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Brian McCall

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# WHY IT IS GOOD TO STOP AT A RED LIGHT: THE BASIS OF AUTHORITY AND OBLIGATION

BRIAN MCCALL<sup>†</sup>

“Law, if it is law, is authoritative, and the authoritative is voice, voice heard.”<sup>1</sup>

Throughout history, some have questioned whether the authority exercised by some over others is consistent with human nature.<sup>2</sup> Is it possible for a law made by one human being to bind the conscience of another, or is such a claim merely tyranny?<sup>3</sup> If such a power to bind to laws made by humans is justified, what is its scope? The answers to these related questions explored in this Article are both descriptive and normative. This Article explains the nature of authority and the extent of the obligation to obey the law as well as explains how the architecture of natural law jurisprudence explains and justifies both the authority and the obligation. To introduce the subject, this Article begins by offering a preliminary definition of authority and obligation. Part I then surveys some of the competing theories of authority and obligation and demonstrates their lack of an ontology and a satisfying justification. Part II presents the classical justification for legal authority and obligation.

Before commencing the discussion, the parameters of the questions can be narrowed somewhat by defining the terms authority and obligation. *Auctoritas*, from which the English word authority is derived, is a “liberty, ability, [or] power” to

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<sup>†</sup> Associate Dean for Academic Affairs and Orpha and Maurice Merrill Professor in Law, University of Oklahoma College of Law; B.A., Yale University; M.A., King’s College University of London; J.D., University Pennsylvania. The author is grateful to Professor Jean Porter and C.G. Bateman for comments on a draft of this Article and to Mallory Irwinsky for her work as a research assistant.

<sup>1</sup> Joseph Vining, *Law’s Own Ontology: A Comment on Law’s Quandary*, 55 CATH. U. L. REV. 695, 695 (2006).

<sup>2</sup> See 2 FRANCISCO SUÁREZ, SELECTIONS FROM THREE WORKS 363 (Gwladys L. Williams et al. trans., Oxford Univ. Press 1944).

<sup>3</sup> *Id.*

express one's will as a "command, precept, [or] decree."<sup>4</sup> Yet, such a general definition would encompass the power or ability of thugs to order people to hand over their wallets. Distinguishing authority from threats backed by force was one of the primary concerns of H.L.A. Hart in defining the concept of law.<sup>5</sup> As Joseph Raz observed, justifying authority involves distinguishing authority to direct action from the mere power to direct action.<sup>6</sup> At the very basic level of a definition, it is apparent how the descriptive answer to the question of legal authority is inextricably linked to the normative claim. That which distinguishes authority from threats backed by force, or authoritarian, is legitimacy. The power or ability to command is a legitimate or justified power, an attribute lacking in the case of the gunman. Authority involves both an ability to impose one's choice of a law upon others as well as a normative justification for doing so.<sup>7</sup> Yet, to constitute legitimate authority, not only must one have the power to command, but that power must also include a duty to obey on the part of the one commanded.<sup>8</sup> Obedience to the law involves conforming one's actions to the requirements of the law.<sup>9</sup> Legitimate authority entails an obligation to conform one's action to the command in a way that the threat of the gunman does not. The effect may be the same—the completion of an action complying with the instructions of another—but the nature of that conformity is different. In the case of the gunman, conformity may be necessary to avoid harm, but it is not normatively obligatory. It is not an act of obedience to conform to the gunman even if it becomes prudentially expedient. In contrast, the claim of authority involves more than

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<sup>4</sup> *Auctoritas*, CHARLTON T. LEWIS & CHARLES SHORT, A LATIN DICTIONARY (Oxford Univ. Press 1879).

<sup>5</sup> H.L.A. HART, *THE CONCEPT OF LAW* 7, 20 (3d ed. 1961).

<sup>6</sup> Joseph Raz, *AUTHORITY AND JUSTIFICATION*, 14 *PHIL. & PUB. AFF.* 3, 5 (1985).

<sup>7</sup> C.G. Bateman, *Sovereignty's Missing Moral Imperative*, 8.2 *INT'L ZEITSCHRIFT* 30, 40 (2012) ("[S]overeignty denotes two main tenets which support its legitimacy. First, there must be a political body or person with the capacity to exercise power over a specific community and place such that no higher authority exists within its jurisdiction. Second, sovereignty must insist that a positive moral imperative is placed on the person or body executing such power in practice.").

<sup>8</sup> See Raz, *supra* note 6 (noting that those claiming legitimate authority are correct "only if and to the extent that their claim is justified and they are owed a duty of obedience").

<sup>9</sup> See *id.* at 7 ("I do all that the law requires of me if my actions comply with it.").

a threat of harm making conformity expedient; although a threat may be added to the instruction of law to encourage obedience.<sup>10</sup> It is not the threat that makes the law obligatory. The threat is legitimate if and only if the one giving the instruction is possessed of authority in contrast to mere force. As Randy Barnett explains, “A lawmaking system is legitimate . . . if it creates commands that citizens have a moral duty to obey.”<sup>11</sup>

In the pithy words of Joseph Vining, legal authority produces “willing obedience.”<sup>12</sup> Willing obedience is not the same as being happy or pleased about one’s obedience. It means being willing to obey even when one does not want to obey. Although Joseph Raz would dispute a general duty to obey the law,<sup>13</sup> he does understand the concept of authority as a power to give another an exclusionary reason for acting when one does not understand the reasons or when one would choose otherwise.<sup>14</sup> If not morally obligatory, for Raz, authoritative law can at least give one a preemptive reason to act.<sup>15</sup> As Philip Soper has noted, recognizing an authority preempts, in some way, individual choice, in the sense that a command or precept given by one with authority takes some degree of freedom away from deliberating personally about the regulated action.<sup>16</sup> Soper describes this autonomy-limiting role of authority as a “content-independent” reason for action, meaning that the reason for action is rooted in the authority of the one commanding or enacting the law and not in the content of the command or law being correct.<sup>17</sup> In other words, the power referred to in the definition of authority is a power to require others to act on the authority’s determination of the correctness of the content of the authoritative claim.

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<sup>10</sup> See *id.* at 5.

<sup>11</sup> Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 116 (2003).

<sup>12</sup> Vining, *supra* note 1, at 696.

<sup>13</sup> See, e.g., JOSEPH RAZ, *THE AUTHORITY OF LAW* 233 (2d ed. Oxford Univ. Press 2009) [hereinafter RAZ, *THE AUTHORITY OF LAW*].

<sup>14</sup> JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 62–65 (Oxford Univ. Press 1999) [hereinafter RAZ, *PRACTICAL REASON AND NORMS*]; RAZ, *THE AUTHORITY OF LAW*, *supra* note 13, at 17–19.

<sup>15</sup> RAZ, *PRACTICAL REASON AND NORMS*, *supra* note 14, at 35–48, 58–78; Raz, *supra* note 6, at 13 (“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.”).

<sup>16</sup> Phillip Soper, *Legal Theory and the Claim of Authority*, 18 PHIL. & PUB. AFF. 209, 215 (1989).

<sup>17</sup> *Id.* at 217–18.

While Abner Greene argues that this preemption of individual determination requires justification, Hart and Kelsen, in contrast, proceed in their jurisprudence without providing a complete justification for legal authority but merely assume its presence in the system.<sup>18</sup> Kelsen merely assumes the existence of a basic norm which he calls a “juristic hypothesis.”<sup>19</sup> Hart acknowledges that without some minimal content, no person would have a reason to obey the law and no legal system would exist.<sup>20</sup> Yet, he merely assumes the existence of this minimum content as a rational necessity without normatively justifying or rigorously defining it. This lack of metaphysical justification is most obvious in his treatment of the Rule of Recognition,<sup>21</sup> which he asserts exists simply because it must exist and thereby sidesteps any rigorous ontological treatment of this foundational rule and its causes. Both Kelsen’s basic norm and Hart’s Rule of Recognition are used to ground their concepts of the legal system. Yet, the most that either thinker can do is simply posit the existence of such a lynchpin of authority as a logical necessity. Hart simply introduces the Rule of Recognition as that rule which tells you what rules count as rules.<sup>22</sup> Hart offers no explanation for the origin of such a rule of recognition other than it just exists in every legal system. Ultimately Hart’s analysis simply ends at an ultimate rule of recognition which has no rule to evaluate its own validity; it is simply “‘assumed’ or ‘postulated’ or is a ‘hypothesis.’”<sup>23</sup> A rule of recognition can “neither be valid nor invalid but is simply accepted as appropriate for use.”<sup>24</sup> For Hart and his disciples, the Rule of Recognition is simply asserted as an uncaused cause of legal

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<sup>18</sup> ABNER S. GREENE, *AGAINST OBLIGATION* 102 (2012).

<sup>19</sup> HANS KELSEN, *GENERAL THEORY OF LAW AND STATE*, at xv (Anders Wedberg trans., Russell & Russell 1945). The author adopts Joseph Raz’s interpretation of Kelsen’s theory with respect to the origin of the basic norm. *See* RAZ, *THE AUTHORITY OF LAW*, *supra* note 13, at 126.

<sup>20</sup> Hart, *supra* note 5, at 193–94 (“In the absence of [the minimum] content men, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of co-operation given voluntarily by those who find that it is in their interest to submit to and maintain the rules, coercion of others who would not voluntarily conform would be impossible.”).

<sup>21</sup> *Id.* at 84–85, 92–93.

<sup>22</sup> *Id.* at 94.

<sup>23</sup> *Id.* at 108.

<sup>24</sup> *Id.* at 109; *see also* RAZ, *THE AUTHORITY OF LAW*, *supra* note 13, at 69 (arguing that the ultimate rule in a legal system has no rule to establish its validity).

systems. It is merely a fact devoid of any metaphysical explanation or proof that a certain rule of recognition exists in a particular legal system.<sup>25</sup> The basic norm and the rule of recognition are simply assumed as givens, and authority is therefore simply assumed to exist. Even Ronald Dworkin, who is claimed by some as a proponent of moral reasoning in jurisprudence,<sup>26</sup> simply asserts the justification of coercive authority. For Dworkin, current adjudications are based on past political decisions, which are simply assumed into the system without justification.<sup>27</sup>

The examination of authority in this Article makes the stronger claim that legal authority can be justified and not simply assumed. Yet, even Raz's minimalist notion of authority as a mere reason for acting requires some justification. Why should the adoption of a rule by a political ruler present a particular reason for choice? Thus, even Raz needs to identify the ontological and normative grounding of his minimalist legal authority to give exclusionary reasons. This Article contends that the architecture onto which human law is layered justifies legal authority. The authority of human laws can be justified and explained only in light of the eternal and natural law.

Contra Raz, the concept of authority articulated in this Article necessarily entails an obligation located beyond the mere command of the one claiming authority to compel obedience to the command. The power of authority in its essence is the power not merely to persuade one to choose an action one might otherwise not have chosen but, as Perry has defined it, the power "to change persons' normative situations," by which he means changing their normative situation by creating a specific obligation to act that did not exist prior to the authoritative act.<sup>28</sup> Authority in the strongest sense of the word is not merely a

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<sup>25</sup> Hart, *supra* note 5, at 104–05.

<sup>26</sup> See, e.g., Rebecca L. Brown, *How Constitutional Theory Found Its Soul: The Contributions of Ronald Dworkin*, in *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* 1, 1 (Scott Hershovitz ed., Oxford Univ. Press 2006).

<sup>27</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 93, 97, 103, 151 (1986); see also Brian M. McCall, *Exploring the Foundations of Dworkin's Empire: The Discovery of an Underground Positivist*, 4 *J.L., PHIL. & CULTURE* 195, 201–02 (2009) (reviewing SCOTT HERSHOVITZ, *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* (2008)).

<sup>28</sup> Stephen R. Perry, *Political Authority and Political Obligation* 2 n.4 (July 12, 2012) (on file with the University of Pennsylvania Legal Scholarship Repository).

claimed ability to superior knowledge of what should be done.<sup>29</sup> To hold authority involves more than merely repeating the content of a preexisting obligation for the purpose of clarifying and publicizing its content—although those possessing authority may do this as well. The strongest form of the concept of authority involves a power to legitimately bring obligations into existence by choosing to enact particular laws. This Article defines, delineates, and defends this strong form of authority. Stephen Perry offers a useful definition of this strong form of authority that is the subject of this Article: “If a directive was issued by an organ of a government which not only claims but also possesses legitimate authority, then those persons who fall within the scope of the directive have an obligation to obey it. Because legitimate authority is moral authority, this obligation is a moral obligation.”<sup>30</sup> The definition contains a criterion for distinguishing between what Patrick Brennan calls “authoritarian” and “authority.”<sup>31</sup> The definition of legitimate authority creates a distinction between a subtle gunman, the one who clothes himself in the robes of a political ruler claiming authority but who, although possessing the power to compel compliance, lacks the power to create obligations to comply. Whereas most people can recognize the gunman when they see him, it is more difficult to recognize the gunman when he is clothed with the vestments of legitimate authority, when he commands from the Kremlin or the White House, but whose claim to authority is false. By defining the precise scope of the claim to authority, it becomes possible to distinguish the authoritarian from the authority. By claiming the obligation to be moral, Perry points to a criterion of evaluation outside the command itself. It obligates by virtue of something beyond itself whereas the gunman or the authoritarian merely obliges by the force of his threats.

One final definitional clarification is warranted. This Article considers only a species of political authority, the power specifically to create or alter laws. The definition of *auctoritas* included the power to create both commands and precepts.<sup>32</sup>

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<sup>29</sup> See GREENE, *supra* note 18.

<sup>30</sup> PERRY, *supra* note 28, at 5.

<sup>31</sup> Patrick McKinley Brennan, *Locating Authority*, in *CIVILIZING AUTHORITY: SOCIETY, STATE AND CHURCH* 163 (Patrick Brennan ed., Lexington Books 2007).

<sup>32</sup> See *ENCYCLOPEDIA OF POLITICAL THEORY* 100 (Mark Bevir ed., 1st ed. 2010).

