

## THE EMPTY IDEA OF AUTHORITY

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*The idea of authority is a fabrication. Claims of moral right to be obeyed owe their historic salience to the self-interest of claimants. When Enlightenment scholars demolished the divine right of kings, they should have disabused us of the right, not just of the notions that it came from the divine and belonged to kings. Their effort to salvage the idea of right to rule and to press it into serving as support for their favored governments was understandable but unjustified.*

*Contrary to widespread belief, the idea of moral right to be obeyed does not help to explain the nature of law. This Article argues that human communications become law simply by participating in a self-recognizing system that successfully signals what people are likely to do and to expect.*

*Claims of moral right to be obeyed have their origins in creationist accounts of law and government. This Article presents an evolutionary account of law and government. The law of a human community is a self-generating, self-recognizing system of human communications that signals likely action within that community. Law is a signaling system that uniquely serves and symbiotically defines a human community.*

*Understanding law as a self-fulfilling signaling system frees us to discard the idea of authority. This Article articulates a fresh and more accurate conception of law that builds on Oliver Wendell Holmes's celebrated insights concerning law's predictive potential. The Article then considers important implications of this new understanding for how we individually make moral choices, for how we read law, and for some of the many other ways that law affects our lives.*

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## I. INTRODUCTION

The Emperor's New Clothes were the idea of authority.<sup>1</sup> In analyzing that idea, we have not sufficiently considered our history. When we do, we discover that the idea of one person having a moral right to be obeyed by others was contrived, and that human ambition was the culprit.

Law does not depend on lawgivers having or claiming a moral right to be obeyed. Law is just a signaling system of and for human action. Law is a self-generating, self-recognizing network of human communications that signals likely action within a human community. Drawing on the insights of systems theory, we can see that the self-generating and self-recognizing systemic nature of law and its self-fulfilling success in signaling likely human action can wholly substitute for the fabricated concept of authority in our understanding of law and government. Law may in

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1. See HANS CHRISTIAN ANDERSEN, ANDERSEN'S FAIRY TALES 263-68 (E.V. Lucas & H.B. Paull trans., Grosset & Dunlap 1945) (1837).

form confer rights and impose duties, but in substance it signals likely action, and therein lies its contribution to human wellbeing.

No theory of authority illuminates the nature of law. In presenting his leading contemporary account of authority, Joseph Raz observes that consent theories of authority “may mislead people into obeying the law where, but for their consent, it would have been clear to them that it is better to disobey.”<sup>2</sup> He cites the loyalty oaths taken by German generals that reinforced their deference to the Nazi leaders of their community.<sup>3</sup> Raz’s normal justification of authority does not mislead us in that way.<sup>4</sup> But it does not explain what law is either.<sup>5</sup> If we do have a moral duty to pay attention to wise guides, that duty is owed not to the wise guides but to those who may be harmed if we fail to pay attention.<sup>6</sup> Even if we did owe a duty of obedience to wise guides, lawgivers can never be sure that their laws apply only on occasions when they really are wise guides, that is, on occasions when we are likely to do better by following their guidance. On Raz’s theory, lawgivers cannot *honestly* claim<sup>7</sup> when making law that they have a moral right to be obeyed.<sup>8</sup>

We can better capture the true nature of law by discarding the idea of moral right to be obeyed. We cannot find value in that idea even by disengaging it from lawgivers and calling it only a characteristic of *law*.<sup>9</sup> Words do not have moral rights, persons do. A right in lawgivers to be obeyed is the historic essence of the idea of authority and the only basis on which the idea of authority can contribute to understanding the nature of law. “Authority” may be, and often is, used as a synonym for legality, but disengaged from lawgivers, the term cannot illuminate *what law is*.

The idea of authority arose through belief that a human community could possess a particular source of unique and consistent epistemic su-

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2. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 90 (1986).

3. *Id.*

4. Joseph Raz’s normal justification of authority is “that the subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority’s directives than if he does not.” Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003, 1014 (2006).

5. See *infra* Part IV.

6. Cf. Stephen R. Perry, *Law and Obligation*, 50 AM. J. JURIS. 263, 279–84 (2005) (arguing that the duty, if it exists at all, is owed to oneself).

7. RAZ, *supra* note 2, at 23–28; cf. Timothy Endicott, *Interpretation, Jurisdiction, and the Authority of Law*, 6 AM. PHIL. ASS’N NEWSL. (Am. Phil. Ass’n, Newark, Del.) Spring 2007, at 19 (acknowledging “a standing risk that the law will not adequately recognize the autonomy of its subjects, because of its artificial techniques for controlling its own jurisdiction and for controlling the scope of its directives”).

8. See Perry, *supra* note 6, at 295 (“If Raz is right, the law can only coherently claim legitimate moral authority for itself if it could in principle possess such authority. A government only possesses such authority if its directives systematically obligate. But to say that its directives systematically obligate is just to say that there exists a general moral obligation to obey the law. If there could not in principle be such an obligation, then our practices are deeply confused, and something has gone seriously awry with our concepts of authority and law.”).

9. For analysis of H. L. A. Hart’s attempt to make this move with respect to his “rule of recognition,” see *infra* Part II.B.

periority concerning their good. Persons who became leaders because they had unique personal qualities<sup>10</sup> let their communities attribute those qualities to supernatural sources.<sup>11</sup> They claimed that divine will both defined the community's good and designated the community's leadership.<sup>12</sup> To perceive good in defying the leader's will was, the argument went, necessarily to make an epistemic error. Even where the leader or his successors did not seem especially virtuous and wise, defiance was said to risk divine retribution. That risk obliterated the potential for disobedience to achieve good and made obedience necessarily the right thing to do. But divine will was more than just a consistent guide to human goodness, because there was a *proprietary* aspect to the divine-human relationship. The creator of something was plausibly understood to have proprietary rights to the use of the thing. As the creator of humans, the divine could coherently be understood to have a *right* to be obeyed by the creation. That right could be delegated to human leaders.<sup>13</sup> When Enlightenment scholars demolished the divine right of kings,<sup>14</sup> they should have disabused us of the right, not just of the notions that it came from the divine and belonged to kings. Instead, they argued that a right to be obeyed persisted, but belonged to their preferred governments.

H. L. A. Hart's celebrated critique<sup>15</sup> of the old positivists<sup>16</sup> and of the Scandinavian realists<sup>17</sup> presupposed that the true concept of law must still somehow accommodate the idea of authority.<sup>18</sup> But what if authority was always in fact an illusion, conjured by self-interested claimants and their acolytes? And what if all that law presently accomplishes would still be accomplished without that illusion? This Article argues for those two

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10. MAX WEBER, *Theory of Social and Economic Organization*, in ON CHARISMA AND INSTITUTION BUILDING: SELECTED PAPERS 46, 47–62 (S.N. Eisenstadt ed., A.K. Henderson & Talcott Parsons trans., 1968) (1945).

11. See, e.g., JOHN NEVILLE FIGGIS, THE DIVINE RIGHT OF KINGS 17–21 (2d ed. 1922); C. J. GADD, IDEAS OF DIVINE RULE IN THE ANCIENT EAST 2–3 (1945).

12. See, e.g., FIGGIS, *supra* note 11, at 17–21; GADD, *supra* note 11, at 2–3.

13. See *infra* Part III.

14. See, e.g., JOHN LOCKE, TWO TREATISES OF GOVERNMENT 142–43 (Peter Laslett ed., Cambridge Univ. Press, 1988) (1690).

15. H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

16. See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Prometheus 2000) (1832); JEREMY BENTHAM, OF LAWS IN GENERAL (H. L. A. Hart ed., Univ. of London, The Athlone Press 1970) (written approx. 1782).

17. See, e.g., ALF ROSS, ON LAW AND JUSTICE (1958) [hereinafter ROSS, ON LAW AND JUSTICE]; ALF ROSS, TOWARDS A REALISTIC JURISPRUDENCE: A CRITICISM OF THE DUALISM IN LAW (Annie I. Fausboll trans., 1946) [hereinafter ROSS, TOWARDS A REALISTIC JURISPRUDENCE].

18. Hart's early working notes reveal that the problematic nature of the assumption was apparent to him: "There is something odd, possibly something mistaken in position which I have taken v. 2 that the essence/structure of a legal system rests on acceptance of central/certain authority as binding. . . . Perhaps all I need to convey is that the obligation is strictly *obligation*. i.e.: narrower than belief in moral goodness. But? there is a muddle (in me) I suspect here." NICOLA LACEY, A LIFE OF H. L. A. HART: THE NIGHTMARE AND THE NOBLE DREAM 228 (2004).

propositions. The Holmesian predictive theory of law,<sup>19</sup> sans any implicit acknowledgment of authority and expanded<sup>20</sup> to account more fully and precisely for law's multi-dimensional systemic signaling of likely human action, better expresses the reality of law's role in our relations with each other. Law-as-signaling-system explains how law accomplishes the law-"observance" that Hart noted. Law-as-signaling-system describes how most modern people really do think about law's contribution to their choices of action<sup>21</sup> and explains why those who do not think about law that way *should* do so. Law may exist and succeed without anyone perceiving a duty to obey lawgivers, for law's existence and success do not depend upon authority. The characteristic both distinguishing and *uniting* those who take an internal point of view toward law is that they understand law to assist valuably their choices of action by signaling likely actions of others that would relate to, or might interact with, any given selectable action. Law successfully coordinates not through direct obligation but through accurate prediction. Recognizing that reality does not make one a "bad man"<sup>22</sup> or a free-rider,<sup>23</sup> but an authentic realist who welcomes all of those still falsely indoctrinated to join him.

The concept of authority has its origins in *creationist* accounts of law and government. This Article presents an *evolutionary* account of law and government. The origin of law and government in ancient communal custom supports a vision of self-generation through a natural selection that started as early as human communication and human community.<sup>24</sup> The autopoietic nature of law has been recognized by systems theorists in their analyses of modern legal systems.<sup>25</sup> This Article contends that

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19. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) (laying "down some first principles for the study of this body of dogma or systematized prediction which we call the law").

20. Contributing to that process of expansion, see William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 30 (1994) ("[L]aw is a prediction of the rules that interacting government institutions will apply.").

21. Ronald Dworkin observes that Raz's account of authority presupposes "a degree of deference toward legal authority that almost no one shows in modern democracies." RONALD DWORKIN, *JUSTICE IN ROBES* 206 (2006).

22. Holmes, *supra* note 19, at 459.

23. See *infra* Part II.E; H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 182-91 (1955); John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3, 8-11 (Sidney Hook ed., 1964).

24. Cf. ROSS, *ON LAW AND JUSTICE*, *supra* note 17, at 91-97. Ross somehow thought that philosophy could illuminate the nature of law without regard to law's social evolution:

Custom is the natural starting point of legal evolution. From the point of view of historical evolution the great problem is rather the growth of a legislative power, how the ideology arose and took hold that certain persons had authority to proclaim new norms which were accepted as "valid" by the judiciary and the people. This problem turns on the origin of political ideology and is a subject for the sociology of law, not philosophy of law. We accept the growth of a legislative power as a fact.

*Id.* at 92.

25. See generally NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* (Klaus A. Ziegert trans., 2004) (1993). See also *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* (Gunther Teubner ed., 1988) [hereinafter *AUTOPOIETIC LAW*]; GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (Zenon Bankowski ed., Anne Bankowska & Ruth Adler trans., 1993).

autopoiesis,<sup>26</sup> not authority, is the animating phenomenon underlying all law in all human communities. If Charles Darwin had preceded John Locke, we would likely have seen this much sooner.

An evolutionary understanding of law reveals the human micro-communities that we call institutions of government to be constituted by specialized sub-systems of signals within the overarching signaling system that serves a human community. Government is not the original source of law. Law precedes and ushers in government. Institutions of government are like organs evolving within a developing species, and serve in turn to promote the growth and flourishing of the system to which they belong. In any human community, there are just persons doing actions. Some of these actions are recognized to be signals of the signaling system that we call law. Those actions recognize themselves to be pedigreed signals, and their recognition is reiterated and confirmed by the system from which they emerge and is thus established for the signaling system's wider human community. When we call the persons who do those systemically-pedigreed communicative actions "officials" or "government" or "the state," we advert to a status that the signaling system itself generates.<sup>27</sup>

The morally dubious character of authority claims and of their relation to law has been well recognized in contemporary legal theory, but the idea of authority has persisted for want of a plausible account of law and government freed from that idea. This Article, precursor to a more extensive treatment by monograph, offers an alternative account of law and government. This Article articulates a vision of law-as-signaling-system and surveys some of that vision's implications for contemporary preoccupations of legal theory.

## II. LAW AS SERVICE TO ACTORS

### A. *Law's Defining Elements*

The human communications that we call law share two characteristics. First, they signal to members of a human community the likely actions of others within that community. Second, they participate in a self-referential, self-sustaining, self-proliferating system that uniquely serves and symbiotically defines a particular human community.

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26. From the Greek for self (*αυτό*) production (*ποίησις*). See HUMBERTO MATURANA & FRANCISCO J. VARELA, *AUTOPOIESIS AND COGNITION: THE REALIZATION OF THE LIVING* xvii (Robert S. Cohen & Marx W. Wartofsky eds., D. Reidel Pub. Co. 1980) (1972).

27. Jules Coleman's analysis of officials' relation to H. L. A. Hart's rule of recognition is apt: "They are, in a sense, officials in virtue of that rule, but they are not officials prior to it (in either the factual or the logical sense). Their behaviour makes the rule possible; but it is the rule that makes them officials." Jules L. Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE *CONCEPT OF LAW* 99, 121 (Jules L. Coleman ed., 2001).

Law serves any member of a human community who is considering whether to do a particular action. Law's service is informational.<sup>28</sup> For any contemplated action, law signals likely action in three dimensions. First, law signals any likely responsive or facilitative action by actors whom law designates governmental. Second, law signals both whether other community members in comparable circumstances will likely choose to act in the contemplated way and how other community members will likely react to and interact with the subject person's contemplated choice of action. Third, and ultimately, law signals the subject person's likely choice of action. That signal of the subject person's likely choice of action visibly shapes the expectations of others. A red traffic light signals not only what police will likely do if I drive through its intersection, but also what other drivers will likely do, and what they will expect me to do.

An action-choosing member of a human community is assisted by that community's signaling system in better seeing the range of reasons relevant to her choice of action and better seeing the relative moral weight of those reasons.<sup>29</sup> In this way, she is better equipped by the signaling system to make good choices of action. Preserving and promoting the predictive efficacy of the signaling system will be a consideration relevant to choice of action, but not a preemptive reason—not a reason that precludes her from also considering other reasons when deciding what to do—and sometimes outweighed by other morally more compelling reasons that point to acting contrary to the system's predictions.

Law is the communicative medium for defining progress in the self-evolving game of human communal life. It communicates a game co-authored by the players. Its development does not depend on any player having a moral right to be obeyed. Claims of authority fail to capture the reality of the game. They are brittle artifacts of a world view we have in other respects discarded. The most perfect theoretical rationale for obeying someone is obviously insufficient to afford that person an ability to create law. To be law, that person's words must signal accurately how people are likely to act. There has to be power, which is substantively to say, efficacy in signaling likely human action. Political power within a human community is nothing but a function of the effectiveness with which the likely actions of other persons are signaled by the communicative actions of the powerful one. Success in signaling is a necessary condi-

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28. "Law is . . . not essentially a motivational device, it is essentially an informational device . . ." Leslie Green, *General Jurisprudence: A 25th Anniversary Essay*, 25 OXFORD J. LEGAL STUD. 565, 573 (2005); see FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 150 (1960) (observing that law should supply "merely additional information to be taken into account in the decision of the actor").

29. On the centrality of assigning weights to reasons for action when morally deciding whether to act, see the brilliant JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 15–35 (1999).

tion for being operative law in a human community.<sup>30</sup> But the other necessary condition is not *authority*. The other necessary condition for being law is that communications derive from the community's uniquely-applicable signaling *system*, not that they be exercises of an actual or claimed moral right to be obeyed.

The success of communicative acts in forming a system that effectively signals likely action within a human community is one of the great moral accomplishments of human social evolution. On his American tour, Alexis de Tocqueville marveled that signaling systems in some forms so similar as those of the United States and Mexico could be so disparately effective in fulfilling their function of signaling likely human action.<sup>31</sup> Success of human communications in forming effective signaling systems for likely human action is a matter of degree, achieved through an evolution far too long and complex and particularized to be adequately appraised, synthesized, and superimposed on other societies. Consent rituals may help to achieve it, but what actually matters is how each member of the community expects other members to behave in relation to the signals of the system. Other claims of moral right to be obeyed, however artificial, may help too. But to whatever degree their supporting theories may persuade, none can ensure success in transforming words into authentic elements of an effective signaling system for likely action within a human community. Human action tracks articulated perceptions of moral obligation far less reliably than it tracks actual perceptions of what others will do and expect. Anyone who thinks otherwise needs to get out more.

Where communications succeed in forming an effective signaling system for likely action within a human community, that fact is a feat of spontaneous self-organization. That evolutionary accomplishment may then develop a life of its own, self-generating hierarchies of signals, nests of signals, and myriad other interdependencies and feedback effects among signals and other human actions. Words can be introduced to any human community, but no method of doing so guarantees the effective internalization of a signaling system.

