Law's Normative Claims

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Law's Normative Claims

PHILIP SOPER

1. INTRODUCTION

When people fail to behave as moral theory says they should, one possible conclusion is that they are acting immorally. Another possible conclusion is that the moral theory that condemns the behaviour is mistaken. Choosing between these alternatives is mostly a matter of comparing one's confidence in the moral theory with one's sensitivity to the fact that non-conforming behaviour by others, at least where it is widespread, may be evidence that the moral theory is wrong.

This simple evidentiary point, rather than some more complex 'fusion of fact and value', is all that is needed in order to explain the link between descriptive and evaluative enterprises. Just as moral intuitions are relevant 'facts' to consider in the development of basic moral principles, so too with the facts of human behaviour: social practices that fail to conform to moral theory represent occasions either for applying the theory (thus condemning and trying to change the behaviour) or for reconsidering the theory.

For most of this century, positivism's contribution to our understanding of law has been conducted primarily as a descriptive enterprise: thinkers like Kelsen and Hart have helped clarify the kind of social facts that characterize legal systems, in particular the kind of normative claims that legal systems typically make. But, while positivists have made progress on this descriptive front, moral philosophers have increasingly concluded of late that the picture that emerges from the positivist's account is of a practice out of line with the conclusions of moral theory: legal

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systems are today regularly characterized as making claims to authority that moral philosophers insist cannot be justified.  

Confronted with this divergence between what law claims and what it is entitled to claim, the moral philosopher who is extremely confident about his or her theory will presumably conclude that it is the behaviour—the claims of the law—that should be modified: law should claim no more authority than it has, and legal practice should accordingly change to eliminate, or to reduce the incidence of, such claims. It is not clear, however, that such confidence would be warranted. The practice of law that is in issue is not like, for example, the practice of slavery or genocide—practices which, if encountered, few would regard as raising doubts about the moral theories that condemn them. Two features distinguish law from other such practices. First, legal systems are self-consciously normative: as described by legal theorists, legal officials make unabashed, if implicit, claims about citizens' obligations towards law that disregard the moral theories that deny the validity of those claims. This feature is not, of course, dispositive of the question whether one ought to re-examine the moral theory (the practice of slavery would be no less easy to condemn just because it included normative claims purporting to justify the practice); but it should give one pause to realize that the practice of law displays no apparent discomfort over, or concern to refute, the moral arguments that deny law's authority. Equally troubling is a second and related feature: the widespread nature of the practice. According to legal theory the normative claims in issue are virtually universal: they are characteristic of states throughout history as well as of all modern states. To continue to condemn as unenlightened a practice that is in this way both normatively self-conscious and widespread seems to require, at the very least, some explanation of why the practice and the theory became (and remains) so divergent.

One possible reaction to this apparent divergence might be to accept it as proof that legal systems are autonomous, enjoying a logic and life of their own with only limited connection to the views and practices of the larger society. This conclusion, however, is not likely to recommend itself to persons sensitive to the evidentiary point mentioned above. Legal officials, after all, are also citizens and members of the larger society. The idea that one can simply switch hats as one switches roles, making implicit
normative claims as a judge that are inconsistent with one's normative judgments as parent, citizen, or person, has little to recommend it. It is for this reason, no doubt, that the best discussions of the autonomy of law in the sociological literature aim, not at celebrating an unbridgeable gap between law and society, but at revealing the various connections among the goals, policies, and norms of the legal system and the underlying community.³

This chapter is motivated by a similar interest in reconciling the normative claims of law with the claims that moral philosophers believe can be justified. I do not, however, focus here on the normative side of the enquiry;⁴ rather, in sympathy with the positivist enterprise, my focus here is on the descriptive thesis: is it in fact the case that legal systems make the kinds of normative claims that appear to many philosophers so hard to justify? My tentative conclusion is that many writers, myself included, have been too quick to assume that the data here, as reflected in the social practice of law, are at variance with moral theory. The normative claims of the law are not, I think, as strong as has been assumed. The upshot, if I am right, is not that those moral philosophers who deny law's authority are correct: rather, whether law has the kind of authority that moral philosophers dispute is a question that remains open—unsettled and controversial from the law's point of view as well as from the point of view of political and moral theory. This conclusion, though it leaves unresolved the question about law's authority, at least has the consequence that, however that dispute is resolved, it need not result in a moral theory that is inconsistent with legal practice.⁵

2. THE MINIMAL NORMATIVE CLAIM: THE CLAIM TO JUSTICE

How does 'the Law' Make Claims?

Although my primary interest in this chapter is the law's claim to authority, I begin by considering a weaker normative claim that legal systems typically make. I do so in order to illustrate the connection between descriptive and normative enquiries in legal
theory, and to clarify certain potentially troublesome preliminary issues. One such preliminary issue is the problem of explaining what is meant in referring to ‘the claims’ of a legal system. Although the idea of ‘the law’ making claims might seem as mysterious as reference to the ‘intent’ of corporations, legislatures, or similar groups, legal theory, by and large, has not been concerned with this problem, and I shall spend little time on it as well. I shall make the same assumption that seems to be shared in the literature: to refer to what ‘the law’ claims, is to refer to what any sensible individual, putting him or herself in the position of a representative of the legal system—e.g. the officials who are responsible for the creation and implementation of the system’s directives—ought to recognize as the implicit claim that accompanies such official action. The claims of the law, in short, are the claims (implicit or explicit) of those who accept and enforce its norms. Undoubtedly, more needs to be said than this, and I shall say more later as the issue becomes important. For now, one point should be emphasized: the attempt to characterize the law’s ‘self-image’ requires distinguishing between the claims of the law and the claims of any particular official or set of officials, such as judges, who may operate as the law’s agents. Officials may make claims about law in their private capacity, just as moral philosophers do. These claims may differ from and even contradict the implicit claims of the legal system in which they function. Roughly, what needs to be kept in mind is the distinction between an official who ‘represents’ the legal system in the sense of speaking for (on behalf of) the law, as opposed to an official who makes personal claims about the law in the same way that any citizen might.

Establishing the Minimal Claim

The manner in which descriptive and normative enquiries combine in legal theory, and the manner in which one establishes what ‘the law’ claims, can both be illustrated by beginning with the minimal claim that legal systems make. Law claims that its actions are morally defensible. The ‘actions’ that are the object of this claim include both the establishment of legal norms (the ‘right to decide’) and the enforcement of those norms through the use of the state’s unique apparatus for imposing sanctions
(‘the right to enforce’). The minimal normative claim of the law is about both of these kinds of actions, but, since it is the sanction that impinges on others and thus seems to require justification, ‘the right to enforce’ may seem the more basic claim. As long as it is recognized that the ‘right to enforce’ entails a claim about what one is enforcing (the state’s view about the appropriate content of the legal norm), it will not matter which formulation is used. For purposes of this chapter, I shall use a third formulation of the basic claim—namely, ‘the claim to justice’—as a shorthand way of referring to either the right to decide or the right to enforce. This formulation helps draw attention to the essential normative component of the claim, namely, that when the state acts, it does so in the belief that it has chosen morally appropriate norms for enforcement, as reflected, for example, in the claim that ‘it is right’ to act as legal norms prescribe, or ‘it is just’ for the state to enforce these norms.

