

LEGITIMATE AUTHORITY AND RAZ

LEGITIMATE AUTHORITY AND RAZ: CONSENT, PIECEMEAL
NONCOMPLIANCE, AND ABSTRACT REVIEW

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A Thesis Submitted to the School of Graduate Studies in Partial Fulfillment of the
Requirements for the Degree Master of Arts

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McMaster University MASTER OF ARTS (2018) Hamilton, Ontario (Philosophy)

TITLE: Legitimate Authority and Raz: Consent, Piecemeal Noncompliance, and Abstract
Review AUTHOR: William Coke, B.A., (H)B.A. (McMaster University), SUPERVISOR:
Professor W.J. Waluchow NUMBER OF PAGES: v, 105

Lay Abstract:

This thesis aims to question exactly how it is one person gains authority over another person, or over a group of people. When is that relationship legitimate? Some people argue that consent makes an authority legitimate. We start by looking at the ability of consent to legitimate authority. We find that this may not be the best way of explaining authority, at least not in the theories we examine. People tend not to expressly consent to authority. Consent theorists struggle to overcome that fact. We find a pretty good alternative to consent in Raz's theory, which is grounded in reasons. It falls to a particular worry: people may be justified in being selectively obedient, depending on the reasons that apply to them. We finally try to appeal to a practice called 'abstract judicial review' to solve this problem in Raz.

Abstract:

The major emphasis of this thesis follows the broader survey in Chapter 1 about consent. Really, the attempt is to pull apart Raz's theory from two particular points: (1) The three-thesis service conception and (2) the noninstrumental grounds argument. In both points, we have to contend with Raz's claim that there is no general obligation to obey the law. We have to manage that claim against Raz's insistence that legal authorities claim that there is not only a general obligation, but a wholly comprehensive obligation to obey. My first major contribution is to show that this represents a real descriptive problem for Raz's account of authority. I acknowledge his attempt to argue in normative terms, and to forgo certain descriptive accuracy in the effort to vouch for what ought to be. My most pointed claim is that he strays too far from a reasonable description of authority in pursuing his justifiable version. My second major point is to argue that abstract judicial review can reconcile Raz's theory with the central case, while also providing a more ethically justified alternative to the 'case or controversy' requirement that plagues so much of Western legal practice.

Acknowledgements:

This thesis would not have been possible without the assistance of my supervisor Wil Waluchow. I credit my discussions with him, his classes, and his notes on my manuscript for drastically improving (and in many cases, saving) my argument. I also thank Stefan Sciaraffa for his help and for his course which discussed authority under so many lenses. I have to thank Professor Matthew Grellette. The core idea of this work was *immediately* formed as he explained to our students (and myself) what exactly a 'reference case' was. Finally, I thank Joseph Raz for his profound philosophical insight and for his incredibly rich work.

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Legitimate Authority and ‘Consent’

Chapter 1

What gives any human being the *right* to command something of another person? What challenges are posed by this question? Do such challenges prevent the possibility of a *legitimate* authority?

In order to properly understand the terms of the inquiry, we should begin with Robert Paul Wolff's "fundamental problem of political philosophy... how the moral autonomy of the individual can be made compatible with the legitimate authority of the state."¹ This needs unpacking. First, we need to understand Wolff's concept of 'autonomy'. Taking his cue from Kantian ethics, Wolff gives us a rudimentary definition: "Since the responsible man arrives at moral decisions which he expresses to himself in the form of imperatives, we may say that he gives laws to himself, or is self-legislating. In short, he is *autonomous*."² Because the autonomous person is one that is under self-rule, such a person can be held morally *responsible* for their choices.³ After all, they deliberately make decisions. Still, the more details we are given about this notion of autonomy, it is obvious that it will present serious challenges. Consider: "The autonomous man, insofar as he is autonomous, is not subject to the will of another. He may do what another tells him, but not *because* he has been told to do it."⁴ As you may anticipate, this is going to be a problem for many conceptions of authority.

We also need a clear sense of what Wolff means by 'legitimate authority': "That is a matter of the *right* to command, and of the correlative obligation *to obey the person who issues the command*."⁵ If an authority is legitimate, that authority creates a moral obligation for its

¹ Robert Paul Wolff, *In Defense of Anarchism* (USA: University of California Press, 1998), xxvii.

² Wolff, *Anarchism*, 13-14.

³ Ibid.

⁴ Ibid.

⁵ Wolff, *Anarchism*, 9.

subjects to follow its directives. You will be doing something *morally* wrong to disobey or disregard commands issued by a legitimate state.

So, the real problem is, under a legitimate authority, morality seems to be demanding two things. Ultimately, morality demands that we follow two incommensurate types of law: self-rule (autonomy) and state-rule (authority). In order to fulfill our duties as morally responsible agents, we have to respect our autonomy: “The moral condition demands that we acknowledge responsibility and achieve autonomy wherever and whenever possible.”⁶ On the other hand: “The defining mark of the state is authority, the right to rule.”⁷ You have a moral obligation to follow the commands of a legitimate authority, not because you have evaluated the content of the command and *decided* autonomously that this is the correct choice of action. As Wolff says: “Obedience is not a matter of doing what someone tells you to do. It is a matter of doing what he tells you to do *because he tells you to do it*.”⁸ This is a significant ethical impasse. If it is true, you will always end up committing a moral wrong, no matter which side you favour. Act as an autonomous agent and you do something morally wrong by ignoring your moral obligation to the legitimate state. If you follow your moral obligation to be obedient to the commands of the legitimate state, you do a moral wrong by forfeiting your autonomy. Some may attempt to make a reasoned choice between these two claims, trying to decide on the lesser of two moral wrongs. By doing so, they acknowledge the irreconcilable problem of authority and autonomy. Depending on how you view the problem, you could conceivably say that Wolff attempts such a choice in his preference for autonomy and, thus, philosophical anarchy. Our focus remains on those authors who attempt to reconcile autonomy and authority.

⁶ Wolff, 17.

⁷ Wolff, 18.

⁸ Wolff, 9.

Of particular note are the social contract theorists who use ‘consent’ as the grounds for legitimate authority. It does not seem to be a successful reconciliation because of the ways in which consent needs to be ‘stretched’ in their work.⁹ I would like to explain their attempt, and the difficulties they face, in order to move closer to a proper reconciliation of autonomy and authority.

John Locke’s *Two Treatises of Government*¹⁰ (the ‘Second Treatise’ in particular) is an excellent example of an attempt to reconcile autonomy with legitimate authority by an appeal to ‘consent’: “Men being, as has been said, by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his [or her] own *Consent*.”¹¹ This claim needs to be pulled apart. We need to understand the ‘freedom’ and ‘equality’ that act as the grounds for this legitimating ‘consent’. Our task is important because of the consequences that attend consent. After the act of consenting, we may no longer have choices about the kinds of things a legitimate authority might demand of us.

First, I want to examine the way in which Locke establishes his legitimate state. I will focus on the Lockean account of natural ‘freedom’. He says: “we must consider what State all men are naturally in, and that is, a *State of perfect Freedom* to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending on the Will of any other Man.”¹² So, before consent has had the ability to form (and legitimate) civil society, Locke believes that people are completely free to self-determine (only insofar as they do not transgress some natural law). That said, not all men

⁹ While this was my position at the outset of this work, further reading has shown me that Hanna Pitkin shares this point of view. My development of my position is indebted to her article ‘Obligation and Consent – 1’.

¹⁰ I cite both Treatises because I refer to both. The first treatise has a lot of material on consent and the law of nature that are useful to a conversation such as this one. I am, however, mostly speaking of the second treatise.

¹¹ John Locke, *Two Treatises of Government* (UK: University of Cambridge Press, 2017), 330.

¹² Locke, 269.

satisfy the basic requirements for this ‘natural freedom’: “if through defects that may happen out of the ordinary course of Nature, any one comes not to such a degree of Reason, wherein he might be supposed capable of knowing the law, and so living within the Rules of it, he is *never capable of being a Free Man*”.¹³ So, actually, it is not the case that *all* men naturally exist in a state of perfect freedom. This is telling. More than some naturally-given freedom, Locke seems to be focused on human rationality: “The *Freedom* then of Man and Liberty of acting according to his own Will, is *grounded on* his having reason, which is able to instruct him in that Law he is to govern himself by, and make him know how far he is left to the freedom of his own will.”¹⁴ John Dunn observes this when he says of Locke’s theory: “Its most essential element remains a sort of formal rationality... The sole source of legitimate authority... is, then, the rational consent of individuals.”¹⁵ So, taking Locke to be consistent, man is naturally free so long as he is predisposed to a certain level of reason – a level able to discern the Natural Law.

We also need to understand Locke’s concept of equality: “wherein all the Power and Jurisdiction is reciprocal, no one having more than another”.¹⁶ This version of equality is what is actually at the core of Locke’s practicable conception of justice: “being furnished with like Faculties, sharing all in one Community of Nature, there cannot be supposed any such *Subordination* among us, that may Authorize us to destroy one another, as if we were made for one another’s uses, as the inferior ranks of Creatures are for ours.”¹⁷ One unexpected consequence of this equality is that it demands an individual protect other people.¹⁸ The argument runs thus: (1) Nature has furnished us with reason enough to protect ourselves from injury. (2) Other people

¹³ Locke, 307-308.

¹⁴ Locke, 309.

¹⁵ John Dunn, ‘Consent in the Political Theory of John Locke.’ *The Historical Journal* 10.2 (1967): 153-162.

¹⁶ Locke, 269.

¹⁷ Locke, 271.

¹⁸ *Ibid.*

are basically the same as us - truly equals. (3) Therefore, we also should protect others from injury as we would ourselves. For Locke, only the need for rectification of natural injustice upsets this sweeping equality: “in the State of Nature, *one Man comes by a Power over another*; but yet no Absolute or Arbitrary Power... only to retribute to him, so far as calm reason and conscience dictates, what is proportionate to his Transgression, which is so much as may serve for *Reparation* and *Restraint*.”¹⁹ To this end, people find that they need officials, specifically because “it is unreasonable for Men to be judges in their own Cases”.²⁰ Locke believes this need will bring people to seek civil society by some kind of mutual consent.²¹ He also believes that the seeking out of such a civil society is a *natural* tendency: “God having made Man such a Creature, that, in his own Judgment, it was not good for him to be alone, put him under strong Obligations of Necessity, Convenience, and Inclination to drive him into *Society*, as well as fitted him with Understanding and Language to continue and enjoy it.”²² As Dunn explains of Locke’s theory: “Where authority is legitimate, it is both a simple duty and a natural inclination to acquiesce in it.”²³

Before moving any further, we should evaluate some of what Locke has already put to us. I say this because, specifically in the *Two Treatises*, Locke tends to commit non-sequiturs. At the very least, he sometimes claims certain things are connected that may not be. First, as we see, he claims that nature, through God, is the source of our freedom.²⁴ Then, he says that rationality is the source of our freedom.²⁵ Granted, insofar as nature provides for rationality, nature is instrumental. However, we also see that there are those for whom nature *prevents* reason:

¹⁹ Locke, 272.

²⁰ Locke, 275.

²¹ Locke, 330

²² Locke, 318

²³ Dunn, 180.

²⁴ Locke, 269.

²⁵ Locke, 309.

“*Lunaticks and Ideots... Madmen*”.²⁶ I realize the Locke thinks that these maladies happen “out of the ordinary course with nature”, but they are still at essence *natural* occurrences.²⁷ Though it may be a contingent fact that rationality is present in nature, it is certainly not a necessary feature of nature. Conversely, it would be entirely possible to discuss human rationality without such an appeal to nature as *intentionally* guiding it.²⁸ Perhaps we could see that rationality is something that occurs ‘out of the ordinary course with nature.’ The heights of rationality are rare, and depending where we set our satisfaction-threshold, such heights are not guaranteed to all people. I realize that the separation of nature and rationality would rob Locke of much of his ability to call on the natural law. I am not sure how helpful such a call is.²⁹ In any case, Locke often says things are connected that are not necessarily so, or he points at a connection he has tenuously proved. In his preface to *Two Treatises*, Peter Laslett holds a similar suspicion about Locke’s writing in the *Two Treatises*: “To call it ‘political philosophy’, to think of him as a ‘political philosopher’, is inappropriate. He was, rather, [with *Two Treatises*] the writer of a work of *intuition*, insight and imagination, if not of profound originality”.³⁰

²⁶ Locke, 308.

²⁷ Locke, 308.

²⁸ Which is not to say, without *any* appeal to nature. Rationality could simply be a natural accident.

²⁹ In the first *Treatise*, for example, Locke admits that God’s divine or natural law tends to be silent in a fairly important matter to Filmer: “... Civil Lawyers have pretended to determine some of these Cases concerning the Succession of Princes; but by our *A*’s Principles, they have medled in a matter that belongs not to them: For if all Political Power be derived only from *Adam*, and be to descend only to his Successive Heirs, by the *Ordinance of God* and *Divine Institution*, this is a Right Antecedent and Paramount to all Government; and therefore the positive Laws of Men, cannot determine that which is it self the Foundation of all Law and Government, and is to receive its Rule only from the Law of God and Nature. *And that being silent in the Case, I am apt to think there is no such Right to be conveyed this way;*” – Locke, 233. To which I want to ask: How is Locke able to read the law of God and Nature in such a way that Filmer is not? Filmer clearly believes the law of God and Nature to be vocal on the matter, Locke does not. Why should Locke know better? Why should Locke be able to appeal to the Natural Law in his own work, when he forbids others to appeal to it, calling it ‘silent’?

³⁰ Locke, 86, italics added.

I raise the above point because Locke does something quite similar regarding consent itself.³¹ To see this, we ought to consider what Locke believes the end of law is: “*the end of Law* is not to abolish or restrain, but to *preserve and enlarge Freedom*: For in all the states of created beings capable of Laws, *where there is no Law, there is no Freedom*.”^{32 33} There is one main concession I will make here. I remind the reader: Locke believes that the natural law is still binding in pre-civil society.³⁴ So there is still *some* freedom in pre-civil society, because there is a type of law that holds before the establishment of civic society. This seems to be a primarily *moral* point. Locke is able to insist upon the natural law’s provision of a basic equality for all people, which stands at the basis of the justification for the social contract itself. E.J. Lowe elaborates on this moral point: “This assumption of natural equality is indeed essential to the workings of any social contract theory, because only beings who are at least roughly equal in their physical and intellectual powers could derive any benefit from freely entering into a mutual agreement of the kind that such a theory envisages.”³⁵

In terms of the citizens who may have to *practically* interact with Locke’s claims, it is important to note what is *actually* being consented to. Ultimately, citizens presumably consent to ‘enlarge’ their natural, ‘perfect freedom’ by establishing a state, replete with officials, who will

³¹ I am indebted to Raz on this point. That will make sense as the chapter continues, but the point is well stated here: “For it seems reasonable to suppose that, regarding such matters, the only reasons which justify consent to authority also justify the authority without consent” (*Between Authority and Interpretation*, 338).

³² Locke, 306.

³³ So, for one, this “Man being born... with a Title to perfect Freedom” (Locke, 323) has a title to an *even more* perfect freedom as he escapes pre-civil society. I am not sure how much I accept a freedom that can be more perfect than perfect. Perfect indicates a ceiling. I am more charitable in the paper about this point. You could conceivably have a greater quantity of perfect things. I give this to Locke as an *ad hoc* rescue.

³⁴ “In transgressing the law of nature... Which being a trespass against the whole Species, and the Peace and Safety of it, provided for by the Law of Nature, every man upon this score, by the Right he hath to preserve Mankind in general, may restrain, or where it is necessary, destroy things noxious to them, and so may bring such evil on any one, who hath transgressed that Law, as may make him repent the doing of it, and thereby deter him, and by his Example others, from doing the like mischief.” – Locke, 272.

³⁵ E.J. Lowe, *Locke* (Canada: Routledge, 2005), 166-167.

be objective in affirming any transgression of the natural law.³⁶ This puts people into a utility relationship with the state. As such, we should be clear about what is really being exchanged. Above, Locke says that consent is given toward the end of enlarging human freedom. However, the exchange seems to be mainly about providing a basic level of security. In broader terms, Dunn explains: “Consent, then, inside political societies is both the mode in which individuals acquire their political obligations and the institutional precondition for each man to feel a reasonable security in his own possessions.”³⁷ Of course, freedom and security of property are not mutually exclusive, but they are not as interchangeable as Locke’s narrative makes them seem. There are many instances where these interests run contrary to each other.

Let us conceive of this in Wolff’s terminology. The *moral* thought is that, by consenting to civil society, people retain and increase their ability to be autonomous in a way not possible in the state of nature. Simultaneously, people legitimize state authority by agreeing to the terms of its establishment and persistence. They deliberately accept to abide by its directives as their very own. I can accept the morally binding force of such a picture. However, if we looked at a civil society in practice, it would be difficult to empirically prove that some aggregate body of citizens understood *this* as the thing they consented to, provided *any* consent could be inferred from their actions. Even if citizens do somehow consent, I am still wary about whether ‘consent’ is doing what Locke claims. Several questions persist: Is this mainly about ‘freedom’ or ‘security’? In other words: is this really about preserving autonomy? Or is it about creating a conception of

³⁶ “Those who are united into one Body, and have a common establish’d Law and Judicature to appeal to, with Authority to decide controversies between them, and punish Offenders, *are in Civil Society* one with another: but those who have no such common Appeal, I mean on Earth, are still in the state of Nature, each being, where there is no other, Judge for himself, and Executioner; which is, as I have before shew’d it, the perfect *State of Nature*” – Locke, 324.

³⁷ Dunn, 173.

state authority that appropriates civilian autonomy to the state's own ends?³⁸ Under real life conditions – outside of such a “*deduction of the concept of the state*”³⁹ – is there such a consent that can legitimize the state in this way? Is this the kind of consent that Locke is actually referring to? Does he have to compromise on consent in ways that leave his ‘legitimate authority’ unworkable?

I believe the answer to the last question is a resounding yes. Whether or not there is a kind of consent that could truly legitimize the state, it is certainly not the kind of consent to which Locke appeals. In an echo of what has been said above, Locke states: “by barely agreeing to *unite into one Political Society*, which is *all the Compact* that is, or needs be, between the Individuals, that enter into, or make up a *Common-wealth*. And thus that, which begins and actually *constitutes any Political Society*, is nothing but the consent of any number of Freemen capable of a majority to unite and incorporate into such a Society.”⁴⁰ So, what does this consent look like *in practice*? Because, outside of those who expressly consent to the terms of the constitution at its establishment, or those who deliberately voice their continued assent to state practices, no such express consent has been given. The compromise comes in the form of Locke's reliance on *tacit consent*:

And to this I say, that every Man, that hath any possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his *tacit Consent*, and is as far forth obliged to obedience to the Laws of that Government, during such Enjoyment, as any one under it; whether this his Possession be of Land, to him and his Heirs for ever... *or*

³⁸ Here it is important to note that I am not referring to any ‘particular’ politician appropriating a citizen's autonomy. My endeavour is not to explore a *realpolitik* question of that sort. I am speaking of the system as being justified in terms that necessarily appropriate the autonomy of individuals so that the state can normatively function. This is a moral worry.

³⁹ Wolff, *Anarchism*, 8.

⁴⁰ Locke, *Treatises*, 333.

*whether it be barely travelling freely on the Highway; and in Effect, it reaches as far as the very being of any one within the Territories of that Government.*⁴¹

The disconnect in Locke's reasoning ought to be clear at this point. This theory is not about consent legitimating authority, so much as it is about entitlements gained by state authority through the use of state property. *Express* consent is not required, although it does leave one considerably more beholden to the state: "he, that has once, by actual Agreement, and any *express* Declaration, given his *Consent* to be of any Commonweal, is perpetually and indispensably obliged to be and remain unalterably a Subject to it".⁴² In essence, just as we could have conceived of nature without intended rationality, we can most certainly conceive of a state that allows the mere use of its property without assuming tacit consent to constitutional principles, or to the day-to-day governmental practices on the part of its subjects.

What does this mean for my broader argument? We can conceive of a state that provides basic infrastructure. We can conceive of citizens using that infrastructure *separate from* their attitudes of consent towards aspects of the state, even constitutive aspects. We can imagine that the mere use of infrastructure does not politically stand for some broader belief in the legitimacy of the state. It may just be that a citizen needs to use this infrastructure for some idle purpose. To assume that the use of infrastructure constitutes something more is to make a mistaken inference about this citizen's psychological state. A lot of the literature seems to point to the fact that no 'express' consent could be at the base of a state's legitimacy. I quote A. John Simmons: "Since the earliest contract theories, it has been recognized that 'express consent' is not a suitably general ground for political obligation. The paucity of express consenters is painfully apparent; most of us have never been faced with a situation where express consent to a government's

⁴¹ Locke, 348.

⁴² Locke, 349.

authority was even appropriate, let alone actually performed such an act.”⁴³ It seems to be a descriptive error to assign a psychologically *tacit* consent from the bare use of state property. Certainly, such use does not constitute any kind of *express* consent.