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30. Cf. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 250 (1980) (“[T]he sheer fact that virtually everyone *will* acquiesce in somebody’s say-so is the presumptively necessary and defeasibly sufficient condition for the normative judgment that that person has (i.e. is justified in exercising) authority in that community.”).

31. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 187 (Arthur Goldhammer trans., The Libr. of Am. 2004) (1835).

The inhabitants of Mexico, wishing to establish a federal system, took the federal constitution of their neighbors the Anglo-Americans as their model and copied it almost entirely. In borrowing the letter of the law, however, they were unable to borrow as well the spirit that animated it. Again and again we therefore find them ensnaring themselves in the machinery of their divided government. With sovereignty no longer circumscribed by the constitution, the states trespass upon that of the union and the union upon that of the states. Even today Mexico is still lurching from anarchy to military despotism and back again.

*Id.*



How did the possibility of an effective signaling system emerge within human community? It evolved directly from the emergence of human communicative capacity and so developed symbiotically with the evolution of human community. Autopoiesis, not authority, holds the key to the nature of law. The pioneering sociologist Niklas Luhmann led the way in recognizing that law could constitute a self-referential, self-generating system.<sup>32</sup> Luhmann observed that law could not “any longer properly be described as a system of norms” but only “as a social system defined by its own code.”

Legal theory has found it difficult (and perhaps it always will) to grasp this positive quality of the law in the absence of any conception of an external (especially a moral) justification . . . . In this situation the theory of autopoietic systems offers at least the possibility of an adequate description. Whether this description can be introduced into the legal system itself (*i.e.*, used as its self-description) must be left an open question (which means, left to evolution).<sup>33</sup>

Luhmann described “legal theory’s efforts to de-tautologize and de-paradoxicalize the system.”<sup>34</sup>

The operations that serve to de-tautologize and de-paradoxicalize the system will seem to the system to be naturally necessary. An observer, in contrast, can recognize the function of these semantic efforts and speculate about other, functionally equivalent possibilities; to him, every specific semantic solution to this problem appears historically determined and contingent, dependent on the supply of plausibility in the specific sociohistorical circumstances.<sup>35</sup>

Autopoiesis renders the concept of authority superfluous to an accurate understanding of law’s nature and function in human communities. Understanding the implications of pervasive autopoiesis in law is the natural next step in the “naturalistic turn” of jurisprudence.<sup>36</sup>

### B. Law’s Self-Reference

Self-reference is a conceptually coherent, morally unproblematic feature of autopoiesis, but not of authority. In an evolutionary account of law and government, signals of likely action within a human community build on earlier signals, traceable in principle back to the first communication in a founding group by a member whose personal qualities rendered his signals of likely action markedly more reliable than

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32. See LUHMANN, *supra* note 25; see also AUTOPOIETIC LAW, *supra* note 25, at 3–4; TEUBNER, *supra* note 25, at 2.

33. Niklas Luhmann, *Law as a Social System*, 83 NW. U. L. REV. 136, 148–49 (1989).

34. *Id.* at 145.

35. *Id.* at 145–46.

36. See, e.g., BRIAN LEITER, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, in NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 15, 30–46 (2007).

communications from any other source. In contrast, the creationist assumption underlying authority accounts of law and government plagues those accounts with infinite regress, a conceptual flaw and moral failing for which H. L. A. Hart<sup>37</sup> and Alf Ross<sup>38</sup> and Hans Kelsen<sup>39</sup> had no satisfactory solution. Hence Kelsen's late-life perplexity in conceding that his concept of a *grundnorm* was self-refuting:

For the assumption of a basic norm . . . not only contradicts reality, since no such norm exists as the meaning of an actual act of will, but also contains contradiction within itself, since it represents the authorization of a supreme moral or legal authority, and hence it issues from an authority lying beyond that authority, even though the further authority is merely figmentary.<sup>40</sup>

Moral rights and duties must ultimately rest on reasoning about the good, not on an act of will. Reasoning about the good historically identified creation as investing rights of control in the creator, a moral principle doubtless appreciated from the earliest occasions on which humans sharpened stones into valuable tools. As the creator of humans, the divine had an intuitively plausible moral right to be obeyed by humans. Reasoning about the good also invoked divine will on the ground that divine will was either morally infallible or at least so omnipotently and omnisciently enforced that compliance was necessarily the right action for humans.<sup>41</sup> No such characteristics can plausibly be attributed to any human will, not even to the Enlightenment's proposed substitute, "popular will." And it will not do to say with Montaigne:

Now, the laws keep up their credit, not for being just, but because they are laws; 'tis the mystic foundation of their authority; they have no other, and it well answers their purpose. They are often made by fools, still oftener by men who, out of hatred to equality, fail in equity; but always by men, vain and irresolute authors. There is nothing so much, nor so grossly, nor so ordinarily faulty, as the

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37. See HART, *supra* note 15, at 110 ("[T]he rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact."); *id.* at 109 ("[I]t is important to distinguish 'assuming the validity' from 'presupposing the existence' of such a rule; if only because failure to do this obscures what is meant by the assertion that such a rule *exists*.")

38. See ROSS, ON LAW AND JUSTICE, *supra* note 17, at 80–83, 158–60.

It could be maintained that a certain authority . . . can be established in norms enacted by itself, which amounts to saying that it is possible for a norm to determine the conditions for its own establishment, including the way in which it can itself be changed. A "reflexivity" of this kind, however, is a logical impossibility, and is generally recognised as such by logicians.

*Id.* at 81. "Every system of enacted law is necessarily based on an initial hypothesis which constitutes the supreme authority, but which is not itself created by any authority. It exists only in the form of a political ideology which forms the presupposition for the system." *Id.* at 83.

39. See Hans Kelsen, *The Function of a Constitution*, in ESSAYS ON KELSEN 109, 117 (Richard Tur & William Twining eds., Iain Stewart trans., 1986); see also Neil Duxbury, *Kelsen's Endgame*, 67 CAMBRIDGE L.J. 51–61 (2008).

40. Kelsen, *supra* note 39, at 117.

41. See *infra* Part III.

laws. Whoever obeys them because they are just, does not justly obey them as he ought.<sup>42</sup>

Positing an antecedent act of human will does not improve the pedigree of an alleged moral right to be obeyed. For authority claimants alleging a duty to obey the law they make just because they make it, “it’s turtles all the way down.”<sup>43</sup>

Kelsen’s self-doubted claims for law’s normative pedigree were belied by the history of his own people. The apparent ease with which his 1920 Austrian Constitution was subverted suggests that the system did not reflect a foundational normativity, but rather was an attempt at signaling likely action that went awry.<sup>44</sup> To the extent that people reflect on their moral selves, their light comes not principally from legal systems. The most those systems can do is supply news of others’ likely actions, information that is valuable if and only if accurate, and never preemptively determinative of what should be done.

Scott Shapiro elegantly summarizes H. L. A. Hart’s account of a legal system’s “rule of recognition”:

According to Hart’s solution, the foundation of all legal authority is social practice. The norms that create legal authority are themselves created by the fact that certain members of the group are guided by a rule that treats these norms as authoritative. . . . The master rule itself, which Hart termed the ‘rule of recognition’, comes into existence simply in virtue of its being practised. It governs behaviour in virtue of its guiding behaviour.<sup>45</sup>

The same curiosity about our own moral obligations that caused us to ask what authorized Kelsen’s *grundnorm* makes us want to know what causes governmental actors in Hart’s world to be guided by the rule of recognition. Their convergent behavior suggests rational decisionmaking. For what *reasons* do they accept the rule’s guidance? They must think that following the rule is the best thing for them to do, or their practice would not be so consistent. To understand the nature of law and how law should affect our choices of action, we need an answer to this question.

One answer is authority. That invites John Finnis’s critique of Hart’s opacity on the mental state that constitutes the internal point of view, and particularly the mental states of those who make and apply law.<sup>46</sup> Finnis points out that the central case of an attitude of rule acceptance within a vision of law as directly obligation-imposing is an attitude of moral duty to obey.<sup>47</sup> Hart had said that “what is crucial” is conver-

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42. MICHEL DE MONTAIGNE, *ESSAYS OF MICHEL DE MONTAIGNE* 317 (Charles Cotton trans., NuVision Publ’ns 2007) (1580).

43. STEPHEN W. HAWKING, *A BRIEF HISTORY OF TIME* 1 (1988).

44. See RUDOLF ALADÁR MÉTALL, *HANS KELSEN, LEBEN UND WERK* (1969); LARS VINX, *HANS KELSEN’S PURE THEORY OF LAW: LEGALITY AND LEGITIMACY* 145–46 (2007).

45. Scott J. Shapiro, *On Hart’s Way Out*, in *HART’S POSTSCRIPT*, *supra* note 27, at 149, 154.

46. See, e.g., H.L.A. HART, *ESSAYS ON BENTHAM* 265–68 (1982) [hereinafter *HART ESSAYS*].

47. FINNIS, *supra* note 30, at 12–15.

gent reference to the rule of recognition “as *authoritative*, i.e., as the *proper* way of disposing of doubts” as to whether any human communication is law.<sup>48</sup> The historic idea of authority does not address what is *proper* in any respect distinct from what is morally required. But authority does not impose a moral duty to obey the rule of recognition unless the source of the rule has a moral right to be obeyed.<sup>49</sup> And then we are back to infinite regress.

What else might prompt governmental actors’ convergent guidance by the rule of recognition? Shapiro observes that “[b]y requiring judges to apply certain rules that have certain characteristics on a regular basis, the rule engenders the formation of expectations about future judicial conduct.”<sup>50</sup> He cites Hart’s Postscript to *The Concept of Law*: “Rules are conventional social practices if the general conformity of a group to them is part of the reasons which its individual members have for acceptance.”<sup>51</sup> Jules Coleman congruently concludes that “the rule of recognition is a coordination convention that creates reasons for acting in the way in which coordination conventions generally do—when they do. This is by creating a system of reciprocal, legitimate expectations.”<sup>52</sup> Lon Fuller had criticized Hart’s account of rules of recognition on that ground: “There is no doubt that a legal system derives its ultimate support from a sense of its being ‘right.’ However, this sense, deriving as it does from tacit expectations and acceptances, simply cannot be expressed in such terms as obligations and capacities.”<sup>53</sup> Hart, in response, asked: “Is it really not possible, without weaving fictions, to be more specific than this?”<sup>54</sup>

Let us try to be. A person is likely to do what the rule of recognition signals he will do *because* the rule of recognition tells him what others are likely to do. Calling the rule of recognition *law* on that ground concedes that the legal system owes its life not to anyone’s moral right to be obeyed, but to autopoiesis—that law is a self-generated signaling system for likely human action. But then should not all legal rules be characterized that way? If the efficacy of the rule of recognition comes from signaling the likely actions of others rather than from implementing a

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48. HART, *supra* note 15, at 95.

49. Cf. FINNIS, *supra* note 30, at 359 (“[T]he ruler has, very strictly speaking, no right to be obeyed . . . ; but he has the authority to give directions and make laws that are morally obligatory and that he has the responsibility of enforcing. He has this authority for the sake of the common good (the needs of which can also, however, make authoritative the opinions—as in custom—or stipulations of men who have no authority).”). Finnis’s contention that serving the good may “make authoritative” human communications from sources that have no right to be obeyed seems to reduce “authority” to a synonym for “law,” while characterizing “law” as an obligatory status that communications *substantively* lose when those communications are “against the common good.” *Id.* at 359–60.

50. Shapiro, *supra* note 45, at 189.

51. HART, *supra* note 15, at 255.

52. Coleman, *supra* note 27, at 119–20.

53. LON L. FULLER, *THE MORALITY OF LAW* 138 (2d ed. 1977).

54. H.L.A. Hart, Book Review, 78 HARV. L. REV. 1281, 1294 (1965) (reviewing LON. L. FULLER, *THE MORALITY OF LAW* (1964)).

moral right to be obeyed, then why would that not equally be true of all the other rules in the system? Calling such a rule of recognition “authoritative” actually assimilates “authority” to “legality,” and discards the historic idea of authority.<sup>55</sup> The idea of authority essentially depends on a creation-delegation model of ontology. If one is not a delegate of authority, one cannot confer authority on anyone else. A rule of recognition affords those who make rules pursuant to it no more moral right to invent and impose duties on others than the source of the rule of recognition had. And the source of the rule of recognition, understood as convention, had no such right: “From a moral or political point of view, the rules of recognition, by themselves, cannot be regarded as sources of obligation.”<sup>56</sup>

Hart’s attempt to solve the infinite regress problem by accepting that the rule of recognition might derive the whole of its efficacy from some phenomenon other than authority really suggested that authority might not be the operative principle underlying the system at all. If it is not, then the natural inference to draw is that whatever phenomenon explains the efficacy of the rule of recognition also explains the efficacy of all the other rules in the signaling hierarchy. Having buried the idea of authority when analyzing the efficacy of the rule of recognition, why artificially resurrect that anachronistic idea when analyzing how the rest of the rules work? This Article argues that law’s true genesis is evolutionary and that its guidance of behavior is purely a function of its success in signaling the likely actions of others. Signaling hierarchies are formed by existing efficacious signals signaling the likely scope for success in generating further efficacious signals. The cross-referencing of the signals establishes an autopoietic *system*. All the signals of the system are supported on the same basis as those that were issued at its beginnings, and that support comes from their self-fulfilling efficacy in signaling likely human action. Recognizing that reality renders the historic of idea of authority—of moral right to be obeyed—completely irrelevant to the nature of law.

Understanding law as an autopoietic signaling system freed from the idea of authority explains why it does not matter that we cannot identify a *mind* behind the law.<sup>57</sup> The identity of the human persons who contribute to law’s appearance is unimportant to law’s character as law. That character in human communications is simply a function of their actual inclusion in a system that succeeds in serving a particular community of humans by signaling those persons’ likely actions. The minds that matter are those of law’s recipients—it is the fact of their widespread

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55. Cf. Leslie Green, *The Concept of Law Revisited*, 94 MICH. L. REV. 1687, 1697 (1996) (observing that to view rules of recognition as conventions “continues to sit uneasily with any notion of obligation”).

56. Andrei Marmor, *Legal Conventionalism*, in HART’S POSTSCRIPT, *supra* note 27, at 193, 215.

57. See generally STEVEN D. SMITH, *LAW’S QUANDARY* (2004); Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104 (1989).

recognition that law's words signal likely human action within their community that self-fulfills law's character.

### C. *Law and Custom*

The articulated customs of a group express members' shared expectations concerning members' likely actions. Building signals of likely action on anterior signals of likely action more plausibly accounts for custom as law than do efforts to relate customary law to authority.<sup>58</sup> Customary laws are pedigreed signals that emerged so early in a signaling system's evolution that the persons whose communications initiated those customs (originally constituted those signals) are untraceable. The pedigree of customs depends not on identifiable communicators but on the fact that communications expressing those customs are recognized to belong to the signaling system by most members of the community *and by the signaling system itself*.

John Finnis notes that the "clumsiness of custom-formation" as a method of solving coordination problems reflects "need for somebody, or some body, to settle coordination problems with greater speed and certainty,"<sup>59</sup> and that authority in particular persons (affording them the moral right to act *as if* they had a moral right to be obeyed<sup>60</sup>) supplies a way to coordinate more efficiently and effectively than does custom. But Finnis's own elaborate account of custom formation under a "framework custom"<sup>61</sup> points to an alternative solution that might more accurately reflect our human history. The alternative account is that custom's evolution solved its own deficiencies by developing customs of treating as effectively predictive those communications signaling likely action that were pedigreed by the evolving sub-systems we call institutions of government. To call the evolution of those customs a creation of "authority" is "artificial and unnecessary."<sup>62</sup> Finnis argues that customs in international law "derive their authoritativeness directly from the fact that, if treated as authoritative, they enable states to solve their co-ordination problems."<sup>63</sup> But "treated as authoritative" here just means "treated as law," and the critical mental state, transparent in the case of international law, is an expectation concerning the likely actions of others.

Institutions of government are micro-communities of persons selected and coordinated in their actions by their community's signaling system both in relation to each other and in relation to others in their

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58. Hart demolished the old positivists' attempts to invest custom with authority through tacit endorsement by someone who has a right to be obeyed. See HART, *supra* note 15, at 44–48. For the account that he was particularly addressing, see AUSTIN, *supra* note 16, at 31–32.

59. FINNIS, *supra* note 30, at 245.

60. *Id.* at 359.

61. *Id.* at 244.

62. *Id.*

63. *Id.*

wider human community. Institutions that make and apply law are themselves constituted by earlier-generated sub-systems of signals. Those institution-shaping signals tell a participant person what other participant persons, and members of the wider community, are likely to do in relation to each action that she might choose to do. Conceiving of law as systematized signals of likely action clarifies how law guides individual choices to act in ways that we may formally call performances of duty and in ways that we may formally call exercises (including delegations) of power and in ways that we may formally call both those things (that is, obligatory exercises of power). Ultimately all of these actions are the choices of individuals, made with regard to the range of reasons perceived to be relevant, including those revealed by information about the likely actions of others that the signaling system supplies. From an action-choosing person's perspective, deciding to perform a legal duty differs from deciding to exercise a discretionary legal power only to the extent that those formal labels accurately signal differences in others' expectations of her likely actions and in others' likely responses to what she chooses to do. Information beyond law's formal labels, whether supplied by the law or by non-legal sources, may, for example, reveal to the action-choosing person that others really do expect her to exercise a formally discretionary legal power and will react adversely if she does not, or that others really do not expect her to perform a legal duty, and will react adversely or indifferently if she does. Law's formal labels are just prima facie signals of likely action, and their degree of predictive efficacy varies even within legal systems.

