HART’S ONION: THE PEELING AWAY OF LEGAL AUTHORITY

STEVEN D. SMITH*

Authority is a numbingly familiar, stunningly mundane fact of life and a daunting mystery. Judging from the claims that surround it, authority (whatever it is) would seem to be at once indispensable but also elusive, perhaps even inconceivable.

The more localized problem of authority in law partakes of this predicament. Start with the proposition that, as Scott Shapiro remarks, “[i]t is hard to think of a more banal statement one could make about law than to say that it necessarily claims legal authority to govern conduct.” 1 In this thoroughly “banal” view, authority (or at least the claim to authority) is an essential part of what makes law “law.” Legal theorists often say as much, 2 in any case, and in this respect ordinary citizens would likely agree. “The man has power,” people might say of a gangster or warlord, “but he doesn’t have authority. He can order people around, yes. But his orders are not really ‘law.’”

So authority is at the core of law. Or so it seems. And since law is all around us, it might seem that authority must be all around us as well. 3 But what is “legal authority,” exactly? Upon reflection, it turns out that such authority is elusive—elusive in fact or practice, perhaps, but also (or even more so) conceptually, or maybe ontologically. It is not easy to give a satisfactory account of how legal authority arises, 4 or of how and why particular legal rules or legal officials possess authority. But more than that, it is not easy to give a satisfactory account of what legal authority even means, or is.

* Warren Distinguished Professor of Law, University of San Diego. A large number of friends and colleagues helped me with comments on earlier drafts: Larry Alexander, Carl Auerbach, Mike Devitt, Don Dripps, Chris Eberle, Bill Edmundson, Ken Himma, Paul Horton, David McGowan, Michael Perry, Sai Prakash, Mike Rapport, Michael White, George Wright, and other participants in a faculty workshop at the University of San Diego. Miranda McGowan was especially generous, providing helpful comments both in writing and in more than one conversation.

2 See JOSEPH VINING, FROM NEWTON’S SLEEP 241 (1995) (“Without authority there is no law.”); Kenneth Himma explains (but also criticizes) the view, held by Joseph Raz and others, that “any institutional normative system that does not claim legitimate authority is conceptually disqualified from being a legal system. The claim to legitimate authority, then, is part of the very nature of law.” Kenneth Einar Himma, Law’s Claim to Legitimate Authority, in HART’S POSTSCRIPT, supra note 1, at 271, 275.
3 The point is repeatedly made in the work of Joseph Vining. See, e.g., VINING, supra note 2, at 4–5, 110–18; JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN (1986).
4 Scott Shapiro, On Hart’s Way Out, in HART’S POSTSCRIPT, supra note 1, at 149, 150 (noting the “chicken-and-egg” problem that “[l]egal authority . . . is a product of legal rules” but that “for the authorizing rules to exist, some source invested with legal authority must exist to create them” and observing that “the law’s claim to legal authority is actually a deeply paradoxical assertion.”).
And the same can be said of authority generally. Thus, Hannah Arendt made the intriguing announcement that “authority has vanished from the modern world . . . . Practically as well as theoretically, we are no longer in a position to know what authority really is.” Her assertion echoed Soren Kierkegaard’s earlier declaration that “the concept of authority has been entirely forgotten in our confused age.” Contemporary theorists sometimes make similar claims.

These are provocative contentions, and they are also paradoxical. How could it be that “the concept of authority has been entirely forgotten?” On first hearing, the claim seems self-negating, as would a parallel claim that, for instance, “Our old neighbor Joe moved away a few years ago and we have completely forgotten that he ever existed.” And if it is true that authority has vanished and that we no longer understand what it even is, then how could observers like Arendt be in a position to know that this is so? And how could we—those of us who ostensibly have lost the conception of what authority is—even make sense of what she is asserting, much less make up our minds about whether her assertion is true?

Their paradoxical quality might lead us peremptorily to dismiss these claims as hyperbole, or as teasers that cannot be taken seriously. Yet such claims, however confusing or paradoxical, are sufficiently common, and come from sufficiently respectable sources (authoritative sources?), that we ought not reject them too hastily. What sort of condition or problem might they be pointing us to? Yet even if the question seems important, it is not easy to know how to pursue such an inquiry. After all, if the claim is that we have forgotten or no longer understand something—the word lingers on, evidently, but we no longer understand the concept or perhaps the reality to which the word alludes—then how are we even to formulate an investigation into the claim? How are we to tell whether something is actually missing if we do not know what that something is?

---

5 Hannah Arendt, *What Was Authority?*, in *AUTHORITY* 81, 81–82 (Carl J. Friedrich ed., 1958). “[T]he moment we begin to talk and think about authority, after all one of the central concepts of political thought, it is as though we were caught in a maze of abstractions, metaphors, and figures of speech in which everything can be taken and mistaken for something else, because we have no reality, either in history or in everyday experience, to which we can unanimously appeal.” See id. at 105.


7 See, e.g., Michael J. White, *The Disappearance of Natural Authority and the Elusiveness of Nonnatural Authority*, in *AFTER AUTHORITY* (Patrick Brennan ed., forthcoming) (manuscript at 3) (“An enduring problem concerning authority for us post-Enlightenment moderns, it seems to me, is that natural authority has largely disappeared from our most common world-views.”). R. B. Friedman observes that the claim “that the very concept of authority has been corrupted or even lost in the modern world” is “an opinion frequently expressed in some of the most well-known discussions of authority in recent years.” R. B. Friedman, *On the Concept of Authority in Political Philosophy*, in *AUTHORITY*, supra note 6, at 56.

8 R.B. Friedman, *On the Concept of Authority in Political Philosophy*, in *AUTHORITY*, supra note 6, at 56.

9 Cf. PLATO, *MENO* 80d (G. M. A. Grube trans., Hackett Publishing 2d ed. 1980) (1976) (“How will you look for it, Socrates, when you do not know at all what it is? How will you aim to search for something you do not know at all? If you should meet with it, how will you know that this is the thing that you did not know?”).
Despite these difficulties, I propose in this essay to approach the matter of authority, and the ostensible absence of authority, by reflecting on an argument that H. L. A. Hart famously made against the jurisprudence of John Austin. Austin had explained law—and legal authority and obligation—in terms of commands backed by sanctions. Hart in turn criticized Austin’s account on various grounds. But his most decisive objection (or at least the one most relevant to our purposes) considered the case of a gunman who demands money from a victim; Hart suggested that even if the subjects of orders backed by sanctions have good reason to comply with those orders, the command-sanction scenario still does not present us with obligation—or with authority. This argument seems promising for our purposes because it offers a case in which someone (the mugger) plainly wields power, and in which a theorist (like Austin) might carelessly describe the situation as one of authority, but in which upon closer examination we may conclude that genuine authority is not actually present. So the gunman case might give us an instance in miniature of the kind of situation that, according to thinkers like Arendt and Kierkegaard, characterizes modern life generally.

Hart’s argument consequently warrants closer examination. And if we inspect and reflect on that argument, it turns out that Hart was right—more right than he realized, probably, or than he wanted to be. Hart used the gunman situation to criticize command-sanction accounts of law, obligation, and authority. But his logic resists being confined to that target. Though Hart himself may not have intended anything so far-reaching, upon reflection it seems that all of the leading accounts of legal authority are vulnerable to his analysis of the gunman example. His argument, carefully considered and persistently pressed, has something like the effect of peeling an onion, as layer after layer, theory after theory, is removed in the quest to find a solid core of real authority. And when the peeling process is finished, it seems, nothing remains. Strip away the false or inadequate notions of authority and there is no real authority left to find.

But that conclusion is perplexing, because if law must possess or at least claim authority in order to count as “law,” as so many theorists suppose, and if it also turns out that authority does not actually exist, then it might seem to follow that . . . law does not exist? And that conclusion seems manifestly absurd. Because we know perfectly well that law exists. Don’t we?

So if the argument previewed here turns out to be persuasive, but if we also know that law exists, where would we be left? Perhaps with the kind of world that thinkers like Arendt and Kierkegaard have thought they perceived? A world with the vocabulary and the trappings of authority, but from which the genuine article has gone missing? Or is that diagnosis itself misguided?

\[10 \text{ See John Austin, The Province of Jurisprudence Determined 21–25 (Wilfrid E. Rumble ed. 1995).} \]

\[11 \text{ See supra notes 1–3 and accompanying text.} \]
This essay uses Hart’s gunman case to reflect on those questions and the perplexing implications of the predicament they point to. Part I examines and elaborates Hart’s argument and suggests that it makes what can be viewed as a conceptual or ontological objection that is importantly different from more familiar factual or theoretical objections to accounts of authority. Part II argues that this same kind of conceptual or ontological objection can be made against other familiar accounts of authority as well. Part III proposes that the intellectual framework in which they operate virtually compels modern theorists, even as they attempt to explain authority, to instead explain authority away. The Conclusion asks whether there is anything in this loss of authority that we need to lament.

I. MUGGING AUTHORITY

The influential position that Hart sought to debunk holds, as noted, that law consists of commands, issued to subjects by a sovereign and supported by the threat of sanctions for disobedience. This Austinian position resonates with certain low-level, commonsense notions: law is what the government orders you to do (e.g., pay taxes), or prohibits you from doing (e.g., use cocaine), and you ought to obey the government and the government’s law because if you do not you will be punished by fine or imprisonment. Oliver Wendell Holmes’s famous jurisprudential “bad man” would find this account of law congenial. But Hart showed that as an overall account of law, the Austinian command-sanction theory is seriously deficient in a number of different respects.

A. THE CONCEPTUAL-ONTOLOGICAL CHALLENGE

One criticism in particular goes to the heart of the problem of authority. Suppose a gunman orders you to give him your money or be killed. You have received an order backed by the threat of a sanction; that threat likely provides ample reason to obey the order. For Austin and like-minded thinkers, law is basically the gunman situation writ large. But Hart showed that this comparison fails to capture many important dimensions of law, including its features of “obligation” and “authority.”

Hart developed the objection by reflecting on the language people would typically use to describe the gunman episode. In recounting the incident, Hart suggested, you might say that you were “obliged” to give the gunman your money, but you surely would not say that you had an “obligation” or a “duty” to pay him anything. Moreover, if you managed to distract the gunman and then escape, you would not report to your friends that you were “obliged” to obey his order but did not; “obliged” is

12 See AUSTIN, supra note 10, at 18–25.
13 Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 459 (1897) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”).
15 Id. at 82.
typically used, Hart observed, in situations in which you in fact did what you were “obliged” to do. By contrast, we often assert that a person has an “obligation” (of child support, perhaps) even when that person fails to honor it.16

Hart’s explicit conclusion is that the gunman does not impose any “obligation” on his victim. But a close corollary is that the gunman does not possess “authority”; that is because in a common view (though one much contested of late),17 obligation and authority are correlative concepts—different sides of the same coin.18 If we follow this view (as Hart did),19 then to say that someone—a gunman, for example—lacks the capacity to impose obligations is just to say that he lacks authority, and vice versa.