Political authority in the broadest sense includes both of these powers. Political authority includes the power to order individuals to act in particular ways. The president may order the army to move to a specific location. The governor may order the offices of a state to close on a certain day due to inclement weather. Neither of these acts involves the creation of a law. Law involves the formulation of a rule and measure of human acts which, although capable of formulation at various levels of generality or specificity, are directed to a community, or a group within a community, to serve as a general guide to action—not an order to act a particular way at a particular time. A law, as opposed to a command, transcends any particular individuals.<sup>33</sup> Laws, although capable of repeal, are written to apply beyond any particular individual at any point in time. A formulated law is not directed merely to the living members of the community for which it is made but to future members—unless the law is later revoked. A command, by contrast, is directed to compel action by one or more particular individuals at points in time and is intended to lapse when the commanded acts are completed. The consideration of authority within this Article is restricted solely to the power to change normative positions by enacting laws. This limitation is not meant to deny the existence of the power of authorities to command but merely to distinguish the power which is likely subject to differing justifications and limitations. Austin and Hart, two jurists who have thought deeply about authority and law, seem to neglect this distinction within political authority.<sup>34</sup> The following discussion is concerned solely with the authority to make obligatory law. Part I examines the two general categories of arguments used to justify legal authority and demonstrate how they fail. It concludes with a brief examination of two theories of authority which do not fall into either group and which come the closest to a real justification of legal authority, that of Joseph Raz and Stephen Perry. Yet, even these attempts fail to provide a completely satisfactory answer.

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<sup>33</sup> See ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. I-II, Q. 90, art. 4 [hereinafter *SUMMA THEOLOGIAE*].

<sup>34</sup> See, e.g., HART, *supra* note 5, at 18–48; RAZ, *THE AUTHORITY OF LAW*, *supra* note 13, at 11–19.

## I. ATTEMPTS TO JUSTIFY AUTHORITY AND OBLIGATION

Innumerable attempts have been made in the history of jurisprudence to justify the power of some people to make laws which others are obliged to obey and thereby change the others' normative position. Although there are many fine distinctions among the theories, they can be grouped into two major categories: consent theories and utilitarian arguments. This Part summarizes the key features of each type of justification and demonstrates their inadequacy, both in the sense of the failure of the argument on its own terms and its failure to explain the ontological goodness of authority. If the strong form of the definition of authority requires that those subject to the law should obey the law even when they believe their calculation of the best action is superior, a complete justification of authority must prove the ontology of authority by explaining its origin and causes. It must demonstrate the good of authority in itself, and not merely instrumentally. To assist in this evaluation, this Part has recourse to the criteria developed by Leslie Green to evaluate whether a particular purported legal system entails an obligation to obey its laws. Although these criteria are not formulated to prove the reality and goodness of authority in the universal context, they are helpful when applied to particular communities. Stephen Perry has provided a succinct recitation of Green's criteria:

To justify the conclusion that there is, within a given legal system, a general obligation to obey the law, the supporting argument or arguments must, according to Green, show that this obligation is (i) a moral reason for action; (ii) a content-independent reason for action, meaning a reason to do as the state directs because the state directs it and not because its directives have a certain content; (iii) a binding or mandatory reason for action, as opposed to a reason which simply happens to outweigh other relevant reasons; (iv) a particular reason for action, meaning a reason that arises only for the directives of a citizen's (or subject's) own state, and not for the directives of other states; and, finally, (v) a universal reason for action, in the double sense that it binds all of a state's citizens to all of that state's laws.<sup>35</sup>

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<sup>35</sup> Perry, *supra* note 28, at 14.

Throughout the analysis of authority, these six criteria will be used as a hermeneutic for judging the success or failure of theories of authority.

A. *Consent Theories*

When the natural law-based justification of authority, described in the next Section, was rejected in the early modern era, philosophers and jurists not willing to abandon themselves to anarchism searched for a substitute. They turned to a familiar area of the law: contracts. Contract law is the law of voluntarily created obligations. If successful, consent theory would satisfy the six conditions for authority since it provides a binding content-independent moral reason for obeying the law made by others universally applicable only to the members of the relevant community. The reason for obeying the law would be the antecedent contractual promise to do so not because of its content but because one promised to obey the law. The moral obligation to obey the law would be entailed by the moral obligation to honor voluntary contracted obligations—which if such a moral obligation can be proven it would support public contracts consenting to obey the law. If the consent were valid such an obligation would be binding. If the consent as given applied universally to all laws made at any time, the obligation would be universal and at the same time limited only to those members of the community made such by consent and not individuals consenting to different states. Although the six conditions would be met, the problem is that consent theory has not been able to establish the existence of the requisite voluntary consent to a universal obligation to obey the laws of a particular legal system by each member of the relevant legal community.

Contracts come into existence upon the freely given consent of the contracting parties. From Rousseau to Locke, many who rejected traditional natural law saw a potential substitute theory in this basic act of voluntary consent.<sup>36</sup> Legal authority and the entailed obligation could be the product of voluntary consent of the governed entering into a compact imposing an obligation to obey the law.<sup>37</sup> But contracts only impose binding obligations on

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<sup>36</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ¶ 95 (Bobbs-Merrill 1952); JEAN-JACQUES ROUSSEAU, *SOCIAL CONTRACT* 152 (Penguin Books 1968).

<sup>37</sup> See, e.g., LOCKE, *supra* note 36, at ¶¶ 14, 22.

the parties actually consenting thereto, and consent of the governed is, at best, a myth. The consent myth has played a significant role in attempting to justify legal authority in America. Americans must obey the law because the consent of “We the People” legitimized the U.S. government.<sup>38</sup> America’s first president invoked this argument to urge obedience to the laws during his farewell address:

The basis of our political systems is the right of the people to make and to alter their own constitutions of government. . . . The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government.<sup>39</sup>

Christopher Ferrara has exploded such rhetoric demonstrating that “We the People” was no more than a tiny minority of the people living in America at the time of ratification of the Constitution.<sup>40</sup> According to Ferrara,

no more than about five percent of the total American population at the time, or about 160,000 white male voters actually cast votes for delegates to the ratifying conventions. Of these 160,000 probably about 60,000 were opposed to ratification. Thus . . . it was . . . only a few hundred *ad hoc* delegates at ratifying conventions whose votes represented the will of about 100,000 propertied electors in a nation of some 3.5 million people, not including the slave population.<sup>41</sup>

Beyond this problem, how does this consent of a majority of five percent of the population hundreds of years ago express the voluntary consent of those living today? As Randy Barnett quipped, “In what sense can a small minority of inhabitants presuming to call themselves ‘We the People’ bind anyone but themselves? And assuming they could somehow bind everyone then alive, how could they bind, by their consent, their posterity?”<sup>42</sup> Yet, these few hundred men’s votes, treated by the myth of “We the People,” are deemed sufficient to express a voluntary consent to be morally obligated to universally obey the

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<sup>38</sup> See, e.g., Barnett, *supra* note 11, at 115.

<sup>39</sup> George Washington, “Farewell Address” (Sept. 17, 1796), in *Documents of American History*, 169, 172 (Henry Steele Commager & Milton Cantor eds., 10th ed., Prentice-Hall, 1973).

<sup>40</sup> CHRISTOPHER A. FERRARA, *LIBERTY THE GOD THAT FAILED 175–87* (Angelico Press 2012).

<sup>41</sup> *Id.* at 183.

<sup>42</sup> Barnett, *supra* note 11, at 123.

laws of a government that was ratified hundreds of years ago. No one living today was alive then to even be excluded from that elite electorate

Even Jean-Jacques Rousseau recognized that the only way to justify legal authority—and an obligation on the part of each member of a society to obey the law—is through unanimous consent to this social contract.<sup>43</sup> Yet, even this early pioneer of consent theory recognized his social contract was only a myth and not a real contract. Unlike with real contracts, which require a real objective manifestation to be bound by the contract, Rousseau admitted that requiring real universal consent was impossible and some form of tacit consent would be necessary to hold his theory together.<sup>44</sup> The weakest form of tacit consent attempts to imply consent from other acts or passive states ranging from voting, residing in a territory, the failure to engage in rebellion,<sup>45</sup> or the receipt by a resident of a territory of some benefit.<sup>46</sup> The voting or political participation version of implied consent relies on the ambiguity of an act like voting which may not imply consent to the system but merely be an act of self defense to avoid a worse evil.<sup>47</sup> As to passive acts such as living in a territory or benefiting from living in a society,<sup>48</sup> these

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<sup>43</sup> ROUSSEAU, *supra* note 36.

<sup>44</sup> *Id.* at 135, 153.

<sup>45</sup> Barnett, *supra* note 11, at 118.

<sup>46</sup> LOCKE, *supra* note 36, at ¶ 119.

<sup>47</sup> See GREENE, *supra* note 18, at 45. Greene also points out that participation in the electoral process, even if it could imply consent to the results of the election in which one voted, cannot be used for its claimed purpose of binding one to the electoral results in the past. *Id.* at 47. Jeffrey Reiman summarizes the failure of the so-called electoral participation theory of consent:

[T]here is nothing inherently legitimating about the electoral process. If anything, the electoral process is the problem, not the solution. . . . [T]he policies that emerge from the electoral process will be imposed on the dissenting minority against its wishes. And then, rather than answering the question of legitimacy, this will raise the question with respect to those dissenters. Why are the exercises of power approved by the majority against the wishes of (and potentially prohibiting the desired actions of) the minority obligatory with respect to the minority? Why are such exercises of power not simply a matter of the majority tyrannizing the minority?

Jeffrey Reiman, *The Constitution, Rights, and the Conditions of Legitimacy*, in CONSTITUTIONALISM: THE PHILOSOPHICAL DIMENSION 127, 134 (Alan S. Rosenbaum ed., Greenwood Press 1988).

<sup>48</sup> See, e.g., A. JOHN SIMMONS, THE PRINCIPLE OF FAIR PLAY, THE DUTY TO OBEY THE LAW: SELECTED PHILOSOPHICAL READINGS 107, 124–5, (Williamson A. Edmunson ed., Rowman & Littlefield 1999); A. John Simmons, The Principle of Fair Play, 8 PHIL. & PUB. AFF. 307, 307 (1979);

arguments run afoul of the principle that mere silence cannot bind an offeree to a contract.<sup>49</sup> A car company cannot drop off a car in your driveway and say, “You owe us if we do not hear from you.” As Randy Barnett observes, “It is still not clear, however, that one is obligated to pay for all unsolicited benefits one receives from others.”<sup>50</sup> If taken to its logical extension, the receipt of benefits legitimizes slavery at least in the case of a beneficent master who provides enough benefits.<sup>51</sup> At a minimum, the resting of a claim to tacit consent on the threat of removal of basic benefits flowing from communal life of any society would seem to constitute undue influence or even duress. Any attempt at implying consent by the receipt of benefits must prove that an easy and realistic option exists for exiting the purportedly beneficial system. People are born into a territory, into a family, and have very little real choice to leave or rebel. The absence of a realistic, inexpensive exit option from the territory means that remaining in a territory is a poor argument for the presence of freely given consent.<sup>52</sup> Thus, tacit consent is really a method for imposing the desired consent on those who do not affirmatively do so. As Randy Barnett wryly notes, “It is a queer sort of ‘consent’ where there is no way to refuse. ‘Heads I win, tails you lose,’ is the way to describe a rigged contest. ‘Heads’ you consent, ‘tails’ you consent, ‘didn’t flip the coin,’ guess what? You consent as well. This is simply not consent.”<sup>53</sup> The logical fallacy in all consent arguments consists in a faulty leap from the legitimate principle of consent in personal relationships and contracts to implied consent in impersonal groups.<sup>54</sup> Rawls’s approach represents a desperate last-ditch effort to invent consent. If real and tacit consent fail to exist, a “hypothetical consent” can be implied. People have consented to that to which they ought to consent. Rawls argues, “The choice which rational

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<sup>49</sup> Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 Seattle U. L. Rev. 469, 502 (2008).

<sup>50</sup> Barnett, *supra* note 11, at 133.

<sup>51</sup> *Id.* at 136.

<sup>52</sup> GREENE, *supra* note 18, at 39–40.

<sup>53</sup> Barnett, *supra* note 11, at 120.

<sup>54</sup> See GREENE, *supra* note 18, at 81 (arguing that such a consent argument “is constitutive of intimate associations and one-to-one promise relationships, respecting the state or a state official as one would respect oneself is not constitutive of citizenship”).

men would make in this hypothetical situation of equal liberty . . . determines the principles of justice.”<sup>55</sup> Thus, “We the People” must obey the laws because Americans have hypothetically consented to what John Rawls says people would have consented to if he asked them, which in fact he never did. Consent has turned into hypothetical or imagined consent. Paul W. Kahn makes explicit the imaginary nature of consent:

To see through the constitution to the popular sovereign whose act it records is what makes it literally our constitution, despite the fact that we, as finite individuals, neither wrote it nor approved it. This is not a matter of “implicit consent” but of a social imaginary that grounds faith. The constitution claims us not because it is just—although we want it to be just—but because it is a remnant of a politics of authenticity that we still imagine as our own.<sup>56</sup>

Beyond the failure to actually prove the existence of any real, meaningful consent to legal authority, the consent argument fails for another reason of ontology. Even if everyone could somehow engage in an evergreen free and voluntary consent, what proof is there that individuals possess the ability to confer such a power in the first place? It is an ancient legal maxim that no one can transfer more authority than one possesses.<sup>57</sup> The proponents of consent merely argue about the legitimacy of the process of passing along legitimate authority from “We the People” to lawmakers. Yet, as Kelsen argues, legitimate authority must rest on a chain of authorization back to a source.<sup>58</sup> Consent theory, if successful, merely proves that a power was passed legitimately. It has no answer for the origin of the power to change others normative situation. It has no answer to the question how one or more human beings can change the normative position of another creature sharing an equal nature. As Abner Greene observes, consent theory only works if you start with the premise that individuals possess authority to be given up in the consenting.<sup>59</sup> Whence does the power to choose our own actions originate? By focusing on the process of transmission,

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<sup>55</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 11 (Oxford Univ. Press 1999).

<sup>56</sup> PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 142 (Columbia Univ. Press 2012).

<sup>57</sup> See, e.g., Justinian, *Digest* 50.17.54 (“Nemo plus iuris ad alium transferre potest, quam ipse haberet.”).

<sup>58</sup> See RAZ, *THE AUTHORITY OF LAW*, *supra* note 13, at 126.

