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LAW'S HALO

BY DONALD H. REGAN

Like many people these days, I believe there is no general moral obligation to obey the law.¹ I shall explain why there is no such moral obligation – and I shall clarify what I mean when I say there is no moral obligation to obey the law – as we proceed. But also like many people, I am unhappy with a position that would say there was no moral obligation to obey the law and then say no more about the law's moral significance.² In our thinking about law in a reasonably just society, we have a strong inclination to invest law with a sort of moral halo. It does not feel right to suggest that law is a morally neutral social fact, nor to suggest that law is merely a useful social technique.

In this essay, I shall try to account in part for law's moral halo. (Let me emphasize "in part"; I do not purport to say everything that could be said.) Because I share the widespread inclination to invest law with this halo, I shall not be interested in a merely historical account of how we come to see law with a halo – a pure "error theory" of law's halo, if you will. I want to justify the halo. On the other hand, the main way to justify the halo is to get clear just what law's moral significance is. It is unlikely that at the end of the process of clarification the halo will have exactly the shape or luminance that it had at the beginning.

Obviously, if we are going to clarify law's moral significance, we must have some general moral presuppositions. I shall write as if I were an act-utilitarian. That is, I shall assume that an act is right if and only if it produces at least as good consequences throughout the universe as any other act available to the agent. In truth, I am not an act-utilitarian. For reasons I have explained elsewhere, I think the act-utilitarian view about the structure of the maximization decision required of a moral agent is oversimplified.³ But


² Cf. Philip Soper, "The Moral Value of Law," Michigan Law Review, vol. 84 (1985), pp. 63–86; Raz, The Authority of Law, pp. 250–261. Notice that Raz, like me, wants to be on both sides of the fence. Indeed, from the point of view of the reader who likes his questions and answers writ large, it may seem I have little to say that Raz has not already said. But there are enough differences of detail, of emphasis, and of general perspective that I hope the repetition of major themes may be justified.

of the standard utilitarian theories, act-utilitarianism is nearest the truth; and it will do for present purposes. There is another issue, of course, about just what consequences count as good consequences which the moral agent is to maximize. My axiological views, like my views on the structure of maximization, are nonstandard in important respects; I am an "ideal utilitarian" and, speaking generally, my views are those of G. E. Moore. But again, that need not concern us in this essay. With one exception, which will be sufficiently marked when it appears, the particular claims I rely on about what is good and what is bad will be uncontroversial.

What follows is divided into three sections, in which I shall discuss three aspects of law's moral significance. In the first section, I shall explain that even though there is no moral obligation to obey the law, it is nonetheless a very important part of law's function to create moral obligations, in various senses. In the second section, I shall explain why, even though there is no moral obligation to obey the law, the law is nonetheless something a moral agent ought always to take into account before acting. In the third section, I shall point out that law is not a mere necessary evil. It is, as Aristotle thought, a good in itself — the natural capstone of human development in a certain aspect. There would be law even in a society of saints.

I. HOW SOME LAWS CREATE MORAL OBLIGATIONS

Notice the title of this section. The topic is how some laws create moral obligations. Just as there is no moral obligation to obey the law in general, so there are many individual laws, including many mandatory laws directly regulating private behavior, which neither create moral obligations nor are intended to. But there are also many laws which do create moral obligations, in various senses, and which are intended to. The main business of this section is to get clear how those laws work.

Let us start with a simple example, the law that says one should stop at a red traffic light and proceed only on a green light. It is clear that I often have a moral obligation to stop at a red light. I have that obligation (when I have it) because if I do not stop, I will cause an accident and injure someone. Why will I cause an accident if I do not stop? Because someone else who has a green light will be driving through the intersection, expecting me to stop. Why will that other party be expecting me to stop? In large measure because the law requires me to stop. In sum, the existence of the law has created the moral obligation.

(I said the other party will be expecting me to stop "in large measure because the law requires me to stop." I do not mean to suggest that the other person expects me to be regulating my behavior with regard to red lights primarily by the occurrent thought that the law requires me to stop at them. I
will stop partly out of habit, partly out of prudence, partly out of direct concern for others, and perhaps partly out of respect for the law; and the other party, if she stopped to think, would know all this. But even so, the law about traffic lights played an important causal role in bringing about the situation where habit, prudence, concern for others, and so on, conspire to make me stop. The law therefore played an important causal role in creating and justifying the other party’s expectation that I will stop.

