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LECTURE

The Questions of Authority

FREDERICK SCHAUER*

It is no surprise that the issue of authority is so central to thinking about law and legal institutions. Whether it be in the context of the authority of a judge, or the authority of a case or statute, or the importance of providing “authorities” in briefs and law review articles, a central feature of law is the frequency with which the fact that someone or some institution has said something, rather than what they have said, makes a difference. Sometimes, for instance, the Supreme Court says things that are silly, and sometimes my friends say things that are sound, but much of how law operates centers around the fact that even the silly things the Supreme Court says count for more than the sound things my friends say.

Although numerous avenues of jurisprudential inquiry are suggested by the role of authority in the operation of law, one avenue has dominated all others. Since the *Crito*,¹ commentators on legal and political authority have been preoccupied with one question—should those to whom allegedly authoritative directives are addressed take those directives as reasons for action when the content of those directives differs from the addressees’ all-things-considered judgment about what to do?² In other words, if

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1. Plato, *Crito*, in *THE DIALOGUES OF PLATO* 33 (Benjamin Jowett trans. & William Chase Greene ed., 1927).

2. For a sample of the enormous modern literature directed to this question see generally *AUTHORITY* (Joseph Raz ed., 1990); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 233-368 (1980); RICHARD E. FLATHMAN, *POLITICAL OBLIGATION* (1972); LESLIE GREEN, *THE AUTHORITY OF THE STATE* (1988); KENT R. GREENAWALT, *CONFLICTS OF LAW AND MORALITY* (1987); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); ALAN JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* (1979); PHILIP E. SOPER, *A THEORY OF LAW* (1984); ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* (1970); Heidi M. Hurd, *Challenging Authority*, 100 *YALE L.J.* 1611 (1991); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 *YALE L.J.* 950 (1973); Symposium, *The Works of Joseph Raz*, 62 *S. CAL. L. REV.* 731 (1989).

authority is content-independent,³ and thus a function of the source of the directive rather than its substance then why, other than fear of sanctions, should anyone obey authority?

The question whether there is a *prima facie* moral obligation to obey the law is important. Nor should it come as a surprise that this question generates so much attention in a country known for the pervasiveness of its legal institutions, and which counts within its jurisprudential heritage both the rejection of the "I was just following orders" argument at Nuremberg and the current condemnation of those judges who, in the 1850s, enforced without moral interposition the horror that was the Fugitive Slave Laws.⁴ Still, the question whether the subject of law should treat the fact of law as morally relevant is only one of a number of questions that might be asked about legal authority. Accordingly, my aim here is not to provide one more answer to the frequently asked question whether there is a *prima facie* moral obligation to obey the law, but rather to try to suggest that there are questions that are not being asked but should be. In taking this approach, and in believing that I can do more good by asking new questions than by presuming to provide any newness in answering a question that has occupied many of the greatest thinkers for literally thousands of years, I leave for other times anything but the most tentative answers to the questions I will pose.

I. THE QUESTION OF OFFICIAL OBLIGATION

The traditional question of legal obligation has been preoccupied with the role of the citizen and dominated by the images of Socrates and the defendants at Nuremberg. Do I, as a citizen of a political state that both has a legal system and is in some sense defined by that legal system, have an obligation to obey the laws of my own state that I would not have with respect to the laws of another country? Although when travelling in France I have good prudential reasons for obeying French law, many would say that I have no content-independent and nonprudential reasons for taking the fact of there being a French law as morally relevant to my decision about what to do. They might still, however, maintain that as a

3. On content-independence, see H.L.A. HART, *ESSAYS ON BENTHAM* 127-61, 220-68 (1982) (explaining content-independence in terms of commands, whereby the reason for a subject to take an action is grounded in the notion that she is commanded to take such an action, not in the nature or character of the action to be done); RAZ, *THE MORALITY OF FREEDOM*, *supra* note 2, at 35-37 (explaining content-independence in terms of reasons whereby a reason is content-independent if there is no direct connection between the reason and the action for which it is a reason); Gerald Postema, *The Normativity of Law*, in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART* 81, 98 (Ruth Gavison ed., 1987).

4. See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 150-54 (1975).

citizen of the United States making a decision in the United States I would have moral reasons for taking the fact of American law as morally relevant to my decision.⁵

Even when the citizen's citizenship is not the relevant feature, the focus generally remains on the "ordinary" individual who is putatively subject to legal authority.⁶ Thus, although under a perspective that views legal obligation as arguably emanating from law as a solution to a coordination problem, there are few relevant differences between the citizen and any other law-subject, the object of attention remains the person who, independent of role or position, happens to be the addressee of a legal directive.⁷

Many laws, however, are addressed not to citizens but to officials.⁸ In this case a far less frequently asked question arises: do officials have moral obligations to obey the law solely by virtue of their role? Although some of the limited literature on this subject tends to use the term "role morality" as the marker for this range of questions,⁹ I prefer the term "positional obligation" coined by John Simmons.¹⁰ This latter term clearly suggests the question whether holding some role or position imposes upon the holder obligations that she would not otherwise have.

5. The relevance of citizenship (or its equivalent) is central to social contract or consent theories regarding moral obligations to obey the law. See, e.g., THOMAS HOBBS, *LEVIATHAN* (Bobbs-Merrill ed., 1958); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Cambridge University Press ed. 1960); Thomas Hobbes, *De Cive*, in *MAN AND CITIZEN* (B. Gert ed., 1972).

6. See *supra* note 2.

7. See, e.g., John Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 115, 133-37 (1984); Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 176-203 (1982); Joseph Raz, *The Obligation to Obey: Revision and Tradition*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 139, 154-55 (1984); see also EDNA ULLMAN-MARGALIT, *THE EMERGENCE OF NORMS* (1977). Cf. Leslie Green, *Law, Co-ordination and the Common Good*, 3 OXFORD J. LEGAL STUD. 299, 312-22 (1983) (subjects of authority have no obligation to obey the law); Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. CAL. L. REV. 995, 1015 (1989) (same); Donald H. Regan, *Reasons, Authority, and the Meaning of "Obey": Further Thoughts on Raz and Obedience to Law*, 3 CAN. J.L. & JURISPRUDENCE 3 (1990) (subjects of authority have no obligation to obey that authority).

