ABSTRACT

Title of Dissertation:	THE NATURE OF GOVERNMENTAL AUTHORITY
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This dissertation puts forward a series of arguments and theoretical proposals concerning institutional authority—particularly, governmental authority. I attend to conceptual debates regarding the function of legal systems and the nature of authority. Moreover, I cover a normative debate regarding the permissible use of political power. The overall view that I build is that governmental institutions have a decision-making authority over the status of certain normative relations in society, and they were designed to have this decision-making authority to serve the need of making group decisions, despite persistent disagreements about policy outcomes, in order to solve practical problems.

Chapter 1, "My Overall Perspective," provides a guide to my overall view regarding the nature of governmental authority. This PhD dissertation takes the form of the three-paper model, and a reader may not see the conceptual links between these papers. In this chapter, I present the view on the nature of governmental authority that comes out of these papers.

Chapter 2, “The Presumption of Liberty and the Coerciveness of the State,” presents a challenge to skeptics who think that nearly all uses of political power is impermissible. I argue that a state can engage in permissible uses of political power over a broad range of domains without possessing any entitlements.

Chapter 3, “What Authority Is, What It Is Not,” argues against the orthodoxy that authority is a species of power over others. I then build and defend the view that authority is a status that authorizes a person or entity to change one’s normative status.

Chapter 4, “Law’s Function as a Decision-Procedure” provides an analysis of how we can determine the law’s essential function. I use this analysis to argue that the law’s essential function is a decision-making one.

Each of these chapters is a standalone paper. None of these papers presupposes another one, and they can be read in any order.

THE NATURE OF GOVERNMENTAL AUTHORITY

by

Cindy Phillips

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Advisory Committee:
Professor Christopher Morris, Chair
Professor Sam Kerstein
Associate Professor Dan Moller
Assistant Professor Brian Kogelmann
Professor Mark Lichbach

Dedication

For my father, mother, and dog. May God bless their hearts.

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Chapter 1: My Overall Perspective

This dissertation is comprised of three core papers on the nature of governmental authority. Chapter 2 discusses the conditions governing the permissible use of political power. Chapter 3 develops a definition for the concept "authority". Chapter 4 defends the view that the law's essential function is a decision-making function. This PhD dissertation consists of the three-paper model; hence, each paper is standalone paper that can be read individually. I believe that these papers position me to provide a unique perspective about why human groups create governmental institutions. In this chapter, I discuss how each paper serves as a core component of my broader perspective on the nature of governmental authority. What results is a view that places a different emphasis on the way that governments are often viewed among philosophers.

A dominant view about governmental authority among philosophers is the following.

Orthodoxy: Government is a coercive entity.

I do not disagree with this view—albeit, I firmly reject a strong formulation of it that states that governments are *necessarily* coercive.[1] But I think that political and legal philosophers often place too much scholarly importance on this claim. The **Dominant**

[1] See, for example, Ripstein (2003). For a discussion of this strong view, see Morris (2012).

View is an emphasis on a perspective of government—it has us view governments as *primarily* coercive entities.

The problem with an emphasis on this perspective of government is that it obscures the government's *essential* role. The following is my view of a government's essential role.

> **My View**: Governmental institutions have a decision-making authority over the status of certain normative relations in society, and they were intentionally designed to have this decision-making authority to serve the need of making group decisions, despite persistent disagreements about policy outcomes, in order to solve practical problems.

This view provides a different perspective on government. As I take it, human groups create governments for a certain reason, and this reason tells us what the essential function of government is—and its essential function tells us what its nature is. Governmental institutions are intentionally designed to have decision-making authority over certain normative relations in society, and this decision-making authority serves the human group need of making decisions about important issues as a group.

An emphasis on a different view of government has importance implications. For the standard theorists, a government's justification for existence must be based on moral facts—e.g., it has a moral entitlement to authorize the use of coercion—

because it is a morally problematic type of thing—i.e., it is a coercive entity.[2] In contrast, in my view, a government's justification for existence is based purely on instrumental facts.[3] And since it is only contingently true that governments authorize the use of coercion against their citizens, its justification for existence need not reference moral facts. My three papers support and contribute to this view.