That the law makes such a minimal claim, variously described in the ways just suggested, is no longer particularly controversial as a descriptive thesis about legal systems. Indeed, it is almost the defining characteristic of modern positivism to insist that it was this attitude of the law towards its norms that was overlooked in classical positivism’s exclusive focus on the state’s coercive power. However obvious the point may seem, it is worth pausing to consider how one might defend this descriptive thesis about the law’s normative posture if challenged. The natural response to one who suggests that law makes no such claim is simply to call attention to common features of social life: the kinds of things that law does when it imposes sanctions—taking a person’s property, liberty, or life—are such serious invasions of another’s interests that it is impossible to exempt them from the normal assumption that a morally conscientious agent will commit such acts only in the belief that they are justified. Only if one thought that the law did not purport to be a morally conscientious agent (if it purported, for example, to be no more than a ‘gunman writ large’) could one fail to see that the practice of law belongs in the same category of other social practices that claim to be morally defensible.

Recognizing that law makes claims different from those of the ordinary gunman was Hart’s way of making the point; but the point can be made in ways that depend less on the contrast with
gunmen, and more on the analogy with any ordinary person who expects to be taken seriously in attempting to communicate and interact with others. Neil MacCormick, for example, notes that the law has Acts that are labelled ‘the Administration of Justice Act’, but that no legal system is likely to pass an ‘Administration of Injustice Act’. The insight that underlies this observation is, of course, not peculiar to law: governments do not enact ‘Administration of Injustice Acts’, but neither do parents announce ‘Unjust Demands for Bedtime’ or friends or neighbours proffer ‘Silly Advice for Improving your Garden’. The point is simply the truism about human behaviour that conscientious people (unless they are engaging in some odd joke of the Monty Python sort) do not offer advice, much less issue demands or take action that affects others, unless they implicitly believe that what they are doing—advising, acting, ordering—is based on morally defensible (sincerely held) beliefs about what it is permissible or right to do.

Consequences and Aspects of the Claim

However expressed, the point about the law’s minimal normative stance, once made, seems so obvious that it causes confusion, not because it is overlooked, but because too much is made of it: recent discussions seem to suggest that the law’s normative claim is somehow inconsistent with positivism’s insistence on the separation of law and morality. Of course this is not so: that conscientious persons believe they act correctly does not prove that they do, and this distinction between what is claimed (or believed) and what is the case is all that the modern positivist needs for his continued denial of a necessary connection between law and morality.

In order to provide a contrast with the question to be considered below, it may be worth briefly considering why the above description of law’s minimal claim does not diverge from what moral theory accepts as a plausible claim, in the way that many think the claim to authority does. That there is no radical divergence here between description and evaluation follows from the arguments made in defence of the descriptive thesis. The ‘claim to justice’ is no more than what is implied by the analogy to ordinary individuals, engaged in sincere and serious
attempts at communication or interaction. In making the same claim that any individual might, the state thus operates no differently and no more autonomously than any individual. The claim to justice does, of course, imply a subsidiary claim: namely, that the state has a right to exist in the first place, but that claim, too, I shall assume, is not one that diverges from what political theory would accept as justified or plausible.¹²

This view of the state as making claims about its actions that are no different from those of any ordinary conscientious individual leaves room, of course, for differences in the content of the state’s claim. The content of the state’s claim to justice will reflect the peculiar kind of entity that the state is and will include subsidiary claims, drawn from political theory, about why a state has the right to interfere at all with the interests of others. Though various political theories will give different explanations for this right, with accompanying differences in the limits recognized on the state’s power, the state’s posture is that it must act on its own lights in this area (as regards the correct political theory), just as it does in all other areas.¹³

So, too, with disputes within a particular version of political theory. In a society that accepts, for example, the view that a state exists only to realize the interests of citizens, further disputes may occur about how the state best serves citizens—by letting them lead their own lives as much as possible or by forcing them to lead ‘virtuous’ lives.¹⁴ However this dispute is resolved, the state in such a society is likely to frame the implicit defence of its actions in terms that individuals normally do not use, for example, in terms of ‘the public interest’, or ‘the common good’, or, as I call it, a ‘claim to justice’. I do not intend, then, any sharp distinction between these various expressions (‘the public interest’, the ‘common good’, or ‘justice’); nor do I intend these expressions to refer necessarily to an objectively identifiable ‘common good’. I use these expressions as interchangeable ways of drawing attention to the fact that the state must morally defend its actions by reference to its own conception of how state power should be used. The law’s claim to justice is, in short, open to the same variety of arguments about what ‘justice’ is that characterize all of moral and political theory; so long as the state’s implicit position on these issues is compatible with the range of contemporary
moral debate about the matter, the state’s posture will not be inconsistent with accepted moral or political theory.

In addition to taking an abstract position on what ‘justice’ means (for a state), the law’s claim to justice typically comprises two major subsidiary claims: first, claims about the content of the law; and second, claims about the procedures by which the content is determined and the law enforced. Claims about content are made whenever the substantive purposes of legal rules are essential to the normative defence of the rule: the law’s posture in such cases is that it has made its best judgment about the underlying substantive purposes and reached a conclusion that reflects the law’s view about how the issue should be resolved. Sometimes content claims are uncontroversial (murder is wrong); sometimes they are not (abortion is/is not permissible). Sometimes the claim about content is the minimum ‘content claim’ that can be made, namely, that the actual substantive choice reflected in a legal rule is less important than that some choice—any choice—be made (rules of the road).15

Procedural claims are the state’s implicit fall-back response to the possibility that content claims might be wrong. Procedural claims—that the state has proceeded in a morally defensible fashion to determine the truth of a substantive dispute about the content of legal rules, or that it has fair procedures for determining the guilt or innocence of persons accused of violating such rules—are an inescapable part of the claim to justice. Just as procedural claims purport to shield the state from moral blame when it is later determined, for example, that a person was wrongly convicted, so such claims also purport to protect the state from blame when it is decided that a legal rule, once thought to be defensible, is no longer so regarded: past convictions (and sanctions) under the law will remain morally defensible so long as the state acted in good faith at the time.16

3. DEFENDING THE CLAIM TO JUSTICE

The Law’s Posture and the Utilitarian Critique

Nothing in the above account reveals any significant divergence between the descriptive and evaluative branches of legal and
moral theory. What gives rise to the appearance of divergence for many people is an alleged discrepancy between the law's claim to justice and the method the law typically uses to justify that claim in particular cases. The dominant legal method is the method of formal appeal to pre-existing legal standards, rather than direct justification by reference to the effect of illegal acts on the substantive purposes that underlie those standards. Because this formal method of justification raises the same problem in attempting to defend the law's normative claim that is raised in debates between act and rule utilitarians within moral theory, I shall call this 'the utilitarian critique'.