8. Under some jurisprudential perspectives all laws are addressed to sanction-imposing officials and only indirectly to the citizenry. See, e.g., HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 93-110 (Anders Wedberg, trans., 1945); HANS KELSEN, *PURE THEORY OF LAW* 168-74, 191-92 (Max Knight ed., 1967). Here I am assuming that some laws are directed primarily to citizens while others, the ones which are my immediate concern in Part I, are directed only to officials. On this distinction, see generally Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989); Edward L. Rubin, *Modern Statutes, Loose Canons and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579 (1992).

9. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) ("role morality" allows officials to avoid making ultimate moral judgments).

10. SIMMONS, *supra* note 2, at 16-23.

To say “would not otherwise have” is not to resolve whether an addressee of the law *qua* addressee or a citizen *qua* citizen has a moral obligation to obey the law. Regardless of the answer to that question, however, we can still ask whether officials have different or additional obligations solely because of their role or position. In other words, even if there is no obligation to obey the law, not even *prima facie*, it might be that officials *qua* officials still have an obligation to obey the law in general, or to obey those laws directed to them.¹¹ Moreover, even if there is a general obligation to obey the law, that obligation is widely understood to be *prima facie* rather than conclusive; and as long as an obligation is *prima facie*, it has a dimension of weight¹² that can be greater or lesser. Consequently, even if all citizens have an obligation to obey the law, officials might have a *greater* obligation, meaning that the official obligation would have more force in the face of competing considerations than a parallel nonofficial obligation to obey the same law.¹³

There thus emerge two related but rarely asked questions. First, if there is no general obligation to obey the law, is there still a positional obligation on the part of officials to obey the law? Second, if there is a general *prima facie* obligation to obey the law, is the strength of that obligation greater when an official is the obligee? But one of the things that makes these questions both difficult and distinct is the difference between consenting to be a citizen and consenting to be an official. For most of us, the idea of

11. The difference between obligations imposed by general laws and those imposed by laws directed solely to officials is worth highlighting. Officials are people as well as officials. Thus they are within the class of addressees of laws directed at the population generally, and they are within a smaller class of addressees of laws directed to them as officials. One question is whether as officials they have greater obligations than others (or obligations where others have none) to obey laws directed to them as members of the class of people generally. Thus, if there is no moral obligation to obey the law, I have no moral obligation to obey the law when doing so would serve no moral purpose, and so I have no obligation to stop at a “Stop” sign when doing so would serve no direct or indirect moral purpose. See Donald H. Regan, *Law’s Halo*, 4, 16-17, 24-25 SOC. PHIL. & POL’Y 15 (1986). But if I am an official of the state, then it might be that I have a special obligation to obey all of the state’s laws and would have a moral obligation to stop at the “Stop” sign, even when doing so served no moral purpose, solely because of my positional obligations. This issue, which turns out to have considerable political salience when we think about officials’ violations of what some think are minor laws (e.g., laws prohibiting possession or use of marijuana), is different from the question whether officials (who might, even as officials, have no obligation to obey general laws) have positional obligations to obey those laws directed to them, just because they are officials.

12. For an explanation of the “dimension of weight,” see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 26-27 (1977).

13. If citizens *qua* citizens had an absolute or nonoverridable obligation to obey the law, then this possibility would not arise because there can be no obligation more powerful than an absolute one. But because no one maintains that a citizen’s obligation, even if there is one, is absolute, then the possibility of an obligation of greater stringency based on the identity of the obligee is distinct.

“consenting” to be a subject of the laws, or of “consenting” to be a citizen, is more metaphorical than real. And because few of us “signed” anything that looks like a social contract in any but the most attenuated sense, the absence of explicit and conscious consent under conditions of genuine choice has often been thought to be fatal to a consent or social contract theory of legal obligation.¹⁴

Most officials, however, (excluding the military conscript) have consented not just metaphorically but actually, knowingly, explicitly, and under circumstances of comparatively free choice. Moreover, their consent commonly takes the form of an oath of office, and that oath of office commonly makes explicit reference to a law-directed obligation. All state and federal officials in the United States, for example, are constitutionally required to take an oath “to support this Constitution.”¹⁵

One of the problems with this and other equivalent oaths is that they are ambiguous about a question of legal theory that could, under one interpretation, cause the issue we are now discussing to dissolve. I want to avoid terms like “positivism” and “natural law” because they carry too much contested jurisprudential and political baggage. Nevertheless, we can contrast two different positions. One position employs phrases like “the law” or “the Constitution” to refer only to indications of written documents like reported cases, statements in treatises regarding the “black letter” law, statutes, regulations, and the text of the Constitution. In other words, this position identifies a discrete subset of social materials, and refers to that discrete subset as “the law” or “the Constitution.”¹⁶

The opposing position would not start with a set of books published by the West Publishing Company or the Government Printing Office, but rather with the practice of legal decisionmaking in general, and adjudication in particular, as it exists in the United States in 1992. Inspired by Ronald Dworkin, this position resists, as a descriptive matter and possibly

14. See SIMMONS, *supra* note 2, at 57-100 (discussing weaknesses in social contract theory of legal obligation).

15. U.S. CONST. art. VI, cl. 3; see SANFORD LEVINSON, CONSTITUTIONAL FAITH 91-94 (1988). There are interesting questions that might be asked about the word “support,” because it arguably includes affirmative duties, and not just a duty not to contravene the Constitution. For my purposes, however, I will take this language to be the equivalent of an oath to follow or obey the Constitution.

16. Although I am wary of the distorting effects of words with widely divergent meanings and thus do not in the text describe this position as “positivism,” it closely resembles what I and others would think of as a position quite compatible with traditional legal positivism. See generally JOSEPH RAZ, *Legal Positivism and the Sources of Law*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 37 (1979); Frederick Schauer, *Positivism as Pariah*, in THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM (Robert George ed., forthcoming 1993); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL’Y 645 (1991); Frederick Schauer, *The Rules of Jurisprudence: A Reply*, 14 HARV. J.L. & PUB. POL’Y 839 (1991).

a normative one as well, the demarcation between law and nonlaw by the contents of a set of books.¹⁷ Rather, so this position maintains, legal decisionmakers in the United States can and do decide cases according to an undifferentiated set of (technically) legal, political, social, and moral sources. And if this is so, then morality is inextricably a part of every legal decision,¹⁸ and moral inspection a necessary condition for every application of law.