Chapter 2 provides a response to a skeptical view of government. A skeptical view of government holds that government is primarily a coercive entity because it commits wide-scope violations of our liberty-rights. As a result, according to this view, nearly all uses of political power is impermissible. This view also holds that governments must be entitled to authorize the use of coercion in order to justifiably coerce its subjects. In addition, the proponents of this view have an impossibly high standard for the permissible use of political power—i.e., the receipt of unanimous consent. The result is that no governments is legitimate according to this skeptical position.

In response, I argue that the kind of liberty violations that need to be justified are much more limited in scope. And, importantly, they need to be justified on only a case-by-case basis; a compelling moral justification must be given in these cases. The result is that the governmental authority itself doesn't need to be morally justified; instead, a government must give a compelling moral justification for violating certain liberties (e.g., freedom of speech) on a case-by-case basis or else its acting

[2] To note, John Simmons (1999) makes a distinction between "justification" and "legitimacy".
[3] My view could be considered a neo-Hobbesian view.

impermissibly in that particular situation. As a result, I am able to set aside strong moral constraints that entail that governments are nearly always acting impermissibly because the kind of thing that government is.

Chapter 3 argues against the common view that "authority" is a control concept. The standard theorists think that the possession of authority, by its nature, is about controlling people's conduct. They think that governments have authority over *people*. In contrast, I argue that, more precisely, authorities have control over *normative relations*, such as permissions, duties, immunities, disabilities, etc. This difference is important. Chapter 3 shows that authority is not about having *power over people*, regardless of whether that power is *de jure* or *de facto*, rather it is about having the requisite authorization to control certain normative relations.[4]

Chapter 4 attends to an analysis of the law's essential function. I argue that its essential function is a decision-making function. There are certain highly controversial normative relations in society—e.g., the right for same-sex couples to get married—and human groups must come to a decision about these normative relations despite their persistent disagreements. I argue that legal systems are intentionally designed to be a common framework where persistently disagreeing individuals can make decisions as a group. A government's possession of authority entails that its decisions about these normative relations are immune to change from competing institutions, such as religious institutions. This thesis has us view governments as things that are intentionally designed to serve the human group need

[4] In this chapter, I also conceive of a counterexample, an ultra-libertarian government, against the strong formulation of the view that states that governments are necessarily coercive. An ultra-libertarian government distributes only immunities against the use of governmental power to its citizens, which entails that the only constraints that it creates are against its own actors.

of making decisions about important issues, despite persistent disagreements, in order to solve practical problems.[5]

In sum, I have shown how these chapters fit into my broader view regarding the nature of governmental authority.

[5] This authority includes the decision about whether citizens have an immunity against the imposition of taxes or a requirement to pay taxes.

Chapter 2: The Presumption of Liberty and Coerciveness of Law

1. Introduction

This paper discusses the permissible use of political power. More specifically, I discuss the ethics of the governmental activities of making laws and enforcing them, activities that restrict people's liberties in practice. I defend a certain context-dependent position: a government must provide a compelling justification for restricting certain liberties, a justification that is sensitive to the relevant facts that govern the permissible restriction of a particular liberty within the particular context that the government proposes a restriction of that liberty, or else the government acts unethically.

To defend this view, in section 6, I argue that the following two premises are true.

(1) A government provides a compelling justification for restricting certain liberties only if it addresses relevant facts for the permissible restriction of that liberty.

(2) What determines which facts are relevant depends, in part, upon contingent facts about the context in which a specific liberty is being restricted.

My view has two significant conclusions. First, facts governing what counts as a compelling justification for restricting certain liberties is dependent upon facts about the *context* for restricting a particular liberty. Second, a compelling justification for restricting certain liberties can only be given in a *contingent* manner.

On my view, given the context-sensitive nature of what counts as a compelling justification, the position that I defend entails that a government can only provide a compelling justification for permissibly restricting a liberty on a contingent basis. In contrast, an *a priori* justification for restricting a liberty fails to be sensitive to the relevant facts for restricting a person's liberty in particular contexts.

