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Why Law Matters for Our Obligations

Guyora Binder*

Abstract

Political philosophers have long debated the problem of political and legal obligation: how the existence of a political community and its laws can affect our obligations. This paper applies Alon Harel’s argument that law has intrinsic value to this venerable problem. It interprets Harel’s argument as a Kantian claim that law enables us to treat our fellows with the respect they deserve, by requiring us not only to treat them decently, but to recognize decent treatment as their right.

I. Introduction

Authority is often presented as a defining feature of law in both positivist and naturalist accounts. Yet some moral philosophers deny that such authority can be justified. As Robert Paul Wolff famously put it, “[T]he defining mark of the state is authority, the right to rule,” while “the primary obligation of man is autonomy, the refusal to be ruled.” On this view, we might have moral reasons to do as law commands, but the fact that law commands cannot be one of them. Law might be a useful instrument for motivating people to fulfill their moral duties, but it cannot change what those duties are. A. John Simmons argues that even if particular laws are useful to achieving moral aims, they cannot be obligatory unless those moral aims could be achieved in no other way.

Recently, some legal theorists have made arguments like Wolff’s and Simmons’s in denying that law has authority or needs to claim it. In Against Obligation, Abner Greene critiques a wide range of arguments for an obligation to obey law. He rejects arguments based on consent as requiring conditions of free choice that do not and cannot obtain. He adds that even those who feel bound to obey law may feel competing duties to obey other authorities, such as religious communities. He rejects arguments that fulfillment of certain criteria of justice or political legitimacy can ground an obligation to obey law, reasoning that few actual legal systems meet these high standards. Hence, law should not present its commands as preemptive reasons for action and does not merit obedience when it does so.

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2 A. John Simmons, The Duty to Obey Law and Our Natural Moral Duties, in Is There a Duty to Obey Law? 93, 188, 194-95 (A. John Simmons & Christopher Heath Wellman eds., 2005).

3 Abner Greene, Against Obligation: The Multiple Sources of Authority in a Liberal Democracy 35-113 (2012).
In *Law’s Evolution and Human Understanding*, Laurence Claus challenges both the descriptive accuracy and the normative appeal of the conception of law as a body of norms followed out of a sense of obligation. Claus argues that the idea of legal authority grew out of illiberal practices of submitting to the personal authority of rulers that were incompatible with modern notions of autonomy and equality. He adds that even in liberal societies with stable governments and social orders, there are widespread patterns of non-compliance and nonenforcement. Even in the modern liberal state, he concludes, social order is more a product of custom than of law. Not only does Claus deny that anyone has an obligation to obey law, he doubts that many people feel such an obligation. On this basis, he denies that law’s effectuality could depend on the prevalence of such a feeling, and so he denies that law need demand it. If authority plays no necessary role in a concept of law, law is better conceived as a useful system of predictions sometimes enforced by coercion, but followed only out of self-interest.

In this context of skepticism about the authority of law, Alon Harel’s new book *Why Law Matters* sounds a dissenting note. Harel argues, in the Kantian tradition, that a number of legal institutions—rights, states, offices, constitutions and judicial review—have intrinsic rather than instrumental value, because they enable societies to confer a dignitary status on individuals that would not otherwise be possible. In making these arguments, Harel takes no explicit position on the problem of legal authority. Yet Kant certainly saw law as authoritative. He saw each of us as having a moral duty not only to refrain from injuring one another, but to subject ourselves to a rule of law forbidding such injury. In so doing, we would endow our fellows with security and dignity by transforming their interests into entitlements. Harel’s claim that law has intrinsic value makes sense of Kant’s idea that we have a moral duty not only to treat our fellows fairly but also to treat them justly—that is, to treat them fairly under law. In this way, Harel’s book shows how law can have the authority to obligate compliance.

**II. Law’s Intrinsic Value**

Harel modestly disclaims a central thesis or method of argument. Yet throughout the work he treats law as a medium for expressing public value judgments about the worth of persons. We often think of laws as having instrumental value in the sense of producing welfare gains, as by deterring crime, or conserving common resources. Harel calls attention to the expressive value of legal institutions, irrespective of their welfare effects. The gist of this argument is that rights, the state, offices, constitutions and judicial review are each necessary to confer a distinctive kind of dignity on individuals.