<sup>59</sup> GREENE, *supra* note 18, at 36.

consent theories ignore the larger ontological problem of the justification of the power supposedly transmitted. Stephen Perry glimpses this problem with acts of consent justifying the categorical power to obligate everyone to obey the law.<sup>60</sup> Michael Moore explains that the failure of consent theories—or other theories based upon the will of individuals—lies in the unjustified move from the fact that sometimes individuals engage in obligation-creating acts—by making a promise for example—to the claim that individuals possess a limitless sovereignty to create obligations.<sup>61</sup> This limitless sovereignty, which consent theorists assume resides in the individual, can then be transmitted by some real or fictitious consent. Yet, as Moore argues:

We should see these obligation-creating acts as part of our limited moral sovereignty, that is, the capacity which each person possesses to alter the moral landscape through his exercise of will. . . . That we have some such sovereignty at all is only because other obligation-creating norms permit us to have and to exercise such powers.”<sup>62</sup>

Even if actual consent were possible, which it is not, it would not transmit a plenary obligation-creating authority since individuals lack such limitless authority. Thus, consent theories of varying stripes fail to fulfill, at the very minimum, Leslie Green’s first and third criteria.<sup>63</sup> Absent real unanimous consent, the theory does not establish a moral reason to obey the law as the authority supposedly conferred by consent has no ontological or moral basis, and consent theories lack a plausible reason why those who do not consent to the system in general or particular laws with which they disagree are obligated notwithstanding their lack of consent universally to obey the law.

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<sup>60</sup> Perry, *supra* note 28, at 29 (“But the basic argument, which if correct applies to all ‘voluntaristic’ arguments for a general obligation to obey the law, including the argument from fair play, is this. Any argument that offers to justify the state’s claimed moral power to impose obligations cannot be conditioned on such contingencies as whether or not citizens (or, more generally, subjects of the law) have engaged in a particular kind of act—for example, the acceptance of benefits, or the making of a promise. This is so because any obligations that arise from the exercise of the power will be categorical, and as such cannot be conditioned on this kind of contingency.”).

<sup>61</sup> Michael S. Moore, *Good Without God, in* NATURAL LAW, LIBERALISM, AND MORALITY: CONTEMPORARY ESSAYS 235–36 (Robert George, ed., 2001).

<sup>62</sup> *Id.* at 236.

<sup>63</sup> See Perry, *supra* note 28, at 11–12.

This lack of reasonable plausibility evacuates human law of the quality of rationality. For consent theorists such as Thomas Hobbes, the starting point is not a universally valid rational law but rather each person's right to self-preservation.<sup>64</sup> Since the foundation of modern authority is not a rational law, the rule of the wise in which rulers deserve to make law because they are skilled in the love of truth, advocated by the ancient philosophers, is no longer considered the best regime.<sup>65</sup> One does not rule by virtue of wisdom but by virtue of having received some volitional consent in the mythical state of nature. Law no longer needs to be reasonable but simply be a willed act of the hypothetically consented to authority.<sup>66</sup>

### *B. Utilitarian Justifications*

Beyond consent theories, another group of jurists attempt to justify authority on utilitarian grounds. This term does not mean that all of these theorists are utilitarian in the strict sense of the term. They all approach the topic from different philosophical premises. What they all have in common is that they justify authority only instrumentally. Authority is good because it is instrumentally useful or effective for achieving some other good. Certainly there is nothing wrong with authority being efficient or useful in achieving other goods. The problem is that usefulness does not justify authority as a real good. If it is only instrumentally good, then authority cannot bind universally in conscience. Doing so begs the question if in a particular situation obedience to authority is not useful or effective—even taking such terms in their most long-term perspective where obedience may not be useful in particular case but disobedience may diminish respect for law, including for the actor, and thus it is useful to obey in the one case, why should one obey the law? One should obey a legal authority in such a case only if doing so is in and of itself good. To say anything less about authority may justify authority as useful but does not justify a universal obligation to obey the law because doing so is good.

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<sup>64</sup> LEO STRAUSS, *NATURAL RIGHT IN HISTORY* 185–86 (1953).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

For the utilitarian justification, the presence of an authority to make laws that people are obligated to obey is useful for communities. Society is better off with authority than without. Although the prior sentence may sound like a truism to all but the most committed anarchist, it does not really justify authority in and of itself. It only justifies it as a less offensive alternative to anarchy. Ultimately, although some utilitarians use moral language—and would likely object to being labeled utilitarian—all among the wide variety of utilitarian theories fail to support an authority that gives a content independent moral reason to obey the law universally.

The negative utilitarian argument—it is a lesser evil than anarchy—is rooted in the state of nature myth used by the consent theorists although it avoids the need for consent. The state of nature is so dangerous and horrid that individuals are all better off with authority that can keep them from slipping back into the state of nature.<sup>67</sup> One of the two main problems with this argument is that it is unverifiable. Since it compares life with authority to a never existent myth, it can never prove its claim of life being better now. The argument sets up a false dichotomy between life with authority and a nonexistent reality so it simply asserts the conclusion that authority is useful. Secondly, the theory fails criteria (ii) content independence, criteria (iii) a binding obligation and not merely the best among other reasons, and criteria (v) universality. Since the end of authority, for the utilitarian approach, is merely avoiding a worse fate, its goodness is dependent upon the extent to which it is in fact the best means to that end in all cases. The problem of legal cheating confronts the theory. To use a classic example, if a person can know for certain that driving through a red light at a deserted intersection entails no risk of slipping into the dreaded state of nature, and if in fact that person can argue that arriving at the destination on time will contribute to a stable and orderly society—perhaps he is on the way to a shift as a police officer—then that person can conclude that running the light is more utilitarian. This example sweeps some complexity under the carpet. There is the argument that not obeying the law wears down respect for the law, and thus it should be universally obeyed even when a particular instance suggests it is

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<sup>67</sup> See GREENE, *supra* note 18, at 94–95 (summarizing this argument).

unnecessary in that context. Yet, if it could be proven that an individual is a perfect utilitarian in that he will not lose his sense of respect for laws that are really justified on a case-by-case basis to avoid the slip into the state of nature then he has no duty to obey a law which does not instrumentally serve the given end. The negative utilitarian argument thus fails to bind universally but only when a particular law is in fact an effective means to avoid the slip into the state of nature. It also fails to offer a content independent reason for obeying the law. Each law is only worthy of obedience to the extent its content actually fulfills the utilitarian criterion of effectiveness.

The more successful utilitarian arguments approach the problem positively. The good that authority is useful for achieving is not simply avoiding a worse mythical state but making possible some positive good. For John Finnis, authority is essentially utilitarian in that it makes possible the good of coordination. First, Finnis argues that authority is needed because people are selfish and foolish in pursuing the common good.<sup>68</sup> This argument is merely a reformulated version of the state of nature argument. Without authority, society is at the mercy of selfish and foolish people. Authority is needed to avoid this worse fate. But Finnis progresses to a more interesting question, “In a community free from these vices, would authority be needed, or justified?”<sup>69</sup> Finnis asserts that “more authority” may be necessary in such an idyllic community to solve coordination problems.<sup>70</sup> Practical reasonableness will often support several reasonable and appropriate solutions to a problem. Authority is needed to choose among them since unanimity of choice is practically impossible and consent theory is merely a form of unattainable unanimity. Having an authority is the only other possibility.<sup>71</sup> Authority is thus only an instrumental good “because required for the realization of the common good.”<sup>72</sup> Although less morbid than the negative utilitarians—since Finnis talks about achieving a positive common good not merely avoiding a worse evil—in the end Finnis can only argue that authority is good by default. Nothing else

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<sup>68</sup> JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 231 (2011).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 231–33.

<sup>72</sup> *Id.* at 246.

works to coordinate effort towards the common good so authority must be good. Authority is thus not good in the broadest sense in which Finnis uses the term—and for which he introduces the word value.<sup>73</sup> To be such, it must be “desirable for its own sake and not merely as something sought after under some such description as . . . ‘what will contribute to my survival.’”<sup>74</sup> Consistently Finnis does not include authority in his list of basic goods.<sup>75</sup> It is only good if it is the only means to achieve coordination which itself is only an instrumental and not basic good. If it could be proven that either in a society of devils or of angels, coordination and the common good could be achieved without authority, then authority would lose its purpose and cease to be an instrumental good. Finnis offers no real ontology for authority as a good in itself. His theory of authority thus fails criteria (ii), (iii), and (v). The only reason to obey authority is because it appears to be the only useful means of coordinating action. Thus, to the extent authority fails to do so it is sapped of its moral authority and is thus not content independent. As understood by Finnis, authority lacks universality in that it would cease to exist in the presence of other more effective methods of coordination.

Although Finnis ultimately concludes that “God is the basis of obligation,”<sup>76</sup> he denies that knowledge of God helps answer questions about obligation.<sup>77</sup> Finnis clearly states that he does not ground his understanding of obligation in terms of conformity to God’s Supreme Will,<sup>78</sup> although he admits that God is the ultimate origin of obligation. As with the Eternal Law, Finnis’ ultimate conclusion is that God is practically irrelevant for understanding and justifying authority. Such a conclusion runs counter to the entire Aristotelian tradition which holds that we must know things through their causes. The ultimate causality of God for authority is dismissed by Finnis from necessary consideration.

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<sup>73</sup> *Id.* at 61.

<sup>74</sup> *Id.* at 62.

<sup>75</sup> *Id.* at 86–90.

<sup>76</sup> *Id.* at 407.

<sup>77</sup> *Id.* at 405.

<sup>78</sup> *Id.* at 403.

Stripped of a necessary ontology of its own, Finnis's theory contains, for all practical purposes, no origin of authority, no transmission, devolution, or consent. Tellingly, when Finnis quotes Fortescue's famous discussion of authority, he can't abide his statement that authority comes from "natural law" and changes it to "practical reasonableness."<sup>79</sup> If authority comes from natural law, that suggests it has an ontology, a history of devolution. The next Part shows that Fortescue's claim that the law of nature establishes authority, which Finnis dismisses as "lawyerly jargon,"<sup>80</sup> is central to the ontological justification of authority. For Finnis, there is only a fact: People acquiescing to someone as an authority explains that there is authority.<sup>81</sup> Lawyers try to legalize the devolution of undeveloped authority.<sup>82</sup> "[T]he sheer fact that virtually everyone will acquiesce in somebody's say-so is the presumptively necessary and defeasibly sufficient condition for the normative judgment that that person has—that is, is justified in exercising—authority in that community."<sup>83</sup> Ironically, although Finnis goes to great lengths to claim he is avoiding the "is" entails "ought" so-called fallacy—rather than rejecting its universal application as a fallacy—this argument simply asserts that authority ought to exist because people nearly universally do acquiesce to someone. To this "scandalously stark principle" he adds two riders. First, the person exercising authority has to comply with the constitutional provisions applicable to gaining the position at the time and place, if any. Finnis's rule is merely a reincarnation of Hart's rule of recognition which simply exists without an ontological foundation or explained and justified origin.<sup>84</sup> As long as one complies with the fact of the rule of recognition, authority is justified. Further, Finnis recognizes that not all people to whom enough people acquiesce are deserving of authority so he has to borrow from consent theorists and create his own myth, like Rousseau and Rawls. His is this: "when practically reasonable

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<sup>79</sup> *Id.* at 251.

<sup>80</sup> *Id.* at 252.

<sup>81</sup> On this point, Finnis's claim becomes indistinguishable from H.L.A. Hart's argument that the fact of obedience to authority simply must be recognized.

<sup>82</sup> FINNIS, *supra* note 68, at 250.

<sup>83</sup> *Id.*

<sup>84</sup> HART, *supra* note 5, at 97–98 (stating the existence of an unstated and often unformulated rule of recognition which can have virtually any content as long as it is in fact used as a rule of recognition by a society).

subjects, with the common good in view, would think they *ought* to consent to it” then they should.<sup>85</sup> Thus, a real community has an obligation to accept an authority when a mythic community of mythic people would have to do so. When ought they accept an authority? The full force of Finnis’s utilitarianism is on display in the answer to this question: “Authority—and thus the *responsibility* of governing—in a community is to be exercised by those who can in fact effectively settle co-ordination problems for that community.”<sup>86</sup> This is another form of fictitious consent: People are deemed to have consented when they ought to consent. They ought to obey simply because there is a fact of authority and there is no other way to get things done.

Some scholars attempt to avoid the utilitarian justification by claiming that authority is valuable in itself; yet, upon closer examination their theory is at heart utilitarian. Joseph Raz, although rejecting a universal obligation to obey the law does recognize that respect for authority is at least permissible. Raz concedes that it is permissible to respect the law—at least in a good legal system—and if you do in fact respect the law then you may be obligated to obey the law.<sup>87</sup> Thus, there is only a contingent duty to obey an authority; if you respect a particular legal system’s law then that respect is the source of your obligation. Raz’s duty can never become completely content independent. The contingent duty only arises if one judges the content of a legal system to be good. A flaw in Raz’s argument can be observed by considering an analogy he uses, friendship. He argues there is no duty to have friendships but if one in fact has a friendship then he has a duty to act as a friend towards the friend.<sup>88</sup> For Raz, there is no good in being a legal system or a good in law itself—regardless of content. Likewise, there is no good in friendship itself. He fails to see that although one may have no duty to be a friend to a particular person—or to be subject to a particular legal system—one does have an obligation to pursue the good of friendship—due to the social component of our nature—and law in general. Friendship and, as discussed

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<sup>85</sup> FINNIS, *supra* note 68, at 251. Finnis does describe this rule as only a “rule of thumb” as to when to refuse to obey someone who has garnered acquiescence leaving the reader in more of a quandary of exactly when authority is justified.

<sup>86</sup> *Id.* at 246.

<sup>87</sup> RAZ, THE AUTHORITY OF LAW *supra* note 13, at 250, 260.

<sup>88</sup> *Id.* at 253–54, 256.

more in the next Part, law are both good because they are a component of Man's nature—specifically his social and political nature—for which Man has a natural inclination.<sup>89</sup> Although there may be no obligation to establish a friendship with a particular person, one is obligated—naturally inclined by nature—to friendships and the attainment of friendship is a good—although there certainly can be degrees of goodness of any particular friendships. As discussed more in the next Part, Man is inclined to law and therefore having law is good—although there are degrees of goodness. For Raz on the other hand, the attribute of authority of law is not good in and of itself but only good if one chooses to respect a given legal system. Raz's conception thus clearly fails criteria (v), as the obligation is not universal but only effective for those who have chosen to respect the law.

Raz's justification is also not content independent. Unlike the consent theorists, Raz does argue that legal authorities are to act based on reasons. "All authoritative directives should be based, in the main, on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive."<sup>90</sup> It is notable however that Raz does not consider these reasons to be themselves legal. The authority in issuing a directive is not necessarily relying on law but in general should be relying on some undefined type of reasons. The work done by authority for Raz is simply to add pre-emptive force to the pre-existing undefined reasons on which the authority's determination depends. Raz develops this argument into what he calls a service conception of authority. Justifying authority "involves showing that the alleged subject is likely better to comply with reasons which apply to him . . . if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than trying to follow the reasons which apply to him directly."<sup>91</sup> Hugo Cyr demonstrates the utilitarian nature of Raz's theory by characterizing the service performed by authority

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<sup>89</sup> See *id.* at 53–77.