The significance of my position is that it runs directly counter to a dominant view in political philosophy. A dominant view in political philosophy is that a state must be entitled to make laws or be entitled to enforce them coercively in order to justifiably coerce its subjects.[6] Call this view the "entitlement view." On this view, for a state to justifiably coerce its subjects, a necessary condition is that it is entitled (or has a right) to authorize the use of coercion or a right to enforce its laws coercively.

Notable skeptics of state power hold the entitlement view.[7] These skeptics also deny that states have the requisite entitlement(s) to make laws and to enforce

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[6] To note, the "or" in this statement is an inclusive "or". For particular examples of these views, see, e.g. Grant Lamond, 'Coercion and The Nature of Law' 7(1) (2001) *Legal theory* 35 at 1, 6; Arthur Ripstein, 'Authority and Coercion' 32(1) (2004), *Philosophy and Public* Affairs 2. For discussions of different variations of entitlement views and views on state coercion, see Robert Hughes, "Law and Coercion" 8(3) (2013) *Philosophy Compass* 231-240; and Christopher Morris, 'State Coercion and Force' *Social Philosophy and Policy* 29(1) (2012) 28-49.

[7] The term "power" in this statement is in reference to "political power" loosely defined in order to account for various views. See, Robert Paul Wolff, *In Defense of Anarchism* (University of California Press 1970); John Simmons, *Moral Principles and Political Obligations* (Princeton University Press 1979), ch. 1. They believe that states must have a right to rule and a right to be obeyed in order to have legitimate authority.

them since (actual) states fail to satisfy the conditions for possessing the requisite entitlement.[8] This denial informs their views regarding the permissible use of political power. An implication of their denial is that all (actual) states make and enforce laws impermissibly since they lack the requisite entitlement.[9]

The position that I defend provides an important contrast to the entitlement view. On the entitlement view, either a government has the requisite entitlement to justifiably restrict its subjects' liberties or it does not. My complaint is that the entitlement view creates a standard for the permissible use of political power that is too general in scope. It is implausible to think that the one-and-the-same entitlement provides a permission for restricting a range of liberties in a range of contexts so long as the restriction falls under the permissible limits of state power.[10]

For instance, the same entitlement that grounds a state's use of political power, e.g., a right to rule (Simmons) or a right to authorize the use of coercion (Ripstein), presumably provides that state a permission to enforce tax laws as well as

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[8] Wolff believes that it is conceptually impossible for a person to permissibly be under the authority of another person since following the commands of another person violates certain obligations to act on one's own critical assessment about what to do, Wolff (1970), ch. 2-3. Hence, Wolff thinks it is impossible to for a state to have the requisite permission to make laws and to enforce them. Other skeptics believe that the conditions for the requisite entitlement is satisfied on empirical grounds (e.g., whether a state has received unanimous consent from its subjects) and that no actual state has satisfied these empirical conditions. My criticism covers both kinds of anarchists.

[9] Simmons's view has certain important complications that I must address. Simmons makes a distinction between legitimacy and justification. See John Simmons, 'Justification and Legitimacy'109(4) (1999) *Ethics*, 739-771. On Simmons's view, a state lacks legitimacy where it lacks unanimous consent from its subjects to govern over them. However, Simmons acknowledges that these states still might to be justified to govern on other grounds. Simmons writes, "I suggest, we can justify the state by showing that some realizable type of state is on balance morally permissible (or ideal) and that is rationally preferable to all feasible non-state alternatives," (Ibid, 742). I address this distinction fully in section 7.

[10] For an excellent discussion about the limits of state power, see John Simmons, *On The Edge of Anarchy*: *Locke, Consent, and the Limits of Society*. (Cambridge University Press 1993). A right to rule may justify enforcing tax laws but it does not justify tyrannical laws.

a permission to enforce laws against jay-walking. I argue that, at first blush, this conclusion seems plausible enough, but it is implausible upon closer inspection.