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7 Harel, supra note 5, at 5.
The state is an entity that can speak for the political community as a whole. Thus, it has a distinctive role in expressing public judgments of value. This is particularly apparent in the context of criminal punishment. Punishment is often explained and justified as a deterrent to antisocial behavior, but private revenge can have this effect as well. Yet private revenge and public punishment diverge in function when we consider their respective meanings. To be sure, revenge conveys that the victim and his associates denounce the previous attack as wrongful, refuse to accept its implicit disparagement of the victim’s dignity and worth, and perhaps disrespect the perpetrator. Public punishment expresses many of these same evaluations, but it adds authoritative weight to them by expressing them on behalf of the entire political community. Thus it resolves the debate about the right or wrong of the initial attack and the relative worth of perpetrator and victim. Rather than contestably asserting the honor of the victim, it authoritatively reestablishes the victim’s dignity. Harel implies that while both public and private actors can deter, only the state can achieve retributive justice by denouncing the act and vindicating the victim in the name of the political community as a whole.

Here we might question whether the contribution the state makes to retributive justice is exclusively intrinsic rather than instrumental. Perhaps what the victim cares about is not his civic status, but his social status; and that public punishment helps restore his damaged social status by coordinating the judgments of individual members of society. If so, we might say that public denunciation not only expresses the political community’s collective denunciation of the offense and vindication of the victim, but also evokes such denunciation and vindication on the part of its members. If public punishment operates in this way, it is both intrinsically retributive and also an instrument of retributive justice. Assuming retributive punishment both expresses public judgment and mobilizes collective judgment, a duty to achieve retributive justice would oblige citizens not only to institute public punishment of wrongdoing, but also to join the state in denouncing wrongdoing and according respect to victims. In other words, by punishing in the name of a political community, the state not only honors individuals in a distinctive way, it also enables individuals to honor each other in a distinctive way.

If the state has significance as the agent of the public, officials have significance as agents of the state. In executing the state’s directives, officials give the state voice and clothe their own actions in public meaning. In order for official action to convey this message, it must be rigidly constrained by procedural routines. This requisite quality of officiousness shows the act is not an exercise of discretion expressing the values and prefer-

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8 For arguments along these lines, see Jean Hampton, The Intrinsic Worth of Persons: Contractarianism in Moral and Political Philosophy 108-50 (1st ed. 2007); Guyora Binder, Victims and the Significance of Causing Harm, 28 Pace L. Rev. 713, 719-28 (2008); Guyora Binder, Authority to Proscribe and Punish International Crimes, 63 U. Toronto L.J. 278, 287-91 (2013).

9 Harel, supra note 5, at 70-82, 96-99.

10 Id. at 87-95.
ences of the official himself, but is instead an application of law. Officiousness also conveys something important about how the law treats individuals. It treats them according to impartial rules, rather than making them means to ends.

The most important way that law conveys the worth of individuals, however, is by conferring rights. The capacity of others to benefit—or harm—us gives them power over us. Rights secure us against domination by binding others to benefit us, or to refrain from injuring us. The state can advance welfare by providing services, or by stimulating employment, or treating injury, but it serves additional purposes by treating any of these benefits as rights. When a person possesses an entitlement to a good, he has not just the use of the good, but security in that use. Where cost-benefit analysis can trade one person’s welfare off against another’s, rights typically cannot be traded off in this way, at least not without the consent of the holder or the giving of certain kinds of reasons. Thus, a right changes the way other actors must reason about how they affect us, and may create grounds for us to contest their actions. Drawing on Rousseau and other republican theorists, Harel argues that these protections change our status from dependent to free.

Constitutions can further entrench rights, securing them against legislative action as well as private violation. Finally, judicial review offers not just a means of enforcing constitutional rights, but an opportunity for holders of rights to be heard and to demand reasons. Taken together, rights, constitutions, and judicial review create a process by which the public, in the form of the state, is made answerable to individuals.

By virtue of the state and the institutional structures that constrain it, law can confer dignity on individuals in ways that would not be possible without it. Does this oblige us to obey law? If we add an assumption it might. Let us assume that people deserve to be treated with the kind of dignity that only law enables. If so, law is an indispensable means of treating people as they deserve. It would seem to follow that we have a moral duty to create, preserve and support the legal regimes necessary to treat people as they deserve. This rationale makes sense of Kant’s insistence that we have duties to obey and enforce law.