The utilitarian critique has two targets: the first is the posture of the law vis-à-vis the ordinary citizen; the second is the normative position of the judge, or other official who imposes sanctions for legal violations. In the first case, the critique aims to establish that law does not have the authority over the citizen that is often assumed—for example, that no duty to obey law qua law can be established on utilitarian grounds. In the second case, the target is the law's claim that it is justified in imposing sanctions, just because the law is broken. My concern at this point is with the second issue: since the law's minimal normative claim is that it is justified in imposing sanctions for breaking laws as long as the content and procedures are believed to be correct (regardless of whether they are correct in fact), this issue—the justification of the sanction—raises the critical initial problem. The other issue—whether citizens have a general obligation to obey—leads to the question that I consider below about whether the law makes any claim about citizen obligation. Although these are distinct normative claims (one about the duty to obey, and one about the right to impose sanctions), for many people there is an obvious connection between them: if utilitarian theory shows that citizens have no duty to obey the law (and may, perhaps, even have a duty in particular cases to disobey), how, then, can one justify punishing such citizens who, by hypothesis, have acted morally?

In what follows I recount as briefly as possible what is now a very familiar debate as it applies to legal systems in general. I defend two primary conclusions. First, a simple act-utilitarian critique inevitably leads to the conclusion that citizens do not (always) have duties to obey the law, and judges cannot (always)
justify the imposition of legal sanctions through the method of formal justification. Second, even if one concedes this issue to the utilitarian, the utilitarian critique misses the point: it fails as an attack on the ability of law to justify its claim to justice because it aims, not at the posture of the law, but at the problems confronting an agent of the law (the judge), and that makes all the difference.

_Telling stories, part one: The citizen and the law._ One reason it is so easy to imagine cases in which disobedience on a utilitarian account will sometimes seem morally justified is the well-known source of endless disputes between act and rule utilitarians: any rule, particularly if conceived to promote a particular purpose (e.g. speed limits that attempt to balance concerns for safety, fuel conservation, and quick transit) must inevitably be overbroad in application. Whether this 'inevitable' overbreadth is a logical feature of 'rules' (a rule that was guaranteed never to be overbroad would be so cluttered with exceptions for particular cases, that it would no longer be a rule), or whether it is a contingent fact of human limitations in designing rules, is unimportant in our present context. What is important is how the utilitarian makes use of this general problem to attack the posture of the law: the typical method employed is that of telling stories designed to make clear that it is logically possible to imagine cases in which obedience will not produce the best consequences—even if one concedes that the general goals of the legal rule are laudable. These stories—about jumping a red light when no one is around, or speeding when it is safe and convenient to do so, or ignoring shipping rules in a harbour where you have lived all your life and which you know better than the legislator, or committing a 'technical' but apparently harmless trespass on private property—all have one thing in common: they are empirically possible hypotheticals, designed to emphasize the logical possibility that legal rules can sometimes require sub-optimal behaviour. If you object to any of these stories, you do not understand the game. If you object, for example, that one never can tell whether jumping a red light is really safe, or whether others might be misled by your example, you are ignoring the fact that the utilitarian can modify the hypothetical in whatever respect is necessary to make the point: put the red light
in the middle of the desert at noon, and posit no defects in eyesight, no witnesses, and no other imaginably relevant features. The only way one could possibly win this game—that is, the only way one could defend rules as always describing the best action to take—is to deny what seems true: that rules do operate with an inevitable amount of 'overbreadth'. Thus the utilitarian establishes his point: complying with legal rules will not always produce the best consequences.

*Telling stories, part two: The judge and the law.* If it is true that the best consequences can sometimes be produced by disobedience rather than obedience, how does that conclusion bear on the question of how officials (judges) should respond to that possibility? How can a judge justify imposing a sanction without even hearing evidence about whether disobedience, under the circumstances, was the best action to take? Since our practice is clear on this point—judges do not view such proffers of evidence as legally relevant—how can one escape the conclusion that the imposition of sanctions remains theoretically unjustified from a utilitarian perspective?

At this point, utilitarian stories begin to diverge. Some suggest that the practice of imposing sanctions without allowing direct appeals to utility can be justified even if the defendant's act is assumed, *arguendo*, to have been morally correct. The most familiar argument to this effect draws attention to the different consequences that attend a judge's decision, compared to a citizen's, and suggests that, when these consequences are taken into account, applying sanctions without allowing direct appeals to utility will often prove to be the best action *for the judge*. Though the debate over this issue remains unsettled two points seem to me to follow from the strict utilitarian critique: (1) It is true that sometimes a judge will do 'the right thing' on a utilitarian account by imposing sanctions, even though the citizen has also 'done the right thing' in disobeying the law; but (2) this defence of the judge's action cannot be guaranteed to work in all cases: it will always be possible to imagine some cases in which a judge will be unable to defend the imposition of the sanction by reference solely to the law, without allowing a direct appeal to the utility of the action.

Because the latter point is the critical one, suggesting as it does
that the formal method of legal justification is inherently incapable of always justifying the sanction, it may be worth explaining why that conclusion seems to follow from the utilitarian critique. The general explanation is the same as the one we made with respect to the citizen's duty to obey. In that case, the utilitarian was allowed to vary the story in any way necessary to make the logical point that it is possible that disobedience will sometimes be the best action. So, too, in the case of the judge. It must logically be possible that the additional 'role-related' consequences of the judge's position may sometimes fail to justify a refusal to consider a direct appeal to the utility of the defendant's action. Whatever one thinks of the general utility of judges deciding only 'according to the law', or the general utility of rules that allocate power to change law between judge and legislator, the consistent utilitarian must now allow sceptics to vary the hypotheticals as they wish: surely, there must be some cases where the evidence is so easy to assess, the gains from speeding so great (though not quite amounting to a 'necessity' defence), the likely overresponse by others if I get off easily contained, etc. that to continue to insist that the role-related costs of ignoring the law outweigh the gains to be realized in letting me off without a sanction is implausible. The law's claim that the formal method of imposing sanctions is morally defensible cannot, it seems, even under the best story-telling, be made consistent with an act-utilitarian critique.24

Distinguishing the Law from its Agent

The above discussion supports the conclusion that the utilitarian critique cannot be confined: it undermines both the claim that obedience is always the best action as well as the claim that a judge can always justify applying sanctions simply because legal rules are violated. Note, however, that the entire focus of the critique has been on judges and the process of formal legal reasoning. As such, the critique aims at the wrong target: it presents at most a problem of moral justification for the act-utilitarian judge who accepts a role requiring him to apply the formal method of justification; it does not present a problem for the law, whose agent the judge is.25

The significance of this distinction between the judge as agent
and 'the law', and the corresponding irrelevance of the utilitarian critique to the present question about how to understand the law's normative posture, can best be seen by considering a second reason why formal rule-application may be thought to be inconsistent with 'doing the right thing'. Until now I have been considering the problem of inevitable overbreadth of legal rules. This problem arises even when it is assumed that the rules in question are aimed at morally defensible goals and are fashioned as carefully as possible to reach just those cases where these goals are implicated. But there is a second reason why rule-following in legal systems may result in unjustified actions—namely, the obvious possibility that the law itself is misguided, wrong, or unjust. Whether it is simply a case of misguided policy (a silly speed limit, based on errors in judgment about the effects on energy conservation), or serious injustice (evil laws), no utilitarian of any sort is likely to argue that blind enforcement of all such laws, without regard to their merits, always leads to the best results. Even a judge with an anti-utilitarian, deontological commitment will have to decide what to do about laws that, in the judge's view, are seriously wrong—consider, for example, the judge who disagrees with a state’s abortion laws. Like the utilitarian judge confronted with the need 'blindly' to enforce rules, the deontological judge too will have to decide whether the implicit promise to act as the law's agent justifies enforcing a law that the judge believes to be immoral. There is no reason to expect that the correct decision for such a judge, under any moral theory, will always lead to the conclusion that the judge has a duty to apply the law. But even conceding that the judge may have a duty to resign, or subvert the law, the judge's situation is not the law's.