Nonetheless, what we have in common is that we are all providing an account of the source of the permission that governs permissible uses of political power—specifically, when it comes to the governmental activities of making laws and enforcing them. I am providing an alternate view to the entitlement view. My alternate view allows me to demonstrate that a state can engage in permissible uses of political power over a broad range of domains without possessing any entitlements.[11]

Entitlement theorists are skeptics of state power to the extent that they do not think that (actual) states have satisfied (or can satisfy) the conditions for acquiring the requisite entitlement in order to have the requisite permission to make laws and to enforce them. That is, they are anarchists to the extent that they think that no state has the requisite permission, i.e., legitimate authority, to use political power. Yet, another kind of skeptic of state power, a more extreme kind of anarchist than the entitlement

[11] In many respects, I have a view that falls under the Hobbesian tradition, one that is laid out in a series of separate papers. For instance, in Chapter 4 of this dissertation, I defend the view that the purpose for which legal institutions exist is grounded on purely instrumental facts in addition to natural facts about human psychology instead of moral facts. It is important to these later arguments that I show that neither the permissible use of political power—when it comes to making laws and enforcing them—nor the authority of legal institutions need to be grounded in a moral entitlement, or a moral fact. What we have in common is that we both (to a large extent at least) ground the authority of legal institutions on (ultimately) instrumental facts and natural facts about humans.

theorist, denies that any state can be morally justified.[12] A central argument for this belief comes from the presumption of liberty.[13]

For both these skeptical views of the state, it is wrong to restrict a person's liberties without sufficient justification.[14] The extreme variant of the skeptical view claims that uses of state power is morally indefensible because liberty is the supreme moral value governing our relations with others and use of state power necessarily violates respecting liberty as the supreme moral value.[15] The first part of my paper

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[12] A main reason that Simmons makes a distinction between legitimacy and justification is that the distinction allows Lockeans to address this type of skeptic. According to Simmons, the Lockean position is that a limited state can be prudentially rational or comparatively justified to living in the state of nature, (Ibid, 741-742). Simmons writes, "The background objection against which such attempts to justify the state are intended to be mounted must be understood to come from the anarchist, who denies that any state can be morally and prudentially justified. A common anarchist view, of course, is that anything that is sufficiently coercive to count as a state is also necessarily, and for that reason, morally indefensible and prudentially irrational," (Ibid, 743). Since I do not recognize a distinction between justification and legitimacy in the same way that Locke (or Simmons's explanation of Locke's view) does, I must have another way of addressing these more extreme skeptics of state power. I address these kinds of skeptics by way of challenging a main underlying premise of their view: liberty is the supreme moral value governing our relations with others. This premise allows them to defend the claim that states are morally indefensible.

[13] For a discussion of the presumption of liberty, see William Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority* (Cambridge University Press 2007).

[14] Isaiah Berlin, Liberty: Incorporating Four Essays on Liberty (Oxford University Press 2002). See esp. chapter "Two Concepts of Liberty" at 166-217; Eric Mack and Gerald F. Gaus, "Classical Liberalism and Libertarianism: The Liberty Tradition" in Gerald F. Gaus and Chandran Kukathas (eds), Handbook of Political Theory (SAGE Publications Ltd 2004) 115-130; Robert Nozick, Anarchy, State, and Utopia (Basic Books 1974); Matt Zwolinski, "The Separateness of Persons and Liberal Theory" 42(2) (2008), The Journal of Value Inquiry 147.