III. Law’s Authority in Jurisprudence

Many people act as if they believe that obedience to law is obligatory and that enforcement of law is justified. They express resentment toward those who violate their legal entitlements, and toward government officials who fail to prevent or to redress these violations. In so doing they invoke law and justice, not just welfare or morality. Sometimes

11 Id. at 171-72.
12 Id. at 174-77.
13 Id. at 177-80.
14 Id. at 202-16.
people express disapproval of others for violating laws—for example those imposing taxes—they would oppose as voters. Lawyers and officials also engage in an elaborate discourse of argument and justification that presupposes that law is binding on officials and makes justified claims upon its subjects. When subjects are surveyed about their attitudes towards law they express that laws should be obeyed, and they explain their own compliance with law by reference to that value commitment. Both psychological and historical research suggest a linkage between compliance and a favorable view of law and legal institutions.

Legal theorists of widely differing views treat these patterns of talking, thinking and acting as part of the phenomenon of law that they are trying to explain.

Legal positivist theories of law often acknowledge that law makes a claim to authority. They reason that legal systems exist and have validity in so far as those subject to them accept that claim. H.L.A. Hart distinguished laws from the commands of a gunman, however general or regular in form. From a viewpoint internal to a legal system, a legal claim is a normative claim about what people are obligated to do. For Hart, such authority was a sociological fact essential for the existence of a legal system. Yet, Hart reasoned, a legal system need not be accepted as authoritative by everyone it affects in order to have existence and to generate valid norms. An essential feature of a law, distinguishing it from other social norms, was its technicality: the existence of a cadre of officials following esoteric rules for the identification of binding norms. For Hart, it sufficed that these officials acted out of a sense of obligation for their commands to be law, even if the public followed these commands out of fear alone.

For Joseph Raz, “[I]t is an essential feature of law that it claims legitimate authority.” A legal system is in force only where it is widely obeyed, and accepted as authoritative by some. Raz conceives authority as a power to create “exclusionary reasons” for action that efface competing considerations, including moral reasons. Indeed, he sees the very efficacy and fairness of law as requiring this sort of normative opacity. He agrees with Wolff that there can be no general obligation to obey law. Yet he argues that a moral agent may permissibly create such a duty by committing herself to obey a particular legal

19 Id. at 93-97, 106-10, 115-16.
20 Id. at 116.
22 Id. at 3-27.
23 Id. at 233-42.
system, and he denies that to accept the authority of a legal system requires abdicating moral autonomy.

Law’s authority also figures prominently in normative theories of law. Such theories often attempt to understand law as a normative practice from the perspective of its participants. They often emphasize that law stakes a claim to authority, and reason that from an internal perspective, the validity of law depends upon the moral validity of that claim. On such a view, persons subject to valid law are obliged to accept its authority.

Examples of such theories are those of John Finnis and Ronald Dworkin. For Finnis, a theory is always an interested account of a subject defined by human projects and ends. A theoretical account of law therefore must incorporate both observation and evaluation to develop a conception of law’s function in human life. A normative theory of law would develop criteria for its proper functioning, rather than explain when or why it functions as it does. Finnis’s theoretical claim is that law’s purpose is to fairly and authoritatively “coordinate action to the common purpose or common good,” typically by organizing the management of common resources and the production of public goods and by assigning individual entitlements. Authority is necessary, because consensus is impossible in a complex society. For Finnis, goods are not simply objects of value or desire, but those normatively appropriate ends that are practically reasonable to pursue. Valid law is enacted law that fulfills this function. The principles of natural law are those that make enacted law valid and compliance with it obligatory. Because Finnis makes the validity of law depend on practical judgment as to whether it fairly shares the burden of achieving normatively appropriate common ends, he arguably makes the authority of law a product of the exercise of moral autonomy.