In distinguishing the law from the judge, it is important to recognize that, for all the focus in recent legal theory on adjudication and the problems of legal reasoning, traditional enquiry into the nature of law has focused instead on the law-giver, or legislator, rather than the law-applier. Political and legal theory alike have long considered the moral posture of the state by viewing it as a single actor—a sovereign, a Leviathan, a ruler named Rex. The justification for this focus on the officials who are responsible for the creation and content of legal norms (not just their enforcement and implementation) is a reflection of the
minimal normative claim we have already discussed: the claim to be acting justly requires a defence in the first instance of the norms that have been chosen to govern society. It is the implicit attitude towards the legal norms of those who create them that is central to the claim of justice.28

Viewing ‘the law’ from this perspective, the problem of overbroad rules presents a different issue of justification from the problem of enforcement that the judge confronts. When the law (conceived of as legislator) faces the choice between enacting a formal rule (do not exceed 55 miles per hour) or a flexible standard (drive at a ‘reasonable’ speed), it faces the familiar problem of whether to formulate legal norms in fairly specific rule-like form, or to provide more general, discretionary standards for courts to apply to particular situations. The issues that bear on the choice between these two methods have often been discussed, with Hart perhaps providing as succinct an account of the matter as any.29 The more one incorporates into a rule vague standards like ‘reasonableness’, or moral concepts like ‘due process’, or ‘equality’, the more one postpones decisions about the specific content of the law to the later point in time when judgment is made by the court. Though such postponement seems more consistent with the utilitarian critique, even the utilitarian presumably would not suggest that it is always better from the legislator’s point of view to proceed through standards rather than through rules. The state’s response, then, to the alleged overbreadth of rules will simply be that this is the state’s best judgment in this particular field about the question whether to regulate by rule or by case-by-case development of standards.30

The implicit justification of the law in cases of overbreadth, in short, is on the merits of deciding to enact rules in the first place, rather than more flexible standards; that justification cannot be attacked by pointing out what the law already knew: that there will be cases, inevitably, where overbreadth results. The posture of the law is that, though it is aware of the possibility, even the inevitability, of overbreadth, it could not have done a better job in designing the rule, consistent with the need for general social control and regulation.

The apparent problem with formal rule-justification thus turns out to be but a subcategory of the more general problem of
human error in the choice of norm. Whether citizens (or judges) think that a rule's content is wrong, or whether they think the rule, though laudable, is overbroad in a particular case, the state's normative posture is the same: it purports to have decided both sorts of questions in good faith. That being the case, error—even subsequent legal confession of past error—does not make the state culpable: the imposition of the sanction will remain morally defensible. Whether an individual or a judge disagrees with either sort of decision (about the content of rules, or about whether to proceed by rule) is irrelevant—why should one think the judge, for example, knows better than the law-giver what justice requires or whether rules are better than standards? If one suggests that there are principles to decide when to allocate decisions to judges and when to legislatures, then the response is: of course there are, but on that matter, too, the law claims the right to decide.

The right to decide, in short, escapes the major thrust of both sorts of attack on the law's normative stance. From the large issues of political theory (should the state be restricted to the role of night-watchman, or may it redistribute wealth and interfere in other ways with the private sector?) to the details of law-making (should the law proceed by rule, or by general delegation of standards to courts or agencies?) to the mid-size issues of constitutional arrangements (which issues should courts decide, and which legislatures?) the state's posture is the same: though all these questions are controversial and reasonable persons can disagree about them, the state claims the right to make the ultimate decision and act on it (impose sanctions accordingly). Such action is morally defensible as long as the decision is reached in good faith.

4. DOES THE LAW CLAIM AUTHORITY?

The most serious suggestion that the law's normative claims are inconsistent with prevailing moral philosophy does not make the mistake of collapsing the law's posture into that of its agents. This suggestion focuses directly on the claims of the state in much the same way that one would on the claim of any
individual (parent, military commander) who claims a certain kind of practical authority.

By 'authority' here is meant more than just 'the right to legislate' or the 'right to decide' or 'the right to impose sanctions to enforce one's decisions'. Authority as used here refers to the issue typically raised in connection with the question of the obligation to obey, namely, the claim that citizens have duties to obey 'just because it is the law'. Various ways of explaining the conceptual content of such a claim have been offered; but whatever differences continue to exist in these various conceptual characterizations, these differences seem minor compared to the one respect in which almost all of the recent discussion seems to agree: law makes a claim to authority that is not justified.

To avoid this apparent divergence between moral and descriptive theory, two responses are possible: disputing the normative theory about whether the claim to authority is justified; and/or denying the descriptive thesis about whether the law does in fact claim an obligation to obey 'just because it is the law'.

As indicated at the outset of this chapter, I continue to think that the first possibility—defending the claim of an obligation to obey—remains an open one. On that issue, moreover, it is even possible, I think, to claim a certain lack of consensus in the moral community if by 'community' one means to embrace an historical segment that includes traditional political theory, as well as more recent discussions. But I put this normative issue aside here to focus instead on the descriptive thesis: what is the evidence for the assertion that law claims a duty to obey?

In view of the apparent consensus on this question, I confess to a certain tentativeness in offering a dissenting opinion. But the consensus is odd for two reasons. First, assertions in the literature about what the law claims are typically just that: assertions. The thesis is presumably an empirical one whose proof lies in simply 'looking and seeing' to discover that this is the claim states typically make. In contrast, both the normative half of the question (is the claim to authority justified?) as well as the conceptual issue (what does it mean to claim authority?) receive extensive discussion and are given all the care in constructing definitions and arguments that characterize the consideration of any difficult issue in moral philosophy. This difference, undoubtedly, is due
in part to the difference between descriptive, conceptual, and normative claims; but it still leaves one who 'sees' law as making a different kind of claim at a loss about how to continue to resolve the disagreement.  

The second reason the consensus is odd reflects the point made at the beginning of this chapter. How could it be that the practice of law, in the claims it makes, is so out of step (and presumably has always been out of step as long as states have existed) with the conclusions of moral philosophy? Rather than simply conclude that law's normative stance is autonomous in this respect, should not the discrepancy induce reconsideration of either the normative or the descriptive claim?  

I shall express my tentative doubts about whether law claims authority in two ways. First, I shall consider, and reject as inconclusive, what I take to be the major positive argument for attributing such a claim to the state. Second, I shall advance a variety of arguments for why this attribution seems to be one that is, if not indefensible, at least incapable of being established as the simple empirical proposition it purports to be.