<sup>90</sup> Raz, *supra* note 6, at 14. Raz never claims that every decision must be based exclusively on dependent reasons but that they must mostly be. See *id.* at 16 ("All it [the Service Conception] requires is that it shall act primarily for dependent reasons.").

<sup>91</sup> *Id.* at 18–19; see also JOSEPH RAZ, *THE MORALITY OF FREEDOM* 53 (Oxford Univ. Press 1986).

as merely a “resource-saving” service.<sup>92</sup> Rather than having to spend the time analyzing all our reasons for action, we can simply obey the decision made by the authority. Yet, as Hugo Cyr has pointed out, if Raz’s theory is taken literally there is really no resource saving because in order to know if we should obey an authority we have to conclude that they do in fact perform this service—they do primarily base decisions on the reasons that individuals would otherwise weight for themselves. Cyr explains, “Moreover, to actually determine whether or not an authority is worth accepting, according to the Service Conception, the subject will ultimately have to engage in the very deliberations that the ‘resource-saving’ feature of the Service Conception was meant to help the subject avoid.”<sup>93</sup>

In making this evaluation the subject is analyzing the content of the authoritative decisions to see if they meet the standard of being primarily based on the reasons that would have been considered. Thus, announced rules are not content independent; they rely for legitimacy on their content meeting this standard. In undertaking this exercise to determine the legitimacy of an entity as an authority the subjects end up “destroy[ing] the authority function of that entity”<sup>94</sup> because the subject has to engage in the same deliberations from which the authority was supposed to save him. The only way to avoid destroying the utilitarian benefit of the authority saving decision making resources of subjects is to abstain from conducting the necessary evaluation of whether the authority meets the standard and accept the conclusion “that an entity has a legitimate authority over us would be ultimately a matter of faith.”<sup>95</sup>

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<sup>92</sup> Hugo Cyr, *Functional and Existential Authorities*, 28 CAN. J. L. & JURIS. 265, 265–288, 271 (2015).

<sup>93</sup> *Id.* at 274.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

Stephen Perry summarizes Raz's argument:

Roughly speaking, the general idea is that, if one will better comply with right reason in a specified set of circumstances by allowing oneself to be guided by the judgment of another rather than by trying to act according to one's own judgment about what ought to be done, then one is justified in subjecting one's will to that of the other.<sup>96</sup>

Perry argues that although Raz's theory might explain the subjection to the directives of another on some occasions—that is, when subjection serves conformity with practical reason—it does not ever provide justification for the power of an authority to change people's normative positions in and of itself.<sup>97</sup> Essentially Raz's position collapses into a form of greater knowledge defense: One who possesses greater expertise becomes an authority based on that expertise. That authority is justified because it is based, although not exclusively, on what he calls dependent reasons,<sup>98</sup> reasons which are merely assumed by Raz to exist and which are not given an ontological, and specifically legal ontological, explanation. Ultimately, any obligation to obey the law of an authority is rooted in the claim that in the ideal—that is, if acting as the experts they are meant to be—they are supposed to be accessing undefined dependent reasons that apply to their subjects. Yet, as Perry points out, the fact that someone is morally obligated to conform to an expert's advice due to the wisdom of that advice does not itself prove the expert has moral power to command the individual to follow that advice.<sup>99</sup> The good advice of the expert contains its own reason for conformity, its inherent goodness. The reason for conformity does not reside in the expert but in the advice. As Perry observes, according to Raz's view:

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<sup>96</sup> Perry, *supra* note 28, at 54. Philip Soper also exposes the utilitarian basis of Raz's service conception of authority:

Raz designates his view the 'service conception' of authority: government exists because (and has authority just in case) it does a better job of advancing the aims of the governed (what 'ought to be their aims') than they could do on their own. The alternative conception might be called the 'leader' conception of authority: government exists because (and has authority just in case) it provides necessary direction in default of agreement about what *are* the aims of the governed.

See Soper, *supra* note 16, at 231–32.

<sup>97</sup> Perry, *supra* note 28, at 51.

<sup>98</sup> Raz, *supra* note 6, at 15.

<sup>99</sup> Perry, *supra* note 28, at 50–51, 57.

So long as I have reason to know that I will in general do better in complying with the reasons that apply to me in a given type of case by following the views of another person rather than by acting on my own judgment, it does not matter whether those views are offered in the form of advice or in the form of directives.<sup>100</sup>

Raz himself seems to concede that his theory is no more than the expert explanation of following authority when he admits that the conditions for the service conception are unlikely to obtain.<sup>101</sup> In the end, the advice of authority may be useful to acting reasonably but it is only authoritative subjectively for those who respect a particular legal system and see its laws as expert advice worthy of respect. In the end authority may be useful but it is not justified. Raz's theory fails the universality condition—condition (v)—because in Raz's view, a legal directive binds except when it does not due to other reasons such as arbitrariness or violation of fundamental human rights.<sup>102</sup> Ultimately, Raz's service conception of authority is merely that—at the service of other undefined, preexisting reasons which already apply to people. The authority is justified if its decisions are most of the time dependent on those reasons except if a particular decision violates other vague non-legal concepts such as “human rights.” For Raz, authority may most of the time make someone more likely to act rationally, but the rationality is the good and the authority is only most of the time useful. There is no particular good to authority itself.

The two thinkers who come closest to avoiding the utilitarian trap and locating the justification for legal authority are Stephen Perry and Randy Barnett. Perry's value theory of authority appears to transcend utilitarianism and sound in substantive moral argument. He argues that authority is a moral power conceived as a value based power. His value-based conception argues that “[l]egitimate moral authority can only exist if there is something sufficiently good or valuable about one person being able intentionally to change the normative situation of another

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<sup>100</sup> *Id.* at 66.

<sup>101</sup> RAZ, *supra* note 91, at 70, 76–78, 104.

<sup>102</sup> Raz, *supra* note 6, at 14; *see also id.* at 15 (“On the contrary, there is no point in having authorities unless their determinations are binding even if mistaken (though some mistakes may disqualify them.”). In other words, law should bind except when it should not for nonlegal reasons.

person.”<sup>103</sup> “[T]he moral and conceptual core of the concept of legitimate political authority” is that “one person has practical authority over another if there is sufficient value in the former person’s being able intentionally to change the normative situation of the latter . . . .”<sup>104</sup> Unlike Raz, Professor Perry recognizes that to justify authority as such, and not just the authority of a good system or a moral or legal expert, the exercise of authority must be shown to be a good or valuable. Professor Perry argues:

One person *A* has a power to effect a certain kind of change in the normative situation of another person *B* if there is reason for regarding actions which *A* takes with the intention of effecting a change of the relevant kind as in fact effecting such a change, where the justification for so regarding *A*’s actions is the sufficiency of the value or desirability of enabling *A* to make this kind of normative change by means of this kind of act.”<sup>105</sup>

Perry sees what utilitarian arguments miss, that the act of changing people’s normative positions must be explained as a good act regardless of its instrumental usefulness for some independent good. The problem that ultimately turns Perry’s argument into a utilitarian one is that he leaves indeterminate this value that is authority. He claims:

[My value theory of authority] is not intended to be a substantive theory addressed to the justification problem, nor can it operate as such. It is not self-applying; further moral argument is required to determine what kinds of value (if any) will justify *A*’s possession of such a power, as well as to determine the sufficiency of that value. This information will be provided by particular substantive theories of justification.<sup>106</sup>

Thus, in the end, the value of authority is utilitarian for Perry as authority is only valuable if it can be found to support attainment of some other undefined value. In other words, authority is merely the best way to reach some other moral goal by imposing obligations necessary to achieve it.<sup>107</sup> At most, Perry’s theory provides a hypothetical method for attempting to justify legal authority. If it can be proven that there is a value

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<sup>103</sup> Perry, *supra* note 28, at 33–34.

<sup>104</sup> *Id.* at 88.

<sup>105</sup> *Id.* at 31.

<sup>106</sup> *Id.* at 82.

<sup>107</sup> *Id.* at 64.

served by legal authority, then legal authority can be justified. To the extent that this conclusion frames the issue for consideration it is useful, but merely in such a modest capacity. Although using the language of moral justification, the value theory still reduces legal authority to a utilitarian role; authority is still instrumental to another undefined value. Perry would probably accept this evaluation, as by his own admission he is only offering a conception of authority and not a justification of it, which he says must come from political moral theory. The closest Perry's theory comes to a real justification is in its functional or teleological argument. The goal of the state is to "accomplish particularly important moral goals that states are uniquely suited, or at least particularly well suited, to achieve on behalf of their subjects."<sup>108</sup> A power which fulfills this function of states is good in that it is suited to the function. Authority fits this function by "means of the normative instrument of a capacity to impose obligations."<sup>109</sup>

In the end, Perry's argument becomes circular. Authority is justified because authority serves the function of the state achieving important moral goals. That is exactly what a theory of authority is supposed to justify, that another person or institution should direct individuals to or away from certain actions. Perry thus only transfers the discussion to the realm of "moral political philosophy." If the function of the state as Perry defines it can be justified in this other epistemological field than authority is justified because authority fulfills that function. Authority is left unjustified other than this utilitarian conclusion. As with the other utilitarian theories, this leaves criteria (ii) and (v) unmet since authority is only good to the extent its use or content actually fulfills the state's purpose. Also, authority would not bind in a hypothetical situation in which it could be shown that some other instrument could better fulfill this function.<sup>110</sup>

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<sup>108</sup> *Id.* at 10.

<sup>109</sup> Perry, *supra* note 28, at 10. Perry does not actually label his argument as teleological or functional but rather following Leslie Greene, he calls it the "task efficacy" theory of authority." Perry, *supra* note 28, at 10.

<sup>110</sup> As described in the next section, the traditional Natural Law explanation of authority meets Perry's two value criteria of authority: the intentionality condition—there must be value in someone having the power intentionally to bind others—and the prospectivity requirement—the present expectation of future acquiescence rather than mere fact of later acquiescence. The value in intentionality

Randy Barnett skillfully exposes the inadequacy of consent theories of legal authority. He keenly notes that even if universal consent were possible, which it is not, consent would only be meaningful if there were a real right not to consent.<sup>111</sup> Thus, even on the consent theorists own terms, something must pre-exist consent, the right to consent or not. Barnett uses this realization to ground legal authority not in consent but in rights.

The assumption that ‘first come rights, then comes government’ helps explain how lawmaking can be legitimate in the absence of consent. For a law would be *just*, and therefore binding in conscience, if its restrictions on a citizen’s freedom were (1) *necessary* to protect the rights of others, and (2) *proper* insofar as they did not violate the preexisting rights of the persons on whom they were imposed. The second of these requirements dispenses with the need to obtain the consent of the person on whom a law is imposed.<sup>112</sup>

He explains, “Therefore, when we move outside a community constituted by unanimous consent, laws must be scrutinized to ensure both that they are necessary and that they do not improperly infringe upon the rights retained by the people.”<sup>113</sup> As perceptive as Barnett’s argument is in exposing the failure of consent theories, he fails to ground his rights come first theory in a solid ontology and ultimately succumbs to the utilitarian trap. First, he substitutes rights for consent in his legal ontology. In the order of being first comes rights and then comes law which is legitimized through its respect for the preexisting rights. Yet, Barnett fails to find an origin for the preexisting rights. He merely assumes their existence and dispenses with the need for any particular content informing the rights on which legal legitimacy rests: “One need not accept any particular formulation of background rights, however, to accept the conception of constitutional legitimacy advanced here.”<sup>114</sup> If he is correct that respect for rights removes the need for consent, the conclusion begs the question of the nature and origin of these

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is that God intends that human authorities exist to make determinations of Natural Law. Prospectivity exists because it is expected that people should obey because there is a delegated authority which has been transmitted from the source of the legal architecture of the universe.

<sup>111</sup> Barnett, *supra* note 11, at 141–42.

<sup>112</sup> *Id.* at 142; *see also id.* at 145 (reiterating this two-part test).

<sup>113</sup> *Id.* at 142.

<sup>114</sup> *Id.* at 141.

rights. Barnett fails to answer this question. If rights are going to legitimize the power to coerce action independently of the content of the command, how can one evaluate the claim to legitimacy without knowing the content of those rights that are determinative in the justification? Thus, ultimately his theory of legal authority is based in a pre-supposed abstract rule such as Hart's Rule of Recognition and Kelsen's basic norm. Barnett's rights simply exist without cause, explanation, or necessary definition. They, like the rule of recognition and the basic norm, are an unjustified black box.<sup>115</sup> Once the ontologically empty concept of rights is assumed, then Barnett falls into the utilitarian trap. Laws are justified to the extent that they are useful to safeguard the preexisting rights. Laws remain utilitarian for Barnett, but he has simply substituted rights for happiness or pleasure or whatever term the particular utilitarian chooses to employ. There is no good in law itself. It is merely useful to protect the assumed but undefined background rights.

Ultimately, all the utilitarian claims to justification of authority as instrumentally good amount to unproven and unprovable claims that some group possesses some unique skill set that will allow them to manage society better than others for some purpose, value, or undefined set of rights. As Alasdair MacIntyre has argued, this claim is merely a fiction created to justify the fact of the power of managerial bureaucrats over society.<sup>116</sup> Essentially the utilitarian claim to legal authority is open to use by those in power or those seeking to overthrow those in power by simply asserting, "We are the best experts in law making and you are better off under our control." Such assertion lacks any justified reason for believing the claim to be true.

Consent and utilitarian theories fail to justify the power to change people's normative positions. All the theories considered fail because they lack any ontological grounding; they fail to identify anything other than a myth to explain the origin of authority and they fail to articulate any goodness in authority other than its usefulness.

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<sup>115</sup> At one point, Barnett switches his language from talking about rights to justice. *Id.* at 144. Justice might be able to serve as a source of obligation for action. Yet, Barnett fails to define justice as anything other than the rights he simply assumes to exist.

<sup>116</sup> ALASDAIR MACINTYRE, *AFTER VIRTUE* 75–77 (2d ed., Notre Dame Univ. Press 2007).