The question then becomes, which conception of the state do we prefer? A state where the bare use of its property constitutes tacit consent? Or, one where the use of property does not constitute tacit consent? I would say the latter. For one, even in the former option, it is difficult to say that *tacit* consent could perform such a weighty normative task of legitimizing the state.

The only reason I would hesitate to dismiss ‘tacit consent’ outright is that *a lot* is at stake. If we can preserve consent by allowing *tacit* consent in its place, we do retain some reconciliation of state authority with personal autonomy. The state’s directives remain *technically* those of the people. However, we ultimately have to conceive of tacit consent, even by the bare use of state property, equivalent to an *identification* with the state’s directives as one’s own. Despite what Locke claims to be doing, freedom and equality seem to be doing almost nothing as the grounds of such a consent. On the contrary, our need for property-guarantees, our need for basic material goods, these seem to be forcing our hand. This is akin to duress.⁴⁴ Our needs for property are fundamental to our survival. As the state becomes the lone guarantor of the security of property, it becomes the sole guarantor of survival. The choice given to us by the state, if it could be called one, can be paraphrased thus: rely on our security or ignore your basic survivalist instinct, consent or die. No citizen is deciding *freely* in this context. There

⁴³ A. John Simmons, ‘Tacit Consent and Political Obligation.’ *Philosophy and Public Affairs* 5.3 (1976): 274-291.

⁴⁴ I am also indebted to Raz on this point. This should become clear towards the end of the chapter. However, for reference: “The repeated attempts to base an obligation to obey the law on promises or other undertakings are even less persuasive... Often such undertakings are given in conditions amounting to coercion or duress which deprive them of any moral validity” – Raz, *Authority of Law*, 239.

is no legitimacy to be had by compelling someone to accept authority in this way. This is not the kind of choice that *can* justify authority.

Locke's rebuttal seems to be that at the "Age of Discretion... [a person] is a Free-man [or, Free-woman], at liberty what Government he will put himself under".⁴⁵ Which is to say: 'you are free to leave'. However, being 'free to leave' is not equivalent to a personal identification with the directives of state authority, nor is it equivalent to a consent to the basic terms of civil association. Even if we wanted to conceive of tacit consent as sufficient to preserve autonomy, strictly for symbolic purposes, we commit ourselves falsehoods of this sort.

As a second pass at Locke's theory, I want to look at the way Locke tries to justify state economic practices by an appeal to consent. We here, again, find that Locke repeatedly uses the technique of making our dependence on an item equivalent to our consent to use it. Consider the way that Locke conceives of the use of money. Locke, arguing that there is enough land on Earth to "suffice double the Inhabitants" offers a caveat: "had not the *Invention of Money*, and the tacit Agreement of Men to put a value on it, introduced (by Consent) larger Possessions, and a Right to them".⁴⁶ We can see, then, both a deliberate decision to invent money on the part of people, as well as the tacit consent to its use. Both of these are apocryphal. Further exposition is required to see the parallels with consent to authority.

First, we begin with the *Law of Nature* that Locke relies on so heavily, which implies that labour entitles a person to its products: "Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his *Property*."⁴⁷ The worry is that the land being worked on belongs

⁴⁵ Locke, 347.

⁴⁶ Locke, 293

⁴⁷ Locke, 288.

to the *Common*; it belongs to everyone. So, Locke is aiming to assuage skepticism about the individual's entitlement to such common property. Thinking of a man who has gathered acorns to feed himself, Locke answers: "And 'tis plain, if the first gathering made them not his, nothing else could. That *labour* put a distinction between them and common."⁴⁸ This is a fairly clear, empirical threshold. It does not seem like consent should play any part in this tale of initial acquisition. Yet, Locke still insinuates that there is a tacit consent on the part of all those who belong to the state, an agreement on the part of *everyone*, that property should function this way: "And will any one say he had no right to those Acorns or Apples he thus appropriated, because he had not the consent of all Mankind to make them his?... If such a consent as that was necessary, Man had starved, notwithstanding the Plenty God had given him."⁴⁹ To which I would respond: this consequence is not enough to assume the complicity on everyone's part in acquiring material goods in this particular way. Second, that would require me to accept that it is between this specific way of acquiring material goods, or starvation. That is a false choice.

This brings us to the strange thinking that there has been some unanimous, deliberate consent to money as an exchange-good. Prior to such an invention, Locke's 'law of nature' is said to control the amount that we may take for ourselves: "As much as any one can make use of to any advantage of life *before it spoils*; so much he may by his labour fix a Property in."^{50 51} This is a sensible explanation for the 'original' limits of our desires. It is also a useful way of conceiving the natural law's limits to our 'entitlements'. It is reasonable to think that we might not want more perishable goods than we could personally use. Either way, money disrupts the

⁴⁸ Locke, 288.

⁴⁹ Locke, 288.

⁵⁰ Locke, 290.

⁵¹ I hold off on offering the more well-known Lockean proviso: "Nor was this *appropriation* of and parcel of *Land*, by improving it, any prejudice to any other Man, since there was still **enough, and as good left**; and more than the yet unprovided could use." Locke, 291.

tale: “And thus *came in the use of Money*, some lasting thing that Men might keep without spoiling, and that by mutual consent Man would take in exchange for the truly useful, but perishable supports of life.”⁵² Not only have we lost our sensible limit to property, we are also told that we have consented to letting uncontrolled appetites loose through our mere use of an exchange-good: “Men have agreed to disproportionate and unequal Possession of the Earth, they having by a tacit and voluntary consent found out a way, how a man may fairly possess more land than he himself can use the product of, by receiving in exchange for the overplus, Gold and silver, which may be hoarded up without injury to any one”.⁵³ I offer this scenario: a man awakens from a life-long coma into a state where money already exists, and where all material items are exchanged on the basis of different values of money. Does that man’s mere use of money constitute a consent to the economy? How much of the economy has the man consented to? If the counter-argument is, as Locke makes it, that the man can leave to go find an economy differently constituted – does the purchase of their train ticket out of the country still constitute a consent to the economic practices of his current nation? Granted, this man could avoid making the ticket purchase and use the highway to walk his way out of the state. Of course, even in this case, this man would be said to tacitly consent to the basic terms of the authority he has spent his whole life trying to escape. After all, he is physically present within the territory.⁵⁴ Or, have we found ourselves again dealing with consent under circumstances equivalent to, or at least similar to, duress?

⁵² Locke 300-301 – Additionally: “Gold and silver, being little useful to the Life of Man in proportion to Food, Rayment, and Carriage, has its *value* only from the consent of Men” - Locke, 301.

⁵³ Locke, 302.

⁵⁴ Imagine a scenario where the authorities had made the entire physical territory into an unliveable concrete highway. By use of this desolate infrastructure, the citizen would be thought to consent to the state.

I want to review briefly, because it may seem we have gone afield from the authority and autonomy question. We have not. When it came to Locke's narrative about our consent to enter into civil society, we saw that the attempt was really to make the state's directives appear as though they originated from us as citizens. Supposedly, as we consent to the establishment and maintenance of state authority, we personally consent to and identify with the directives that serve those goals. However, we also found that consent was not really vital to the picture in a way that security, and more importantly, property, were. The discussion of money, then, and our supposed consent to it, is at the core of the Lockean picture of the legitimate state.

Unsurprisingly, we see the familiar device of 'tacit consent' employed to enable the state authority to appropriate human autonomy to its own ends. This is not an issue of *realpolitik*, rather a logical consequence of the commitment to this kind of moral argument wherein Locke "has been forced so to widen the definition of consent as to make it almost unrecognizable."⁵⁵ Any assumption of this type of consent on the part of the state, or its advocates, must necessarily misinterpret the behaviour of its subjects in its effort to justify its own practices. As Lowe asks: "Why should it be assumed that the tacit consent supposedly implied by a person's voluntary enjoyment of certain of a state's conveniences create a blanket obligation to respect *all* of its laws and institutions?"⁵⁶ Further to my point, as much as money is a convenient trade object, it is also a basis for survival. It would seem as though any citizen that declined to use this convenience would likely die. It is not a free choice. Neither the objection with (1) the ability of tacit consent to establish or preserve legitimate civil society, or (2) the ability of tacit consent to legitimate state economic practices, are objections that Locke anticipates.

⁵⁵ Pitkin, 995.

⁵⁶ Lowe, 177

As a third pass at Locke's theory, I want to look at his attempt to refute an objection to his story about the way in which civil society started. I do this because Locke's consideration of a potential counter-argument to his own theory opens up the conversation a little. First, it gives one final opportunity to refute his appeal to consent as grounds for legitimacy. Second, this objection allows us to consider another author who has attempted to ground the legitimacy of the state in the consent of the governed – Hobbes. I will address each author in turn as they respond to the objection:

*That there are no Instances to be found in Story of a Company of Men independent and equal one amongst another, that met together, and in this way began and set up a Government*⁵⁷

Perhaps most fascinating is how Locke deals with this objection. On the lack of evidence to prove his story true, of the seeming inability to properly refer to any group of people prior to civil society, Locke writes: "it is not at all to be wonder'd, that *History* gives us but a very little account of Men, *that lived together in the State of Nature*. The inconveniences of that condition, and the love, and want of Society no sooner brought any number of them together, but they presently united and incorporated".⁵⁸ We know that Locke believes men possess a natural inclination toward civil society. So, the repeated claim here is unsurprising. Still, Locke's own lack of evidence about any actual 'state of nature' does jeopardize his ability to reference its existence with such certainty.⁵⁹ Also, in his response to the objection above, Locke's attempt to base civil society on the consent of the governed is an incredibly shaky one. It begins with a

⁵⁷ Locke, 333.

⁵⁸ Locke, 334.

⁵⁹ As far as I can tell, this raises no empirical questions. This is a matter of argumentative methodology. It is bad practice to use the absence of evidence for something as an argument for its existence. I cannot say that the absence of evidence for witches is because witches, by virtue of their *inclinations* (to use Locke's terminology), would inevitably dispose of any trace of themselves. I certainly cannot do that in my appeal to the existence of witches. This is what I see Locke doing.

stipulation: “if I might advise [people] in the Case, they would do well not to search too much into the *Original of Governments*, as they have begun *de facto*, lest they should find at the foundation of most of them, something very little favourable to the design they promote [i.e. legitimate government]”.⁶⁰ To which we may reasonably ask: what alternative is there? In Locke’s case, it is to rely solely the above stipulation, in the face of an absence of evidence regarding the establishment of civil society, to ponder on the way familial patriarchies turned into proper civil societies.⁶¹ His resulting hypothesis reads: “when Ambition and Luxury, in future Ages would retain and increase the Power, without doing the Business, for which it was given... Men found it necessary to examine more carefully *the Original and Rights of Government*”.⁶² Which is to say, these men were guarding themselves against a kind of conquest by a tyrannical patriarch. They were trying to preserve some fundamental aspect of their autonomy against an increasingly encroaching state. This is not really a breeding ground for consent. Additionally, it does not seem to escape the *de facto* origin Locke intends to avoid. Nevertheless, Locke concludes: “And thus much may suffice to shew, that as far as we have any light from History, we have reason to conclude, that all peaceful beginnings of *Government* have been *laid in the Consent of the People*.”⁶³ I am not persuaded. In the first place, I believe that citizens are in a situation of duress when they consent to state authority. They cannot expressly or tacitly consent in any morally meaningful way. The absence of any real ‘state of nature’ just exposes a supplemental error in Locke’s thinking. He either does not have enough evidence on which to base his sweeping claim about natural laws and inevitable human inclinations, or he has

⁶⁰ Locke, 336.

⁶¹ Locke, 337-344.

⁶² Locke, 343.

⁶³ Locke, 344.

a story about men fighting against an encroaching *de facto* state. None of this helps the argument for a free choice undergirding the establishment of state authority *as it would have happened*.

I move to Hobbes, and to an observation that may be less popular, however true. Hobbes is able to give us a better picture as to the origin of civil society, but he still ends up appealing to ‘tacit consent’ in ways we might want to avoid. Before I can elaborate, I first argue (and do not merely say) that Hobbes’ ‘authority’ is one that tries to ground itself on the consent of the governed. This is despite Hobbes’ own proclamation that the establishment of civil society is “more than Consent, or Concord; it is a reall Unitie of them all... as if every man should say to every man, *I Authorise and give up my right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner.*”⁶⁴ I take Hobbes’ insistence that this is about ‘more than consent’ to be largely poetic. Shortly after, Hobbes refers solely to consent as the ground of the rights of authority.⁶⁵ Ultimately, a civic compact must be made between all parties so that the authority is given to a ruler by the citizens as *authors*: “For that which in speaking of goods and possessions, is called an *Owner*, and in latine *Dominus*... speaking of Actions, is called *Author*. And as the right of possession, is called *Dominion*; so the right of doing any Action, is called *AUTHORITY.*”⁶⁶ As shown above, each man must consent to authorize and give up their right to govern themselves. They must intend to give up their right to perfect autonomy.

Now to Hobbes’ response to the objection that Locke just dealt with: that there never was such a state of nature in real life. I have encountered several readers of Hobbes who speak of

⁶⁴ Thomas Hobbes, *Leviathan* (UK: Penguin Classics, 1985), 227.

⁶⁵ “From this Institution of a Common-wealth are derived all the *Rights*, and *Facultyes* of him, or them, on whom the Sovereigne Power is conferred by the consent of the people assembled.” – Hobbes, 229.

⁶⁶ Hobbes, 218.

the Hobbesian ‘State of Nature’ as strictly a hypothetical device. There are several instances in the text of *Leviathan* which indicate that Hobbes believes the state of nature is real:

“It may peradventure be thought, there was never such a time, nor a condition of warre as this; and I believe it was never generally so, over all the world: but there are many places, where they live so now. For the savage people in many places of *America*, except the government of small Families, the concord whereof dependeth on naturall lust, have no government at all; and live at this day in that brutish manner, as I said before.”⁶⁷

So, Hobbes is here responding directly to the objection Locke has tried to overcome. He is telling us that the state of nature really exists, and it exists in the America of his time. My point in referring to this is simply to show that Hobbes is actually referring to a phenomenon he can point to in the real world, unlike Locke. This is a positive for Hobbes’ work. He has some evidence of the state of nature.

As we try to make sense of what this means for a society entering into this compact with itself, we still encounter the problems we’ve seen with ‘tacit consent’ above as a necessary feature of the Lockean concept of authority. Hobbes says: “And whether he be of the Congregation, or not; and whether his consent be asked, or not, he must either submit to their decrees, or be left in the condition of warre he was in before; wherein he might without injustice be destroyed by any man whatsoever.”⁶⁸ I say above that Hobbes *tries* to ground his theory on the consent of the governed. I use this language deliberately, as I do not think he succeeds in the endeavour. For Hobbes, consent is assumed, on the condition that people are free to leave and go back into the state of nature and warre.⁶⁹ As stated before, the ability to leave is not equivalent to

⁶⁷ Hobbes, 187.

⁶⁸ Hobbes, 232.

⁶⁹ Hobbes, 229

a consent to the basic terms of association, or to continued government practices. Especially when you are only able to leave to find near-certain death, you are in a situation akin to or identical with duress. Ultimately, Hobbes appeals to the state of nature as an actual place, but he does not treat consent in actual terms. There can be no morally meaningful consent in circumstances of duress. He fails to capture *actual* consent.

So, we close with a fairly disappointing attempt to reconcile authority and autonomy by appeal to consent. When we examine Locke, the basic terms of association seem to employ consent as a legitimizing measure. However, on closer examination, this is consent in name alone. What really was important was that the use of property constituted a tacit consent on the part of the citizen. However, normatively or descriptively, we would be reasonable to suppose that a better option would be to disconnect the use of government property from a consent to its personage, practices, or basic terms of association. The reliance on such consent as a legitimizing measure may, in theory, reconcile the autonomy-authority problem. It may make the state's directives appear as our own (or at least as authorized by us). However, this is truly no more than a mere appearance. It is a state appropriation of collective autonomy. In other words, the Lockean state *assumes* that it is making decisions on our behalf as a way of morally obliging us to follow directives that we may deeply oppose. While Locke leaves ample for revolution in his theory, he also says: "*Great mistakes* in the ruling part, many wrong and inconvenient Laws, and all the *slips* of humane frailty will be *born by the People*, without mutiny or murmur."⁷⁰ Which, regardless of any theory, I believe to be practically true. However, the people bearing the brunt of these inconvenient laws should not be said to *create* them autonomously. Such an ascription ultimately leaves people no redress to the political society they have apparently authorized. It

⁷⁰ Locke, 415.

leaves the authority free to disregard the complaints of those opposed to their directives. This outcome is far from reconciling autonomy and authority. With Hobbes the story is similar, as I hope is fairly clear without repeating what has been said.

So, we find ourselves at an impasse. If these authors are sufficiently representative of consent-based theories of legitimacy, we need to seek something other than consent as a ground to reconcile our autonomy with legitimate authority. The question then becomes: What else could possibly do that kind of normative work?

I would briefly like to return to Wolff, if only as a framing device, and the general belief in favour of democracy to solve this authority-autonomy problem. Wolff says: “There is only one form of political community which offers any hope of resolving the conflict between authority and autonomy, and that is democracy.”⁷¹ Now, this can be qualified in several ways. Of course, Wolff is really hoping for something like unanimous direct democracy, where political decisions are assented to by the entirety of the voting population.⁷² Wolff believes many social contract theorists (Locke and Hobbes included) are approximating some ideal of this sort: “One evidence of the theoretical primacy of unanimous direct democracy is that fact that in all social contract theories, the original collective adoption of the social contract is always a unanimous decision made by everyone who can later be held accountable to the new state.”⁷³ For reasons we have seen, Locke and Hobbes have failed to provide a convincing account of this initial agreement. Also, as Wolff is painfully aware, the democracy we currently have is a far cry from his own ideal.

⁷¹ Wolff, *Anarchism*, 21.

⁷² Wolff, 22-27.

⁷³ Wolff, 27.

Wolff sees considerable problems with resolving our concern through an appeal to our current representative, majoritarian democracy. At the *representative* level, the issue is that the voting citizen has to lend a considerable amount of agency to his or her representative, which precludes the citizen from having a comprehensive autonomy in matters of political import. For one, there are too many citizens in a modern democracy for an electoral candidate to hear them all.⁷⁴ Without being personally heard, citizens must choose a candidate who has advertised a general platform most closely resembling their interests.⁷⁵ Even still, such a platform will not be completely inclusive of the citizen's wishes. Wolff sharply points out: "on what grounds can it be claimed that I have an obligation to obey the laws [i.e. that the authority is legitimate] which are made in my name by a man who has no obligation to vote as I would, who indeed has no effective way of discovering what my preferences are on the measure before him?"⁷⁶ So, contemporary, representative democracy has failed to provide for a legitimate authority on Wolff's terms.

At the *majoritarian* level, Wolff is bothered by *general* faith in democracy, as uncritically accepting tradition, noting that there is an "unexamined assumption that a majoritarian democracy of thoroughly public-spirited citizens, if it could ever exist, would possess legitimate authority. This is merely one more reflection of the universal conviction that majority rule is self-evidently legitimate".⁷⁷ On two levels, then, we seem to be left grasping at straws. We need a fresh approach to finding 'legitimate authority', or we need to accept that we still must face some hard decision regarding our moral duties between autonomy and legitimate authority.

⁷⁴ Wolff, 28.

⁷⁵ Wolff, 29.

⁷⁶ Wolff, 29.

⁷⁷ Wolff, 54.

Luckily, we have such an approach: Joseph Raz's conception of authority. Raz tries to solve our problem in a way that uses something other than consent as a basic ground. Rather, for Raz, the question is about objective reasons that pertain to the authority-subject relationship.⁷⁸ This needs considerable elaboration to make good sense. The rest of this chapter will be an attempt to demonstrate how Raz has circumvented the problems created by consent-based attempts to reconcile authority and autonomy.

There are normative and descriptive reasons to prefer Raz's account of authority. On the normative side, Raz offers us a greater chance to possibly arrive at truly legitimate authority. On the descriptive side, Raz offers us a closer account of what authority actually does – it imposes.

Before delving any further, we need a clear sense of the Razian concept of authority. Raz says:

Authority in general can be divided into legitimate and de facto authority. The latter either claims to be legitimate or is believed to be so, and is effective in imposing its will on many over whom it claims authority, perhaps because its claim to legitimacy is recognised by many of its subjects. But it does not necessarily possess legitimacy.

Legitimate authority is either practical or theoretical (or both). The directives of a person or institution with practical authority are *reasons for action* for their subjects, whereas the advice of a theoretical authority is a *reason for belief* for those regarding whom that person or institution has authority.⁷⁹

The main point is that authorities create and change the reasons that pertain to their subjects. To begin, Raz conceives of reasons in both 'first-order' and 'second-order' terms. If I have a

⁷⁸ Joseph Raz, *The Authority of Law* (UK: Oxford University Press, 2011), 17-18.