At one level, my moral obligation to stop at the red light can be explained without any reference at all to the law. I should stop because of the injurious consequences of not stopping, given other people’s expectations and behavior. Still, the law was crucial in creating the relevant expectations and, thus, in bringing it about that my moral obligations with regard to traffic lights are what they are. And it was the main purpose of the law, if not to create the moral obligations (since the mere existence of moral obligations can hardly be thought to be a good in itself), then to create the organization of communal expectations and behavior that the moral obligations fall out of.

The law about traffic lights solves a coordination problem. It is representative of a vast range of other cases in which laws solve, and are intended to solve, other coordination problems. The example is simple; the function it points to is as important as any function law serves.4

Now, the observation that many laws solve coordination problems may seem too obvious to bother with. In fact, I shall have no choice but to say some obvious things in the course of trying to get straight just what it is of moral significance that law does for us. But for what it is worth, my observation may be a bit less obvious than it seems, inasmuch as I would reject most of the thinking that conventionally surrounds the idea that laws somehow solve coordination problems.

The idea that laws solve coordination problems most often crops up in connection with the “fair-play” argument for a general moral obligation to obey the law. But I differ with fair-play theorists on at least three grounds. In the first place, I do not think there is any basic moral obligation of “fair-play,” that is, of holding up one’s end in fair cooperative arrangements. Insofar as there are particular obligations which suggest this general fair-play obligation, they are generated by utilitarian considerations. (This obviously is a topic too large to argue about here.) In the second place, fair play theorists tend to believe that achieving coordination often requires non-act-utilitarian behavior. They suggest, implicitly or explicitly, that we ought to hold up our end in some cooperative scheme instead of doing the act-utilitarian thing, because general act-utilitarian behavior would destroy coordination entirely.

4 Cf. Raz, The Authority of Law, pp. 246–249. (Raz’s ideas on law as a technique of achieving cooperation are emphatically not the object of my criticisms in the next few paragraphs of text.)
This is simply a mistake. The red-light example is by no means the best example for showing that this is a mistake, but notice that even in that example my stopping at a red light while someone else drives through the intersection is not only the behavior that coordination requires, it is also thoroughly act-utilitarian.\(^5\)

Finally, even if there were an obligation of fair play which sometimes required non-act-utilitarian behavior, that would not entail a general moral obligation to obey the law, for the simple reason that the law might sometimes enact unfair cooperative schemes. Once we decide that some particular act required by some law is not required by fairness, then the fact that the law requires it provides no reason at all for doing it (not just a reason that is overridden, but no reason at all). Nor can we avoid this point by saying the legal system is a single overarching cooperative scheme which we should abide by so long as it is reasonably fair. There is no ground for thinking we have any basic obligation to follow all the details of a scheme, when those details are unrelated to fairness or perhaps even positively unfair, just because the scheme is reasonably fair as a whole.\(^6\)

Of course, if there were a basic obligation of fair play, then the fair-play theorist could say the same thing about law that I say from the act-utilitarian perspective: he could say that many laws create particular moral obligations by setting up particular fair cooperative schemes which, once they are brought into existence, morally demand participation. But this would still be a case of laws creating moral obligations; it would not demonstrate the existence of a general moral obligation to obey the law.

In the last two paragraphs, which dealt with the relation between a hypothetical obligation of fair play and a general moral obligation to obey the law, I have gotten a bit ahead of myself by assuming some ideas I shall develop more carefully when I explain from the act-utilitarian point of view why there is no moral obligation to obey the law even though many laws create moral obligations. To reemphasize the main point made so far: the red-light example discussed above is a case in which law is intended to and does create moral obligations in the course of solving a coordination problem, without reference to any general moral obligation to obey the law and without requiring any non-act-utilitarian behavior.

Let us turn now to a different red-light example. Imagine that you are driving in a flat desert. You approach an intersection, and you are facing a red light. Sometimes there is traffic at this intersection (that accounts for the presence of the traffic light), but on this occasion you can see that there is no other car within a mile in any direction. The law unequivocally requires that

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\(^5\) For further discussion of the compatibility of coordination and act-utilitarian behavior, see my *Utilitarianism and Co-operation*, especially chs. 3, 4.