It is important to notice how this objection to the command-sanction theory differs from other kinds of familiar objections to accounts of legal or political authority.20 Some criticisms are factual in nature: an account of authority is criticized on the ground that its premises are false as a factual matter. Consent or “social contract” theories, for instance, frequently provoke the objection that we did not in fact consent to the authority of the state or enter into any social contract.21 Other criticisms challenge the theoretical sufficiency of an account. Thus, if it is argued that government has authority and that we are obligated to obey it because it confers benefits on us (protection, for example, or public services), a critic might argue that even if the premise is factually correct, the conclusion that government thereby acquires authority and that we are obligated to obey is simply a non sequitur: the benefit account is theoretically insufficient.22

So accounts of authority may be vulnerable on either factual or theoretical grounds (or both). And insofar as these objections are

16 Id. at 83. Indeed, we would find it unnatural even to describe the gunman’s order as a “command,” Hart thought, since “a command is primarily an appeal not to fear but to respect for authority.” Id. at 20.
18 JOSEPH RAZ, THE MORALITY OF FREEDOM 23 (1986) (observing that “[i]t is common to regard authority over persons as . . . correlated with an obligation to obey on the part of those subject to the authority”). See also R. B. Friedman, On the Concept of Authority in Political Philosophy, in AUTHORITY, supra note 6, at 56, 65 (“[T]he point of claiming that an imperative comes from authority is to put a person under an obligation to obey it.”); Michael J. White, The Disappearance of Natural Authority and the Elusiveness of Nonnatural Authority, in AFTER AUTHORITY, supra note 7, at 14 (asserting that “obligation and authority are correlative notions. More particularly, authority implies the obligation of some persons (at some times and in some circumstances) to accede to that authority’’); AUSTIN, supra note 10, at 22; LESLIE GREEN, THE AUTHORITY OF THE STATE (1988) 193–94 (quoting Hannah Pitkin’s assertion that “[i]t is part of the concept, meaning of ‘authority’ that those subject to it are required to obey, that it has a right to command. It is part of the concept, the meaning of ‘law’, that those to whom it is applicable are obligated to obey it.”).
20 We will look at some of these theories in more detail in Part II.
21 See infra notes 64–65 and accompanying text.
22 See infra notes 72–80 and accompanying text.
persuasive, the upshot is that the account so criticized fails to provide good reasons to act in obedience to a legal regime and its rules. But Hart’s objection to the Austinian account does not quite fall into either of these categories, and the conclusion it points to is importantly different. Purely as a factual matter, the premise that the gunman, or the government, will impose severe sanctions for disobedience may be absolutely true. And the conclusion that one has a good reason to obey the gunman’s or the government’s orders may be compelling as well, as someone who defies the order may quickly learn to his (perhaps short-lived) distress. The problem, as Hart showed, is that the power to coerce conduct in that way just is not what we understand “authority” to be.

To distinguish it from the factual and theoretical objections, we might call this sort of objection to an account of authority “conceptual.” Or we might call it “ontological.” We have a conception of what authority is—or at least a dim or inchoate notion—and the gunman’s power to coerce just does not fit within that conception. Or what the gunman possesses (power to coerce) just is not what authority is.

In one sense this conceptual or ontological objection might be viewed as merely semantic. We can imagine the mugger who sees Hart strolling in Hyde Park and engages him: “Please, Professor Hart, let us not quibble. For my part, I am perfectly prepared to concede that what I’m imposing on you may not correspond to your concept of ‘obligation,’ and that I do not possess what you call ‘authority.’ You should accordingly consider yourself at liberty to regard yourself as ‘obliged,’ not ‘obligated.’ Use whatever terms you like—it makes absolutely no difference to me—just remember this: you’d better hand over the money, or else.”

In another sense, though, the conceptual or ontological objection seems even more fundamental than the others. As against factual or theoretical challenges, a proponent of a particular account might try to produce more supporting evidence to shore up the factual premises, or she might adjust or improve her theory in order to deflect logical objections and thus secure the desired conclusion. But as against the conceptual or ontological objection, such evidence or adjustments seem futile; that is because an account may be perfectly persuasive as it stands—except that it is simply not talking about “authority.”

For many purposes, this distinction might not matter. But for other purposes it might matter greatly. Perhaps we think, as so many theorists suppose, that in order to have “law” we need actual or at least claimed “authority,” and not merely power to enforce compliance. In that case, the conceptual or ontological objection seems particularly pertinent. Or perhaps, to return to where we started, we are trying to understand and assess the claims of thinkers like Arendt and Kierkegaard who say that authority has vanished from the modern world. Once again, the conceptual

23 See, e.g., Mark C. Murphy, Surrender of Judgment and the Consent Theory of Political Authority, in THE DUTY TO OBEY THE LAW 319, 320 (William A. Edmundson ed. 1999) (proposing a “refurbished” consent theory to overcome the standard objections).

24 See supra notes 1-3 and accompanying text.
or ontological objection would be crucially important, because it might help explain how someone could say, perhaps trenchantly rather than incoherently, “Authority is absent in the modern world. To be sure, there is a great deal that happens—people exercising power over others, for example—that often passes under the name of authority. If you reflect carefully, however, you will see that this isn’t really authority.”

This observation might be cogent. But it might not be. How should we decide? The question prompts us to reflect more closely on Hart’s gunman example. Suppose Hart is right that we typically would not ascribe obligation and authority in the gunman situation. What conception of authority underlies and informs that denial? Why does the gunman not have authority? And what exactly is it that he lacks?

B. AUTHORITATIVE REASONS

Hart’s argument, in focusing on the words people would use to describe the gunman situation, seems premised on the assumption that close reflection on ordinary ways of talking can provide valuable insights into the nature of the things people are talking about. So the fact that we (or at least British speakers of Hart’s generation) would say “obliged” rather than “obligated” in describing a mugging tells us something about what “obligation” (and, correlatively, “authority”) are thought to be—or at least what they are not thought to be. On this debatable but at least plausible premise, we might step back momentarily from the gunman example to consider what people might say that authority is. We can then return to the gunman case and try to discern what is missing—what element or component of “authority” the gunman lacks.

1. Authority and Reasons to Act

So suppose we ask: when people talk about “authority,” what sort of thing do they have in mind? What do they understand “authority” to mean, or to be?

25 In this vein, Michael White describes the “pervasive modern suspicion that the emperor has no clothes—that, while authority may claim to dress itself with the mantle of moral legitimacy, it is ultimately nothing more than a matter of the assertion of one will, or group of wills, over others.” Michael J. White, The Disappearance of Natural Authority and the Elusiveness of Nonnatural Authority, in AFTER AUTHORITY, supra note 7, at 5.

26 Thus, at the outset of his project Hart asserted that “the suggestion that inquiries into the meanings of words merely throw light on words is false. Many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions . . . .” Hart, supra note 14 at vi. Exactly how Hart understood the relation between linguistic analysis and jurisprudence has generated extensive discussion among theorists. See, e.g., Timothy A. O. Endicott, Herbert Hart and the Semantic Sting, in Hart’s Postscript: Essays on the Postscript to The Concept of Law 39 (Jules Coleman ed. 2001); Nicos Stavropoulos, Hart’s Semantics, id. at 59. It seems clear, though, that Hart was not concerned with linguistic usage just for its own sake: he used it to achieve insights into the subjects that language users discuss. In this vein, Nicos Stavropoulos observes that “Hart claims . . . [that] the quest for definitions is not exclusively about language, but is meant to provide metaphysical knowledge . . . . A definition, Hart argues, achieve this by revealing the ‘latent principle’ that ‘guides our use’ of a word.” Id. at 64.
It is immediately obvious that people use the term in a bewildering variety of ways, and this fact severely complicates any inquiry into the nature of authority. But if we were to search for some common theme or bottom-line conception of the sort of practical authority we associate with law or government (and perhaps other institutions as well), a curious but common notion appears: ordinary speakers say that someone has authority if “you have to do what they tell you to,” or perhaps if “you’re supposed to do what they tell you just because they said to do it.” And in this respect, ordinary speakers do not differ significantly from what high-level theorists sometimes say. Thus, Jules Coleman uses a similar locution for law, suggesting that “the law purports to govern our conduct by telling us that we have an obligation to act in a certain way for no reason other than that the law commands it.”

This “just because they said so” description evidently assumes a sort of cognitive and voluntarist causal connection between the authority’s command and the subject’s compliance. In a fantasy story or a science fiction movie, we might encounter stronger authority—the wizard or X-man mutant who through magical powers can simply seize or overpower someone’s will and literally force her to comply with commands. But in human affairs, authority does not work in that way; it operates upon our reasoning and decision-making. So we might clarify the “you have to do what they say” description by explaining that someone has authority if the fact that they order you do something in itself gives you a reason (whether categorical or merely prima facie we need not decide here) to act as ordered.

Some such “reason for acting” conception of authority is apparent in the common practice of citing an authority’s order as one’s reason for doing something. Thus, asked for an explanation of something you did, you might say “I paid my taxes because the government (or the law) required it” or “I went to the store because Mother told me to.” And once again,

27 People talk, for example, about “authority” but also about “the authorities,” which seems to be a synonym for “the officials” and thus noncommittal about whether “the authorities” necessarily possess genuine “authority.” With respect to “authority,” people talk about “moral authority” and “legal authority.” Sociologists sometimes distinguish “charismatic” from “bureaucratic” authority. See FROM MAX WEBER: ESSAYS IN SOCIOLOGY 245–64 (H. H. Gerth and C. Wright Mills eds., trans., 1946).

Legal theorists talk about “practical authority” and “theoretical” or “epistemic authority.” Distinctions are drawn, or sometimes neglected, between “real” and “apparent” authority—de jure versus de facto authority. And sometimes theorists, and people generally, make descriptive statements from an external perspective, “Joe has authority” is thus meant to assert, basically, that Joe is perceived and accepted as having authority within a particular culture or organization or legal system, while at other times they speak more evocatively or from what Hart called an “internal perspective.” HART, supra note 14, at 88–91. Hence, there is no incoherence in asserting that someone has authority in a descriptive sense while denying that the person has authority in a more evaluative sense, and vice versa. Such complexities severely challenge any inquiry into the nature of authority, such as this one, but they are unavoidable.

28 JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE 121 (2001) (emphasis added). See also R. B. Friedman, On the Concept of Authority in Political Philosophy, in AUTHORITY, supra note 6, at 56, 63 (“We describe such situations [of authority] by saying that an order is obeyed or a decision is accepted simply because X gave it or made it.”) (Quoting R. S. Peters). Cf BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 156 (2d ed. 1999) (“The question is whether the legal status of a command, authorization or prohibition, by itself, without more, adds any moral reason for doing or not doing the action indicated.”).
sophisticated theorists have typically explained authority in terms of “reasons for acting.”

But this observation raises further questions. In the first place, it seems clear that not just any sort of “reason for action” will constitute or reflect authority. After all, the gunman’s threat *does*, in an obvious and powerful way, supply a reason for acting—but not, it seems, the kind of reason associated with authority. Put differently, we have a *reason for acting* whether we are “obliged” or merely “obliged.” But Hart’s analysis suggests that merely “obliging” reasons are not truly authoritative. Why not? Why is the gunman’s threat not the type of reason that we place in the category of “authority”? And what sort of reason *would* count as an “authority” reason?

Presumably the answer to that question might have something to do with the common but curious locution we have noticed already: someone has authority if you have to do what they say “just because they say so.” Or you have to do something, as Coleman puts it, “for no reason other than that the law commands it.” But this notion of doing something “just because” someone said to, though familiar enough, calls for clarification. An official order is only one fact or feature of a situation—one among many—that leads us to act in any particular instance: the order must combine with various other facts or features—desires or objectives or motives of those to whom the order is addressed, as well as other relevant conditions of the world—to produce action. If the Tsar orders a stone to do something, nothing will happen. If the Tsar, in the privacy of his bedroom, whispers an order to distant officials, again nothing will happen. And if the Tsar barks out an order to you or me, then again nothing will happen. Action occurs when the Tsar audibly orders his officers to do something because the order sounds in their ears, registers in their minds, and interacts with commitments they have (and that you or I probably do not have). So what would it mean to say that they act “just because” the Tsar so ordered?

Hart’s relatively brief analysis of the gunman case did not purport to address this sort of question. Nonetheless, reflecting on the gunman situation may help us discern answers, and thus to get a somewhat clearer conception of what “authority” is or at least what it is not.

2. *Reasons Personal, Impersonal, and Contingently Personal*

Consider a situation that in some ways seems parallel to the gunman situation, but in which someone is induced to act by a natural fact or occurrence. Normally, perhaps, you go for a walk in the park each afternoon at five o’clock, even on rainy days. But on a particular day a ferocious lightning storm is raging, so you stay inside. The lightning storm is a natural fact that, given your aversion to death or serious injury, provides you with a reason to do or forego doing something. It gives you a “reason to act,” but surely you would not describe the storm as having “authority,” or as imposing “obligations” on you.