⁷⁹ Joseph Raz, "Authority, Law, and Morality," *The Monist* 68, no. 3 (1985): 295-324, <http://www.jstor.org/stable/27902922>. - p.296, italics added.

positive reason to act, if I feel that I ought to do something, I have a ‘first-order’ reason.⁸⁰ These reasons pertain *directly* to me, they are the reasons I have access to and on which I personally deliberate. If I have a “reason to act for a reason”, my parent tells me to do what before I had decided alone to do, I have a ‘second-order’ reason.⁸¹

How authority affects this picture is fairly simple to illustrate by example. If I want to go bike riding without a helmet, and someone kindly reminds me that people should wear helmets, that advice hasn’t really changed any of the first-order reasons that pertain to my situation. The advice might add one reason in a balance towards the decision I will make. Ultimately, I determine the balance of reasons. On the other hand, if a police officer informs me that I am legally forbidden from riding my bike without a helmet on, the reasons that pertain to me have changed significantly. The mere fact that an officer is telling me to do something is a significant reason, despite whatever balance of reasons I was acting on before.

Raz offers three main categories of reasons to explain what effect an authority has on the subject’s relationship with reasons when commands are issued (as Raz sometimes refers to them, “power utterances”).⁸²

(1) Positive Reasons | Second-Order Positive Reasons

(2) Negative Reasons | Second-Order Negative Reasons (Exclusionary Reasons)

(3) Combination (Protected Reasons)⁸³

While I have hinted at it, Raz himself has a more specific parental analogy to make sense of the subject’s relationship to reasons.⁸⁴ (1) If a child feels that he has a reason to wear a winter coat,

⁸⁰ Raz, *Authority*, 16-17.

⁸¹ Reasons can be both positive and negative, and that means different things as Raz will explain. As an introduction, I am keeping things simple and only referring to the positive terminology.

⁸² Raz, *Authority of Law*, 18.

⁸³ Raz, 17-18

⁸⁴ Raz, 16-18.

that is a first-order reason. It is simply a reason to act. Now, if a mother tells her child to wear a winter jacket, that is a positive reason for the child to *do* something. It is a second-order reason, a reason to act for a reason. If, additionally, the father tells the child to obey the mother's instructions, that is still a second-order positive reason. The child still has a reason to act for a reason. The father has *reinforced* the mother's command. (2) A negative reason, correspondingly, would arise if the child had been instructed by the mother *not* to wear the coat. The child now has a reason to *refrain* from acting. However, second-order negative reasons are not simply reinforcements of the first-order negative reasons. Rather, they are *reversals* of sorts: "To get an example... we need only reverse the father's instruction and assume that he orders his son not to act on his mother's orders".⁸⁵ These negative, second-order reasons exclude one from the claim or circumstance initially imposed. As such, they are referred to as 'exclusionary reasons'. (3) Raz does not explicitly refer to this third category as combined, opting instead to call them 'protected reasons': "sometimes the same fact is both a reason for an action and an (exclusionary) reason for disregarding reasons against it".⁸⁶ I see it as a combined category because the protected reason combines the first-order reason to perform or refrain from an act, and adds second-order negative reasons to refrain from certain further considerations about the matter.⁸⁷ The relevant point is that these reasons are 'protected' from further deliberation where exclusionary reasons forbid it.

This understood, we are better able to comprehend how it is that an authority affects the reasons that pertain to a subject when commands are issued: "Orders... are given with the

⁸⁵ Ibid.

⁸⁶ Raz, 18

⁸⁷ Of course, you could very easily have a negative, first-order 'negative' reason to *refrain* from acting and further 'exclusionary' reasons to ignore any other positive reasons to *perform* the act. This would still be a 'protected reason.' It is simply **protected** from certain further deliberations.

intention that their addressees shall take them as protected reasons”.⁸⁸ To be consistent with our language above, orders are meant to be a reason for whatever is commanded (whether the command is to positively *act*, or negatively *refrain*), and a reason against certain further deliberations about where exclusionary reasons forbid it. Even further, orders “are made with the intention that they should prevail in certain circumstances even if they do not tip the balance... [The individual commanding] is also trying to create a situation in which the addressee will do wrong to act on the balance of reasons. He is replacing his authority for the addressee’s judgment on the balance”.⁸⁹

So, descriptively, we can make sense of the way that Raz thinks authoritative directives interact with the reasons directly pertaining to a subject. That does not assist us in answering the question that opened this essay, which was normative: What gives any human being the right to command something of another person? Or maybe we can term the question differently: When is an authority *correct* in issuing commands? When is a subject *correct* to be obedient to an authority? Is there even a measurable threshold?

Raz begins to answer this question in a compelling way, referring to “the case of two people who refer a dispute to an arbitrator”.⁹⁰ He notes *two* features unique to the situation. First, the arbitrator is in a position to critically and objectively evaluate all the reasons that pertain to the litigants.⁹¹ Raz refers to the arbitrator as having dependent reasons, “reason to act so that his decision will reflect the reasons which apply to the litigants”.⁹² In other words, the reasons in favour of a certain decision are dependent on the circumstances themselves. Raz refers to this as

⁸⁸ Raz, 22

⁸⁹ Raz, 23-24.

⁹⁰ Raz, ‘Authority, Law, and Morality,’ 297.

⁹¹ Provided there are no omissions or falsehoods.

⁹² Ibid.

the dependence thesis: “All authoritative directives should be based, among other factors, on reasons which apply to the subjects of those directives and which bear on the circumstances covered by the directives. Such reasons I shall call dependent reasons”.⁹³

Second, the litigants are relying on the arbitrator’s decision to replace the chaotic attempt to balance their own reasons. Before the trial, both subjects were free to determine things according to their own point of view. They now surrender that freedom to the arbitrator’s decision. Raz refers to “a reason which displaces others a preemptive reason”.⁹⁴ However, I will mainly refer to this as *The Preemption Thesis*, and Raz does as well: “The fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should replace some of them”.⁹⁵

These are both precursors to the normative core of the Razian conception of authority, *The Normal Justification Thesis*: “The normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of alleged authority as authoritatively binding and tries to follow them, than if he tries to follow the reasons that apply to him directly”.⁹⁶ In other words, an authority can achieve its *de jure* status if it can demonstrate that, by issuing directives, it better enables its subjects to live according to the reasons that actually pertain to them. So, to balance out the presentation of reasons above, we have three normative *theses*.

- 1) The Dependence Thesis
- 2) The Preemption Thesis

⁹³ Raz, 299.

⁹⁴ Raz, 297.

⁹⁵ Raz, 299.

⁹⁶ Ibid.

3) The Normal Justification Thesis⁹⁷

In this language, the claim of the Normal Justification Thesis does not seem as monumental as it actually is. It is vital to note that this thesis does away with the need for any ‘seeking out’ of an arbitrator, or any *voluntary* surrender on the part of the subjects to the directives being issued: “The Normal Justification thesis replaces the agreement between the litigants which was the basis of the arbitrator’s authority.”⁹⁸ It is this move that changes everything. We have finally found an alternative to the theories above, which attempted to ground the legitimacy of authority on the voluntary entrance of the subject into a special authoritative relationship. We have found a pathway to legitimate authority that no longer relies upon consent.

This is no accident, either, as Raz has intentionally formatted his argument to respond to the “paradoxes” created by Wolff.⁹⁹ Raz believes Wolff is correct where he “assumes that reason never justifies abandoning one’s autonomy, that is, one’s right and duty to act on one’s judgment of what ought to be done, *all things considered*.”¹⁰⁰ This is what Raz refers to as the principle of Autonomy. We have seen it already spoken of as a moral duty of autonomy and, by this point, it should need no further unpacking. Where Raz believes Wolff goes wrong is in this: “[Wolff] wrongly assumes that this [principle of autonomy] is identical with the false principle that there are no valid exclusionary reasons, that is, that one is never justified in not doing what ought to be done on the balance of first-order reasons.”¹⁰¹ Raz refers to this incorrect portion of Wolff’s

⁹⁷ I do not deny the normative nature of the positive, exclusionary, and protected reasons I have presented above. I have focused on the normativity of these three theses because they better serve to answer my own normative question about the right to rule in a way that positive, exclusionary, and protected reasons, etc. do not. Additionally, while all these theses have their own peculiar types of reasons, I have divided these from the class of reasons above. I have partly done so for clarity of organization, and for ease of understanding for the reader.

⁹⁸ Ibid.

⁹⁹ Raz, *Authority of Law*, 26.

¹⁰⁰ Raz, 27.

¹⁰¹ Ibid.

essay as ‘the denial of authority’. The discussion revolves around way that we *conceive* of reasons. The charge here is that Wolff has wrongly confined the authority-autonomy problem to first-order reasons: “If all valid reasons are first-order reasons then it is a necessary truth that the principle of autonomy entails the denial of authority, for then what ought to be done all things considered is identical with what ought to be done on the balance of first-order reasons.”¹⁰² This is how we end up in our binary selection between autonomy and authority, or, as Raz sees it, in our false choice. For Wolff, it is always one or the other. Raz thinks Wolff has gone wrong in suggesting that the subject must always follow the reasons that apply to them directly. Raz believes we can autonomously acknowledge that there may be some ‘exclusionary reasons’, duly pertaining to us, that exclude us from the obligations posed by the first-order balance of reasons.

Because this is very technical language, let us return to the example given by Raz: the child and their coat. Let us suppose that it is cold outside, and on the balance of reasons as it directly appears to the child, he should wear a coat. The child’s mother then issued a directive: she told the child that he must wear his coat. This is a second-order reason to perform the act of putting on a coat. It is exclusionary to the extent that it excludes considerations of not putting on the coat. Now, we introduce a *further* exclusionary reason: the father tells the child to disregard to mother’s instruction. This does not pertain to the act of putting on the coat, it pertains to the instruction to wear it. This is still a second-order reason, and it competes with the mother’s authoritative command. It intends to exclude the child from the initial obligation. The direct, first-order balance of reasons is thus much harder for the child to navigate. Though, we do have a picture of how these kinds of reasons function, even in a complex scenario.

¹⁰² Ibid.

Now, let us transpose this to the authority-autonomy problem. The moral duty of autonomy issues an obligation to me: to preserve my autonomy or commit a moral wrong. Now, a legitimate authority issues a directive to me. In keeping with the Normal Justification Thesis, this directive will better help me realize what ought to be done *all things considered*. This may prove to be a valid ‘exclusionary reason’. In other words, I may, as an autonomous agent, find that I am better off without deliberating on the matter with the first-order reasons that are available to me. If so, it would go against right reason to reflect on the matter solely by appeal to first-order reasons, as Wolff might. I would be doing a disservice to myself as an autonomous agent to disregard the truth of the matter – that this directive will leave me better off than I myself would. Precisely because I am autonomous and self-governing, I simply forgo deliberation on the matter because it is clear to me that I have been reasonably excluded from my duty to deliberate on the matter. I am no longer obligated to put on the proverbial coat of judging things according to first-order reasons. An ‘exclusionary reason’ is present.

This is how Raz will normatively approach a reconciliation between the duty of autonomy and duties to legitimate authority. Of course, for there to be such thing as a legitimate authority, the Normal Justification Thesis has to be satisfied. This is no small feat. The authority itself has to satisfy a set of objective reason-conditions that enable it to be considered legitimate. It is not possible to go into detail about the necessary content of those reason-conditions as of yet. It is, however, promising that Raz tends to appeal to an objective provision of reasons that *actually* pertain to us, which is communicated by ‘the dependence thesis’. It is also promising that Raz aims to deal in terms that are objectively true: “If our beliefs are false, we believe that we have reasons, but we do not. We must admit this even when we believe them to be true.”¹⁰³ It

¹⁰³ Raz, “Disagreement in Politics,” *The American Journal of Jurisprudence* (1998), 25-52. - p. 28.

is a cause for optimism that, attached to Raz's theory, is a belief in objective truth. Raz's belief in objective truth does something unique: it creates an *accountability* relationship to that truth. If there is a truth about which directives will better serve subjects, then the issuing authority is accountable to that truth. To be legitimate, it must provide sufficient outcomes for the subjects it governs.¹⁰⁴

It would be a mistake for myself to get muddled in arguments about practical consequences at this point. After all, the majority of this chapter has been designed to show the descriptive issues that arise in an appeal to consent as a bridge between authority and autonomy. Hopefully I have been persuasive enough to show why such an attempt is misguided, and my reader feels that Raz is justified in saying:

Indeed, it would be impossible to base authority on consent that is misguided and ill-founded... But if so, then the consent is given in the true belief that there is adequate reason to recognize the authority of the institutions, or principles, in question. The question arises whether these considerations are not enough to establish the authority of those bodies or principles, independently of the consent.¹⁰⁵

Again, the force of my larger argument hinges on an accountability relationship between the state and the individuals it claims to legitimately direct. State authority is necessarily *imposed* on people, and to claim that the citizen has created such an imposition seems deeply disingenuous. For one, it limits the citizen's ability to redress unfair encroachments. We are dealing with something that Raz calls the 'question of appropriation': "The aspect of the moral problem we are confronting is not the limits of one's freedom that the law or other authoritative

¹⁰⁴ In no way am I hoping for any kind of pareto-optimality regarding outcomes that pertain to subjects. However, the NJT seemingly has to be quite responsive to major dissatisfaction on the part of the population, provided such dissatisfaction makes objective sense. I am optimistic about this feature of it.

¹⁰⁵ Raz, *Between Authority and Interpretation* (UK: Oxford University Press, 2011), 337.

directives pose. It is that the limits are imposed deliberately, and that they are imposed by another. *They are not limits set by me.*”¹⁰⁶

The consent theorist has given us a descriptively inaccurate account of the foundations of our society. All along the line we can trouble the consent narrative. We can doubt whether there was unanimous consent in the state of nature sufficient to establish civil society. We can doubt whether successive generations, raised in that society, had truly consented. For that matter, we can doubt whether tacit consent was sufficient to legitimate the society at any point on this timeline. We can doubt that the use of property signals anything more than a desire to use property, perhaps necessarily so. Finally, we can wonder whether the consent itself was given, if given at all, under circumstances equivalent to duress, as Raz does: “The repeated attempts to base an obligation to obey the law on promises or other undertakings are even less persuasive. True enough, some people are made to take an oath of allegiance, sometimes including an undertaking to keep to the law. Often such undertakings are given in conditions amounting to coercion or duress which deprive them of any moral validity”.¹⁰⁷ Of course, the Razian conception of authority may institute unduly coercive measures, or may create circumstances similarly akin to duress. In practice, any theory that appeals to ‘objectivity’ in morality may implement measures that are ‘objectively’ preferable to the authority but that have disastrous outcomes for certain parties. It may be ‘objectively’ moral for us to stop eating meat, but the cessation of this practice might force people to forgo elements of their culture, or lose their businesses, simply to stay in the good graces of the legitimate state. Closer scrutiny of Raz’s theory is required to test that possibility. That said, by beginning with the declaration that authority is an imposition, and by recognizing that the best way to approach that imposition is to

¹⁰⁶ Raz, *Between*, 162, italics added.

¹⁰⁷ Raz, *Authority of Law*, 239.

provide strong reasons for subjects, Raz offers a promising start. He has already evaded some serious pitfalls that plague consent-based attempts to reconcile authority and autonomy.

In closing, having looked at the seemingly-incommensurate duties to autonomy and to legitimate authority, we have decided to ignore the difficult choice of one duty over another. We then looked at attempts to use ‘consent’ as a bridge between authority and autonomy, particularly John Locke’s. There were three major passes at John Locke’s theory that seemed vital to our questioning. First, we addressed the attempt to ground the origin of civil society on consent. There, we saw that Locke was using the questionable argumentative device of ‘tacit consent’ to legitimate the state through the mere use of state property. This raised a question about how Locke conceives of property. Second, we examined what was at the core of any property acquisition and exchange, labour and money, only to find that ‘tacit consent’ was being employed again to appropriate human autonomy under the authority’s own terms. Finally, we considered an objection that Locke anticipated, only to find conjecture about the origin of civil society that does not stand to scrutiny. Alongside that conjecture, we found the weakest attempt to appeal to ‘tacit consent’ that we had yet encountered. We also saw that Hobbes is not immune to this shaky appeal to ‘tacit consent’.

Finding that ‘consent’ may not be a legitimate reconciliatory device, we moved back to Wolff to reframe the discussion. Perhaps, we thought, Wolff’s confidence in democracy could push us in the right direction. However, Wolff also left us at an impasse, and our aporia deepened.

We then introduced a very different kind of theory through Raz, one based on objective reasons. We have explored the basic kinds of reasons that are operative in Raz’s authority-subject relationship, and we have connected them to three theses that help to create a fully-

formed relationship between authority and subject. Most promising was the fact that we have found Raz speaking in terms of objective truth: *Authority is an imposition*. Raz does not try to escape this fact or cloak it in a false consent. He also provides the ‘Normal Justification Thesis’ in an attempt to give a basic condition for when, in actual fact, a subject is better off following the directives of a purported authority. These are a few reasons to prefer Raz’s conception of authority to those that try to find legitimacy in the consent of the governed.

Now, our focus changes. We need to examine the ability of the Normal Justification Thesis to provide for the outcomes it purports to guarantee. Further, what do we do when the Normal Justification Thesis functions *most of the time*? What happens when an authority *occasionally* fails to achieve such outcomes, however regularly it succeeds? How comprehensive must the Normal Justification Thesis be in serving the interests of subjects? Does this trouble Raz’s ability to provide us with a sufficient, or at least acceptable, account of legitimate authority? I will attempt to answer these questions in the following chapter.

Razian Authority and Justified Noncompliance

Chapter 2

In the previous chapter I argued that Raz's conception of authority is preferable to some social contract theories, especially where the social contract theorist predicates the legitimacy of authority on tacit or hypothetical consent. Having decided to favour Raz's theory of authority, I believe that we are now in a position to offer a more refined and specific analysis of Raz on his own terms. Particularly, this paper aims to address a problem that I find with Raz's notion of legal obligation. It is a seemingly obvious point that Razian authority leaves the moral possibility for piecemeal noncompliance with certain authoritative directives. Raz opens the final section of *The Authority of Law* by openly declaring: "I shall argue that there is no obligation to obey the law. It is generally agreed that there is no absolute or conclusive obligation to obey the law. I shall suggest there is not even a prima facie duty to obey it."¹⁰⁸ As the opening of his next chapter indicates, and other writings confirm, this is qualified to mean that there is no *general* obligation to obey the law.¹⁰⁹ Before expanding on the meaning of a 'general obligation to obey' we can reflect on a logical consequence of its absence, as given to us by Raz: "Not even all those who deny the existence of a general obligation to obey the law have realized its full implications. If there is no general obligation to obey, then the law does not have general authority, for to have authority is to have a right to rule those who are subject to it."¹¹⁰ This is where we find an inevitable conflict between the Razian concept of authority, and the central case of legal authority as he presents it. The problem is the state claims supreme legal authority: "...the law provides ways of changing the law and of adopting any law whatsoever, and it always claims authority for itself. That is, it claims unlimited authority, it claims that there is an obligation to obey it whatever its content may be."¹¹¹ Such a conflict raises certain questions: Where does the

¹⁰⁸ Joseph Raz, *Authority of Law* (UK, Oxford University Press, 2009), 233.

¹⁰⁹ Raz, *Authority of Law*, 250; Joseph Raz, *Ethics in The Public Domain* (US, Oxford University Press, 2001), 341.

¹¹⁰ Raz, *Ethics in The Public Domain*, 341.

¹¹¹ Raz, *Morality*, 77.

line stand in Raz’s work between the normative and the descriptive? Is Raz offering an account of authority that has simply strayed too far from the core case? In sum: does the conflict between (1) the classic understanding of legal authority, replete with claims to supremacy and paramountcy, and (2) Raz’s account of authority, with its insistence on the absence of a general obligation of obedience, represent a descriptive failing on Raz’s part? Even if we hesitate to ascribe to Raz something as extreme as a descriptive failure, we should acknowledge and explore the differences between these two understandings of authority. For my part, I do argue that Raz has strayed too far from the core case of authority in his description of what authority ought to be.¹¹² I do not think we can accept an account of authority that allows for such piecemeal noncompliance as being conceptually accurate. In the following, final chapter of my thesis, I will propose a way to rectify this problem, and reconcile Razian authority with the central case. I will suggest we do this through the use of the courts as a uniquely reason-providing institution.

Where the surface issue is the conflict between Raz’s concept of authority and the central case of legal authority, the deeper problem is made clear as a result of deliberate commitments Raz makes. Two separate spheres of Raz’s theory lead to a justified, piecemeal noncompliance which is compatible with his framework, and which is at odds with the central case of legal authority. I will address both in turn. Firstly, we have to assess the service conception of authority and its three interdependent theses¹¹³ we encountered in the previous chapter: (1) The

¹¹² It may be possible to suggest that our ‘central case of law’ is a mere contingent fact, reflective of the circumstances of, for example, Western legal practice. A possible objection could argue that Raz’s philosophy ought to be free from such empirical restraints. I cede the point to some extent. However, there seems to be a real philosophical gravity to the central case of law as commanding a general obligation to obey. Aiming to be modest, strictly on a conceptual level, such a general obligation to obey seems like a *possibly* central feature of law.