[15] One objection considers the value of addressing this extreme anarchist position given that the entitlement view is a significantly more plausible skeptical view of state power. In defense, I note that discussions of the presumption of liberty has received attention from notable constitutional law lawyers. For example, Randy Barnett, the director of the Georgetown Center for the Constitution, dedicates a full book on the presumption of liberty—see Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2013)—where he argues that an unprincipled judiciary poses a threat to constitutionalism given the original intent of the writers of the American Constitution. To note, Barnett is not an anarchist, but he demonstrates that the presumption of liberty is a very intuitive position that many people hold. In addition, significant legal philosophers have also commented on the widespread intuitive appeal of the presumption of liberty. See William Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority* (Cambridge University Press 2007), ch 6. An important contribution to the literature, from addressing the presumption of liberty in depth, comes from showing that the presumption of liberty is not intuitive when examined in closer detail. If my arguments against the presumption of liberty are correct, the appropriate conclusion is that the extreme anarchist position, i.e., states are morally indefensible, cannot be defended from a simple appeal to an "intuitive" principle about

argues against the extreme variant of the skeptical view. This task is important because the extreme variant of the skeptical view opposes my positive view on the grounds that no compelling justification for restricting a liberty exists other than the receipt of consent. The second part of my paper lays out my positive view regarding the permissible use of political power. My positive view provides a direct response to the entitlement theorists.

I organize this paper as follows. In section 2, I provide some preliminary remarks on certain themes that play a continuing role throughout this paper. In section 3, I provide a general overview of the skeptical view of state power. I discuss the main defense for the extreme variant of the skeptical view, the presumption of liberty. In section 4, I lay out possible defenses for the presumption of liberty. In section 5, I then provide counterexamples to each defense. These counterexamples aim to show that a justification is not needed to restrict certain liberties. I then show how this result undermines this more extreme anarchist view of state power.

In section 6, I then develop an account in which states may engage in permissible uses of political power without having an entitlement to make laws or to enforce them coercively. On my view, the exercise of political power is morally problematic in the following two cases:[16] (1) when a state restricts (what I call) "protected liberties", liberties that are protected by a corresponding right against interference, without a compelling moral justification, and (2) when a state arbitrarily

liberty because it really rests on a view of liberty that is implausibly extreme—i.e., liberty is the supreme moral value governing our relations with others—or as I shall argue in section 5.

[16] In what follows, for sake of brevity, when I refer to uses of political power, I mean to constrict my domain to making laws and threatening people with sanctions.

restricts "unprotected liberties", liberties that aren't protected by a corresponding right against interference.

On my view, a state needs an entitlement to neither make laws nor to enforce them. To permissibly restrict a protected liberty, a state must merely give a compelling justification for such a restriction that is appropriately sensitive to the relevant facts governing the particular context in which a specific protected liberty may be permissibly restricted. And to permissibly restrict an unprotected liberty, a state must do so for the reason that it promotes some public good or furthers its subjects' interests.

In section 7, I conclude this paper with the following observation. My positive view demonstrates why the entitlement view is implausible. A compelling justification for restricting a protected liberty can only come from a state official that has appropriately evaluated and weighed the relevant reasons and facts at hand—namely, the reasons and facts that ought to be considered when restricting a protected liberty within a specific context. As a result, an *a priori* justification, such as a right to rule, cannot be the source of the requisite permission for restricting any liberties because a compelling justification can only be given on a contingent basis once the relevant reasons and facts are appropriately assessed and that assessment is appropriately promulgated to the relevant parties.

2. Some Preliminaries

To begin, I must make some preliminary remarks on certain themes that play a continuing role in the rest of this paper.

One broad strategy for analyzing the connection between the use of political power and state coercion is to analyze the semantics of the concept "coercion." According to this strategy, all coercive acts are *pro tanto* morally wrong.[17] It is also widely thought that all uses of political power are coercive.[18] Hence, it is further widely thought that each use of political power is *pro tanto* morally wrong. The literature on this topic has digressed into a discussion regarding the proper semantics of the concept "coercion." The motivation behind this digression is the belief that the truth of the statement "the law is coercive" depends on the proper understanding of the meaning of "coercion." However, this literature has not generated a consensus on the meaning of "coercion", and this topic proves to be very controversial.

I do not follow this strategy. Rather, I think much progress can be made with a very superficial understanding of the term "coercion." I think we may make significant progress by examining the skeptics' complaint for thinking nearly all uses of political power are impermissible.