Dworkin reasons that legal argument draws on both past institutional decisions, and considerations of justice and prudence to urge that its audience is obliged to do something. This normativity presupposes that this entire system of legal sources and reasons stakes a moral claim on the decision-maker. All legal argument therefore depends upon and implicitly asserts the legitimacy of law. It thereby commits its participants to view legal sources as asserting principles of justice, and to apply those sources as justifiably as possible. From this perspective, the flaw of legal positivist accounts of law is their failure to take the content of legal argument “seriously.” In particular, Dworkin takes issue with

24 Id. at 233-61.
25 Id. at 25-27.
27 Finnis, supra note 26, at 6-19.
28 Id. at 232.
29 Id. at 23.
30 Id. at 238-54.
Hart’s picture of law as a finite set of determinate rules, necessitating the exercise of discretion to resolve hard cases.\textsuperscript{31} For Dworkin, all legal argument is an effort to subject the decision-maker to the authority of law, and yet all such argument invites the decision-maker to participate in that authority by interpreting past decisions in their best light. To do justice in hard cases, the decision-maker must exercise, not discretion, but interpretive judgment.\textsuperscript{32}

For both Finnis and Dworkin, the sources of law are not exhausted by enacted rules. Those sources include the conscience of every actor applying law. Far from preempting moral deliberation, the authority of law depends upon it.

### IV. Arguments for Legal Obligation

A lengthy tradition in philosophy has sought to identify the conditions for the legitimate exercise of political authority. Of course, it is conceivable for law to be legitimately enforceable without anyone having a duty to obey it. Thus William Edmundson has argued that even though legitimate law demands obedience, we owe it only non-resistance.\textsuperscript{33} Nevertheless, philosophers have generally treated the legitimacy of law and the obligation to obey law as correlative.

The philosophical debate over the duty to obey law is very ancient. In Plato’s \textit{The Crito}, Socrates offers several arguments for obedience to law. Two are straightforward. Thus, he owes the law obedience because it has benefited him. It has conferred entitlements upon him, protected him against violence and theft, and fostered a well-governed community for him to live in. In addition, he has assented to the laws and procedures of his community by remaining within it, with knowledge of its institutions.\textsuperscript{34}

Yet Socrates offers another argument based on a puzzling metaphor. He owes the laws obedience, he says, because, like parents, they have nurtured and educated him.\textsuperscript{35} This strange argument must be understood in light of Socrates’s conception of philosophy as justificatory conversation that tests and educates the participants, thereby bringing the ignorant under the governance of the wise. Socrates also imagines law as ideally such an educative conversation, and law’s power as the authority of reason. The laws have nurtured him in the sense that his ideas about justice derive from the experience of a social practice of submitting disputes for reasoned resolution. Thus, to object to his own death sentence as unjustified is already to concede that his life should depend on what reasons of justice he can offer others that he deserves to live. To assert rights and frame arguments is therefore to accept the authority of law in principle, however much one might

\textsuperscript{32} Id. at 81-130; Dworkin, supra note 26, at 43-44.
\textsuperscript{34} Plato, \textit{Dialogues of Plato} 50 (Benjamin Jowett trans., 1900).
\textsuperscript{35} Id. at 49.
disagree with a particular judgment. This was Socrates’s defense, that his seemingly subversive practice of philosophy reinforced the authority of the laws, which were grounded in reason. To evade the law’s judgment by escaping would therefore belie his defense, and absolve his judges of fault in misapplying the law, by implying they had no duty to follow it in the first place.36

Like Socrates, Kant reconciled fidelity to law with morality by using law’s virtues of consistency and impartiality as a model for morality. Kant certainly did not think we exercise moral autonomy by doing whatever we want. Kantian moral autonomy requires subjecting ourselves to fair rules. The moral agent chooses these rules by imagining and evaluating a community in which everyone acts as he does. In other words, Kantian morality requires that the agent imagine uniformly applied laws and then live by them. Kant’s ethic of impartiality is reminiscent of Rousseau’s concept of the general will that would enable individuals to transcend their individuality and enact legitimate law. Kant reasoned that if communities could subject themselves to law democratically, individuals could assume moral obligations autonomously in the same way.

Modern philosophers have offered at least six kinds of arguments for the legitimacy of some kinds of government.37 Three are primarily concerned with why government is a good thing:

(1) Public Welfare Arguments: It is collectively rational to institute government in so far as necessary to overcome the epistemic, collective action and coordination problems preventing individuals from cooperating to achieve various public goods.