¹¹³ I am also familiar with the fact that the service conception is satisfied solely by the Dependence thesis and the NJT: “They regard authorities as *mediating* between people and the right reasons which apply to them, so that the authority judges and pronounces what they ought to do according to right reason. The people on their part take their cue from the authority whose pronouncements replace for them the force of the dependent reasons. This last implication of the service conception is made explicit in the preemption thesis. *The mediating role of authority cannot be carried out if its subjects do not guide their actions by its instructions instead of by the reasons on which*

Dependence Thesis, (2) The Normal Justification Thesis, and (3) The Pre-emption Thesis.¹¹⁴ As we examine the service conception, we find that a necessary feature of the Normal Justification Thesis is that it leaves room for authority to be binding for some and not for others in ways that are context-sensitive.¹¹⁵ Where a transgression of the law would not destabilize the system itself, and where such a transgression is better informed by right reason, it seems that such noncompliance is not only morally permissible, it may be encouraged by the service conception. Where there is general confusion about the failure of the law to act in accordance with right reason, the service conception may justify or recommend significant conflict with legal authority. As said, this is a problem for several reasons. It is *descriptively* at odds with the concept of ‘authority’ in the central case, and reliance on this theory to inform the *practice* of authority could lead to great, unnecessary confusion and harm. Though, I am not speaking particularly about practice.

In another sphere of Raz’s work, we encounter issues with what he will refer to as ‘noninstrumental grounds’ which have power to create obligations. Without going into any depth about Raz’s particular perfectionist value theory, we can rely at a distant level on the fundamental, intrinsic goods which Raz identifies, those which secure ‘relationships’ and ‘pursuits’.¹¹⁶ Where such intrinsic goods are secured, Raz believes that constituents may, if rarely, respond by offering their ‘consent’ to be governed: “Consent to political authority, where

they are supposed to depend.” (‘Authority, Law, and Morality,’ 299, italics added). To the extent that the preemption thesis is a necessary consequence of the service conception in its proper functioning, I incorporate it as essentially belonging to it. I do not think any philosophical benefit comes from barring the preemption thesis from the service conception. The preemption thesis explains exactly *how* authorities mediate between people and right reasons. You could, presumably, have the preemption thesis without the sufficient NJT-dependence thesis combination, but that is true for any one of these three theses.

¹¹⁴ Joseph Raz, ‘Authority, Law, and Morality,’ *The Monist* 68.3 (1985), 299.

¹¹⁵ “The puzzling aspect of our conclusions is in the refusal to give a yes or no answer to the question: is the authority of the government legitimate? We concluded that it is legitimate to various degrees regarding different people.” *Morality of Freedom*, 104.

¹¹⁶ *Morality*, 93.

given, is often free. It does not follow that it is binding. It is binding only if there are good reasons to enable people to subject themselves to political authorities by their consent.”¹¹⁷ If not ‘consent’, subjects may manifest an attitude of ‘respect’ toward their government: “... in a reasonably just society this belief in an obligation to obey the law, this attitude of respect for law, is as valid as an obligation acquired through consent and for precisely the same reasons.”¹¹⁸ Both ‘consent’ and ‘respect’ are technical and loaded Razian terms and we will expand on their meaning in the following. At the basic level, these are both said to increase the binding force of the authority, providing that the intrinsic goods which preserve relationships and pursuits are secured: “Therefore, people who share [in attitudes of consent or respect of law] have an obligation to obey the law that they acquire through their own conduct of their own lives, as part authors of their own moral world.”¹¹⁹ In what follows, I will deal less with consent, though I will address it. My primary focus in the second section is on the attitude of respect for law and what kinds of obligations it can impose. What I hope to prove is that respect for law – though it is the strongest ‘horn’ of Raz’s theory in creating legal obligations – still stops short of the central case of legal obligation which demands full compliance with its directives. While Raz may find this morally or philosophically unproblematic, I do not believe such a dissonance is necessary for Raz’s theory. As stated, I hold off on my attempt to reconcile Razian authority with what I will often refer to as the ‘central case’ until my final chapter.

Before we can cover either of these two spheres, (A) the service conception and (B) noninstrumental values, we need to understand what a ‘general obligation to obey the law’

¹¹⁷ *Morality*, 89

¹¹⁸ *Morality*, 98.

¹¹⁹ *Morality*, 98.

means. Les Green speaks about Raz's ability to secure a sense of obligation as such, where he says of Raz:

He identifies obligations by a formal and material feature. First, they purport to be *exclusionary* reasons for acting: they defeat some considerations against acting as one is obligated, not by outweighing them, but by excluding them from consideration altogether. As applied to obligations imposed by authority, Raz calls this the "pre-emptive" thesis: "[T]he fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them." Second, obligations are inherently *goal-independent*; they "derive from considerations of values independent of the person's own goals"....¹²⁰

I find this formal and material division useful because it almost maps on to the two horns we have outlined above. At the formal level, we focus on the service conception. As Green indicates, we find legal obligation in the form of the pre-emption thesis. At the material level, we can look, very basically, at the intrinsic values that preserve relationships and pursuits.

I do, however, believe we can offer a more specific explanation of obligation. This will help us understand what a 'general obligation to obey' looks like. As Steven J. Burton proposes, Raz takes a moral interpretation of the law: "The moral interpretation, in a highly sophisticated version offered by Raz, holds that the law offers objective moral reasons for action to citizens and judges... If the law is authoritative morally, legal reasons should enter a person's deliberations as full blown moral reasons, but they are only offered as such reasons if the law is not morally authoritative."¹²¹ This needs significant unpacking. It is actually quite simple, and I

¹²⁰ Leslie Green, 'Law, Legitimacy, and Consent,' 62 S. Cal. L. Rev. 795, 3.

¹²¹ Steven J. Burton, 'Law as Practical Reason,' 62 S. Cal. L. Rev. 747, 10.

think it gives us reason to understand precisely what is meant by a general obligation to obey. Burton reminds us that, for Raz, an objective morality is at the core of what makes practical directives authoritative, legal or otherwise. If the purported authority is acting in accord with the right reasons of objective morality, its directives (and the reasons that inform its directives) are ultimately morally right. So, the directive itself is a ‘full blown moral reason’ to act a certain way. However, the directives are intended, as Green has reminded us above, to pre-empt certain moral deliberations. So, these directives do not *appear* moral to the subject. Where the subject is appealing to the moral reasons at issue, in the face of authoritative directives, they have ignored the very purpose of the legitimate authority. The authority’s purpose is, for Raz, to decide what is morally right for the subject to do.

Now, all this seems to suggest a general moral obligation to obey authority, not to the lack thereof. So Raz’s insistence that there is no such obligation in the case of law appears unusual. However, Raz constantly offers us useful hints in his very pregnant language about precisely how to interpret him. So, let us revisit his most sweeping claim: “I shall argue that there is no obligation to obey the law. It is generally agreed that there is no absolute or conclusive obligation to obey the law. I shall suggest that there is not even a *prima facie* obligation to obey it.”¹²² There are two points to be observed here.

First, this statement is far less confusing if we take Burton’s lead and understand obligation in a strictly moral sense. Disobedience of law is not *necessarily* a moral wrong. If we see things in this light, we can understand why Raz qualifies this assertion: “there is no general obligation to obey the law”.¹²³ This is a crucial qualification. Without it, Raz argues for too much. Surely, there must be *some* moral obligation to obey *some* law. Indeed, Raz even tells us:

¹²² *Authority of Law*, 233.

¹²³ *Authority of Law*, 250.

“There is probably a common core of cases regarding which the obligation [to obey the law] exists and applies equally to all. Some duties based on the co-ordinative argument (e.g. duty to pay tax) and on the bad-example argument (e.g. avoiding political terrorism) are likely to apply equally to all citizens.”¹²⁴ So, we do well to see obligation in a strictly moral sense, and to understand simply that disobedience is not always a *moral* wrong.

Second, we are now in a position to see the way in which Raz is actually framing the discussion. Because, it is very clear that he is speaking to two distinct camps of thought. The first, less popular, group holds an absolutist position on the obligation to obey the law. Their argument does not stand to scrutiny as far as Raz is concerned: “There are risks, moral and other, in uncritical acceptance of authority. Too often in the past, the fallibility of human judgment has led to submission to authority from a misguided sense of duty where this was a morally reprehensible attitude.”¹²⁵ I find this persuasive.

The second camp seems to be the one Raz is almost exclusively speaking to: “[Their position] is summed up by the view that every citizen has a prima-facie moral obligation to obey the law of a reasonably just state. Its core intuition is the belief that denying an obligation to obey its laws is a denial of the justice of the state.”¹²⁶ We can now blend Raz’s language with the position of this second camp – if there is no general *moral* obligation to obey the law, then there is no prima facie or defeasible moral obligation either. I stop the exegesis on what a ‘general obligation’ means at this point because my aim is not to give voice to a debate between Raz and these camps, and their inclusion is incidental as a way of revealing the conversation Raz intends to have. I want to focus on Raz’s theory internally. I hope that this has been sufficient to describe

¹²⁴ *Ethics*, 350.

¹²⁵ *Ethics*, 351.

¹²⁶ *Ethics*, 341.

(1) what a ‘general obligation’ to obey the law means and (2) what the insistence on its absence aims to refute in particular.

A. The Service Conception

For immediate reference, I leave the three-thesis ‘service conception’ of authority below. I will unpack each of these theses in what follows, particularly in an effort to show (1) their ultimate interdependence as regards obligations and (2) how they lend themselves to a justified noncompliance which is at odds with the central case of legal authority, even as Raz understands it.

The Dependence Thesis:

All authoritative directives should be based, among other factors, on reasons which apply to the subjects of those directives and which bear on the circumstances covered by the directives. Such reasons I shall call dependent reasons.

The Normal Justification Thesis:

The normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, than if he tries to follow the reasons which apply to him directly.

The Preemption Thesis:

The fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should replace some of them.¹²⁷

¹²⁷ ‘Authority, Law, and Morality,’ 299

Before I can arrive at the problem I see resulting from the three-thesis service conception, I need to make a point about how I believe these three theses work regarding obligation, particularly legal obligation. From the observations above, we can surmise that there is no ‘general obligation’ to obey the law. However, given Raz’s belief in a probable common core of binding directives, we can infer that there is such thing as a ‘particular obligation’. The point may be so obvious as to appear redundant. What is fascinating about it is that it invites questioning as to what constitutes this common core. In other words, it invites questioning about which directives are unquestioningly binding, if any. Conversely, this inference invites questioning about what *disobedience* is always-already morally justifiable, if any. Outside the obvious core (observance of laws against murder, for example) the boundary line is far from obvious.

I also need to put forward another potentially obvious point. The three-thesis service conception is *completely* interdependent with itself. No one of the three theses ought to be rhetorically favoured to arrive at obligation. Consider Les Green’s point about the formal aspect of Razian obligations: “[T]hey purport to be *exclusionary* reasons for acting: they defeat some considerations against acting as one is obligated, not by outweighing them, but by excluding them from consideration altogether. As applied to obligations imposed by authority, Raz calls this the ‘pre-emptive’ thesis...”¹²⁸ Contrast this claim with one made by Thomas May: “For example, consider Raz’s position on the binding nature of an authority’s directive. The only check on authority is provided by what Raz dubs ‘The Dependence Thesis’. As the nature of an authoritative directive is such that it is meant to reflect a balancing of reasons for action, the normative obligation imposed by a directive is dependent upon its authoritative nature (its being

¹²⁸ Green, ‘Law, Legitimacy, and Consent,’ 3.

meant to reflect a balance of reasons for action).”¹²⁹ Likely for the sake of clarity, each of these writers isolates one of the three theses to explain Razian obligation. My opinion is that such an isolation is misleading. Razian obligations are created by the tandem functioning of at *least* the Preemption Thesis and the Dependence Thesis, and obligation requires the NJT when dealing with non-voluntary authoritative relationships.¹³⁰ Someone may want to say that Green and May are speaking from two separate points of view, where Green is talking about checks on subjects,¹³¹ May is speaking more directly about checks on institutions. I do not think such a claim stands to scrutiny, because, ultimately, both Green and May are speaking about the subject’s position in regard to authority. Green is talking about subjects *in* obligation. When May is speaking about ‘checks on authority’, he is speaking on checks on authority *available* to the subject, as he offers the Razian quote in support of his assertion:

It is not that the arbitrator’s word is an absolute reason which has to be obeyed come what may. It can be challenged and justifiably refused in certain circumstances. If, for example, the arbitrator was bribed, or was drunk while considering the case, or if new

¹²⁹ Thomas May, ‘On Raz and the Obligation to Obey the Law,’ *Law and Philosophy* 16 (1997) 25-26.

¹³⁰ In the ‘Arbitrator’ example, the Dependence Thesis and the Preemption Thesis are held to work together because of the voluntary appeal on behalf of the parties to the decision. Particularly as state legal authorities are concerned, or where nonvoluntary authority relations arise, the NJT will be a necessary part of any sort of legal obligation that may arise.

¹³¹ Green: “To understand legal statements we should interpret them as meant by those who take them and accept them at face value, those who acknowledge the law in the way it claims a right to be acknowledged.” (‘Law, Legitimacy, and Consent,’ 2) While Green is primarily speaking about understanding law as it *intends* to be understood in the core case, as claiming unlimited authority, he is adjacently speaking about law according to its recipients. In other words, Green often does situate his discussion from the subject’s point of view. Donald Regan more explicitly voices his positioning in his paper ‘Authority and Value’: “When we think about the relationship between authority and subject, we can think about it from the subject’s point of view or from the authority’s point of view. My remarks in this essay are relentlessly from the subject’s point of view... It seems to me that Raz’s predominant focus in *The Morality of Freedom* is on authority from the subject’s point of view.” (12-13) Regan further acknowledges that Raz occasionally shifts in perspective and that this may be a cause for ambivalence here. (13) I do not think the point is vital for my argument, suffice to say that our ‘dispositional lens’ informs the discussion to an extent.

evidence of great importance unexpectedly turns up, each party may ignore the decision.¹³²

Forgetting Raz's brief doubts about "whether the arbitrator's is a typical case of authority", his own theory suggests that it is from the vantage of those who have submitted to the arbitrator (the parties in question) that authority is checked.¹³³ Both men are speaking about the subject's point of view, and both have unduly isolated one thesis of three interdependent ones to explain Razian obligation.

Much of the early portion of *The Morality of Freedom* is aimed at showing the interdependence of these three theses. I will aim to provide a condensed exegesis of their hybrid-functioning before showing that they lead to a problem with piecemeal noncompliance. Raz classifies his theses: "One concerns the type of argument required to justify a claim that a certain authority is legitimate. The second states the general character of the considerations which should guide the actions of authorities. The last concerns the way the existence of a binding authoritative directive affects the reasoning of the subjects of authority."¹³⁴ In order, he is speaking about the Normal Justification Thesis, the Dependence Thesis, and finally the Preemption Thesis. Consider the case of the arbitrator, one raised in the previous chapter: "He has the authority to settle the dispute, for [the parties] agreed to abide by his decision... They ought to do as he says because he says so. But this reason is related to the other reasons which apply to the case... The arbitrator's decision is meant to be based on the other reasons, to sum them up and to reflect their outcome."¹³⁵ In other words, the arbitrator's decision is predicated on

¹³² May, 'On Raz and the Obligation to Obey the Law,' 26; *Morality*, 42.

¹³³ *Morality*, 42.

¹³⁴ *Morality*, 38.

¹³⁵ *Morality*, 41.

what Raz will call dependent reasons.¹³⁶ In the specific case of the arbitrator, the fact that the decision is successfully predicated on dependent reasons means that the other parties are pre-empted from acting on the relevant reasons, *as they appear to each of them*: “Notice that a dependent reason is not one which does in fact reflect the balance of reasons on which it depends: it is one which is meant to do so.”¹³⁷ Ultimately, without the dependence thesis being satisfied, the pre-emption thesis has no normative ground to stand on. Conversely, if the dependence thesis is satisfied, and this does not pre-empt the parties from acting on the relevant reasons as they see fit, the appeal to the arbitrator is meaningless. If we want to understand Razian obligation, we need to understand how these theses work interdependently.¹³⁸

One final point before our closer analyses of the three theses specifically. I want to stress something that may get lost in the complexity and systematicity of what is being presented. Raz takes pains to remind us that cognitive deliberation is not barred in assessing reasons or directives. As he muses on philosophers who see his theory as vouchsafing ‘surrender of judgment’ on the part of subjects, he rebuts: “...no surrender of judgment in the sense of refraining from forming a judgment is involved. For there is no objection to people forming their own judgment on any issue they like.”¹³⁹ Also: “Note that there is no reason for anyone to restrain their thoughts or their reflections on the reasons which apply to the case, nor are they necessarily debarred from criticizing the arbitrator for having ignored certain reasons or for having been mistaken about their significance. It is merely action for some of these reasons that is excluded.”¹⁴⁰ I raise this point now for two reasons. First, it helps us to understand the kind of

¹³⁶ *Morality*, 41.

¹³⁷ *Morality*, 41.

¹³⁸ I stave off from showing the interdependence of all *three* theses at this point until I can present them more fully in what follows.

¹³⁹ *Morality*, 40.

¹⁴⁰ *Morality*, 42.

obligation subjects actually have. Second, it is this exact point that I will rely on heavily in chapter 3, to try and fix the problem of justified noncompliance we will encounter.

I begin by observing the Dependence Thesis. We have covered much of what is relevant about it with Raz's arbitrator example. The arbitrator should intend that their decision 'sums up' the relevant balance of reasons. In the simplest terms, the dependence thesis argues that the arbitrator ought to try to deliberate based on the reasons that apply to the disputants.¹⁴¹ Further, their final decision, or issued directive, should itself attempt to apply to the disputants based on those reasons.¹⁴² The kinds of reasons that apply to the disputants, and the final decision which reflects the outcome of the balance of reasons, itself becoming a reason for action, are dependent reasons.¹⁴³

We can see why May might have grounded obligation so strictly by way of the Dependence Thesis, because the mere attempt by an arbitrator to satisfy the dependence thesis creates a certain binding force. Raz says: "Note that the decrees of such a body [satisfying the Dependence Thesis] will be binding even if they in fact err as to what people's obligations are. The arbitrator's decision is binding even if mistaken..."¹⁴⁴ But the rhetorical favouring of the Dependence Thesis in creating obligation is ultimately misguided, because Raz immediately follows by informing us that the arbitrator's decision is "meant to decide on the basis of dependent reasons and [his or her decision is] therefore pre-emptive."¹⁴⁵ The interrelation between the dependence thesis and the pre-emption thesis cannot be overlooked. In any event, the Dependence Thesis is certainly not the sole check on state authorities.

¹⁴¹ *Morality*, 41; *Authority, Law, and Morality*, 297.

¹⁴² 'Authority, Law, and Morality,' 297.

¹⁴³ *Ibid.*

¹⁴⁴ *Morality*, 44.

¹⁴⁵ *Morality*, 44.

It is with the Dependence Thesis that a trend in Razian thinking can be highlighted: the prioritizing of morality ahead of law. This will help us understand, as we encountered earlier, Burton's claim that Raz has a moral interpretation of the law.¹⁴⁶ As regards the Dependence Thesis, the favouring of morality over law appears by way of an emphasis on duty.¹⁴⁷ The point begins with Raz's wonder, addressed above, "whether the arbitrator's is a typical authority".¹⁴⁸ Raz anticipates a challenge: "It might be thought, for example, that the arbitrator is typical of adjudicative authorities, and that what might be called legislative authorities differ from them... [as authorities] whose job is to create new reasons for its subjects... not purporting to replace any reasons at all."¹⁴⁹ Often Raz will discuss the creation of 'new reasons' in regard to co-ordination problems: "Where there is a co-ordination problem the issuing of an authoritative directive can supply the missing link in the argument. It makes it likely that a convention will be established to follow the authoritatively designated act... Such authoritative directives provide subjects with reasons which they did not have before."¹⁵⁰ 'Duty', and its application to things like coordination problems, rests to a large degree on a philosophical stipulation, i.e. the concepts and language Raz employs to interpret authoritative functioning: "Concentration on the imposition of duties does not, however, distort our understanding of authority since all the other functions authorities may have are ultimately explained by reference to the imposition of duties."¹⁵¹ So, thinking about coordination problems, suppose a legislator were to "declare a certain day shall be a national holiday", a religious holiday for example.¹⁵² This might seem like a 'legislative' act as

¹⁴⁶ Burton, 'Law as Practical Reason,' 10.

