel's claim that desire-satisfaction is not, by itself, a reason for action. See T. NAGEL, *THE VIEW FROM NOWHERE* 151 (1986).

a reason to obey such a rule. And if one admits this, then one admits that there is no content-independent reason to abide by rules enacted by the majority.

If individuals should comply with rules enacted by the majority only because such rules are more likely to be better than those preferred by the minority, is there any room left for considerations of reciprocity? One might think that there is. Reciprocity might function, for example, as an epistemic rule of thumb. In cases in which we are uncertain as to which of two rules might be optimal, the fact that others have deferred to our judgment in the past in cases in which we have been confident may give us a reason to defer to their confidently held judgments in cases in which we are uncertain. But the sort of reciprocity that this strategy represents is certainly not the sort that political theorists have invoked to ground a general obligation to obey democratic laws. Reciprocity on this account is simply the result of taking others' confidence in cases of uncertainty as a heuristic guide to determining which rules are optimal, because in cases in which we are confident we take our confidence to be a heuristic guide to the rules to enact and so take our confidence to be a good basis for others to opt for the same rules. Reciprocity, on this account, does not generate a content-independent reason to adhere to the will of the majority. Rather, it functions as an epistemic strategy for obtaining the content-*dependent* reasons for (and against) the enactment of proposed rules. If the principle of reciprocity merely functions as an epistemic rule of thumb, it fails to give us a reason to attribute influential authority to democratic governments: for in failing to provide a foundation for taking democratically enacted laws as new reasons for action, it violates the independence condition.

It thus appears that the theory of reciprocity does not provide us with a reason to think that the laws enacted by a political majority give content-independent reasons for action. It does not, that is, give us any reason to think that the fact that the majority has willed a particular set of rules is *itself* a reason to adhere to such rules. The principle of reciprocity thus fails to function as a reason to attribute influential authority to democratic enactments.

b. *The Theory of Gratitude*

In an attempt to solve the first of the two problems I raised against the theory of reciprocity, one might appeal to an alternative source of influential authority, one which does not rely on the requirement that individuals *accept* the benefits received from cooperative schemes in order to be bound by their rules. This alternative account, the traditional version of which was first propounded by Socrates in Plato's *Crito*,⁶⁸ bases the obligation to attribute influential authority to a majority on the moral requirement of gratitude for the benefits received from the enactments of that majority (though such benefits

68. PLATO, *Crito*, in PLATO: COLLECTED DIALOGUES 27 (E. Hamilton & H. Cairns eds. 1961).

may never have been accepted). On this theory, even the vast number of individuals who do not and who may never participate in democratic processes are obligated to factor in, as a new reason for action, the fact that a particular law has been preferred by the majority, for they owe a debt of gratitude for the benefits that they have received as a result of others' taking majority preferences as new reasons for action. Such a debt functions as a "special case of the general obligation to help persons who benefit us."⁶⁹

In order to think that those who do not participate in democratic processes nevertheless benefit from others' willingness to attribute influential authority to majoritarian laws, one must be able to give an account of just what these benefits are. One might think, for example, that the *potential* to become a participant capable of constituting a political majority (the preferences of which all citizens must then take as new reasons for action) is itself a benefit sufficient to give rise to an obligation of gratitude requiring those who never realize this potential (and thereby never accept the benefits of a majoritarian democracy) nevertheless to attribute influential authority to the majority's laws. However, such an argument would surely stretch the notion of a benefit to an extreme.

Alternatively, one might suggest that the outcomes of democratic decisionmaking are more likely to be substantively beneficial than are the outcomes of dictatorial decisionmaking. Democratic decisionmaking, on such an argument, might best produce legislation that accords with the balance of content-dependent reasons for action and so might achieve greater equality, distributive justice, and individual liberty. One owes a debt of gratitude to those who take the laws which result from democratic processes as new reasons for action, just because one reaps greater substantive rewards from those laws than one would from the laws of any other system.

Two responses to such an argument are in order. First, such an argument bucks our original hypothetical. For we began by assuming that we are faced with two regimes, one a majoritarian democracy and one a tyranny, both of which produce *identical* substantive outcomes by enacting *identical* laws. The question we set out to answer was whether we have any special reason to take the laws enacted by a majority as giving us new reasons for action that we do not have when the same laws are enacted by a dictator. To suggest that our reason for attributing content-independent status to the reasons for action generated by the majoritarian enactment of laws is that such rules produce different (and better) substantive outcomes is thus question-begging. If we owe obligations of gratitude to those who treat the laws enacted by a majority as having influential authority because by doing so they produce for us a just distribution of substantive benefits, then we must owe the same obligations of

69. J. PLAMENATZ, *CONSENT, FREEDOM AND POLITICAL OBLIGATION* 24 (2d ed. 1968). For general discussions of the significance of gratitude to political obligation, see Greenawalt, *supra* note 59, at 754; Wright, *supra* note 59, at 1000.

gratitude to those who take the laws passed by a dictator as having influential authority, since by so doing they produce the same just distribution of benefits.

Second, even if we were to set aside our own hypothetical for the moment and endorse the supposition that, in general, the results produced by attributing influential authority to the laws enacted by majorities are substantively more just than are the results produced by attributing influential authority to the laws enacted under dictatorships, the reason for complying with democratically enacted laws to which this supposition gives rise is not a content-independent one that requires, for its justification, something like the theory of gratitude. If the conduct preferred by the majority is more likely to be the right conduct—that is, if it is more likely to accord with the balance of the content-dependent reasons for action (and so be the most just, the most efficient, etc.)—then one indeed has a reason to comply with the majority's will. But one's reason for compliance is not a content-independent one: rather, the majority's enactments provide a reason to believe that there are *other*, antecedently existing, and content-*dependent* reasons for compliance. One's reason for obeying laws enacted by a majority is thus epistemic. By obeying such laws, one is more likely than not to act in accord with the balance of content-dependent reasons for action. One's appeal to the will of the majority thus becomes a heuristic guide to just those content-dependent reasons that make the rules which the majority endorses the right rules. The attempt to justify the influential authority of a democratic government by claiming that that government achieves substantively better laws thus violates the independence condition.

Defenders of the theory of gratitude might argue that while we indeed have content-dependent reasons to comply with democratically enacted laws if such laws better cohere with the content-dependent reasons for action that we already have than do those enacted under other political systems, the theory of gratitude nevertheless provides us with an *additional*, content-independent reason to comply with such laws. For the additional increment of substantive justice that is supposed to result from democratic processes is only made possible if most citizens in fact take such laws as the source of a new reason for action. One owes an obligation of gratitude to those citizens who do take democratically enacted laws as giving content-independent reasons for action, for their doing so makes possible the continued existence of a scheme that produces greater substantive justice than any alternative scheme.

Two problems appear devastating to this argument. First, it is not at all clear that we *do* incur obligations of gratitude to those who confer content-independent status on the reasons generated by the rules of a democracy, even when their doing so confers upon us continued benefits. As John Simmons has argued, there appear to be at least five necessary conditions for

the generation of an obligation of gratitude.⁷⁰ First, the benefit must have been conferred on us as a result of some special effort or sacrifice made on our behalf. If others benefit us merely in the course of pursuing their own affairs we do not feel that any special debt is owed them. Second, the benefit must not have been conferred upon us for disqualifying reasons (such as self-interest, duress, a desire to hurt another, etc.). Third, the benefit must not have been forced upon us against our will. Fourth, we must have wanted the benefit (or it must be the case that we would have wanted the benefit had our judgment been unimpaired). And finally, we must not have wanted the benefit *not* to be provided by those who made sacrifices on our behalf.