(2) Natural Necessity Arguments: Human beings are naturally disposed to live in groups, affect one another’s interests, compete for resources, power and status, and choose leaders. Political power of some kind is inevitable, and uncertain or divided power leads to violent contestation.38 The challenge of holding power often induces leaders to mobilize attacks on less organized populations. Anarchy and war are so miserable that there is a need to form governments, and civil war is so miserable that there is a presumptive need to preserve tolerably just established governments.

(3) Moral Good Arguments: Government can be a useful or even a necessary means of fulfilling moral obligations people owe one another and should recognize. Such obligations could be of mutual protection or aid; of distributive, corrective or retributive justice; or of enabling fair participation in collective choices that will affect them.

The next three arguments are more concerned with why this need for government is our problem—why it imposes any duties of obedience on us:

36 Id. at 52.
37 See generally Simmons, supra note 2; Edmundson, supra note 33, at 7-70; Greene, supra note 3, at 35-113.
(4) *Fair Play Arguments:* Individuals who assert rights under law are fairly obliged to respect the rights of others under law. More controversially, individuals who benefit from the public goods enabled by general compliance with law are fairly obliged to cooperate in producing those goods by complying. This includes everyone, if those public goods include care during the substantial periods of our lives when we are dependent. Similarly, individuals who participate in competitive collective decision processes are fairly obliged to accept the results, win or lose.

(5) *Sociability Arguments:* People who regularly interact and affect one another arguably have a duty of mutual aid. Cooperative social interaction reduces mistrust and consequent conflict and insecurity. Frequent associates have more information about one another’s needs and lower costs to provide aid. When one’s associates commit to a common project, assisting them expresses that one values the association. These duties of sociability provide a reason to comply with the particular cooperative schemes accepted by one’s associates, even if other cooperative schemes would be as beneficial or more so.

(6) *Consent Arguments:* Presumably, government is legitimate to the extent those subject to it accept its authority—which many do. Government might have to meet certain conditions of justice for such consent to count as rational, or to be compatible with the continuing autonomy of the governed.

These arguments are contingent and cumulative. Together, they encourage our obedience to law in so far as it suppresses anarchy and civil war, serves other public or moral goods, is obeyed and valued by our associates, is tolerably stable and just, and we personally benefit from and consent to it.

How do Harel’s ideas fit into our taxonomy of arguments for legal obligation? Basically, they fit into the third category. Thus, Harel claims that individuals deserve to be publicly recognized and treated as subjects of rights, and this moral good requires a liberal state governed by a rule of law. Yet Harel’s reasoning implies not only that law and government are moral goods, but also that individuals are morally obliged to obey and accept the authority of at least some laws. Thus, if individuals deserved recognition and treatment as subjects of publicly conferred rights not only by officials, but also by other individuals, then each of us would have a moral duty not only to avoid infringing such rights, but also to respect them *as law.*

**V. Arguments Against Legal Obligation**

To see the significance of Harel’s argument for a duty to respect our fellows as subjects of legal rights, it is useful to work through Simmons’s influential arguments against legal obligation.

Simmons rejects public welfare arguments by reasoning that the obedience or disobedience of any individual can neither achieve nor frustrate the achievement of a public good. Since such goods depend on widespread compliance, no individual can make a
difference. Thus no one can have a duty to obey law by virtue of having a duty to cause or maximize the good.

Yet if one has a duty to seek, promote, facilitate, encourage or cooperate in achieving the good, a different conclusion might be reached. Accomplice liability attributes liability for contributing to wrongs in this way without causing them. Similarly, compliance with cooperative schemes makes one “complicit” in the achievement of goods one has not caused.

Simmons would respond that any vague duty of promoting the good could be pursued in a variety of ways and so could never dictate obedience to any particular law. And since those other ways of pursuing the good might turn out to be better, the morally autonomous person must eschew any commitment to a particular means for promoting the good in favor of fidelity to the good itself.

If a duty to achieve the good cannot ground a duty to cooperate in producing a good, one might try to base such a duty on fair play or sociability. Simmons’s objection to a fair play argument is that it cannot apply to everyone, because some might not benefit from or desire the creation of the public good.