The evolution of government institutions was often aided by the self-serving fiction of particular persons' authority claims, but what mattered for achieving a well-coordinated, sophisticated social order was that human communications from particular institutional sources came to be treated as signaling likely human action. Custom in this way became self-transforming, but persisted as a recognizable part of the signaling system to the extent that the signals of evolving institutions did not entirely supersede it. An evolved system of signals about likely human action may be configured to calibrate speed of signaling to context and thus optimally elicit the benefits of deliberation and of rapid response. Such systems are self-perpetuating and, through their accuracy, self-validating. A rational participant in the community to which a signaling system relates will usually act as the system's signals predict he usually will because the system's signals create reasons for him to do so, not in the actual existence of authority, but through information supplied about the likely actions of others.

The idea of authority doubtless aided in the process of generating the highly effective signaling systems that many human communities now have. But these systems are now self-sustaining and self-expanding, and we have no need of a fallacious idea that some humans have a moral

right to be obeyed by others in order to maintain our signaling systems and to reap their coordinative benefits. Those benefits flow from the fact of the systems' existence such that every member of a community can, regardless of beliefs about authority, know that their system's signals succeed in conveying the likely actions of others, and thus valuably inform decisionmaking about what to do.

*D. Revolutionary Change and the Rebooting of Signaling Systems*

Revolutions are discontinuities in law's essentially evolutionary formation. In moments of revolutionary change, core components of a community's signaling system may disappear within part or all of that community. This may be due to an invasion by outsiders operating under another signaling system. If the invaders succeed, they may recast the community's signaling system in their own image, comprehensively or selectively, at least subordinating the old system to their own by establishing effective downlinks. Obversely, revolutionary change may come through an expulsion of outsiders and a severance of some or all downlinks, as occurred in the American experience.

Thirdly, change may occur through the disengaging of a sub-group of insiders who act pursuant to their own, newly-closed signaling system. For example, a military coup amounts to a sub-community of persons disengaging their internal signaling system from the main system, severing the links that subordinate the former to the latter, and then, through operation of their internal signaling system, destroying some or all of the main system and supplanting it. The frequency with which this phenomenon occurs reflects the frequency with which the military sub-system of a community's signaling system achieves a higher degree of internal predictive efficacy than exists within the system as a whole. In other words, soldiers are very likely to do what their generals say those soldiers will do—more likely than citizens, including generals, are to do what civilian officials say those citizens will do. We may say that in these circumstances, military discipline exceeds civil discipline. When that feature is combined with the very spirit of human ambition that spawned authority claims, we have a recipe for revolutionary change.

Fourthly, like organ failure in a human body, revolutionary change in a human community may come through complex interactions that cause an apparently spontaneous collapse in the predictive efficacy of what had been the community's signaling system. This circumstance we shudderingly call anarchy.

There is no reason to think that the probability of any of these changes is much affected by whether incumbent persons in government institutions claim a moral right to be obeyed. Nor is there reason to think that indoctrinating community members with notions of moral duty to obey government adds appreciably to the survival and efficacy of a well-established signaling system. And by causing individuals to overva-



lue doing what the system signals they are likely to do, indoctrination with the idea of authority may cause individuals to behave less morally than they otherwise would.

In tension with their essentially predictive function is the fluidity of legal systems, an equally essential dynamism. A particular communication called a constitution might contain words that well predict, in the language of the relevant community, how persons will interact to form institutions and will behave as participants in those institutions. But over time some participants may act contrary to what the constitutional document predicts sufficiently to change the community's understanding of what institutions are likely to do and therefore be, without any announced revolution. Such contrarian actors walk tightropes, for if they overdo their departures from predicted behavior, they risk undermining the efficacy of the signaling system from which their own actions draw significance.

Let us take an example from the American story. Article III of the United States Constitution signals that all participants in the system to which that communication contributes will accept Supreme Court decisions about what the Constitution says as effective predictors of likely human action—the Court is explicitly invested with jurisdiction over “all Cases, in law and equity, arising under this Constitution.”<sup>64</sup> But what if the Congress for which the Constitution provides had, upon assembly, resolved to remove by impeachment any judge who purported to adjudicate the constitutionality of Acts of Congress? Then Congress's vision of the good, if its signals were treated as predicting likely human action, would have been ultimate within the system. But what if Congress's signals were not so treated? What if Presidents and state governments had comparably disregarded Acts of Congress when themselves deciding what to do? Such circumstances could not have lasted long, and the transition to a more efficacious signaling system would not necessarily have involved the complete collapse of the American legal system; many subsystems of signals, such as those that we say create private property and contracts, might have remained efficacious. But a pall of uncertainty would have descended, with bad consequences for the American community.

Now let us consider a variation on the story. What if the Supreme Court, in fulfilling its systemically-signaled function of signaling elaboratively what the Constitution says, issues signals that do not plausibly elaborate the Constitution's words, understood as symbols in the language of the signal-receiving American community? One possibility is acquiescence by other actors, akin to that which might have followed subversive signals from Congress. But another is disregard by other actors, and the collapse of essential parts of the American community's

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64. U.S. CONST. art. III, § 2, cl. 1.

signaling system. Of this, more will be said in Part V. For now, note that such signal-disregarding action, whether by a court or by any other governing institution, might sometimes *morally* occur. Even those whose actions produce words that the system recognizes to be integral, pedigreed signals might in rare circumstances be morally justified in disregarding the signals that predict their actions. Sometimes a judge might be morally justified in resolving a dispute contrary to the law's signals of his likely action. But in making that moral calculation, he must weigh the risk to the efficacy of the signaling system and the comparative value of that system. He must ask, in particular, whether other actors are likely to respond to his contrarian action *as if* it were what the system predicted it would be, and if not, whether their not doing so changes the moral calculus that governs his choice of action. Such departures from what the signaling system predicts cannot accurately be characterized as evolutionary—evolution in the signaling system proceeds according to its own autopoiesis, which signals the ways in which signals of likely action can likely be successfully supplanted by fresh signals. Seeking to supplant existing signals in ways that the system does not signal as likely to succeed in shaping the actions of others involves seeking to accomplish micro-revolutions. That may well be possible. But the likelihood of success is not signaled by the system.

*E. Where Does Moral Duty Enter?*

Law's defining denominator consists in signaling likely action and belonging to a self-recognizing system co-extensive with a human community. But some of the human communications that share in these two characteristics also moralize. They purport to instruct, to express obligation. To the extent that they do that too, those communications fulfill a second function that has nothing to do with being law. That second function is moral education.

The judicial opinion-writing that characterizes the common law tradition has helped to inculcate false belief that law is directly obligatory. Judicial opinions, written to resolve concrete disputes arising in actual human lives, are often preachy. The language of duty appears more prominently in common law doctrine than in enacted legislation. But moralizing is neither sufficient nor necessary to the true concept of law. Its insufficiency is obvious—the effectiveness and accuracy of moralizing turns not at all on whether it comes from lawgivers through law or whether it comes from podia and pulpits nowhere near legislative chambers and court rooms, and in prose and poetry unfound in statute books and law reports. But moralizing is also not *necessary* to law's nature. Its absence from many of the communications that we call law sits at odds with Hart's assertion that "the theory of law as coercive orders, notwithstanding its errors, started from the perfectly correct appreciation of the

fact that where there is law, there human conduct is made in some sense non-optional or obligatory.”<sup>65</sup> As John Finnis acknowledges,

legislative draftsmen do *not* ordinarily draft laws in the form imagined by Aquinas: “There is not to be killing”—nor even “Do not kill”, or “Killing is forbidden”, or “A person shall not [may not] kill”. Rather, they will say “It shall be [or: is] an offence to . . .” or “Any person who kills . . . shall be guilty of an offence”. Indeed it is quite possible to draft an entire legal system without using normative vocabulary at all.<sup>66</sup>

Finnis attributes these drafting choices to the importance of distinguishing the consequences respectively signaled by separate bodies of law—crime, torts, property, administrative law, among others.<sup>67</sup> Conversely, the common law of contract and tort remains heavily embroidered with “duty talk,” notwithstanding the compelling case made by the law and economics movement that most of those legal “obligations” should be understood as offering choices between courses of action (for example, between keeping a promise or breaking it and paying money) that may ordinarily be morally made in whichever ways achieve the most efficient allocation of resources.<sup>68</sup> The real reason that we think the “It shall be an offense to kill” statute refers to something *truly* “non-optional or obligatory,”<sup>69</sup> while the common law opinion expressing a “duty to perform” contracts refers to something actually quite optional,<sup>70</sup> is that we do *not* regard law as directly determining moral obligation. We do not really believe in a general moral duty to obey lawgivers. We recognize ourselves to have an obvious moral duty not to kill that would exist regardless of what the law said. We do not recognize ourselves to have an obvious moral duty to perform all contracts, especially after we have attended some law and economics workshops at the University of Chicago. For us, the true substance of law lies not in moral instruction, one way or the other, but in prediction. That is the distinctive value *as law* that human communications have to their recipients in the human communities to which they pertain.

Hart’s critique of Austinian positivism<sup>71</sup> and of Scandinavian realism<sup>72</sup> emphasized that criticism is generally forthcoming from members of a human community in reaction to apparent disregard of the communi-

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65. HART, *supra* note 15, at 82.

66. FINNIS, *supra* note 30, at 282.

67. *Id.* at 282–83.

68. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 50–53 (6th ed. 2003); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1–2 (1960).

69. HART, *supra* note 15, at 82.

70. Holmes, *supra* note 19, at 462 (“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.”).

71. AUSTIN, *supra* note 16, at 157.

72. ROSS, *ON LAW AND JUSTICE*, *supra* note 17; ROSS, *TOWARDS A REALISTIC JURISPRUDENCE* *supra* note 17.

ty's law.<sup>73</sup> But criticism for apparent disregard of law is mostly not based on a perceived general moral duty to obey lawgivers, or from any other perception that could support characterizing law as *directly* obligation-imposing.<sup>74</sup> Such criticism might as often occur in a community where no one had ever alleged a moral right to be obeyed.<sup>75</sup> That criticism has several potential sources.

First, there is almost *always* a modest, non-preemptive reason for members of a human community to do what their law signals that they are likely to do, namely, the good of preserving the predictive efficacy of the community's signaling system.<sup>76</sup> It is a reason that applies save in that rarest of situations where the system as a whole signals more evil than good and so is not worth saving (it being worse than the prospect of transitional anarchy). Recognizing the vacuity of authority claims is necessary to a clear-eyed appreciation of law's signals, but the morality of what community members then do always has among its considerations the moral value of an effective signaling system for likely human action.

The good of having the signaling system is not appropriately assimilated to a duty to obey lawgivers, for two reasons. First, the duty-to-obey formulation, even when not understood to preempt other considerations, implicitly overstates the weight that preserving the system deserves to have in most community members' calculations of what to do. In their capacities as mere members of the community to which the system pertains, this reason for choice of action has only modest weight, and may readily be overridden by other considerations, because individual choice not to do what the system predicts one will do poses negligible risk to the efficacy of the signaling system. But for members of the community whose actions themselves constitute signals of the system—those whom the system recognizes to be governmental actors doing pedigreed communicative actions—this reason has greater moral weight, for the risk to the efficacy of the system deriving from those actors' disregard of the system's predictions is greater. Intermediately placed are those doing governmental acts that do not generate laws.

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73. HART, *supra* note 15, at 57, 87.

74. Hart thought that the concept of obligation did not necessarily entail moral reason for action, but Raz's response is compelling:

[R]ules telling other people what they ought to do can only be justified by their self-interest or by moral considerations. My self-interest cannot explain why they ought to do one thing or another except if one assumes that they have a moral duty to protect my interest, or that it is in their interest to do so. While a person's self-interest can justify saying that he ought to act in a certain way, it cannot justify a duty to act in any way except if one assumes that he has a moral reason to protect this interest of his. Therefore, it seems to follow that I cannot accept rules imposing duties on other people except, if I am sincere, for moral reasons.

Joseph Raz, *Hart on Moral Rights and Legal Duties*, 4 OXFORD J. LEGAL STUD. 123, 130 (1984).

75. LESLIE GREEN, THE AUTHORITY OF THE STATE 223 (1988) ("There are many good reasons for obeying the law which have nothing whatever to do with the claim that it is obligatory to do so."); cf. Steven D. Smith, *Hart's Onion: The Peeling Away of Legal Authority*, 16 S. CAL. INTERDISC. L.J. 97, 123 (2006) (identifying the inadequacy to establish authority of various much-cited reasons for conforming with instructions).

76. FINNIS, *supra* note 30, at 361, 365.

The signaling system can survive some instances of even wholesale disregard of particular signals, especially where that disregard reflects widespread understanding that moral reasoning generally does not support, perhaps never supports, acting as the signals predict.<sup>77</sup> Such understanding is, of course, often a precursor to change in what the system actually signals. Hence the widespread late-twentieth century disregard in Western communities of signals that predicted punishment for various consensual adult sexual behaviors. Hence the many circumstances in which many people jaywalk. Where the system predicts that a community member will not do an action that she concludes should otherwise be done, she should consider two factors in deciding the correct weight to place on preserving the predictive efficacy of the system. Firstly, she should consider whether the system's signal predicts action that is pervasively immoral, or whether the signal just fails to point to the good in her particular instance. Secondly, she should consider whether her acting contrary to the signal's prediction is likely to coincide with contrarian action by many others. If she concludes that the signal's predicted action is not pervasively immoral and that acting contrary to the signal risks contributing to concerted disregard, then the good of preserving the predictive efficacy of the system deserves greater weight in her choice of action than it otherwise would.

The second and conclusive reason for not characterizing the non-preemptive duty to preserve the efficacy of the signaling system as a duty to obey lawgivers is that the duty to preserve is really owed to all members of the community served by the system. Preserving the efficacy of law's signaling system is the one content-*independent* interest that contributes to "fair play" arguments for authority.<sup>78</sup> Those arguments do not support authority in the essential sense of moral duty to obey lawgivers, because the duties to preserve the efficacy of the system and to help law achieve particular substantively good things—such as coordination for good purposes—are not owed to lawgivers, but to one's fellow law receivers as co-beneficiaries of the shared signaling system that serves the shared human community. "It's not about you" would be a perfectly accurate response to anyone relying on fair play to support his claim of right to be obeyed.

To allege that an otherwise contestable belief in lawgivers' weighty or even preemptive moral right to be obeyed must be artificially maintained and acted upon in the interest of fair play is to beg the question, for if the delusion that there is such a right were dispelled through the visible disregard of disbelievers, then no ostensible issue of fairness

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77. GREEN, *supra* note 75, at 229 ("[I]t is just false to think that there are no laws whose disobedience the system can survive, and false to think that there are no people whose compliance is unnecessary.").

78. See Hart, *supra* note 23, at 178; Rawls, *supra* note 23, at 4; cf. A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 138–39 (1979) (arguing that the "open benefits" of governance cannot morally support the case made by Hart and Rawls for obligation).

would exist. The true moral culprits are those who help to perpetuate the delusion by paying lip service to the idea of authority while quietly choosing their own actions in knowing disregard of that idea. For example, if on balance the moral weight of reasons relevant to action does not support doing what a compulsory vaccination law predicts that I will do, then I may morally choose not to be vaccinated. But it would be immoral for me to avoid vaccination while citing the law as a conclusive reason for others to be vaccinated.

The Dworkinian vision of community commitment and associative obligation,<sup>79</sup> and the Rawlsian conception of duty to support just institutions,<sup>80</sup> may also be conceived as salient instances of the non-preemptive moral duty to preserve the efficacy of law's signaling system. That system's value to its community is a content-independent moral reason for community members to do as the system's signals implicitly predict they will do.

A second reason for criticizing those who apparently disregard law's signals arises frequently, but not always—in many legal systems it will just *usually* apply. Usually, the system's signals of what one is likely to do will track what one actually ought do anyway, having regard to the totality of reasons that are relevant to one's choice of action. Much criticism for apparent disregard of law operates on an implicit syllogism, a premise of which is that law signals what really is the right thing to do, not circularly because law signals it, but having regard to the totality of reasons relevant to action. In other words, even where criticism for apparent disregard of law seems to be more than prudential (“you might get caught”) or self-interested (“you might get us all in trouble”), that criticism may nonetheless just reflect a moral conclusion that the particular law signals likely action that a full analysis, unpreempted by law, shows to be the right thing to do. In particular, a critic who invokes the law may mean that the attitudes of others, reflected in the content of the law, deserve evidentiary weight in moral decisionmaking. “It's the law” is often invoked as tiebreaker in a first-order moral disagreement, a mere citation of widespread shared opinion supporting the speaker's perspective on the underlying morality of the situation, without necessarily implying that law *preempts* considering what the moral answer would otherwise be, or even re-weights the calculus very much.