Some skeptics think that nearly all uses of political power are impermissible because they unjustifiably violate our liberties. The challenge that they present is that each use of political power must be justified and that each use of political power should be presumed to be impermissible until it is justified.[19] I believe that this

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[17] See William Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority* (Cambridge University Press 2007).
[18] For a discussion, see Edmundson (n 17) Chaps. 4-5.
[19] This challenge runs parallel to the challenge that the claim "law is coercive" poses. William Edmundson writes, "the slogan 'law is coercive' is supposed to tell us why state action stands in *special* need of justification". Edmundson (n 17) at 84, emphasis is given by the author.

challenge is compelling, and we need not digress into a discussion of the semantics of "coercion" to understand or to answer this challenge.

It is also important for me to be explicit about the definition of "liberty" that I endorse. On my view, liberty should be understood as non-domination.[20] A dominates B if and only if A has a power of interference over B on an arbitrary basis.[21] And an act is perpetuated on an arbitrary basis if that act is chosen or not chosen at A's pleasure.[22]

Whereas many others have argued against skeptics on the grounds that these skeptics have the wrong view of liberty, it is beyond the purview of this paper to argue which definition of liberty is more plausible.[23] I present my preferred account of liberty mainly to bar any objections that take cases in which one arbitrarily dominates the will of another as a counter-objection to anything that I say, for it is my view that it is morally objectionable for an individual or institution to arbitrarily dominate the will of another.

Finally, I must make the following note. Exercises of political power include the following actions or activities: making laws, threatening people with sanctions, creating obligations, imposing sanctions or punishments, forcing people to submit (e.g., putting people in handcuffs), committing violence (e.g., shooting people). Skeptics believe that states are not entitled to perform any of these actions; hence, for

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[20] Philip Pettit *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1997); Ibid, *On the people's terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012).
[21] Pettit, *Republicanism* (n 20) at 52.
[22] Ibid, 55.
[23] Although the definition of liberty that I adopt has some implications for my views concerning the permissibility of exercising political power, it doesn't play nearly as much a central role in shaping my views on the topic as it does for skeptics.

them, no state has the authority to commit any of these actions. If one wants to vindicate the use of political power, one must address each of these uses of political power. However, the subject matter of this paper concerns only the permissibility of making laws and threatening people with sanctions.[24] Although, what I say here lays some of the groundwork for addressing the rest of the uses of political power, they must be fully addressed in separate papers.

3. The Skeptics' Challenge Against the Use of Political Power

Skeptics of the state range from radical anti-statists to less anti-statist libertarians. They hold a suspicious attitude towards each use of political power.[25] They don't simply defer to the state's authority on each legislation because they believe that states are neither entitled to make laws that restrict behavior nor entitled to authorize the use of coercion. Hence, for skeptics, each use of political power must be justified on grounds other than entitlements.

The skeptics' challenge is that each use of political power must be justified and that each use of political power should be presumed to be impermissible until it is justified.[26] Many of them conclude that nearly all uses of political power are

[24] Although, I lay part of the groundwork for an account that explains why states can permissibly create obligations, a full defense is the subject matter of a separate paper on political legitimacy.
[25] In contrast, for example, some statists believe that there is an obligation to obey even unjust laws. See, e.g., Thomas Hobbes, *Leviathan*, chap 26 [131-150] (Cambridge University Press 1991 [1651]).
[26] Bruce Ackerman states a view called "Principle of Rationality," according to which all power including political power is presumptively illegitimate until the powerholder supplies a reason for having the power while other people do not. Bruce Ackerman, *Social justice in the Liberal State* (Yale University Pres 1981) at 4-5.

impermissible. In this section, I present the skeptics' background views for surmounting this challenge. I first discuss the definition of liberty that many skeptics commonly hold. I then discuss the importance that they place on the value of liberty. Finally, I show how their commitments on these two issues inform their views on the permissibility of exercising political power.