It should be apparent that this latter jurisprudential view makes the official's oath irrelevant to the question we are now considering. If one can, should, or must refuse to follow the West Publishing Company or Government Printing Office law in the name of morality, *and in doing so still be doing "law,"* then an oath-based obligation to obey the law, or an oath-based obligation to obey the Constitution, is still consistent with disregarding certain aspects of West Publishing Company law in the name of morality. It turns out therefore, that, under this latter jurisprudential perspective, the view that there is a moral obligation to obey the law and the view that there is no moral obligation to obey the law are extensionally equivalent. If one can disregard the West Publishing Company law in the service of morality while still operating under the rubric of "law," then saying that there is a moral obligation to obey the law is equivalent to saying, tautologically, that there is a moral obligation to be moral. Under this view, taking the oath of obedience to the law is redundant of otherwise existing moral obligations.

Ultimately, therefore, the only interesting questions about the possibility of an official's positional obligation to obey the law presuppose the prior, or non-Dworkinian view, pursuant to which there is a field of official directives that some would call "law" even if their indications were morally undesirable.¹⁹ And here we might note the contribution to this debate by

17. See RONALD DWORKIN, *LAW'S EMPIRE* 410 (1985); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184-86 (1977). For present purposes the similarities between Dworkin and other theorists are more important than the differences, and there are other views that are relevantly similar to Dworkin's. See MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 156 (1988) (arguing that common law cases are decided under a unified methodology in which social propositions, such as morality, policy, and experience, are relevant, and are sometimes supported by or in conflict with doctrinal propositions, such as statutes and common law precedents); David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105, 116-19, 125 (1988); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279, 286 (1985).

18. That is, morality is not just a part of the interpretation of those legal items that contain a moral reference, such as "equal protection of the laws," "cruel and unusual punishment," and "unreasonable searches and seizures," but is an integral part of all legal determinations.

19. Note that I am not claiming that one or the other of these positions is correct, although I do have views on the subject. Rather I am claiming only that the standard formulation of the "obligation to obey the law" question presupposes the acceptance of one of these views and the rejection of the other.

that prominent jurisprudential scholar, Fawn Hall, whose enduring contribution to legal philosophy came during the Iran-Contra Committee's investigation. In explaining the actions she took as Oliver North's secretary, she said that "sometimes you have to go above the written law, I believe."²⁰ In so identifying some conceptual space between what the written law requires and what one ought to *do*, Fawn Hall reformulated the very presupposition I am discussing here. So if we are dealing with what Fawn Hall called "written law," or what Ruth Gavison calls "first stage law,"²¹ or what the traditional positivist simply calls "law," and if we stipulate that this thin conception of law is just what law is, then taking an oath to obey it might plausibly make a moral difference.

We have now further clarified our question: *if* the words "law" or "Constitution" in an oath refer to law in this thin sense such that disobedience to the law in the name of morality is a conceptual possibility, then does taking an oath to support that law create an obligation to obey it where none would have otherwise existed, or create a stronger obligation than otherwise exists for those who do not take the oath?²²

What makes an oath different from any other official statement is that we consider the oath a species of a promise. Perhaps official obligation is different from citizen obligation because by taking the oath the official has made a promise, thus taking on additional obligations just like anyone else who has made a promise. If promises create obligations,²³ then promising

20. Dan Morgan & Walter Pincus, *Hall Testifies of Necessity 'To Go Above Written Law,'* WASH. POST, June 10, 1987, at A1.

21. Ruth Gavison, *Comment*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 21, 30-31 (Ruth Gavison ed. 1987).

22. In this formulation I assume not only the thinner definition of "law," but mutual understanding on the part of society as oath-giver and the official as oath-taker about what the oath means. Thus I assume away the quite distinct possibility, especially in the United States, that the moral component of the word "law" is sufficiently well-understood that taking an oath to "obey the law" is not to take an oath to subjugate one's best moral judgment. If this is true then a judge who in the name of morality refused to enforce the Fugitive Slave Laws was not violating his oath. But nor was Fawn Hall, except insofar as the violation of the oath came about as a function of acting immorally in an objective sense rather than acting immorally in the subjective sense of morality as perceived by the agent. This is a real difference, but it now is quite a bit removed from the question of what, if anything, is added by the oath. If taking an oath, or making a promise, obliges you to do the right thing regardless of whether you perceived it to be right or not, then the oath adds nothing. The argument from the oath presupposes some degree of intentionality, so if we do not distinguish judges from national defense secretaries, as well we might, and if we do not fault the judge for violating his oath in refusing to obey the Fugitive Slave Laws, then we should not fault Fawn Hall for violating her oath in going above the written law, although we can still fault her for acting immorally.

23. The philosophical literature addressing this issue is enormous. See generally CHARLES FRIED, *CONTRACT AS PROMISE* (1981); WILLIAM DAVID ROSS, *THE RIGHT AND THE GOOD* (1930); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE*

to obey the law would create an obligation for the official making the promise that would not otherwise have existed for that official, and would plausibly create a stronger obligation even if one existed prior to the promise.