¹⁴⁷ *Morality*, 44.

¹⁴⁸ *Morality*, 42.

¹⁴⁹ *Morality*, 43.

¹⁵⁰ *Morality*, 30, 49; Green, quoting Raz: "The case for having any political authority rests to a large extent on its ability to solve co-ordination problems and extricate the population from Prisoner's Dilemma type situations." (6) Green discusses Raz's dealing with co-ordination problems at some length in 'Law, Legitimacy, and Consent.'

¹⁵¹ *Morality*, 44.

¹⁵² *Morality*, 44.

described above, one that does not replace any existing reasons for subjects. It seems to create new reasons for action. However, and this is Raz's point: "In every case the explanation of the normative effect of the exercise of authority leads back, sometimes through very circuitous routes, to the imposition of duties either by the authority itself or through some other persons."¹⁵³ Consider our 'religious holiday'. We might understand that people ought to observe this holiday by reference to the rights of religious freedom given by their legal constitution, for which they have a correlative *duty* to observe the holiday.¹⁵⁴ Raz does not say that all exercises of authority actually impose duties, merely that all authoritative acts can be explained by *reference* to duties. This is troubling for the 'adjudicative'-'legislative' divide Raz's imagined opponent wants to use. Because, what may seem like a completely new reason for action, the state solving a 'coordination problem', could merely be a reason for action deeply intermingled with reasons that already exist. This supposedly 'new' reason for action may merely be the logical consequence of an existing reason, or the replacement of a reason for action given contextual shifts. It would be cumbersome, however possible, to identify a completely 'new' reason.

Once we have secured our understanding of authoritative functioning primarily by reference to duties, then we can see how heavily morality ought to factor into authoritative decision making for Raz. Consider the Razian example of conscription in First World War Britain.¹⁵⁵ The example is intended to show how closely related all exercises of authority are with the imposition of duties, but it also explains 'duty' in heavily moral wording:

¹⁵³ *Morality*, 44-45.

¹⁵⁴ I do not think the point is significantly altered in the case of civic holidays. Observance of Labour Day does not create an absolutely 'new reason' for action. We hold certain duties to each other in civic society that we end up observing uniquely as 'holidays' are decidedly proclaimed.

¹⁵⁵ *Morality*, 45.

By and large, those who approved of conscription when it came did so because they believed that it was everyone's duty to serve in the armed forces in any case. They would have denied that the conscription law imposed a completely new duty [even though it was legislatively enacted]. It merely declared what people ought to have done. Because the doubters were bound, by the fact that they were subject to the authority of Parliament, to follow Parliament's judgment as to what their duties were, its Act is not merely dependent on those duties but also pre-empts them.¹⁵⁶

Several things are happening above. We have already explored the problem of identifying strictly 'new' rules. There is something else, far more characteristic, to observe. We see a substitutive equivalent between 'duty' and 'what people ought to have done'. So, duty and morality are linked, however suggestively. In the strongest reading, duty could be seen as wholly equivalent with 'right action'. Conversely, the language is sparing enough that an uncharitable reader may intend to understand the subject's fulfillment of duty in purely procedural terms. If one merely 'goes through the motions' with authoritative directives, one does what one ought to do without any real deliberation, while wholly and uncritically surrendering one's judgment. This is, of course, not what Raz wants. Still, this would not change the fact that, where the dependence thesis is satisfied, following through with a required procedure still secures what *ought* to be done. So, the problem is not the theory's, rather its malpractitioner, the wholly passive subject. Consider Burton's description: "...the law offers objective moral reasons for action to citizens and judges. Such reasons are capable of entering a person's practical deliberations and, when they do, playing a fully moral role there."¹⁵⁷ So, the final inference to be made about the dependence thesis is that, in the attempt to 'sum up' the balance of reasons that pertain to

¹⁵⁶ *Morality*, 45.

¹⁵⁷ Burton, 'Law as Practical Reason,' 10.

subjects, the official ought to observe what people morally *should do* given their circumstances. While a mere ‘attempt’ on the part of the official is sufficient for a bare satisfaction of the dependence thesis, the Razian ideal seems to imply a successful attempt, however difficult that may be.

We are now in a position to address the pre-emption thesis as a corollary to the dependence thesis. A basic point needs to be reiterated, which is that the pre-emption thesis only pre-empts reasons for action: “*the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.*”¹⁵⁸ Nothing is to prevent a subject from considering, reviewing, or evaluating the judgment behind a directive. What matters is that, when assessing what to do, one should consider what the authority requires, and consider which reasons for *acting* should no longer hold. Just as there were ‘dependent reasons’, Raz says: “I shall call a reason which displaces others a preemptive reason.”¹⁵⁹ There are *layers* of normativity here, but I would like to call attention to one of them. Where the dependence thesis argued that an authority *should* consider the reasons that pertain to the subject, the pre-emption thesis says the subject *should* exclude and replace their reasons for action according to the directives issued.

We can then understand why Green would have grounded obligation so primarily by reference to the pre-emption thesis, because of the way that an authoritative directive excludes and replaces reasons for action that were available prior to its issuance. The certain normative layer of the pre-emption thesis that we just observed is reasonably overshadowed by the ability of the state to coerce. What a subject *should* do is often irrelevant because the state has the

¹⁵⁸ *Morality*, 46.

¹⁵⁹ ‘Authority, Law, and Morality,’ 297.

capacity to enforce compliance in any case. There is also the fact that the pre-emption requires certain actions from citizens that the dependence thesis does not require of the state. In the example of the arbitrator, Raz says: “Because the arbitrator is meant to decide on the basis of certain reasons the disputants are excluded from later relying on them. They handed over to him the task of evaluating those reasons. If they do not then reject those reasons as possible bases for their own action they defeat the very point and purpose of the arbitration.”¹⁶⁰ It is not that the citizens ought to merely attempt to follow the decision of the arbitrator, they ought to follow the arbitrator’s decision successfully.¹⁶¹ That is a significant difference. The formal element of Razian obligation, at least regarding the pre-emption thesis, manifests itself in the fact that subjects are forbidden from acting on certain reasons once a directive is issued.

As a clarificatory matter we should understand the relationship between preemptive reasons and what Raz calls ‘content-independent’ reasons. Raz defines the latter:

A reason is content-independent if there is no direct connection between the reason and the action for which it is a reason. The reason is in the apparently ‘extraneous’ fact that someone in authority has said so, and within certain limits his saying so would be reason for any number of actions, including (in typical cases) for contradictory ones... This marks authoritative reasons as content-independent.¹⁶²

While Raz identifies other kinds of content-independent reasons in promises, threats, and requests, my interest is simply in showing that authoritative commands are content-independent as far as a subject is concerned.¹⁶³ What cannot be stressed enough, though probably has been stressed too much, is that the focus here is on reasons for action. This is something that the pre-

¹⁶⁰ ‘Authority, Law, and Morality,’ 298.

¹⁶¹ Provided the arbitrator is himself successful. I thank Dr. Waluchow for this point.

¹⁶² *Morality*, 35.

¹⁶³ *Morality*, 35-36.

emption thesis seems to communicate on its own. As Raz says, explaining the pre-emption thesis: “Lawyers say that the original reasons merge into the decision of the arbitrator or the judgment of a court, which, if binding, becomes *res judicata*. This means that the original cause of action can no longer be relied upon for any purpose.”¹⁶⁴ To summarize, then, when an arbitrator issues their decision, that issuance is a content-independent reason which itself pre-empts (by excluding or replacing) some reasons for action.

Raz has his own reasons for the inclusion of the pre-emption thesis. He sees it partially as a matter of consequentialist prudence: “The advantage of normally proceeding through the mediation of rules is enormous. . . . It enables a person to achieve results which can be achieved only through an advance commitment to a whole series of actions, rather than by case to case examination.”¹⁶⁵ In what will become an increasingly familiar move, Raz sees the pre-emption thesis as another opportunity to prioritize the role of morality in authoritative relationships. Consider this claim as representative of the trend we observed above:

Ultimately, however, directives and rules derive their force from the considerations which justify them. That is, they do not add further weight to their justifying considerations. In any case in which one penetrates beyond the directives or the rules to their underlying justifications one has to discount the independent weight of the rule or the directive as a reason for action. Whatever force they have is completely exhausted by those underlying considerations.¹⁶⁶

We have essentially seen this same appeal to ‘justifying considerations’ three times now. We saw it regarding consent in my first chapter. Consent was seen as a possibly legitimating

¹⁶⁴ ‘Authority, Law, and Morality,’ 297.

¹⁶⁵ *Morality*, 58.

¹⁶⁶ *Morality*, 59.

device when the considerations that justified consent were already present. We have seen it in regards to the dependence thesis, where the duties created by authoritative directives were understood by the moral considerations of ‘what ought to be’. Now, we see the same measure being employed in the quotation above, where directives achieve their force by the considerations which justify them. We will see this prioritizing of morality again in the following section on noninstrumental goods. It does not specifically pertain to the pre-emption thesis.

I have much less to observe about the pre-emption thesis, partly because I see it as a real corollary to the dependence thesis. So, much has already been said. Also, the pre-emption thesis is itself quite spare. Partly, I feel that a debate about the *merits* of the pre-emption thesis runs too close to a debate about the value of rules *simpliciter*, or authorities *simpliciter*, which is not a conversation I intend to have. Consider Raz’s quote: “Thus the mediation of authorities may, where justified, improve people’s compliance with practical and moral principles. This often enables them better to achieve the benefits that rules may bring... and other benefits besides.”¹⁶⁷ This is sensible. Of course, authorities and rules may fail to offer such conformity with our practical and moral principles. Still, Raz’s statement is not a forceful assertion, it is an expression of possibility. Authorities *may* provide benefits *where* they are justified.

That said, we are now in a position to seek my topic, which is the problem of justified noncompliance as I have referred to it. We have not been able to pick up on it until now. Since we have been dealing with the dependence thesis and the pre-emption thesis, the analogy most suitable for our purposes was the Razian ‘arbitrator’. Two points follow. First, the arbitrator’s case, with its reliance on the dependence and pre-emption theses, does not lead to the problem of justified noncompliance. The voluntary submission of each party to the authority of the

¹⁶⁷ *Morality*, 59.

arbitrator, in conjunction with satisfaction of the dependence thesis and pre-emption thesis, perfectly binds the parties to the decision of the arbitrator to my mind. Second, the problem of justified noncompliance results from my sub-argument that all three theses of the service conception are wholly interdependent with each other in establishing obligation, at least within non-voluntary authoritative relationships. Recall the vital quote from my first chapter: “The Normal Justification thesis replaces the agreement between the litigants which was the basis of the arbitrator’s authority.”¹⁶⁸ One of the reasons we explored the role of consent so heavily in that chapter is because its presence and absence have such significant effects regarding the obligations of subjects.

So, what happens when we introduce the Normal Justification thesis? What changes? The NJT appears in *Morality of Freedom* with Raz’s concession that even legitimate authorities can fail:

But naturally not even legitimate authorities always succeed, nor do they always try to live up to the ideal. It is nevertheless through their ideal functioning that they must be understood. For that is how they are supposed to function, that is how they publicly claim they attempt to function, and... that is the normal way to justify their authority (i.e. not by assuming that they always succeed in acting the ideal way, but on the ground that they do so often enough to justify their power), and naturally authorities are judged and their performance evaluated by comparing them to the ideal.¹⁶⁹

I think the above quotation is almost as useful a *definition* of the NJT as is the more comprehensive one offered at the beginning of this section.¹⁷⁰ One of the first things to observe

¹⁶⁸ ‘Authority, Law, and Morality,’ 299.

¹⁶⁹ *Morality*, 47.

¹⁷⁰ I here offer *Morality of Freedom*’s version of that analytic definition: “*the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons*

is that we are moving away from a mere ‘attempt’ on the part of authorities to create some binding force, as was seen with the dependence thesis. In the above quote we have an admission that legitimate authorities may, at times, not even attempt to live up to their ideal.

The other thing to note is that the NJT seems to confirm Raz’s worry that the case of the arbitrator is *not* the typical case of authority. In fact, the *normal* way to justify authority, and so the normal way to conceive of authority *proper*, does not look like the arbitrator’s case at all. On Raz’s theory, if the arbitrator ultimately failed in its task, if it neglected all dependent reasons and did not even try to observe them, its decision would not be binding. A government, as far as the NJT is concerned, can outright fail to discharge its duty at times. It may neglect to even try. Raz says, in regard to the NJT: “An authority is justified... if it is more likely than its subject to act correctly for the right reasons... If every time a directive is mistaken, i.e. every time it fails to reflect reason correctly, it were open to challenge as mistaken, the advantage gained by accepting the authority as a more reliable and successful guide to right reason would disappear.”¹⁷¹ I understand that Raz is arguing that, in probabilistic terms, we have a moral duty to follow right reason through the orders of a legitimate authority. To Raz’s credit, his system still allows for anomalous occasions (where the authority was drunk or in obvious error) where disobedience is allowable. That said, the NJT disrupts our previous picture a little bit, because it allows a kind of patchy legitimacy from its authority. The purported subject is faced with a serious dilemma, even with the probabilistic likelihood of coherence with right reason through compliance: ‘the mere likelihood that I will comply with right reason through the acceptance of an authority is a far cry from the guarantee that I always will.’ And I empathize with Raz that there would be no certainty

which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly. (53)

¹⁷¹ *Morality*, 61.

of cohering with right reason from a citizen acting solely on first-order reasons. That likelihood would probably decrease significantly. In Raz's defence, a guarantee of perfect coherence with right reason is too much to ask of an authority. Perhaps my largest worry is this: we might do well to wonder if our acceptance of a purported authority will lead us into certain moral wrongs that our newfound *general* adherence to right reason may generate as collateral, wrongs we may not commit if left to our own reasons. I will return to this.

As Raz sees it, this is not so much of a worry. Rather than being concerned with the moral wrong we may do in subjecting ourselves to the authority of another, Raz reminds us of the good we do through subjection:

[If I cannot...] bring my performance up to the level of [another] person then my optimistic course is to give his decision pre-emptive force. So long as this is done where improving the outcome is more important than deciding for oneself this acceptance of authority, far from being either irrational or an abdication of moral responsibility, is in fact the most rational course and the right way to discharge one's responsibilities.¹⁷²

The claim is strong at the individual-to-individual level, but several things happen when we abstract from this one-to-one relationship and consider how this theory plays out at a state level. We also have to remember that, typically, we do not think of the state as demonstrating a particular efficacy in practical decision-making while establishing its authoritative claim. The individual is not given the opportunity to bring their practical reasoning up to the level of the state before the state makes a claim on the person as subject.

Raz himself wonders about his ability to abstract to a discussion about authority over groups: "Does not the fact that political authorities govern groups of people transform the

¹⁷² *Morality*, 69.

picture?... It is an advantage of the analysis... that it is capable of accounting for authority over a group on the basis of authority relations between individuals.”¹⁷³ His theory holds if he examines each individual relationship in a network as being authoritative or not, depending on the strength of practical reasoning of each party to each. Though, I would not defend Raz so heartily against someone who wanted to argue that, once we begin speaking about collectives, authority is of a completely different category than the kind Raz propounds. I am not the only one given pause by this move. Leslie Green says:

...consider the fact that legal systems of modern states govern the behavior of large societies. This being so, there is an important asymmetry between citizens and officials. Individual citizens, even in a democracy, are *law-takers* just as individual consumers in a competitive market are price-takers. This... is to remind us that such control is essentially collective in form. To exercise it therefore requires organization and the ability to bear substantial transaction costs.¹⁷⁴

Green observes the point perfectly. At least in Western democracies, we operate collectively. If we conceive of the people as sovereign, then we are trying to understand the practical reasoning ability of some aggregate group acting in unison. If we see the officials as sovereign, the picture gets a little cleaner, but we then see citizens almost exclusively as *law-takers*. Such *law-takers* may have strong practical reasoning faculties, and still their point of view may be unattended to by state actions. This concern is shared by Yasutomo Morigawa, though at a conceptual level:

These are social, practical concepts always involving not only the “insiders” or those who are committed to the moral legitimacy of the normal use of the concept and the community where it is in use, but also “outsiders,” or those who do not recognize the

¹⁷³ *Morality*, 71.

¹⁷⁴ Green ‘Law, Legitimacy, and Consent,’ 4.

legitimacy of at least the sector of the society where the concept is in use... For the ordinary citizen, law is not only a servant, but also something with which to cope.¹⁷⁵

These two quotations, Green's and Morigawa's, share more common territory than it initially seems they do. When we expand the field for Raz's authority relation, especially in conjunction with the authoritative claims a state will tend to make, we run into real concerns about how we may 'keep faith' with Raz's doctrine. As individual subjects, we are *law-takers* in Green's language, and law is something with which we cope, in Morigawa's.

Our subjection is further entrenched when we look at what state authorities claim over us as citizens, and Raz is not unfamiliar with this: "If you say 'one has an obligation to obey any law which does not violate fundamental human rights' you have denied that the law has the authority it claims for itself."¹⁷⁶ Says the 'central case': you cannot qualify your obedience to the state on your own terms, or according to any terms outside of our comprehensive legal system. Where your prima facie duty to obey depends on your intuition, where you do not leave all possible room for any exclusionary reason we may issue, you are in conflict with the unlimited authority we claim as law.

So, let us review and apply. First, Raz expands from the individual to the group by maintaining a network of individual relationships. The NJT holds that authority is justified for groups, just as it was for individuals, by the likelihood of compliance with right reason through authoritative relations. However, we have also introduced the notion of 'insiders' and 'outsiders' in terms of feelings about the law, or certain directives. We have, also, kept in view the unlimited authority that states claim. All of these inform the problem of justified noncompliance.

¹⁷⁵ Yasutomo Morigawa, 'Authority, Rationality, and Law,' S. Cal. L. Rev. 897, 8.

¹⁷⁶ *Morality*, 76-77.

Here is where things become challenging. Individuals vary in their expertise, and that is just as true for the individuals who fulfill official roles within the state. Raz says:

...it is impossible to generalize and indicate an area of government regulation which is better left to individuals. But regarding every person there are several such areas. One person has wide and reliable knowledge of cars, as well as an unimpeachable moral character. He may have no reason to acknowledge the authority of the government over him regarding the road worthiness of his car.¹⁷⁷

What we have, then, are specific competencies in the face of generalized rules, laws. Some commands, where reflective of right reason, may appear redundant to a person who has specialized in some area of practical reasoning. Other commands, those that may be at odds with right reason, are non-authoritative. If not of *no* authority, these directives are of an *ignorable* authority. Raz then says: “We are forced to conclude that while the main argument does confer qualified and partial authority on just governments it invariably fails to justify the claims to authority which these governments make for themselves.”¹⁷⁸ Which, if we were simply talking about *any* kind of authority that could be justified at all, would not be so troubling. Raz has not offered us that. He has offered us the *normal* justification for authority, and it is very much at odds with one of the most normal manifestations of authority, the state’s. We need to consider the insider-outsider dilemma at hand.

To take a jurisprudential example, call to mind the example of Dworkin’s ‘vegetarian’:
 “A vegetarian might say, for example that we have no right to kill animals for food because of the fundamental moral rule that it is always wrong to take life in any form or under any

¹⁷⁷ *Morality*, 78.

¹⁷⁸ *Morality*, 78.

circumstance.”¹⁷⁹ Furthermore, consider Dworkin’s quote: “People, at least people who live outside philosophy texts, appeal to moral standards largely in controversial circumstances. When they do, they want to say not that the standard ought to apply to the case in hand, whatever that would mean, but that the standard does apply”.¹⁸⁰ Now, this vegetarian may think that their government has *generally* satisfied the NJT and that, for the most part, they are likely better to comply with right reason by following the government’s directives. Save for this caveat, that they are deeply disturbed with the law’s permission of the slaughter of animals. This vegetarian feels as though they possess right reason to an extent the government does not. What does Raz’s theory say about this person’s ability to effect change? What does it say about their obligation to obey laws that are felt to be heinous? “The test is as explained before: does following the authority’s instructions improve conformity with reason? For every person the question has to be asked afresh, and for every one it has to be asked in a manner which admits of various qualifications. An expert pharmacologist may not be subject to the authority of government in matters of the safety of drugs...”¹⁸¹ As regards Raz’s test, here, it is important for us to consider exactly who is asking this question afresh. For the vegetarian, who finds complicity in the slaughter of animals an unbearable guilt, it would appear that observing the rules which facilitate the slaughter does not improve conformity with reason. For those who feel their lives and identities have been deeply intermingled with the social practice of meat eating – an avid hunter, for example – it would appear an affront to reason if an authority forbade them from doing so. Now, I understand that Raz is operating under the impression that conformity with reason is something objectively ascertainable. I am not going to debate his ontology of reasons. What I

¹⁷⁹ Ronald Dworkin, *Taking Rights Seriously* (US, Harvard University Press), 52.

¹⁸⁰ *Taking Rights Seriously*, 55.