\(^6\) For further discussion, see Smith, "Is There a Prima Facie Obligation," pp. 954–958.
you stop and wait for the light to change. Habit, or even prudence (in the form of uncertainty about whether there is a police helicopter overhead) may lead you to stop and wait for the light. But you have no moral obligation to stop or, having stopped, to wait. (When I say there is no moral obligation, I am not relying on a distinction between morality and prudence. For convenience, let us assume there is in fact no police helicopter. Now you have no moral obligation and no prudential "obligation" either.) There is simply no reason at all, moral or prudential, to stop at the light.

This case shows that there is no moral obligation to obey the law. The law requires you to stop and wait at the red light in the desert. If there is in fact no moral reason at all to stop and wait in the case as I have described it, then obviously the fact that stopping is required by law is not a moral reason to stop. But if the illegality of not stopping is not a moral reason to stop, then there cannot be a moral obligation (not even a prima facie moral obligation) to obey the law. What could we possibly mean by saying there was a moral obligation to obey the law, if that did not at least entail that the illegality of an act was some moral reason for avoiding the act? The fact I am pointing to when I say there is no moral obligation to obey the law is just this: there are some cases where a particular act is illegal but where there is no moral reason at all to avoid that act.

In a sense, of course, my argument begs the question. I simply assert that when you are faced with the red light in the desert in the circumstances I have imagined, you have no moral reason to stop. But in that sense, every argument from an example must beg the question. The point of examples is to help us see things clearly. My assumption is that one who reflects on my example (and, if necessary, on well-known refutations of various positive arguments for the existence of a general moral obligation to obey the law) will see, in the end, that there is in fact no moral reason at all to stop — in which case my other conclusions follow.7

Perhaps it will help if we compare the case of the red light in the desert with my original case of the red light at an intersection where there was cross traffic. In the original red-light case, I said I had a moral obligation to stop, which the law in fact created. But even in connection with the original case, I said something which might have prepared us for my conclusion about the red light in the desert. I said that my obligation to stop when there was traffic could be explained without any reference to the law. Once we have pointed

7 My argument here obviously owes much to Smith, "Is There a Prima Facie Obligation," pp. 969–971. Just for completeness, I will stipulate, if the reader wishes, that no one observes my disobedience at the red light in the desert (so I cannot be setting a bad example); there is no danger of my present disobedience weakening my own resolve to obey other laws when obedience would have good consequences; and so on. All of this to guarantee that there really is no reason for obedience in this case.
out that there is oncoming traffic, that the person faced with a green light will be expecting me to stop, and that if I do not stop there will be an accident, then we have done all that needs to be done to account logically for the existence and the full strength of my moral obligation to stop. The obligation is completely accounted for, and the law has not been mentioned.

As I have said before, the law is part of the causal explanation for the existence of the circumstances that account logically for the obligation. Specifically, the law is part of the causal explanation of why the driver with the green light expects me to stop, which in turn is part of the explanation of why, if I do not stop, there will be an accident. And because the law is part of the causal explanation of the facts that constitute the logical explanation for the moral obligation to stop, the law is in an obvious sense part of the causal explanation for the existence of the obligation. But precisely because the law contributes only causally, and not logically, to the existence of the obligation, there may be cases, like the case of the red light in the desert, where it just turns out that the law does not actually cause the sort of facts that are logically related to the existence of a moral obligation. When that happens, there is a law, and there is legal obligation, but there is no moral reason at all to do as the law requires. The law has not caused the existence of a moral obligation in the way that it often does.8

It may not be entirely clear just what I mean by distinguishing between the law’s being logically related to the existence of moral obligation and its being only causally related. By way of clarification, let me introduce a distinction between what I shall call “intrinsic” and “indicative” reasons.

Consider the original red-light case, in which I am confronted with a red light and there is oncoming traffic. In the final analysis, the reason I should stop is that if I do not stop, I will cause physical injury or, at least, property damage. The fact that some act will cause physical injury (let us concentrate on that) is always a morally relevant reason for avoiding that act. This reason may be outweighed. There may be competing moral reasons for doing the act which are more significant than the reason against doing the act constituted by the fact that it will cause physical injury. But even if the physical-injury reason is outweighed, it always counts. This sort of reason is what I call an “intrinsic reason” for action.