In arguing against predictive theories of law, Hart observed that community members coherently speak of a draft dodger as having an *obligation* to report for military service even where that person has escaped the jurisdiction or engaged in bribery and is at no risk of actually being punished in the way that the law predicts.<sup>81</sup> But such usages would only contribute to a case against predictive theories of law if “duty talk” were

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79. RONALD DWORKIN, *LAW'S EMPIRE* 195–216 (1986).

80. JOHN RAWLS, *A THEORY OF JUSTICE* 354 (1971); cf. RAZ, *supra* note 2, at 102.

81. HART, *supra* note 15, at 84.

ordinarily divorced from underlying perceptions of what would be the right thing to do anyway. And manifestly it is not. We speak of people having obligations to do what is right without necessarily even noticing whether the right action is signaled by law. People are as likely to speak of an “obligation” to protect their families as they are to speak of an “obligation” to defend their wider communities, and the frequency and fervor of that usage depends in either case not at all on what the law signals on the subject.

A third reason for criticizing those who apparently disregard law’s signals partakes of elements from each of the preceding two. The signaling system’s predictions may themselves fulfill an obviously valuable coordinative function, notably in resource allocation, or may reflect lawgivers’ access to expert understanding of what is good in some other respect. In either of those circumstances, the system itself generates an instance of a moral reason for action. The reason for action is coordination or achieving some other, expertly-identified, good. These are reasons for action that may sometimes be received from non-legal sources (that is, from communications that are not systemically recognized to participate in the community’s signaling system), and one may be criticized for not acting in accordance with these reasons regardless of whether they derive from the community’s signaling system or from non-legal sources. Where, however, these reasons for action derive from the legal system, criticism for disregarding them may be framed as criticism for not following the law. All of this may equally be said of punishment avoidance as a reason for action. That reason is of course rightly included among considerations to be assessed in decisionmaking about what to do. Risks of harm are always morally relevant, whether they are revealed by the signaling system or identified from non-legal sources, and one may in either case rightly be criticized for not giving them due weight when making choices of action.

A fourth reason for criticizing those who apparently disregard law’s signals is the good of setting an example for the young and the stupid. Visibly acting contrary to law’s predictions of one’s likely action may in some contexts encourage other persons to trivialize law’s contribution to practical reason and thus to make more moral mistakes in their own choices of action.<sup>82</sup> A parent may attend more closely to speed limits when children are her passengers, not necessarily because doing so makes her driving safer, but because her example may ultimately make *their* driving safer.

None of these grounds on which apparent disregard of law may be criticized implies perception of any content-independent moral duty to obey lawgivers, let alone a *preemptive* moral duty to obey lawgivers. In other words, none necessarily implicates the idea of authority. The soci-

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82. FINNIS, *supra* note 30, at 361.

ological phenomenon of criticism that Hart noticed may sometimes be framed as criticism for violating a duty to obey the law, but if the critics were pressed on their bases for criticism, disregard of authority would often not be the essence of their complaints.<sup>83</sup> And from a moral realist's perspective,<sup>84</sup> even widespread expressed belief in the idea of authority, accompanied by behavior that actually did seem to demonstrate such belief, would not tell us anything enduringly valuable about the nature of law. Without the support of moral reasoning, that sociological evidence would just document the incidence of a delusion, much as the Milgram Experiment did.<sup>85</sup> Because law can achieve all of the good that it presently does without the aid of that delusion, the efficacy of law would not be diminished if we dispelled that delusion, and this Article aspires to help do just that.

#### F. *The Language of Authority*

We may, and probably always will, use the term "authoritative" to describe pedigreed signals of the signaling system and other actions that the system designates governmental. That usage deploys the term "authority" to denote concepts that need bear no relation to the historic idea for which the nomenclature was developed. The ongoing concepts are *law* and *government*. We may continue to associate the language of authority with what counts as law and what constitutes government. We may use the terms "authoritative," "legal," and "governmental" interchangeably. "Authority" so used is not a defining ingredient of law and government, but merely a synonym for them. To say that authoritativeness appears to imply more is simply to acknowledge that the term's linguistic origin lies in a false conception of what counts as law and what constitutes government—a conception of derivation from persons who have a moral right to be obeyed.

Disengaging the concept of authority from lawgivers<sup>86</sup> destroys its potential to illuminate the nature of law. We do not obey *words*, we obey communicating persons. We do not owe moral duties to words, we owe them to persons. Words do not have rights to be obeyed; unless persons do, then nothing does. To say that the words of the law have "authority" independent of lawgivers is either to talk tautologically, because one is using "authority" as a synonym for "legality," or to attribute to law's words an unidentified moral value in guiding human action.<sup>87</sup> But

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83. See LEITER, *supra* note 36, at 4 ("Naturalists can demand, to be sure, that any account of [normative] features of law which depends on 'folk intuitions' as data points in theory-construction ought to answer to empirically sound methods for ascertaining that data.")

84. See Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1144-47.

85. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 3, 7-8 (1974) (testing subjects' willingness to administer electric shocks of increasing severity in response to instructions that purported to be mandatory and responsibility-relieving).

86. See, e.g., HEIDI M. HURD, MORAL COMBAT 153-56 (1999).

87. See *id.*



there is only one kind of valuable guidance that *all* law provides, and that is news of the likely actions of others. And *systemic* signaling of the likely actions of others, of the kind necessary, for example, to allow confident conceptions of property, is the one kind of valuable guidance that *only* law can provide, exclusively among human communications. That circles us back to a definition of law that has no need of the concept of authority and that generates merely a non-preemptive duty to preserve the efficacy of the system from which law comes. In other words, we are circled back to treating “authority” as a superfluous term, to be used, if at all, as a synonym for legality.<sup>88</sup>

Discarding the idea of a moral right to be obeyed does not render obsolete, but just more precise, our use of the terms “legitimacy” and “sovereignty.” “Legitimacy” aptly adverts to the goodness of the ways in which persons constitute and operate institutions of government. Actions that form government or govern are sometimes called illegitimate on the particular ground that those actions do not correspond to the signaling system’s predictions and so jeopardize the signaling system’s efficacy. Sometimes illegitimacy is alleged on the more comprehensive ground that government actions, including actions that constitute institutions and select human participants in those institutions, are the wrong things to do, having regard to the totality of reasons relevant to those choices of action, including the value of preserving the signaling system’s efficacy.

“Sovereignty,” on the other hand, signifies the relative independence of some human communities from each other. That characteristic is expressed and implemented through the relative independence of those communities’ respective signaling systems. Humans are members of multiple, nested communities, each with its own uniquely operative signaling system for likely action therein. Each of us belongs to several geographic communities, ascending hierarchically to a nation state and to the international community. These all have their own dedicated signaling systems, and those systems are interlinked vertically and horizontally. We may also be members of institutional communities, and the signaling systems of these may have uplinks to and downlinks from the signaling systems of one or more geographic communities, so that the institutions operate in effect through sub-systems of signals with a derivative relation to a larger signaling system or systems. When we call a community sovereign, we indicate the limited nature of any downlinks to that community’s signaling system from other systems. Hence the particular acknowledgment of sovereignty in the signaling system that we

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88. English-language dictionaries acknowledge the multiple senses of the term “authority.” Sometimes that term is used as a synonym for law, sometimes for government, and sometimes for an *expert*. See *infra* Part IV. These usages are distinguishable from the historic use of the term “authority” to denote one who has a moral right to be obeyed. Only in the historic sense of moral right to be obeyed does a concept of authority have any potential to inform our understanding of what law is.

call international law and in those signaling systems that we call federal. None of this implies a moral right in any participant in any signaling system to be obeyed by anyone.

*G. Authority, Anarchism, and the Mob*

Recognizing that an autopoietic signaling system accomplishes all of the good previously attributed to authority lets us discard the idea of authority *without* embracing anarchism. We may be joined by the occasional philosophical anarchist whose critique was confined to the concept of authority.<sup>89</sup> But our discovery will do nothing for those who oppose institutions of government,<sup>90</sup> and they are well justified in claiming etymological title to anarchism. Institution-building was historically associated with self-serving claims of authority, but communities' growing scale and complexity would have prompted our nascent signaling systems to evolve institutions even if individuals had not worn their selfish genes so immodestly. The wondrous accomplishments of that evolution are sophisticated and effective signaling systems that may be maintained through integrated institutions without maintaining any illusion that any particular community member has a moral right to be obeyed by others.

The notion that we needed an authority theory to tell us *what counts as law* actually had matters backward—the intensity of philosophical interest in the question “what is law?” significantly derived from a felt need to identify the human communications to which a direct, distinctive and strong, perhaps even preemptive, *obligation-creating* quality should be attributed. When we discard the idea of authority as ill-begotten and morally groundless, the question “what is law?” becomes less interesting. But we can notice that human communications that fulfill to varying degrees a forewarning function concerning likely action within a human community tend to be called law by members of that community in situations where the communications form part of a signaling system that is uniquely operative within that community. Then we have no difficulty answering the question whether, as is colloquially said, the word of the mafia used to be “law” in some Sicilian towns. Of course it was, for law as signaling system is not premised on moral right to be obeyed. Law is just human communication that systemically signals likely human action and thus effectively guides members of the community to which law's system applies in deciding how to act themselves. When Hart's “gunman”<sup>91</sup> has the town council in his pocket, the “gunman” *reductio* is not absurd at all.

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89. See ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 72 (1970).

90. *Id.* at 80–82.

91. HART, *supra* note 15, at 19, 82–83.

## III. THE INVENTION OF AUTHORITY

John Locke opened the preface to his *Two Treatises of Government* with an expression of hope that the writings

are sufficient to establish the Throne of our Great Restorer, Our present King *William*; to make good his Title, in the Consent of the People, which being the only one of all lawful Governments, he has more fully and clearly than any Prince in *Christendom*: And to justify to the World, the People of *England*, whose love of their Just and Natural Rights, with their Resolution to preserve them, saved the Nation when it was on the very brink of Slavery and Ruine.<sup>92</sup>

This bore a somewhat attenuated relation to reality. William had arrived in England with an army, at the invitation of a coterie of Protestant grandees.<sup>93</sup> Though bolstered by desertions from James II's army,<sup>94</sup> the core of William's force, like the troops of the previous conquering William, were not even English. James had gone to France as guest of the Sun King, but was now in Ireland, assembling another army with Louis XIV's support.<sup>95</sup> And in England, Locke could hear murmurings—by what *right* was William King?<sup>96</sup>

Locke needed an answer that would persuade minds inculcated with the idea of preemptive moral right to rule, reflected in the English monarchy's motto, *dieu et mon droit*. The revolution could not be justified to his audience merely by comparing those personal characteristics of the two contenders that actually affected their prospects of governing well. Locke needed to establish both that James had been morally ousted, and that William *in particular* had a moral right to be obeyed. Locke could not say the truth—that William was just a military strongman with a disciplined army,<sup>97</sup> a set of opinions agreeable to many among the English elite,<sup>98</sup> and a moderate dose of the Weberian<sup>99</sup> charisma<sup>100</sup> that James so conspicuously lacked.<sup>101</sup> Beyond making a breach-of-contract case against James that released the English people from obedience,<sup>102</sup> Locke alleged a new commitment—to William. His argument

92. LOCKE, *supra* note 14, at 137.

93. TIM HARRIS, *REVOLUTION: THE GREAT CRISIS OF THE BRITISH MONARCHY 1685–1720*, at 271–75 (2006); WOUT TROOST, *WILLIAM III, THE STADHOLDER-KING: 195–205* (J.C. Grayson trans., 2005).

94. HARRIS, *supra* note 93, at 276–96.

95. *Id.* at 433–47.

96. ROGER WOOLHOUSE, *LOCKE: A BIOGRAPHY* 283 (2007).

97. See HARRIS, *supra* note 93, at 271–75; TROOST, *supra* note 93, at 195–205.

98. HARRIS, *supra* note 93, at 271–75; TROOST, *supra* note 93, at 195–205.

99. See WEBER, *supra* note 10, at 48–65.

100. Though an “extremely reserved, reticent person,” William drew on “[a]mbition, enormous strength of will and the belief that God had destined him.” TROOST, *supra* note 93, at 23–24.

101. HARRIS, *supra* note 93, at 477–85. James “managed to alienate Tories and Whigs, Anglicans and dissenters alike.” *Id.* at 486. “William’s invasion was itself predicated upon the fact that James’s regime had already begun to collapse from within . . .” *Id.* at 485.

102. See LOCKE, *supra* note 14, at 413.

improbably inferred from the wider population's acquiescence a tacit promise to obey and then made a moral claim that the alleged tacit consent could confer authority in the same sense as divine delegation had hitherto been alleged to do, namely, as a preemptive moral right to be obeyed.<sup>103</sup> Locke's preface hailed the right of William by consent, saying nothing of William's wife Mary, James's daughter.<sup>104</sup> But the collective choice of the English to characterize the new reign as a joint one of William and Mary self-consciously acknowledged the persuasive power of succession principles.<sup>105</sup> Those principles could draw some moral support from their propensity to reduce risks of transitional anarchy. But the apparent strength of the moral case for respecting succession claims and avoiding alternative selection methods came from the old divine-endorsement theory of authority.<sup>106</sup>

A frontal attack on the idea of moral right to rule would not have been persuasive, could not safely be made, and would not have sufficiently secured William. Locke's version of right to rule by agreement of the ruled was the best that he could do. David Hume subsequently called "[t]ime and custom"<sup>107</sup> the bases of English monarchs' right to rule. But even if these could amount to a moral reason, and not just a sociological description, that reason would not suffice for Locke's purposes. Locke needed the man who had just shown up with an army at his back to have a moral right to be obeyed. Only a claim of contract could aspire to persuade the English of a moral right to rule acquired in the midst of revolution. Here Locke was in a bind, which he handled by exploiting an ambiguity in the word "tacit." That word could mean "implied," or it could just mean "constructive." In arguing that the people of England tacitly consented by staying around after William arrived,<sup>108</sup> Locke evaded the question whether the choice to stay evidenced a mental state of commitment, or in itself imposed an obligation to obey. The second alternative, if explicitly argued, would have been totally unpersuasive. What moral work could such a fiction hope to do for people worried that perhaps the divine will required them to keep James? Yet had the first alternative been true—had the population silently but actually consented to William's accession and implicitly promised to obey him—then Locke would not have needed to make the argument. When a moral person promises, she implicitly avers a moral right to make the promise. If the potentially persuasive reading of Locke's case for William was accurate, then Locke was seeking to convince the population of a consent theory

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103. *See id.* at 317.

104. *See id.* at 137–39.

105. *See HARRIS, supra* note 93, at 333–34; TROOST, *supra* note 93, at 207–10.

106. On James's accession in 1685: "The vast majority of James's subjects, including those who held power, believed that their king ruled by divine right and was absolute." HARRIS, *supra* note 93, at 478.

107. 2 DAVID HUME, A TREATISE OF HUMAN NATURE 617 (London, Thomas Longman 1740).

108. LOCKE, *supra* note 14, at 347–48.

that they *had already accepted* when they tacitly promised obedience. The reason that Locke published the *Treatises of Government* when he did, though they had in most part been written long before,<sup>109</sup> and though the danger that had precluded past publication might yet reappear,<sup>110</sup> was precisely because so many in the population were skeptical and needed to be won over.<sup>111</sup> And there was no behavior in the population beyond ongoing presence to support inferring majority consent of the kind that Locke argued could commit the whole.<sup>112</sup> Parliament's approval of the Declaration of Rights<sup>113</sup> did not suffice to show majority consent even on a representative basis, because the proportion of the population who were eligible to vote in parliamentary elections was small and malapportioned.<sup>114</sup>

Locke needed William to succeed. Had the revolution failed, as had the mid-century one, then Locke's fate would probably have been even worse than his previous expulsion by the Stuarts from a tenured appointment at Oxford.<sup>115</sup> At best it would have meant a return to exile.<sup>116</sup> Locke doubtless remembered the miseries visited on John Milton in the wake of the Stuart Restoration for having, among other things, advanced a consent theory of authority in support of the earlier revolution.<sup>117</sup> Hence Locke's attempts to keep the *Treatises'* authorship anonymous,<sup>118</sup> though he had to know that the secret would eventually become open.<sup>119</sup>

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109. See MAURICE CRANSTON, *JOHN LOCKE: A BIOGRAPHY* 207–08 (1957); Peter Laslett, *Introduction to JOHN LOCKE, TWO TREATISES OF GOVERNMENT* 3, 45–66 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); WOOLHOUSE, *supra* note 96, at 275.

110. HARRIS, *supra* note 94, at 433–47; Laslett, *supra* note 109, at 66.

111. Even some of those who conspired to bring about the Dutch invasion did not will its eventual outcome. "I can take God to witness that I had not a thought when I engaged in it," wrote the earl of Danby's son "(and I am sure my father neither) that the prince of Orange's landing would end up in deposing the King." . . . Had James stayed, therefore, there can be little doubt that events would have taken a different turn from the sequence that ensued as a result of his flight. His departure meant that those few real revolutionaries who had all along intended to replace him with William of Orange, including the prince himself, succeeded beyond their wildest dreams.