It is not at all clear that those who might be thought to attribute influential authority to the laws produced by democratic processes do so for reasons that give rise to obligations of gratitude on the part of those who are benefited by such an attribution. Those who factor into their reasons for action the fact that certain laws have been democratically enacted are unlikely to do so as a special effort to aid individuals who do not participate in the democratic process and who are not inclined to give similar status to the fact that that process has produced particular rules. More plausibly, any benefits that one receives as a result of others' willingness to take the directives produced by a democratic processes as having influential authority are conferred by those others unintentionally. It would thus appear that the first condition for the generation of an obligation of gratitude is unsatisfied and the second is rendered moot. And since a large number of citizens do not make their will known through political participation, it is difficult to know whether such individuals indeed want (or would want) the additional benefits that may accrue from others' attribution of influential authority to majoritarian rules. It is thus difficult to know whether the very individuals whom the theory of gratitude was supposed to bind (those who fail to engage in any political activities) indeed satisfy the final three conditions which must be met before they can be thought to have an obligation of gratitude that requires them to confer influential authority on democratic results.

Yet a second problem faces the theorist who claims that we owe a debt of gratitude to those who confer the unique benefits of democracy upon us by weighting the balance of reasons for action with the fact that the majority has preferred a particular course of action. This problem arises from the fact that in most cases there appear to be many ways of discharging debts of gratitude: taking the rules enacted by the majority as giving new reasons for action appears to be just one of several methods by which we might discharge our supposed debt to those who have benefited us by doing likewise.

One might claim, in response, that while debts of gratitude may be discharged in several ways, the continued existence of a majoritarian democracy

70. A.J. SIMMONS, *supra* note 1, at 170-79.

depends upon the willingness of most citizens to take the will of the majority as an additional reason to act as is willed. The salient means of repaying others for doing this is by similarly doing so. Taking the laws enacted by the majority as giving new, content-independent reasons for action is thus the means by which this particular debt must be discharged.⁷¹ Yet from the fact that a benefactor has a particular need, it does not follow that a debt of gratitude must be discharged in a manner that helps to meet that need. And even if a debt of gratitude requires that one meet the need of one's benefactor, this could be accomplished in the political case by often, but not always, taking the laws of the majority to give new reasons for action. The theory of gratitude thus fails to provide a general account of why individuals should attribute content-independent status to the reasons for action that is given by the majoritarian enactment of rules. It thus fails to give us a reason to think that laws enacted under majoritarian democracies possess influential authority of any weight, let alone a weight sufficient to enable such democracies to function as "as if" practical authorities.

c. *The Theory of Consent*

The final act-based account of why one should attribute influential authority to laws enacted by majorities has perhaps the most influential legacy.⁷² On this account, we have an obligation to treat democratically enacted rules as giving new, content-independent reasons for action because we have, in some manner or another, consented to do so. Our obligation to attribute influential authority to democratic governments functions, on this theory, as a special case of the obligation to keep promises. Two strands of consent theory can be distinguished. The first grounds the obligation to confer (influential) authority upon democratically enacted laws in each citizen's *personal consent* to do so. The second grounds this obligation on a notion of *historical consent*, maintaining that a historical group's initial consent to attribute (influential) authority

71. As Kent Greenawalt construes it, this argument is the basis of Philip Soper's theory of legal obligation: "Subjects should respect the good faith efforts of those with authority and a crucial way to show this respect is by obeying their directions. Subjects have a prima-facie obligation to obey the law because those with authority care about whether the law is obeyed and they deserve respect." Greenawalt, *Comment*, in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY* 156, 157 (R. Gavison ed. 1987); see also Henry, *Political Obligation and Collective Goods*, in *NOMOS XII: POLITICAL AND LEGAL OBLIGATION*, *supra* note 64, at 263.

72. For the intellectual history of consent theory, see generally J. GOUGH, *THE SOCIAL CONTRACT* (1936); G. SABINE, *A HISTORY OF POLITICAL THEORY* 311-499 (1973). For contemporary discussions concerning the importance of consent to theories of legal obligation, see generally J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1965); J. GOUGH, *JOHN LOCKE'S POLITICAL PHILOSOPHY* 52-79 (2d ed. 1973); R. NOZICK, *supra* note 14, at 3-146; J. PLAMENATZ, *supra* note 69; J. RAZ, *MORALITY*, *supra* note 1, at 80-94; Gewirth, *Political Justice*, in *SOCIAL JUSTICE* 119 (R. Brandt ed. 1972); Green, *Law, Legitimacy, and Consent*, 62 S. CAL. L. REV. 795 (1989); Regan, *Authority and Value*, *supra* note 1, at 1032-39.

to a majoritarian democracy binds all subsequent generations.⁷³ Since this second version is highly implausible, for only when an individual has been authorized to give consent for another can his consent bind that other, I shall deal here only with the merits of the first version.

Central to the consent theorist's account is the assumption that performative acts such as promise-making and consent-giving change the normative universe. Individuals, on the theory of consent, are "naturally free."⁷⁴ Only by a voluntary act, performed with a clear understanding of its moral significance, may an individual leave this "natural state of freedom," in which no individual or institution can obligate him, and shoulder obligations to others. When an individual promises to perform an act or consents to another's exercise of (influential) authority, this act is itself thought to provide the individual with a content-independent reason for keeping the promise or abiding by the will of the designated authority. That is, the individual's voluntary act is thought to provide the citizen with a reason over and above those he might already have to engage in the promised conduct or comply with the will of the authority.

As an account of our political obligations, the theory of consent has been thought to possess substantial intuitive plausibility. It appears reasonable to claim, for example, that under a *direct, unanimous* democracy, citizens are obligated to take the fact that they have voted for a particular law as itself a reason to abide by it; their vote, that is, is appropriately taken as a clear signal of their willingness to change their normative environment by adding to the reasons for a particular course of action the fact that they consented to such action. Similarly, it is plausibly thought that citizens who participate in *direct, majoritarian* democracies consent to take the majority's will as a reason for action, even when they find themselves in a minority. Finally, the account can seemingly be generalized to *representative* democracies, for citizens who participate within such systems are thought to consent to the attribution of influential authority to laws enacted by a majority of their representatives.

Despite the intuitive virtue this theory may be supposed to possess, there are a set of reasons for rejecting it as an adequate account of why laws enacted by political democracies might be thought to possess influential authority. The

73. As the medieval political theorist Richard Hooker claimed:

[T]o be commanded we do consent, when that society whereof we are part hath at any time before consented. . . . Wherefore as any man's deed past is good as long as himself continueth; so the act of a public society of men done five hundred years sithence standeth as theirs who presently are the same societies, because corporations are immortal; we were then alive in our predecessors, and they in their successors do live still.

1 R. HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY ch. 10, at 8, *quoted in* J. GOUGH, JOHN LOCKE'S POLITICAL PHILOSOPHY, *supra* note 72, at 56. This notion of historical consent was severely criticized by Hume and Kant. *See* D. HUME, *Of the Original Contract*, in HUME'S ETHICAL WRITINGS 255-73 (A. MacIntyre ed. 1965); I. KANT, THE METAPHYSICS OF MORALS pt. I, § 46 (J. Ladd ed. 1965) (1803); *see also* Macdonald, *The Language of Political Theory*, in LOGIC AND LANGUAGE 167 (A. Flew ed. 1st series 1959).

74. *See* T. HOBBS, *supra* note 38, pt. II, ch. 14, at 128; I. KANT, *supra* note 73, pt. 1, § 44; J. LOCKE, *supra* note 38, ch. 2, § 4; J. ROUSSEAU, *supra* note 56, at 1; Hart, *supra* note 60, at 175-76.

first reason for finding the theory unacceptable is a version of a reason long touted by political theorists for rejecting any consent theory of political obligation. It seems virtually impossible to determine when and how citizens living under democratic institutions consented to the attribution of influential authority to the laws enacted by such institutions.⁷⁵ Consent theorists have historically recognized this problem. Yet they have maintained that while few have indeed been faced with a situation in which *express* consent has ever been possible or appropriate, "signs of contract [may be] either 'express' or by 'inference.'"⁷⁶ They have argued that what is important is that individuals manifestly accord to the majority a special right to influence behavior in areas within which the individuals would otherwise be free to act—a right that generates on the part of those individuals a special obligation not to interfere with the exercise of the right accorded. Consent theorists have argued that this can be done *tacitly*, and indeed *is* done tacitly by all individuals living under democratic regimes.