---

29 See, e.g., *infra* notes 50–52 and accompanying text.
30 *COLEMAN, supra* note 28, at 151.
Why not? And isn’t this situation essentially like the gunman scenario? In each case, we might say, your reason for acting is to avoid death or injury, and some outside fact—the storm, the gunman—just happens under the circumstances to implicate that reason.

This characterization may seem obtuse, though, because it neglects what may seem an obvious and crucial difference in the cases. The reason provided by the gunman’s threat, unlike that provided by the storm, emanates from a person. And that difference might seem to be of the essence, because we typically associate “authority” with persons like officials or governors and not with natural facts or occurrences like lightning storms.

This observation seems correct, and it provides an important insight into authority. We might try to capture the insight by acknowledging a distinction between “personal” and “impersonal reasons.” Authority, we might say, exists only where the reasons for acting are personal in nature. This clarification need not preclude law from having authority, because even if law itself is not a person, it is the construction and expression of persons—framers, legislators, judges, “We the People.”

This distinction, however, does not yet tell us why the gunman does not have authority. After all, the gunman is a person. And yet, it seems that this observation overlooks something important: although the gunman is a person, the fact that he is a person is not essential to your reasons for complying with his order. To you, as you decide whether to hand over your money, the gunman with his order and his gun and his threat are more in the nature of external facts from which you predict the likelihood that death or injury will occur if an action is not taken. They are equivalent to the ominous sounds of thunder that lead you to infer that if you go out into the park there will be a risk of serious injury. So although the threat does indeed emanate from a person, what matters to your decision is not the fact that it comes from a person but rather your assessment of its evidentiary value in predicting whether bad consequences will follow if you do not hand over your money. The mugger is a person, but only incidentally so: it is not his personal quality that matters to your decision.

We could underscore the point by imagining scenarios in which the same kind of threat comes not from a human being but rather from, say, some sort of robot whose wiring has short-circuited and thereby caused the robot to become a menace. If you believe the robot will inflict death unless you place a valuable green bill in its gleaming mechanical pincers, the fact that the robot is not a person will have no apparent relevance to your decision. Or imagine that some highly sophisticated and powerful vending machine has gone seriously haywire and is about to explode, and the only way to avert the danger is to keep pumping quarters into the slot. In this

31 See VINING, supra note 2, at 248 (asserting that “a search for authority presupposes the personal”).
32 It may well be, as lawyer and psychologist Benjamin Sells has argued, that we often do think of law itself as a person. A common image, Sells has found, is of the law as “an older man, gray-haired and distinguished looking” who wears a leather or camel coat, carries a briefcase, and drinks his coffee black without sugar. BENJAMIN SELLS, THE SOUL OF THE LAW 24 (1994). For present purposes we need not rely on any such personifying imagery; it is enough that law is an expression of persons.
situation, you have the same sort of reason to “hand over the money” as you have in the mugger situation: you want to avoid the imminent risk of death or injury, and the way to do that is to transfer money to the source of the danger. The fact that this source of danger is a person in one case and a piece of metal in the other does not alter the type of reason that induces you to part with your money.

So it seems that we need to recognize three sorts of reasons: personal reasons, impersonal reasons, and what we might call “contingently personal reasons.” Authority may exist, we might tentatively say, only in situations where the reasons for acting are personal in nature. Conversely, where someone acts in response to an impersonal fact or reason (a lightning storm, for example), authority is not at work. And the same is true where, although the factors prompting action happen to involve persons, that fact is incidental or extraneous to their functioning to produce action. In short, reasons that are merely contingently personal in nature are for our present purposes equivalent to impersonal reasons, and we do not put impersonal reasons under the heading of “authority.”

3. Principles and Contingent Facts

The distinction between personal and impersonal reasons (with reasons that are only incidentally or contingently personal operating more like impersonal reasons) may help to explain why the gunman does not exercise “authority” even though his threat does provide a powerful reason to act. But this distinction does not yet provide any illumination of the common notion that authority exists when you have to do something “just because” someone said to do it, or “for no reason other than that the law commands it.” That notion is, as we noted, obscure. Given that any decision to act will be the product of interaction among a variety of facts, factors, and motives, what could it mean to do something “just because” someone (or the law) so ordered?

We might begin to formulate a response by sorting the factors that lead to action into some rough categories. Some of the factors will be internal to the actor—her desires, objectives, commitments. Let us call these internal factors her “principles of action.” In acting on these internalized desires, objectives, and commitments, she will encounter a variety of facts and conditions in the world, and these external factors will have implications for the achievement of her desires or objectives, or for the carrying out of her commitments. But some of these implications will be direct and essential, while others will be more contingent.

Suppose, for example, that you have a friend who loves classical music, so that listening to music is for her an important principle of action. The fact that the orchestra is playing Mozart tonight at the concert hall is

---

33 See COLEMAN, supra note 28, at 121.

34 William A. Edmundson, When Reasons Obligate 4 (Apr. 19, 2004) (unpublished manuscript, http://law.gsu.edu/wedmundson/Reasons%20Obligate.pdf) (observing that “[d]esires, wants, values, interests, needs, pleasures, pains, aims, projects, commitments, intentions, ends, goals, beliefs, and facts—whether singly or in combination—may furnish reasons for action”). All of these items except perhaps the last one appear to refer to what I am here calling internalized “principles of action.”
directly and essentially related to that principle; it is precisely the sort of fact in the world that her classical music principle picks out as centrally relevant to how she should act. She does not attend every classical concert that occurs, of course. Still, given her love of classical music, the fact that this concert will feature Mozart is in itself a sufficient reason for her to attend. Asked why she went to the concert, she might reply, “Because they were playing Mozart.” And at least for those who know her, no further explanation would be needed.

But suppose that you, by contrast, are tone deaf and wholly oblivious to the charms of music, but you enjoy the company of your Mozart-loving friend. You might attend the concert with her, but now it seems that the fact that this is a classical music concert is only contingently related to your principles of action. Your desire or commitment is to be with a friend, and Mozart is only contingently related to that principle: if instead your friend happened to have a taste for free style rap contests or NASCAR races, you would be as happy to accompany her to one of those events. So if your roommate, say, who knows you well, asks why you went to the concert and you answer “Because they were playing Mozart,” your roommate will remain in the dark. “Okay . . . , they were playing Mozart. And so . . . ?” More explanation would be needed—something that would connect the fact of Mozart to your principles of action.

Where a fact is directly and essentially related to a person’s principle of action, it seems a permissible and understandable (if somewhat abbreviated) locution to say that the person acted “just because” of that fact. Your friend could say that she went to the concert “just because they were playing Mozart.” This locution does not deny that the fact alluded to interacted with other facts, especially including the actor’s own internal desires, objectives, and commitments, to produce the action; but it serves to call attention to the essential rather than merely contingent connection between this particular external fact and an internal principle of action. Conversely, if you are deaf to Mozart and attended the concert only to be with your friend, then it is still true that Mozart figured into the overall constellation of facts that led you to act as you did. In a distant sense (the sense of “actual” or “but for” cause familiar to tort lawyers), you attended the concert “because” Mozart was being played. But you would not say you went “just because” the orchestra was playing Mozart; that description would make Mozart seem much less contingent than in fact he was to you. In short, we do not use “just because” for merely contingent facts.

We can now return to the gunman situation and observe another reason why the gunman does not have authority. Even though the gunman provides compelling reasons to act, those reasons are only contingently related to the principles of action of his victim. A common principle of action would be to remain alive, and the gunman’s threat, by giving a victim reason to predict that a failure to hand over the money might lead to

death, gives the victim a reason to comply. But the connection between the gunman’s order and compliance is contingent. The principle of avoiding death leads us not to pick out muggers but rather to avoid them, and to prefer that they did not exist. And in the actual mugging scenario, if the victim believed the gun was not loaded, or if (unbeknownst to the gunman) he happened to be wearing a bulletproof outfit, then he presumably would not have a reason to pay. Because the connection is contingent, it seems a mistake to say that the victim gives the gunman the money “just because” the gunman so ordered. And if that sort of “just because” is the mark of authority, then we can say that the gunman lacks such authority.

Indeed (and this point will become crucial), it is not quite correct to suggest, as Hart did, that the crucial distinction is whether the victim was “obligated” or merely “obliged.” There might well be situations in which the victim could be said to be “obligated” to pay the mugger, but in which the fact of the gunman’s threat would still be only contingently related to the victim’s principles of action, and in which the gunman would accordingly still not have “just because” authority. Suppose, for example, that the gunman holds you up, threatening to kill you if you do not hand over your money, and suppose also that you are a tough, defiant, Sylvester Stallone-type of character whose first instinct is to try to disarm the gunman. But as you are about to grab for his gun, you suddenly remember that you have children at home who depend on you for financial and emotional support; if you were injured or killed, they would be left in a lamentable situation. So you reluctantly give the gunman what is in your wallet.

In this situation, once again, you have reasons to comply with the gunman’s order. Those reasons are “personal” in nature; they arise out of a concern for persons—namely, your children. And they could plausibly be described as constituting an obligation. Thus, asked why you gave the gunman your money, you might explain, “I felt it was my obligation—because of the children, you know. Back before I had a family I wouldn’t have given the creep a dime, but a parent has certain responsibilities.” Even so, it is still not true that the gunman’s order imposed an obligation on you, or that the gunman was exercising authority. Our analysis of contingency suggests why this is so. Your principle of action consists of a commitment to care for your children, not a commitment to obeying gunmen. The commitment to your children reflects an obligation. But the gunman’s threat is only contingently connected to that obligation. Thus, the obligation does nothing to confer authority on the gunman.

36 Of course, if his principles of action were different he would not have a reason to comply; thus, if the victim of the mugging happened to be harboring a death wish but was morally opposed to suicide, the mugger’s fortuitous threat might give him a reason not to comply.

37 In a related vein, John Simmons explains that for many laws, such as laws prohibiting murder, theft, and fraud, “it is perhaps plain in these cases that there is a moral duty or obligation to do . . . . what the law requires. . . . .” Even so, “this duty should not be seen as equivalent to a duty to obey the law.” That is because “[a] moral duty to obey the law would be a duty to do as the law requires because it is required by valid law, . . . . a duty to obey the law as such, not to do as it requires just insofar as it happens to overlap with independent moral duties . . . .” A. John Simmons, The Duty to Obey and Our Natural Moral Duties, in Is There a Duty to Obey the Law? 91, 94–95 (R.G. Frey ed., 2005).
4. Authority and Contingency

The preceding discussion has attempted to elaborate on what is implicit in the common notion—sometimes expressed as well in similar if slightly more dignified terms by sophisticated theorists—that someone has authority when “you have to do what they say just because they say so.” That notion suggests that authority inheres in a kind of capacity by one’s order to give others “reasons for acting.” But the notion denies the existence or operation of authority, we have seen, when the reasons for acting exhibit either of two types of contingency.

First, we associate authority with “personal” reasons, not with impersonal reasons such as natural facts or conditions, and not with reasons that only incidentally or contingently emanate from persons. Second, if an order amounts to a fact that is only contingently relevant to the subject’s principles of action, then once again it is not a manifestation of authority.

The gunman’s order is—or at least may be—contingent in both senses. Though the gunman is a person, his personhood is not essential to the victim’s reason for handing over the money; the threat would have the same force if it came from an impersonal source, such as a robot. To the victim, in other words, the gunman is not essentially different from some natural risk-indicating fact, such as a lightning storm. Second, even the threat itself (whatever its source) may be only contingently related to the principles of action that animate the victim. Thus, even if the victim complies out of a sense of obligation to his or her children, the gunman’s order is only contingently related to that principle of action.

So the discussion vindicates Hart’s observation that the gunman lacks the capacity to impose obligations, and hence lacks authority. But if Hart’s observation is elaborated in this way, then its corrosive logic is hardly limited to gunman scenarios. It is not just muggers—or Austinian sovereigns whose commands are backed by sanctions—who do not generate the requisite personal and “just because” type of reason, and whose claims of authority are vulnerable to the types of criticisms that Hart’s example gives rise to. Other theories of authority provoke similar objections.