W.A. SPECK, *RELUCTANT REVOLUTIONARIES: ENGLISHMEN AND THE REVOLUTION OF 1688*, at 238–39 (1988).

112. LOCKE, *supra* note 14, at 212–13.

113. 1689, 1 W. & M., sess. 2, c. 2 (Eng.); see LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS, 1689, passim* (1981).

114. See, e.g., EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 42 (1988) (estimating the reach of the franchise in counties at approximately one fifth of the adult male population); J.H. Plumb, *The Elections to the Convention Parliament of 1689*, 5 *CAMBRIDGE HIST. J.* 235 (1937) (elaborating electoral circumstances that rendered even the 40-shilling freehold property qualification for male voting in counties an overstatement of popular participation).

115. WOOLHOUSE, *supra* note 96, at 207–10.

116. Laslett, *supra* note 109, at 66.

117. See STANLEY FISH, *HOW MILTON WORKS* 517–18 (2001); BARBARA K. LEWALSKI, *THE LIFE OF JOHN MILTON: A CRITICAL BIOGRAPHY* 398–407 (2000) (describing Milton's post-Stuart Restoration years in a chapter titled "In Darknes, and with Dangers Compast Round" 1660–1665, quoting a line from Book 7 of Milton's "Paradise Lost").

118. Laslett, *supra* note 109, at 4–6.

119. WOOLHOUSE, *supra* note 96, at 281–83.

A bolder attack on the idea of authority would have exposed Locke to trouble even if James never returned, for it might have lost him *William's* favor. The thesis of this Article, that the idea of moral right to rule is a fabrication of self-interested claimants, is a proposition that in Locke's era, and for most of human history, could not safely be articulated. In many communities even now, it cannot be said. To deny authority was, and in many communities still is, to risk everything. As it was, Locke had spent much of his adult life feeling frightened.<sup>120</sup>

For if it be asked, what Security, *what Fence* is there in such a State [an absolute monarchy of the kind James II had claimed], *against the Violence and Oppression of this Absolute Ruler?* The very Question can scarce be born. They are ready to tell you, that it deserves Death only to ask after Safety.<sup>121</sup>

The separation of powers that was accomplished through the 1688 revolution made possible what those with actual opinions in Locke's era had hardly ever experienced: "a tranquility of mind arising from the opinion each person has of his safety," or as Montesquieu called it, "political liberty."<sup>122</sup> A yearning for predictability, for some security in the survival of good government, pervades the *Second Treatise*. In seeking to secure such government, the furthest Locke could safely, persuasively, and supportively go was to shift the alleged source of right to rule from divine endorsement to popular consent. Questioning the very idea of particular persons having moral rights to be obeyed would not have seemed open to him.

The consent criterion for incidence of moral duty to obey had a long pedigree, but a rarefied one. As David Hume observed, it had not figured in the claims of rulers and in the self-understandings of most law-abiding subjects.<sup>123</sup> It could be traced from one of the reasons Socrates gave for obeying the laws of Athens,<sup>124</sup> through Manegold of Lautenbach's reason for denouncing and resisting his monarch, the Holy Roman Emperor Henry IV, during the latter's dispute with the Pope in the eleventh century,<sup>125</sup> to John Milton's defense of the decision to depose, try, and execute James's father, Charles I, four decades before Locke published.<sup>126</sup> Thomas Hobbes had also made a mid-century case for consent, but, unhelpfully, had called that consent indefeasible.<sup>127</sup>

120. See, e.g., *id.* at 181, 207–10, 214.

121. LOCKE, *supra* note 14, at 210.

122. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151 (Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748).

123. 2 HUME, *supra* note 107, at 590–600.

124. See I PLATO, *Crito* in *THE DIALOGUES OF PLATO* 435–36 (Benjamin Jowett trans., Random House 1937); cf. I PLATO, *Apology*, in *THE DIALOGUES OF PLATO*, *supra*, at 412 (suggesting that the contractual duty to obey did not preempt a conflicting duty to the divine).

125. See FRITZ KERN, *KINGSHIP AND LAW IN THE MIDDLE AGES* 119–21 (S.B. Chrimes trans., Basil Blackwell Oxford 1914) (1939).

126. JOHN MILTON, *The Tenure of Kings and Magistrates*, in JOHN MILTON, *POLITICAL WRITINGS* 3, 7 n.21, 8–13 (Martin Dzelzainis ed., Claire Gruzelier trans., Cambridge Univ. 1991) (1650). Consider

Locke's claim that a duty to obey might be owed through *tacit* consent shared with Socrates' account a "one could have just left" rationale<sup>128</sup> that may have been personally true for Locke and for Socrates, but was certainly not true for most of England in 1688. And even where departure is physically possible, surely "[c]onsent cannot be binding on people, in the way this argument requires, unless it is given more freely, and with more genuine alternate choice, than just by declining to build a life from nothing under a foreign flag."<sup>129</sup> Even where an alternate is chosen, what promise to the institutions of the chosen community does that *really* imply? Did a Jewish person who fled inquisitorial Spain "consent" to the somewhat softer forms of anti-semitism that blighted the governance of his potential destination communities?

But there was a deeper reason for Locke's choice of rationale for revolution than the political pressures that he personally faced. In seeking to debunk the divine-endorsement theory of law and government, an evolutionary explanation for those phenomena would almost certainly never have occurred to him.<sup>130</sup> To a seventeenth century European mind, however innovative, non-creationist ways to think about the emergence of law and government in human communities were likely no more within reach than non-creationist ways to think about the emergence of humans. Seeking to attribute the creation of law and government to human minds rather than to the divine was in any event sufficiently innovative to risk trouble, but the minimum innovation required to meet the political necessities of the time.

The conflict between William and James could be characterized as a titanic clash of moral visions, a struggle of ideas about goodness in government. The evolution of human communication facilitated that framing of their story. But shorn of accompanying rhetoric, their actual behavior, like that of campaigning politicians before and since, resembled the maneuvering among dominant males that may be witnessed in the chimpanzee enclosure at the San Diego zoo.<sup>131</sup> The empirical evidence pointed to negotiations and agreements alright, but none to which most

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er also the Huguenot consent theory advanced in *Vindiciae contra Tyrannos*, discussed in FIGGIS, *supra* note 11, at 113–16.

127. THOMAS HOBBS, *LEVIATHAN* 228–29 (C.B. MacPherson ed., Penguin Books 1968) (1651).

128. LOCKE, *supra* note 14, at 229–30; I PLATO, *Crito* in *THE DIALOGUES OF PLATO*, *supra* note 124, at 435.

129. DWORKIN, *supra* note 79, at 192–93.

130. Men too might as often and as innocently change their Governours, as they do their Physicians, if the Person cannot be known, who has a right to direct me, and whose Prescriptions I am bound to follow. To settle therefore Mens Consciences under an Obligation to Obedience, 'tis necessary that they know not only that there is a Power somewhere in the World, but the Person who by Right is vested with this Power over them.

LOCKE, *supra* note 14, at 203.

131. See JANE GOODALL, *THE CHIMPANZEES OF GOMBE: PATTERNS OF BEHAVIOR* 3–4 (1986); see also *id.* at 313–56 (ch. 12: "Aggression," especially 318–19: "Coalitions and Snowballing"); *id.* at 409–42 (ch. 15: "Dominance," especially 418–24: "Coalitions," 424–29: "Motivation and Alpha Status," and 429–36: "Loss of Rank").

of the affected populations were party. If, as Locke argued, government first emerged in early human communities through contract,<sup>132</sup> what reason was there to think that the deals differed in character from those that Locke could actually see around him—James’s negotiations and agreement with Louis; William’s negotiations and agreement with the disaffected English aristocrats?<sup>133</sup> Was it not much more plausible to suspect that leadership in human communities emerged through a mix of violence and negotiation among those few community members whom the happenstance of genetics and genealogy had optimally situated for dominance?<sup>134</sup> Would not what those persons signaled soon be self-fulfillingly most likely to happen, thus interweaving their identities with emerging conceptions of law and government? Far from occurring behind a veil of ignorance,<sup>135</sup> the human actions that began our experience of law and government occurred amid acute awareness of differences in individuals’ attributes. All that we know about the way our species interacts suggests that those crucial actions were probably expressions and exploitations of our differences.

But then how came we to the rhetoric of moral right? How could these persons with straight faces pretend, perhaps even believe, that whole communities of other persons were “theirs” to rule? How could they squabble over nations in the way that estranged relatives in other families might squabble over an intestate aunt’s china? The answer seems to lie somewhere in what Max Weber called the “routinization” of “charismatic authority.”<sup>136</sup> Locke shared, though with an improbable utopianism,<sup>137</sup> Weber’s opinion that leadership likely emerged among early humans through recognition and appreciation of some persons’ “exceptional powers or qualities. These are such as are not accessible to the ordinary person, but are regarded as of divine origin or as exemplary, and on the basis of them the individual concerned is treated as a leader.”<sup>138</sup> Distinctive abilities, whether attributed to the supernatural or to the natural, were facts from which inferences of entitlement might be drawn and claims made. But the need to claim a right to one’s role with-

132. LOCKE, *supra* note 14, at 100–04, 211.

133. See HARRIS, *supra* note 93, at 239–348; TROOST, *supra* note 93, at 173–94 (Ch. 8: “James II, William III and Louis XIV (1685–88)”).

134. Such an understanding certainly comports with David Hume’s hard-eyed assessment of human nature, though he was willing to entertain Locke’s notion of an original authentic consent. See 2 HUME, *supra* note 107, at 590–600.

135. Cf. RAWLS, *supra* note 80, at 136–42 (hypothesizing an “original position” for the purpose of conceiving principles of justice in human community).

136. WEBER, *supra* note 10, at 48.

137. LOCKE, *supra* note 14, at 329–30. Anticipating Weber’s account of charismatic authority and its routinization, Locke speculated, rather optimistically, that in ancient communities some one good and excellent Man, having got a Preheminency amongst the rest, had this Deference paid to his Goodness and Vertue, as a kind of Natural Authority, that the chief Rule, with Arbitration of their differences, by a tacit Consent devolved into his hands, without any other caution, but the assurance they had of his Uprightness and Wisdom . . .

*Id.*

138. WEBER, *supra* note 10, at 48.



in the group really arose, Weber suggested, from self-interested desire to perpetuate incumbency beyond what charisma would naturally have afforded,<sup>139</sup> a sentiment not entirely unfamiliar to tenured academics. In Rousseau's words: "The strongest is never strong enough to be always the master, unless he transforms strength into right, and obedience into duty."<sup>140</sup> Desire to pass the role to progeny or other favored persons when abilities really receded would have added motivation. Where the divine was once invoked to explain qualities that made others want to follow anyway, now divine will was invoked to explain why those who could see no other reason to follow still should.<sup>141</sup>

[I]n every case, princely power and those groups having interests vested in it—that is, the warlord's following—strive for legitimacy as soon as the rule has become stable. They crave for a characteristic which would define the charismatically qualified ruler.<sup>142</sup>

In his Schweich Lectures,<sup>143</sup> the distinguished Assyriologist C.J. Gadd described the vision of law and government articulated in the ancient Code of Hammurabi:

Its genesis and idea . . . were set forth by the king in a lengthy prologue and epilogue. Anu and Enil, the supreme gods, . . . called the name of Hammurabi "so that I might cause justice to appear in the land and might destroy naughty and wicked men, so that the strong should not afflict the weak." Later Marduk also delegated him for the same purpose, and thereupon he issued his laws. The epilogue to the Code reiterates these ideas with much emphasis upon the divine commission to secure the happiness of his people and upon his own perfect fulfilment of the charge. The sculptured relief at the head of the stele is a pictorial summary of the leading ideas expressed in the prologue and epilogue—the god extends, and the king piously accepts, the circlet and sceptre expressive of that sovereignty as a function of which the laws were given.<sup>144</sup>

The frequency with which ancient law and government claimed divine endorsement<sup>145</sup> suggests that the articulated idea of a preemptive moral right to be obeyed began as a corollary of those claims to supernatural

139. *See id.* at 54–58. Weber explained that this self-interest was every bit as much that of those who enjoyed incumbency, including derivative "authority," under the aegis of a charismatic leader.

140. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 8 (G.D.H. Cole trans., Telegraph Books 1985) (1762).

141. WEBER, *supra* note 10, at 57. "Genuine charisma rests upon the legitimation of personal heroism or personal revelation. Yet precisely this quality of charisma as an extraordinary, supernatural, divine power transforms it, after its routinization, into a suitable source for the legitimate acquisition of sovereign power by the successors of the charismatic hero." *Id.* at 39.

142. MAX WEBER, *ESSAYS IN SOCIOLOGY* 27 (H.H. Gerth & Wright Mills trans., 1946).

143. GADD, *supra* note 11.

144. *Id.* at 43.

145. *See id.* at 14 (generalizing across Western Asian civilizations, Gadd observed: "[T]he principal channel through which the divine purpose flowed into the minds of men was the vicarious will of the king, as the gods' representative upon earth . . ."); *see also* FIGGIS, *supra* note 11, at 17–21.

status. The theoretical details of divine endorsement varied,<sup>146</sup> but nexus to the supernatural is surely the most likely originating rationale for particular persons' claims of authority and the reason that such claims seemed often to be widely considered credible. Who but the divine could aspire to obtain authentically preemptive obedience of the kind exemplified in the biblical account of Abraham preparing to sacrifice his son, in disregard of all humanly conceivable moral reason and intuition?<sup>147</sup> The divine, observed Rousseau, is "an authority of a different order, capable of constraining without violence and persuading without convincing. This is what has, in all ages, compelled the fathers of nations to have recourse to divine intervention and credit the gods with their own wisdom."<sup>148</sup> He quoted Macchiavelli: "there has never been, in any country, an extraordinary legislator who has not had recourse to God; for otherwise his laws would not be accepted."<sup>149</sup> In ancient cultures suffused with belief in an engaged divine dimension to their communal lives,<sup>150</sup> leaders' divine-endorsement-driven claims of right to be obeyed had a potential for compelling conceptual coherence that no substitute rationale for authority has ever matched.

Disobeying and removing bad government in such circumstances required a conceptual two-step. Bad performance had to be characterized not merely as bad, but as cause or evidence of a further fact—the absence or loss of divine endorsement. Weber noted that even natural disasters might prompt a Chinese emperor's removal by revealing him not to be "a legitimate 'Son of Heaven.'"<sup>151</sup> In medieval Europe, Pope Gregory VII's conflict with the Holy Roman Emperor Henry IV prompted a papal assertion that the Church could declare badly-behaved monarchs no longer to be God's Anointed. "He solemnly freed the subjects from their duty of obedience to the king."<sup>152</sup> And the moral weight of belief in divine endorsement prompted a remarkable artificiality in the characterization by some of the English Parliament's conflict with Charles I:

It was pretended that the Parliament took up arms against the person only of the King but in support of his authority. This shews how loth men were to believe that what was legally wrong will ever be morally right.<sup>153</sup>

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146. See, e.g., GADD, *supra* note 11, at 23 ("For the Egyptians transmission of the divine will was not, for a long time, the subject of ideas so definite as those held in Western Asia. The present divinity of the king must have made it seem less important to be in touch with some remoter authority . . .").

147. *Genesis* 22.

148. ROUSSEAU, *supra* note 140, at 37.

149. *Id.* (quoting NICCOLÒ MACCHIAVELLI, DISCOURSES ON LIVY, bk. V, ch. XI (1513–17)).

150. See, e.g., GADD, *supra* note 11, at 39.

151. WEBER, *supra* note 10, at 50; see also FREDERICK W. MOTE, IMPERIAL CHINA 900–1800, at 8–10, 102, 506–20, 553–59, 861–62 (1999).

152. KERN, *supra* note 125, at 108.

153. FIGGIS, *supra* note 11, at 223–24.

Claims that the divine will required preemptive obedience were not accompanied by willingness to leave enforcement to that source. The self-serving nature of authority claims was reflected in the parallel ratcheting of revolutionary endeavors to the zenith of criminal culpability<sup>154</sup> and an associated signaling of the most vicious punitive responses conceivable.<sup>155</sup> The choice to treat participation in revolutionary change as more severely punishable than any other behavior, however good the proposed change might be, said more about the self-serving nature of the authority thesis than about the value of preventing anarchy. Even Locke, in arguing the case for change, emphasized that the case depended on “the miscarriages of the former reigns” that broke contractual faith, without which “our complaints were mutiny . . . and we ought to return as fast as we can to our old obedience.”<sup>156</sup> But might not changing a minimally good government to a better one by revolution sometimes be moral?<sup>157</sup> That was what James Madison incited when he proposed adopting the United States Constitution by a means not contemplated in the operative Articles of Confederation.<sup>158</sup> The incumbent-coddling law of treason brooked no such exceptions. Those laws were designed to vindicate the authority claims of existing institutions. But what if attempting revolution did not really always deserve punishment, and never deserved the draconian penalties that treason laws often signaled? Then those laws reflected a morally unjustified pursuit of incumbents’ self interest. Might not that same self interest be all that substantively stood behind the authority claims that treason laws sought to support?