**Justifying Sanctions without Claiming an Obligation to Obey**

The suggestion that the 'right to rule' can be logically separated from 'the duty to obey' has often been made of late, usually as a conceptual or normative matter, rather than as a suggestion about what states claim. Since it is this latter, empirical question that I want to pursue, it may help first to clarify exactly what is in issue. Note first that the question is not whether certain concepts in our language—such as 'command'—necessarily entail a claim of correlative duties. Sometimes, the issue is put this way: the law, it is suggested, claims not only the right to decide what norms to enforce, but also a 'correlative' duty to obey. I do not want to quarrel with the conceptual claim about our language—I will assume that the 'right to command' is an example of a concept in our language that connotes a correlative 'duty to obey'. Having made that concession, one simply poses the current question a different way: does the state claim the right to command (with correlative duties to obey), as well as the right to enforce its norms?
Turning 'punishments' into 'prices'. The most frequently encountered argument against the claim that the state claims only a right to enforce its decisions is that this posture would be tantamount to inviting each citizen to decide on his or her own whether or not to obey. The sanction cannot be avoided, but if the state makes no claim that citizens must obey just because the law says so, then the state in essence invites each citizen to view the sanction as the price to be paid for engaging in prohibited conduct. Such a view is inconsistent with the normative language of praise and blame that distinguishes, for example, taxes from fines and accompanies the judgment that the latter are 'punishments'. Thus, it is concluded, entities that did not claim a duty to obey would not correspond to any of the actual entities we know as 'legal systems'.

This argument is the right kind of argument—it looks for inconsistencies in our normative practices that would result if we took one description rather than another to be characteristic of the law's posture. It is the same kind of argument, in short, that was employed above in explaining both how the law makes claims, and what the minimal claim must be. In the present case, however, the argument seems mistaken. It overlooks the fact that the minimal normative claim of the state involves two claims: the claimed right to enforce, and the claim that the norms being enforced are believed to be just—the content is believed to be correct, etc. The latter aspect of the claim ensures that the language that accompanies the imposition of sanctions will continue to be the moral language of blame; the law will still distinguish between taxes, which citizens are invited to view as the price for engaging in designated conduct, and fines which entail claimed moral duties to refrain from the conduct. All that the state needs to do in order to continue coherently using the familiar moral language in its legal practice is to maintain its moral posture with respect to the content; it does not need to add a content-independent moral judgment about the duty to obey the law qua law.

Considerations that weigh against the view that law claims authority. The positive arguments for denying that one can so easily take for granted that the state claims authority build on the above response: what exactly could a state do to make clear that
it either was or was not claiming that citizens had a content-independent duty to obey? My hypothesis is this: nothing in the practice of law as we now know it would change if the state, convinced by arguments that there is no duty to obey law *qua* law, openly announced that it was abandoning any such claim.39 If this hypothesis is correct, then I do not see how the posture of legal systems today can be so easily assumed to be one that obviously claims authority in the sense of a content-independent duty to obey as well as the right to coerce.

In evaluating this hypothesis, the following factors seem to me relevant:

(1) The duty to obey the law is not itself typically a *legal* norm. The speeding defendant, for example, does not get two fines—one for speeding, and one for failing to obey the norm that laws are to be obeyed just because they are the law. Law-breaking, in short, is not worse just because it is *law*-breaking; law-breaking is bad because the act described in the content of the legal norm is thought, on the merits, to be wrong.40

(2) Abandoning the view that the state claims that citizens have duties to obey does not mean the state must abandon its own moral view about the underlying act that led to the legal rule and sanction. That moral judgment will continue to be reflected in the institutional process by which offenders are identified and sanctioned, and punishments will thus not become prices *from the state’s point of view*. Nothing will prevent a citizen from adopting the economic or ‘bad man’s’ point of view, but that is not what is in issue.

(3) A corollary of the above suggestion is that a state *could* without contradiction openly adopt the ‘bad man’s’ point of view: but that *would* be tantamount to declaring that all sanctions are ‘taxes’ on conduct, with the implication that the state takes no view about the morality of the conduct. That is a possible position; it just happens not to be the position that most states take about most laws (and we might not even think of such a society as a ‘legal’ system); most important, it is not the position that would be entailed if the state made no claim about a duty to obey.

(4) Any suggestion that the state makes a claim to authority because that helps ensure the state’s survival must confront the frequent observation that legal systems can survive well enough,
thank you, with coercion alone. States design sanctions to ensure adequate compliance by those who do not share the underlying moral judgment about content; in any healthy state, most citizens will share that judgment (or at least they will share the judgment about the processes by which undesirable norms are recognized as such and so changed). The suggestion that the state’s survival requires a duty to obey in addition to this shared moral judgment about the content of its norms (plus, of course, the sanction) seems empirically untenable.

Objections

So many people have assumed that the state makes a claim to authority that the above conclusion, questioning that assumption, would be stronger if we could explain the source of the mistake. Here are some possibilities.

General and specific authority. It is important, first, to note that what is in question is the law’s claim to general authority: a claim that all law is to be obeyed, independent of content. To be contrasted with this claim of general authority is what might be called a claim of specific authority. In many cases, the justification for a law just is the fact that it is a law—like rules of the road, or conduct that is mala prohibitum. Here the ‘content claim’ of the law is that, because of the need to co-ordinate, for example, action is wrong only because the law so declares. This claim of ‘specific’ authority, like any other claim, can be right or wrong (the law may be mistaken about whether co-ordinating activity is needed, for example). These examples of law ‘claiming authority’ may be conceded; they still leave open the central question whether law claims general authority for laws whose content is justified on the merits, not merely on the ground that the law forbids the act.

Officials versus ‘the law’. It is important again to distinguish what ‘the law’ claims, from what particular individuals, including officials, might claim. That particular judges or legislators often claim that citizens have duties to obey—as a matter of their personal judgment about the issue within political theory—is a commonplace fact and easy to understand. (There is little to lose,
and perhaps something to gain, by adding a claim of citizen duty to other reminders of why one should obey. Besides, it might be true.) Once again, though, it is important to distinguish ‘the law’ from any of these persons acting in their individual capacity. The best way to do that is to recall the method by which we began in explaining how the law makes claims and what the minimal normative claim must be. When one asks whether the practice of law would change if ‘the law’ were seen as making no claim about a duty to obey, one is asking whether any normative inconsistency would arise within the practice. My suggestion is that no inconsistency would arise comparable to the inconsistency that would be presented if law imposed serious sanctions on others without purporting to justify such actions.

Authority in other contexts. It might be objected that my test—what would be different if the claim to authority were abandoned—is the wrong test. By that test, could one not also question whether parents claim authority or, even, military officers? After all, the parent only needs the right to enforce the parent’s decision (a consequence of the parent’s right to decide); any other additional normative claim that the child ‘should obey’ could be explained as an implicit judgment about the content of the act that is prescribed, not a claim about the parent’s right to be obeyed just because it is the parent. I confess I am no longer sure whether even these classical paradigms of authority ought still to be regarded as paradigms of the empirical claim. If this conclusion is too radical, one might distinguish the parent’s position (and the military officer’s) in the following way. Perhaps the normative argument for parental authority is uncontroversial (and true) in a way that does not apply to law. If so, it may be that the parent’s claim (you ‘should obey’) automatically conveys in practice both reasons—the content-based reason, as well as the content-independent one. My own view is that parents probably do not think in these terms: they do not stop to consider whether the child has a duty to obey just because the parent said so: the force of the ‘just because’ is conveyed by the right to enforce the parents’ decision; the force of the ‘duty’ is exhausted by the belief that the content is correct. To claim an additional duty to obey just because the parent said so requires a level of sophistication only philosophers typically display. So, yes,
parents could abandon any such claim and nothing would change. On the other hand, having abandoned the claim only means that it is left open—to be decided by moral philosophy, and, if moral philosophy concludes parents have such authority, it will 'automatically' attach to the parents' directive whether the parent thinks about it or not. Finally, note again, that many parents might claim a duty to obey as a matter of their own opinion on the issue within moral philosophy. Just as one must distinguish personal views of officials from what 'the concept of law' entails, so too one might suggest that the 'concept of parenthood' does not entail the claim that children have a content-independent duty to obey, even though many parents, for understandable reasons (including the possibility that they are correct), may make such a claim as a personal matter.