Although viewing the oath as a promise explains how the oath can create an obligation, or increase the stringency of a preexisting obligation, it does not explain what seems to be a puzzling position in much of the literature. A widely held view is that if you hold a position whose positional requirements direct you to obey or enforce an immoral law, or commit an immoral act in the process of obeying or enforcing the law, then if you properly choose the moral course you should also resign your position. If morality requires you to avoid the obligations of "your station and its duties,"²⁴ then you cannot morally continue to hold your position while being unable to fulfill your positional obligations. If having the law changed is not an option, your only option is to resign.²⁵

But why should you resign? Assuming that you do have positional obligations, and assuming that they are overridden by general moral obligations, it does not seem to follow that resignation is morally necessary. If I make a promise, and if the obligation to keep that promise comes into conflict with an even stronger obligation that requires that I not keep the promise, the former obligation is overridden by the latter. But that does not mean that my initial promise was unavailing: not only did the initial promise raise the threshold for the weight necessary for some other obligation to determine what should be done, but the overridden promise does not evaporate.²⁶ If on Monday I promise to pick up your mail every day for the following week while you are away, and if on Wednesday I cannot do so because I must rush an injured relative to the hospital, am I relieved of the obligation to pick up your mail on Thursday and Friday? I would think not, because a promise to engage in multiple performances does not terminate upon failure to perform on one occasion. By the same token, if I have by virtue of a promise (the official's oath) agreed to obey the law in all cases, the fact that that obligation is overridden in one case does not automatically indicate that the obligation terminates forever.

(1969); JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* (1990); Jan Narveson, *Promising, Expecting and Utility*, 1 *CAN. J. PHIL.* 207 (1971); Joseph Raz, *Promises and Obligations*, in *LAW, MORALITY AND SOCIETY* 210 (P.M.S. Hacker & J. Raz eds., 1977); Jerome Schneewind, *A Note on Promising*, 17 *PHIL. STUD.* 33 (1966).

24. F.H. BRADLEY, *ETHICAL STUDIES* 160 (2d ed. 1927).

25. For an example of the view that resignation is the only option if one violates the positional duties of one's office, see 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 14 (1991).

26. Here I expand on ideas first set out in a prior article. See generally Frederick Schauer, *Can Rights Be Abused?*, 31 *PHIL. Q.* 225 (1981).

Now of course there is a difference between my obligation to pick up the mail and an official's obligation to obey the law. In the case of picking up the mail, the obligation arguably persists because it is for the benefit of the promisee, although the override was for my benefit as promisor. Nevertheless, once we understand the idea of overridable obligations that survive the override despite being overridden in a particular case, we see that there is at least no logical inconsistency in an official viewing the obligations of her own oath as overridden in one case and still not resigning. Indeed, even if the oath were taken to be absolute, such that the official who broke it can be said to have *violated* the oath,²⁷ it is not clear that the punishment for that violation, whether such punishment be socially imposed or self-imposed, would necessarily have to be termination of the official's office.

If the question is seen as one of conscience rather than as one of punishment, the same result follows. Assuming no attempt by the official to hide the act,²⁸ conscience would seem to allow the official to continue to hold the position so long as she acted on the assumption that the obligation was genuine. As long as the official's oath raises the threshold for acting contrary to the obligation above what it would have been without the oath, then an official who persists with that raised threshold understanding of her role need not as a matter of conscience resign even after a specific case in which the concerns of morality nevertheless surpassed the raised threshold.

But suppose the oath does not exist, or is, as discussed above, sufficiently indeterminate as to jurisprudential content such that it cannot be equated with a promise to obey the written law. In this case might there still be an official obligation to obey the written law? Without the benefit of being able to rely on the oath as promise, the issue becomes solely one of the soundness, or lack thereof, of the place that role morality or positional obligation assumes in considering the responsibilities toward the law of officials *qua* officials.

Now it might be that the positional obligation of officials is supererogatory, requiring them to do more than might otherwise be required—some acts that would be morally optional for citizens might be obligatory for

27. This language incorporates Alan Gewirth's typology pursuant to which obligations, rights, or rules are *infringed* when they are not carried out. When an infringement is justifiable the obligation is *overridden*; when an infringement is not justifiable the obligation is *violated*. Alan Gewirth, *Are There Any Absolute Rights?*, 31 PHIL. Q. 1 (1981). For similar structures, see Robert Nozick, *Moral Complications and Moral Structures*, 13 NAT. L. FORUM 1 (1968); Judith Jarvis Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV. 45, 47-50 (1977).

28. This may be a bigger assumption than necessary. If all obligations are overridable, then the obligation of official candor to the official's constituents can also be overridden.

officials. Just as we expect the captain to be last to board the lifeboats and thus "go down with the ship," so might we also expect officials, as captains of the ships of state, to maintain a different balance between the prudential and the moral than we expect of those holding no official position.

But our issue is different. We are concerned with an aspect of role morality or positional obligation pursuant to which the role-holders, because of the role, might refrain from what would otherwise be morally obligatory acts, or would be compelled to take what would otherwise be morally prohibited acts. Once put this way it is far from clear that there is a plausible argument for official obligation to obey the law in the face of countervailing moral imperatives, that differs from the arguments for citizen obligation to obey the law in the face of countervailing moral imperatives. Because my aim here is primarily to raise questions rather than to give answers, however, I want to discontinue any further pursuit of the question whether officials, because they are officials, have an obligation to obey the written law that surpasses the obligation, if any, of other citizens. Additionally, I want to shift away from this issue because there are two quite different ways of asking the question "Is there an obligation?"

Usually when we inquire "Is there an obligation?", we are asking a question of moral ontology, pursuant to which we believe that there is a moral fact of the matter that we are attempting to discover. This was the type of inquiry pursued in Part I, and is the type pursued by most people who ask questions about moral obligation to the law or the state.

But "Is there an obligation?" might also be asked as an empirical question in an attempt to discover the attitudes of members of a society, the incentives that exist within that society, and the norms of behavior that a society creates and enforces. From this standpoint when we say "Is there?" we have less theoretical, but no less important, aspirations, looking for the extant norms within a given culture rather than for the deep truths of moral metaphysics. Thus, we can ask the questions "Is there a citizen obligation to obey the law?" and "Is there an official obligation to obey the law?" as empirical questions about the norms in this society at this time. It is to this range of questions that I now turn.

II. OFFICIAL OBLIGATION AS AN EMPIRICAL QUESTION

In order to try to answer the empirical question "Is there a general or official obligation to obey the law in the United States in 1992?", we should recall the essential qualification of content-independence, the notion that the concept of authority in general and legal authority in particular is independent of the content of the pertinent directive. Thus, the question becomes whether the fact of legal authority *simpliciter* is taken to be relevant in the elaboration and enforcement of social norms.