The illegality of driving through a red light, in contrast, is not an intrinsic reason for stopping. It is an indicative reason. Indicative reasons, as their name suggests, indicate the likely presence of intrinsic reasons. The fact that I am coming up to a red light at a traffic intersection is some indication

8 It might occur to the reader that laws could not create any expectations at all, and therefore the law on traffic lights could not create a moral obligation even in the red-light-in-traffic case, unless people believed there was a moral obligation to obey the law. This is a mistake, for reasons I shall adumbrate in section III (without being able to develop them at length).
that there is an intrinsic reason for me to stop at that intersection (such as the intrinsic reason that I will cause physical injury if I do not stop). But the indicative reason does not guarantee the existence of any intrinsic reason at all, as we have seen in the case of the traffic light in the desert, in which the indicative reason turns out to be illusory. The force of the indicative reason may evaporate completely once we consider more facts. An indicative reason may be canceled, annulled. (Remember that no additional facts can make the force of an intrinsic reason evaporate. An intrinsic reason cannot be canceled or annulled; it can only be outweighed.)

In sum, intrinsic reasons are reasons which are logically connected with the existence of obligation, which is why they always count, while indicative reasons merely indicate the likely presence of particular intrinsic reasons. An intrinsic reason does not entail the existence of an obligation-all-things-considered. It entails a sort of a *prima facie* obligation, or a moral pressure. But, unlike an indicative reason, it entails such a *prima facie* obligation or moral pressure; it does not merely tend to suggest it.

(The distinction between intrinsic and indicative reasons is not a distinction peculiar to utilitarian analysis. Even deontologists will have use for such a distinction. So far as I can see, the main point of W. D. Ross’s invention of *prima facie* obligations was to have a category of moral considerations with the same logical relation to obligations-all-things-considered as these things I prefer to call intrinsic reasons. Needless to say, even though utilitarians and deontologists both have use for the distinction between intrinsic and indicative reasons, they will differ on what reasons are to count as intrinsic and what as merely indicative. That is a matter of the substance of one’s moral theory.)

One last point, lest my attempt to clarify cause new confusion. Intrinsic reasons are reasons that are logically connected with the existence of moral obligations, and what I meant earlier when I said the law was not logically related to moral obligation was just that illegality is not an intrinsic moral reason for avoiding an action. But as the counterpoise to my earlier claim that law was not logically related to moral obligation, I said that law was (often) causally related; and as the counterpoise to my more recent observation that illegality is not an intrinsic moral reason for action, I have said that law is an indicative reason. Obviously, being causally related to moral obligation is not exactly the same thing as being an indicative reason. It is because law is causally related to moral obligation in many red-light cases that it is an indicative reason in such cases. But something could be an indicative moral reason for action without making any causal contribution to the existence of the relevant moral obligation. Indeed, laws are often indicative reasons in this totally noncausal way, as we shall see in the example I now turn to.
Imagine that agricultural scientists discover that a recently introduced growth-enhancing chemical used on watermelons causes serious injury to people who ingest it. Accordingly, an appropriate regulatory agency forbids further use of the chemical. This is a case in which the law is a very significant indicative moral reason for not using the chemical even though the law makes no causal contribution to the existence of the intrinsic reasons for not using the chemical.

Someone might suggest that the regulation here does contribute to the intrinsic reasons for not using the chemical. The existence of the regulation encourages buyers of watermelons to expect that the chemical has not been used, and this encourages them to eat the watermelons, which is what will cause harm if the chemical has been used. But the expectations here do not play the same role in the explanation of why the chemical should not be used that the expectations surrounding red lights play in the explanation of why we should stop at them. If we assume that the only reason for growing watermelons is for human consumption, then regardless of the number of people who will actually buy and eat the contaminated watermelons, there is no possible gain, and some possible cost, from using the dangerous chemical. So, regardless of the number of people who will actually buy and eat the contaminated watermelons, the chemical should not be used. If the existence of the regulation proscribing the chemical generates expectations in some knowledgeable consumers that the chemical will not be used, that may increase the number of consumers who are at risk if the chemical is used. And in that sense, the weight of the intrinsic reasons for not using the chemical is increased. But we can give a complete explanation of why the chemical should not be used without reference to consumer expectations or to the regulation which generates them.