As for military commands, one could say much the same thing: probably nothing in the practice would change if soldiers were thought to have no duty to obey just because of the command: sanctions would be effective enough. It might be thought that the military is different because of the empirical question of survival mentioned above: military commands, one might suggest, are so invasive of personal interest that only a moral duty to obey, as well as the sanction, can guarantee the required level of effectiveness. But this, too, seems far-fetched. Soldiers reluctant to risk their lives in the face of threatened sanctions for disobedience are hardly likely to reconsider because of an additional 'moral duty' to obey. Nobody is suggesting that abandoning the claim of authority, even in the military context, means that soldiers are being invited to sit around and decide for themselves what orders to obey. The order will still be to act now (you may deliberate or not as you like, just as long as you do it), and the sanctions will be correspondingly severe to reflect the extent to which the order requires overcoming self-interest or contrary moral judgments.

All of these cases—military orders, parental directives, and legal norms—share one common feature that casts doubt on the assumption that any of these are cases involving an essential claim to authority in the sense we are considering. That feature is the difference in approach to practical reasoning between ordinary individuals, on the one hand, and moral philosophers, on the other. Consider again the case of law. There is something odd
about the suggestion that law claims that citizens have a moral duty to obey law, just because it is law. Legal systems are not in the business of making pronouncements on fundamental questions of moral philosophy—they are, rather, in the business simply of making judgments about the norms to be enforced in society. The idea that law would simply assert a duty to obey without defence, without bothering to consider whether the claim is true, is odd to say the least. The oddity is illustrated by imagining the dialogue that might ensue if one could explicitly discuss the question with the law (or, an easier case to imagine, with a parent). The law insists that its legal norm is just, and that it has the right to create and enforce such norms for the community. Because the law believes the norm is just, it also believes citizens should comply for that reason—the content-based reason. If one asks whether the law also expects obedience, even if the norm turns out to be wrong, the response is likely to reflect the odd nature of the question. Since the law thinks the norm is correct, it is difficult to know what to say about the hypothetical counterfactual:

CITIZEN. What if it turns out that you are wrong in your moral judgment about the norm’s content. Do you still expect me to obey then?

LAW. I’m not sure what you’re asking. Since I think the norm is just and am entitled to act on my own judgment, what difference does it make that my judgment might be wrong (but not culpably wrong). I still expect you to comply, if that’s what you’re asking, and, of course, the imposition of the sanction (if I’ve acted in good faith) will be morally defensible even if the judgment about content is later proved to be wrong. Isn’t that enough? If you want to know whether you also have moral reasons to comply apart from the content of the norm, I’m interested in that question too—as a matter of moral philosophy; but whatever the answer moral philosophy reveals about that doesn’t seem to affect what I’m asking you to do. You have a prudential reason to comply because of the sanction (which is independent of content), and you have a moral reason as well if I am right about the content. If moral philosophers prove that you also have a content-independent moral reason to
comply so much the better. Actually, I don’t spend much

time thinking about that question.

Having authority and claiming authority. The above discussion
suggests that persons who might actually have authority need
not necessarily claim authority. Is that suggestion plausible? It
seems plausible enough in the case, for example, of theoretical
authorities. One might offer an opinion about a factual matter
without claiming to be an authority—perhaps because one is
uncertain about one’s relative standing among so-called ‘ex­
 perts’; yet it may be clear that the advice is authoritative and
advisees would be wrong not to regard it as such. Whether one
has theoretical authority, in short, is a matter of the facts about
the expertise of the person providing advice or information; the
person giving such information may be ignorant of, or uncon­
cerned about, the facts that establish him or her as an authority.

There does not seem any obvious reason why practical
authority should be different in this respect from theoretical
authority. The preceding discussion explains why: the explana­
tion for what makes one a practical authority is a complex matter
of moral theory; that people might convey their desires or de­
mands to others, without thinking about whether moral theory
gives their desires or demands the special weight that they
would carry if they actually have authority, seems just as plaus­
ible as in the case of scientists who might have authority, but not
know or care about the facts that establish their authority. One
can have authority (or be an authority), in short, without know­
ing it and thus, a fortiori, without claiming it.

Claiming authority and expecting compliance. A final point worth
considering is whether it makes sense to distinguish an expecta­
tion of voluntary compliance with one’s wishes or desires from a
claimed duty to comply. In ordinary contexts, this distinction
seems plausible. A colleague, friend, or spouse may ask one to
perform an important task and expect compliance, without sug­
gest ing that failure to comply would be morally wrong. Requests
are commonly thought of in this manner. But one should not
assume that ‘mere requests’, so conceived, never result in duties
to comply. There may be some requests which, though the
person making them does not claim a duty to comply (for the
reasons discussed above), nevertheless create such a duty. Whether that is the case will depend on the relationship and the kind of respect that is due to someone who expects my compliance. In the case of law, this distinction is important for two reasons. First, it will help account for another common descriptive thesis about law, which may be confused with the claimed duty to obey: it is often noted that the law’s posture towards the sanction is that the legal sanction is not intended to be the primary motive for compliance; voluntary compliance with legal norms (regardless of content) is expected. The point is that even if this ‘expectation of voluntary compliance’ attaches to legal directives, it is distinct from a claimed ‘duty to comply’. Second, if the law did not at least expect voluntary compliance, it is probably unlikely that it could have general (as opposed to specific) authority. If the duty to obey exists, it is probably the result of a theory based on the respect that is owed the state, which seems to require at least the expectation of voluntary compliance (without such an expectation, the failure to comply would show no disrespect).41

5. THE CLAIM OF AUTHORITY VERSUS THE ASPIRATION TO AUTHORITY

The distinction just made, between an expectation of compliance and a claimed duty to obey, points towards a different description of law’s attitude to its own authority and the possibility of a (moral) obligation to obey law. It is possible that the phenomenon legal and moral theorists think they have detected in describing law as claiming authority is not a ‘claim’—a bald assertion that citizens have content-independent duties to obey; rather, it may be just a ‘hope’ that it will turn out that political theory will demonstrate that there are content-independent moral reasons to obey. I said above that the law’s survival does not depend on an actual duty to obey, much less on a (false) belief in such a duty. But that does not mean a state may not hope that such a duty does exist—simply because one would rather have those who disagree about the content of legal norms obey because of moral duty rather than out of fear of the sanction. One could say the same of parents: parents do not, I
suspect, think about the question whether children have a moral duty to obey even if parent's directives are badly misguided or unjust; they rely, like the law, on the right to have their moral judgment become the norm that is enforced within the family. But if they did think about the question, there is reason to suspect that they would hope that moral theory is rich enough to show that the motivation for children's complying even with wrong-headed directives stems as much from a true moral theory about the respect that is owed parents as it does from the fear of the sanction.