## II. THE NATURAL LAW JUSTIFICATION OF AUTHORITY

Having failed to find a satisfactory justification for authority in consent or utilitarian theories, this Part argues that traditional natural law theory provides a satisfactory grounding for legal authority. This Part has two objectives. First, it shows that the natural law justification provides ontology for human legal authority. Classical natural law jurisprudence provides a home for legal authority within the architecture of law resting on a solid ontological foundation. In doing so, this Part begins as Stephen Perry suggests by addressing the “‘existence conditions’ for a power to change through legal authority people’s normative position rather than on conditions that will justify the supposedly mediating conclusion that there exists a (general) moral obligation to obey the law.”<sup>117</sup> After exploring the proof of such power’s existence, the obligation to obey the laws made by the authority is explained and can then be limited. Second, this Part demonstrates that the natural law argument satisfies Leslie Green’s criteria for a successful argument for an obligation to obey the law.

### A. *The Creation of Legal Ontology*

The natural law justification of authority can be summed up in the old saying: “All authority comes from God.”<sup>118</sup> Pope Leo XIII noted that the notion of legal authority deriving from the people was a departure from classical Catholic jurisprudence, which held “the origin of authority in God as a natural and necessary principle.”<sup>119</sup> Joseph Raz admits that all authority must be conferred by another.<sup>120</sup> Raz explains that Kelsen’s legal theory recognizes the need for an external single norm to move from “is” to “ought” and validate all laws. According to Raz,

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<sup>117</sup> Perry, *supra* note 28, at 4.

<sup>118</sup> RICHARD FLATHMAN, *POLITICAL OBLIGATION* 215 (Atheneum 1972).

<sup>119</sup> Leo XIII, *Diuturnum*, no. 5., available at [http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_29061881\\_diuturnum.html](http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_29061881_diuturnum.html) (last visited July 29, 2016) (“[V]ery many men of more recent times, walking in the footsteps of those who in a former age assumed to themselves the name of philosophers, say that all power comes from the people; so that those who exercise it in the State do so not as their own, but as delegated to them by the people, and that, by this rule, it can be revoked by the will of the very people by whom it was delegated. But from these, Catholics dissent, who affirm that the right to rule is from God, as from a natural and necessary principle.”).

<sup>120</sup> RAZ, *THE AUTHORITY OF LAW*, *supra* note 13, at 20.

Kelsen admits some natural law is needed to have any law.<sup>121</sup> Kelsen admits that without his basic norm as presupposed there is no law. “[A]n anarchist . . . who denied the validity of the hypothetical basic norm of positive law . . . will view its positive regulation of human relationships . . . as mere power relations . . . .”<sup>122</sup> It is the basic norm that saves Kelsen’s system from being Hart’s gunman. But for Kelsen, there is no ontology for this basic norm; it is just an uncaused cause for the entire legal system which he has assumed to exist because it must exist.<sup>123</sup> In Raz’s words, for Kelsen, “It does not make sense with regard to any basic norm to ask when it was created, by whom or how. These categories simply do not apply to it.”<sup>124</sup> Without admitting so, Kelsen and Raz have simply come to the same conclusion that philosophers reached thousands of years ago. If the principle of origin of law is an uncaused cause, then that principle must be the uncaused cause of everything. C. G. Bateman observes:

[F]rom Hammurabi to Hadrian, and even on past to the Hapsburgs, the only affective benefactor of sovereignty was, at least in theory, the deity. In societies where religion was the fundamental framework of daily life for all classes, rulers, for the sake of legitimacy, had to acknowledge that it was the God or ‘the gods’ who had bequeathed their sovereignty. In this context sovereignty was never aggregately or individually understood as solely attached to either the will or skill of personages, it came from the deity.<sup>125</sup>

St. Paul expresses the same argument succinctly: “[A]uthority comes from God only, and all authorities that hold sway are of his ordinance.”<sup>126</sup> J.D. Goldsworthy concludes that only with God can morality successfully claim that “its precepts are authoritatively binding in a sense which transcends even enlightened self-interest.”<sup>127</sup> His claim holds equally true for law.

<sup>121</sup> *Id.* at 124–25, 129, 132–33.

<sup>122</sup> HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 413 (Russell & Russell 1945).

<sup>123</sup> Hart’s Rule of Recognition is similar in this respect in that it must exist for the legal system to exist, but Hart offers no explanation of why or how it exists other than to assume it does.

<sup>124</sup> RAZ, *THE AUTHORITY OF LAW*, *supra* note 13, at 126.

<sup>125</sup> Bateman, *supra* note 7, at 4–5.

<sup>126</sup> *Romans* 13:1 (Knox Bible).

<sup>127</sup> J.D. Goldsworthy, *God or Mackie: The Dilemma of Secular Moral Philosophy*, 30 *AM. J. JURIS.* 43, 77 (1985).

Even if Michael Moore's argument were correct, which this author does not believe to be the case, and society could have good without God,<sup>128</sup> he fails to even raise the related question, can we have authority without God? Even if Moore proves that there is good and that people should do good because of the reality of morality, such proof fails to explain why any person should have the power to change the normative position of another by determining what is good for him in a particular circumstance when good can be done in two or more morally ambivalent ways. Socrates, unlike Moore, saw the good, God, and authority as intimately linked.

For Socrates, it is not enough that kings or oligarchs, or even citizens, wield the largest share of political power in their states, it is whether that sovereign power is the product of the 'good[.]' As to the fountainhead of this notion of 'good,' like many of the theorists who ended up weighing in on sovereignty after Socrates, he appealed to God.<sup>129</sup>

Even Emperor Frederick II, not the most pious of Christian rulers, felt the need to acknowledge in promulgating legislation for the Kingdom of Sicily the ultimate origin of law in God. "After Divine Providence had formed the universe, . . . [God] put [His rational creatures] under a certain law . . ." <sup>130</sup> The modern crisis of justifying authority emerged when the notion of legal authority became detached completely from God so that political theory could imagine the state as being sovereign in its own right, whereas the time of Constantine's sovereign authority was "thought to be under the jurisdiction and control of God."<sup>131</sup>

In Kelsen's language—and this may be the bit of natural law Raz admits Kelsen needs—the basic norm is therefore the Eternal Law, an omnipresent foundation or starting point. Whereas Kelsen merely asserts the necessity of a basic norm, which has no ontology other than to fulfill a need to exist to make Kelsen's jurisprudence complete, the Eternal Law has a complete ontology, discussed in a prior article.<sup>132</sup> The Eternal Law is the

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<sup>128</sup> See Moore, *supra* note 61, at 236.

<sup>129</sup> Bateman, *supra* note 7, at 36.

<sup>130</sup> LIBER AUGUSTALIS [CONSTITUTIONS OF MELFI PROMULGATED BY THE EMPEROR FREDERICK II FOR THE KINGDOM OF SICILY IN 1231] 33 (James Powell trans., Syracuse Univ. Press 1971).

<sup>131</sup> Bateman, *supra* note 7, at 39.

<sup>132</sup> See Brian M. McCall, *The Architecture of Law: Building Law on a Solid Foundation—The Eternal and Natural Laws*, 10 *VERA LEX* 47–48 (2009).

only law, which is an uncaused cause since the Eternal Law is nothing other than the Divine Wisdom ordering the universe.<sup>133</sup> The Eternal Law legislates the ends of things, including legal authority and human law. If we can find authority legislated into the Eternal Law, we will have found a source from which all subsequent authority can be derived. Yet, we come to know the content of the Eternal Law not directly, but through our participation in the Eternal Law through the Natural Law.<sup>134</sup> Likewise we encounter the Natural Law not solely in the abstract but through the developing customary history of real political communities. Thus, by dialectically examining the authority exercised in actual, historically developing communities, we can find the origin of authority in the Eternal Law. In this sense, Leo XIII argued the principle that all authority comes from God is a “natural and necessary principle.”<sup>135</sup> It is necessary since, as even Kelsen acknowledged, authority must ultimately derive from a necessary being or an uncaused cause. It is natural because we come to know of its existence through the natural law.

St. Thomas begins his consideration of sovereign authority by considering Man’s ends.<sup>136</sup> By doing such, he begins with the Eternal and Natural Law. The Eternal Law establishes the ends of Man’s nature.<sup>137</sup> Those ends become known through the natural inclinations which direct Man. Yet, as Jean Porter argues, even though the principles of Natural Law, “are accessible to reflective judgement,” their relative indeterminacy means they are not sufficient in themselves “to govern conduct or to provide adequate structures for social activities.”<sup>138</sup> The principles permit a realm of choice among particular ways of conforming to Natural Law. Individuals must make some of those elections, but others cannot be left to each individual.<sup>139</sup> A

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<sup>133</sup> See *id.* at 57.

<sup>134</sup> See *id.* at 56–57.

<sup>135</sup> Leo XIII, *Diuturnum*, *supra* note 119, at no. 5.

<sup>136</sup> THOMAS AQUINAS, *DE REGNO*, in *SELECTED POLITICAL WRITINGS* bk. I, ch. i, p. 3 (A.P. d’Entrèves, ed., J.G. Dawson, trans., McMillan 1959).

<sup>137</sup> See McCall, *supra* note 132, at 92.

<sup>138</sup> JEAN PORTER, *MINISTERS OF THE LAW* 81 (William B. Eerdsman’s Publishing Co. 2010).

<sup>139</sup> See Brian M. McCall, *Decorating the Structure: The Art of Making Human Law*, 53 *J. CATH. LEGAL STUD.* 23, 27–28 (2014).

component of Man's ends is living in society.<sup>140</sup> The existence of communities is therefore commensurate with human nature.<sup>141</sup> Man is meant to live in a society. Since a community is a heterogeneous organism, it needs a principle of order to unify it.<sup>142</sup> Authority is therefore both "appropriate and . . . necessary" because in order to be effective in a social context, the determinations of Natural Law which affect the common good will have to be "public and . . . stable."<sup>143</sup> Yet, since the indeterminacy of Natural Law allows for more than one—although not an unlimited—rational choice, there will be an element of contingency to the any particular election made—the right as opposed to the left side of the road, for example.<sup>144</sup> As a result, Jean Porter concludes, "it must be imposed in some way if it is to [be] a cogent claim, having binding force within a context of human relations."<sup>145</sup> The nature of making particular determinations for a society requires that the election be both an act of reason—it must conform to the rational principles of Natural Law—and an act of the will—be an authoritative, binding choice among permissible possibilities. "[A]uthority serves to bring a relatively final, public, and generally acceptable specificity to indeterminate rational and natural principles in such a way as to create a framework for shared activities of diverse kinds."<sup>146</sup>

*B. From Necessary to Good*

Yet, the explanation in Section A appears on the surface to be utilitarian. Authority is justified because it is necessary to make social life possible. Yet, this appearance is only superficial. Authority is not only necessary, but also, as Porter says, appropriate and is in fact good. Authority fulfills a particular need for public and definitive determinations to be made for individuals in a social context. Yet, both that social context and the necessity that authority satisfies have been willed by Divine Providence. The indeterminacy of Natural Law and hence the

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<sup>140</sup> See McCall, *supra* note 132, at 83.

<sup>141</sup> Suárez, *supra* note 2, at 364 (citing Aristotle's *Politics*).

<sup>142</sup> See HENRI GRENIER, THOMISTIC PHILOSOPHY, III MORAL PHILOSOPHY 289 (St. Dunstan's Univ. 1950).

<sup>143</sup> Porter, *supra* note 138, at 81.

<sup>144</sup> *Id.* at 81.

<sup>145</sup> *Id.* at 81–82.

<sup>146</sup> *Id.* at 82.

need for authority is not accidental but has been intentionally written into the legal fabric of the universe. Put another way, human authority was not strictly necessary. The Eternal Law could have specified all principles of action in the Natural and Divine Law leaving no room for determination. God chose to leave this task, in a sense, unfinished and thus intended the need that authority satisfies. Unlike the scholastic jurists of the classical Natural Law tradition, early modern Natural Law theorists like Blackstone envisioned human law as being made by copying necessary specific precepts of Natural Law into human law.<sup>147</sup> In contrast, the Medieval scholastics understood the relationship to be more complex; Natural Law, and even to some extent, Divine positive law,<sup>148</sup> was indeterminate and in fact required human law makers to actively provide that determination. Professor Porter explains:

[R]ather than regarding social conventions as more or less direct and unchangeable expressions of human nature, they emphasize the need for processes of rational, communally shared deliberation, in order to move from natural principles to their conventional formulations. . . . These general principles [of Natural Law] are accessible to reflective judgment, and yet they remain relatively indeterminate, in such a way that they are not sufficient to govern conduct or to provide adequate structures for social activities. Seen in this context, relations of authority appear as appropriate and sometimes necessary elements in the social life of rational animals. The rational principles of [N]atural [L]aw must be specified in order to be put into practice, and yet these specifications cannot be left to individual judgments; they must be generally accepted in order to provide a framework for social activities, and that means at least that they must be public and relatively stable.<sup>149</sup>

The indeterminacy of Natural Law is not a fault or failing of Natural Law that needs to be fixed by inventing the concept of legal authority. It is an intentional indeterminacy legislated into the legal system by the ultimate legislator through the Eternal Law. God wanted rational creatures to participate more actively than Blackstone's idea of copying out pre-formulated precepts. If

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<sup>147</sup> *Id.* at 63–64.

<sup>148</sup> *See id.* at 75. Porter cites *SUMMA THEOLOGIAE*, *supra* note 33, pt. I-II, Q. 91, art. 3; Q. 99, art. 3, reply to obj. 2; Q. 99, art. 4 as demonstrating that even the Divine positive law leaves “much undetermined.”

<sup>149</sup> PORTER, *supra* note 138, at 81.

Natural and Divine Law explicitly contained all particular determinations of right action, there would be no room for the election of means—the realm of human liberty. Human authority is necessary and useful—as the instrumental arguments of the utilitarians suggest—yet it is more than that. It is good because God, the author of law, wishes humans to participate in the making of laws that govern their communal activity. He provides for the further specification and determination of general public precepts by one having care of a community, by particular human beings exercising law-making authority. This authority ultimately resides in God but is delegated and shared with human agents through the intentional indeterminacy contained in the revelation of Eternal Law through Natural and Divine positive law. To fully understand human legal authority in these terms, this Article returns to what has been established about Eternal Law and its relation to Natural Law and human positive law in prior articles.<sup>150</sup>

The Eternal Law, although fixing the ends of creatures, does not fix for Man the means to those ends. The Eternal Law legislates the course of these means only in general by implanting the natural inclinations. The Eternal Law requires the cooperation of human agents in determining the particular election of proportionate means through working out determinations of the principles of natural law in contingent circumstances.<sup>151</sup>

These particular determinations are made within a threefold order of authorities: the individual, the familial, and the regnative.<sup>152</sup> The Eternal and Natural Laws leave some of these necessary determinations to each individual to determine.<sup>153</sup> Others are determined for individuals by the authority of their personal, not strictly speaking legal, superiors<sup>154</sup>—those possessing authority in an imperfect or nonpolitical community, that is, parents for children in a family. Finally, those determinations that affect “the common good”<sup>155</sup> are left “to the discretion of those who were to have spiritual or temporal charge

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<sup>150</sup> See McCall, *supra* note 132; McCall, *supra* note 139.