Much confusion has been had concerning the sort of conduct that might be said to constitute tacit consent to a majority's exercise of (influential) authority. Locke maintained that the receipt of the benefits of democracy through residence sufficed to constitute tacit consent.⁷⁷ Others have followed Locke by maintaining that voting in elections, running for political office, and applying for a passport, are all acts that constitute tacit acceptance of obligations within democratic systems.⁷⁸

Yet such claims are confused insofar as they slur a distinction crucial to the theory of consent. This distinction is between "signals of consent" and

75. This rejoinder to the consent theory is old hat. As John Simmons says: "Since the earliest consent theories it has of course been recognized that 'express consent' is not a suitably general ground for political obligation. The paucity of express consentors is painfully apparent." A.J. SIMMONS, *supra* note 1, at 79. And as John Mackie points out: "An alleged contractual duty to obey the law is the basis of one of the main Socratic arguments [in support of an obligation to obey the law]. But . . . there is nothing in the lives of most ordinary citizens in a modern state that could constitute even a tacit or an implied agreement to obey." Mackie, *Obligations to Obey the Law*, 67 VA. L. REV. 143, 145 (1981). The argument from consent "is incredible," claims David Lyons, "because few of us have ever been parties to such an agreement. . . . This argument does not work, because its conclusion rests on false premises." D. LYONS, *ETHICS AND THE RULE OF LAW* 211 (1984); see also R. FLATHMAN, *POLITICAL OBLIGATION* 209 (1972); P. SINGER, *supra* note 56, at 22-26; Simmons, *Consent, Free Choice, and Democratic Government*, 18 GA. L. REV. 791, 819 (1984); Smith, *supra* note 1, at 960-64; Wright, *supra* note 59, at 1000.

76. T. HOBBS, *supra* note 38, pt. II, ch. 14, at 128.

77. Locke wrote:

[E]very Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his *tacit Consent*, and is as far forth obliged to Obedience to the Laws of that Government, during this Enjoyment, as anyone under it; whether this his Possession be of Land, to him and his Heirs for ever, or a Lodging only for a Week; or whether it be barely travelling freely on the Highway

J. LOCKE, *supra* note 38, § 119.

78. See A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 11-14 (1948); J. PLAMENATZ, *supra* note 69, at 168, 170-71; P. SINGER, *supra* note 56, at 50-51; Gewirth, *supra* note 72, at 137-38. T.H. Green even went so far as to say that no despot, however arbitrary, ever really governs simply by force alone, or against the general will. See Green, *The Principles of Political Obligation*, in *THE POLITICAL THEORY OF T.H. GREEN* 117 (J. Rodman ed. 1964).

“signs of consent.”⁷⁹ An act constitutes a signal of consent if, in the context in which it is performed, the act conventionally counts as an expression of the actor’s intention to consent. Thus, all express acts of consent are signals of consent. But in saying that an act is a sign of consent or “implies” consent, we mean neither that the actor intended to consent nor that the act would normally be taken as an attempt to consent. There appear at least three ways in which an act might be said to function as a sign of consent.⁸⁰ First, an act may be such that it leads us to conclude that the actor was in an appropriate frame of mind to consent had she been called upon to do so. Second, an act may be such that it commits the actor to consent on pain of irrationality. And third, an act may be such that it binds the actor morally to the same performance to which she would be bound if she had in fact consented.

The acts that Locke and many other consent theorists have taken to constitute tacit consent to a majority’s exercise of (influential) authority are acts that at best function only as signs of consent; they are not signals of consent.⁸¹ And acts that are merely signs of consent cannot consistently be appealed to by a consent theorist as a basis for attributing influential authority to democratic enactments. For such acts do not constitute deliberate undertakings of obligations intentionally incurred with a clear understanding of their morally binding significance. For one to have genuinely, if only tacitly, consented to take the laws enacted by a political majority as giving new reasons for action, one must have performed an act that functions as a signal of consent. But if this is the case, then it would seem that we are forced to conclude that tacit consent meets the same fate as does express consent: very few individuals have so consented to take the rules enacted under majoritarian or representative democracies as possessing influential authority.⁸² And since few citizens, then, can be thought

79. I have elsewhere developed this distinction in substantial detail. See Hurd, *supra* note 5, at 953-54. In the context of discussing the consent theory of obligation, John Plamenatz makes a similar distinction between “direct consent” and “indirect consent.” See 1 J. PLAMENATZ, *MAN AND SOCIETY* 239-41 (1963). Peter Singer captures this dichotomy by distinguishing between “real consent” (which includes tacit consent) and “quasi-consent.” See P. SINGER, *supra* note 56, at 47. And John Simmons talks of this distinction as one between “signs of consent” and “acts which ‘imply consent.’” See A.J. SIMMONS, *supra* note 1, at 88.

80. See A.J. SIMMONS, *supra* note 1, at 89.

81. But see J. PLAMENATZ, *supra* note 69, at 7 (attempting to refute view that Locke confused tacit consent with acts implying consent).

82. Leslie Green has recently advanced an interesting variation on the Lockean attempt to ground political obligation in tacit consent. See Green, *supra* note 72, at 818-25. Green argues that political obligations can be assumed by voluntarily entering into the *role* of citizenship. The assumption of this role “will rarely be a single act of commitment.” *Id.* at 823. Just as one voluntarily becomes a lawyer (and so voluntarily assumes a set of duties that are not themselves subject to individual alteration) without performing any *one* act that at that moment makes one a lawyer, so one can voluntarily assume the role of citizen (with its accompanying nonvoluntary duties) through a successive set of choices. *Id.* at 823-24. To the extent that many voluntarily assume the *role* of citizen, they assume the duties of obedience that (nonvoluntarily) attach to that role. In the language of this discussion, the incremental adoption of the role of citizenship brings with it the obligation to treat majoritarian laws as a source of new reasons to act.

There is much to be admired in Green’s new take on this old theme. And perhaps Green is right in thinking that if political obligations are role-relative obligations, they, like parental obligations, can be construed as consensually assumed even in the absence of any single act of consent. But Green still faces

to have consented to the attribution of influential authority to the directives of most democratic political systems, few can be thought to have an obligation to take the enactment of such directives as a new reason to act as directed.

Yet this argument against the consent theory of influential authority may be guilty of the same sort of hypo-bucking of which I accused past arguments. For recall that we began by assuming that we were concerned solely with a *direct*, majoritarian democracy. Under such a regime all citizens participate in the enactment process. If this sort of political participation were to constitute tacit consent to the attribution of influential authority to majoritarian results, then the above objection to the consent theory of influential authority would fail.

There remains, however, a more interesting and subtle problem with the theory of consent—a problem that stems from its fundamental assumption that acts of consent provide content-independent reasons for action. To motivate this problem, let us reconfirm our supposition that everyone in the democratic regime with which we are concerned has indeed done all that it takes to consent (either expressly or tacitly) to the rules of the system. Why would we take these individuals' acts of consent as providing them with content-independent reasons for action? The answer has always been that such acts constitute a form of promising, and promises function to give content-independent reasons for action. But do they? I think not.

Promises function not as new reasons for action but as expressions of intentions to act. The unique moral significance that they appear to possess is not a result of the fact that they *change* the normative universe, but rather, a result of the fact that they *map* it. As predictions of behavior, they inevitably provide a basis for others' reliance. When others in fact rely on one's predictions to such an extent that they would be harmed if one failed to act as predicted, their reliance generates a new reason to act as one predicted that one would. But this new reason is a content-*dependent* one. The right thing to do, given the weight of their reliance, may well be to act as one said one would, even if, absent their reliance, one has ceased to have enough reasons to act as predicted to make that course of action rational.⁸³

two problems. First, he must make plausible just how political citizenship constitutes a discrete role, like being a lawyer, a parent, or a judge. To speak of citizenship as a voluntarily adopted role, as opposed to a nonvoluntary status, appears metaphorical. Second, to the extent that a role functions like a promise, Green's argument invites the second problem which I raise concerning the theory of consent as a source of influential authority. See *infra* text accompanying note 83.