II. PEELING THE ONION

As noted, Hart’s central conceptual or ontological objection was offered against one particular account of obligation and authority—what we have been calling the command-sanction account. But essentially the same objection can be made against other familiar accounts of authority as well.38

---

38 The objection can be made against these accounts, that is, insofar as they are taken to be accounts of “authority” in the familiar “just because” sense discussed above. It is always open to a proponent of a theory to say that the theory is not trying to explain authority in that sense, but only to provide content-independent reasons for complying with official directives. In other words, a theorist is free simply to shrug off the conceptual-ontological point (much in the way that our hypothetical Hyde Park mugger did). Whether anything of value would thereby be lost is a question discussed (briefly) in the Conclusion. I thank Ken Himma for impressing this point on me.
Theories of authority and their variations are legion; there is no canonical way to classify them and no way to examine all of them. But purely as an organizing device, it may be useful for present purposes to consider the central recurring features by grouping accounts into three rough categories that we can call consequentialist, deontological, and empirical. (Though most accounts, as we will see, will have elements of each.) We can then observe how the conceptual-ontological objection can be pressed against each kind of account.

A. CONSEQUENTIALIST ACCOUNTS OF AUTHORITY

This sort of account accepts the consequentialist premise that practical reason is or should be directed to maximizing good consequences—for particular actors, or for society as a whole—and the account then seeks to explain authority in consequentialist terms. Perhaps the most starkly consequentialist account is one that explains legal authority and obligation in terms of sanctions for disobedience. Why should I obey the law?, Holmes’s bad man asks. And the law replies: Because if you do not, bad consequences—punishments—will follow. The force of this position is obvious enough. But as discussed, it was precisely this sort of account that Hart’s objection was directed against; Hart showed that obedience coerced by threat of sanction does not involve obligation or, by extension, authority. Thus, Hart’s objection peels away “command-sanction” theories as adequate accounts of authority: such accounts are not actually talking about authority at all.

1. Expertise

Authority is sometimes associated with expertise. But although experts are no doubt more welcome (and more respectable) than muggers, Hart’s objection has the same result for consequentialist accounts of authority based on expertise. In essence, an expert—a doctor, stockbroker, or auto mechanic, for example—are sources of information by which we predict future consequences that are relevant to our principles of action. That information comes from persons, to be sure (because the doctor, stockbroker, and mechanic are persons), and it may come in the form of directives. But neither of these facts is essential to the way in which this expert advice affects our reasons for acting. Those reasons are essentially impersonal in nature or, rather, contingently personal. Moreover, experts’ directives are only contingently related to our principles of action. Thus, the nature of our reasons for acting on the advice of experts is not in this respect essentially different from that of our reasons in the command-sanction scenarios.

So suppose your doctor orders you to stop smoking. You probably have good reasons to follow his directive. So you might explain to a friend, “I’m

39 See Edmundson, supra note 17, at 228-30 (describing a variety of ways in which theories of legal authority and obligation can be classified).
40 See Holmes, supra note 13, at 459.
41 See infra notes 50–52 and accompanying text.
quitting because my doctor told me to.” Indeed, “doctor’s orders” is a well-known explanation for particular actions. Even so, it would seem odd to say that you are “obligated” to follow this directive, or that the doctor has “authority” over you. Rather, his directive is relevant because it reflects an expert belief—a kind of “evidentiary fact”—that smoking is bad for your health, and this evidentiary fact is relevant to your desire for good health. The doctor is a person, but this fact is not crucial to your reason for acting. If some on-line medical diagnosis program led you to the same conclusion, you would again have the same reason to quit smoking. The information you receive from the doctor may come in the form of a directive—it might even be phrased as a command (“I tell you, you’ve got to stop smoking!”)—but again, this fact is not essential. The doctor’s expert belief would provide the same reason, assuming you knew of it, even if he failed to communicate his belief to you at all (perhaps because he forgot, or didn’t want to frighten you)—or even, for that matter, if he ordered you to continue smoking (perhaps because he had invested heavily in the tobacco industry).

In short, both the gunman’s threat (“Your money or your life”) and the doctor’s directive (“You really need to quit smoking”) emanate from persons, and they may take the form of commands. But it is not the fact that they emanate from persons or take the form of commands that gives you a reason to act. Rather, those utterances stand to you as evidentiary facts, suggesting that if you do not perform some particular indicated action, bad consequences will follow. We can imagine similar facts coming to you by some means other than through a person, or in some form other than a command, and in each case, you would have the same reason to act. But as we have seen, we do not associate “authority” with facts or reasons that are merely contingently personal or contingently related to one’s principles of action.

So Hart’s objection peels away accounts of authority based on punishment or expertise. And it works to similar effect with the influential accounts of authority associated with Joseph Raz and John Finnis.

2. Authority and Peremptory Reasons

Perhaps the most influential account of authority in modern legal theory is Raz’s “service conception of authority.” Raz suggests that practical authority—which in his view, as noted, is something that law necessarily claims to possess—can be understood in terms of three basic

42 A mugger’s exchange is almost certain to involve an order or command, but as a matter of logic it need not. We can imagine the civilized mugger who respects his victim’s freedom of choice. “I’m just telling you the facts. You can give me the money and live, or you can refuse and die. It’s entirely your choice.”

43 COLEMAN, supra note 28, at 124. Jules Coleman, though critical of Raz in significant respects, describes Raz’s account of authority as “brilliant both in the depth of its problematic and in the perspicuity of its solution, and . . . it is certainly the most fully developed, sophisticated, and influential doctrine of legal authority to date.” Id. at 124. Though rejecting much in Raz’s positivistic jurisprudence, John Finnis endorses his conception of authority. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 234 (1980). But see Himma, infra note 48.

44 See supra note 2.
ideas, or theses. The “dependence thesis” asserts that authoritative directives are “based on the other reasons” that would guide the agent in any case, operating “to sum [those reasons] up and to reflect their outcome.” The dependence thesis is supplemented by “the normal justification thesis,” which explains our rationale or justification for obeying authority: we do what the authority says because we are more likely to comply with the reasons that already apply to us by following the authority’s directives than by acting on our own independent judgment. In that case, we do not so much add the authority’s directives into the mix of reasons we will act upon, but rather we should treat those reasons as replacing or preempting other reasons. Raz describes this last idea as “the preemption thesis.”

Thus, if your stockbroker orders you to sell your stock in IBM, she is presumably acting on the basis of the same profit-making reasons that would motivate you if you did not have a broker (the dependence thesis). And if you think your broker understands the stock market better than you do, you may plausibly conclude that you will achieve your own investment goals more effectively by following her advice than by acting on your own decisions (the normal justification thesis). In that case, your broker’s directives will provide you with reasons that are not so much “in addition to” the profit-making reasons you already have, but that in an important sense “replace” or “preempt” those reasons (the preemption thesis).

Raz’s account provides an impressive explanation of a particular kind of reason for acting. His account has been criticized, but let us suppose that it is persuasive in describing a particular kind of practical reasoning. Does Raz give us “authority” of the sort we have been looking for? It seems not. On the contrary, if offered as an explanation of authority, or of obligation, Raz’s account seems to invite the same kind of criticism that Hart made against Austin.

Indeed, we have already seen how this is so. Thus, the medical doctor would seem to be an excellent example of someone who can give peremptory reasons of the kind Raz describes; but as we have seen, the doctor does not exercise “authority” but is merely a source of evidentiary facts. The same analysis applies to the stockbroker. The stockbroker

---

46 Id. at 297. More precisely, the authority’s directives preempt further consideration of the kinds of reasons that are reflected in the authority’s directive. But if the authority has not taken some class of reasons into account, then her directive would not preempt consideration of those reasons. For example, you might defer to your doctor’s instructions with respect to health-related considerations. But if you have a faith-based objection to, say, receiving a blood transfusion, you might not regard the doctor’s medical judgment as preempting consideration of that sort of reason; that is because the doctor has no competence with respect to that sort of reason and her directives presumably have not taken it into account.
47 Id. at 299.
48 See Kenneth Einar Himma, Just ‘Cause You’re Smarter than Me Doesn’t Give You a Right to Tell Me What to Do: Legitimate Authority and the Normal Justification Thesis, OXFORD J. LEGAL STUDIES (forthcoming) (thoroughly critiquing Raz’s account); See also LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES 73–77 (2001) (discussing deficiencies in Raz’s account); See also RONALD DWORKIN, JUSTICE IN ROBES 201, 206 (2006) (describing Raz’s account of authority as “eccentric” and as “presuppos[ing] a degree of deference toward legal authority that almost no one shows in modern democracies”).
provides the kinds of peremptory reasons that Raz describes. And the client might say, loosely, “I sold my stock in IBM because my broker told me to.” But even though the broker is a person, the “because” in this statement does not reflect the kind of personal and “just because” reason needed for authority. So once again, the more complete explanation would say, “I sold the stock because I want to make a profit in the market and avoid losses, and the fact that my broker told me to sell led me to believe that the best way to achieve those goals would be to sell. Did I have an ‘obligation’ to do what my broker told me to do? Of course not!”

In fact, it wasn’t the broker’s order at all, but rather her expert opinion, that was relevant to your decision to sell. If you had known (by, say, overhearing a phone conversation between the broker and some other client) that the broker believed IBM was going to plummet, then you would have had the same reason to sell even without any actual communication from her. And conversely if you had known that the broker did not actually believe IBM would drop you presumably would not have sold even if she had told you to (by mistake or misfeasance of some sort). The broker’s instruction was an evidentiary fact, and you would have had the same reason to act if you had encountered the same kind of fact from some impersonal source.

The same conclusion follows if we suppose that the authority is mediating moral rather merely prudential reasons. Commenting on Raz’s account, Kenneth Himma explains:

Suppose that right reason demands always that we comply with moral standards. Suppose further that A is infallible in determining what is required by moral standards and is morally impeccable in the sense that A always directs what is required by those standards. And suppose that there is no other fact that might legitimate A’s authority apart from A’s impeccability. While I am morally obligated to comply with the correct moral judgments that are expressed in A’s directives, it is false that I am morally obligated by A’s directives. If A’s directives always demand what is required by morality, I am morally obligated to do as A says—but not for the reason that A says it.49

3. Coordinating Authority

Finnis, by contrast to Austin with his emphasis on punishment (and also in contrast to darker views stressing the need for legal authority to restrain violence and wickedness), points to the positive benefits of law and legal authority in promoting valuable social coordination.50 In a complex and pluralistic society in which a huge variety of agents pursue a vast array of interests and agendas, it is to everyone’s benefit to have someone who can issue directives and rules by which agents can coordinate their projects

50 FINNIS, supra note 43, at 231–33.
And activities with those of other agents. Nor would the need for such authority disappear, as is sometimes said, if everyone behaved like an angel. On the contrary, the need for coordinating rules would likely increase. Thus, the good of society (and of those of us who make up society) requires not only criminal law but also contract law, corporate law, and constitutional law.

But such rules and directives do not just appear spontaneously or ex nihilo; they must come from somewhere—or, usually, from someone. So if there is a person or persons with the power and propensity to issue such coordinating rules and have them obeyed, the very ability to provide such coordination gives this person or persons authority. Their authority derives from “the sheer fact of [their] effectiveness” in satisfying this need for coordination—from “[t]he fact that the say-so of [these people] will in fact be, by and large, complied with and acted upon . . . .” Moreover, insofar as we all have a moral obligation to act for the common good, it seems to follow that we have at least a prima facie moral obligation to obey those rules.

Finnis’s coordination account succeeds in articulating a kind of reason for acting in accordance with officially promulgated coordinating rules. But is it an account of “authority,” in a strict sense? Does the account survive Hart’s conceptual-ontological objection? If we look only at the specific linguistic patterns Hart noted, Finnis’s coordination account may not seem vulnerable to the objection. On Finnis’s premises, after all, we might well say that we are “obligated,” and not merely “obliged,” to follow the rules laid down by governmental officials. But once again, on closer inspection it seems that although Finnis’s account may well give us an explanation of reasons for acting in accordance with commonly observed rules, it does not quite serve up the kind of authority we are looking for.