However, even though the regulation does not create the intrinsic reasons for avoiding the chemical, it can still be an important indicative reason. It may well be the regulation which first brings the dangerousness of the chemical to the watermelon growers’ attention. The significance of the regulation is increased if we reflect that the promulgators of the regulation are likely to be much more expert than the growers on the matter of dangerousness. Doubting growers should almost certainly bow to the regulators’ expertise. So the ban on the chemical is an extremely significant indicative reason to abandon the chemical, from the growers’ point of view.

If we distinguish between objective and subjective obligation – where objective obligation is determined by the facts of the case regardless of what the agent knows about the facts, while subjective obligation is defined as what the agent’s objective obligation would be if the facts were as he believes them, or should reasonably believe them, to be – then even though the regulation which forbids the use of the growth-enhancing chemical does not
create the *objective* moral obligation to abandon the chemical, still it creates a strong subjective obligation to abandon it. And it is the purpose of the law to create this subjective obligation, in just the same sense in which it is the purpose of the law about red lights to create the objective (and incidentally subjective) obligation to stop at them in most circumstances.

For the sake of a certain sort of completeness, I shall discuss one last example, a law that regulates private behavior in a very important way but that creates neither objective nor subjective moral obligation. Consider the law against murder. So long as people are disposed to commit murder, the law forbidding murder is important. (I assume there is some deterrent effect.) But the law against murder makes no contribution to our moral obligations not to commit murder. The explanation of why murder is (almost always) objectively wrong does not depend at all on expectations generated by the law against murder. (As with the ban on the growth-enhancing chemical for watermelons, the existence of a law against murder might lull some potential murder victims into a false sense of security and might thereby increase the number of opportunities which present themselves to a would-be murderer. But the law still contributes nothing to the explanation of why any particular murder is wrong.) Nor does the law against murder affect our subjective obligation not to commit murder. We know murder is wrong without needing the law to inform or remind us.

Let me quickly summarize what our examples have shown about law’s relation to moral obligation, before I add a couple of final observations.

(1) There is no general moral obligation to obey the law, not even a *prima facie* obligation. This is shown by the fact that there can be cases in which an act is illegal but in which there is no intrinsic moral reason at all for avoiding it. (The red light in the desert.) The illegality of the act is not itself an intrinsic moral reason for avoiding the act.

(2) Some laws create objective moral obligations. That is to say, some laws contribute causally to the existence in certain circumstances of intrinsic moral reasons for adopting or avoiding the behavior the law requires or forbids. (The red light in traffic.) Furthermore, it is often part of the purpose of such laws to create such intrinsic reasons.

(3) One and the same law may create objective moral obligation (intrinsic reasons) in some cases to which it applies but not in other cases to which it applies. (The law about red lights.) This is what we would expect if we remember that law’s contribution to the existence of intrinsic reasons is causal, not logical.

(4) Some laws create indicative reasons for action (subjective obligation). Laws which create important indicative reasons may include both laws which sometimes create intrinsic reasons (the law about red lights) and laws which do not create intrinsic reasons (the watermelon growth-enhancing
chemical regulation). It is often part of the purpose of a law to create indicative reasons for action.

(5) Some important laws regulating private behavior create no moral obligation of any kind, objective or subjective. They create neither intrinsic nor indicative reasons. (The law against murder.) This can be true even though there is a weighty moral obligation which coincides in content with the legal obligation the law imposes.

Now, as to the final observations: First, once we understand how laws can create moral obligations, we see further that laws can create moral obligations of widely varying strengths. The law that limits how long one may park at the same parking meter creates a genuine moral obligation, but a vastly weaker obligation than is created by the law about red lights when there is cross traffic.

In his well-known argument against the existence of a moral obligation to obey the law, M. B. E. Smith assumes implicitly that if there is something reasonably denominated “the moral obligation to obey the law,” then it must be of the same strength in all cases in which it is relevant. (Of course, the other reasons for or against some action may vary from case to case, so the obligation to obey the law will sometimes prevail and sometimes be defeated even though its strength is constant.)