83. My position on this point comes close, in part, to that held by William Godwin. As Godwin recognized, "Previously to my entering into a promise, there is something which I ought to promise, and something which I ought not." W. GODWIN, *supra* note 3, at 218. Thus when we promise, we either have adequate reasons for promising or we do not. If we do not, then our promise cannot provide them. It is at this point, however, that I part ways with Godwin's analysis. For as Godwin goes on to argue, if one does have sufficient reasons for promising, then the promise functions as an "additional inducement" to do what ought otherwise to be done. But to the extent that we act on the basis of this inducement, we act for a wrong reason. Since morality requires that we act for the right reasons, "promises are, absolutely considered, an evil." *Id.*

If what I have said of promise-keeping is plausible, the same can be said of acts of consent to the exercise of influential authority. Were we in fact to consent expressly or tacitly to take the majority's expression of will as a new reason for action, our consent would merely provide others with a reason to think that we have other reasons for abiding by the will of the majority even when we find ourselves part of a minority. Others may well rely on our consent, and so abide by the dictates of the majority when they are in the minority because they anticipate that we will do the same. And their reliance on our consent may indeed give us a new reason to abide by the laws enacted by the majority, but such a reason is not a content-independent one. The reliance of others is not a reason independent of the content of the reasons that we already have to comply with democratically enacted laws; rather, it becomes part of those reasons. If the reasons against complying with the laws enacted by a political majority outweigh the reasons that we have to prevent harm to those who have relied on our predicted compliance with those laws, then, on the balance of content-dependent reasons, we should refuse to comply with those laws. We lack, that is, any content-*independent* reason for complying with the will of the majority when what that majority wills is in significant respects wrong. The theory of consent thus appears to violate the independence condition, and so appears to fail as a basis for taking democracies as influential authorities.

The theory of consent fails to give us a special reason to comply with laws enacted by political majorities, both because few of us have indeed consented to take the laws of a majority as giving new, content-independent reasons for action, and because such consent, even if procured, would not, *by itself*, constitute a reason for compliance. These problems are reminiscent of those that we encountered when considering the theory of reciprocity and the theory of gratitude. In each case, we failed to discover how individuals could be thought to have voluntarily acted so as to shoulder obligations of obedience—either by accepting benefits, receiving benefits, or consenting to the rules which provide those benefits. And in each case, we failed to discover how such acts, even if performed, would in fact constitute content-*independent* reasons to comply with the will of a political majority. Since a majority can function as an influential authority only if there are content-independent reasons to abide by it, the failure of the three act-based theories to establish any content-independent reasons for

My thesis does not require that we think of promises as evil. On the contrary, since predictions of future events are in many cases extremely helpful, promises, to the extent that they are generally reliable predictions of future behavior, will be helpful. And insofar as they are helpful—insofar as people develop reliance interests as a result of them—they will stand proxy for content-dependent reasons for action (reasons that reflect those reliance interests) that are in fact right reasons for action.

I am without a doubt guilty of playing fast and loose here with what is a difficult and extensively debated topic. To do otherwise would take us far afield. The analogy to a “new” theory of promising is important to the discussion of the theory of consent, but to be successful this “new” theory would require a thorough defense. For an introduction to the literature that would have to be grappled with in order to begin such a defense, see *supra* note 25.

complying with majority will represents a failure to establish any basis upon which democratically enacted laws could possess influential or “as if” practical authority. Since this failure appears endemic to act-based accounts of why we should attribute influential authority to democratically enacted laws, I propose to examine an alternative type of theory in order to determine whether it can escape the difficulties encountered by the theories considered in this section.

3. *A Duty-Based Theory of Influential Authority*

If no other act-based accounts of our political bonds can be given beyond those provided by the three theories discussed above, then we must concede that individuals do not have special *legal obligations* to comply with laws enacted by political majorities. Two options remain: either we must accept the supposedly counterintuitive conclusion that individuals are not morally bound to take the laws favored by a majority as giving new reasons for action, or we must try to find a duty-based account of these bonds. Recognizing the need for such a choice, John Rawls abandoned the theory of reciprocity in favor of the latter option.⁸⁴

Recall that obligations were defined by Hart as moral requirements generated by voluntary acts which bind not by virtue of the nature of the act required, but by virtue of the nature of the relationship that exists between the specific person bound and those to whom she is bound.⁸⁵ Duties, in contrast, are to be thought of as independent of any institutional setting or special relationship: they apply to all individuals irrespective of their status or of acts performed. As Rawls explicitly claims, “Obligations can be accounted for by the natural duty of justice . . . [for] [i]t suffices to construe the requisite voluntary acts as acts by which our natural duties are freely extended.”⁸⁶

According to Rawls, each member of a political community is bound by a natural duty of justice to support and further the just political institutions of her community. This duty is two-pronged: “First, we are to comply with and do our share in just institutions when they exist and apply to us; and second, we are to assist in the establishment of just arrangements when they do not exist, at least when this can be done with little cost to ourselves.”⁸⁷ This theory is thought to provide a perfectly general account of political duty, in that all citizens of societies governed by institutions that are just are bound equally under them, “irrespective of [their] voluntary acts, performative or otherwise.”⁸⁸ The natural duty of justice might further be thought to satisfy the independence condition which must be met by any account of how institutions

84. J. RAWLS, *supra* note 14, at 114-17, 333-42.

85. *See supra* note 60 and accompanying text.

86. J. RAWLS, *supra* note 14, at 343.

87. *Id.* at 334.

88. *Id.*

possess influential authority, for this duty is taken to be a reason to obey the rules enacted by an institution above and beyond the reasons to think the rules just.

In order for Rawls' theory to give us a special reason to attribute influential authority to the rules enacted by a majority that we do not have if those same rules are enacted by a dictator, we would have to have some account of why democratic institutions are just, while tyrannical ones are not. Two sorts of accounts present themselves. The first account is motivated by a substantive theory of justice. On this account, democratic processes of legislation are just because they are more likely to produce substantively just outcomes than are dictatorial systems of legislation—that is, they are more likely to produce results that accord with the antecedently existing content-dependent balance of reasons for action. But while this may indeed be true, such an account faces the same problems that were faced earlier by the theorist who maintained that we owe gratitude to those who attribute influential authority to the rules governing democratic processes because in so doing those individuals preserve a system that produces greater benefits for us than do other systems. The first common problem is that this argument fails to take seriously the hypothetical that tests the moral uniqueness of democracies. For if a dictatorial government were to pass laws identical to those passed by a majority, and if such laws produced identical results in both the dictatorship and the democracy, then it would appear that under a substantive theory of justice, both regimes would be equally just. Rawls' natural duty of justice would thus require that we attribute influential authority to both the democracy and the dictatorship. It thus appears that Rawls' natural duty of justice, if filled out by a substantive theory of justice, fails to give us a special reason for taking democratically enacted laws as giving new reasons for action.

The second common problem that faces both the gratitude theorist and the natural duty of justice theorist is that their theories violate the independence condition. For while one certainly has a reason to comply with the directives of the majority if those directives accord with the balance of content-dependent reasons for action, one's reason to do so is not content-independent. The preferences of the majority in such a case merely function as heuristic guides to the antecedently existing content-dependent reasons for action, and so function only epistemically. They thus give no new reasons for action; they merely evidence already existing reasons for action.