Many of these skeptics endorse a view of liberty as non-interference. On this definition of liberty, Isaiah Berlin writes,

> I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others. If I am prevented by others from doing what I could otherwise do, I am to that degree unfree; and if this area is contracted by other men beyond a certain minimum, I can be described as being coerced, or, it may be enslaved...Coercion implies the deliberate interference of other human beings within the area in which I could otherwise act. You lack political liberty or freedom only if you are prevented from attaining a goal by human beings.[27]

On this definition of liberty, A is unfree with respect to B to the extent that A deliberately makes a course of action, which B could otherwise do, substantially practically less eligible.[28] According to these skeptics, making laws that restrict

[27] Berlin, I. "Two Concepts of Liberty", in I. Berlin, *Four Essays on Liberty*, London: Oxford University Press. New ed. in Berlin 2002. at 169.
[28] I change the wording "prevent" to "substantially practically less eligible" since I believe that the latter wording is more precise.

behavior are deemed to be coercive since it makes certain courses of actions, which some people would otherwise do, substantially practically less eligible. A core feature of skeptics' position is that each of us has a general negative right against interference. That is, all others have a duty to refrain from interfering with the ends that we want to obtain.

Moreover, skeptics converge, in sufficiently similar ways, on the importance that they place on liberty. Gaus and Mack claim that "individual liberty is what each individual may legitimately demand of each other individual".[29] They continue,

Part of the reason that liberty is the only thing—or at least the primary thing—that may be demanded of others as a political right is that the demand for liberty is uniquely modest; to demand liberty is merely to insist that one be left alone in one's solitary activities or in one's joint activities with other consenting individuals. Liberty as non-interference by others is thus a good that everyone with aims, goals or projects has an interest of demanding from all others, it can only be supplied by others, and it can be universally supplied at modest costs, unlike demands to be benefited or served at the expense of others.[30]

Skeptics take liberty to be the supreme moral value governing our relations with others. They believe that liberty should be the most extensively respected moral value. The implications of this statement are far-reaching.

First, each liberty-violation must be justified. As Douglas Husak states, "The objectionable feature that attaches to each instance of coercion persists even after a

[29] Mack and Gaus (n 14) 116-117, emphasis in the original.
[30] Ibid, 117, my emphasis.

demonstration that the particular deprivation of freedom is justified".[31] Moreover, the justification must be a moral justification since coercion is ordinarily regarded as something that stands in need of a moral justification.[32]

Second, the only adequate justification for restricting one's liberty is the receipt of personal consent. As John Simmons writes, "attempts by others to govern us will require some special justification—a justification consistent with and respectful of our natural freedom...Consent is an act only a free person can perform; it is a use, not a breach, of one's freedom".[33]

Third, a government must have the consent of all for the legitimate use of political power. Simmons writes, "a legitimate government must have the unanimous consent of its citizens".[34] The reason being a person who has not given his consent would be bound to a government that he has not consented to.[35]

Skeptics make one exception or limitation on the general negative right against interference: we have a right not to be interfered with—except when we violate another person's rights or harm that person. Following J.S. Mill's formula,[36] they argue that an individual or institution may subject A to force if and only if that force will prevent A from harming B or nullify some harm that A has already inflicted upon B. These cases would justify the use of political force. But, this

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[31] Douglas Husak, 'The Presumption of Freedom' 17(3) (1983), *Nous* 345 at 345, 355.
[32] Lamond (n 14) 36.
[33] Simmons (*On the Edge of Anarchy*, n 10) at 74.
[34] Simmons (*Moral Principles and Political Obligations*, n 7) at 71.
[35] Ibid, 72.
[36] See John Stuart Mill, *On Liberty* (Oxford University Press 1991 [1859]).

justification doesn't account for much because anyone would be justified in using force to prevent harm to others.

For example, a state is justified in using force to prevent Stephen from committing a mass shooting on campus. But any person would be justified in preventing Stephen from harming others. Mark, another student on campus, for instance, would be justified in tackling Stephen to the ground. Since any individual would also be justified in preventing Stephen from harming others, the prevention of harm to others would not uniquely justify a state's exercise of force.

Hence, in what follows, I focus strictly on cases in which a state restricts a person from doing something that is morally permissible because these are the more controversial cases regarding the permissible use of political power. For a concrete example, consider the following case.