<sup>151</sup> See SUMMA THEOLOGIAE, *supra* note 33, pt. I-II, Q. 108, art. 2.

<sup>152</sup> See RUSSELL HITTINGER, THE FIRST GRACE 99 (ISI Books 2003); see also SUMMA THEOLOGIAE, *supra* note 33, pt. I-II, Q. 90, art. 3, reply to obj. 3.

<sup>153</sup> SUMMA THEOLOGIAE, *supra* note 33, pt. I-II, Q. 108, art. 1.

<sup>154</sup> *Id.* at pt. I-II, Q. 108, art. 1–2.

<sup>155</sup> *Id.* at pt. I-II, Q. 108, art. 2.

of others.”<sup>156</sup> The first two orders are only analogous to law, which properly exists only in the third. Why is the sanction of law better than each determining for himself—or each superior of a nonpolitical community determining for it—all the individual cases? The first answer is that the common good requires it. By definition, the individual cases which should be addressed by human law rather than individual decision are those affecting the common good. Just as those decisions not affecting the common but only a personal good should be left out of human law, those cases which do affect the common good should be determined not by private individuals but by those having “spiritual or temporal charge of others.”<sup>157</sup> Francisco Suárez demonstrates that such an authority is needed to govern any society.<sup>158</sup> He explains, “[N]o body can be preserved unless there exists some principle whose function it is to provide for and seek after the common good thereof, such a principle clearly exists in the natural body, and likewise (so experience teaches) in the political.”<sup>159</sup> A homogeneous body such as an animal has instincts which serve the unifying purpose of directing the whole animal to its end, survival. In Man, the rational soul serves this purpose. Thus, in the heterogeneous body of politics a principle of order must govern the heterogeneous parts because each individual in a society looks after his own cares and these sometimes are contrary to the common good. Also, sometimes there are things that are necessary for the common good but are not directly pertinent all the time to individuals so not all will work toward them without direction.<sup>160</sup>

Governed society thus provides for peace and order among people and families and for the avoidance and correction of injustices.<sup>161</sup> Beyond the organic unity of the individual, the heterogeneous organisms of the family and a perfect community thus require a principle of order to govern determinations necessary under Natural Law to reach Man’s end. Although the form and nature of the authority to determine rules of action varies from the individual to civil society, the source and

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<sup>156</sup> *Id.* at pt. I-II, Q. 108, art. 2, reply to obj. 4.

<sup>157</sup> *Id.*

<sup>158</sup> Suárez, *supra* note 2, at 365–66.

<sup>159</sup> *Id.* at 366–67.

<sup>160</sup> *Id.* at 367.

<sup>161</sup> *Id.* at 365.

principle is the same: the provision for human determination of principles of Natural Law provided by the Divine Wisdom in the Eternal Law. God could have provided this principle of order directly, but he chose to provide for the participation of human agents—the individual’s reason and will, the personal superior, and legal authorities. These authorities are good not by virtue of any internal cause but because they participate in the ultimate legal authority ruling the universe, God. The third form of authority, to make laws for a community, is the subject of this Article and so it turns to consider its origin and nature.

St. Thomas explains that when one is directed to an end exterior to oneself one needs a guide to direct to that end.<sup>162</sup> The etymology of the word *gubernator*—one in authority of a polis—is related to the nautical term for a pilot,<sup>163</sup> who is one who directs a ship to an exterior end, the port. Since the end of the common good is external to Man, there is need for such a guide, an authority. As a social being, Man’s individual end, the fulfillment of his nature, is inextricably caught up in the end of the society of which he forms a part, the common good. Thus, a need for a directive authority in the sphere of determinations beyond those within the determination of the individual is part of the legal architecture itself and would be present even in a theoretical community of saints not affected by the “wounding of nature.”<sup>164</sup>

Classical natural law jurisprudence understands legal authority to be existential rather than functional. The good or end of a thing is the fullness of its being.<sup>165</sup> Professor Hugo Cyr distinguishes the former type of authority as one in which those subject to it see their existence and identity as existentially connected to the authority. He contrasts this type of authority to mere functional authority which exists solely for instrumental efficiency.<sup>166</sup> Clearly utilitarian theories can only justify the thin functional form of authority. Although consent theories may come closer to justifying existential authorities since the theory sees authority as the expression of popular consent, ultimately it

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<sup>162</sup> AQUINAS, *DE REGNO*, *supra* note 136, at bk. I, ch. xv, p. 79.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at bk. I, ch. v, p. 25–27; *SUMMA THEOLOGIAE*, *supra* note 33, at I-II, q. 85, art. 3.

<sup>165</sup> See McCall, *supra* note 132.

<sup>166</sup> Cyr, *supra* note 92, at 286–287.

fails to do so. As argued earlier, the consent is only at best fictional. Beyond its expositive failure, being rooted in consent it only justifies authority because it is useful or beneficial to the consenting parties. The natural law tradition understands legal authority to be existential and an inherent part of a person's identity as part of a common political community through which the perfection of human nature must be pursued by obeying the determinations of Natural Law made by those entrusted with care of that community. It is not simply that authority makes life more efficient. Authority is existentially connected to a social being and we are existentially connected to society by the natural inclination to live in society. Without authority we could not be fully what our nature is designed to be. As Jean Porter has observed, "[I]t addresses one of the pervasive needs of human life, since without a whole range of shared activities, we as rational, social animals could not live—fully, or perhaps at all—in the way characteristic to us as a specific kind of living creature."<sup>167</sup>

Authority is thus more than a necessary evil instituted after the loss of original justice; ordered determination by an authority predates destruction of the Natural Law in us.<sup>168</sup> The Eternal Law by fixing a social element in Man's nature and by entrusting particular determinations to human agents, makes the presence of an authority, one charged with care of the social community in its quest for the common good,<sup>169</sup> a good. The making of determinations of law that guide toward the common good is the end or purpose of authority fixed by the Eternal Law. A proper understanding of the necessity and goodness for human determination of Natural Law refutes Kelsen's claim that knowledge of Natural Law would make human positive law superfluous.<sup>170</sup> Far from being a "foolish effort at artificial illumination in bright sunshine,"<sup>171</sup> the making of human law involves the rational selection among several determinations in the bright light of Natural Law. Perhaps Kelsen's dismissal of Natural Law resulted from his misunderstanding the classical doctrine's explanation of the divinely desired indispensable role

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<sup>167</sup> PORTER, *supra* note 138, at 82.

<sup>168</sup> AQUINAS, DE REGNO, *supra* note 136, at bk. I, ch. v, p. 25–27.

<sup>169</sup> See SUMMA THEOLOGIAE, *supra* note 33, at I-II, q. 90, a. 1.

<sup>170</sup> Kelsen, *supra* note 19, at 13.

<sup>171</sup> *Id.*

for human law to make determinations of the general principles of Natural Law. The making of human law is a good: It is the attainment of a natural end.<sup>172</sup> Human society, or the social aspect of human nature, is naturally inclined to be directed by law. Thus, the fulfillment of that natural inclination—the formulation of determinate laws—is good. In the words of Jean Porter, “Authority thus shares in the goodness, the attractive power, and the rational cogency of proper to human life as such.”<sup>173</sup>

C. *From the Good of Authority to the Virtue of Obedience*

Not only do consent and utilitarian theories fail to adequately explain the origin of legal authority, but they also consider authority or the power to affect the normative position of others as at best neutral and at worst an evil, albeit a necessary evil. Obedience may be necessary, but it is not good according to this dim view of authority. Utilitarian theories find no good in this power to change normative duties and the obligation to obey but accept the fact as justified only to the extent that it can produce other goods. Consent theorists start from the premise that authority restricts individual freedom and is therefore problematic. This problematic interference with freedom that a duty to obey another person creates can then only be justified if freely given consent accepts it. Obedience is justified only as an act of freedom through consent. The understanding of authority rooted in the natural law tradition offers a much stronger ontology—one that not merely accepts authority as necessary but as good. Obeying the law is therefore not only necessary, but also an authentic good commensurate with human nature. Leo Strauss argues that since Man is naturally social and therefore the restraint of freedom is natural, too, and therefore it is good for Man. Man cannot associate without restraint on freedom involved in a duty to obey. He explains:

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<sup>172</sup> Michael S. Moore conceives of the value of law in a similar manner by considering law a functional kind. See Michael S. Moore, *Law as Functional Kind*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 188 *et. seq.* (Robert P. George ed., Oxford Univ. Press 1994). Moore, however, does not locate the origin of the function in the Eternal Law.

<sup>173</sup> PORTER, *supra* note 138, at 133.

Man is so built that he cannot achieve the perfection of his humanity except by keeping down his lower impulses. He cannot rule his body by persuasion. . . . What is true of self-restraint, self-coercion, and power over one's self applies in principle to the restraint and coercion of others and to power over others. . . . To say that power as such is evil or corrupting would therefore amount to saying that virtue is evil or corrupting.<sup>174</sup>

The dim view of restraint as unnatural and evil is evident in Enlightenment authors such as Jean Jacques Rousseau<sup>175</sup> and constitutes an often unstated premise of consent and utilitarian justifications of authority. For this contrary view, restraint—and therefore every virtue—is corrupting of freedom. Law involves restraint and this restraint is unnatural, at best conventional. For the classical tradition, however, restraint of action is on the contrary good and natural, in fact virtuous. Strauss explains, “If restraint is as natural to man as is freedom, and restraint must in many cases be forcible restraint in order to be effective, one cannot say that the city is conventional or against nature because it is coercive society.”<sup>176</sup>

Postclassical jurisprudence is therefore uncomfortable with and thus continually in search of a justification for a coercive authority. The distinction with the armed gunman haunts Hart's analysis. The best they can produce is an assumed basic norm or rule that must exist to justify the existence of a legal system. Hart and Austin were wrong in concluding that various societies each need their own absolute, in the absence of which there would be no legal system.<sup>177</sup> This assumption arises from the premise that law and authority are not natural and therefore only conventional. In the absence of convention there would therefore be no legal system. Yet, a legal order although making use of conventional elements is ontologically natural. There is always a cosmic legal system by virtue of the existence of the ultimate sovereign, the Promulgator of Eternal Law. There may be no specifically human legal system in a particular time and space—in a civil grouping in a state of anarchy for example. This

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<sup>174</sup> STRAUSS, *supra* note 64, at 132–33.

<sup>175</sup> See, e.g., ROUSSEAU, *supra* note 36; JEAN JACQUES ROUSSEAU, *EMILE OR ON EDUCATION* (Allan Bloom trans., Basic Books 1979) (both understanding freedom as the natural state of man and restraint as a corrupting convention).

<sup>176</sup> STRAUSS, *supra* note 64, at 132.

<sup>177</sup> HART, *supra* note 5, at 65.

lack of a human legal system in a particular area would stem not from the lack of an unlimited human sovereign but rather the lack of someone with care of a community to make the necessary legal determinations of Natural Law for that civil society. There is no need for a sovereign in Austin's terms, but there is a need for someone filling the office of determination maker under Natural Law, or in the phrase of Jean Porter, a "minister of the law."<sup>178</sup> If such an office is vacant, there is no functioning particular human legal system in such area but a legal system still exists, albeit one requiring further determination. There is always a legal system as no one is outside the Eternal, Natural, and Divine Law. The need for a human authority arises from the intentional indeterminacy of Natural Law. Unlike Hart, who lamented the indeterminacy "handicap" in law,<sup>179</sup> this view of authority rejoices in the indeterminacy within the Natural Law. This indeterminacy is a gift of God providing the opportunity for us to participate in the divine action of making law by determining the Natural Law.

The conforming of our individual actions to the determinations of those charged by the Eternal Law with this responsibility of making determinations is thus a fulfillment of an aspect of human nature. Obedience to the law is thus a natural inclination in the sense discussed in a prior article.<sup>180</sup> Due to the social aspect of our nature, we have a natural inclination to obey the law. According to the Thomist Jeremiah Newman, justice is good under the aspect of due, and legal justice involves a case where due arises under the divine or human law.<sup>181</sup> Thus, doing what is due under the determinations of human law constitutes a good act because it is a legally just act. Aristotle argues that good government consists in two essential elements: good laws and the obedience of citizens to the laws.<sup>182</sup> St. Thomas treats the virtue of obedience as a species of the virtue of justice.<sup>183</sup> Obedience is the virtue whereby individuals allow their free determination of actions to be directed by the

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<sup>178</sup> See PORTER, *supra* note 138.

<sup>179</sup> HART, *supra* note 5, at 125.

<sup>180</sup> See McCall, *supra* note 132.

<sup>181</sup> JEREMIAH NEWMAN, FOUNDATIONS OF JUSTICE: HISTORICO-CRITICAL STUDY IN THOMISM 127 (Cork Univ. Press 1954).

<sup>182</sup> ARISTOTLE, POLITICS 1294a (C. Lord trans., Univ. of Chicago Press 2013).

<sup>183</sup> SUMMA THEOLOGIAE, *supra* note 33, pt. I-II, Q. 104, art. 2, reply to obj. 2.

command of another.<sup>184</sup> Aquinas explains the naturalness of obedience to authority: “Wherefore just as in virtue of the divinely established natural order the lower natural things need to be subject to the movement of the higher, so too in human affairs, in virtue of the order of natural and divine law, inferiors are bound to obey their superiors.”<sup>185</sup> Not only is the power to make determinations affecting the common good derived from the Eternal Law, but the obligation to obey is also found in the Eternal Law through the Natural Law which contains a secondary precept that superiors ought to be obeyed within the scope of their authority. Obedience to the law is thus a good in and of itself because one who obeys participates in the end of good government of society. All laws which are just and ordained to the common good are binding in conscience. The law binds by virtue of legal justice. Its breach may in a particular case constitute merely a minor infringement of legal justice but it still impugns it. Obedience to these laws is thus a moral act. There is no such thing as purely penal laws—laws which do not bind in conscience but for which one must pay the price if caught—as some modern theorists have suggested.<sup>186</sup>

This conclusion requires a different analysis of Joseph Raz’s traffic light example.<sup>187</sup> He posits as a legitimate law the requirement to stop at a red traffic light. He then assumes a case in which disregarding the red light will not result in any danger to anyone, including the driver, and will not diminish anyone’s respect for law or those who make it, including the driver’s. Since in this case, disobedience would not affect any of the purposes of the law—specific and general—as Raz conceives of them, Raz concludes “that in this case or a similar case the utterances of authority can be held to be legitimate without holding them to constitute reasons for action.”<sup>188</sup> Raz does not see that obeying the law, even in such a circumstance, is good because doing so constitutes a good act—a virtuous act of legal justice and participation in good government by obeying the particular determinations of the constituted authority. The only difference between a normal case and this special case of a

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<sup>184</sup> *Id.* at pt. I-II, Q. 104, art. 1.