The regularity with which those claiming authority have accepted honorific titles such as “Majesty” and “Highness” and have overcondemned those who actively disputed their claims to authority does not morally justify the hyperbole of honorifics<sup>159</sup> or the overbreadth and severity of treason laws. Likewise, the frequency in human communities of authority claims does not appreciably aid in justifying those claims. The most plausible view of our discoverable history as a species suggests

154. *See id.* at 21 (“In the rise of the law of treason under Alfred [the Great of England] we see how important the protection of the king’s person is becoming, although as yet it is only as part of the general law, differing merely in degree from treason to a lord, that we discern the germs of the later code of high treason.”).

155. *See, e.g.,* I THE DIARY OF SAMUEL PEPYS: INTRODUCTION AND 1660, at 265 (Robert Latham & William Matthews eds., 1970) (entry for October 13, 1660, describing Pepys’ witnessing of a hanging, drawing, and quartering for regicide), 269–70 (entries for October 20 and 21, describing aftermath of quarterings).

156. WOOLHOUSE, *supra* note 96, at 283–84.

157. Government (in Robert Nozick’s terminology, the dominant protective agency) may be morally justified in acting. “But it is not entitled to be the dominant agency, nor is anyone else.” ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 140 (1974).

158. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 93, 476, 665 (Max Farrand ed., 2d ed. 1937) (Madison’s notes); *cf.* ARTICLES OF CONFEDERATION OF 1781, art. XIII.

159. *Cf.* MILTON, *supra* note 126, at 11 (“[T]he Titles of Sov’ran Lord, natural Lord, and the like, are either arrogancies, or flatteries, not admitted by Emperours and Kings of best note, and dislik’t by the Church both of Jews, *Isai.* 26.13. and ancient Christians, as appears by *Tertullian* . . .”).

that authority was invented by those atop existing hierarchies of dominance in response to the developing reasoning abilities and communicative skills of the dominated. And the obvious rationale for dominance of some humans over others that could be inferred from perceived origins in a Created Nature was the will of the Creator.

Assertions of divine endorsement supported inferences of preemptive right to be obeyed through implicit variations on an epistemic claim—God or gods, as the creative force, must know what is best for the creation. Even where the gods were characterized as quite selfish, their boundless ability to affect humans adversely made doing what divine will demanded necessarily the best thing for humans to do.<sup>160</sup> The will of the creator defined goodness in the experience of the creation. It did not matter whether one framed the reason for action as doing the good or as doing the divine will, for these were necessarily synonyms. But the divine will was more than just a consistent guide to human goodness. The divine had a moral *right* to rule the creation however the divine pleased, because the creation *belonged* to its creator. Humans were the property of the divine. And the exercise of proprietary rights could be delegated for their more effective use. C.J. Gadd described “a fairly consistent picture of the ideas entertained in Western Asia about the origins of divine rule”:

There was an act of creation, differing greatly in details, but leading to the invention of man as a means of relieving the gods from otherwise unescapable toil, particularly in building their houses . . . . In order that the creatures might be capable of their duties they must be given an ordered life and the skills necessary for sustaining a civilized existence, both for themselves and for the gods. The next stage, then, is for the gods to improve their patrimonies with these essential institutions; order is maintained by the appointment of a king, and skills are dispensed to mankind in a variety of ways.<sup>161</sup>

From divine endorsement of the leader, it logically followed that doing what the leader showed he wanted through his signals of likely action had to be the path to the good, and to think otherwise had to be an epistemic error. Even if the leader seemed a fool or a knave, the fact of divine designation meant that ousting him violated a duty owed to the divine and posed an unacceptable risk of divine retribution.<sup>162</sup>

The divine-endorsement rationale for authority was advanced articulately by those sufficiently invested in the existing social ordering,<sup>163</sup> often

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160. See GADD, *supra* note 11, at 13–14, 36–37.

161. *Id.* at 13.

162. See, for example, the biblical story of David’s refusal to harm the flawed King Saul because “who can stretch forth his hand against the Lord’s anointed, and be guiltless?” I *Samuel* 26:9 (King James); see also I *Samuel* 24 (King James).

163. On the role of those who enjoy derivative “authority” from a charismatic leader in establishing and justifying criteria for achieving continuity in government, see WEBER, *supra* note 10, at 26–28, 39–40, 54–61.

including those who led the community's devotions to the divine.<sup>164</sup> It remained the orthodoxy, the dominant strand of assertion by dominant persons about morality in human government, in seventeenth century Europe. When Milton,<sup>165</sup> Locke,<sup>166</sup> and others<sup>167</sup> sought to move their communities beyond this ancient vision of law and government, they did so with a pressing imperative not only to condemn the substantively bad leadership of particular persons, but also to advocate for the leadership of other particular persons. To that end, they felt need of a substitute way to claim a moral right to be obeyed for the substitute leaders whom they favored. That felt need to preserve the idea of authority, their difficulty in imagining how law and government might exist without that idea, and their particular need to allege the possibility of discontinuously derived, post-revolutionary authority, explain the popularity in that period of factually improbable consent theories of a right to rule that rose from the ruled rather than descending from the divine.

#### IV. THE MORALITY OF ACTION

In any human community, there are just persons doing actions. Life in community presupposes the morality of treating persons as morally responsible for the actions they do. We cannot live together without saying "should" and "ought" a lot—that is, without characterizing each other as having moral obligations.<sup>168</sup> When deciding whether to do any action, a morally responsible person is morally obliged to consider everything that she has reason to believe will help her make the right choice.<sup>169</sup> When deciding whether to do any action, no one is absolved from moral responsibility by what the community's signaling system tells her about the likely actions of others. She must still decide for herself whether the contemplated action is the right thing to do. Deferring to law would be morally justified if law were her most reliable guide to the truth about the

164. See FIGGIS, *supra* note 11, at 17–21; GADD, *supra* note 11, at 39; KERN, *supra* note 125, at 106.

165. See MILTON, *supra* note 126, at 8.

166. See LOCKE, *supra* note 14, at 330–33.

167. See, e.g., JAMES TYRRELL, *PATRIARCHA NON MONARCHA* (1681) (preface). Late seventeenth century consent theories owed a significant debt, explicit in Locke's work, to RICHARD HOOKER, *OF THE LAWES OF ECCLESIASTICALL POLITIE* (1593). See, e.g., LOCKE, *supra* note 14, at 326–27.

168. In the words of the arch skeptic David Hume:

[T]h[ough] it be possible for men to maintain a small uncultivated society without government, 'tis impossible they should maintain a society of any kind without justice, and the observance of those three fundamental laws concerning the stability of possession, its translation by consent, and the performance of promises. These are, therefore, antecedent to government . . .

2 HUME, *supra* note 107, at 590.

169. Joseph Raz, *Incorporation by Law*, 10 *LEGAL THEORY* 1, 5 (2004) ("It is rationally alright to perform an action so long as the reasons for it are not defeated, for example, so long as the reasons against it are not more stringent."). Moral obligation informs the process of assigning weights to reasons in a moral person's rational calculation of whether to do an action. Morality may require, permit, or preclude the assigning of particular weights to particular reasons. See RAZ, *supra* note 29, at 15–16; see also Heidi M. Hurd, *Challenging Authority*, 100 *YALE L.J.* 1611, 1613 (1991).

good, but the mere fact of being law does not turn human communications into reliable guides to goodness.<sup>170</sup> What law signals about the likely actions of others supplies reasons for particular answers to our moral questions, but is never ipso facto determinative of what we should or should not do.

Let us reflect on this by stepping outside our universe of operative signaling systems, back into the state of nature. Imagine three of us in a lifeboat on the open ocean after a shipwreck. It is the *R. v. Dudley and Stephens* scenario,<sup>171</sup> but let us look at ourselves on the first day in that unfortunate circumstance, a time when in our variant on the story, the lifeboat still contains a small supply of food and fresh water. Suppose that after a few hours in the hot sun, one of us snaps, grabs the food and water, and begins devouring it well beyond what is necessary for survival to the next day, so reducing our prospects of each actually surviving. Are you and I, the other two occupants of the boat, morally obliged to sit by and let this occur? Of course we would like to tell him to stop, but suppose there is no time for that—the water is disappearing too fast. Is it not certain what we would and should do? We would try to take hold of the conspicuous consumer bodily and wrest the water bottle and the loaf of bread from his grasp. If success were not otherwise possible, we might have to clobber him. His shrieks of “autonomy violation” would be to our ears wholly uninteresting. His antecedent consent or lack thereof would also seem morally irrelevant. We are stuck in the same space together because of the shipwreck of life that put us involuntarily here, and the good of survival requires that we coordinate our actions in relation to the limited supply of resources, “owned” by none of us, to which we happen to have access.<sup>172</sup> That story much more accurately depicts our human circumstances than does the Lockean allegation of voluntary entry into community,<sup>173</sup> for no alternative to community is plausible on a planet with many inhabitants and limited resources.

Notice in this scenario that whether we signaled our likely action to the over-consumer before applying force is a morally relevant consideration, but not a determinative one. If there was time to tell him to stop, our failure to do so first would count against the morality of our action against him. But where taking that time would have appreciably compromised the good of preserving the supplies, we might have been morally justified in applying unforwarned force to him. In human relations, force came first, long before language. Notice also that just as consent

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170. The loss of meaning that Jürgen Habermas attributed to legalization of human relationships is a function of law's inability to embody the essence of morality. See 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 356–73 (Thomas McCarthy trans., 1987).

171. (1884) 14 Q.B.D. 273.

172. LOCKE, *supra* note 14, at 272 (“And thus in the State of Nature, one Man comes by a Power over another . . . [E]very Man hath a Right to punish the Offender, and be Executioner of the Law of Nature.”).

173. *Id.* at 330–31.

does not determine the morality of using force against the undisciplined supply gobbler, majoritarian decisionmaking does not determine the answer either. Locke's argument that on unanimously forming a community, authoritative decisionmaking within that community would devolve to majority voting, because a single "body" has to move wherever the greater weight propels it,<sup>174</sup> ignored the yawning flaw in the analogy—a body's movement is guided by that very small part of its mass that consists of its *brain*. Locke's argument did not succeed in showing that wise and moral persons should necessarily defer to the will of mindless or immoral majorities. If two of the three lifeboat occupants were irrationally gobbling more than they should on the first day at sea, the one wise occupant would morally be justified in seeking to use force to stop them. If he succeeded, we would be more likely to congratulate than to criticize. All that would be necessary to prompt congratulation is that our theory of the good as applied to the facts call for maximizing the prospects of human survival. For none of this analysis are we assisted by any notion that anyone has a moral right to be obeyed by anyone else. Introducing that notion only obscures our analysis of the morality of action.

This hypothetical highlights the flaw in Hart's "fundamental objection"<sup>175</sup> to predictive theories of law. Hart argued that "where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying the sanctions."<sup>176</sup> Signaling the likelihood of negative responsive action helps to justify negative responsive action not by imposing an invented duty to obey the signaler and avoid the risk of that action but by *forewarning* of that action. Particular responsive action may or may not be morally justified, with or without forewarning, but forewarning improves the prospects of moral justification. Applying force to someone may be justified by the good of preventing greater harm. Using force even just to deter may be justified by the good of preventing greater harm. If our nefarious supply hog kept trying to take the food and water every time we tried for some shuteye, we might have to punish him with a smaller share or even a thump to deter future attempts. Forewarning of our doing that would help to justify our action, not by imposing a new duty on our problem person that would not otherwise exist to stop his over-consumption efforts, but by assisting us in achieving the good of stretching the supplies with a minimum of actual harm to him. Forewarning would add to his awareness of reasons for avoiding behavior that would give us reason to harm him.<sup>177</sup> Nothing about our signal of

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174. *Id.* at 331–33.

175. HART, *supra* note 15, at 84.

176. *Id.*

177. *Cf.* Raz, *supra* note 169, at 2 ("Reasons are considerations by which agents' behaviour is to be guided. They apply only to agents who can, in principle, be aware of their existence, for otherwise those agents cannot be guided by them."). *But see id.* at 168 n.5 (calling "principle" in the foregoing

likely action would create in him a new duty to desist from over-consuming the supplies. He had a moral duty to avoid over-consuming them anyway. Had he not, then our forewarning of likely force not only would have failed to create such a duty, but in itself would have been an immoral threat. Far from being demolished by deeper understanding of the “internal aspect of rules,”<sup>178</sup> predictive theories of law are vindicated by such understanding. Hart’s error was to view the interplay of signaling actions and recipients’ understanding of their reasons for action as evidencing the invention through signaling of a special class of perceived obligations that are content-independent and even preemptive. But perception of such a special class of obligations is actually aberrational, a delusion born of indoctrination with the authority thesis. The perceptions of obligation that are generally experienced across legal systems by those who take an internal point of view toward law are perceptions of moral obligation, pure and simple. Law’s signals help us to understand the range of reasons for action that we have, and thus help us discover our true moral obligations. “[T]heories of legal institutions should account for *all* of the ways in which the law guides conduct, not simply focus on one technique at the expense of all others.”<sup>179</sup> But all of the ways that lawgivers are morally justified in guiding conduct, and the ways that lawgivers usually do succeed in guiding conduct, derive from law’s signaling the likely actions of others, not from lawgivers’ inventing and imposing on us content-independent duties to obey lawgivers, let alone preemptive duties to do so. That may have been uniquely unobvious in Hart’s own milieu—hidebound, conformist, let’s-form-a-queue-just-so-we-can-stand-in-it 1950s Britain.

Now let us change the scenario to make ourselves three citizens in their home jurisdiction whose car has broken down on an isolated desert road. Let us assume that the law of the jurisdiction does not recognize a defense of necessity—it just signals punitive action in response to assaults. Does that change the conclusion about what should be done? Surely the moral answer is the same. What the law signals is certainly a relevant consideration, but not determinative.

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“[a] weasel word disguising the difficulty of specifying the strength of the ‘can in principle’ in that condition”). Life in community requires a morality that imputes responsibility even to the insane, though our perceptions of others’ mental states affect the details of our responses. We may formally call an insane actor not criminally responsible, but that substantively just changes the location at which we hold him against his will. If his mental condition renders him necessarily impervious to forewarnings of that forcible action, that fact does not determine the morality of taking the action, it only affects the potential of forewarning to *contribute* to justifying the action. Our right to hold him involuntarily still implies a breach of some duty by him, some failure to behave as persons in community are morally obliged to behave. It is when we reach the possibility of good consequences from harming someone who has violated no duty, such as the hapless cabin boy in *Dudley and Stephens*, that deontologists and consequentialists really square off.

178. HART, *supra* note 15, at 84.

179. Scott J. Shapiro, *The Bad Man and the Internal Point of View*, in *THE PATH OF THE LAW AND ITS INFLUENCE* 197, 200 (Steven J. Burton ed., 2000).



What of a person who is contemplating doing an action that the system calls governmental? Is he absolved by the system's existing signals from moral responsibility for his action? No. He is morally obliged to consider the universe of reasons relevant to deciding whether to do the action. He can never escape moral responsibility for his actions by just "following the law" or "obeying the duly constituted authorities." Those who do "state" action are subject to the same moral principles as everyone else. The only consistent variation in the way those principles apply is the greater weight that preserving the efficacy of the signaling system deserves to have for those whose actions significantly affect the prospects of preserving that efficacy. For *all* persons, doing "what the law says"—whether what it "allows" or what it "requires"—is *in itself* neither necessary nor sufficient for the morality of action.

Exposing law's true character as a signaling system clarifies our moral circumstances. Where a communication that we call law imposes a "duty" to do or not do an action, those words in substance just signal whether the action is likely to happen or not. Those words signal how incidence of the action is likely to affect the incidence of identified governmental actions, and thus the law's words also signal whether the action is likely to be done. Where lawgivers appropriate the language of morality—of right and duty—they may obscure law's true contribution to practical reason, by seeming implicitly to be claiming that they as lawgivers are defining the contours of moral responsibility. To the extent that lawgivers *really do* claim authority, understood as preemptive moral right to be obeyed, *and* use moral language ("rights," "duties") they *do* implicitly claim to be the conclusive exponents of morality on the matters that their words address. That claim is itself immoral, and an obstacle to the clear-eyed exercise of our practical reason. Once, however, we discard the assumption that lawgivers necessarily claim authority, we can look less bleakly at the extent to which law takes a moralizing tone. So long as law's recipients understand what law *really* does, lawgivers' choice to express their law in the language of rights and duties is morally unproblematic.

All that those members of the community who have a chance to contribute to the community's signaling system can morally and effectively do through their pedigreed communications is signal likely human action. But that is no trivial contribution. It has immense moral importance, for it supplies information of great value to recipients' decision-making about what to do. It was the accomplishment that Oliver Wendell Holmes celebrated in *The Path of the Law*.<sup>180</sup> Stephen Perry has argued that Holmes' "basic claim is that the terms 'right' and 'duty' not only do not bear in law the same meaning as in moral contexts, but are, generally speaking, 'empty' terms; there are no such things as legal rights

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180. Holmes, *supra* note 19, at 457–58.

and duties.”<sup>181</sup> But when lawgivers both claim authority and speak the language of “right” and “duty” in the pedigreed signals they issue, they *claim* to be defining what is moral for the recipients of those signals, either in a sense of universal truth or for purposes of a virtual world in which lawgivers tell law’s recipients to pretend to be when making choices of action.