One hypothesis is that there is no social obligation, or social perception of a moral obligation, to obey the law *qua* law, even *prima facie*. But once we understand content-independence, we understand as well that this view does not mean that one is morally free to murder, to rob, to rape, or to trade securities on inside information. What is wrong with murder, robbery, rape, and insider trading is not that they violate the law, but that they are activities that are perceived by society to be morally wrong,²⁹ and thus it would be considered morally wrong to engage in them independent of the existence of a legal prohibition. Under this hypothesis, the state adds nothing to the moral calculus by making these activities illegal, and society would be just as willing to condemn or extra-legally sanction those who lawfully commit these acts as it would those who commit them in violation of the law. Conversely, under this hypothesis neither the state's prohibition of that which is not perceived to be morally wrong, nor its compulsion of that which is not morally required, makes a difference. Consequently, making a form of behavior legally obligatory does not create a social perception of an obligation beyond the obligations, if any, attaching to the substance of the underlying moral prohibitions.

I have tried to frame this hypothesis carefully because serious empirical inquiry can try to determine whether it is true or false only if the hypothesis itself is framed properly. Unfortunately, the existing empirical work on the subject of the extant norms of obedience to law³⁰ has not sufficiently recognized the importance of the dimension of content-independence. As a result, such empirical work has been inclined to look for the reasons, other than fear of sanctions or hope for rewards, why people would obey laws that they believe desirable but whose obedience would not be in their self-interest. This inquiry is important to understanding the relationship of a society to its law, but it is somewhat different than the question that lies at the center of the issue of legal authority. If we are interested in whether people obey the law *qua* law, then we need to examine the question not in the context of good laws that we would just as soon not obey, like tax laws or "Keep Off the Grass" signs, but rather in the context of bad laws that are nevertheless the law, or good laws whose purposes would not be served by obeying them on some particular occasion.³¹

29. Although I believe that they *are* morally wrong, the formulation in the text, suggesting that they may be merely wrong as a matter of social convention, is the one most suited to the social/empirical focus that is the topic of this section.

30. See, e.g., TOM R. TYLER, *WHY DO PEOPLE OBEY THE LAW?* 40-68 (1990).

31. These are two different issues. Because rules are actually, or potentially, under-and over-inclusive vis-a-vis their background justifications, even good rules may, under certain circumstances, generate bad results. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 31-34 (1991).

Thus, empirical inquiry that would adequately explore this hypothesis ought ideally to focus on two related questions, each of which could be asked for ordinary citizens and for officials. The first question would address whether, and if so why, subjects of laws who perceive such laws to be immoral, wrong-headed, unsound, or silly nevertheless obey those laws, even when no sanctions attach to disobedience. The second question would be similar to the first, but it would focus not on bad laws, but on good laws in the context of situations in which no purpose would be served by obedience. As an example of this latter issue, consider why it is that, based on my own casual observations, the Viennese will not walk against a "Don't Walk"³² sign even when it is clear beyond doubt that neither traffic nor police officers are anywhere to be seen, whereas most Americans (and all residents of Cambridge, Massachusetts) would not take the presence of the sign as anything other than a challenge?³³

The answer to these empirical inquiries is likely to be different for citizens and officials. Consistent with my general themes here, however, I want to focus on the officials, asking whether, legal punishment or other sanction aside, there now exists in the United States a social norm obliging officials to treat the fact of law as relevant to their decisions. And although, as with most empirical questions, the use of anecdotes is a highly unsatisfactory way in which to answer an empirical question about large group tendencies, anecdotes may still suggest that there is a real question worth investigating more systematically. Let me offer, then, a set of anecdotes suggesting that despite the widely held view that this is the most legalistic of countries, it is also one in which officials are often not expected to take the law seriously in its own right, but are instead rewarded or punished according to whether they simply "do the right thing."

32. Actually, "Halt!"

33. The dynamics are slightly more complex than the text indicates. Although I have spent quite a bit of time in Vienna (and in Finland, where the same phenomenon exists), I have spent no time lurking in dark corners watching pedestrians at intersections, and thus virtually all of my observations have taken place in a context in which the person I was observing knew I was there. Insofar as there is social pressure to obey the law (for example, based again on personal observation, crossing against a "Halt!" sign in the former German Democratic Republic would generate the same amount of overt verbal condemnation as would smoking a cigar in a Berkeley vegetarian restaurant), then my presence as observer might have had a deterrent effect not present for the lone pedestrian. Thus, one question is whether citizens have truly internalized the value, in which case they would be inclined to obey even when there is no sanction in the form of condemnation or otherwise. Another question is whether a society has internalized the value, such that there would be social pressure even on an individual who has not internalized the value to obey even when the applicators of the pressure would agree that no point would be served by obeying in this particular case.

Consider first the controversy surrounding the 1988 presidential election regarding Michael Dukakis's veto, while Governor of Massachusetts, of a bill that would have compelled all teachers in the state to lead the Pledge of Allegiance on a daily basis.³⁴ Relying on an advisory opinion of the Massachusetts Supreme Judicial Court³⁵ and on *West Virginia State Board of Education v. Barnette*,³⁶ Governor Dukakis explained his veto in terms of constitutional compulsion, an explanation widely understood to be a major political gaffe.³⁷ Viewing this explanation as a political mistake, however, presupposes a political environment in which we do not expect our political figures to defer to constitutional constraint because of the fact of, rather than the substance of, the constitutional constraint.