For myself, I think Smith’s assumption is a fair one: if what we are talking about really is just the moral obligation “to obey the law,” then it would seem that the obligation ought to have the same strength whether the law is about parking meters or about murder. Notice I am not claiming that all obligations must be of constant strength in all cases. Consider, say, the obligation to avoid doing harm. Harm is something that comes in degrees, so it is both natural and sensible to talk about an obligation to avoid doing harm that comes in varying strengths. But illegality is not like harm; illegality does not come in degrees. We normally think that an act either is illegal, or it is not. We may not be certain which it is; but degrees of certainty are not the same as degrees of legality. So, it is specifically the supposed obligation to obey the law about which I am suggesting that it seems it ought to have a constant strength.

If, as Smith and I suggest, any “obligation to obey the law” ought to have a constant strength, then the fact that different laws so obviously create (moral) obligations of different strengths is evidence for the claim that even though laws do create moral obligations, the obligations are not sensibly regarded as instances of a general moral obligation to obey the law. (Without contradicting myself, I can add that if one is going to argue for a moral obligation to obey the law, then one ought to claim that that obligation comes

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in varying strengths. Such is the claim of John Finnis, for example, who is to that extent on the right track — though Finnis does not adequately explain, to my mind, how it is that one and the same obligation “to obey the law” can vary in its strength from case to case.)

Finally, although I have argued that there is no general moral obligation to obey the law, what I have said about the various ways in which laws can create moral obligations may tend to explain, historically and psychologically, the occurrence of loose talk about such a general moral obligation. And what I have to say in the remaining sections may add to the explanation.

II. HOW A MORAL AGENT SHOULD ALWAYS TAKE THE LAW INTO ACCOUNT

I have pointed out that individual laws are often indicative moral reasons for action. In fact, there is a sense in which illegality in general is a moral indicator: in a reasonably just modern society, an agent should not do an act which she knows to be illegal without giving thought to the question why the act is illegal and making sure that she has taken whatever it is the law is trying to accomplish adequately into account.

The argument for this claim is obvious enough. In a reasonably just modern society most laws have comprehensible purposes; most of the laws with comprehensible purposes are aimed at promoting genuine goods or avoiding genuine harms; and many of the laws aimed at promoting genuine goods or avoiding genuine harms are actually reasonably designed to accomplish their ends. Given all of that, it is worth an agent’s time (morally) to give thought to possible explanations of the illegality of some action she is considering before she actually does the act, in order to make sure the law does not suggest some relevant consideration she might otherwise have overlooked or underestimated.

Notice the various things I have not said in the course of explaining how illegality in general is a moral indicator. (1) I have not said that if the agent knows some act is illegal, that makes it more probable than not that the act in question is immoral. My claim is not about probabilities at all. (2) I have not

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10 John Finnis, Natural Law and Natural Rights (Oxford: Clarendon Press, 1980), pp. 314–320. Incidentally, Finnis is also one of the few people who have recognized that promises create obligations of widely varying strengths (p. 308). This obvious but neglected fact about promises moves me to deny that there is anything sensibly referred to as “the obligation to keep promises,” just as I deny that there is an obligation to obey the law. Of course promises, like laws, are often intended to and often do create moral obligations; but that is a different claim.

11 My claim here obviously resembles Raz’s claim that a citizen might “trust” the lawmaking and judicial institutions of a generally good legal system (The Authority of Law, p. 245). But Raz seems primarily to suggest trust as a permissible reason for obedience, whereas my emphasis is on what the citizen is morally required to do before she disobeys.
said that if the agent knows some act is illegal, then she should not do the act unless she can adduce some positive moral reason for doing it. The agent might know the act is illegal but might decide on the basis of additional facts that the illegality indicates no actual intrinsic moral reason for avoiding the act. (3) I have not even said (or I have not meant to say) that an agent must not act illegally until she is sure she has figured out just why the act she is considering is illegal and just how important are any intrinsic moral reasons which the illegality indicates. Depending on the other reasons for and against an action, there may be wide variation in how much thought or investigation is required in order to have taken the illegality adequately into account. (4) Finally, I have not contradicted my claim in the previous section that the law against murder creates no significant indicative reason. My claim in this section entails that an agent who knows murder is illegal should not commit murder until she is reasonably sure she knows what the point of the law against murder is; but since no sane person could lose track of the point of the law against murder, the law against murder is not a significant indicative moral reason in any sane agent’s thinking. Nor is it intended to be.

Once we are clear about all the things I have not said, it may seem that what I have said is very weak. From one perspective it is indeed weak, weak to the point of vanishing. What I have said does not give illegality any intrinsic moral weight; nor does it guarantee that illegality always indicates a reason of any intrinsic moral weight.