Notice further that if we were to suppose that democracies in general produced greater substantive justice than alternative sorts of political systems, Rawls' natural duty of justice would not require that we comply with democratically enacted laws that are not substantively just. For if our duty is to achieve substantive justice, then it cannot be the case that this very same duty demands our attribution of influential authority to substantively unjust laws. Rawls' natural duty of justice, if conceived of under a substantive theory of

justice, thus fails to give an account of why a political minority is obligated to take the laws enacted by the majority as a source of new reasons for action when those laws are wrong. It fails, that is, to give a content-independent reason for complying with the will of the majority, and thus, it fails to give an account of why democratically enacted laws possess influential authority.

An alternative theory of why democracies are uniquely just might stem from a procedural conception of justice. On such a theory, democracies are just because the procedures that produce their results are themselves fair, while tyrannies are unjust because they lack fair procedures. To defend such a view, one has to think that political participation is itself a value: the process of political decisionmaking is more just if all individuals who are to be bound, in some sense, by the outcomes of such decisions have a say in the process. But the same challenge that was issued to the theorist defending a duty of reciprocity can be raised here. Why value our own participation in the process of political decisionmaking unless that participation produces for us and others substantively better results? The answer given by the famous anarchist, Robert Paul Wolff, is that participation maximizes our ability to be self-legislating because it allows for the autonomous exercise of choice, and this is of greater value than accomplishing substantively beneficial arrangements. But the fully rational and autonomous agent would seemingly be considerably less rational if he valued the imposition of his will solely for its own sake, and so preferred to participate in the political process despite the fact that his participation produced substantively inferior results for himself and others. A fully rational person should seemingly value political participation only if he thinks that his participation will accomplish better results (results more in accord with the balance of content-dependent reasons for action) than his nonparticipation.

But if participation is only a value if it produces greater benefits to those who participate than does nonparticipation, then we must conclude that the procedural theory of justice collapses into the substantive theory of justice. Like the act-based theories of influential authority, Rawls' natural duty of justice founders on the independence condition. In failing to give us a content-independent reason for complying with laws enacted by a majority, it seems that Rawls' natural duty of justice does not provide an account of why such laws possess influential authority.

In light of the failure of both act-based and duty-based accounts to provide us with a special, content-independent reason to comply with laws enacted by a democratic majority, it would appear that we are left with the supposedly counterintuitive option of thinking that individuals are not morally bound by the will of the majority. We are forced, that is, to conclude that we have no reason to confer even influential authority on democratically enacted laws, for the fact that such laws have been democratically enacted itself possesses no special moral status. And if the laws enacted under democracies inevitably lack influential authority, it seems likely that the laws enacted under other regimes

will fare no better. For democratically enacted directives stand a better chance of satisfying the sorts of conditions that would give rise to content-independent reasons for action than do directives enacted nondemocratically: namely, they require reciprocal compliance, they appear to be the product of civic consent, they are born of procedures that seem maximally just, etc. That democratically enacted laws fail to possess influential authority is thus a reliable indication of the fact that laws enacted under systems that are less likely to meet these conditions will similarly lack influential authority.

So where does this leave us? Have we backed ourselves into a theoretical corner from which we can only escape by embracing a philosophy of anarchy?⁸⁹ Our situation, I think, is not this desperate. But before we go on to examine just what might be left of a notion of legal authority, it will be useful to review the argument thus far. We began by considering the traditional view of legal authority—the theory of practical authority. This theory was found to be conceptually incoherent: despite Raz's sophisticated attempt to rescue it from incoherence, the concept of practical authority foundered upon the paradoxical demand that we act contrary to the balance of reasons when commanded to do so. We then took up a second theory of legal authority—the theory of influential authority or "as if" practical authority. This alternative concept of authority was found to be free of the dilemma that plagued the concept of practical authority, and thus, the attempt to employ it as a theory of legal authority was conceptually vindicated. But to succeed as an account of legal authority, the theory of influential authority demanded a theory of why governments might be thought in fact to possess such authority. And it was on this score that the theory came up empty-handed. For there appeared no reason to take the enactments of even the most democratic of governments as a source of new content-independent reasons for action characteristic of an influential authority.

Does all this necessitate the view that there is no such thing as legal obligation as it has long been conceived? The answer seems quite clear: Yes. But while there may be nothing that obligates us legally, there may be much that obligates us morally. And insofar as we are morally obligated to act in certain ways, there may still be an authoritative role to be played by legal institutions.⁹⁰ It is to this role, and the concept of authority that attaches to it, that I propose to turn in the next and final Part of this Article.

89. "If we indulge the minor simplification that anarchism is the alternative or compelling position, it appears that theorists have found that position too weak to accept but far too important to dismiss . . ." R. FLATHMAN, *supra* note 1, at 175.

90. Insofar as the rest of the Article is devoted to examining this role, I hope to escape the disapproval that Donald Regan has levied upon others who have reached similar conclusions concerning our political obligations: "I am unhappy with a position that would say there was no moral obligation to obey the law and then say no more about the law's moral significance." Regan, *Law's Halo*, *supra* note 1, at 15.

III. THEORETICAL AUTHORITY: A FINAL SOURCE OF LEGAL AUTHORITY

A. *Theoretical Authority as a Solution to the Paradox of Practical Authority*

If, as the preceding Parts have argued, our only reasons for action are those first-order content-dependent ones that exist prior to the political enactment and enforcement of particular laws, then the importance of those laws cannot be explained in terms of any new reasons for action which such laws provide. Does such a conclusion make a mockery of governmental activities? Does it render impotent the directives of legislatures, courts, and regulatory agencies? Must we conclude, in fact, that the force of law is wholly illusory? Were our only available theories of the importance of law those which we have already canvassed, then the collective answer to the above questions would inevitably be in the affirmative. But there remains a final theory of authority, one which stands a chance of vindicating our deeply felt conviction that laws possess a special status and are worthy of our most serious consideration: the theory of theoretical authority.⁹¹

It will be recalled that when an institution constitutes a theoretical authority about what one ought to do, its utterances function as reasons for belief in certain deontic propositions.⁹² The authoritative utterances of theoretical authorities concerning the content of our actions are thus reasons to *believe* that one ought to do what is prescribed—but they are not themselves reasons to *do* what is prescribed. Unlike the directives of a practical or influential authority, the utterances of a theoretical authority do not affect the balance of reasons for action. Rather, they simply provide information about that balance as it exists independently of those utterances. The directives of a theoretical authority are thus wholly evidential. They function as pieces of advice—not as commands or requests.

Consider, for example, the case in which a legislature decrees that all contracts must be in writing. If the legislature were to function as a practical or influential authority, then the fact that the legislature issued such a decree would itself provide a reason to make contracts in writing. But if the legislature functions only as a theoretical authority, its decree constitutes only evidence

91. I am not alone in thinking theoretical authority the only source of political authority. See, e.g., Alexander, *Law and Exclusionary Reasons*, 18 PHIL. TOPICS 5, 5-22 (1990); Bell, *Authority*, in ROYAL INSTITUTE OF PHILOSOPHY LECTURES: 1969-70, at 190, 195-96 (1971); Regan, *Authority and Value*, *supra* note 1, at 1036-37. It is also important to recognize that a political theory of theoretical authority would embody many of the characteristics of what Richard Flathman has called a "substantive-purposive" account of political authority, i.e., it will embody the propositions that (1) authority provides statements to be believed (as opposed to commands to be obeyed), (2) authority is an attribute of persons (as opposed to a creation of rules or offices), and (3) it is impossible to understand authority without understanding the substance and purpose of the statements that it provides. See R. FLATHMAN, *supra* note 1, at 14-16. To this extent the theory joins a set of others to which Flathman devotes considerable evaluation and from which he borrows extensively in developing his own account of political authority.

92. See *supra* text accompanying notes 8-10.

that there are *other*, content-dependent reasons for making contracts in writing (such as the prevention of fraud, the benefit of having clear evidence of contractual intent, and so forth).