Other examples of this same phenomenon abound, each presenting an example in which the authoritativeness of a formal rule or judicial opinion carried less political weight than did disagreement with its content. From Lincoln,³⁸ to Roosevelt,³⁹ to Meese,⁴⁰ prominent political officials have argued with some political success that Supreme Court opinions they believed erroneous should be given limited effect by other branches of government. Although the issue is controversial, the very fact that numerous federal agencies have a "nonacquiescence" policy regarding their treatment of federal courts of appeals decisions with which they disagree is strong evidence that agency interposition of its own best judgment in the

34. See Lackland H. Bloom, Jr., *Barnette and Johnson: A Tale of Two Opinions*, 75 IOWA L. REV. 417, 417 (1990) (while Dukakis's veto may have been constitutionally correct, the voting public preferred Bush's criticism of Dukakis's veto); L. Gordon Crovitz, *Letter*, AM. LAW., Apr. 1989, at 15 (defending his critique of Dukakis's veto); Dennis J. Hutchinson, *And Besides Gut Feelings, George?*, CHI. TRIB., June 30, 1989, at 25 (mentioning Bush's criticism of Dukakis's veto); David Whitman, *Behind the Pledge Flap: The Nasty History of Our Oath of Allegiance*, WASH. POST, Sept. 18, 1988, at C1 (discussing irony of conservative President who supports judicial restraint and individual freedom, yet criticizes opponent who vetoed law requiring recitation of Pledge of Allegiance).

35. Opinions of the Justices to the Governor, 363 N.E.2d 251 (1977).

36. 319 U.S. 624 (1943).

37. See Tom Wicker, *It's Still Bush League*, N.Y. TIMES, Sept. 16, 1988, at A35 ("too legalistic").

38. GERALD GUNTHER, CONSTITUTIONAL LAW 23 (12th ed. 1991) (in a speech Lincoln opposed the Dred Scott decision and in his First Inaugural Address he questioned the extent to which Supreme Court decisions are binding on the general population and other branches of the federal government).

39. *Id.* at 23-24 (in both a letter and a proposed speech FDR argued that government action and legislation must go forward, even when the constitutionality of such action and legislation has previously been raised by the Supreme Court).

40. Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 981-83 (1987) (drawing a distinction between Constitution and constitutional law, arguing that former is supreme law of land while latter is Supreme Court interpretations of former and as such not binding on the other coequal branches of government).

face of contrary court decisions is not a politically unacceptable act.⁴¹ The Cincinnati obscenity prosecution of Dennis Barrie and the Institute of Contemporary Art for displaying an exhibition of the photographs of Robert Mapplethorpe was a total nonstarter as a matter of constitutional law,⁴² but those in charge of initiating the prosecution seem to have suffered no negative political consequences as a result of their actions. Nor do Clint Eastwood, Eliot Ness, or numerous other television police officers suffer negative professional consequences for proceeding without a warrant or failing to give a *Miranda* warning as long as they apprehend the actual culprit. Moreover, there is some evidence to support the proposition that officials will be considered liable for damages when in following a plainly lawful and plainly reasonable rule they do not override that rule in order to make the best decision possible under the actual circumstances of a particular event.⁴³

These and numerous other anecdotes mesh well with a broader jurisprudential environment in which scholars can, without feeling sheepish, urge courts to update statutes that they feel are obsolete,⁴⁴ and in which numerous legal institutions have a less formal understanding of their role

41. See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) (addressing constitutionality of agency nonacquiescence, and evaluating its costs and benefits). Although there is a difference between those who deny an obligation to obey the law and those who deny an obligation to obey some court's interpretation of it, in practice the issues are virtually identical. The question in both is one of deference to another institution, whether it is the "law" in one case and "some court" in the other, when one's own best judgment is at odds with that of the institution. Still, I do not deny that although the claims may be close to extensionally equivalent, it is politically necessary to characterize them in terms of resisting the decisions of the courts rather than resisting the law.

42. See *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987) (determination of literary, artistic, political, and scientific value is to be based on national rather than local standards); *Smith v. United States*, 431 U.S. 291, 308 (1977) (same); *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (holding unanimously that a state court may not attempt to reach sexually explicit "mainstream" material under the obscenity laws). The jury acquittal in Cincinnati forestalled any actual appellate review of the constitutionality of the prosecution, but I have little doubt that Mapplethorpe's photographs had garnered sufficient mainstream critical acclaim to surpass any plausible application of the "serious artistic value" standard.

43. For a particularly vivid example, in which school officials were held liable in tort for negligence despite having followed a reasonable rule prohibiting school officials from transporting injured students, see Ronald J. Allen, *Foreword: The Nature of Discretion*, 47 LAW & CONTEMP. PROBS. 1, 2-4 (1984).

44. See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). See also T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21, 56-61 (1988) (statute should be interpreted as if it had been recently enacted by employing familiar tools of statutory interpretation); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1481, 1496-97 (1987) (statutes should be interpreted "dynamically"); Donald L. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672, 675 (1987) (when statutes become obsolete, courts become less faithful to legislative intent); Note,

than is the case in many other countries.⁴⁵ In other words, both political events and scholarly analyses lend some support to the proposition that American legal and political officials have greater social and political authorization to depart from the specific indications of written law in their attempts to achieve the best result than might at first be apparent in such a highly law-soaked culture, and than might be the case for their counterparts in other legal cultures.

None of this is to say that there might not be evidence, anecdotal or otherwise, inclining toward the opposite conclusion. And my investigation is sufficiently unsystematic that it might be that any such countervailing evidence is stronger than the evidence on which I rely, leading to the conclusion that political and legal officials⁴⁶ in the United States, more than in other legal cultures, have a social and political obligation to obey the formal indications of the law even when their best all-things-considered judgment would lead them to do otherwise.

But if I am right, and the evidence from the American legal and political culture inclines toward rather than away from the social and political permissibility of official moral and policy-based interposition against suboptimal indications of the law in a formal sense, then Fawn Hall's statement is well within the American political tradition. It is true that the crowd gasped when she made her claims of the right to go above the written law, and it is true that in response to those gasps she retreated a bit, saying that "[m]aybe that's not correct; it's not a fair thing to say."⁴⁷ But perhaps the gasp was a bit hasty, and the retreat a trifle premature. However politically predictable the gasp, and however tactically necessary the retreat, the fact remains that the entire Iran-Contra affair as it has been played out in public has not been a political plus for its chief protagonists. And as long as that is the case, it remains quite possible that Fawn Hall was condemned far less for an attitude of disrespect for the law than for the fact that she was on the wrong side of a public policy debate. Had she gone above the written law in the service of what society either at the time or subsequently determined to be the correct side of the debate, it is likely

Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court, 95 HARV. L. REV. 892, 913 (1982).