At the risk of repetition, the latter comments will, I hope, forestall any misunderstanding that to 'demote' the claims of the state by abandoning the view that law necessarily or even typically claims authority does not entail giving up on the question of whether the law does in fact have such authority. Quite the contrary: the argument I make here simply restores that question to the position it has always occupied—a matter of concern primarily for moral philosophy (not for bald assertion by the law) and, of course, a matter of concern for any conscientious citizen.

NOTES


2. For two recent examples of investigations that conclude that law typically makes claims to authority more extensive than can be justified see J. Raz, The Morality of Freedom (Oxford: Oxford Univ. Press, 1986), chs. 2-4, esp. pp. 76-7 ('law is the only human institution claiming unlimited authority . . . [but] there has hardly been any political theorist in recent times who has shared [the view that this claim is justified]'); L. Green, The Authority of the State (Oxford: Oxford Univ. Press, 1988), chs. 3, 8-9. See also R. Flathman, The Practice of Political Authority (Chicago and London: Univ. of Chicago Press, 1980), 227 ('the overwhelming preponderance of known political associations that have claimed or now claim authority did not or do not come close to meeting the requirements [for justifying those claims]').

3. For an insightful discussion of the autonomy of law from a sociologist's perspective, and a devastating critique of one modern attempt to view law as radically autonomous, see R. Lempert, The

4. Elsewhere, I have suggested that the increasingly popular conclusion that law does not have the authority it claims needs to be reconsidered. See P. Soper, A Theory of Law (Cambridge: Harvard Univ. Press, 1984).

5. For a similar conclusion about the law's claim to authority, suggesting that it is at best an empirical question whether any particular state makes the claim, rather than a necessary feature of law, see K. Greenawalt, Conflicts of Law and Morality (Oxford: Oxford Univ. Press, 1987), chs. 2, 4.

6. This term is used by Green, The Authority of the State, ch. 3.

7. As will become clear, I do not distinguish in this chapter between 'the law', 'the state', the government', or similar phrases that in common usage refer to the official institutions that create legal norms and enforce them through the relative monopoly on force that is characteristic of a legal system.


10. Hart's later retreat on this issue—denying that officials must be seen as implicitly expressing a belief in the justice of the rules they accept and enforce (see H. L. A. Hart, Essays on Bentham (Oxford: Oxford Univ. Press, 1982), 153–61, 262–8)—seems to be a consequence of the failure to distinguish the attitudes of particular judges, considered as agents, from the implicit attitude of 'the law' whose norms the judge is asked to enforce. Hart is correct that particular judges may have any view of the merits of the laws they enforce, including conscious and explicit disapproval of the law (see Hart, Essays on Bentham, 158–9). But the individual judge's situation differs from the 'law's' in the same way that an agent who did not choose the content of the instructions he has been given differs from his principal. In both cases, it is possible for the judge or agent to form a view about the merits of the instructions different from the view held by the principal who gave the instructions. The point can be illustrated by imagining a judge deciding a case where the judge is responsible for the content—as when the judge has discretion (in what Hart would call the 'penumbral' area of a case). For such a judge to exercise his discretion and choose the norm to create and enforce, while still denying that he approved of the norm, would at
best be strange, at worst 'pragmatically self-defeating' or 'logically inconsistent'. MacCormick, 'A Moralistic Case', 2.


12. The state's minimal normative claim would be out of line with prevailing moral or political theory if, for example, the state could not justify its right to exist. In this respect, legal systems differ from individuals: no one challenges an individual's right to exist, in the way that some theorists (anarchists) challenge the state's right to exist. The anarchist's challenge, however, does not have enough adherents among contemporary moral and political theorists to create a problem of divergence in this respect between the practice of law and contemporary political theory.

13. See MacCormick, 'A Moralistic Case', ('no law without supporting ideology'). It is possible, of course, that in a society sharply divided over ideology or over critical aspects of an ideology, no 'implicit' substantive position of the state on the ideological issue need be assumed; in such cases, presumably, the state's claim to justice will fall back on familiar arguments from political theory about the state's right to act despite (because of?) failure to achieve consensus on underlying moral issues. For further discussion, see n. 15 below.

14. For an example of a disagreement about how state authority in the service of citizens is typically justified compare J. Raz, 'Authority and Justification', *Philosophy & Public Affairs* 14, no. 1 (1985) 7–29 (defending a 'service conception', whereby the justification of authority depends on doing a better job of advancing the aims of the governed than they could do on their own, with P. Soper, 'Legal Theory and the Claim of Authority', *Philosophy & Public Affairs* 18, no. 3 (1989) 209–37 (defending a 'leader' conception, whereby the justification of authority may also include cases of governmental direction in default of agreement about what are the aims of the governed).

15. For the suggestion that all norms might be viewed by the state as responses to co-ordination problems, see C. MacMahon, 'Autonomy and Authority', *Philosophy & Public Affairs* 16, no. 4 (1987) 310–19. Under this view, presumably, all content claims become what I call in the text the minimum content claim that is possible, similar to the claim made about rules of the road. (See also n. 13 above.) In societies
where the state's underlying ideology denies state power to take action except to resolve co-ordination or prisoner-dilemma problems, the state will presumably remain 'officially' agnostic about the content of the norm, claiming only that, like rules of the road, some norm had to be chosen and the choice in the particular case was made in a fair manner.

16. For the complications and paradoxes that result if one assumes, instead, that the state is justified in punishing only those who are guilty in fact (both as respects the immorality of the prohibited act and the factual proof that the act was committed by the defendant), see H. Hurd, 'Justifiably Punishing the Justified', *Michigan Law Review* 90, no. 8 (1992) 2203–2324. That this is not the state's posture seems clear: the state is a human institution and thus claims, not infallibility, but only lack of culpability when it makes mistakes, as long as it acts in good faith. See P. Soper, 'Some Natural Confusions about Natural Law', *Michigan Law Review* 90, no. 8 (1992) 2418–23.

17. The utilitarian critique has an obvious relationship to formalism, conventionalism, and similar theories that purport to justify sanctions solely by reference to norms that can be identified through fairly straightforward empirical means. The problem discussed in the text does not assume that the law always justifies its actions by such formal methods; it is enough that the law typically (or at least sometimes) adopts the formal method. See generally, Raz, 'On the Autonomy of Legal Reasoning', 5–10 (discussing the limits and implications of formalist views that see legal reasoning as autonomous and unrelated to moral reasoning). For a good recent discussion of the problem as it relates to rule application in law, see F. Schauer, *Playing by the Rules* (Oxford: Oxford Univ. Press, 1991).

18. This example is the most frequently encountered; see e.g. D. Regan, 'Law's Halo', *Social Philosophy & Policy* 4, no. 1 (1986) 17–21. See also M. B. E. Smith, 'Is there a Prima Facie Obligation to Obey the Law', *Yale Law Journal* 82 (1973) 971.