Yet how does evidence affect reasoning? Is it not likely that a theoretical authority affects our reasons for belief in a manner symmetrical to the way in which a practical authority affects our reasons for action? Thus, if practical authorities must be thought to provide exclusionary reasons for action, is it not likely that theoretical authorities must be thought to provide exclusionary reasons for belief? If true, such an account of theoretical authority would certainly invite a dilemma analogous to the dilemma of practical authority. The dilemma of theoretical authority would run as follows:

(1) If advice provides a reason for belief concerning what ought to be done, then in formulating one's belief about what one ought to do, one is barred from considering reasons for belief that are contrary to the reason for belief provided by a particular piece of advice.

(2) If one is barred from considering reasons for belief that are contrary to the reason provided by advice, then advice bars any further consideration of other reasons for belief that support the reason provided by that advice.

(3) HENCE: Upon the receipt of advice, the only reason that one should consider for believing that a certain action should be performed is the fact that that action has been advised.

(4) But, if a belief is rational *because* it is the product of advice, then any advice gives one a reason for belief. (Thus, the advice that it will snow in Ecuador gives one a reason to believe that it will.)

(5) If, alternatively, a belief is rational only if it comports with other requirements, then the sheer fact that a belief is a product of advice does not make that belief rational.

(6) Since the consequent of (4) is false, the antecedent of (4) must be false.

(7) Since the antecedent of (4) must be false, then the antecedent of (5) must be true.⁹³

(8) If (5) is true, then to hold rational beliefs one must form one's beliefs on the basis of reasons other than the fact that one has been given advice.

(9) HENCE: Beliefs formed on the basis of advice are irrational.

This parallel dilemma for a theory of theoretical authority wears its rebuttal on its face. Unlike the commands of a practical authority, advice given by one possessed of theoretical authority does not appear to deprive one of the freedom to consider other reasons for belief. Our normal expectation in giving advice is that those to whom it is given will consider it *along with everything else*. And our general practice upon the receipt of advice is to take it into consider-

93. The suppressed premise in (7) is: If it is not the case that a belief is rational *because* it is the product of advice, then a belief is rational only if it comports with other requirements.

ation—to add it to the balance of factors being weighed. Advice thus does not seem to convey even an apparent exclusionary reason for belief (as commands seem to convey apparent exclusionary reasons for actions).

Perhaps, however, these common sense assumptions about advice are mistaken. Common sense may be misled by the greater power that we have to ignore advice than to ignore commands; it may confuse that power with the demands of rationality. Thus, our common sense intuitions about advice may be the product of unjustifiably conferring a lesser degree of respect on our obligations to hold rational beliefs than is conferred upon our obligations to perform rational actions. In any case, perhaps the demand for rationality in our beliefs renders the notion of theoretical authority as incoherent as the demand for rationality in action renders the notion of practical authority.

To explore this, consider four possible accounts of how advice might be thought to possess exclusionary force. The first account holds that, contrary to appearances, all advice given by a theoretical authority does bar consideration of evidence other than the advice itself. Advice, on this view, constitutes an exclusionary reason for belief just as a command might be thought to constitute an exclusionary reason for action. Such a view would justify the first premise of the parallel dilemma for theoretical authority.

The most compelling foundation for such a view would lie in some idea that advice is unlike other sorts of evidence, for it must always either be heeded or ignored: one takes it or leaves it. By virtue of its all-or-nothing character, advice cannot be treated as simply another piece of evidence—another reason for belief—to be added to all other pieces of evidence. This may be due to the kind of evidence of which advice consists. Advice is always someone else's judgment about the beliefs that can be justifiably held given his or her estimate of the balance of reasons for belief. Advice is not itself part of the evidence on which it is based. Accordingly, one might think that to be considered at all, advice must preempt other evidence in determining what it is that would be rational to believe. Advice, on such a view, demands just that surrender of judgment that begins the above dilemma of theoretical authority.⁹⁴

Yet advice may be heeded without a surrender of judgment. While advice may function as a different kind of evidence than most other kinds by virtue of its status as another's summary of the balance of reasons for belief, the evidence that advice provides may nevertheless be thought to be on par with the evidence on which it is based. The advice of a theoretical authority constitutes evidence at all only because that authority is more motivated to discover the truth, or is in possession of more information, or has superior inference-drawing abilities. That a theoretical authority judges the available

94. It is common to encounter the claim that both theoretical and practical authorities demand the identical sort of "surrender of judgment." See, e.g., R. FLATHMAN, *supra* note 1, at 18-19, 92-100, 247 n.7; J. RAZ, *MORALITY*, *supra* note 1, at 67-69. But see R. FLATHMAN, *supra* note 1, at 100-02; L. GREEN, *supra* note 1, at 27; K. GREENAWALT, *supra* note 1, at 59 n.6 & n.14.

evidence to justify a certain conclusion is itself evidence for the truth of that conclusion. This is not to say that when a theoretical authority (such as a weatherperson) judges a certain proposition to be true (for example, that it will rain tomorrow) that authority changes the objective probability of the truth of that proposition. For if there were no weather forecast, the objective likelihood of rain would be the same. Evidence, in the sense that is relevant here, is a matter of reasons for belief by an individual, not a matter of objective probability (if this much-disputed notion has any meaning at all). Both the weatherperson's forecast and the "farmer's moon" are reasons to believe that it will rain tomorrow, even if one of those pieces of evidence is itself a judgment based on the other. There is, then, nothing that compels us to accept an all-or-nothing account of the nature of advice. Advice may be heeded by being considered along with all other evidence; it need not exclude consideration of that other evidence.

Consider, however, a modified version of this first account of the exclusionary work that is done by advice. Such a version is reflected in Donald Regan's recently articulated view of the epistemic role of law.⁹⁵ On an account of advice that borrows from Regan's analysis, advice might be thought to function as an "indicator rule." When we receive advice, we are given a second-order epistemic reason to believe that that advice reflects the balance of first-order reasons for belief that are available from sources other than advice. The advice itself is an "indication" or summary of those first-order reasons for belief. Insofar as the advice reflects the balance of all first-order reasons, it does not exclude beliefs based on that balance. As such, advice does not provide protected reasons for belief of the Razian sort. But inasmuch as advice sums up the balance of all first-order reasons for belief, it cannot, on pain of double-counting, be added to those reasons. As such, advice indeed preempts those other reasons for belief. It excludes our ability to consider *both* the indicator rule that is provided by the advice and the antecedently existing reasons for belief that that advice purports to sum up.

This account is tempting, for in many instances the advice of an individual does appear to piggyback on antecedently existing reasons for belief so as to add nothing new to those reasons. If one were to add the fact of the advice to those reasons one would illegitimately assign a greater probability to the truth of the belief advised than would be objectively merited. Thus, for example, when an attorney advises a client that the client's will should be signed by two witnesses, the attorney issues an indicator rule that the client can substitute for, but not add to, all the reasons that the client could accumulate from other sources (such as law books, the experience of friends, and television programs) for the belief that wills should be signed by two witnesses. Were the client to

95. Regan, *Authority and Value*, *supra* note 1. For a good discussion of Regan's notion of indicator rules, see Alexander, *supra* note 91, at 16-19.

add the attorney's advice to those other reasons rather than substitute it for them, the client would be guilty of double-counting the reasons for her belief. If the client takes the attorney's advice, she is thus excluded from further considering the reasons for belief summed up by that advice.

While initially plausible, this account of the exclusionary role of advice gives way to an unfortunate regress. For it places a premium on a distinction that cannot be maintained. Crucial to this account of the exclusionary role of advice is the thesis that motivated the first account above: that advice is a different sort of evidence than is other evidence. Advice functions as "summary evidence" of other, primary evidence. Such a thesis might be motivated by the fact that as an intentional communication of another's judgment, advice functions as a "signal." To be contrasted with signals are pieces of evidence which, by virtue of being causally related to or symptomatic of certain natural phenomena, function as "signs" of those phenomena. Thus, storm clouds are signs of snow; the weatherperson's forecast of snow is a signal of snow. Similarly, the defendant's fingerprints on the murder weapon are signs of guilt; the defendant's confession is a signal of guilt. On this second account, signals sum up signs, and so cannot be considered together with those signs.