From another perspective, however, the claim I have made is a strong one. It is a claim about the moral significance of illegality in general. The significance is merely subjective and cautionary; but it attaches to illegality across the board (in a reasonably just modern society).

I suspect that not infrequently in ordinary discourse the real force of reminders that some act is illegal is to encourage the agent to look again at certain consequences she may have slighted in her deliberations. And I suspect that this subjective and cautionary moral relevance of illegality in general helps to account for our inclination to say there is a general moral obligation to obey the law.

III. LAW IN A SOCIETY OF SAINTS

Brief as it is, this section will begin with a coherent theme and then degenerate into a loosely connected miscellany of observations. The coherent theme is this: Our inclination to say there is a moral obligation to obey the law may actually reflect an inchoate understanding that law is a valuable institution in a very deep sense. Law is not merely a necessary evil, a social technique for holding in check the selfish and criminal tendencies that abound in any actual society. Rather, law would have a role even in a society of saints.
Perhaps it is not obvious why the fact that law would have a role in a society. But I think it does. If there would be no law in an ideal society — if law were nothing more than a tool of social engineering for mitigating present evils — then it would seem more natural to many people to say that present evils — then it would seem more natural to many people to say that law can be ignored when the goals of the law can be better promoted by ignoring the law than by obeying it. On the other hand, if law has a role in an ideal society, that seems to give law an intrinsic value, for which we show proper respect by asserting a moral obligation, even in our imperfect society, to obey the law.

The tendency I have just suggested is not a necessary feature of our psychology; there is even a contrary tendency. With some people, feelings about the fragility of social organization in our actual, very unsainty, world probably contribute more to the desire to assert a moral obligation to obey the law than do any considerations of the ideal. Still, for many other people the idea that law has a role in an ideal society would suggest, through the mediation of the idea that law is therefore morally valuable, that we have an obligation to obey the law.

As to how it is that law has a role in an ideal society, notice that because I am a utilitarian, my notion of an ideal society is much more ideal than many people's notion. On one common (nonutilitarian) view, people have conflicting goals inevitably and essentially. The "ideal" society is one in which everyone subordinates his pursuit of his own particular goals to principles of justice which are designed to palliate and channel the unavoidable conflict. In this ideal society, law presumably has an important role, but it is no part of my project to specify just what that role is. In my ideal society, my society of (utilitarian) saints, there is no fundamental conflict at all. But even so, there is a need for institutions to disseminate information about the consequences of various actions and to organize cooperation; and as we have seen, these are functions the law can and does perform (both in our very imperfect actual society and in the ideal).

I would go so far as to claim that informed and self-conscious cooperation is an intrinsically valuable activity of great importance. (Here is the one point at which I make a possibly controversial axiological claim.) Since cooperation in large schemes between strangers can only be organized by the law (or by some essentially analogous social institution), law is an essential means to achieving something of intrinsic value. I think law remains a means; but one might well suggest that the more nearly society approaches the ideal, the harder it is to distinguish meaningfully between obedience to law and participation in a large-scale cooperative scheme\(^{12}\) — and if we cannot

distinguish at all, then we must admit that in this context obedience to law takes on intrinsic value and becomes morally obligatory.

Whether or not we think obedience to law as such becomes obligatory in my ideal society, it is certainly (and perhaps paradoxically) true that the better the society, the higher will be the proportion of laws that create moral obligations. This is not simply because a better society will have better and wiser legislators. It is rather because the better the society, the less need there will be for laws which enforce totally independent moral obligations, such as the law against murder. In a very imperfect society, even the laws promulgated by a perfectly wise legislator would often create no moral obligation at all. Much effort would be devoted to stopping murder and the like. The better the society, the higher the proportion of laws that will be devoted to creating cooperative schemes and providing information for well-disposed but non-omniscient citizens to act on. In short, the higher will be the proportion of laws that create moral obligation.