45. See generally P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS* (1987); D. NEIL MACCORMICK & ROBERT S. SUMMERS, *INTERPRETING STATUTES: A COMPARATIVE STUDY* (1991).

46. My conflation of the political and the legal is perhaps a bit too quick. Although it is not my agenda here, it is possible to maintain that legal officials, including judges, prosecutors, and perhaps all lawyers, have a positional obligation to obey the law that is different from and greater than the positional obligations of public officials with less law-specific responsibilities.

47. Ed Magnuson, *Shredded Policies, Arrogant Attitudes*, TIME, June 22, 1987, at 21.

that her willingness to go above the written law in the service of that position would have been less subject to condemnation than standard platitudes about respect for law might indicate.

As I indicated above, my unsystematic empirical speculations should not be interpreted as making any stronger claim than that there is an issue to be investigated and a question to be answered. Once the question is properly clarified, we can recognize it as one that requires us to determine the extent to which, if at all, obedience to law as a value is itself rewarded, or lack of such value is punished, within a given political and legal culture. With this as the question—the empirical question of legal authority—it is far from clear that there “is” an obligation to obey the law, even *prima facie*, on the part of American political officials in the United States at this time.

That there may be less of a culturally enforced norm of official obedience to the law than we might think does not mean that this state of affairs might not be in need of change. It also does not mean that more formal institutions of punishment might not serve the function of changing this state of affairs, at least insofar as these institutions punish officials who break the law in the service of good aims. However, in numerous areas, especially areas of constitutional law, there continues to be a reasonably small number of incentives to law-following *qua* law-following. Although we punish police officers for violating the Constitution, we hardly ever punish prosecutors for initiating unconstitutional prosecutions, and we never punish legislators for passing unconstitutional laws. In order to explore this issue further, however, we need to switch standpoints, for now we are looking at the question of obedience from the perspective of the imposer of authority rather than the subject of authority. This changes the analysis quite dramatically, as I will try to show in the following section.

III. THE ASYMMETRY OF OFFICIAL AUTHORITY

We have now backed into still another rarely asked question about authority in general and legal authority in particular: how does authority look not from the bottom but from the top? Are the arguments for and against the *imposition* of authority merely the mirror image of the arguments for and against obedience to authority, such that if obedience to authority is irrational or immoral, then so too is its imposition? Or is authority asymmetric, making it possible simultaneously to condemn it from the perspective of the subject while still understanding it from the perspective of the imposer? I believe there is much to be said for the latter position, and I will sketch the outlines of a defense of such an argument.

As discussed in Part I, there is a widely held position pursuant to which

the rational subject of an authority is justified in refusing to follow an allegedly authoritative directive when the subject is convinced, all things considered, that it is best not to follow the directive.⁴⁸ But this conclusion differs when one addresses the question from the point of view not of the subject but of the imposer of authority. Suppose that the authority and the subject simply disagree about the wisdom of following the directive of the authority on some occasion. That is, suppose the imposer of authority is just as convinced that, all things considered, a directive from the authority to the subject should be followed as the subject is convinced that it should be disregarded. In this case, it would make sense for the rational imposer of authority to try to prevent noncompliance just as strenuously as the subject would try not to comply.

Consider the following example. A parent tells her child that he should go to bed tonight at 9:00 p.m. The child wants to stay up until 10:00 p.m. to help a friend with her homework. Having considered his parent's knowledge and experience, the child nevertheless concludes that it is morally preferable to disobey his parent's authority. The parent, however, is equally convinced that helping the friend is not nearly as beneficial to the friend as the child thinks, and that disobeying on this occasion is more likely to lead to future and less justified cases of noncompliance (the "slippery slope" phenomenon) than the child supposes. The parent therefore concludes that, all things considered, the child should go to bed at 9:00 p.m. In this case it appears that noncompliance is morally justified from the child's (subject of authority's) perspective, whereas compliance is morally preferable from the parent's (imposer of authority's) perspective. Thus, if compliance under these conditions by the child is indefensible except as blind obedience, then so too is the parent's tolerating noncompliance indefensible except as equally blind acquiescence. Given that the

48. Throughout this article I have employed a heuristically truncated view of what should be considered in any agent's all-things-considered judgment. Suffice it to say that I recognize that a sophisticated act-based decisionmaker will take into account in every case the value of having legal rules for purposes of predictability, certainty, and the like. But even though the value of rules, including rules of law, is part of the act-based decisionmaker's calculus, that decisionmaker makes her own calculations about what value, if any, attaches to following the rule on the particular occasion, and will not follow the rule if, taking everything including rule-generating values into account, it is best on the particular occasion not to follow it. See generally GERALD POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* (1986); Chaim Gans, *Mandatory Rules and Exclusionary Reasons*, 15 *PHILOSOPHIA* 373 (1986); Michael S. Moore, *Authority, Law, and Razian Reasons*, 62 *S. CAL. L. REV.* 827 (1989); J.J.C. Smart, *Extreme and Restricted Utilitarianism*, 6 *PHIL. Q.* 344 (1956). Thus the question is not one of whether the subject ignores the advantages of having legal rules, but of whether, as the tradition of nonobedience would maintain, the value of having those rules is determined by the subject in light of the decision the subject has to make, or on the other hand, as the tradition of obedience would maintain, the value of having and following the rules is taken *a priori* by the subject.

interesting questions of authority arise only in cases of disagreement between authority and subject, we can see that in such cases the rational authority is led to impose sanctions while the rational subject is led to disobey.