¹⁸¹ *Morality*, 74.

will say is that, even if right reason is objectively ascertainable, it is so amidst greatly varied and charged claims about what constitutes it. That is going to cause problems for a lot of authoritative claims under the NJT.

Suppose that our vegetarian *happens* to be objectively correct that the authority of the laws which facilitate the slaughter of animals for consumption is ignorable. Even if the dependence thesis were satisfied, and the preemption thesis ought to have held, the cornerstone of obligation in nonvoluntary circumstances, the NJT, both holds and does not hold here. The state, generally, is authoritative because it does increase the likelihood of conformity with right reason thanks to its provision of infrastructure, courts, etc. However, in a particular matter, obedience to the state's directives represents a grave affront to right reason. If we read Raz's test as it pertains to *particular* laws: 'Does following the authority's instructions improve conformity with reason?' The answer is 'no', and the NJT is not satisfied in the particular here. The choice, then, is quite grim. Either we forgo right reason at a crucial impasse because of the *general* success of the authority, or we transgress the authority because of a *particular* failure. My understanding of Raz's writing on the lack of a general obligation to obey the law suggests that such a transgression is the choice his theory calls for. Not only that, his theory calls for this disobedience because of the way in which he foresees the NJT failing at a particular, crucial point. This is why I have been so insistent that *all three theses* are required for us to arrive at the comprehensive level of obligation Raz wants for subjects. In our case, our vegetarian has not been pre-empted from acting for certain reasons.¹⁸² So, moving forward, let us suppose he does act.

¹⁸² The vegetarian would have to show that his case represents a significant moral difficulty and that his conviction against the cause supported by the state is justified. Mere 'intuitional' disagreement could not suffice. I thank Dr. Waluchow for this point.

Raz has a threefold distinction about possible transgressions of this sort: revolutionary disobedience, civil disobedience, and conscientious objection.¹⁸³ However, beyond the category division provided in *The Authority of Law*, I do not find his writing about disobedience to be of much use in instances where the NJT has failed. His questioning revolves more around showing “the difference between asserting that civil disobedience is sometimes right and claiming that one has, under certain conditions, a right to civil disobedience.”¹⁸⁴ Raz also employs the ‘justifying considerations’ tactic here, where the rightness or wrongness of a civilly disobedient act depends on the broader circumstances: “It is not necessarily, as is sometimes said, justified only as an action of last resort. In support of a just cause it may be less harmful than certain kinds of lawful action... It may be wrong not to resort to civil disobedience and to turn to such lawful action first, or give up any action in support of a just cause.”¹⁸⁵ What is clear is that Raz believes there is not an official right to be civilly disobedient, though we may have a right to conscientious objection.¹⁸⁶ Raz does not commit to a decision on the latter.

Suppose our vegetarian, then, was *civilly disobedient* in Raz’s sense. He joined with a community of like-minded people and passively barred a truck full of livestock from entering into a slaughterhouse. We have stipulated that he *was* in accordance with right reason by doing so. Since morality precedes any authoritative claim, I believe Raz’s theory is going to say this transgression of law is justified. Remember that one of the arguments Raz opposes calls for a

¹⁸³ *Revolutionary Disobedience* is a politically motivated breach of law designed to change or to contribute directly to a change of government or of the constitutional arrangements (the system of government).

Civil Disobedience is a politically motivated breach of law designed either to contribute directly to a change of law or of a public policy or to express one’s protest against, or dissociation from, a law or public policy.

Conscientious Objection is a breach of law for the reason that the agent is morally prohibited to obey it, either because of its general character (e.g. as with absolute pacifists and conscription) or because it extends to certain cases which should not be covered by it (e.g. conscription and selective objectors and murder and euthanasia)

¹⁸⁴ *Authority of Law*, 267.

¹⁸⁵ *Authority of Law*, 275.

¹⁸⁶ *Authority of Law*, 275-276.

prima facie duty to obey the law due to “an obligation to support and maintain just institutions”, with the attendant concern that “disobeying the law undermines its authority, and is therefore contrary to the obligation to support just institutions.”¹⁸⁷ I am very fond of Raz’s response to this view: “... it is a melodramatic exaggeration to suppose that every breach of law endangers, by however small a degree, the survival of the government, or of law and order.”¹⁸⁸ Our vegetarian’s blocking of the road is not an act that will destabilize all of law and order. As far as one can push Raz’s system this way, I firmly believe that we find ourselves in a position where Raz’s theory *supports* a justified noncompliance on the part of the vegetarian. However, it is completely at odds with the central case of authority as I understand it, and as Raz presents it.

The most challenging hurdle I have encountered in posing this argument comes from Dr. Waluchow. The challenge speaks to the possibility that both the subject and the authority are justified in asserting their respective positions, even in this impasse of right reason. Further to my worry is the claim that the disobedient subject can both be justified in disobedience and still accept the authority of the law. Outside of the terms of this discussion as it has been established, where Raz’s authority means one thing and the ‘central case’ of authority means another, the challenge is unanswerable. It is possible that both parties may be justified in a ‘common sense’ scenario,¹⁸⁹ but the rules established by our two cases of authority seem to confine us. In Raz’s case, the authority simply cannot be justified on the matter. It was a stipulation that the vegetarian was in accord with right reason. With the prioritizing of morality ahead of law in Raz’s work, the authority is ignorable at this point. The authority being entitled to punish where it was in the moral wrong goes against much of what we established above. It was not in accord

¹⁸⁷ *Morality*, 101.

¹⁸⁸ *Morality*, 102.

¹⁸⁹ Though, I worry saying this may make it appear I am not arguing in ‘common sense’ terms. I simply have to rely on my axioms here.

with right reason and it ought not to pre-empt the vegetarian's unlawful act. Conversely, according to the 'central case' we cannot see the disobedient subject as being justified at all, because they have ignored the supremacy the law claims for itself. It might be the case that the subject is, from some Archimedean point, justified. Maybe this is what the challenge intends to communicate. However, the central case could not possibly recognize that justification. Its fundamental belief in its own supremacy prevents the consideration of the dissident's position on a moral matter.

If the central case of authority is one which claims supremacy, and Raz normatively argues for a particular understanding of authority without incorporating this defining feature, he runs the risk of descriptive inaccuracy. So, what would he have to say about the thought that he is guilty of such inaccuracy? I close this section on Raz's attempt to explain his divergence from the central case:

The service conception is a normative doctrine about the conditions under which authority is legitimate and the manner in which authorities should conduct themselves. Is not that a confusion of conceptual analysis and normative argument? The answer is that there is an interdependence between conceptual and normative argument... Accounts of authority attempt a double task. They are part of an attempt to make explicit elements of our common traditions: a highly prized activity in a culture which values self-awareness. At the same time such accounts take a position in the traditional debate about the precise connections between that and other concepts. They are partisan accounts furthering the cause of certain strands in the common tradition, by developing and producing new or newly recast arguments in their favour.¹⁹⁰

¹⁹⁰ *Morality*, 63.

I leave it to the reader to decide whether Raz has strayed too far in talking about authority at such a distance from the central case. There may be practical measures we can implement to reconcile Razian authority with the law's claim to supreme authority. I will try to bridge Raz's theory with the central case in the following chapter. The three interdependent theses of the service conception, without the 'safety measures' I will present in the following chapter, seem to lead to a justified noncompliance that I find descriptively troublesome. This said, I know he is arguing at a moral level. However, I think he loses the reality of his subject as he seeks its justifiable moral version.

B. Noninstrumental Goods and Binding Attitudes

We tread now into 'subsidiary' territory: "The question we must now turn to is: can one of the subsidiary arguments for the justification of authority supplement the main argument and show that at least the authority of relatively just governments is as wide as they claim it to be?"¹⁹¹ Leaving aside the task of defining 'relatively just' governments, we turn to the major subsidiary pillars which flank the service conception as possible sources of obligation: consent and respect. Though, Raz's earlier insistence on the absence of even a prima facie general obligation to obey should already hint to us – the law's claim to unlimited authority is too strong as far as he is concerned. This is still the case even where subsidiary measures are employed.

Regarding consent, there are two things to note about how they create obligations for the subject. First, 'consent' is, unsurprisingly, to be assessed in reference to 'justifying considerations', but in an especially consequentialist sense: "Consent... is an act purporting to change the normative situation. Not every act of consent succeeds in doing so, and those that succeed do so because they fall under reasons, not themselves created by consent, that show why

¹⁹¹ *Morality*, 80.

acts of consent should, within certain limits, be a way of creating rights and duties.”¹⁹² To the extent that consent exists within that circumstantial backdrop, its presence *can* create rights and duties. To which Raz says: “I would, therefore, suggest that consent is to be explained by reference to its purported normative consequences only.”¹⁹³ It might be forgotten, by Raz’s appeal to ‘justifying considerations’, that consent performs a function not already performed by the existing reasons. Where consent creates duties, they are binding.

The second thing worth noting is that Raz does not offer a justification of consent on instrumentalist terms. He acknowledges arguments which do: “Were the consent to be valid then if the rights or duties consented to and their creation have good consequences, which outweigh the bad consequences to which their creation or existence lead, the validity of consent is instrumentally justified.”¹⁹⁴ All those he acknowledges share a utilitarian bent. For example, an instrumentalist justification may value the autonomy of the individual, and say that the individual deciding for themselves is an important factor, among many, in a utilitarian calculus. Raz does not seem to think these arguments lack basic merit. He seems to simply prefer, or want to remind us of the possibility of, a non-instrumentalist understanding of consent in terms of creating obligations. Autonomy is still clearly a core value, but not as one factor among many:

...consent can be given non-instrumental validation in many contexts. Through consenting a person attempts to fashion the shape of his moral world. All too often moralists tend to regard a person’s moral life as the story of how he proves himself in the face of moral demands imposed on him by chance and circumstance. Crucial as this aspect is, it is but one side of a person’s moral history. The other side of the story evolves

¹⁹² *Morality*, 84.

¹⁹³ *Morality*, 84.

¹⁹⁴ *Morality*, 85.

around the person not as the object of demands imposed from the outside, but as the creator of such demands addressed to himself.¹⁹⁵

It is probably best not to abstract too quickly from the individual to the group in this case, perhaps especially in this case. Ultimately, we do well to remember that, in the presence of justifying considerations, consent can create obligations. All we have added with the above quotation is the additional fact that consent can be a way of binding oneself, and that this is seen as a noninstrumental value. It is a noninstrumental value of autonomy.

Instead, we might refer to the basic level of value theory offered in Raz's discussion of authority. Raz singles out two kinds of moral value which play a role in our placing demands upon ourselves as autonomous actors who shape our own moral worlds: relationships and projects. Regarding relationships, Raz is speaking about the values which arise from autonomous choice: "With many relationships the case for self-creation is even stronger, since in them the fact that one chose to have a relationship of a certain kind and chose one's partner is part of what makes the relationship valuable."¹⁹⁶ Regarding projects, Raz might just as well have cited the value of ambition, as he feels the moral value inherent to projects "is reflected in our admiration for people who have made something of their lives, sometimes against great odds, and in our somewhat disappointed judgment of those who merely drift through life."¹⁹⁷ Without going any deeper into Raz's value theory, we have two noninstrumental goods that emerge from Raz's ultimate value – autonomy. By valuing autonomy, by seeing autonomy manifest through relationships and pursuits, Raz arrives at the noninstrumental justifications of consent and respect.

¹⁹⁵ *Morality*, 86.

¹⁹⁶ *Morality*, 87.

¹⁹⁷ *Morality*, 87.

Much has been said about the Razian understanding of consent in the previous chapter, and in this one. Very little has been said about the noninstrumentalist justification of consent, however. On instrumentalist grounds, our *ad nauseam* point of ‘justifying considerations’ reappears. Consent, says the instrumentalist, can be binding only where justifying considerations are present, thus making consent somewhat redundant. Autonomy is at the core of the noninstrumentalist justification of consent: “It is the autonomous achievement or pursuit of a goal or an activity of value which makes relationships and personal projects valuable.”¹⁹⁸ As relationships are sources of objective moral value, and as the autonomous entrance into relationships is significant to their value, consent plays a vital role. Where we abstract to the citizen’s relationship to society: “It expresses an attitude to the law as an aspect of that society...”¹⁹⁹ Consent, for the noninstrumentalist, is then an *attitude* which has the effect of binding the autonomous agent: “It is precisely because it is thought to be binding that it can serve as an expression of identification.”²⁰⁰ The individual, through an attitude of either consent or respect, comes to identify with their society. This, combined with the fact that such identification creates certain obligations, is Raz’s *identification thesis*.²⁰¹ Now, the society itself must be reasonably just for consent to be binding.²⁰² However, if the society is just, consent is successful in creating obligations of obedience to authority: “It is binding only if the conditions of the normal justification thesis are substantially met independently of the consent. But the non-instrumental argument shows that consent does extend the bounds of authority beyond what can be established without it.”²⁰³

¹⁹⁸ *Morality*, 91.

¹⁹⁹ *Morality*, 91.

²⁰⁰ *Morality*, 92.

²⁰¹ *Morality*, 92. Although, it is not given a proper definition in the writing from *Morality*. It is gestured towards, but never expressly said.

²⁰² *Morality*, 91.

²⁰³ *Morality*, 93.

Now, my arguments about consent in the previous chapter were mainly in support of Raz's critique of certain instrumentalist justifications. My thoughts on the noninstrumentalist justification are aligned with Raz's, in seeing its value, but I do find the 'consent' argument to be of negligible importance. I borrow a point from Leslie Green, though not to his own purposes. First, Raz says: "Consent or agreement requires a deliberate, performative action, and to be binding it has to be voluntarily undertaken. Many people, however, have never performed anything remotely like such an action."²⁰⁴ I think this is true, and I do think consent's role in this conversation is somewhat negligible *because* of its rarity. Now, Green responds:

The alleged marginality of consent is due to two things. First, consent is said to be a rare event in the lives of ordinary citizens. Second, it only binds where the two necessary conditions for legitimacy are already met or at least nearly so. This seems to give the identification thesis a certain rhetorical edge since, unlike the oddity of consent, it is advertised as capturing a more normal social relationship. But that is illusory. Because all real communities are to some degree alienated from their legal systems, identification of the sort Raz discusses is an equally, if not more, rare and marginal occurrence.²⁰⁵

What I find troubling here is that both men are talking about the value of consent to begin with, and they only differ in where they would situate consent as a factor in creating obligation. Green, in the very quote above and in much of 'Law, Legitimacy, and Consent' is fighting for consent to play a more central role in establishing obligation. Still, it does not help the case for the centrality of 'consent' to target the identification thesis, which itself contains an argument for consent in creating obligations. What I gather is a concession that 'consent' is a rarity as much as 'identification' is, and my suspicion of its negligible role is affirmed. Lastly, and perhaps

²⁰⁴ *Ethics*, 353.

²⁰⁵ Green, 'Law, Legitimacy, and Consent,' 12.

unrelatedly, I note that I feel ‘*consent* to obey the law’ would circumvent the problem of piecemeal noncompliance by creating a uniquely comprehensive obligation, save for the fact that its rarity leaves it at the margins of the conversation.

We are now able to discuss Raz’s concept of respect, which I think is the most interesting of all sources of Razian obligation. Raz tries to explain this highly complex attitude by an appeal to an analogy with friendship. To make sense of this analogy, we single in on the origin of the relationship: “When a relationship leading to friendship begins to develop between two or more people its future shape will be affected by the fact that each of them has a conception of what friendship is and what it implies (in his culture). This awareness gives, consciously or unconsciously, a direction to the developing relationship. To put it crudely, it will become a recognizable variation of the basic form, or fail.”²⁰⁶ While the moral value of relationships is still clearly a predominant focus, the friendship analogy is telling because a certain level of control is absent. The noninstrumental justification of consent was about autonomous choice and individual control in creating relationships of value. In the example of friendship above, there are multiple agents negotiating the terms of a relationship which is, at least partially, socially determined. Certain features of ‘friendship’ are then nonvoluntary: “...it is of the essence of friendship that friends regard their relationship as requiring actions independently of the desires of the agent or the interests of his friend.”²⁰⁷ Characteristic of Raz, the relationship itself lends to a particular kind of reason, *expressive* reasons.²⁰⁸ When a friend performs a certain action under “belief that this is what is required by his friendship” the friend has acted for an expressive

²⁰⁶ *Authority of Law*, 254.

²⁰⁷ *Authority of Law*, 255.

²⁰⁸ *Authority of Law*, 255.

reason. These reasons are expressive of the relationship established and of the attitude held by their observer about it.²⁰⁹

We then need to consider how the analogy plays out in relation to respect for law, and what kind of obligation is created thereby. Raz says:

A person identifying himself with his society, feeling that it is his and that he belongs to it, is loyal to his society. His loyalty may express itself, among other ways, in respect for the law of the community. Friendship likewise presupposes mutual loyalty and there is therefore little surprise that both friendship and respect for law give rise to expressive reasons.²¹⁰

If the problem with consent was that it was too rare to create some kind of obligation to obey, that is certainly not the problem here. I think Raz has a very strong point. People start to identify with a reasonably just society over time, and their attitude of respect is slowly cultivated or diminished. I also feel that such an attitude is, perhaps, a source of more comprehensive obligations than those arrived at through the NJT. Regarding respect for law, Raz states: “Their attitude of respect is their reason – the source of their obligation. The claim is not merely that they recognize such an obligation, not merely that they think that they are bound by an obligation. It is that they really are under an obligation; they really are bound to obey.”²¹¹ So, we have an attitude that seems fairly ubiquitous under a reasonably just state, that creates strong obligations under not (entirely) voluntary circumstances. This seems like the closest we have come to a strong source of obligation to obey the law, and the point is not lost on Raz: “But can

²⁰⁹ *Authority of Law*, 255.

²¹⁰ *Authority of Law*, 259.

²¹¹ *Authority of Law*, 253

it be that respect for law does not rest on an obligation to obey but is a substitute for it? Can one say that one's respect for law obliges one to obey it? I shall defend this possibility..."²¹²

Yet, the problem of justified noncompliance prevents this from being possible. It does so through a feature which could not be glossed over, *qualified* respect. This is certainly a byproduct of the friendship analogy, and it may be a disruptive feature of human relations in general: "...remember that just as there are qualified or partial friendships (golf friends, business friends, etc.) so there are possibilities of qualified respect (respect for law on all matters except women's rights, etc.)... a person may regard a qualified respect as the appropriate expression of his attitude to his society."²¹³ The problem of justified noncompliance is most obvious here. The ability for subjects to appeal, even in part, to their own moral intuitions in their selections about which areas of law are respectable is completely *anathema* to Raz's general project. Of course, some of the relationship between the law and citizens is going to be socially determined, hence its *semi*-voluntary aspect. However, it seems that the part that *is* socially determined is not significant enough to prevent subjects from 'creating their own obligation' by an appeal to their feelings of identification. For some reason, Raz arrives at his strongest source of legal obligation right as he permits such an allowance. The semi-voluntary nature of respect for law, the fact that it organically grows over time, and that aspects of it are socially determined, may create certain desirable obligations. However, the *voluntary* aspect of the semi-voluntary relationship is more disruptive than it seems, and it leads to a problem of piecemeal noncompliance. So, on entirely separate grounds from the service conception, Raz finds himself too far from the central case of legal obligation with its claim to unlimited authority. Qualified respect, while morally justifiable,

²¹² *Authority of Law*, 253.

²¹³ *Authority of Law*, 259-260.

and perhaps a workable *start*, seems a weak description of the social phenomena of authority and the obligations attending it.

Conclusion

In the above we have argued that Raz's normative argument for authority leaves it descriptively at odds with the central case. I feel that the true subject of his analysis, authority, is lost in his description of what authority *ought* to be. I do not feel it is irretrievably lost, and I think that Raz's work is pointing in the right direction a lot of the time. Where we have observed a problem, we have tried to see how his theory lends to a piecemeal noncompliance which the central case does not permit. We have tracked this argument through two major horns.

First, we looked at the service conception, and its three interdependent theses, to show that the introduction of the NJT disrupts the comprehensive kind of obligation we found in the arbitrator's case. The notion of right reason, its contestability, and its priority over legal obligation brought us to consider the case of a vegetarian who acted out and who was civilly disobedient. Under the stipulation that he *was* acting under right reason, we saw that Raz's 'test' for the NJT at the particular level encouraged noncompliance with the state's directives. Though, this is not without a conflict between the *general* authoritativeness of the state and its *particular* failures. We paused, finally, to reflect on Raz's goal: a blending of conceptual and normative theorizing. My position is that his conceptual analysis suffers in his attempt to find a justified version of authority. If such a justified version is possible to find, it has to be found closer to the central case.