We might better appreciate the difficulty by spelling out the coordination-based reason for acting in this way: (1) it is beneficial—or morally obligatory, or a requirement of practical reason—for citizens to act so as to promote the common good; (2) having and acting in accordance with coordinating rules promotes the common good; (3) coordinating rules require and emanate from a legal regime; (4) therefore, it is beneficial, or morally obligatory, for citizens to recognize and to act in accordance with


The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. . . . The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.

52 See FINNIS, supra note 43, at 231 (“[T]he greater the intelligence and skill of a group’s members, and the greater their commitment and dedication to common purposes and common good . . . ., the more authority and regulation may be required, to enable that group to achieve its common purpose, common good.”).

53 FINNIS, supra note 43, at 246–47.

54 It would be more in accord with Finnis’s account to call this an obligation of practical reason, but “moral obligation” is close enough for present purposes; and the term also shows how Finnis’s is not a purely consequentialist account. It may be, as Finnis has elsewhere asserted, that all plausible moral theories contain both consequentialist and deontological elements. See John Finnis, Fundamentals of Ethics 84 (1983).
the directives of a legal regime. Let us suppose that this account is persuasive: it would permit citizens to say, “I did such-and-such because the government (or the law) so decreed,” at least in a loose sense of “because.”

But once again, this reason for action seems multiply contingent. Coordinating norms come from all sorts of sources. Government officials provide coordinating rules, but so do customs, as well as people to whom we typically do not ascribe “authority.” A tree falls in the road, and a bystander may step in to direct traffic: drivers have reason to follow the bystander’s directives, but they would usually not consider themselves subject to the bystander’s authority.

Conversely, although the officials to whom we customarily ascribe authority may help to promote coordination, they do many other things as well, and sometimes they act to disrupt coordination. Think for example of desegregation laws and judicial decisions such as \textit{Brown v. Board of Education}. In the short run and perhaps in the very long run as well, such laws may disrupt patterns of behavior that have served to coordinate human interaction, albeit in ways that the government regards as unjust. The purpose of such legal measures is not to promote coordination, but rather to correct injustice—despite the cost to coordination. So the authoritative status of such laws could hardly be said to derive from or inhere in their coordinating function.

In sum, the connection between the authority of government or law and coordination seems contingent in various respects. But let us bracket these contingencies and consider the logic of Finnis’s account more closely. In this account, citizens follow the rules laid down by government officials not because those officials have any “right to rule” based on consent, or virtue or wisdom, or tradition, or divine right, or any of the other bases of legitimacy to which governments have historically appealed. Rather, the obligation to obey the law derives from the requirement to act for the common good. That requirement supports compliance with official directives simply because of “[t]he fact that the say-so of [these people] will in fact be, by and large, complied with and acted upon . . . ,” and general compliance therefore serves the good of coordination.

In this respect, though, the reason for complying with government directives seems closely analogous to the reason for complying with the gunman’s directive in the “Papa Stallone” situation discussed earlier—the situation in which the victim complies not out of respect for the gunman, or

55 These points are developed at greater length in Steven D. Smith, \textit{Cracks in the Coordination Account? Authority and Reasons for Acting}, 50 \textit{AMER. J. JURIS.} 249 (2005).
56 See \textit{FINNIS, supra} note 43, at 238–45 (offering an intricate analysis of the legalization of custom).
58 \textit{FINNIS, supra} note 43, at 248–251 (Finnis criticizes “[t]he tendency of political thinkers to utter legalistic fictions about the original location of authority . . . .” Under the coordination account, authority is not dependent on “[c]onsent, transmission, contract, custom.” Nor does it depend on virtue in the rulers: full political and legal authority can exist in “the very frequent case where bad men establish their rulership over a realm . . . .”).
59 \textit{FINNIS, supra} note 43, at 125.
60 \textit{FINNIS, supra} note 43, at 246.
for the order itself, but rather because of an obligation to his children. In that situation, as we saw, the subject of the order might plausibly be said to be “obligated” to comply. But because the obligation is owed to someone other than the person issuing the order and because the order is only contingently related to that obligation, it would seem wholly implausible to say that the person issuing the order thereby acquires authority. The same analysis would seem to apply to Finnis’s account. Thus, a compliant citizen might explain, “I obeyed the law because I wanted (or was morally obligated) to promote the common good, and the government’s directive was a fact that led me to conclude that acting in accordance with the directive would achieve that objective.” The reason for following the law—the “obligation,” even—derives from an independent obligation to which the law is contingently related.

Indeed, Finnis himself (following Aquinas) carefully explains how in the case of unjust laws, subjects are not obligated by the laws themselves, but may nonetheless have a moral reason to obey them so as to avoid injury to fellow citizens. But although just laws surely claim more respect than unjust laws, insofar as the obligation to obey derives from a general duty owed to our fellow citizens, there seems to be no difference in this particular respect between just and unjust laws. In neither case does the law provide the “just because” sort of reason that is the mark of authority.

B. DEONTOLOGICAL ACCOUNTS OF AUTHORITY

Finnis’s coordination account has already carried us in the direction of deontological theories of authority. Accounts of authority that are primarily deontological or duty-based might be assigned to two major groups or families. The most familiar accounts cluster around ideas of consent, promise, or agreement. A different family of accounts emphasizes gratitude, reciprocity, or “fair play” as a basis of authority. Each type of account provokes familiar criticisms, of both the factual and theoretical varieties. But in addition, upon closer examination, each type of account seems vulnerable to Hart’s more conceptual or ontological objection—to the objection that asserts that even if an account is factually and theoretically persuasive, it still is simply not talking about authority.

1. Consent-Based Accounts

Probably the most familiar explanation of authority, at least in the Anglo-American legal tradition, features consent or agreement as the basis of authority. The Declaration of Independence famously announces the ostensibly “self-evident truth” that just government must be based on “the
consent of the governed." This assertion was an expression of familiar notions, elaborated in different versions by thinkers like Hobbes, Locke, and Rousseau, of a social contract in which agents in a state of nature agree, in exchange for the blessings of orderly governance, to give up some of their natural liberties and to follow legal decrees. Kent Greenawalt observes that "for most of the history of liberal democracies, the dominant theory about why citizens are obligated to obey the law has been social contract." Thus, legal authority derives from a mutual exchange of promises voluntarily given.

As noted in Part I, such accounts are often criticized for being factually inaccurate. In reality, most of us never did in fact agree or promise to be subject to a legal regime. Proponents of such theories may respond by developing notions of hypothetical consent, but these modifications provoke the objection that conclusions of authority amount to non sequiturs. Our normal assumption is that you and I are bound by agreements or promises that we actually did make—not by agreements or promises that we might have made or even should have made.

Suppose, though, that these criticisms are set aside; would the consent-based accounts actually deliver up what we have been looking for—namely, authority? We could bracket the usual criticisms by imagining that in fact all of us have freely entered into an agreement—there is a copy in writing, available for public inspection, with all of our John Hancocks at the bottom—in which we explicitly and solemnly promise to obey the laws adopted by some legal regime clearly designated in the agreement. Under those hypothetical conditions, would authority exist?

Upon reflection, it seems that even in this somewhat fantastic scenario, Hart’s objection would still have force. Once again, our promise would give us a reason to follow the regime’s legal directives. (Or at least it would have that effect on the unheroic assumption that we have a moral obligation to fulfill promises.) We might thus say, “I paid my taxes because the government (or the law) commanded me to.” But also once again, this statement seems to be an abbreviation for a more complete explanation, which would go something like this: “I paid my taxes because I believe I have a moral obligation to fulfill my promises, and as it happens I made a promise to do what the law commands.”

So the legal decree (“Pay your taxes”) is only contingently related to the principle of action—that is, the obligation to keep promises. You can

---

65 DECLARATION OF INDEPENDENCE [¶ 2] (1776).
68 See A. John Simmons, The Duty to Obey and Our Natural Moral Duties, in IS THERE A DUTY TO OBEY THE LAW? supra note 37, at 118 (“Real citizens in real political communities seldom do anything that can be plausibly described as either a promise to obey or any other kind of freely made commitment to comply with domestic laws.”).
69 See Michael J. White, The Disappearance of Natural Authority and the Elusiveness of Nonnatural Authority, in AFTER AUTHORITY, supra note 7, at 18.
make promises about anything. You might have promised to make a pilgrimage to Miami, or to call your mother every Monday morning, or to stand on your head in the main square at lunchtime. You might have promised to follow the teachings of Miss Manners, or the Dalai Lama, or the Queen of Sheba, even though those worthies do not know of your existence and are not pretending or attempting to address you at all. Or, you might have promised to do the opposite of whatever the law commands. As it happens, you promised to obey the law—so we are supposing—and as a result you now have a reason to do that. But the legal directives do not in themselves give you a reason to act; they are merely facts that, given the contingent content of your particular promise, happen to implicate your primary reason for acting.

In sum, consent-based accounts of authority are vulnerable to factual and theoretical objections, but they are also vulnerable to an even more fundamental objection: even on their own premises, what they provide is not, strictly speaking, authority.

2. Gratitude, Reciprocity, Fair Play

Other accounts of authority do not depend on promise or consent but rather on duties grounded in obligations of gratitude, reciprocity, or fair play. One form of this approach emphasizes duties ostensibly arising from what government and law do for us. If someone does you a favor or confers a benefit on you, you are morally obligated, perhaps, to return the favor or to bestow a benefit in return. Government and law confer benefits on us (protection against violence, for example), and we are obligated to reciprocate by accepting the law as authoritative for us.

Once again, accounts based on gratitude or reciprocity provoke important criticisms of the factual and theoretical varieties. Government does things that both help and hurt most of us, and some of us might question whether we are net beneficiaries (especially relative to some other government that we might prefer). Even if we are beneficiaries, moreover, absent meaningful consent on our part we might still regard government as a benefactor that lacks power merely by conferring benefits to bind us in particular ways. But let us set aside these criticisms: even if gratitude-based accounts are factually and theoretically acceptable, so that they succeed in explaining why we have reasons to follow the government’s legal decrees, do these accounts actually supply us with authority?

Again, the answer is doubtful. Suppose your rich Uncle Albert, out of the kindness of his heart, gives you a major present—a BMW, let us say. You are presumably obligated to feel and express gratitude to Uncle Albert. Perhaps you are also obligated to reciprocate by doing something nice for him. One possible way of doing something nice and hence expressing gratitude—but only one way, and only a possible way—might be to comply with requests he makes, or with directives he issues.

70 For a helpful overview, see Wright, supra note 67, at 1–18.
71 For discussion of these problems, see Edmundson, supra note 17, at 236–39, 243–45.
Suppose you are a celebrated songwriter and Uncle Albert says, “Please, my child, write me a song”: gratitude and reciprocity may imply that you ought to do this. And you might explain, “I wrote the song because Uncle Albert asked me to.” Even so, the “because” seems indirect and contingent. The more complete account would say something like this: “I wrote the song because I wanted (or felt obligated) to do something nice for Uncle Albert—he did after all give me a BMW—and the fact that he asked me for a song led me to believe that this would be a way of doing something nice for him.” But there might well be other ways of discharging gratitude-based duties. You might surprise him with a delicious dinner, or with tickets to the Super Bowl. Conversely, if you have just lost your beloved pet hamster and you know that in your current forlorn and embittered mood the only song you could write is likely to bring Uncle Albert more sorrow than joy, you might sensibly conclude that your duty of gratitude to Albert means that you should not comply with his request for a song.

In sum, you may have a good reason to do what Uncle Albert says to do in a particular context. Even so, it would be an overstatement to say that you act “just because” Uncle Albert told you to, and hence a mistake to say that Uncle Albert has “authority” over you. Even if you have an “obligation,” that obligation derives from some other normative source—the duty of gratitude, perhaps—and not from any authority possessed by Uncle Albert. Substitute “law” or “government” for Uncle Albert, and the same conclusion obtains: gratitude may give you reasons to act but nothing that upon close inspection appears to satisfy the specifications for “authority.”