Yet while there is a genuine distinction between signs and signals, this distinction does not track the supposed distinction between summary evidence and primary evidence. Signals do not sum up or function as indicators of signs. Rather, signs and signals are two categories of evidence, each causally related to the phenomena of which they are evidence. To see that one cannot maintain the distinction between summary evidence and primary evidence which the sign/signal distinction misleadingly suggests, consider the following. If one would be guilty of double-counting evidence were one to add the weatherperson's forecast to the reasons provided by storm clouds for believing that it will snow, would one not be guilty of double-counting evidence were one to add the thermometer's reading to the coldness of the day, since the thermometer sums up that coldness? And would one not also be guilty of double-counting evidence if one added the ice on the lake to that coldness, since the ice also sums up that coldness? Indeed, would one not be guilty of double-counting evidence if one added the coldness to the atmospheric conditions that cause it, since those atmospheric conditions sum up that coldness? If the answer to these questions is yes, then one could not simultaneously consider the forecast, the thermometer's temperature reading, the ice that has formed on the lake, and the atmospheric conditions of the day as evidence that it is cold.

Yet surely this conclusion offends our understanding of what constitutes evidence. That pieces of evidence are causally related does not render each a summary of the others. On the contrary, their causal connectedness is what allows us to consider each of them evidence of a single phenomenon. To the extent that advice (that is, an intentional communicative signal) is causally

related to the phenomena about which it advises, that advice will similarly function as evidence of that phenomena. And such a causal connection surely exists. Just as the fact that a thermometer reads thirty-two degrees is causally connected to the temperature which it reports, so the fact that a well-informed individual has given a piece of financial advice is causally connected to the financial climate which that advice reflects. And just as the thermometer reading can be added to other evidence (such as the freezing of the lake, the coldness of the wind, and so forth) in determining the truth of a proposition about the weather, so an individual's financial advice can be added to other evidence (including the evidence that caused the individual to issue the advice, such as stock market reports, interest rates, and so forth) in determining the truth of the financial information conveyed by the advice. As such, advice no more excludes or preempts consideration of the other reasons for belief that may have caused the advice than any other evidence excludes other reasons for belief to which that evidence is causally related.

Let us turn, then, to the third of the four possible grounds for thinking that advice possesses exclusionary force. One pursuing this third possibility might admit that advice in fact functions just like all other evidence, but maintain that all evidence provides exclusionary reasons for belief, and hence, that advice must do the same. On this third view, evidence (a reason for belief) is always exclusionary because deliberation about what to believe must at some point stop. In order to believe anything or to do anything, one must cease at some point to suspend judgment and judge. One must thus, at some point, exclude further investigation and consideration of the evidence and, hence, exclude the further evidence that such investigation and consideration would reveal. In this sense, advice, like all evidence, excludes other evidence when that advice forms the basis for a judgment.

Yet this use of the notion of exclusionary force is harmless to a defense of the conceptual coherence of theoretical authority. If the above dilemma of theoretical authority were to begin on this basis, the dilemma would be one for rationality itself. That is, if excluding reasons for belief on this basis were problematic, then, since all evidence has this feature, it would be unclear how we could believe anything and still be rational. This is a worthy problem, and one that is related to a problem for theoretical authority which I shall discuss shortly, but it is not itself a problem for an account of theoretical authority.

In order to be employed as the starting point for the dilemma of theoretical authority, this third account of the exclusionary nature of advice must be modified. Such a modification provides us with the final possible means of fueling the dilemma of theoretical authority. According to this fourth account, *some* advice (but not all) may well be thought to provide a recipient with such strong evidence for the truth of a proposition that, when considered in relation to the other evidence possessed by that individual, the advice may seem to demand the exclusion of any contrary evidence, and thus, the surrender of

judgment. For example, the physician who advises a medically ignorant patient to adopt a particular diet as the sole measure available to save that patient's life appears to leave that patient with little choice. The experienced stockbroker who counsels financially uninformed clients to pursue a particular investment seems to leave those clients with no grounds for debate. And the chemist who recommends the development of a new compound is likely to leave those who remember little of their high school chemistry with no means of disputing the chemist's formula. It would appear, that is, that upon the receipt of advice such as this, one is effectively barred from considering further the merits of what is advised. When a particular piece of advice is uncontested (such that it is the sole evidence that we possess to think that some course of conduct is required) and uncontestable (in that it is issued by someone better situated than we to determine the conduct that is required), that advice appears to bar any further deliberation on our part concerning the reasons to believe that we ought to act as advised. And if this is in fact the case, then the concept of theoretical authority would seemingly land us in the analogous dilemma to that which defeated the concept of practical authority.⁹⁶

On inspection, however, this fourth account of the exclusionary effect of advice does no more to generate the dilemma of theoretical authority than did the previous three accounts. The "exclusionary work" done by the advice of even the most persuasive theoretical authority is purely epistemic. Unlike the commands of a practical authority, which bar one's further deliberation about contrary courses of action by providing a second-order reason to *act* only *because* the action has been commanded, the statements by one possessing theoretical authority (even of an uncontestable sort) do not bar further deliberation by providing a second-order reason to *believe* a proposition solely *because* that belief has been advised. That is, even uncontestable theoretical authorities do not give *protected* reasons for belief; they simply give new reasons for belief.

In the end, the only exclusionary effect that advice can have comes not from that advice, as such, but from an epistemic rule of thumb to which all deliberation is subject: when the evidence in favor of some proposition is good enough in comparison to the sort of other evidence that might be accumulated, exclude consideration of such other evidence. This rule of thumb has nothing intrinsically to do with the effect of advice on deliberation or with the dynamics of theoretical authority; it merely reflects the demands of search patterns rationally derived to accomplish the discovery of truth. Although advice can, by use of this rule of thumb, function to exclude other evidence, so can any other piece of strongly persuasive evidence (such as the flight of the bumblebee vis-à-vis the question of whether the bumblebee can fly). The above dilemma of theoretic-

96. We would, of course, have to narrow the statement of that dilemma so as to apply only to uncontested and uncontestable advice, not to advice as such.

cal authority thus cannot be generated from this “exclusionary” feature of advice, for this is a feature common to all forms of evidence.

There is thus no dilemma that challenges the conceptual coherence of a theory of theoretical authority in a manner analogous to the dilemma that defeats the coherence of a theory of practical authority. Since the exercise of theoretical authority does not involve the giving of protected reasons, it does not bar independent consideration of or deliberation about the merits of advised action. Thus the lemma that generated the analogous paradox of practical authority does not get off the ground. This, by itself, establishes the conceptual coherence of a theory of theoretical authority.

Such a vindication, however, may have a hollow ring. For a practical problem remains. In order for there in fact to exist theoretical authorities, it must be the case that one has a means of identifying them without oneself becoming one of them. Just as it would seem that one would need to know the spelling of a word before one could consult a dictionary so as to determine its proper spelling, so it would seem that one would need to be a theoretical authority in order to determine whether another is better situated than oneself to be such an authority. While our personal experience of the trial and error method with which one in fact employs a dictionary vitiates the temptation to declare the very notion of using a dictionary viciously circular, it takes a bit of explaining to render the practical employment of a theoretical authority similarly noncircular. And the concept of a theoretical authority will only be a meaningful one, albeit a conceptually coherent one, if we can in fact provide such an explanation and so make out the conditions upon which the concept is applicable. How is this to be accomplished?