This argument is usefully compared to Jeffrie Murphy’s critique of a fair play account of punishment. Herbert Morris had argued that offenders had a duty to suffer punishment because they had received the benefits of law in the form of protection of their persons and property, and cooperatively produced public goods like education and environmental quality, without the burdens of compliance. Murphy pointed out that this makes retributive justice contingent on distributive justice, and that many offenders are likely to be victims of distributive injustice. This argument shows that a fair play duty to obey law is contingent on fair institutions, not that there can be no such duty.

Simmons’s objection to a duty of fair play is quite different. He objects to being forced to play the game. Thus even in a distributively just society, an anarchist might object to receiving the benefits of cooperation—presumably including protection of his person and entitlements. If so, he should be entitled to provide his own security, pay no taxes, and obey no laws. Yet it seems odd for the anarchist to demand an entitlement to be free of coercion. Who has a duty to enforce or respect this entitlement, and how does that duty arise? Simmons presumes that the anarchist has no moral duties to help realize distributive justice because he can opt out of the game. But this requires the dubious as-

39 Simmons, supra note 2, at 124-27.
41 Simmons, supra note 2, at 166-68.
42 Id. at 126.
43 Id. at 119-20.
44 Herbert Morris, Persons and Punishment, 52 Monist 475 (1968).
assumption that there is someplace outside the playing field of social life, where obligations of justice don’t apply because people have no effect on each other.

The argument from sociability asserts that people who interact or who share identification with a community appropriately feel a heightened sense of responsibility for one another’s welfare. Simmons responds that such theories are reducible to either public welfare or consent theories. Thus we should support our neighbors’ preferred legal norms because that makes them happy, or our sociability provides a reason to think that consent is widespread.

The argument from natural necessity offers a different ground for mutual responsibility, insisting that humans cannot avoid competition and conflict over scarce and common resources. Thus every individual’s entitlements are inevitably determined collectively. We can determine these entitlements with a view to fairness, or welfare, or some other value, but we cannot avoid determining them. Thus the obligations of distributive justice cannot be avoided. Underlying the argument from natural necessity is the premise that individual autonomy is a fiction—that we are naturally subject to society and that a measure of freedom is only possible by fashioning social arrangements into a sufficiently fair and democratic rule of law.

Simmons has two responses to the argument from natural necessity that legal regulation of conflict is necessary. First, legal regulation of conflict might not be necessary because resources and responsibilities could all be allocated by voluntary agreements. Second, even if legal regulation of conflict is necessary, distributive justice is not. Government could fulfill its function of maintaining social peace by adopting and enforcing a libertarian legal regime. Thus anarchists are not morally obliged by natural necessity to accept anything beyond a minimal state. They might be obliged to obey laws against murder, but not to pay taxes or minimum wages, or conserve carbon.

The proponent of legal obligation will respond to the first argument by noting that human experience is that anarchy does not solve the problem of order or preclude coercion. Voluntary agreements solve little if they are unenforceable. The response to the second argument is that the minimal state is a distribution of entitlements affecting everyone’s interests, not an alternative to enforcing a distribution. It is only a permissible alternative to some more social democratic distribution if it is more just.

Simmons may object that the proponent of legal obligation has now shifted from a natural necessity to a moral goods argument. Simmons offers two objections to an obligation to achieve distributive justice that recapitulate his objections to a duty of achieving public goods. First, if individual noncompliance makes no causal difference to the efficacy of laws, the goal of achieving distributive justice cannot ground a duty of

46 Simmons, supra note 2, at 112-14; A. John Simmons, Justification and Legitimacy: Essays on Rights and Obligations 65-92 (2001).

47 Simmons, supra note 2, at 133-34.

48 Id. at 136, 152.
obedience. Second, a duty of distributive justice cannot ground a duty to support any particular legal regime. Reasonable people will disagree on principles of distributive justice. Individuals might choose to fulfill their distributive obligations in a variety of ways. The territorial jurisdictions determining the geographic scope of our legal obligations are unlikely to line up with the geographic scope of our moral duties because their populations are wider than the circle of association but narrower than the circle of people affected by our actions.

Simmons regards all of the arguments considered thus far as identifying reasons to enact and obey law, but not as establishing duties to do so. All of the reasons considered are ones an autonomous moral agent might reject. The only sufficient ground for a duty of obedience that Simmons recognizes is consent.