A different form of this approach points more to the obligations of “fair play” that we owe to our fellow citizens or subjects. In an early article, Hart himself suggested that legal obligation arises from the obligations we owe to our fellows in what is taken to be a sort of common venture.

When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission. The rules may provide that

---

72 Cf. A. John Simmons, The Duty to Obey and Our Natural Moral Duties, in IS THERE A DUTY TO OBEDIENT THE LAW?, supra note 37, at 119 (“Suppose that we do in fact owe benefactors a fitting return of some sort. Whatever else may be true of these debts, it is clear . . . that our benefactors are not entitled to themselves specify what shall constitute a fitting return.”).

73 Cf. Edmundson, supra note 17, at 245 (“If you, unbidden, squeegee my windshield, I may owe you a duty to say thanks, but I do not owe a duty to do whatever you demand, even if what you demand is very important to you.”).

74 It is not clear that Hart himself continued to accept this rationale. The nature of obligation was something that vexed Hart throughout his life. Thus, his biographer reports that Hart “was never convinced that he had satisfactorily resolved this dilemma about the restricted, but genuinely normative, notion of obligation in law . . . .” NICOLA LACEY, A LIFE OF H. L. A. HART 228 (2004). Indeed, late in life in personal ruminations Hart described the problem of obligation as “[q]uite panic-generating!” and worried about whether he could be “honest about errors [in The Concept of Law] without wrecking the book.” Id. at 336.
Hart’s “joint venture” or “fair play” rationale has generated extensive discussion. Once again, however, we need not enter into the merits of those debates. For our purposes the important point is that whatever its virtues, the “fair play” account seems subject to reservations much like those noted earlier with respect to promise-based accounts. That is, even on the assumption that Hart’s rationale provides us with good reasons to comply with official orders or rules, these are not “just because” reasons of the sort we associate with authority.

First, the reasons do not emanate from any authoritative quality of the rules themselves, or of the rulers, but rather derive indirectly from our obligations to fellow participants in the common venture. Indeed, Hart himself emphasized the point. In addition, the connection between the rules and rulers and the common venture is contingent. It so happens that our fellow participants have ordained that those who participate in or are affected by the venture should follow the rules laid down by specified officials. Or at least so we are hypothesizing. But the joint venturers might have ordained something quite different. They—we?—might have settled the terms of the venture in advance, or incorporated and deferred to (evolving) custom rather than to formal official directives, or demanded ongoing collaboration and consensus among the venturers. In sum, any obligation to follow the law does not derive from law’s authority; rather, the obligation is a contingent consequence of some independent moral duty or principle of action.

C. THE LIMITATIONS OF THE EMPIRICAL APPROACH

The difficulties in consequentialist and deontological accounts might prompt us to take a different course—one that may seem both more modest and more secure. We might start with the undeniable fact that however hard it may be to explain what “authority” actually is or how it arises, people surely do talk about authority; and they routinely make (or reject) claims and ascriptions of authority with respect to various institutions and legal regimes. So rather than theorizing about authority as if it were some sort of Platonic essence, perhaps we should stick to the empirical and study the
ways in which people and communities talk about and attribute “authority” to different regimes or institutions.

Hart himself seems to have pursued this approach (though he did not limit himself to it). Thus, he famously described his overall project in The Concept of Law as “an essay in descriptive sociology.” And immediately following his analysis of the gunman situation he proceeded to reflect on different conditions in which people typically do or do not talk about obligations. These reflections were elaborated into a theory of law as a system of primary and secondary rules with a sort of master “rule of recognition” at its center. And the “rule of recognition” gains its force and influence, Hart thought—its authority—from the fact that officials by and large accept it as such. Thus, Hart’s approach seems to focus not so much on the question of “What is authority, really?” but rather on the question “How do political communities construct or ascribe or recognize authority?” Or, rather, his approach reduces the former type of question into the latter type of question.

Whether Hart’s own “social practice” version is an accurate account of how communities like our own understand law and authority has been the subject of fierce and ongoing debates. Over the intervening decades, critics like Ronald Dworkin have severely criticized Hart’s account, and more positivist-minded supporters have come to Hart’s defense, often by amending or expanding upon what he said. Scott Shapiro observes that “[t]he debate between the Dworkinian and Hartian camps on these issues has been the story of analytical jurisprudence for the last thirty years.”

For present purposes, we can steer clear of these debates. That is because however valuable or illuminating it may be for the questions it is addressing, an empirical or sociological description does not in itself speak to the most central substantive questions raised by observations like those that prompted the present discussion: Arendt’s claim that authority has “vanished from the modern world,” for example, or Kierkegaard’s assertion that the concept of authority has been “entirely forgotten.” Suppose that a sociological study, whether conducted through intense empirical research or from an Oxford professor’s armchair, accurately reports that people ascribe “authority” to legal regimes under conditions X, Y, and Z. Presumably, the people who are the subject of the study make that ascription because they suppose that authority actually exists under those conditions. It may be valuable to know that people so suppose. But
questions remain: what is it that exists under those conditions, and what is it about X, Y, and Z that leads people to ascribe authority under those circumstances? And, perhaps most fundamentally, are the ascriptions correct, or justified? To address those questions, we would need to go beyond a mere description of the patterns of ascription.

More generally, an empirical or social science approach to the question of “authority” would be descriptive and, to use Hart’s terminology, “external” in character.86 Or, perhaps more accurately, it would be an “external” report on the “internal” thinking and practice of those who consider themselves subject to law. Taking the perspective of an outside observer (an anthropologist, perhaps, or a sociologist or political scientist), this approach would seek to describe the conditions under which people ascribe authority, or “legitimacy,” to a legal regime. A sociologically-minded legal theorist might ask whether attributions of authority in fact conform to some “rule of recognition,”87 as Hart contended. Other social scientists would be more interested in other questions. Do elections cause people to treat a government as authoritative? Public displays, ceremonies, and monuments? Exhibitions of military power? Are the governments of the People’s Republic of X or the Commonwealth of Y regarded by their subjects as “legitimate”?

These are the sort of questions that, for example, political scientists pursue, and they are plainly valuable for various purposes, including some legal purposes. Even so, such descriptions do not purport to tell us, as Arendt put it, “what authority is” or whether real authority actually exists in a particular situation. Empirical or sociological accounts of authority are in this respect like empirical accounts of morality. An anthropologist may give us an elaborate account of how, in the culture of the Sargasso Islands, eating one’s relatives is believed to be morally permissible, even commendable. The account may be perfectly true as a description, and it may also be valuable (for example, if you are contemplating a Sargassan expedition and happen to have relatives there). But the account does not preclude us (nor, for that matter, does it preclude a Sargassan) from asking, “Alright, these people believe that eating relatives is morally permissible—but is it really?”

After all, as moral realists insist and as even the proponents of relativistic moral theories typically concede, even the denizens of this or any other culture will not think that something is morally permissible or morally wrong because they think so, or that “morality” is constituted by and reducible to “what people think about morality.”89 Indeed, that position

---

86 See HART, supra note 14, at 88–91.
88 Arendt, What Was Authority?, in AUTHORITY, supra note 5, at 81, 82.
89 In this vein, Michael Moore observes that “there is a lack of any logical relation between the statement, ‘bullfighting is wrong,’ and the statement, ‘most people (in England?) think (feel, believe) that bullfighting is wrong.’ These are not equivalent statements, as we all readily recognize. The first says nothing about people's mental states of belief or feeling; it talks about bullfighting. The second says nothing about the wrongness of bullfighting; it only describes the mental state of a group of
is arguably untenable because it leads to an infinite regress. The same can be said about “authority.”

Consequently, there is nothing incoherent in a citizen—an anarchist or dissident, perhaps—responding to a social science analysis with, “Yes, I know that most of my neighbors ascribe ‘authority’ to this government. I think they’re wrong. And it isn’t just that the government lacks authority over me because I don’t accept that it has it: even if I did ascribe authority to the government, I would be mistaken. And the government doesn’t have authority over my neighbors either, not really, even though they believe it does. The truth is that the government is nothing more than a large-scale mugger, basically, and the fact that it operates systematically and on a large scale, and that most of my herd-like neighbors mindlessly go along, doesn’t give it real authority.” Anarchists—or, more modestly, people opposed to particular regimes—have frequently made such contentions; they may be quite wrong, but they are not babbling incoherently (in the way that someone would be who declared, “Yes, I know Joe is a single man—he’s never been married—but he isn’t a bachelor”).

In sum, the response of “descriptive sociology” or empirical social science is potentially valuable for many purposes. It does not, however, answer the most substantive questions—the questions about what (and whether, and in what conditions) authority actually is—that thinkers like Arendt have raised, and that the gunman situation poses.

D. COULD GOD HELP?

We have seen that the consequentialist and deontological theories of authority are vulnerable to Hart’s conceptual or ontological objection; and purely descriptive theories, for all of their potential value and insight, do not speak to the substantive questions we have been discussing. So it seems we are in a predicament. In order to have “law” we need authority, or at least something that is capable of possessing authority. But the major accounts fail to explain how law has, or even could have, such authority. Even if their factual premises and their logic were sound, these accounts would give us reasons to act in accordance with law—but not genuine obligation or authentic authority. So if law needs authority but the extant

people. There simply is no relation between the truth values of the two statements.” Michael S. Moore, A Natural Law Theory of Interpretation, 58 S. CAL. L. REV. 277, 377 (1985).

That is, if “immoral” is understood to mean “believed by people in culture X to be immoral,” so that the statement “Bullfighting is immoral” is understood to mean “Bullfighting is believed by people in culture X to be immoral,” then what does “immoral” in this latter sentence mean? Do we end up with something like “Bullfighting is (believed by people in culture X to be (believed by people in culture X to be (believed by people in culture X to be . . . [ad infinitum])) immoral)?

An ancient anecdote makes the point:

Indeed, that was an apt and true reply which was given to Alexander the Great by a pirate who had been seized. For when that king had asked the man what he meant by keeping hostile possession of the sea, he answered with bold pride, “What thou meanest by seizing the whole world; but because I do it with a petty ship, I am called a robber, whilst thou who dost it with a great fleet art styled emperor.”

Augustine, City of God 113 (Modern Library ed. 1993).
accounts do not explain how law could have authority, then what conclusion should we draw? What has gone wrong?

As noted, thinkers like Arendt and Kierkegaard have sometimes suggested that doubts about authority pose a peculiarly modern problem. And an occasional thinker suggests that this predicament points us backwards in time, or around the world, to views that link authority to a transcendent source: God, or Allah. A classic expression in this vein by a prominent legal scholar is Arthur Leff’s celebrated essay (recently revived by Samuel Calhoun) called “Unspeakable Ethics, Unnatural Law.” Leff’s agonized meditation was essentially about the problem of finding normative authority in the modern world—or, as he put it, with the problem of finding an answer to “what is known in the bar-rooms and schoolyards as ‘the grand sez who’”? Why should we treat anyone’s say-so—the courts’, the government’s—as authoritative for us?

Leff considered a variety of possible responses and found them wanting—hence his famously despairing conclusion. But he also suggested that the problem would be solved if we admitted God into the picture: God and God alone could provide the normative authority we need for law and ethics. With God, Leff asserted, normative authority is there whether we like it or not:

Assuming that I know what the command “Thou shalt not commit adultery” means, then if (and only if) the speaker is God, I ought not commit adultery. I ought not because He said I ought not, and why He said that is none of my business. And it is none of my business because it is a premise of His system that what He says I ought not to do, I ought not to do.

---

92 See supra notes 5–6.
94 Author Leff, Unspeakable Ethics, Unnatural Law, 1979 DUKE L.J. 1229.
95 Id. at 1230.
96 Id. at 1249.
Conversely, without God, normative authority simply does not exist. “It is of the utmost importance to see why a God-grounded system has no analogues. Either God exists or He does not, but if He does not, nothing and no one else can take His place.”