Although the parent-child example contains a particular command, it should be clear that nothing changes when we are dealing with a general rule, except that the imposer of authority must make judgments about the necessity of compliance on a wholesale basis in advance, rather than on a retail basis for each case. So if a parent were convinced in advance that the child was likely to substitute his own judgment for that of the parent on a continuing basis, and that the consequences of such substitutions, in the aggregate, would be worse than if no substitution occurred, the parent would want to create an incentive system such that the child would be highly reluctant to substitute his own judgment, even when that child might think that it would be the best thing to do. In the case of legal authority, therefore, this example suggests that even if from the perspective of the official as subject there is no obligation to obey the law *qua* law, from the perspective of the official as imposer of authority there is good reason to impose upon the subject a reason to act as if there were an obligation to obey the law.⁴⁹

When we are talking about the law, the role of “the authority” is filled not only by the lawmaker, but also by the society that creates the norms determining whether noncompliance with legal authority will be rewarded or punished. In theory a society could determine, for the set of laws directed to certain officials, or for the larger set of all laws directed to officials, the expected consequences of any given degree of official interposition against the written law. This would involve knowing something about the laws and something about the officials, of course, but a society might determine, for its set of laws directed to officials, and for its set of officials, that there was more of a worry about excess interposition (Fawn Hall and Oliver North) than about excess obedience (Nuremberg and the Fugitive Slave Laws). If a society were more concerned with excess interposition, the analysis would deepen somewhat. We would then want to determine the proportion and consequences of errors of unjustified interposition and, conversely, errors of unjustified noninterposition, all

49. In reaching these conclusions I have benefitted greatly from numerous conversations over the years with Larry Alexander. For some of his views on these subjects, see Larry Alexander, *Law and Exclusionary Reasons*, 18 PHIL. TOPICS 5, 7-8 (1990); Larry Alexander, *The Gap*, 14 HARV. J.L. & PUB. POL’Y 695 (1991). For related views on these subjects, see ROLF E. SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS: A UTILITARIAN ACCOUNT OF SOCIAL UNION AND THE RULE OF LAW* 53-59 (1975).

from the perspective of society as creator of the social and political norms of official behavior.

Suppose, as an example of the kind of calculation required by this analysis, that society as designer of the decisionmaking environment determined that for every one thousand cases in which the law prohibited an official from taking some action, the official would, ideally, override the authority of the law in 40 cases and obey the law in the other 960. But it might also be estimated that if the officials were permitted to identify the cases in which an override of the authority would be justified, the officials would identify one hundred cases where an override of authority would be justified. And suppose finally that thirty of those one hundred cases are estimated to be the same cases identified by the designer of the environment as ones where officials' overrides would actually be justified. Thus, from society's perspective, allowing officials to make the compliance-noncompliance calculation produces seventy errors of over-identification and ten of under-identification.

Now suppose that an alternative procedure totally curtails officials from making the determinations of whether an override of authority is justified, say by mandating imprisonment for all officials violating the written law regardless of the actual desirability of outcome of their doing so. Under this procedure, none of the mistakes would be errors of over-identification, because the sanctions for interposition would be so severe, but there would still be forty mistakes of under-identification.

Although the calculus could be made more complex by assigning different values to different types of mistakes, thus requiring a calculation of expected value, assume that all mistakes have the same social consequences. If that is so, then the former procedure produces eighty mistakes and the latter forty, which would make the latter procedure preferable even though it identified no cases of desirable interposition.

This is a crude model, not only in that it assigns an equal value to all mistakes, but also because it fails to discriminate among decisionmaking environments. A better model would be more narrowly tailored, recognizing that some officials have more expertise than others (such as by comparing the expected competence of elected justices of the peace and judges of the United States Courts of Appeals regarding technical legal matters), some officials have more time than others, some officials operate within different incentive structures than others, and so on. But the point here is not to provide the best technical model possible. Rather it is to suggest a framework for analysis that starts with the assumption that, given that some bad laws exist and that some good laws will produce bad results, it might be worthwhile to have officials empowered to eliminate bad results *some of the time*. Starting with this assumption, we can imagine a degree of

interpositional inclination that would produce the optimal number of desirable interpositions.⁵⁰ If, for example, officials were slightly less reluctant to interpose than in the latter model described above, the one in which interposition was strongly discouraged, but still more reluctant than in the former model, the one in which permitting interposition produced excess interposition, we might wind up with even fewer than forty errors.

Consequently, if we accept the asymmetry thesis, pursuant to which the analysis of authority from the perspective of its imposer looks different from the analysis from the perspective of the subject, then a society must decide whether the degree of sanction it imposes for violations of law by officials is consistent with the degree of reluctance it wants its officials to have in deciding whether to “go above the written law.” As explained above, my sense is that this society presently strikes this balance pursuant to a procedure under which *ex post* justified acts of disobedience to the law on the part of officials are punished quite mildly, if at all, while *ex post* unjustified acts of disobedience to the law are punished somewhat more heavily than those same acts would have been punished merely for being bad policy. If this is so, an official violating the law in the service of what that official then thought to be the right, all things considered, result would have some reason to pause and consider the severity of the punishment before engaging in the act of interposition. In other words, it is possible that the current incentive structure, one that tends not to punish (politically and legally) justified acts of interposition but that punishes unjustified acts more if they are also unlawful, appears to encourage the official to be quite sure when contemplating violation of the law.

This is hardly a bad structure, for it avoids the theoretically available but practically difficult strategy of punishing people for justified violations of the law. Yet by increasing the punishment when law violation turns out *ex post* to have been unjustified, the current strategy induces more caution than would be the case if the illegality were irrelevant to the political, social, or legal sanction for having engaged in a bad act.

Like my previous questions, I do not purport to answer definitively the questions of how much a society should control its officials, or of how much it should use legal formality as a method of control. But it seems

50. There is a considerable amount of economics and law and economics literature directed to the question of producing the optimal level of law enforcement. *See, e.g.*, George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 532-33 (1970); Louis Kaplow & Steven Shavell, *Optimal Law Enforcement With Self-Reporting of Behavior* (Mar. 10, 1992) (on file with *The Georgetown Law Journal*). In some respects I am suggesting that a similar perspective might relate not only to how a particular agency achieves optimal compliance with one set of laws, but also to how a society achieves the optimal number of good results when that society uses laws as an indicator of good results, but is properly wary of defining good results in terms of law-compliance.

important to recognize that how, for example, a judge looks at this question is different from how those who empower or constrain judges look at this question. Moreover, the question is different still when we are speaking not of judges but of administrative agencies, or police officers, or the military. As I have attempted to show, the questions concerning authority are numerous, and we will get no closer to answering any of them if we assume that all of the important issues surrounding the concept of authority can be collapsed into one and only one question.