Another feature of the ideal society that leads to a mild paradox about the relation between legal and moral obligation is this. In an ideal society, where individuals are not only well-motivated in general terms but can be counted on to use the subjectively most appropriate rules of thumb for estimating consequences in whatever situations they find themselves, all laws would contain act-utilitarian excusing conditions. Driving through the red light in the desert would be permitted if the circumstances made it a reasonable choice. (In our actual society laws do not normally have act-utilitarian excusing conditions because individuals cannot be trusted not to abuse such excusing conditions, whether intentionally or by unconscious self-preference; and the administrative burden of separating the excused (or justified) violations from the unexcused case by case, if the act-utilitarian excuse were allowed, would be too great. In the ideal society, however, people can be trusted not to abuse the excusing conditions. Indeed, we would never need to review the individual’s choice; anyone who thought he was excused (having, of course, taken the law into account) would be excused — perhaps only subjectively, but if so, then still in a sufficiently strong sense so that there would be no point in punishing the act even though it was objectively wrong.)

But if every law includes an act-utilitarian excusing condition, then there will never be a case where legal and moral obligation diverge. Someone might suggest that this casts doubt on the claim that in the ideal society there is no moral obligation to obey the law.¹³ For myself, I do not see any problem for the claim that there is no moral obligation to obey the law (except, perhaps, the problem I have already mentioned, viz., the difficulty of dis-

¹³ This possibility was raised by Philip Soper in a discussion of my paper.
tinguishing between obedience to law and participation in a large cooperative scheme). It is true that we could not prove the nonexistence of a moral obligation to obey the law by adducing an actual case where there was legal obligation but no moral reason at all to comply (as we did with the red-light-in-the-desert case in our imperfect society, where laws do not contain act-utilitarian excusing conditions). But that does not mean we could not still see that there was no moral obligation to obey the law, either by bringing forward hypothetical cases from an imperfect society or by just seeing, on moral reflection, that it is not legality or illegality that is fundamentally morally significant. Incidentally, if we could not prove the nonexistence of the moral obligation to obey the law in my ideal society, we equally could not prove that it was important to recognize or to posit such an obligation, since one would never have any legal obligation which was not duplicated in content by some moral obligation which might be caused by the law but which was logically explicable without any reference to the law.

On a related point, it might seem that we need at least a general belief in the moral obligation to obey the law to explain how law could produce cooperation at all. Why do we assume other people will do their part in the legally stipulated scheme if not because we assume they will think they are obligated? The answer, which I cannot develop here, is that if all the potential participants in the scheme are well-motivated and understand the law as indicating a superior pattern of joint behavior which it would be desirable for all to adopt, then there is no reason why the existence of the law as an indicator should not produce new mutually coherent intentions and expectations of cooperative behavior on all sides, without the help of any notion that the law as such obligates.

The discussion of this section should have made it clear why I did not mention in the first section certain actual but uninteresting ways in which laws may create moral obligation. From a utilitarian point of view, once a law is passed one may have a number of moral reasons to obey it: disobedience may lead to punishment, which is a bad consequence one has an obligation to avoid even when it occurs to oneself; justified disobedience may set an example for others which will be misinterpreted and will stimulate unjustified disobedience; any instance at all of lawbreaking may create resentment and similar painful feelings in other people who obey the law and want the law to be obeyed all the time; even justified disobedience might conceivably contribute to a lawbreaking disposition in the agent which would lead to unjustified lawbreaking on other occasions; and so on. These are all moral reasons for doing what the law requires which come into existence only with the adoption of the law, so they are in a sense moral reasons which the law creates. But these reasons would not exist in a society of saints. Nor is creating these reasons ever the ultimate purpose behind the adoption of any
particular law, even in an imperfect society. So, the modes of legal creation of moral obligation that I have focused on are the modes that are essential to law’s function.

A CONCLUDING REMINDER OF OUR STARTING POINT

I am at least as conscious as the reader of the fact that this essay has been a potpourri mixing moderately precise argument and rather impressionistic “suspecting” and “suggesting.” My excuse is the nature of the question from which we started: Why, given that there is no general moral obligation to obey the law, are we not content simply to say there is no obligation and have done with it? Why does law have a halo? Why does an attitude of “respect for law” (Joseph Raz’s phrase, though I mean to use it more loosely than he) seem to some extent required and not merely permissible, as Raz suggests?¹⁴ The moderately precise argumentation in this essay has been about what law’s connections with moral obligation really are, in both imperfect and ideal societies. The impressionistic bits have been about how the real connections of law and moral obligation generate law’s halo. Halos, for better or worse, resist precise analysis.

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¹⁴ Raz, The Authority of Law, pp. 249, 260.