<sup>185</sup> *Id.*

<sup>186</sup> NEWMAN, *supra* note 181, at 57–58.

<sup>187</sup> RAZ, THE AUTHORITY OF LAW, *supra* note 13, at 16.

<sup>188</sup> *Id.*

deserted intersection is that fewer social consequences result from an act of disobedience in the deserted intersection. For the motorist, however, he has forfeited the opportunity to practice the virtue of legal justice. Thus, there is only a difference in the scope of the consequences flowing from running the red light, not a change in the binding obligation to stop due to human legal determination.

Beyond the goodness of authoritative determinations in and of themselves, another good of obedience to legal authorities can be discovered in light of the obstacles to virtue created by the wounding of nature.<sup>189</sup> Aristotle noted this good of obedience in his discussion of virtue. His argument in favor of authority is based on the observation that virtue requires not simply understanding but action.<sup>190</sup> It is not enough to know what is virtuous to be virtuous, one has to do it. Some people, either through a gift of nature or good training, will act according to virtue once they hear an argument as to what is virtuous; but not all are this way. Some are ruled more by their passions and will not be persuaded by argument. They require an act of the will to be moved to virtue because passions respond more to force than argument. Therefore, laws are needed both to urge people to virtue by directing to the good they can will themselves and to compel others, “for most people obey necessity rather than argument.”<sup>191</sup> The Digest agrees that it is of the very essence of law to command.<sup>192</sup> St. Thomas defines a command as the act of moving “by reason and will.”<sup>193</sup> As was discussed in a prior article, law must be a dictate of natural reason whereby it guides the reason of those under the law to know the good.<sup>194</sup> Since the wounding of nature affects both the reason and the will, human law cannot remain merely a dictate of reason—which would merely support the expert notion of authority. Since passions,

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<sup>189</sup> For a further discussion of the wounding of nature, see Brian M. McCall, *Consulting the Architect when Problems Arise: The Divine Law*, 9 GEO. J.L. & PUB. POL’Y 103 (2011).

<sup>190</sup> ARISTOTLE, NICOMACHEAN ETHICS 1179a33-1181b13 (H. Rackham trans., Harvard Univ. Press rev. ed. 2015).

<sup>191</sup> *Id.* at 1180a41-42.

<sup>192</sup> See Justinian, *supra* note 57, at 1.3.7.

<sup>193</sup> SUMMA THEOLOGIAE, *supra* note 33, pt. I-II, Q. 104, art. 1.

<sup>194</sup> McCall, *supra* note 139.

which can direct the will away from the true good, respond to commands not rational arguments, human law must also be an act of coercion.

To understand this further value of authority it is necessary to discuss the interdependent relationship between personal moral virtue and the common good, which is the end of law. Although law is directed to the common good in contrast to individual or purely personal goods, the common good is related to individuals. In the preface to Charles de Koninck's work dedicated to the relationship of the common good to individuals, J.M. Cardinal Villeneuve summarizes the interconnectedness:

[The common good is] the greatest good of the singular, not by being a collection of singular goods, but best for each of the particular individuals who participate in it precisely on account of its being common. Those who defend the primacy of the singular good of the singular person suppose a false notion of the common good as if it were alien to the good of the singular; whereas it is natural and proper that the singular seek more the good of the species than his singular good. Since the person, an intellectual substance, is a part of the universe in whom the perfection of the whole universe can exist according to knowledge, his most proper good as intellectual substance will be the good of the universe, which is an essentially common good. . . . It is true also that a person can perversely prefer his own singular good to the common good, attaching himself to the singularity of his person, or as we say today to his personality, set up as a common measure of all good. Furthermore, if the reasonable creature cannot entirely limit himself to a subordinate common good, such as the family or political society, this is not because his particular good as such is greater; it is because of his proper ordination to a superior common good to which he is principally ordered. In this case, the common good is not sacrificed to the good of the individual as individual, but to the good of the individual insofar as the latter is ordered to a more universal common good, indeed to God. A society consisting of persons who love their private good above the common good, or who identify the common good with

a private good, is not a society of free men, but of tyrants, who menace each other by force, and in which the final head is merely the most astute and the strongest among the tyrants, the subjects being nothing but frustrated tyrants.<sup>195</sup>

The common good is that external good or end common to all members of the society. Attainment of the common good cannot be achieved separately from individuals pursuing their individual end or good because the common good of the society is constituted by the same end as individuals, the perfection of the aspects of human nature. Since human nature involves a social aspect, the perfection of virtue of each individual is a component of attainment of the common good. Thus, in pursuing the common good, the law has an interest in the individual moral determinations of the individuals of society. As a social animal, Man works toward his individual good as part of a society, as part of a whole working to the common good of all. Thus, part of the purpose of law in pursuing the common good is to assist individuals in making personal determinations conforming to the Natural Law. It then becomes necessary to consider the nature of this relationship between law and personal determinations.

Any human participation in the Eternal Law will be imperfect. The act of determining individual cases to conform to virtue is difficult—involving an effort of reason. In the words of St. Thomas, “[I]t is difficult to see how man could suffice for himself in the matter [training himself to be virtuous].”<sup>196</sup> Consequently, Aristotle and St. Thomas suggest recourse to a proven good or wise man. As discussed above, those possessing the habit of justice, the wise, are more likely to be correct in particular determinations. Their conclusions are more likely to correspond to the specific truths contained in the Eternal Wisdom. Thus, contrary to modern liberal individualistic philosophy the determination of acts solely by autonomous individuals is not an ideal that would be preferable but for the practical need to coordinate choices. Individual choice aided by recourse to the wisdom of human law is preferable. The difficulty

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<sup>195</sup> J.M. Cardinal Villeneuve, O.M.I., preface to *On the Primacy of the Common Good: Against the Personalists and The Principle of the New Order* by Charles De Koninck (Paris: Université Laval Editions Fides, 1943), Sean Collins translation reprinted in *The Aquinas Review*, V.IV (1997), available at [http://dataworks.com/aqr/V4\\_BC\\_text.html](http://dataworks.com/aqr/V4_BC_text.html) (last visited June 22, 2016).

<sup>196</sup> SUMMA THEOLOGIAE, *supra* note 33, at pt. I–II, Q. 95, art. 1 at 48.

in making good determinations indicates that individuals need to look outside themselves for assistance when determining their own particular acts. For this reason, St. Thomas explains that a system of formulated human laws should include general principles of action in addition to the particular determinations affecting the common good.<sup>197</sup> Human laws include not only specific determinations but also deductions of principles from Natural Law.<sup>198</sup> Particular individual decisions are aided by having recourse to general principles deduced from Natural law by a legal authority. Although speaking about the relationship between judges and lawmakers, his analysis applies more generally:

As the Philosopher says (Rhet. i, 1), “it is better that all things be regulated by law, than left to be decided by judges”: and this for three reasons. First, because it is easier to find a few wise men competent to frame right laws, than to find the many who would be necessary to judge aright of each single case.— Secondly, because those who make laws consider long beforehand what laws to make; whereas judgment on each single case has to be pronounced as soon as it arises: and it is easier for man to see what is right, by taking many instances into consideration, than by considering one solitary fact.— Thirdly, because lawgivers judge in the abstract and of future events; whereas those who sit in judgment judge of things present, towards which they are affected by love, hatred, or some kind of cupidity; wherefore their judgment is perverted. Since then the animated justice of the judge is not found in every man, and since it can be deflected, therefore it was necessary, whenever possible, for the law to determine how to judge, and for very few matters to be left to the decision of men.<sup>199</sup>

Note, this is a tempered assessment of the question. St. Thomas does leave room for some “few” case by case determinations but argues that “whenever possible,” there should be laws formulated in general by a few wise men who would, being distanced from human emotions which can distort the consideration of specific cases, be more likely to reach the just conclusion. In a sense, St.

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<sup>197</sup> *Id.* at I–II, Q. 95, art. 2 at 50.

<sup>198</sup> *Id.* at I–II, Q. 95, art. 2 at 50 (“[S]omething may be derived from the natural law in two ways: first, as a conclusion from premises, secondly, by way of determination of certain generalities.”).

<sup>199</sup> *Id.* at I–II, q. 95, art. 1, reply to obj. 2 at 49.

Thomas is stating an old legal maxim familiar to most lawyers, namely that bad facts make bad law. If law is solely a product of unrelated case-by-case rulings of particulars by individuals, it is likely that the unique and potentially emotionally compelling aspects of the individual case will lead to a bad law, a bad decision. Thus, *ex ante* formulation of a general rule can be more likely to be correct. St. Thomas does not advocate the formulation of an all-encompassing omnibus code for “[c]ertain individual facts which cannot be covered by the law” need to be left to individual judgment.<sup>200</sup> Alasdair MacIntyre uses the analogy of a craft to describe the development of virtue.<sup>201</sup> One learning a craft must advance under the direction of a master who guides by virtue of his authority the transformation within the apprentice into one who has internally mastered the craft. Just as those learning the art of building need a teacher to guide the development of their habit, the community needs an authority to guide the development of individual choices. Laws that contain deductions of general principles from Natural Law guide individuals without completely determining individual actions, leaving the final choices of action to individuals within the bounds of the general principles. Such laws generally prescribe virtue rather than prohibit vice. In this sense, human law directs individual acts as well as coordinating those acts to the common good. In guiding individual determinations, law does not exceed the bounds of its direction to the common good. Since assisting individuals in making good individual determinations is inextricably connected to the common good, the law orients to the common good even when it guides individuals in making particular determinations for themselves.

For Aristotle and St. Thomas, the two major qualifications for one to assume legal authority in a regime are that he be virtuous—the wise—and that he act for the common good.<sup>202</sup> Thus, it is prudent to leave the determination of particular rules affecting the common good to those who are supposed to be wise

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<sup>200</sup> *Id.* at I–II, q. 95, art. 1, reply to obj. 3 at 49.

<sup>201</sup> See, e.g., ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL INQUIRY: ENCYCLOPAEDIA, GENEALOGY, AND TRADITION* 60–64 (Univ. of Notre Dame Press 1990).

<sup>202</sup> This Article’s presentation of this claim is a summary. See ARISTOTLE, *POLITICS*, 1094a-3, 1103a3-10; AQUINAS, *DE REGNO*, *supra* note 136, at bk. I, ch. i, p. 5; bk. I, ch. ii, 11–13 for more details.

and virtuous, the ruling authorities, temporal and spiritual.<sup>203</sup> The reference to both temporal and spiritual authorities as instruments of human determinations is an important point to note for our time. Both religious and civil authorities have the obligation and freedom to make particular determinations of the Natural Law within the appropriate spheres of their jurisdiction. Thus, not all laws enacted to aid individual moral determinations need be made by temporal authorities. St. Thomas is speaking of authority in general, and he envisions a plurality of authority in distinct but overlapping spheres, overlapping in that they all relate to the same subject—individuals making determinations of actions under the Eternal Law. Harold Berman argues that this plurality of overlapping jurisdictions was a central feature of the traditional understanding of legal authority.<sup>204</sup> This conception differs greatly from contemporary visions of authority as monolithic and monopolistically controlled by a single human legal sovereign as Austin envisions.

Thus, authority serves two distinct but related roles which can be summarized in the statement that authorities make laws which directly or indirectly affect the common good. Some laws directly affect the common good by making particular determinations for actions so as to orient those actions to, and coordinate them with respect to, the common good. Some laws also aid individuals in attaining their personal end, their personal good, by providing guidance in the form of deduced principles of Natural Law. In such a way, the law indirectly aims at the common good by guiding individuals whose individual choices inextricably affect the common good.

This insight provides part of the answer to Hart's question of what distinguishes the coerced compliance with the demand of a gunman from the obedience to the law.<sup>205</sup> First, the lawmaker is entrusted with the power to require obedience to a command which is a determination of Natural Law; the gunman is a self-

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<sup>203</sup> SUMMA THEOLOGIAE, *supra* note 33, at I-II, Q. 108, art. 2, reply to obj. 4 at 311.

<sup>204</sup> See HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 536–7 (Harv. Univ. Press 1983) (arguing that the nature of authority was “rooted in the duality of secular and spiritual authorities” and “the belief in the supremacy of law was rooted in the pluralism of secular authorities within each kingdom, and especially in the dialectical tension among royal, feudal, and urban politics”).

<sup>205</sup> HART, *supra* note 5, at 6–7.

appointed commander. The legal authority is empowered to command for the purposes of guiding individuals to actions which are oriented to the common good, a good which by its very nature includes the good of the individual commanded. The gunman commands action which is oriented solely to his individual advantage and not to the common good. Secondly, the power to command is entrusted to the legal authority from a superior authority, God and His Eternal Law. God provides for the exercise of authority by those entrusted with care of the common good. The gunman usurps authority for himself for the purposes of advancing his own personal good. Even though both a legitimate authority and the gunman coupled their command with a threat of consequences for disobedience, the difference between the two is that a legal authority is given this power to command and threaten from a superior authority. The gunman usurps the power for himself. As Hart rightly argued, the presence of a threat of punishment is insignificant to legitimize authority.<sup>206</sup> Yet, since Hart rejects the delegation of authority from outside a particular legal system, he is forced to ground the obligation to obey legal authority on the negative consequences of disobedience albeit defined more broadly than those of a gunman. Hart explains, “Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.”<sup>207</sup> Hart thus ends up basing the obligation to obey internally on social pressures to conform, resulting in no qualitative difference between law and the gunman. The difference is only one of quantity. The gunman’s threat is backed merely by himself and his gun; the law’s threat is backed by broader social pressure. It is still a threat that makes a law obligatory for Hart. The classical Natural Law explanation avoids reliance on threats of consequences as constituting the obligation to obey the law. The threats merely remain as potential consequences of violating the otherwise justified duty to obey legitimate laws. Obligation derives from

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<sup>206</sup> *Id.* at 81–83 (showing that obligation must consist of more than predictions about the likelihood of suffering negative consequences for disobeying).