The second area of our analysis focused on the 'noninstrumental goods' of consent and respect in Raz's work. We found that these are manifestations of Raz's ultimate value, autonomy. The noninstrumental justification of consent, its finding of value in the autonomous

entrance into relationships of value, offered a considerable kind of obligation. The issue was its rarity. As regarded respect, we found a significant source of nonvoluntary obligation that could be reasonably expected from a large portion of a just society. However, we found Raz tooling his notion of respect so that it permitted certain versions of *qualified* respect. This is where we found piecemeal noncompliance becoming an issue for the ‘noninstrumental goods’ portion of the work. Qualified respect allows an appeal to one’s intuitions about which aspects of the just society are worth respecting. As close as we came to finding a source of nonvoluntary obligation that coheres with the core case, qualified respect really troubled the search.

All this said, I have said that I would like to reconcile Razian authority with the central case in the following chapter. I will do so by an appeal to the courts as a reason providing institution. I do so in conjunction with a point made in chapter one, which was not of much use in this discussion of the problem of piecemeal noncompliance: the value of accountability in authoritative relationships. What Raz has done so well with the service conception is provide an infrastructure for the *possible* justification of authority, even if it is at odds with central case at crucial junctions. The most vital point that he observed, and that we reflected upon at several instances here, is that the subject does not surrender their judgment entirely as they adhere to an authority. They are merely forbidden on acting from certain reasons. This begs a question: how do we understand *action*? It is this question I hope to explore in what follows.

The Case for Abstract Review:
Reconciling Razian Authority with the ‘Central Case’

Chapter 3

This final section is an attempt to fix the problem of piecemeal noncompliance in Raz's theory as we have found it. We have seen that Raz comes very close to providing a source of nonvoluntary obligation through both the NJT and his supplementary appeal to 'respect'. Rather than doing away with this compelling effort, and ignoring all that Raz helpfully contributes, my thinking is that the more productive thing to do is examine the 'central case' and see if *it* stands to scrutiny as Raz's theory did. We can, as Raz does, cede that the central case of authority is known by the fact that "it claims unlimited authority, it claims that there is an obligation to obey it whatever its content may be."²¹⁴ I have shown the ways in which Raz's conception of authority finds itself at odds with this. I, however, have also noted a particularly significant point in the way that Raz provides for cognitive disagreement with authoritative directives. I repeat the quote from a previous chapter. "Note that there is no reason for anyone to restrain their thoughts or their reflections on the reasons which apply to the case, nor are they necessarily debarred from criticizing the arbitrator for having ignored certain reasons or for having been mistaken about their significance. It is merely action for some of these reasons that is excluded."²¹⁵ My second chapter closed on a consideration of what constitutes *action*.²¹⁶ Action is an important term to clarify, because its boundaries allow or disallow for the reconciliation of Raz's theory of authority with the central case. For example, does a formal motion to repeal a provision as unconstitutional constitute *action* in the Razian sense? My greatest risk in this paper will be to suggest that such a motion should not be conceived as action in the Razian sense. I understand that this puts me in contentious territory. Remember Raz's claim: "An authority is justified... if it is more likely than its subjects to act correctly for the right reasons... If every time a directive

²¹⁴ Raz, *Morality*, 77.

²¹⁵ Raz, *Morality*, 42.

²¹⁶ I am inescapably deriving this wonder from Hannah Arendt and her book *The Human Condition*, though my stipulation of what constitutes *action* here is not hers.

is mistaken, i.e. every time it fails to reflect reason correctly, it were open to challenge as mistaken, the advantage gained by accepting the authority as a more reliable and successful guide to right reason would disappear.”²¹⁷ It may seem I have overlooked this point. I have not. I am not arguing for any kind of perennial vigilance against all possibly-unconstitutional norms. What I am speaking about – and what I hoped to demonstrate in the previous chapter by an appeal to Dworkin’s ‘vegetarian’ – are potentially-*egregious* directives that may lead a reasonable agent into the problem of ‘piecemeal noncompliance’. In the event that a reasonable agent feels compliance with right reason means noncompliance with state directives, I would like to proffer a kind of failsafe. I think this failsafe is useful for Raz. I would also like to argue that the ‘central case’ of authority requires such a failsafe to be considered *de jure*. That failsafe is abstract judicial review. I will define it in what follows.

First, to frame this discussion, I would like to refer to two landmark decisions in American legal history: *Plessy v. Ferguson* and *Roe v. Wade*. What I am aiming to distill, however, are not the *contents* of the judicial opinions as written, rather the *contexts* by which each of these cases came to trial. What is important to note is that each of these were cases of ‘concrete’ judicial review, as opposed to ‘abstract’:

Concrete review is the examination of the constitutionality of primary legislative provisions in a concrete case by an organ with judicial status. This distinctive features of this kind of procedure are therefore: 1) litigation in a court concerning a given legal question, 2) primary legislation relevant to the case, in respect to which the court has doubts concerning its conformity with the formal constitution, 3) a judicial decision

²¹⁷ Raz, *Morality*, 61.

stating, possibly among other things, whether the possibly unconstitutional provision ought to be applied or not.²¹⁸

Most particularly, I am focused on the fact that concrete review arises in response to existing litigation between parties. As a matter of fact, in the American context, the conventional understanding is that constitutional review *requires* existing litigation: “The role of the judiciary, states the Constitution, is to resolve cases and controversies.”²¹⁹ I will refer to this, as Shapiro and Stone Sweet also do, as the ‘case or controversy’ requirement.²²⁰ Let us look at the first ‘case or controversy’ relevant to the discussion.

In *Plessy v. Ferguson*, Justice Brown delivers some of the facts of the case stating the Supreme Court’s opinion:

the plaintiff in error [Plessy]... on June 7, 1892... engaged and paid for a first class passage on the East Louisiana Railway from New Orleans to Covington, in the same state, and thereupon entered a passenger train, and took possession of a vacant seat in a coach where passengers of the white race were accommodated... he was, with the aid of a police officer, forcibly ejected from said coach and hurried off to and imprisoned in the parish jail of New Orleans, and there held to answer a charge made by such officer to the effect that he was guilty of having criminally violated an act of the General Assembly of the State...²²¹

There are two points to note here. The first is that Justice Brown either misrepresents, or does not know, what motivated Plessy’s transgression. Brown situates the argument in several ways, but

²¹⁸ Pfersmann, ‘Concrete Review as Indirect Constitutional Complaint in French Constitutional Law,’ *European Constitutional Law Review* 6 (2010), 228.

²¹⁹ Shapiro, ‘Abstract and Concrete Review in the United States,’ (Further: ACRITUS), *On Law, Politics, and Judicialization* (UK, Oxford University Press, 2002), 6.

²²⁰ Shapiro, ‘Abstract Review and Judicial Law-Making,’ (Further: ARJLM), *On Law, Politics, and Judicialization* (UK, Oxford University Press, 2002), 3

²²¹ USSC, *Plessy v. Ferguson*, 538-539.

primarily he thinks this disobedience depended on Plessy's belief "that the mixture of colored blood was not discernible in him, and that he was entitled to every right, privilege and immunity secured to citizens of the United States of the white race".²²² The *actual* history of the case is quite different. Homer Plessy was not acting alone under the impression that he was indistinguishable from other white Americans. The truth is that "A Citizens Committee of black residents of New Orleans came together to challenge the law. *To create a test case*, Homer Plessy, a light-skinned African American, refused a conductor's order to move to the 'colored only' part of his railroad car and was arrested."²²³ Nowhere in the *Plessy* decision is this orchestrated attempt to challenge the law addressed.

While it seems widely agreed that the decision itself was reprehensible, the sentiment that appears strongest is about the inability of the court to recognize an affront to human equality. Perhaps equally upsetting, to my mind, is the lacuna of facts surrounding the impetus for the case. While Plessy's lawyer, Albion W. Tourgee, is identified at the outset of the decision, Justice Brown does not nod to the fact that Tourgee was "a judge in North Carolina during Reconstruction [who] had waged a courageous battle against the Ku Klux Klan."²²⁴ There were socially significant factors that never entered into the facts of the case itself.

The second point to note is the far more pertinent to my argument, which is that Homer Plessy had to volunteer his own innocence to trigger this 'test case'. He had to be detained in 1892 to await a final decision four years later because he believed that a certain Louisiana statute was unconstitutional. He had to be the personal target of some of the more upsetting claims of the court decision: "if he be a colored man and be so assigned, he has been deprived of no

²²² *Plessy*, 541

²²³ Eric Foner, *Give Me Liberty: An American History*, vol. 2, (US: W.W. Norton & Co, 2012), 646. Italics added.

²²⁴ Foner, 646.

property, since he is not lawfully entitled to the reputation of being a white man.”²²⁵ Worst of all is that the Supreme Court case turned *solely* on the conformity between two rules, not necessarily the case or controversy surrounding Homer Plessy himself: “So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature.”²²⁶ Famously, the court decided against Plessy: “We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority... If one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane.”²²⁷ While there are layers of issues here, I am just drawing attention to the fact that an American citizen had to sacrifice his innocence, and all the privileges associated with it, to have a morally egregious provision brought to judicial questioning. It is my contention that this is morally wrong. It is also *exactly* the problem of justified noncompliance that we saw in Raz’s theory of authority.

Some terminology needs clarifying, then. Really, what we are looking at is a matter of conformity of rules. As Pfersmann says:

There are two main legal issues concerning a judicial decision: its relative *validity* (or relative normativity) and its *conformity*. A legal act, which respects the necessary and sufficient conditions for its production is relatively *valid*, i.e., it is valid *in* the system under consideration. A valid norm then may or may not be in *conformity* with other legal standards, made substantially binding on the said norm.²²⁸

²²⁵ *Plessy*, 549.

²²⁶ *Plessy*, 550.

²²⁷ *Plessy*, 551-552.

²²⁸ Pfersmann, 243.

In the event that some norm is in violation of, or not in *conformity* with, a constitutional rule, it then is invalidated – either piecemeal or wholesale. The degree to which the nonconforming statute is altered is somewhat irrelevant to my inquiry. My question is: what is the *value* of the ‘case or controversy’ requirement in establishing the conformity of rules? Such a conformity determination could well be an analytic practice, or perhaps a hypothetical one. I again refer to Pfersmann:

Contrary to normal adjudication, constitutional adjudication is concerned with the question of conformity of statutory norms, i.e., provisions of primary legislation, with constitutional norms. This leaves in principle much less space for the establishment of relevant facts, as the relevant facts in such matters are precisely the norms at stake and the normative relation between them.²²⁹

Yes, there is an impact in understanding the harm that befell Homer Plessy himself, and, unlike our hypothetical vegetarian, the ethics surrounding his case do seem a lot more immediate and visceral. The wonder is whether this immediacy is so valuable that it justifies letting harm befall a citizen like him.

I raise a second, more recent, landmark American case: *Roe v. Wade*. Its plaintiff, Norma McCorvey, was living in Texas during her third pregnancy.²³⁰ She did not want the child, and she was living in the state of Texas, where abortion was illegal.²³¹ Persuaded by an adoption lawyer, she was led to speak with two law students, Linda Coffey and Sarah Weddington, who were “looking for a case that would challenge the abortion laws for the whole country, to bring

²²⁹ Pfersmann, 245.

²³⁰ Sabrina Tavernise, ‘Roe v. Wade, Part 1: Who Was Jane Roe?’ *New York Times: The Daily*, audio podcast, July 23, 2018. <https://www.nytimes.com/2018/07/23/podcasts/the-daily/roe-wade-abortion-norma-mccorvey.html>. (11:15)

²³¹ ‘Roe v. Wade, Part 1’ (13:50)

to the Supreme Court.”²³² Norma, like Plessy before her, seemed like a strong candidate for a test case: “...in a narrow, legal sense, Norma actually really worked. She was a young woman who desperately wanted an abortion, and had asked her doctor for one. But, it just so happened that she lived in a state that did not allow it legally.”²³³ That said, Norma’s own personal desires were often divergent with those of Linda Coffey and Sarah Weddington. She herself says: “They wanted to change a law. I wanted to have an abortion. They said: ‘Norma, don’t you want to exercise your rights by having control over your own body?’ ‘Yes,’ I said. Well, all you have to do is sign here on this dotted line.”²³⁴ She did.²³⁵ Unlike Plessy’s case, the court ruled 7-2 in favour of Norma.²³⁶ The case itself was heavily politicized, and Norma was left in the centre of a polarizing national debate, regardless of her pseudonym.²³⁷ There followed “abortion clinic bombings” and “murders of doctors”.²³⁸ It is here where I begin to question the ‘case or controversy’ requirement that implicated Norma McCorvey. As a figure in the center of a political debate, Norma faced significant pressure: “Well, I’ve been shunned by quite a few of the national leaders and the pro-choice movement. To me, sometimes, I really get this really strong hint that people think that I’m just, like, totally stupid, and I’m not... I’m a street kid... I wasn’t their ‘chosen one’ to be their special Jane Roe.”²³⁹ Those pressures increased, and Norma further found herself in a crisis with the movement she was said to represent. Meeting with Coffey and Weddington, further along in this third unwanted pregnancy, Norma discovered that “it would probably be too late for her to actually get an abortion by the time the case was

²³² ‘Roe v. Wade, Part 1’ (13:45)

²³³ ‘Roe v. Wade, Part 1’ (15:00)

²³⁴ ‘Roe v. Wade, Part 1’ (16:00)

²³⁵ ‘Roe v. Wade, Part 1’ (16:45)

²³⁶ ‘Roe v. Wade, Part 1’ (18:10)

²³⁷ ‘Roe v. Wade, Part 1’ (21:00)

²³⁸ Sabrina Tavernise, ‘Roe v. Wade, Part 2: The Culture Wars’ *New York Times: The Daily*, audio podcast, July 24, 2018. <https://www.nytimes.com/2018/07/24/podcasts/the-daily/roe-wade-abortion.html>. (14:00)

²³⁹ ‘Roe v. Wade, Part 2’ (16:00)

decided.”²⁴⁰ Justice Blackmun’s opinion tells us that she did terminate the 1970 pregnancy that led to her District Court hearing.²⁴¹ In any event, she felt that her attorneys had used her as a stepping stone to bring a question of rule *conformity* to the Supreme Court.

Disenchanted with the movement she was said to represent, in 1995, Norma McCorvey converted and became “a born again Christian”.²⁴² She ended up announcing: “...upon knowing God, I realize that my case, which legalized abortion on demand, was the biggest mistake of my life.”²⁴³ More than her frustration with her attorneys, Norma’s personal guilt weighed heavily with her: “She [felt] a deep, big sadness that she attributes to supporting abortion. She talks about how she suddenly starts to hear the sound of children’s feet pitter-pattering through the clinic after its closed, after-hours. She hears the sound of a child’s laugh as she tries to cut the flowers outside to put in the recovery room.”²⁴⁴ Between the time of the decision in 1973, and 1995, over the course of twenty-two years, Norma’s life was irretrievably marked by a trial that she reticently joined. The wonder cannot be helped, whether Coffey and Weddington could not have appealed to the court with a hypothetical Jane Roe, rather than having the real Norma McCorvey use Jane Roe as a pseudonym. The practical consequence is this: for many people, there is an underlying sense that *Norma McCorvey* was single-handedly responsible for the legalization of abortion – not the attorneys, and most certainly not the authoritative Supreme Court. McCorvey had to suffer to contribute to American legal development, and she was not a legal official. At the risk of over-repetition, her life was defined by a question of rule conformity that did not necessarily require her presence. True, this case does not speak *as* neatly to the problem of

²⁴⁰ ‘Roe v. Wade, Part 2’ (17:50)

²⁴¹ USSC, *Roe v. Wade* (s. 125)

²⁴² ‘Roe v. Wade, Part 2’ (21:10)

²⁴³ ‘Roe v. Wade, Part 2’ (22:00)

²⁴⁴ ‘Roe v. Wade, Part 2’ (23:10)

piecemeal noncompliance as Plessy's. But, it does underscore the moral trouble with the 'case or controversy' requirement.

Furthermore, in the Roe v. Wade opinion, there is the oft-neglected case of the other parties to the decision. Most significant to our purposes is the case of:

John and Mary Doe, a married couple, [who] filed a companion complaint to that of Roe... Mrs. Doe was suffering from a 'neural-chemical' disorder... [and] her physician had "advised her to avoid pregnancy until such time as her condition has materially improved"... pursuant to medical advice, she had discontinued the use of birth control pills... if she should become pregnant, she would want an abortion performed by a competent, licensed physician under safe, clinical conditions.²⁴⁵

To this end, Mary Doe's suit resembled Roe's very closely. However, the court saw difficulty in finding for John and Mary Doe because it could not guarantee that a sufficient 'case or controversy' had led to it. The Justices found that:

Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not combine... we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy.²⁴⁶

Which is quite a stunning way to conceive of the issue at hand. Ultimately, then, John and Mary Doe would have had to get pregnant and *then* appeal as McCorvey had. This would leave them in the precarious position of having to possibly: illegally obtain an abortion if the trial were not timely enough, stand-in for a highly politicized movement as McCorvey did, face the costs of

²⁴⁵ USSC, *Roe*, (s. 121)

²⁴⁶ USSC, *Roe*, (s. 128)

their suit if they were unsuccessful in persuading the judges of the unconstitutionality of the abortion statute, and the list continues. Citizens should not be left in such a desperate place by the Supreme Court. This case, which the court decided against just as it did with Plessy, *does* seem to lead to an issue of justified noncompliance. That might be a valuable trend to observe.

So, we are left with the task of understanding the possible alternative to the ‘case or controversy’ requirement. Luckily, we do not have to look very far. Several countries provide for measures where the ‘case or controversy’ requirement does not need to be met. For broad-strokes purposes, we can follow Shapiro and Stone Sweet in their claim that the “diffusion of constitutional judicial review over the past half-century has resulted in the emergence of two dominant ‘models’ of review: the American and the European.”²⁴⁷

Shapiro and Stone Sweet break down the European model of constitutional review into four constituent components:

First, constitutional judges alone exercise constitutional review authority; the ordinary, non-constitutional judiciary remains precluded from engaging in review. Second... constitutional judges do not preside over judicial disputes or *litigation* or judicial appeals... Third, constitutional courts... occupy their own ‘constitutional’ space, a space neither ‘judicial’ nor ‘political.’ Fourth, *most constitutional courts are empowered to judge the constitutionality of statutes before they have been applied. This mode of review, called ‘abstract review’, is typically defended as guaranteeing a more complete system of constitutional justice than does the American model, since it can eliminate unconstitutional legislation and practices before they can do harm.*²⁴⁸

²⁴⁷ Shapiro, ARJLM. 1.

²⁴⁸ Shapiro, ARJLM, 2. Italics are my own.

It is probably no mystery that I feel the European model is preferable, mainly because of this fourth criteria. What I find most valuable is the absence of litigating parties to the constitutional question. Shapiro and Stone Sweet offer a working definition of ‘abstract review’: “‘abstract review of legislation’ refers to the control of the constitutionality of statutes, by a court or other jurisdiction, prior to their application or enforcement by public authorities.”²⁴⁹ They also observe²⁵⁰ a common spectrum, conceptually ‘situating’ the different kinds of judicial review: “the French system, which allows only for abstract review, constitutes the least ‘judicial’ format for review in Europe and North America, and also the most ‘political’, while the American system... anchored the other opposite end on the continuum.”²⁵¹ Perhaps the use of this continuum will assist us in our purposes. In trying to reconcile the Razian conception of authority with the ‘core case’, I think the best strategy is to find an existing ‘core case’, or something close to it, that permits for such abstract judicial review. I think we should look at this ‘continuum’ to make our decision.

First, we ought to look at the French case of judicial review, since it appears most promising according to what we have found. There is a deeply Rousseauian core that informs French review: “the traditional French ideology of the ‘law’ as an expression of the general will induced a long-standing reservation against judicial review of parliamentary statutes.”²⁵² The practice of constitutional review in France, then, did not arise out of faith in the judiciary or in a faith in ‘separation of powers.’ Contrarily: “distrust in Parliament’s ability to sustain a stable government and to provide for coherent legislation prompted de Gaulle to introduce

²⁴⁹ Shapiro, ACRITUS, 3

²⁵⁰ Though they do not argue for this spectrum. I see it as a useful organizing device.

²⁵¹ Shapiro, ARJLM, 5.

²⁵² Pfersmann, 223-224.

constitutional review... it was conceived of as a strictly preventative check on legislation, to prevent Parliament from overstepping its limited competencies.”²⁵³

In framing the French practice here, however, there is a problem of the dates between different pieces of research. Shapiro and Stone Sweet were writing about their understanding of the French practice of Judicial Review in 2002. Pfersmann tells us, however, that: “In 2007, the new President of the Republic initiated a large-scale constitutional reform, mainly intended to bring the legal framework closer to the American model of presidential government... the committee voiced the need of introducing review *a posteriori* to... bring ‘hierarchical superiority back to the Constitution.’”²⁵⁴ However, we have a clear enough picture of what Shapiro and Stone Sweet were referring to before this shift took place. Constitutional review was not introduced in France until 1958, with the enactment of a new constitution, “and then only abstract and *a priori*” until this 2007 sea change took place.²⁵⁵

One of the things that I believe must be kept in view, for any discussion of this kind, is *who* triggers the constitutional question about rule conformity. In the French case, as of 1958: “Referrals could be filed only by the highest political authorities (the President of the Republic, the Prime Minister and the presidents of the chambers of Parliament), not by the addressees of the norm.”²⁵⁶ A revolution happened in 1971 that “introduced rights into the formal Constitution... by using the Preamble as a norm of reference.”²⁵⁷ By 1974, members of Parliament, who found themselves in significant enough numbers, had the power to raise questions for the Constitutional Council.²⁵⁸ This seems to be, more or less, the picture that

²⁵³ Pfersmann, 224.