Joseph Raz does not contend that law’s recipients should live mentally in such a virtual world and does not contest the morality of making choices of action based on the universe of reasons really applicable to those choices.<sup>182</sup> But Raz notices that sometimes a moral person will encounter a source of uniquely valuable guidance about whether to do or not do a particular action. The person who is trying to choose may have reason to believe that she is more likely to reach the right answer by accepting the guide’s answer than by attempting to assess for herself the universe of relevant considerations.<sup>183</sup> Maybe this is because the guide has unique expertise, or maybe it is because everyone else seems to be paying attention to the guide, enabling the guide to coordinate their actions valuably in some respect. In such circumstances, the morally optimal way to proceed is to act in the way signaled by the guide, without any second-guessing. The first time that I drive on a road and encounter a roadside sign that reads “30,” I should limit my speed to 30 miles per hour, for I have reason to think that the signal reflects better judgment than I am capable of independently exercising about the speed at which the road can safely be traveled. Notice that this is the moral choice for me to make regardless of who put up the sign, so long as I have reason to believe that the source’s claim to superior judgment on the matter of speed is credible. That might be true of a source that renders the sign a pedigreed signal of the community’s signaling system, but it might equally be true of some other source, such as a small group of concerned local residents. To be authoritative in this sense is not necessarily to be governmental; the authoritative one may just be a credibly knowledgeable individual.

But what of the second time that I take the road? What if my first experience revealed to me that the road stays wide and free of topographic oddities and could safely be traveled by me in my fabulous car at faster than 30 miles per hour? Suppose that staying under 30 will make me late for class, wasting the time of 80 students who await my instruction. (Never mind why I am running late; the issue is what I should do *now*.) If the sign is a pedigreed signal, the *systemic* nature of law generates a moral duty here that would not otherwise exist, but that duty is

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181. Stephen R. Perry, *Holmes Versus Hart: The Bad Man in Legal Theory*, in *THE PATH OF THE LAW AND ITS INFLUENCE*, *supra* note 179, at 158, 187. “As Holmes put the point in a letter written to John Chipman Gray in 1914: ‘I became convinced that the machinery of rights and duties was a fifth wheel.’” *Id.* at 184.

182. See RAZ, *supra* note 29, at 15–39.

183. RAZ, *supra* note 2, at 38–105.

merely the modest, non-preemptive duty to preserve the predictive efficacy of the system. It is not *authority*, and especially not a *preemptive* duty to obey. The fact that Raz's normal justification sometimes supports following guidance cannot oblige me to follow guidance on any occasion that the normal justification does not apply. I am morally responsible for my individual acts and am obliged to ask what considerations are morally relevant on each occasion that life offers me a choice of action. The second time that I take the road, the right choice of action may be to go faster.

There is no way to regulate speed on a road that is more likely to tell each driver the maximum moral speed for him to go on each occasion that he drives than what he can work out for himself. Regulating speed on the road is justified by the good of reducing harms to which high speed contributes. But applying Raz's normal justification of authority, it may well be that not every user of the road, on every occasion that he uses it, will be morally obliged to travel at or below the signaled maximum speed. Some drivers on some occasions, maybe many drivers on many occasions, will be morally justified in going faster, having regard to the universe of reasons relevant to action.<sup>184</sup> Can a regulator in such circumstances honestly *claim* a right to be obeyed? He could if all users were under a preemptive moral duty to obey him, but on the normal justification thesis, they may well not be. Surely the regulator cannot honestly claim more authority than he knows himself to have. What he cannot know, he cannot honestly claim. Overbroad claims of moral right to be obeyed *mislead* Hart's "puzzled man" or "ignorant man" who is willing to do what is required, if only he can be told what it is."<sup>185</sup> A theory of authority that does not reliably guide the way lawgivers behave does not help explain, let alone justify, lawgiving.<sup>186</sup>

Even where a puzzled and ignorant person really should follow the law's guidance in deciding what to do, his moral duty to do so is owed not to lawgivers, but to those whose interests are affected by whether he does the right thing. Raz's normal justification points only to a right in those whom we may harm if we act wrongly, a right that requires we do our best to act rightly. For example, if my doctor tells me to stay home from work because I am contagious, my duty to do so is owed not to my doctor, but to my co-workers. My doctor has no right to be obeyed, but my co-workers have a moral right not to be needlessly put at risk. My doctor's words identify the right thing to do, but his expertise does not afford him a moral right to be obeyed. We sometimes use the term "au-

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184. *Id.* at 104 ("[T]he authority of the government . . . is legitimate to various degrees regarding different people.").

185. HART, *supra* note 15, at 40.

186. For an array of other angles from which the normal justification is susceptible to criticism, see generally 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*, 27 OXFORD J. LEGAL STUD. 121 (2007).

thority” as a synonym for “expert,” but as English-language dictionaries consistently recognize, that usage is wholly distinct from the historic idea of moral right to be obeyed. Expertise is mastery of *knowledge*. Authority in the historic sense is mastery of *persons*. Mastery of knowledge implies mastery of persons not at all. The normal justification does not support a right in lawgivers to be obeyed.<sup>187</sup> And only in the historic sense of moral right to be obeyed can “authority” have potential relevance to the nature of law.

A duty to do what law says for any reason other than that the lawgiver has a moral right to be obeyed does not reflect *authority*, but just some other reason for action. A duty to do what law says reflects authority only if that duty corresponds to a right in the lawgiver to be obeyed. If the road regulator is to have authority and assert it honestly, then that moral right to be obeyed must be ascertainable by him when he is regulating and must be authentically his. To meet those criteria, the right must come from something beyond the normal justification, which applies only sporadically and never actually gives lawgivers a right anyway. Could an alternative source be consent?

One cannot morally promise to do wrong and one cannot morally keep such a promise. Robert Paul Wolff’s critique on that score remains as compelling as when he first advanced it.<sup>188</sup> Arguments that promise-keeping to government can sanctify what would otherwise be bad behavior assume that authority is necessary if human communities are to achieve the good things that government accomplishes. In fact, authority is necessary for none of those good things. When we recognize that law achieves all of those goods just by being an effective signaling system for likely action within a human community, then the achievement does not require any notion of lawgivers having a moral right to be obeyed. Open-ended promises to obey lawgivers are immorally overbroad and cannot afford lawgivers an open-ended moral right to be obeyed.

Despite the superfluity to law and government of a moral right to be obeyed, perhaps we might wish to afford lawgivers as much moral right to be obeyed as possible on the theory that doing so can only enhance the efficacy of the signaling system. To that end, we might seek to read down instances of actual consent so that the promises of obedience apply only to performing moral actions—both those morally required and those morally discretionary. But from lawgivers’ perspective, their resultant contractual right to be obeyed would suffer from the same uselessness as does Raz’s normal justification. Though actually capable of being theirs, that right would not reliably be co-extensive with the laws that lawgivers make, because there is no way for lawgivers to discover *ex ante* the right’s true incidence. As lawgivers when making law cannot know how much authority a read-down consent actually gives them, they can-

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187. See Perry, *supra* note 6, at 279–84.

188. WOLFF, *supra* note 89, at 29, 40–42.

not honestly claim authority to make the laws they do. Even actual consent fails to supply lawgivers with an honestly claimable moral right to be obeyed. So long as any future road user may ever be morally obliged to drive faster than 30, the road regulator cannot honestly claim authority for his “30” sign, notwithstanding the user’s actual promise to obey.

And of course actual consent hardly ever exists. Its sphere of ostensible relevance is mostly confined to persons doing actions that the system designates governmental. In most human communities, those who have opportunity to do governmental actions are uniquely likely to have antecedently and with authentic voluntariness promised obedience to lawgivers. Keeping that promise tracks a content-independent moral reason for action that those persons would have anyway, namely, the good of preserving the efficacy of the signaling system.<sup>189</sup> But preserving the system, though an especially weighty consideration for *governmental* actors, is never a *preemptive* reason for choice of action. Adding the good of promise-keeping does not preempt considering some other reasons for action either.<sup>190</sup> Those who do governmental actions must still do their best to do what is truly moral, and their promises of obedience can affect the answers to their moral enquiries only where the choice whether to do contemplated governmental action would otherwise be morally discretionary. But this is an empty set, given the presence, even without promise-making, of a weighty moral duty to preserve the efficacy of the signaling system. Any choice of action that promise-keeping could potentially turn from being morally discretionary to being morally required will be morally required anyway by the non-contractual duty to preserve the system.

And for the rest of us, choosing actions as mere members of a human community, claims of our consent to obey lawgivers are mostly as fanciful as were Locke’s attributions to the acquiescent English community of 1688. Whole communities hardly ever do anything unanimously and voluntarily enough to count as consent by each of their members.<sup>191</sup> That fact denies across another dimension the possibility of lawgivers knowing the true extent of any contractual right to be obeyed that they might have, and thus precludes them from honestly claiming contractual authority in support of the general laws they make.

Even when a newcomer promises at entry to abide by the laws of a community, it is factually unclear that this involves a promise to obey whatever the community’s law and government might become. Law and government are essentially dynamic. Government is what government does, and so will differ in essence tomorrow from what it is today. If to-

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189. RAZ, *supra* note 2, at 90 (“[C]onsent can only be held binding if it is so qualified that its effect is almost entirely confined to reinforcing independently existing obligations to obey.”).

190. FINNIS, *supra* note 30, at 308–09 (a promise may eliminate the weight that might otherwise be given to some reasons for action, but does not preempt an overall balancing of reasons for action).

191. RAZ, *supra* note 2, at 94.

day we promise to obey the government and tomorrow government prohibits three of our favorite things, the prohibiting regime is a *different government*. For anyone who doubts this, the reductio is clear enough. If today I arrive in the United States and promise obedience to the Constitution and laws, and tomorrow the amendment process is successfully used to repeal the Constitution and adopt a different one, does my consent persist? How does one define the degree of difference that vitiates consent? No First Amendment? No Bill of Rights? No Separation of Powers? What if the Constitution's text stayed the same but any or all of these changes were accomplished by the choice of those who operate government institutions to treat the Constitution's words as meaning something different from what the persons operating those institutions had treated the words as meaning at the time when I promised obedience? Did someone who immigrated to Germany in 1930 discover three years later than he had obviously promised to obey the Nazis? Even if someone actually promised to obey whatever a community's law and government might become, or whatever that law and government might become through non-revolutionary change, both asking for and giving such a "blank check" are immorally overbroad actions. If those actions are capable of creating moral reasons for later action, those reasons certainly do not reach as far as the promise purports to do.<sup>192</sup> If a consent theory cannot tell those in government whether they are justified in acting, then they cannot honestly claim that the theory provides moral support for their action. To say that it does risks joining the ignoble parade of claims, peppering human history, that were no more than simpering apologetics by co-opted sophists for the arbitrary dominance of some humans over others.

Finally, let us be clear about what follows from governance that we may call, with rising degrees of moral approbation, majoritarian, democratic, just and fair, or even plain *good*. We have reasons to prefer that the persons who participate in institutions of government be chosen in some ways over others and that those persons behave in government in some ways rather than others, including that they issue some kinds of laws and not others. We may be quite robust in the moral realism with which we assert that some governments are better than others, whether in their constitution or in their operation or both. But none of this implies a content-independent moral duty to obey incumbents. Nor can such a duty be bootstrapped by the necessity of government, for government can not only exist and function, but exist and function *well*, without anyone believing that the persons who are to be thanked for their service in that government have a moral right to be obeyed. All that is necessary for institutions to function effectively is that they participate in a signaling system that in fact achieves a high degree of predictive efficacy for

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192. *Id.* at 90.

action within its community. And that may be so without anyone believing in a content-independent duty to obey incumbents. If we wish to compliment a well-constituted and well-run government, we may call it “legitimate” without implying that anyone in it has a “because I said so” right to be obeyed.<sup>193</sup> It would be perfectly rational and right to urge a wise and virtuous person to run for office, to campaign for her enthusiastically and to vote for her gratefully, without ever believing that she will ever acquire a content-independent moral right to be obeyed.<sup>194</sup>

Our regulator seems to have little prospect of honestly claiming authority for his regulation of the road. But why would he need to make that claim? The status of his communication as law does not really depend upon his claiming authority, but upon two facts. First, the communication signals the likely actions of persons designated by the signaling system to stop motorists and to impose fines and also signals what speed most motorists will likely go, and in particular, what speed any given recipient of the speed signal will likely choose to go. Second, the communication is recognized to be part of the signaling system that applies within and reciprocally defines that community—it recognizes itself to be a signal of the system, and the rest of the system affirms that self-recognition. That is all words need for them to be law. No one need have or claim a moral right to be obeyed, and all may decide what is best to do, informed of the likely actions of others but affording that information only the weight in their choices of action that it morally deserves.

## V. LIVING WITH LAW AS SIGNALING SYSTEM

The words that follow range briefly over much. They seek to enter existing conversations concerning how we should think about law’s nature and operation, and to invite further reflection on what might follow for those conversations from an understanding of law as purely a signaling system.

### A. *Closing the Gap*

When we speak of those persons who participate in generating law as *lawgivers*, not law imposers, we reflect the reality that receiving signals of others’ likely actions is a benefit, not a burden. The systemically pedigreed signals we call law are issued not in the exercise of a *right* to be obeyed, but in the performance of a *service*.

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193. See *supra* Part II.F.

194. The better the government is, however, the weightier will be the nonpreemptive duty to preserve the efficacy of the signaling system. Cf. RAWLS, *supra* note 80, at 356–62. Jeremy Waldron’s insights concerning the contribution that majority voting procedures make to good government point to circumstances in which the duty to preserve the system will be especially compelling and call for law’s signals to “command respect among people who disagree about whether they satisfy Raz’s *normal* justification thesis.” JEREMY WALDRON, *LAW AND DISAGREEMENT* 101 (1999).

Understanding law as a signaling system affords fresh perspective on an anomaly left by contemporary authority theories that Frederick Schauer has called the asymmetry of authority<sup>195</sup> and that Larry Alexander has called the “gap” between the morality of making rules and the morality of following rules.<sup>196</sup> The anomaly may be expressed as follows: Because claiming authority is supposedly necessary to achieve law, doing so may be moral even though the claim is overbroad, that is, even though the claim of a moral right to be obeyed extends to some circumstances where there is no such right and where law’s recipients are under no moral duty to obey. Conceived as a feature of law’s supposedly necessary relation to *authority*, the paradoxical conclusion is that making law necessarily involves a dishonest claim of moral right—an intrinsic, hypocritical deception.

When we see law as a signaling system, and authority as a superfluous fabrication, we are freed from the notion that lawgiving intrinsically involves dishonesty. Lawgiving does not intrinsically involve overclaiming a moral right. But law does over-perform its service, and that over-servicing is not harmless; it inhibits moral behavior and adds to risks that moral behavior will be punished. We still, therefore, need a moral justification for the extent to which general laws sometimes signal that a particular action, despite actually being the right thing to do, will likely trigger a punitive response—a response that would, in the circumstances, be morally unjustified. When persons make law, they are of course morally obliged to strive for the level of generality that optimally achieves the net benefits of which law is capable. Consistent with achieving the virtues of relative generality, lawgivers must strive to minimize the inhibition of moral behavior and the risk of that behavior being punished. Their project is morally justified by their law’s participation in a system that incalculably enhances the quality of community members’ lives. Among other benefits, an effective signaling system *reduces net inhibition*. All but the most totalitarian signaling systems inhibit moral behavior and otherwise harm moral persons far less than the only alternative to an effective signaling system. What is that sole alternative? The state of nature, in which no one ever has reason to feel safe.<sup>197</sup>

Once law is understood as a signaling system, not as a regime of direct obligations, the likely harm caused by the gap is much reduced, and so more readily justified. Where law is understood as a regime of direct obligations, there are greater probabilities both that persons will be de-

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195. Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL’Y 645, 692–93 (1991) [hereinafter Schauer, *Rule of Law*]; see also Frederick Schauer, *Imposing Rules*, 42 SAN DIEGO L. REV. 85, 87 (2005).

196. LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 53–55 (2001); Larry Alexander, “*With Me, It’s All er Nuthin*”: *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 551–55 (1999); Larry Alexander, *The Gap*, 14 HARV. J.L. PUB. POL’Y 695, 695–96 (1991) [hereinafter Alexander, *The Gap*].

197. See HOBBS, *supra* note 127, at 183–88.



tered from doing moral things and that punishers will punish immorally, because a perception that law is directly obligatory obscures moral responsibility for action. Understood as a signaling system, law leaves each person starkly and self-consciously responsible for moral choices of action. Suppose that a person is convinced that he should exceed the systemically-signaled speed limit during a particular journey. Suppose that including the good of avoiding a fine in his calculations of what to do, discounted for the probability of avoiding detection, and also considering the likely actions and expectations of others, still yields the conclusion that he should speed, and so he does. Now consider that occurrence from the perspective of another person whom the system enables, and signals as likely, to respond punitively. The prospective punisher must decide whether to act punitively, as the system signals he is likely to do. The sub-system of signals that sets up the institution to which the prospective punisher belongs creates reasons for him to act as the system predicts he will. If I am a highway patrol officer who never writes speeding tickets, others within the department will likely take actions that make my career short-lived. But ultimately the prospective punisher is morally obliged to decide for himself whether he is morally justified in punishing for the particular action.