But would bringing God into the discussion help with the particular problem we have been considering? It is a complicated question, and a full treatment would pull us into discussing the philosophical intricacies of divine command theory. But for now, we can modestly say that there is reason for skepticism. Suppose God exists and has given us a set of commands—or has authorized a legal regime to do so, so that laws enacted by the regime have the indirect imprimatur of God. Has the problem of authority been solved? Has Hart’s objection been deflected?

The question provokes another: assuming God has given us commands, directly or through intermediaries, what reason do we have to obey those commands? One familiar response holds that God will bless those who follow his commands and punish those who do not. On this assumption, we surely have a good reason to do as God commands. Even so, it would seem that God’s commands (and God’s intention and ability to enforce those commands) are in the nature of facts that are strongly but nonetheless contingently, relevant to other reasons we independently have—the desire for blessings of health and prosperity or whatever, and the aversion to punishment. To put the point differently, God in this account is very much like the mugger in Hart’s example—albeit a vastly more powerful mugger, and one who gives both positive and negative incentives. God’s infinitely greater power would mean that we have a much stronger reason to obey divine commands than we had to comply with the mugger’s orders. Even so, the kind of reason associated with God’s commands is much like the kind of reason attached to the mugger’s threats. And as Hart showed, that kind of reason does not really impose “obligation,” or reflect “authority.”

A more cheerful explanation emphasizes not God’s power but rather His omniscience and benevolence: God knows, perfectly, what is good for us (perhaps because He made us), and his commands are designed to help us achieve that good. Once again, on these assumptions we have a very strong reason to comply with God’s commands. But now it seems that God stands to us in much the same relation that the doctor or stockbroker does: He knows what our interests are, and what will achieve them, much more fully—or even, in this case, infallibly—than we ourselves do. God is in a sense the supreme expert who never breaches His fiduciary duty. But as we saw already, though there may be very good reasons to comply with the advice of experts, it seems a mistake, strictly speaking, to say that they have “authority” over us. Their directives amount to facts—evidentiary facts—that contingently implicate our reasons for acting. But we do not

---

98 Leff, supra note 94, at 1231.
99 The locus classicus for these puzzles is Plato’s dialogue *Euthyphro*. PLATO, EUTHYPHRO 7–59 (Harold North Fowler trans., 1914).
100 See, e.g., Deuteronomy 28.
stop smoking or buy stock in IBM “just because” the doctor or stockbroker told us to. And the same would seem to be true for God.

Is there any other way to account for how God’s commands would obligate us? Leff’s own answer to the question is provocative but also problematic. Leff seemed to think that since in “a God-based system” God would by hypothesis have created us (along with everything else), it would follow almost as a matter of logic or definition that we would have a duty to obey God’s directives. On those theistic premises, “[o]ur relationship to God’s moral order is the triangle’s relationship to the order of Euclidean geometry, not the mathematician’s. We are defined, constituted, as beings whose adultery is wrong, bad, unlawful.”102 Thus, it would no more be open to us to question whether we have a duty to obey a divine command than it is open to a triangle to decide whether a triangle should have three sides. “We are not doing the defining.”103

This is an intriguing proposition, but at least on its face the proposition seems to contain a non sequitur. Even on the premise that God made us, along with everything else, it does not necessarily follow that we are obligated to do whatever God commands. Parents sometimes but unsuccessfully make a similar plea to children—without me you would not even exist, so you should do what I say—but children typically see through the argument.104 The crucial fact is that they are here now, and like it or not, they are choosing agents who have to make decisions, and the fact that they would not be here but for someone else does not in itself supply a controlling reason for deciding as that person desires. The same may be said of human beings in relation to a deity who created us.

In this respect, Leff’s analogy to geometry seems inapt. A triangle presumably is not the sort of thing that has any capacity to decide whether or not to obey the rules of geometry. A triangle just is a figure with three sides—by definition, as Leff said. Conversely, we seemingly do have the capacity to decide whether or not to obey a directive, including a divine directive. (Or at least, that is the assumption that animates the whole inquiry into “authority” and “reasons for acting.”) And given that we are confronted with that choice, we naturally look for reasons governing the choice.

On standard theistic assumptions, of course, we do indeed have overwhelmingly good reasons to obey divine directives. As noted, though, these reasons seem to derive from God’s power to bless and punish, or from God’s omniscience and benevolence. But those sorts of reasons do not answer Hart’s objection or give us true “authority” of the sort we have been seeking.105 And it seems mere escapism to answer that we have reasons to obey “by definition.”

102 Leff, supra note 94, at 1231.
103 Leff, supra note 94, at 1231.
104 A Far Side Cartoon entitled “Cartoon Teenagers” shows a defiant, unattractive young man pointing his finger at a large, menacing father and mother and protesting, “Hey, look. I didn’t ask to be drawn.” GARY LARSON, THE FAR SIDE GALLERY 3 at 118 (1988).
105 Cf. Alasdair MacIntyre, Which God Ought We to Obey?, in PHILOSOPHY OF RELIGION 575, 579 (Michael Peterson et al. eds., 2001):
There may be other ways to interpret Leff’s proposition.\textsuperscript{106} For now, though, the conclusion seems to be that even bringing God into the picture does not provide the sort of authority we have been looking for. And if even God cannot claim authority, then the prospects begin to look bleak.

III. EXPLAINING AUTHORITY—OR EXPLAINING AUTHORITY AWAY?

Hart’s objection strips obligation and authority away from the gunman situation but, as we have seen (and perhaps beyond Hart’s own intentions), it achieves the same subversive result when applied to other common accounts of authority—even divine authority. From a more detached perspective, it becomes apparent how these accounts are variations on a common strategy, and how all the variations are vulnerable to Hart’s objection. More generally, it becomes apparent how modern theorizing about authority, in an attempt to explain and justify it, has in fact worked to dissolve it.

The familiar accounts of authority, based as they are on coercion or coordination or consent or the like, are reductionist in character. They attempt to explain how authority works by reducing it into something else—some other normative source that is taken to be more primary and secure. That “something else” may be good consequences of various sorts—avoidance of punishment, or social coordination, or the achievement of goods (like health) that an expert may understand better than we do. Or the more basic desideratum may be some more primary or uncontroversial moral principle, such as the principles of keeping promises, or complying with contracts, or manifesting gratitude. The accounts attempt to subsume the duty to follow directives from some official source under these more basic objectives or commitments. Following authority is just one instance or application of pursuing one’s good, or keeping one’s promises, or whatever.

The most familiar criticisms typically argue that the reductions are unsuccessful. Following authority is not the best way—not in all circumstances, at least—to achieve the desired goods. Or the principles of promise-keeping or gratitude do not yield any obligation to do as the law commands. So go the arguments.

Hart’s objection takes a different tack. Instead of arguing that an attempted reduction fails, it suggests that if the account succeeds then by virtue of its very success it gives us . . . what? Reasons to act, perhaps, but

\textsuperscript{106} I try to approach the matter of divine commands from a different perspective in Steven D. Smith, Modernity, Autonomy, and Authority (unpublished manuscript, on file with author).
no genuine “authority.” On the contrary, by dissolving authority into some other normative principle or source, the reductive accounts reduce authority out of existence. They do not give us the “just because” reasons that, as we saw earlier,¹⁰⁷ seem necessary to authority. Instead, they present a picture in which people have reasons to follow some official’s or institution’s directives not because the official or institution so ordered—not in any strict or direct sense, at least—but rather because people have other reasons for acting to which the law’s directives may happen to be relevant external facts.

So it seems that reductionist theories of authority face a dilemma. Either they are unpersuasive, and thus fail to explain authority, or they are persuasive; but then in explaining authority they end up explaining it away. To be sure, this dilemma need not be debilitating, or even discouraging. That is because it is always open to the theorists to scale back or perhaps just clarify their objectives: if a theory succeeds in supplying persuasive reasons for acting in accordance with official directives, perhaps that is good enough. But insofar as the theories purport to explain authority in the familiar “just because” sense, they seem destined to fail of their purpose.

Indeed, in this respect the predicament of authority is even more dire, or perhaps more ironic. Taken as accounts of authority, the modern theories seem not only destined to fail; in an important sense they have been deliberately designed to fail. How could this be so? To answer that question, we need to consider the context and purpose of modern theorizing about authority.¹⁰⁸ Recent theorizing about legal authority is no doubt influenced by various assumptions and concerns, but much of it has operated within what we might call a Kantian framework committed to the value of personal autonomy,¹⁰⁹ and one central animating purpose of such theorizing has been to resolve what Raz describes as the paradox of “the alleged incompatibility of authority with reason or autonomy.”¹¹⁰

Thus, in a revealing introduction to an anthology collecting some of the most influential modern writing on the subject of legal authority, Raz explains that the collected essays can be understood as alternative responses to what he calls “the challenge of philosophical anarchism.”¹¹¹ “Most people are puzzled,” he observes, “by the idea that one person

¹⁰⁷ See supra Part I.B.

[P]ublic reasoning always occurs in a local context as part of a set of conversations that have their own peculiar history. We reason not just in the company of others, but in the company of particular others, with whom at any given time we will share some set of background presuppositions.

¹⁰⁹ For overviews of this development, see J. B. SCHNEEWIND, THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY (1998); LOUIS DUPRE, PASSAGE TO MODERNITY: AN ESSAY IN THE HERMENEUTICS OF NATURE AND CULTURE (1993), especially chs. 4–5. Though the commitment to autonomy is strongly associated with Kant, it is hardly limited to his views. Gerald Dworkin explains that the “view of the moral agent as necessarily autonomous” is “a philosophical view that is shared by moral philosophers as divergent as Kant, Kierkegaard, Nietzsche, Royce, Hare, Popper, Sartre, and Wolf.” GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 34 (1988).
¹¹¹ JOSEPH RAZ, Introduction to AUTHORITY, supra note 6, at 1, 3.
should have a right to rule another,” and this puzzlement informs the challenge—a challenge that Raz says has been most lucidly presented by Robert Paul Wolff. 112 Wolff’s argument, in turn, operates on explicitly Kantian assumptions. 113 Though the full argument is more complex, the core point can be simply stated. We are, or at least aspire to be, autonomous beings; our moral worth and dignity inhere in that autonomy. 114 Autonomy entails self-legislation, or “submission to laws which one has made for oneself.” Hence, “[t]he autonomous man, insofar as he is autonomous, is not subject to the will of another. He may do what another tells him, but not because he has been told to do it.” 115

The state and its law, on the other hand, are heteronomous relative to us: they are outside forces ordering us to obey their commands because we have been commanded. And that is a claim that, as autonomous beings, we can never recognize. Some laws and legal regimes are of course more worthy of our respect than others, but “[a]ll authority is equally illegitimate . . . .” 116

Morality and obligation require autonomy, in short, while law is intrinsically heteronomous. 117 In consequence, whether or not obligation can arise in other ways, the law in itself can never truly obligate—and hence can never wield genuine authority. 118

There is a powerful and almost axiomatic force in this challenge, and Raz presents modern theorizing about authority as a series of efforts to deflect or defeat it. But it begins to look as if the effort is futile—at least on modern assumptions including a commitment to autonomy. That is because, as Wolff contended, the law’s command is inherently heteronomous relative to the realm of autonomous individual agents. So genuine authority is ruled out in advance by the very framework of

112 JOSEPH RAZ, Introduction to AUTHORITY, supra note 6, at 1, 3.
113 ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 12, 14, 72 (1998 ed.) (1970). In the Preface to the 1998 edition, Wolff explains that "[a]s a student of the philosophy of Immanuel Kant, I naturally conceived the question of state legitimacy as the problem of making the moral autonomy of the individual—the centerpiece of Kant’s ethical theory—compatible with the authority claims that Max Weber had identified as the hallmark of the state.” Id. at x.
114 Id. at 71-72:
   It is out of the question to give up the commitment to autonomy. . . . When I place myself in the hands of another, and permit him to determine the principles by which I shall guide my behavior, I repudiate the freedom and reason which give me dignity. I am then guilty of what Kant might have called the sin of willful heteronomy.