²⁵⁴ Pfersmann 226.

²⁵⁵ Pfersmann, 223.

²⁵⁶ Pfersmann, 224.

²⁵⁷ Pfersmann, 224.

²⁵⁸ Pfersmann, 225.

Shapiro and Stone Sweet have of French judicial review in 2002. It still restricts access of constitutional questioning to official members of the state. Pfersmann informs us about how the practice of review used to function, or continues to, if it is triggered:

When exercising *a priori* review, the Council examines an entire bill after its adoption by both chambers of Parliament within one month. Contrary to the European standard, a decision of the French constitutional court extends to an entire statute and provides it with a label of constitutionality, except for those provisions which are annulled as unconstitutional and for those subjected to a so-called ‘interpretation in conformity.’²⁵⁹ ²⁶⁰

This seems to be part of the boundary line of the French case as Shapiro and Stone Sweet see it. Pfersmann essentially tells us that the ‘European’ model of judicial review is not one which extends to entire statutes. Though, substantively, the picture looks quite the same. Provisions are eventually annulled, if unconstitutional. This seems like it would still be the case even if the analysis is of a mere provision or regulation, or an entire statute that contains such a provision or regulation.

So, could the ability to ask constitutional questions ever be extended to citizens?

Pfersmann tells us in the post-2007 case of *a posteriori*, or concrete review, in France: “The constitutional question itself may be raised by the court settling the original litigation (*judex a quo*), by the parties or by both of them. In most European systems, however, the *judex a quo* itself raises the question *and* decides whether or not the issue should be referred to another,

²⁵⁹ Pfersmann, 225.

²⁶⁰ “The so-called *interpretation in conformity*... consists in the rulings that a legislative provision which has at least two different meanings is considered to be constitutional under one (or more) meanings and not under another meaning (or meanings)... This technique supposes indeed *interpretation* in order to identify the various meanings of the relevant provisions, but its very operation consists in a partial annulment and in certain cases the substitution by alternate provisions. It hence is not *review*, but alternative law-making.” (225) Essentially, one reading of a provision is chosen against another possible reading which leaves the provision unconstitutional.

specialised – constitutional – court.”²⁶¹ For a more specific, or at least more applied, restatement of that claim: “Whereas in Spain and Italy the competence to raise the [constitutional] question is *shared* by the ordinary courts and the parties to the original litigation, this right in France [post-2007] is the exclusive competence of the parties; yet only the courts are allowed (*and* even obliged) to *transmit* the question under specific circumstances.”²⁶² True, France no longer holds its unique position through strict adherence to *a priori* review. However, French legal practice still offers us a useful understanding of a possible ‘core case’ by allowing litigating parties access to concrete review through the lodging of a constitutional complaint.

There have been proposals in France for direct access on the part of citizens to the Constitutional Council, through the form of Direct Constitutional Complaints.²⁶³ “*Direct constitutional complaints* are requests lodged by individuals with the Constitutional court, which examines them as to the admissibility and possibly as to the substance. These complaints can have different objects and follow different procedures. The fact that they are lodged by individuals should not be confused with their legal target.”²⁶⁴ With this, I think we have found a practice that could completely eliminate both the problem of (1) needing to create a test case and (2) the problem of piecemeal noncompliance. Consider: “Direct constitutional complaints directly targeting legislative provisions are abstract in the sense that admissibility conditions require that statutory provisions *as such*, i.e., without their application in a specific case, have an impact on the legal situation of the complainant and violate his or her constitutional rights.”²⁶⁵ This is the exact solution I am seeking. Admittedly, it is represented by *aspects* of ‘core case’

²⁶¹ Pfersmann, 228.

²⁶² Pfersmann, 232.

²⁶³ Pfersmann, 233-234.

²⁶⁴ Pfersmann, 234.

²⁶⁵ Pfersmann 235.

practices in France, not the French case itself. Also, direct constitutional complaints were merely proposed, not adopted.²⁶⁶ However, we can see the promise of such a practice, especially in the American context. We would not have to have people like Homer Plessy or Norma McCorvey sacrificing themselves to address the failing of a legal system to find conformity within its rules.

While it may not be anywhere near the middle of our ‘continuum’ of judicial review. There have been Canadian arguments *for* the ‘case or controversy’ requirement that are reasonable, if flawed. These should be considered in turn. In Canada, the closest thing to abstract judicial review is a ‘reference case’. Gerald Rubin gives us an introduction:

An analysis of the nature of “reference cases” requires a working definition of that term and a term which is synonymous with it; “advisory opinions.” An “advisory opinion” has been defined as follows. A formal opinion by judge or judges or a court of law or a law officer upon a question of law submitted by a legislative body or a government, but not actually presented in a concrete case at law.²⁶⁷

So, this is also a kind of abstract review that is solely available to governmental officials.

Citizens do not have the ability to raise reference cases. There has been historical worry about the use and effect of reference cases in a Canadian context, more or less for exactly this reason:

The judges have objected to the submission of references from an ethical viewpoint because, they argued, references affect private rights without affording parties affected an opportunity to be heard and because, though theoretically merely advisory, opinions rendered are bound to embarrass the administration of justice when the subject of an earlier reference is brought before the courts on a later question by genuine litigants.²⁶⁸

²⁶⁶ Pfersmann 235.

²⁶⁷ Gerald Rubin, ‘The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law,’ *McGill Law Journal* 6 (1960), 168.

²⁶⁸ Rubin, 185.

The argument seems to be in favour of either avoiding reference cases entirely, or of understanding their risk through their inherent character, which requires the absence of litigants. It surprises me that no one thought to make the practice more inclusive by offering the possibility for citizens to make the complaint, without there being further legal obligation to participate in legal proceedings. Certainly, a citizen could offer anecdotal evidence of their finding and let the court use that as a basis without there being any further implication of themselves in an issue of constitutional magnitude.

There has also been the worry that reference cases represent a genuine overstep on the part of the judiciary into the political realm. Rubin explains this difficulty: “‘Constitutional’ cases... were to be referred to the Court, while cases involving ‘policy’ were... ‘clearly, exclusively for the executive and legislative’... However, there is often no clear cut line between ‘constitutional’ cases and ‘policy’ cases.”²⁶⁹ The fear seems to be that elected officials may withdraw from trying to resolve difficult problems when they are able to rely on appointed judges to deal with such controversies.²⁷⁰ I can understand the concern, but Edward Blake’s counter-argument is far more effective to my mind: “there ought to be a reference [to the Court] in certain cases where the condition of public opinion renders expedient a solution of legal problems, dissociated from those elements of passion and expediency which are rightly or wrongly too often attributed to the action of political bodies.”²⁷¹ The court is simply in a less precarious position to decide difficult cases. It is uniquely situated, not only with a comprehensive understanding of the law, but to provide explicit reasons for its position. If the court fails to persuade the legislature that it is being dispassionate or meticulous, there is always

²⁶⁹ Rubin, 172.

²⁷⁰ Rubin, 172.

²⁷¹ Rubin, 171.

the ability for the legislature to resort to the ‘advisory’ nature of the reference opinion as non-binding. If, on the other hand, the judiciary fails to acknowledge the ‘advisory-only’ character of a reference decision, there should be sufficient legal grounds to challenge the Court as using a false precedent.

The issue, as I see it, is this: ‘What party should bear the burden of uncertainty?’ Lord Haldane, in a 1915 case, gave what I found to be the most troubling argument in favour of the ‘case or controversy’ requirement. Rubin explains:

Lord Haldane referred to the attempts made by the Supreme Court in the *Companies Reference* to carry out the task imposed upon them by the submission. In Lord Haldane’s view, the task had been an impossible one, owing, he said, to the abstract character of the questions put.²⁷²

Haldane said:

It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided... it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.²⁷³

While I empathize with the difficulty of deciding cases *even where* there are concrete facts, I find this line of reasoning ineffectual. Often concrete cases will lead judges to interpretations of rules in ways that are largely abstract. The *Roe v. Wade* opinion, for example, catalogues a brief history of philosophy regarding the difficult topic of when something qualifies as being alive.²⁷⁴

²⁷² Rubin, 182.

²⁷³ Rubin, 182.

²⁷⁴ *Roe*, s.160.

When those abstract interpretations inform the judicially-created rule, we have an abstract origin to a practical question. We re-encounter that abstract origin when others raise further concrete cases. To a certain point, I understand. Haldane is observing the fact that a judge is often a like a referee in simply declaring a rule to have been broken or not, in conformity in this case or not, etc. However, this is not the sole judicial function. Where constitutional questions are concerned, especially, judges are the ones who should bear the uncertainty about whether or not rules are over or under inclusive, failing to conform, etc. This uncertainty should not be left to citizens who are not legal officials, and whose lives will be altered so that judges do not face ‘an embarrassment of the administration of justice.’ This is what I have meant throughout my thesis when I refer to a theory of authority grounded in accountability. Officials should be accountable to citizens as citizens are accountable to officials. A condition of their legitimacy is that officials understand this accountability relation and steadfastly attempt to maintain it in good faith.

So, let us return to the American ‘boundary-line’ of judicial review, known for being solely *a posteriori* and concrete. Known by reputation, but not in fact. As Shapiro and Stone Sweet show us: “The judicialization of politics proceeds through judicial lawmaking, which is always a blend of abstract and concrete.”²⁷⁵ They further outline the conditions whereby abstract review is actually implemented in the American context:

In the US, abstract review occurs most often in one of the following two situations. First, under certain circumstances, plaintiffs may seek declaratory or injunctive relief by a judge which, if granted, suspends the application of the law in question pending a judicial determination of its constitutionality. Plaintiffs commonly file such requests immediately after the statute has been signed into law by the appropriate authority. Second, under

²⁷⁵ Shapiro, ACITUS, 2.

judicial doctrines developed by the US Supreme Court pursuant to litigation of First Amendment freedoms, plaintiffs may attack a law on its face, called a ‘facial challenge’, and plead the rights of third parties.²⁷⁶

So, where is the origin of the American reputation for solely concrete review? Shapiro and Stone Sweet offer a couple of explanations. The first is that “the precise, juridical meaning of the phrase ‘case and controversy’ has never been fixed... In any event, the phrase cannot stand alone since it references doctrines related to separation of powers, standing to sue, and justiciability. Each of these legal frameworks has been constructed in complex lines of case law which are more or less incoherent.”²⁷⁷ The *true* explanation, however, is as Shapiro and Stone Sweet say – a historical accident.²⁷⁸

The US Constitution does not specifically authorize constitutional judicial review as do the contemporary constitutions of European states in which such review is practised. As a result, in the famous opinion in *Marbury v. Madison* on which US review is grounded, John Marshall (USSC 1803) was driven to a complex argument for review, an argument derived from the fundamental duty to decide ‘cases and controversies’ ‘arising under’ the Constitution that is specifically assigned to the Court by Art. III... Thus Marshall’s confining of constitutional review to conflicts of law situations in genuine cases and controversies not only ties review to the specific cases and controversies language of the Constitution but, far more importantly, renders judicial review into a facet of the judicial powers specifically granted to the federal courts by the Constitution.²⁷⁹

²⁷⁶ Shapiro, ACRITUS, 3.

²⁷⁷ Shapiro, ACRITUS, 6.

²⁷⁸ Shapiro, ACRITUS, 24.

²⁷⁹ Shapiro, ACRITUS, 24.

It is a historical accident of language, and of wilful blindness to certain current legal practices, that this frustrating ‘cases and controversies’ requirement continues to define American judicial review. Given how largely American legal practice sets a standard for the discussion of the ‘core case’, we can see how the ‘supreme authority’ Raz contrasts with might be informed by this. Citizens must transgress (*Plessy*) or suffer (*Roe*) unconstitutional laws in order to legitimately satisfy the ‘case or controversy’ requirement. We are now in a position to offer a ‘failsafe’ in Razian terms, and to close this discussion.

Razian authority, as we have seen, functions on the basis of reasons. We have covered several kinds of reasons that Raz puts forward, but for the sake of simplicity we can simply refer to the dependence thesis: “All authoritative directives should be based, among other factors, on reasons which apply to the subjects of those directives and which bear on the circumstances covered by the directives. Such reasons I shall call dependent reasons.”²⁸⁰ In the previous chapter, we saw how the dependence thesis, combined with the NJT and preemption thesis, created a qualified obligation for subjects. There are several pertinent *types* of qualified obligation, but our focus has always been the qualification that cognitive disagreement was always permitted in the Razian framework. Remember: “there is no reason for anyone to restrain their thoughts or their reflections on the reasons which apply to the case, nor are they necessarily debarred from criticising the arbitrator for having ignored certain reasons or for having been mistaken about their significance. It is merely action for some of these reasons which is excluded.”²⁸¹ My point follows from this. If we can accept that a citizen’s direct constitutional complaint does not qualify as action in the Razian sense, we have then found the possibility to create a forum. In this forum, an authority can reissue the satisfactorily dependent reasons, or

²⁸⁰ Raz, ‘Authority, Law, and Morality,’ 299.

²⁸¹ Raz, *Morality*, 42.

admit its own failure to satisfy the dependence thesis and to respect its accountability relation to its citizens. Presumably, it would do so by invalidating the law, replacing it with an eye to the reasons that actually pertain to the subjects, or offering a conforming interpretation of the law.

We can expand on the ways that this might satisfy other elements of Raz's theory.

Consider the NJT and its argument that an authority is legitimate if subjects are more likely to follow right reason through obedience with state directives. By providing a 'safety-valve' for the authority to receive complaints which may bring it more closely to right-reason, the authority can more confidently claim that its subjects are more likely to comply with right reason by following state directives. This is because the state will offer an infrastructure for its directives to be more closely aligned with right reason in the event that they are out-of-sync. This will not depend on the subjects' voluntary acceptance. It will be a fact that the NJT is easier to satisfy.

Lastly, we consider the preemption thesis. People would be more likely to suspend their reliance on their first-order reasons, not only as a way of fulfilling their duties to right reason, but on the pretence that they may have recourse to such first-order reasons when they feel the authority has failed in its accountability relationship to them. As a matter of fact, this is the final way I see of resolving the challenge posed by Dr. Waluchow which gave me such difficulty in my second chapter. With my proposed solution, even under Razian terms, it really *is* possible to see both parties as justified – the dissident and the supreme authority. Of course, I am not imagining a case of noncompliance here, because I do not have to. I am imagining a case where noncompliance would have been the only resort in our prior scenario, where now there would be some possibility of civic discourse. That said, I hold with Raz in saying that the judges may in fact attempt a solution on the dependent reasons and err in their outcome. Though, that need not be where the discussion about rule conformity ceases. I will revisit this in closing.

Most importantly, we are able to address Raz's finding at the end of his discussion of authority in *Morality of Freedom*: "We are forced to conclude that while the main argument [for the 'central case'] does confer qualified and partial authority on just governments it fails to justify the claims to authority which these governments make for themselves."²⁸² Or, perhaps worse yet, this finding: "Even assuming complete good will and unimpeachable moral convictions, inefficiency, ignorance and other ordinary facts of life will lead to objectionable laws being passed."²⁸³ What we are able to say is that, by pursuing abstract review, the 'central case' of authority might be better able to satisfy Razian ideals. A government's claim to supremacy might be morally justifiable where that government claims supremacy as a result of its accountability relation to its citizens. Such a government would presumably acknowledge that it will produce 'objectionable laws' and will anticipate a measure of restoring society to right reason through the courts. What abstract review provides to citizens is this: an avenue for complaint that does not incriminate, or unduly impose on, those who find that the law is contrary to right reason, or not in conformity with itself. The courts can find rule conformity without trampling on its citizens to do so.

So, the inevitable questions are, why would we have faith in the courts to restore right reason where the legislature has failed to do so? Presumably, the legislature is more in touch with its constituencies, it is not constrained by onerous legal procedures, and it has a far stronger claim to being democratic than the courts do. Worse yet, why would we want a court to fulfill such a political role? Does this not bring the court into the "political thicket"²⁸⁴ and disrupt the separation of powers which insulate the court as an institution of justice?

²⁸² Raz, *Morality*, 78.

²⁸³ Raz, *Morality*, 79.

²⁸⁴ Suzie Lechtenberg, 'The Political Thicket.' *More Perfect*, audio podcast, June 10, 2016. https://www.wnycstudios.org/story/the_political_thicket/

I think the lead-in to that answer comes from one of the points that Rubin made in his article: “There is thus a danger that the federal executive, where a case involves *both*... constitutional issue[s] and highly controversial questions of policy will... pass political ‘hot potatoes’ to the Supreme Court”.²⁸⁵ The legislature is, and has been, known by this tendency. As said above, the position of an elected official is far more precarious than an appointed judge. For their own professional survival, politicians have to be more concerned with the fluctuating interests of their constituents than issues of justice.²⁸⁶ However, these arguments have all been issued elsewhere and do not need much revisiting here. Our Razian point is that the Supreme Court, in particular, is in a position to promulgate *reasons* that apply to citizens in a way that is both thorough and easily accessible. It seems there is no better way for the state to assure citizens some compliance with right reason than to directly distribute ‘right reason as it has been discovered’ in close analysis with constitutional principles. As to the point of protecting the court from entering the political thicket, I have two responses. In the American context, the fact is that American justices understand they have already entered into the political thicket:

The ordinary deference a court owes to any legislative action vanishes when constitutionally protected rights are threatened. The rational connection between the remedy provided and the evil to be curbed, which might in other contexts insulate legislation against attack on due process grounds, will not suffice. We would abandon our constitutional duty if we took at face value the legislative determination.²⁸⁷

My other response is to say that, in Canada, the mere existence of reference cases shows that the courts will directly comment on legislative enactments, even if their comments are named

²⁸⁵ Rubin, 172.

²⁸⁶ And these need not be mutually exclusive, though they could contingently be.

²⁸⁷ Shaprio, ACRITUS, 19.

‘advisory only’. The courts, therefore, do not seem to be opposed to involving themselves in political questions. What I offer in my hope for abstract review is a mere extension of this existent practice to citizens.

It is possible that this may not eliminate *all* justified noncompliance, but it does eliminate the problem of justified, piecemeal noncompliance as we discovered it. Some citizens may be too impatient to allow for the process of abstract review to see itself through. Though, it might be hard to say their proposed noncompliance was justified as a result of impatience. However, depending on how egregious the provision, they may still be vindicated. One reason that a problem of justified noncompliance may persist, at least in response to the framework Raz has developed, is that the dependence thesis only requires that the authority attempt to base its decisions on the relevant reasons.²⁸⁸ It does not require a successful attempt. Although, avoiding *all* justified noncompliance was never exactly our focus. Our focus was on justified, piecemeal noncompliance when the Normal Justification Thesis generally held – hence, our vegetarian’s dilemma.

The proposed solution does create the possibility to prevent certain transgressions of the law, to prevent certain sufferings on the part of citizens, and to provide Raz with a kind of reconciliation with the ‘core case’ of authority. Because, if the core case is defined by its claim of “unlimited authority, if it claims that there is an obligation to obey it whatever its content may be”, then by *providing* this failsafe, the authority leaves the option for citizens to obey the law even where they find it an affront to right reason. It especially encourages cooperation where before there was *piecemeal* noncompliance. It helps in the problem of piecemeal noncompliance because, in such cases, the rest of the authoritative relationship was thought to be fairly stable.

²⁸⁸ Raz, *Morality*, 41.

Our solution encourages citizens to sternly obey legal procedures so that they can arrive at the outcome they desire.

If there had been internal, anonymous measures for legal change made available to citizens such as Plessy and McCorvey, two lives may not have been sacrificed in order to test a basic question of rule conformity. Adding this procedure as a necessary conception of the ‘core case’ of authority, we see that the core case can more easily (though not perfectly) enforce compliance on its own terms, and in Raz’s as well. A party that feels wronged can raise the question of rule conformity to the authority in total compliance with state practices, walk away, and let the court issue its dependent reasons in its opinion. If the finding is that the statute is not in conflict with constitutional principles, the party will at least be provided with the reasons that are thought to pertain to them. If the dependence thesis is not satisfied by the opinion in some extremely obvious way, there should be no reason why – like an appeal – the question could not be renewed. I understand that this not a perfect reconciliation. Despite my ambition here, this is likely just a start. It does, however, seem to bring us, and Raz, closer to the hope of a legitimate legal authority in the real world.

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