<sup>207</sup> *Id.* at 86. To distinguish law from morality or social convention, Hart merely makes distinctions in the type of punishment or consequences that flow from disregarding a precept. Thus, law, morality, and social convention for Hart only differ in the nature of punishments related thereto.

the provision by Eternal Law for rational determinations of Natural Law by human authorities. Rather than deriving an obligation to obey from the existence of a legitimate threat of punishment, the classical theory derives the legitimacy of a threat of punishment from the presence of a legitimate obligation to obey. Legal authorities can threaten consequences because they possess legitimate authority delegated to them to create the obligation which will later be coupled with a threat. Punishment derives from obligation not vice-versa.

To distinguish this power to obligate from the demand of a gunman, it is necessary to recognize that unlike the gunman's, the legal authority's power is delegated from above. The legal authority's power originates in the power to guide toward the development of virtue and to make determinations of Natural Law provided by God. Since all humans share an equal human nature—although differing in accidentals to that nature—no person can confer authority to command on another person as both are equal in nature. Authority must come from a superior. Hart recognizes this need when he argues that a legal system must have a supreme lawmaker from whom subordinated lawmakers receive their authority.<sup>208</sup> The indeterminacy of Natural Law as provided for in the plan of the Eternal Law provides for the delegation of authority from a superior. Beyond this important distinction, the lawmaker's command must not only be a product of a delegated authority but it must also be a product of reason—a deduction or determination of Natural Law—whereas the gunman's demand is the product solely of his will and need not be rational. The exercise of legal authority involves the making of rational deductions or determinations of the rational principles of Natural Law and is thus an act not only of the will but of the intellect. Yet, since after the Fall law serves

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<sup>208</sup> *Id.* at 24–25. Hart erroneously goes further to demand independence as well as a supreme lawmaker. Certainly he is correct to note that for one particular legal system—England—to be distinct from another—Russia—the supreme lawmaker in England must be independent of the one of Russia. Yet, it does not follow from this conclusion that both the supreme lawmaker of England and Russia cannot each be independently subordinate to a lawmaker above both of them who has severally delegated a limited authority—within the respective countries—to exercise internal to that system the supreme legislative power still subject in turn to the overarching supreme lawmaker. Admitting such a dependence of both countries on a higher authority does not destroy the independence of England and Russia from each other pursuant to their separate delegation.

the purpose of guiding the subjection of the disordered passions to the intellect, it also must involve a coercive act of the will. The absence of both intellectual and volitional elements renders a purported act of a lawmaker nothing other than an act of violence.<sup>209</sup> When the necessary rational connection to Natural Law is removed, the lawmaker becomes merely Hart's gunman, notwithstanding his possession of titles suggesting legitimate authority.

#### CONCLUSION

Unlike Finnis's utilitarian rationale for the existence of human law that ought to be obeyed, traditional Natural Law jurisprudence understands the making of particular human laws to be a good in and of itself because the authority is fulfilling a purpose established by the Eternal Law. Human lawmaking is not merely instrumentally good as a useful means to coordinating group actions. Contra Finnis, the justification of authority defended in this Article holds that authority, the choice or election among possible legal determinations of Natural Law precepts, is a good in and of itself because it is legislated into the system by the Eternal Law which provides that such determinations ought to be made by those with care of the community. Making human laws is thus a participation in God's governance of the universe which God has entrusted to Men. As an aspect of God's nature, authority thus is a good in its own right and not merely an instrumental good to solve a coordination problem. Finnis bases the need for authoritative rulers on a requirement for "speed and certainty" that is not provided by a coordination solution by custom.<sup>210</sup> At his most utilitarian, he says, "Authority (and thus the *responsibility* of governing) in a community is to be exercised by those who can in fact effectively settle co-ordination problems for that community."<sup>211</sup> Particular authorities may vary widely in their effectiveness in performing their task, but the activity has value regardless because it is a participation in God's law making. For this reason, St. Thomas Aquinas held that one could not be removed from an office of legal authority simply for making bad

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<sup>209</sup> See SUMMA THEOLOGIAE, *supra* note 33, at I-II, Q. 96, art. 4.

<sup>210</sup> FINNIS, *supra* note 68, at 245–46.

<sup>211</sup> *Id.* at 246.

laws.<sup>212</sup> A tyrannical prince may be participating poorly in God's authority but that does not detract from the goodness of that authority itself.

Grounding human authority in the Eternal Law provides the only answer to what Steven Smith has called law's quandary: Does the law exist or is it only a conceptual construct?<sup>213</sup> Utilitarian and consent or popular sovereignty theories might say something about law or something about why some people obey it, but none of them provides answers to the big question. If law and legal authority really exist, from where did they come? As Joseph Vining has commented about Smith's work, the classical view of law running from the ancient world through Christian jurisprudence maintained that the key to the big question lay in the divine. Vining observes, "Smith begins with an overarching sense of law, 'classical' or 'traditional,' preceding the developments of the twentieth century. One view, which he outlines, is that this overarching sense depended upon and linked human law to divine law with divine judgment and sanction."<sup>214</sup> The modern break with this ontology created a metaphysical problem which the modern theories of authority fail to solve satisfactorily. John Finnis resists relying on this classical understanding of law and its grounding of authority and obligation in God. He seems to believe that unless he removes God from the explanation of authority and obligation, his argument can be defeated by the question: "Why should we obey God?"<sup>215</sup> Yet, that question can be answered in the same way that one would answer the question of a worker on a building site: "Why should we obey the architect?" The answer is because the architect has in his mind the entire plan and can see better than the individual builder the purpose of his particular action and how it fits into the overall structure. Ultimately, God should be obeyed not simply because, in the words of Michael Moore, he is some "Big Person."<sup>216</sup> As Patrick Brennan has observed, the Thomistic definition of law does not contain an element of coercion.<sup>217</sup> Obedience to the law is not a result of law being

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<sup>212</sup> See AQUINAS, *DE REGNO*, *supra* note 136, at Bk. I, ch. VI, 31–33.

<sup>213</sup> See STEVEN D. SMITH, *LAW'S QUANDARY* (Harv. Univ. Press 2004).

<sup>214</sup> Vining, *supra* note 1, at 700 (referring to SMITH, *supra* note 213, at 47).

<sup>215</sup> *Id.*

<sup>216</sup> Moore, *supra* note 61, at 235.

<sup>217</sup> Patrick McKinley Brennan, *Are Legislation and Rules a Problem in Law? Thoughts on the Work of Joseph Vining*, 55 VILL. L. REV. 1191, 1214 (2010).

coercive. Some forms of coercion may be justified once an obligation to obey the law has been established. But this use of coercion is a consequence of legitimate authority, not a constituent of it. Ultimately, we should obey God's law because the world is objectively rational, and He is the source of that rationality. He can see the entire architecture and thus we should obey Him. This rational obligation to obey God's law is the source of the rational obligation to obey the authorities He has permitted to participate in His lawmaking, by entrusting them with perfecting his architectural design by making particular determination.

Recognizing the necessity of God in the foundation of legal authority raises the question: Should Natural Law theory be articulated so that it depends upon belief in God? Some may fear losing an audience for the argument over this issue. There are two possibilities to avoid God's fundamental role in legal authority. Either deny his necessity or reduce that necessity to virtually nothing. The first solution leads to the dead end justifications of utilitarianism and consent theory. As discussed in Part I of this Article, the attempts to justify legal authority without God have all failed to present a cogent, complete, and satisfactory explanation for the ontology and origin of legal authority. For those who wish to diminish the central role of God in the origin of law and legal authority, they likewise end up in an unsatisfactory conclusion. Patrick Brennan vividly describes the bleak world of legal theory built on Deist's notions of a minimalist God:

The world to which the Deist would consign us looks like this. On the one hand, irrational, unfree creatures—such as puppies and petunias—would be infallibly moved by God through their created inclinations to their respective ends. Rational human creatures, on the other hand, would suffer their inclinations to their end(s), alright, but would enjoy no authoritative measure for freely achieving them. What this would mean, in other words, is that the creator created with the certainty that his rational creatures would not, absent divine intervention (as in Scripture), be commanded to the end(s) for which God created them. Created by God but not commanded by God, to vary

Hittinger's phrase. Or, to vary the phrase yet again, no measures, or rules, or law imposed by another by which to choose and act. Kant celebrated the putative result as "autonomy." But is this true?<sup>218</sup>

For this reason, Brennan argues that the very notion of law and legal authority must be based on presuppositions about God:

And here the connection with religion, the work to make law heard proceeds only on presuppositions. If it does not proceed on those presuppositions, it does not produce anything to which there is any sense of obligation. That which evokes no sense of obligation is not law. It is only an appearance of law, the legalistic, the authoritarian, not sovereign but an enemy. Principal among the presuppositions of legal work are that a person speaks through the texts; that there is mind; that mind is caring mind. These are the links between the experience of law and religious experience<sup>219</sup>

One need not accept everything that theology teaches about God to find the origin of authority in Him.<sup>220</sup> Yet, at least one must recognize God as a God of law, a Person who orders the universe with authority and entrusts a portion of that authority to rational creatures to do likewise. Only here can we find not only a satisfactory explanation of authority—an answer to the question why the fallible determinations of other fallible rational creatures should be obeyed as law by us—but we can also regain a humanized authority. If law is only words and text, then as Brennan observes, it easily becomes authoritarian. If law is in a rational mind, it can resist authoritarianism. Locating human legal authority within the person of God secures limits to the exercise of that authority by human minds and the duty to obey the laws they produce. Proving this claim is beyond the scope of this single Article.

Finally, the Natural Law explanation satisfies Leslie Green's requirements for an authority that can obligate obedience to laws. The Natural Law provides a moral reason—in the sense of a reason independent of the human law itself—for action—

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<sup>218</sup> *Id.* at 1210.

<sup>219</sup> *Id.* at 1207.

<sup>220</sup> Note that failure to accept all that God reveals about Himself and His law will lead to an incomplete and fractured account of Natural Law. Thus, although acceptance of the classical Natural Law thesis does not depend on the acceptance of all aspects of revealed theology but only natural theology, the result of failing to integrate revealed theology will be incomplete and imperfect.

condition (i)—because the Natural Law entrusts to human authorities the responsibility to determine particular action to be done or avoided pursuant to its own general precepts. Thus, the precept of Natural Law that individuals are to live well in society obligates us to conform to the determinations of applicable authorities independently of those determinations themselves. The foregoing justification of legal authority provides a content-independent reason for action—condition (ii)—because the general precepts of Natural Law permit for a variety of possible conforming determinations and the particular one to be obeyed is to be obeyed because the applicable authority in fact so determined. Subjects do not obey human laws because all things considered, they would have selected this particular determination of Natural Law. They must obey because Natural Law has delegated election of this type of determination to human authorities. Stephen Perry argues that to satisfy condition (ii), we must not refer to an independent moral obligation to do X but rather only to the legal directive to do X.<sup>221</sup> If we parse more precisely what we mean by X, we can see how a human law requiring citizens to do X is content independent under the Natural Law understanding of law. For example, the human law requiring one to drive on the right side of the road is rooted in the obligation under Natural Law to drive safely, but the specific obligation to do such by driving on the right side as opposed to the left is dependent solely on the determination by a human lawmaker even if that determination derives its obligatory force from a more general precept of Natural Law. Prior to the drive on the right law being enacted, each person is free to conform to the general precept of driving safely by making individual determinations about which side appears to be the safest in the particular context. Yet, once the determination is made by human law, all drivers must drive on the right because the lawmaker has now made the determination for the community. Punishment for murder provides another example. The Natural Law obligates one not to murder, but the obligation to be confined to prison for life if one murders is obligatory once a human authority has determined a life sentence to be the punishment due to those who commit murder. Although rooted both in the Natural Law precepts prohibiting murder and

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<sup>221</sup> Perry, *supra* note 28, at 14–15.

requiring evildoers to be punished, the specific nature of the punishment is content independent as it arises from the legitimate determination of the authority in selecting this particular punishment. Human law provides a binding or mandatory reason for action—condition (iii)—because God through Natural Law delegates the power to determine Natural Law to human authorities. The mandatory nature of legitimate human determinations thus derives from the mandatory nature of the ends of human existence established in the Eternal Law. Although the election of means in relation to that end is left to human choice, it is not always left to each individual for all choices. Some determinations are left to the superiors of families, imperfect communities, and perfect communities. Yet, the power to determine is derived from the Eternal Law. Human law is a particular reason for action only for the directives of a citizen's, or subject's, own state—condition (iv)—because Natural Law entrusts determination not to one superior but to a variety of temporal and spiritual superiors dispersed throughout the variety of perfect communities around the globe. The various imperfect and perfect communities are constituted by nature with their own particular superiors entrusted with a specific jurisdictional limit for making determinations for their particular community. As argued in a prior article, those determinations can legitimately differ from community to community and still be derived from the same Natural Law precept.<sup>222</sup> The developing customs of each community will result in different but still legitimate determinations of the same Natural Law precept. Finally, a particular determination is a universal reason for action—condition (v)—because it binds all of those subject to the applicable authority to all determinations of that authority. Unlike Raz's theory, the classical theory requires universal conformity even when individuals might deem the determination unnecessary in a particular case. Many theorists have argued that this universality condition can never be met as in every society there will at some point be a law that should not be obeyed.<sup>223</sup> At some point, another normative principle demands disobedience to a law. Such a conclusion is necessitated by restricting the idea of legal system to human-made laws. Thus,

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<sup>222</sup> See McCall, *supra* note 139.

<sup>223</sup> Perry, *supra* note 28, at 12.

when a human-made law must be disobeyed, it appears to lack legal universality. Yet, if the legal system is larger than the determinations by human authorities to include the Natural Law, when those determinations that cannot be obeyed are encountered individuals still conform their actions to the law in its fullest sense. Subjects are only bound in conscience to obey determinations of the Natural Law. If a human authority commands something other than a valid determination of Natural Law it is not a law at all. Thus, if human law is defined to include only those acts of lawgivers that are in fact laws, the universality condition is satisfied. Those acts of lawgivers that may be disregarded are not laws because they are invalidated by higher law. Yet, to prove this last point, we must examine more carefully the limits on human law-making authority conferred by the Natural Law. A subsequent article will argue that once this limitation is understood, the legitimate disregarding of a human made law can be seen not as a moral objection to a legal obligation resulting in disobedience to law; it is a legal objection based on the resolution of a conflict of laws and the purported disobedience is rather an act of obedience to higher law.