Very well, but if we are to credit legal theorists like Hart and social scientists like Tyler, most people do accept the authority of law. It would seem—by Simmons’s own premises—that people who accept the authority of a legal regime for good reasons have a duty to obey law.

Yet Simmons insists that hardly anyone consents to obey law. He supports this startling claim, not by talking about attitudes and beliefs, but by talking about acts. Thus, no true contracts were signed between the English and their sovereign, or among the French citizenry at the conclusion of their revolutions. No actual agreement warrants the difference principle. We cannot pledge allegiance to the constitution merely by remaining within our borders, as Socrates did, or voting in elections, or—well, pledging allegiance—because all of this is constrained by circumstance and motivated by self-interest, and could be insincere.

Consent, as Simmons uses the term, means not a mental attitude, but a formal undertaking creating an institutional fact. Presumably, this is needed on the view that a mere mental attitude cannot bind us if at some later point we change our mind. Perhaps, although it seems that if we expected others to obey a law when it benefited us, we are bound by fair play to obey it when it benefits others. Moreover, an attitude of fidelity to law may not be easily changed, if it is rooted in an identity as a loyal citizen, or an army veteran, or the subject of rights. Finally, even if we are no longer obligated by consent we have withdrawn, that does not preclude our obligating ourselves by means of continuing consent.

Yet Simmons would deny that a self-image as a law-abiding person—which is what social scientists seem to mean by the authority of law—can be a true source of obligation. It seems that much as we might want to, we cannot consent to the authority of law

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49 Id. at 136, 169.
50 Id. at 161-68.
51 Id. at 116-20.
52 Id. at 117, 147.
without exercising a preexisting Hohfeldian power to create a duty and a correlative right. But, Simmons implies, we cannot already have such a power to authorize law’s authority, unless we presuppose some still higher authority that can bind us to be bound.

VI. Why Why Law Matters Matters to Legal Obligation

For Simmons, as for Wolff, any such authority is precluded by our moral autonomy. Yet for Plato, Rousseau and Kant, the rational embrace of just laws is an exercise of autonomy that makes political freedom possible. Harel’s insight is that political freedom is not only a set of arrangements that manages the problems of scarce and common goods in a tolerable way. It is also an identity, a legal status of personhood. This identity is a social identity that protects us from harm and secures to us recognition as a rational subject whose objections must be heard and who must be answered with reasons. At the same time, a status of political freedom is a personal identity that we claim, and that we thereby commit ourselves to recognize in others. In demanding that others treat us reasonably according to law, we obligate ourselves to do the same.

It seems that many of Simmons’s arguments against political obligation are reducible to either a denial of collective responsibility for distributive justice, or a jaundiced view of the cooperative pursuit of the common good as a threat to moral autonomy. Yet in critiquing Kant’s account of the moral duty to subject oneself to law, Simmons also presumes that law can have only instrumental value. According to Simmons, the moral good Kant attributes to law is simply protection against injury. But that purpose can be achieved without law, as long as everyone refrains from injuring one another. Hence one has no moral duty to one’s fellows to subject oneself to law:

Justice for Kant . . . consists in each person’s having that to which she has a legitimate moral claim—physical security and “external freedom,” the resources necessary for pursuing a reasonable, just life, etc. Justice cannot (despite Kant’s occasional lapses) consist of the institutional provision of these goods without the definition’s simply begging the question at issue between Lockeans and Kantians. The Kantian claim must be rather the empirical claim that institutional enforcement is the only way to genuinely secure people’s legitimate claims. People are not entitled to any more than having their rights respected. They are not entitled to having them respected in a certain way (e.g., . . . institutionally).

This assertion that it can make no moral difference whether one’s physical security and access to resources are protected by law or by the indulgence of a slavemaster is precisely what Harel denies, in asserting the intrinsic value of law. Legal rights secure not just material goods, but one’s status as an equal and as a subject, to whom power must answer in the discourse of reason. Kant required not only respect for moral autonomy, but also legal recognition of moral autonomy. Our duty to recognize one another’s equal dignity as subjects of rights is Why Law Matters for our moral obligations.


54 Simmons, supra note 2, at 177 n.64.