The answer rests upon the ability to specify the motivational and capacity conditions that must be met by an individual or institution in order to think that individual or institution better situated than oneself to judge the merits of particular courses of action. And such conditions can indeed be specified without in fact judging the merits of those courses of action. In order to be better situated to judge the right reasons for action, a theoretical authority must be properly motivated to judge those reasons and must be in possession of resources with which to judge those reasons that exceed one’s own.⁹⁷ The first condition—that of determining proper motivation—is initially a psychological question, although there may be institutional grounds for thinking that certain individuals and institutions will function “as though” they were properly motivated. Such is the sort of argument that is employed to justify the adversarial system: by virtue of the formal constraints imposed by that system, the actions of self-interested parties (clients and advocates) are nevertheless likely to produce results that approximate those that would be reached by one

97. For a more thorough discussion of these conditions of theoretical authority, particularly as they apply to legislatures, see Hurd, *supra* note 5, at 1010-15.

truly motivated to discover the truth of the contested matter. The second condition—that of establishing superior theoretical capacity—involves determining the characteristics and resources of a good moral observer. Such an observer, for instance, must have extensive fact-finding facilities, sufficient time for deliberation and debate, the ability to determine the implications of any given decision for other decisions, and so forth. Just as we can specify the conditions under which scientific research optimally proceeds without in fact possessing the ability to conduct that research, so we can specify the conditions under which moral deliberation optimally occurs without in fact possessing the ability to engage in that deliberation. We can thus specify the conditions for theoretical authority without in fact possessing such authority.

B. *Theoretical Authority as a Theory of Legal Authority*

Having rendered the concept of theoretical authority both coherent and meaningful, there remains a final question that must be answered before one can be in a position to tackle the formidable project of determining whether the concept of theoretical authority can provide us with an account of the importance of the law and an explanation of the source of our obligations to abide by it.⁹⁸ That question can be cast as follows: Just what would the theoretical authority of a government be authority for? What would the laws enacted by a government be evidence of? The answer cannot be that they provide evidence of our legal obligations, for the preceding two Parts of this Article combine to

98. I have already put the cart before this horse by elsewhere examining whether the law can accomplish the tasks that it is called upon to perform—such as solving coordination problems and defusing prisoner's dilemmas—if it is only (and at best) a theoretical authority. See Hurd, *supra* note 5, at 1015-22. Larry Alexander has recently advanced the very interesting argument that the law cannot accomplish these necessary tasks if citizens and officials come to know and appreciate its lack of practical or influential authority. For as Alexander argues:

[B]ecause individuals would know that the institutionalized decisionmaking process, however well-designed, was fallible, they would occasionally disagree with the institution's decisions and fail to act in accordance with them. And if we believed the individuals' errors in these cases would be more serious . . . than the institution's, then we would want . . . an institution that *demand*s acts in accordance with its decisions.

Alexander, *supra* note 91, at 9-10. Thus, argues Alexander, notwithstanding the fact that the law cannot possess anything more than theoretical authority, we have grounds for demanding that the law act as if it had practical authority, and grounds for telling others that it in fact *has* such authority. As Alexander says: "We as subjects of legal directives may have reason to have those directives applied coercively even when the balance of first-order reasons is against compliance; and . . . we may have reason to have the authorities claim that compliance as well." *Id.* at 17.

This subtle argument suggests that while law cannot, as a conceptual matter, provide new reasons for action, we have reasons to encourage citizens and officials to treat it as though it can provide such reasons. And, further, we have reasons to have it treat us as though it is a practical authority for us, even when we know that it is not, and even when we think it mistaken. That is, we have reasons to have it punish our justified disobedience.

This is the most sophisticated defense of why the law should punish civil disobedience that I have encountered. But because this thesis goes to the question of how the law can and should guide action—and not to the question of what authority the law possesses—it is an argument that challenges those who pursue the conceptually subsequent project of vindicating the ability of a theoretical authority to produce coordination, check free-riding, and punish disobedience.

demonstrate that there are no legal obligations as those have been traditionally understood. Rather, if legislative enactments are theoretically authoritative it must be by virtue of the fact that they function as heuristic guides to our antecedently existing *moral* obligations.

Such a possibility was repeatedly suggested in the previous Part concerning the unique status of democratically enacted laws.⁹⁹ As we saw in that discussion, one defending the moral significance of democracy is inclined to appeal to the claim that democratic processes are more likely to produce substantively better outcomes than are other political decisionmaking processes. We concluded in that discussion, however, that this appeal fails to provide us with a content-independent reason for complying with democratic processes, and so fails to provide us with a reason to think that democratically enacted laws possess influential authority. While this was a problem devastating to those who sought a basis for conferring influential or “as if” practical authority on democratic results, it poses no problem at all for one who is prepared to give up such a search and to embrace, instead, a theory of legal authority based on the notion of theoretical authority.

If it is indeed true that democratic results are more likely to be substantively just than are the results of other forms of legislation, then the will of the majority will indeed possess a very special status—a status that will demand our serious consideration of the rules that a majority wills. But this special status will not be of a moral sort. If morality obligates us to structure social arrangements in a manner that accords with the balance of content-dependent reasons for action, and so to maximize (presumably) equality, liberty, the fair distribution of substantive benefits, and so forth, then any means that assists us in determining how best to do this will be of significant importance. If what the majority of persons favors in fact correlates with ways of designing social schemes so as to maximize these substantive values, then we have every reason to take seriously the outcomes of democratic decisionmaking processes.

Democratic results may well then possess not practical or influential authority, but theoretical authority. That is, they may give us reasons to think that there are other, antecedently existing reasons for structuring social arrangements in the manner willed by the majority. Democratic results may thus function as heuristic guides to right action. If we think that the majority of individuals is more likely to be right than we are about what behavior is morally required or about how best to design a scheme of social cooperation, then we have every reason to take the majority’s opinion as *evidence* of the content of morality. On this account of legislative authority, the directives of a democratic majority are reasons, but they are reasons for belief about valid reasons for action; they are not themselves reasons for action.

99. See *supra* text accompanying notes 66 & 83.

It would take a good deal of work to make out just why the opinion of the majority might be more likely to capture the truth about the content of morality than is the opinion of the minority. Nothing that I have said so far suggests that such a task, if undertaken, would be successful. All that I am here suggesting is that *if* this were to be made out, then democratically enacted rules may indeed be thought to possess a special sort of authority—a sort of theoretical authority. We should comply with such rules not *because* they are favored by a majority, but because, absent reasons to think otherwise, the fact that they are favored by a majority is evidence of the fact that they are the right rules to follow. The true value of democracy, on this view, will not be moral; it will be epistemic.

CONCLUSION

I have argued that the classic theory of legal authority upon which contemporary jurisprudence predicates our obligation to obey the law is deeply incoherent. As such, the traditional concept of legal obligation is indefensible. We are thus in need of an altogether new explanation of why the law counts. Much of this Article has been devoted to showing that this explanation cannot be achieved merely by modifying the classic theory of authority so as to preserve the notion that the law is special because it is uniquely obligating. For if I am right, the law cannot generate unique *legal* obligations. Rather, if the law is to possess any authority at all it must be by virtue of accurately reflecting *other* obligations—those moral obligations which exist antecedent to the enactment and enforcement of the law. The law must possess, that is, theoretical authority.

This conclusion is an important one for both political theory and jurisprudence alike. The central question in political theory has been the question of whether the law obligates: Does law compel obedience just because it is the law? My conclusion requires that this question be answered in the negative, with the important qualification that the discussion of theoretical authority leaves open.

The central question of jurisprudence has been the question of what constitutes the law's essential nature: How does law relate to morality? At least since the time of St. Augustine, it has been assumed that in some sense a norm must obligate for that norm to be a law. On this legal positivists and natural lawyers have agreed. Legal positivists, however, have been compelled to defend their value-free theories of law by defending a nonmoral notion of legal obligation. If my analysis is right, there can be no legal obligations distinct from the obligations imposed by morality—for as I have argued, the law can obligate only by virtue of functioning as an epistemic guide to antecedently existing moral obligations. Law, in other words, is necessarily related to and dependent upon morality.