115 Id. at 14.
116 Id. at 19.
117 For a helpful discussion, see Neil MacCormick, The Concept of Law and The Concept of Law, in THE AUTONOMY OF LAW 163, 181–85 (Robert P. George ed., 1996). MacCormick concludes that “[l]aw may then engage our autonomous assent, but in its own character it is relatively, if not absolutely, heteronomous.” Id. at 185.
118 See Wolff, supra note 113, at 18:

   The defining mark of the state is authority, the right to rule. The primary obligation of man is autonomy, the refusal to be ruled. It would seem, then, that there can be no resolution of the conflict between the autonomy of the individual and the putative authority of the state. Insofar as a man fulfills his obligation to make himself the author of his decisions, he will resist the state’s claim to have authority over him. That is to say, he will deny that he has a duty to obey the laws of the state simply because they are the laws.
assumptions in which the inquiry is being conducted, as indeed Wolff argued.  

So, what to do? The obvious and almost mandatory strategy, within a framework containing strong commitments to autonomy, is to show that obeying authority can be consistent with—indeed, reasonably required by—what we ourselves choose and will for ourselves. You do what an authority directs because you believe that following such directives is the best way to achieve your own objectives, or to comply with the reasons that you already do or should endorse. Once again, the doctor and stockbroker are good examples. You do not compromise your autonomy by following your doctor’s orders. On the contrary, you follow those orders because you choose to do so, and you choose to do so because you believe this is the best way to have what you want—namely, health. Or, in a social contract, you obey the state and its laws because you promised to do so.

Suppose some such account can plausibly explain why we should do as the law commands, and why such compliance is consistent with our autonomy. The hard question now is whether this explanation allows us to say that we are doing as the law commands because the law so commands, or, as Jules Coleman says, “for no reason other than that the law commands it.” Something like this, after all, is what the familiar locution takes “authority” to mean, and to be. But in modern accounts, it seems that this description is no longer apt. Rather, we do what the law directs only because—and only if and insofar as—we believe that following the law will enable us to act on the reasons we already embrace without regard to the law. So the law becomes merely an important fact in the world—one along with many others—that may be contingently relevant to our reasons for acting.

In this vein, Heidi Hurd explains a variety of considerations that make it “generally appropriate, indeed, generally obligatory, to comport one’s conduct in accordance with social and legal rules.” But “[n]one of these considerations gives us a reason to follow the law because it’s the law . . . .”

119 In this vein, Wolff argues that “the concept of a de jure legitimate state would appear to be vacuous.” Id. at 19.
120 Raz’s own approach to the challenge, however, seems more oblique. Under the “service conception of authority” with its dependence and normal justification theses, we follow authoritative directives because this is a better way of following the reasons that apply to us anyway. See supra notes 45–48 and accompanying text. Depending on what those reasons are taken to be, the requirements of Kantian autonomy may or may not be satisfied. For example, in Kant’s moral theory, natural desires are viewed as heteronomous, but so are objective moral principles or values that do not originate in our own will. See John Rawls, Themes in Kant’s Moral Philosophy, in KANT AND POLITICAL PHILOSOPHY 291, 304 (Ronald Beiner and William James Booth eds., 1993). So insofar as the “reasons” which authoritative directives mediate are these types of heteronomous reasons or motives, problems of autonomy would be presented. Those problems, however, would arise from the reasons or motives that the authority is taken to be mediating, not from the fact of following authority. For a discussion of whether Raz’s account of authority is consistent with the requirements of autonomy, see generally Himma, supra note 48.
121 See COLEMAN, supra note 28.
122 See supra note 28 and accompanying text.
So it seems that in attempting to save authority, modern theorizing has in fact negated it. It is not that “just because” authority itself is inconceivable, exactly. On the contrary, we can readily imagine persons who embrace a commitment to obey someone else—some other particular person, perhaps (the Guru, the Prophet, the Leader), or even just some generic Other (obedience for the sake of obeying). Obedience would thus become a fundamental principle of action for such persons. This situation may not be merely imaginary: it is arguable that many people in the world, now and in the past, have in fact exhibited some such mindset of subservience. And in this case, authority and obligation would be present in full form; subjects would do as the Leader directed “just because” the Leader so decreed, and not merely because the Leader’s directives are contingently relevant to some other principle of action that the subjects embrace or endorse.

But it is precisely this mindset of subservience that the modern commitment to autonomy rejects as unenlightened, pitiable, even immoral. So although authority is easily conceivable in these terms, it is hard on modern assumptions to conceive of any justification for authority so understood. What thinkers like Wolff deny, therefore, is the possibility not of authority, exactly, but rather of “legitimate authority.”

124 We might put the point differently. The central purpose of modern theorizing about legal authority, as Raz explains, has been “predominantly normative or moral”; it has been addressed to “the question of justification” for obeying authority. RAZ, Introduction to AUTHORITY, supra note 6, at 1. But within a framework of pervasive and virtually unquestioned commitment to individual autonomy, the more successful this normative or moral theorizing is in providing a justification for obedience, the more it necessarily aggravates the more conceptual or ontological problem of authority to which Hart’s analysis of the gunman situation points us.

125 Cf. JOHN STUART MILL, On Liberty, in ON LIBERTY AND OTHER WRITINGS 10 (Stefan Collini ed., 1989) (complaining of “the servility of mankind toward the supposed preferences or aversions of their temporal masters, or of their gods” which “made men burn magicians and heretics”). Eric Hoffer provides a grim description of this mentality in his provocative book, E RIC HOFFER, THE TRUE BELIEVER: THOUGHTS ON THE NATURE OF MASS MOVEMENTS (1951). E.g., id at 118–19:

To the frustrated, freedom from responsibility is more attractive than freedom from restraint. They are eager to barter their independence for relief from the burdens of willing, deciding, and being responsible for inevitable failure. They willingly abdicate the directing of their lives to whose who want to plan, command and shoulder all responsibility. . . . .

The frustrated follow a leader less because of their faith that he is leading them to the promised land than because of their immediate feeling that he is leading them away from their unwanted selves. Surrender to a leader is not a means to an end but a fulfillment. Whither they are led is of secondary importance.


Wolff, supra note 113, at 19.

127 Wolff, supra note 113, at 19.

128 Arendt, What Was Authority?, in AUTHORITY, supra note 5.
IV. CONCLUSION: THE VANISHING ONION?

The preceding discussion has suggested that observers like Arendt and Kierkegaard may be right. On modern assumptions, centrally including a commitment to individual autonomy, authority—or at least “legitimate” or normatively attractive authority—seems impossible, almost inconceivable.

There are of course plenty of people who hand out orders, or who boss other people around, sometimes for laudatory or benign purposes. We may have very good reasons to comply with such orders—reasons ranging from unpleasant and pragmatic ones, such as a desire not to be shot by a mugger (or a political despot?), to admirable and moral ones, such as a commitment to keeping promises or serving the public good. We may even use the term “authority” in describing some of these situations, and the fact that we do so provides social scientists—and legal theorists—with ample material to study. But upon closer inspection, our reasons for complying in these cases boil down to reasons that are not essentially different in their form, or their motivating logic, from the reasons we follow in non-authority situations. We act to promote our interests, or to comply with independent moral obligations that official orders happen to implicate in certain situations. We do not act “just because” the law obligates us, or because we recognize the law’s authority over us. Or so it seems.

Should this conclusion be troublesome? Perhaps not. It might rather be cause for celebration. Arendt herself seemed to think that authority’s disappearance leaves us in a pitiable position. The “loss [of authority],” she lamented, “is tantamount to the loss of the groundwork of the world.” But why? So long as people have good reasons to comply with official directives where compliance is desirable, what difference does it make that their compliance is not a response to genuine authority? As we have seen, the sort of actual authority that we can most readily conceive of—the dominating capacity rulers would have in a world in which servile subjects truly obey commands “just because” the rulers have so ordered—seems distinctly unattractive, even abhorrent. If the loss of authority means the elimination of that sort of servility, our reaction might well be, “Thank goodness! So much the better.”

To be sure, if law itself requires authority in order to qualify as law, as theorists often suppose, then the discovery that authority is no longer available might seem to leave us in an awkward position. More generally, R. B. Friedman observes that “authority is a notion intimately bound up with most, if not all, of the central questions of political philosophy,” so once again, the disappearance of authority may seem inconvenient. But any embarrassment might be short-lived. Rather than draw the despairing conclusion that law does not exist, or that political philosophy is pointless

129 Arendt, What Was Authority?, in AUTHORITY, supra note 5, at 112.
130 See supra notes 1–2. Would it help to say, as theorists like Raz do, that what is essential to law is not authority, per se, but rather the claim or pretension to authority? On the analysis presented here, that qualification seems of little help. Raz and others maintain, after all, that although law does not need to actually possess authority in order to qualify as law, it needs to be capable of possessing authority. But it is hard to see how law would have that capacity on the analysis presented above.
131 Friedman, supra note 6, at 56.
or misconceived, why would we not just ratchet down our expectations? Instead of talking of “authority,” we could simply talk about “reasons for action,” or some appropriately limited subclass of such reasons. We could even retain the word “authority,” understanding now that we are using it in an emphatically lower case sense–authority lite.\(^{132}\)

Not only could we do this: it is arguable that we have in fact been engaged in this deflationary or deflated practice for some time now. As long as we can remember, in fact. And at last report, the sky had not fallen.

In short, if Arendt and like-minded thinkers are correct in claiming that “authority has vanished from the modern world,” the disappearance may not be anything we ought to lament. Still, it is hard to be sure. Maybe our depiction of genuine authority as domination and subservience is a caricature; maybe the depiction elides a crucial distinction between, as Joseph Vining puts it, “the authoritative” and the “authoritarian.”\(^{133}\) If Arendt was right that “[p]ractically as well as theoretically, we are no longer in a position to know what authority really is,”\(^ {134}\) then perhaps we are not in a position to appreciate what we may have lost.

On this assessment, we would be in a situation analogous to the condition we find ourselves in when someone claims that, say, food just does not taste like it used to (before the age of pesticides, chemical additives, and so forth), or that music has lost its aesthetic power since the musical scale was domesticated in the early modern period,\(^ {135}\) or that musical recordings have lost the richness they had in the days before compact disks. Food can be pretty tasty and music can gratify and uplift even now. But who knows? Things might have been different once. We might have lost something of real value.

How might we judge? It seems the most we could do is try to recreate the former conditions as closely as we can and then look to see what if anything might have been lost. We could bake a cake using an old recipe and purely organic foods. We could reconstruct a sixteenth century keyboard instrument, or dust off an old Victrola or record player. But even if we managed this, our conclusions would need to be tentative. It might be that by now, not only are food and music different than they were, but we are different as well, so that we are no longer acculturated to appreciate the subtle qualities of taste or sound that people could detect under other conditions.

With similar reservations, we might make a comparable effort in recovery with regard to authority. No doubt the task would be much more difficult than finding a record player and an old vinyl record. But if a major cause of the disappearance of authority has been the development of the by now almost automatic commitment to autonomy, perhaps we might attempt

\(^{132}\) Cf. Michael J. White, *The Disappearance of Natural Authority and the Elusiveness of Nonnatural Authority*, in *AFTER AUTHORITY*, supra note 7, at 16 (“So, if something remains within this world-view that we wish to call ‘authority’, it must be quite different from authority as we usually conceive of it.”).


\(^{134}\) See Arendt, *What Was Authority?*, in *AUGHRORITY*, supra note 5, at 81, 82.

to extricate ourselves from this modern framework—at least as a thought experiment—and see whether anything of interest reappears. Who knows what we might discover?

In the meantime, though, it seems that we may just have to address the problems of jurisprudence and political philosophy (and of life?) with “reasons for acting” but without the assurance of any genuine “authority”—and without any certainty about whether we actually are better or worse off for its absence.

Leslie Green offers a helpfully suggestive discussion of a less individualistic, more communitarian approach to authority and of the “shared goods” potentially associated with that approach in GREEN, supra note 18, at 188–219. See also the collected essays in AFTER AUTHORITY, supra note 7.