19. See R. Sartorius, *Individual Conduct and Social Norms* (Encino, Calif.: Dickinson Publ. Co., 1975), 54–5 (apologizing, at pp. 57–8, for using the 'trite example of the traffic laws'); see also P. Soper, 'Legal Theory and the Claim of Authority', 221–2 (using the same trite example, with no apology).


22. See e.g. Regan, ‘Law’s Halo’, 19 n. 7.

23. Compare Sartorious, Individual Conduct and Social Norms (an act-utilitarian can consistently explain, using the legal system as an analogy, how rules might be enforced formally without allowing direct appeals to utility and without making such rules mere ‘rules of thumb’); with R. Brandt, A Theory of the Good and the Right (Oxford: Oxford Univ. Press, 1979), 276 (endorsing Sartorius’s attempt to rescue the role of rules by analogy to the legal system, but commenting that ‘it is surprising that [Sartorius] thinks it consistent [with act-utilitarianism] to do so’); compare also Lyons, ‘Utility and Rights’ (the practice of enforcing legal rights by the formal methods of the law is inconsistent with utilitarianism) with R. M. Hare, ‘Utility and Rights: Comment on David Lyons’s Essay’, in J. R. Pennock and J. W. Chapman (eds.), Ethics, Economics, and the Law 149–57 (defending the formal method of enforcing rights according to rules that are ‘intuitively’ sound without allowing direct ‘critical’ appeals to the utility of the act).

24. It should be noted that in cases where the law provides judges with discretion to decide whether to impose the sanction, or where the law provides for defences like the ‘necessity’ defence, the problem created by the formal method of justification disappears: the judge will be empowered to entertain direct appeals to utility. But this escape from the problem will not always be possible: if it were, judges would become the legislators and creators of law, not the law’s agents, and would find themselves in the different normative situation discussed in the next section.

25. For a somewhat similar distinction, described in terms of the ‘asymmetry of authority’, see Schauer, Playing by the Rules, 128–34.

26. The only argument to this effect would be one that claimed that the rule ‘Always obey the law’ (a moral, not a legal rule) is itself a rule that is likely to produce better consequences than any more limited rule. Few think this utilitarian defence of the obligation to obey is plausible.

27. See e.g. D. Brink, ‘Legal Positivism and Natural Law Reconsidered’, Monist 68 (1985) 376–84 (arguing that judges could not have a moral obligation to apply law that is too unjust).

28. I do not see any morally relevant distinction between officials who ‘accept’ basic rules and enforce them, and officials who create the content of such rules: in both cases, as long as official acceptance is a necessary feature of a legal system, the officials are ‘responsible’ in the relevant sense for the content (implicitly claiming the content is just). Of course, as discussed above (see n. 10) individual officials
may dissent from this 'official' view; but when they do, they are dissenting from the implicit posture of 'the law'.


30. The implicit claim of the law that proceeding by rules, rather than delegated standards, is justified in a particular case entails a variety of subsidiary claims, such as: (1) proceeding by rule, rather than more flexible standard, is likely to produce the best results; (2) even though it is foreseeable that the rule will apply to some cases that should be excepted, it is not possible (would be counter-productive, etc.) to try to foresee and describe those excepted cases now; (3) inviting judges to create exceptions by considering direct appeals to utility would be less desirable than requiring recourse to the legislator to change the rule. Any of these claims can be wrong; all that matters is that the state in good faith thought them to be true in a particular case of rule-enactment.

31. The only limitation on this claim will parallel the limitation on any individual's attempt to deny culpability. Persons who commit moral errors may not be culpable as long as they did their best to determine the moral facts and acted accordingly; but this excuse is limited by concepts of 'negligence' or good faith which put into issue the degree of care that was taken before acting. Actions that are 'clearly immoral' may, thus, be morally culpable, even though an individual did not know it at the time. I have suggested elsewhere that this same limitation on the state's posture may be evidenced in practice in the *theoretical* acceptance of the Nuremberg principles. See Soper, 'Some Natural Confusions about Natural Law'.

32. See Hart, *Essays on Bentham*, 254–5 (discussing the 'content-independent' claim of law); J. Raz, *The Authority of Law* (Oxford: Oxford Univ. Press, 1979), chs. 1, 2 (discussing law's claim to provide 'exclusionary reasons' for action); Green, *The Authority of the State*, chs. 2, 3 (discussing the law's claim that legal requirements are to be taken as binding, content-independent reasons for action).

33. See n. 2 above.


35. I, too, have 'taken for granted' in earlier work that the law makes the claim of a duty to obey that is at the centre of political theory. See Soper, *A Theory of Law* and 'Legal Theory and the Claim of Authority'. I took that claim to be strong evidence that contemporary political theories—denying an obligation to obey—were wrong. I
now think that the more interesting problem is the apparent discrepancy between the legal and moral points of view—a discrepancy that can be resolved without abandoning the claim that there is a duty to obey the law. As the text explains, there may be an obligation to obey, but the state need only claim what is necessary to defend its own actions (the right to coerce), with the question of its authority (and the duty to obey) to be resolved through moral and political theory.

36. See e.g. Smith, 'Is there a Prima Facie Obligation to Obey the Law', 975-6; R. Ladenson, 'In Defense of a Hobbesian Conception of Law', Philosophy & Public Affairs 9, no. 2 (1980) 141.


38. For an example of the argument, see Raz, The Morality of Freedom, 27 ('We are to imagine courts imprisoning people without finding them guilty of any offence; damages are ordered, but no one has a duty to pay them. The legislature never claims to impose duties of care or of contribution to common services. It merely pronounces that people who behave in certain ways will be made to suffer'). See also MacCormick, 'A Moralistic Case', 21 ('The very imposition of a “punishment” as such always involves some element of moral stigma (whether deservedly or not) . . . Utilitarians may think this is a mistake. Punishment, perhaps, in their eyes is just a price charged for rule-breaking, set at a level which tries to price breaches out of the market.')

39. When I say that the practice of law would not change, I mean the normative practice: no inconsistency would arise comparable to the inconsistency that would be presented if law imposed serious sanctions on others without purporting to justify such actions. Whether the behaviour of citizens would change (whether fewer people, for example, would obey the law if officials claimed no duty to obey qua law) is a separate question.

40. A similar argument has been made by M. B. E. Smith in suggesting that any moral obligation to obey the law would be trivial because it could not add significant moral weight to the existing moral evaluation of the content of the act. See Smith, 'Is there a Prima Facie Obligation', 970. I have criticized this argument elsewhere as it applies to the question of moral obligation. See Soper, A Theory of Law, 86-7. But the parallel argument in trying to decide whether there is a distinct legal obligation to obey the law qua law seems to me to have some force, as long as one assumes that legal norms are typically identified, in part, by the existence of sanctions. Sometimes, as in the case of penalties for scofflaws, or punitive damages for wilful disobedience, the law does impose a separate sanction to reflect the 'wrong' involved in the fact that one broke the law (in
addition to the sanction for the ‘wrong’ involved in engaging in the proscribed conduct).

41. See Greenawalt, *Conflicts of Law and Morality*, 49 (‘If a good government adopts valid laws whose scope is much broader than any expected compliance, a conclusion that the government is legitimate presumably would not acknowledge a duty to obey that reaches further than official hopes about obedience’).