Notice that both action-choosing persons in this scenario may act morally and yet a punishment still occur. That will be so where the punisher conscientiously reaches a different conclusion concerning the good than the punished person conscientiously reached. The possibility that the punisher will morally place greater weight on the good of preserving the system's efficacy contributes to that risk. But in deciding whether to punish, the prospective punisher is morally obliged to engage in a fully particularized enquiry into the morality of the potentially punishable action.<sup>198</sup> He then has to ask whether his predicted response is morally justified. When deciding how to act, he cannot morally take an "ipso facto" approach to the law's signals of his likely action. Knowing this reduces the extent to which the potentially punished person will be deterred from moral action by the law's signals. Many signaling systems overtly acknowledge this reality of particularized "prosecutorial discretion." The cherishing of juries in the common law tradition derives not merely, or perhaps much at all, from perception that one's peers are more likely than professional judges to find facts accurately. The glory of the jury is that one's peers, free of any need to explain themselves, are more likely to decide whether one *really* deserves to be punished, rather than treating the law's prediction of punishment as determinative.

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198. Cf. Alexander, *The Gap*, *supra* note 196, at 699; Schauer, *Rule of Law*, *supra* note 195, at 649–50 (discussing the difficulties of particularized enforcement within a vision of law as authoritative).

### B. *Can Valid Laws Conflict?*

In place of the debate about whether Hans Kelsen was right to depart from his own theory and to posit the possibility of co-existing conflicting norms within a legal system (so that valid law could require and forbid simultaneously),<sup>199</sup> we may ask whether a signaling system can concurrently issue conflicting signals of likely human action. While usually only one of the signals will in fact fulfill its function and so deserve its status as a self-recognized part of the self-recognizing signaling system, the answer may not be resolved exclusively by hierarchical or last-in-time principles (though the higher or later signal will of course necessarily imply its own efficacy, as did the lower or earlier one). There is scope for nuance and for shared contribution to a fuller vision of likely human action, something that theories of law tying legal status to direct obligation cannot manage. Suppose the first signal predicted punishment for exceeding 65 miles per hour on a particular highway, while a subsequent signal from the same source signaled that exceeding 55 miles per hour would likely trigger punishment. If in fact police stop drivers between 55 and 65 miles per hour only when those drivers are out of harmony with the general flow of traffic, and this pattern becomes apparent, then the signals both contribute relevant but incomplete information about likely police action, to be supplemented with the unexpressed evolutionary practice that might ultimately be called customary law. So what is a driver's moral duty in such circumstances? The concept of authority, of discrete obligation imposition, is too clumsy and demanding to capture the true function that the words we call law subtly play in shaping such human interactions. Law is not as bossy as legal theory has made it out to be.

### C. *Retroactive Laws*

Law-as-signaling-system explains what is entailed by retroactive law more coherently than can the notion that law is directly obligatory, for to purport to impose *obligation* in respect of past conduct is absurd and necessarily immoral. Retroactive laws are not absurd, but issuing them is morally dubious, for a reason that understanding law as a signaling system makes clear. So-called retroactive laws signal the likely future actions of others as surely as do other kinds of law. What prompts us to call laws retroactive is that they signal likely future action based on past conduct, and thus do not assist in making decisions about whether to do the triggering conduct. Such laws make predictions in two dimensions rather than three—in respect of a given action, they predict responsive or facilitative actions by government actors, and they predict the future reac-

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199. HANS KELSEN, *GENERAL THEORY OF NORMS* 214 (Michael Hartney trans., Oxford Univ. Press 1991); cf. Joseph Raz, *Critical Study: Kelsen's General Theory of Norms*, 6 *PHILOSOPHIA* 495, 502 (1976).

tions of others (for example, with respect to contracting over now-illegal subject matter). But that information does not help any recipient decide what to do (aside from flee or negotiate from a position of weakness), for to the extent of the retroactivity, the deeds are done before the information arrives. Retroactive laws, to the extent of their retroactivity, function as *fo-rewarnings* only in so far as the temporal gap between their issuance and occurrence of the actions they signal lets subjects leave the community or try to talk government actors out of doing as predicted. Those recipients cannot acquire, avoid, or shed the targeted characteristic.

Retroactive laws function comparably to laws that signal consequences for other characteristics that the subject cannot affect, such as race. Past conduct is an intrinsic characteristic of the subject, as much part of his unalterable story as race or birthplace. Making laws that affect persons by reference to characteristics that those persons cannot change is not always immoral, but the justification for making those laws applicable to those persons cannot lie in guiding choices about whether to bring those characteristics about. Retroactive laws provide little or no moral support to subsequent government action. Later action may be morally justified, but that justification cannot substantially come from retroactive laws. On retroactivity, as in other respects, such as custom as source of law or power-conferral as kind of law,<sup>200</sup> law as signaling system explains “the variety of laws”<sup>201</sup> better than any account of law as a regime of direct obligations can do.

#### D. *Perfecting Law’s Positivism*

Understanding law as the signals of an autopoietic system signaling likely human action clarifies the relation of law to morality. Law bears no necessary relation to the morality of action. Law just signals what humans in the community to which it pertains are likely to do. Its sporadic adoption of moral nomenclature is substantively inconsequential. The irrelevance of law’s linguistic form is conceded by those who aspire to find directly-established rights and duties in legal communications that adopt a forewarning form rather than a duty-imposing one.<sup>202</sup> It is the forewarning form of much legal communication that more accurately reflects the moral substance of what law does and therefore is. To ask whether an action is “illegal” in a community is substantively to ask whether the community’s signaling system forewarns of negative consequences for the actor forthcoming through the actions of others. Such a negative forewarning is of course a relevant consideration in the prospective actor’s moral calculation about whether to do that action. But that is all it is. If it is systemic and likely to be accurate, then the signal is law. But that

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200. See *supra* Part II.C.

201. HART, *supra* note 15, at 26–49.

202. FINNIS, *supra* note 30, at 282–83.

fact bears no reliable relation to the morality of action, including the morality of actions that *generate* law.

When we speak of “*bad laws*,” we substantively mean that those persons who are capable of issuing pedigreed signals that would supplant those laws *should do so*. We may also mean that the pedigreed signaling actions that constituted those laws were immoral actions. But among the reasons we might have for reaching those conclusions, only one kind of moral deficiency can *in itself* potentially affect bad signals’ status as law, and that deficiency is failure to signal likely human action. Because those bad signals are pedigreed by a system that overall achieves substantial predictive efficacy for action within its community, the signals formally remain valid laws until systemically supplanted. But where a signal becomes a subject of wholesale, self-reinforcing disregard, it may coherently be called “not really law” as surely as it may be called bad.

### *E. Interpreting Signals*

#### *1. The Ethics of Governmental Action*

All human communications have potential relevance to human action. What distinguishes particular human communications as *law* is their belonging to a *system* of *effective* signals concerning likely action within a human community. That efficacy makes reasonable the reliance of recipients in assessing what to do. For communications to be effective signals of likely action, those signals must be capable of being, and be, understood close to uniformly across their target audience within their human community. To the extent that signals are not so understood, they fall short in achieving their function as law. Such a shared understanding should continue for so long as the communications are active components of the signaling system—that is, until the system visibly supplants them. To the extent that a signal issued one day cannot be counted on to signal the behaviors it signaled that day when a dispute comes to be resolved through institutional processes years later, the value of the signal as a predictive tool concerning human behavior is diminished. A signaling system that predictably guides human action is a good that depends on the potential for meaning-fixedness of signaling words across a community and over time. Without that potential, law’s aspirations are quixotic.

*Almost no one who objects to originalism would really be willing to embrace the legal implications of semantic skepticism. If legal texts are all radically indeterminate, then there the “living meaning” of the living constitution is radically indeterminate. No lower court decision can meaningfully be said to be consistent or inconsistent with a Supreme Court decision. No action by a federal marshal or*

*party can be meaningfully said to be consistent or inconsistent with a judicial order.*<sup>203</sup>

What are the moral implications of this for persons doing governmental actions? For those persons, the non-preemptive moral duty to preserve the efficacy of the signaling system deserves especially heavy weight in their moral calculations of what to do, because their individual actions may appreciably affect the efficacy of the system. For governmental actors, moral justification for acting contrary to the system's predictions will be rare. But the efficacy of the system calls for those who promulgate signals not only to keep their signals' scope within that predicted by the system, but also to issue signals that convey as uniform a meaning as possible to their target audience. Unless a signal has a shared discernible meaning to most of its target audience, it cannot fulfill its function. Unless a signal has a discernible original public meaning,<sup>204</sup> that signal cannot contribute to the moral justification of subsequent government action. Subsequent government action, to be justified, will otherwise have to look exclusively elsewhere for moral support.<sup>205</sup>

When signals are vague, they convey less about likely human action. The signals issued atop signaling hierarchies, to the extent that they predict large swathes of efficacious signaling discretion for subordinate signalers, will often themselves provide little guidance about likely action. Who knows what a signaler may do in issuing signals with respect to "commerce," or what an expository signaler will make of "due process"? But that is one reason why *hierarchy* can be valuable. Through those who act at the second and lower levels of such signaling hierarchies, the system may generate signals that do provide very valuable guidance for all action-choosing members of the system's community, balancing precision with plausible continuity to achieve real predictability of action. If the lower levels of signalers *fail* to supply sufficient basis for shared understanding of concrete applications, then their signals may provide no more moral support to concrete applications than would signals that are retroactive or explicitly signal arbitrariness.

## 2. *The Nature of Lawgiving Intention*

If a rational participant in a procedure for producing words self-consciously engages in the procedure *because* that procedure is treated by others as producing *law*, then she cannot intend a meaning of those

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203. Lawrence B. Solum, *Semantic Originalism* 120 (Ill. Pub. Law & Legal Theory Research Papers Series, No. 07-24, Nov. 22, 2008), available at <http://ssrn.com/abstract=1120244>.

204. See Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992).

205. That moral support may well be found. But contrast the clarity with which understanding law as signaling system creates implications for interpretation with the tortured relation of authority theories to interpretation. "[I]t is difficult to find any authority theory that is both persuasive and logically connected to interpretive method." Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 611 (2008).

words other than their original public meaning. To intend to create law is to intend to create for one's community effective signals of likely action and that, by definition, is to intend the original public meaning of the words that one is producing. The idea of authority obscures this. If law derived its status from the authority of the producer, then we might be lured into thinking that the law is what its authoritative source imagined law's words to mean.<sup>206</sup> But when we discard the idea of authority, we see that law is what its words signal to its community. We might say that to engage in an avowedly lawmaking process is to be irrebuttably presumed to intend the promulgation public meaning of the words used. To intend otherwise is not to intend to *enact law*. If one has not troubled oneself to pay the same attention to the issued words as affected recipients will, then one cannot have an understanding of those words, only an imagining.

Words may, of course, lack an original public meaning for a human community. But in those circumstances, the signals that those words comprise provide no moral support for subsequent government action. Subsequent action, including subsequent dispute resolution that calls for exposition of existing signals, must find its moral justification exclusively elsewhere. Moral support for acting in relation to law's recipients cannot be found in the private imaginings of lawgivers.

### 3. *Lawgiving through Expository Signaling*

Legal systems purport to distinguish expository signaling from supplanting signaling. The logic of systemic hierarchies and branches lets signalers supplant only signals that they could themselves have issued. But enforcing that logic calls for signaling by dispute resolvers that expounds existing signals. The dynamic nature of law and government produces disputes that require exposition of the signals from which the disputants purport to draw justification for what they do. To the extent that the disputed signals are vague or otherwise underdeterminate, their signalers ultimately predict effective signaling discretion for dispute-resolving expositors. The signals issued by those expositors contribute to justifying subsequent government action, functioning as law at the level of the signals that were expounded.<sup>207</sup> But what of instances where exist-

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206. Cf. Heidi M. Hurd, *Interpreting Authorities*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 405, 405–06 (Andrei Marmor ed., 1995). “For as long as the law is accorded the sort of authority that it has historically claimed, intentionalism will necessarily be accorded the sort of respect that it does not deserve.” *Id.* at 405. On the relation between theories of interpretation and theories of authority, see also ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* (2d ed. 2005).

207. On the expository challenges posed by vagueness and ambiguity, there is a burgeoning literature by scholars whose conclusions diverge despite their consensus on the centrality to interpretation of “original public meaning.” Compare Jack M. Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 291 (2007), and Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 *CONST. COMMENT.* 427 (2007), with RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE*

ing signals are not underdeterminate? What of instances where those signals have a discernible original public meaning that is sufficiently precise to inform recipients concretely of likely subsequent government action? Then the ethics of a signaling system call for expositors to retrieve and to affirm that meaning. Reading the output of a system that *exists* to inform of likely action is *essentially* an exercise in meaning retrieval. To the extent necessary to rescue the system from respects in which its existing signals fail to fulfill its function, expositors may morally engage in meaning assignment. But the system's signals are not mere playthings for expositors; they are guideposts by which community members have made their choices and built their lives, and should be redefined no more readily than expositors would wish their own signals to be.<sup>208</sup>

#### 4. *Who Signals Ultimately?*

The current debate among American constitutional theorists over interpretive principles is not actually about *whether* to read legal texts in accordance with their original public meaning, but about *which* texts to read that way. The debate is substantively about whether the morality of the system frees the Supreme Court to read the United States Constitution in a non-originalist fashion while nonetheless insisting that all other government actors must read Supreme Court opinions in an originalist fashion. The Court's pronouncement in *Cooper v. Aaron*<sup>209</sup> necessarily implied that all other government actors must read Supreme Court opinions in accordance with those opinions' original public meaning and not by reference to those other actors' own conceptions of systemic perfection. Had other government actors the freedom to interpret the Court's words in a non-originalist fashion, then the distinction between observance and defiance would be indeterminable. The issue, in other words, is whether the ultimate source of signals in the American system should be the deliberative bodies that produced the United States Constitution and its amendments, or whether that ultimate source of signals should be one particular deliberative body that we have in our midst. A ground for favoring the latter over the former is transaction costs—the transaction costs of using Supreme Court

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PRESUMPTION OF LIBERTY (2004), and KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION (1999), and KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION (1999), and John O. McGinnis & Michael B. Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371 (2007), and Solum, *supra* note 203, at 18–19.

208. Cf. Joseph Raz, *Interpretation Without Retrieval*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY, *supra* note 206, at 155, 174–75 (comparing the meaning assignment involved in interpreting works of art).

209. 358 U.S. 1 (1958). The Court's holding "that the federal judiciary is supreme in the exposition of the law of the Constitution, and . . . that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States," *id.* at 18, necessarily implied that other government actors are not free to interpret the Court's words according to those actors' own perceptions of political perfection.

appointments and subsequent adjudications as the mechanism for changing our ultimate signals are lower than the transaction costs of undertaking the processes required for constitutional amendment. But to conclude that the morality of the system favors this outcome involves concluding that the system's essence is oligarchy.<sup>210</sup> The communications of the oligarchs certainly do succeed in signaling likely human action within the American community. And that is precisely because those signals are almost universally read in accordance with their original public meaning.

## VI. CONCLUSION

When we live in community, thinking about what others are likely to do and to expect valuably contributes to all of our choices of action. That thinking, with varying degrees of directness, is essential to most choices to invest time and energy and other resources, for to invest is to devote for the purpose of rewards that mostly depend on the behavior of others. Law exists to inform our thinking about what others are likely to do and to expect. Its character depends not on any moral status of right in lawgivers, but on how we all in fact predictably respond to it. When we think about legal implications of action, we think only superficially about legal "obligations." In substance, we think about human consequences. Our philosophers tell us that not all perception of moral obligation is consequentialist. But perception of legal obligation can be nothing else, for in substance to perceive legal obligation is never to perceive directly what we should do, but only to perceive the likely actions and expectations of others.

When we peel away law's ostensibly direct obligation and discover its purely informational character, we are better enabled to fulfill our moral responsibilities to each other. A clear understanding of what law accomplishes promotes moral reflection in all who are of any mind to engage in that. And the bad man, of course, is precisely where he always was, for he was never at risk of being misled by law's veneer of moralizing.

In *The Empty Idea of Equality*,<sup>211</sup> Peter Westen called the idea that like should be treated alike "an empty vessel,"<sup>212</sup> available to be filled by morals discovered elsewhere. The idea of authority is an empty vessel that cannot be filled. Its emptiness derives not from tautology but from a total absence of true instances. We can hope to seek out a moral truth about which distinctions should not be drawn and to imbue the word "equality" with that righteous vision. We cannot hope to find a moral truth that reveals an authentic authority, for the idea of one human hav-

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210. Cf. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 210 (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 35 (1999) (articulating populist visions of systemic ultimacy).

211. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

212. *Id.* at 547.



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ing moral claim to another's obedience was formed by fabrication. The moral truth is that authority is an illusion, and our time has come to let it go.