No Jaywalking: The pedestrian crosswalk light is red. However, since no cars are approaching in either direction, Bert decides to jaywalk knowingly against the law. Bert is not putting anyone in harms way by jaywalking on this occasion. However, a cop sees Bert jaywalking and administers a fine to Bert without Bert's consent.

In this case, a state is restricting Bert from committing a morally permissible action. Skeptics view this use of political power to be impermissible. The state, on their view, is wrongly obstructing a goal that Bert wants to obtain.

These considerations greatly restrict the range of permissible uses of political power. Skeptics deny that states are entitled to make laws that restrict behavior and that they are not entitled to authorize the use of coercion. Hence, for them, all

exercises of political power must be justified on other grounds. But, for them, preventing harms or possessing unanimous consent is the only acceptable grounds to permissibly use political power. However, it's safe to assume that the vast majority of actual laws do not prevent harms or receive unanimous consent. This position entails that nearly all uses of political power are impermissible.

The skeptics' challenge rests on two pillars. (Claim 1): Liberty is the supreme moral value governing our relations with others. For them, liberty should be the most extensively respected moral value. But why should we believe that (Claim 1) is true? I challenge the truth of (Claim 1) over the course of the next two sections (i.e., sections 4 and 5). (Claim 2): The only justifiable use of political power without consent is to prevent or to nullify a harm. After presenting my positive account on the permissible use of political power, I demonstrate that (Claim 2) is false. This is the subject-matter of section 6.

4. The Presumption of Liberty

In this section, I present a central argument for the claim that liberty is the supreme value governing our relations with others: the presumption of liberty. Simply put, the presumption of liberty states that any restriction of one's liberties requires adequate justification. In its most general form, the presumption of liberty can be formulated as follows:

Presumption of Liberty: It is wrong to restrict a person's liberty without sufficient justification.

The presumption of liberty is a burden-shifting type argument. It sets a state of affairs as a normative default position (i.e., the non-violation of liberties). Defenders of the presumption of liberty then argue that others must justify venturing away from this normative default position.[37] On this view, it is presumed that the violation of a person's liberty is morally impermissible until it is justified.

To fully understand the issues at stake, let's breakdown the presumption of liberty and analyze its components. The presumption of liberty has two components: (a) the existence of liberty-rights and (b) a feature of liberties that explains the justification- demanding force behind liberty-violations. I explain each in turn.

A liberty-right is a Hohfeldian term.[38] Hohfeld analyzes a liberty- right to be the mere absence of an obligation. Since morally permissible actions are simply those actions that one has the absence of an obligation to perform, the set of actions that one has a liberty-right to perform is equal to the set of actions that is morally permissible. Hence, people have a corresponding liberty-right to perform any morally permissible action. In particular, we have a liberty-right to jaywalk since jaywalking is morally permissible.

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[37] Randy Barnett also puts the idea this way: "A presumption of liberty would place the burden on the government to show why its interference with liberty is both necessary and proper rather than…imposing a burden on the citizen to show why the exercise of a particular liberty is a "fundamental right,". Randy Barnett, *Restoring the lost constitution: The presumption of liberty* (Princeton University Press 2013) at 260.

[38] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as applied in Judicial Reasoning' 23 (1913) *Yale Law Journal* 16.

We should note that the existence of a liberty-right alone doesn't explain the justification-demanding force behind the presumption of liberty since a liberty-right is simply the absence of an obligation. Nothing more is said about how we ought to treat liberty-rights, for (again) it is simply the absence of an obligation. Let me put this point rhetorically: Why do we need to demand a justification for restricting a movement or an action that we have an absence of an obligation to do?

There must be a feature that humans place on liberties that explains the justification demanding force behind liberty-violations. We should remind ourselves, however, that skeptics owe an argument that explains why this feature generates a requirement for a justification in order to permissibly restrict a liberty.

In fact, there must be two different kinds of defenses given the differing contexts of liberty-violations. In one context, we are told that we ought to prefer the action that promotes a person's liberty as opposed to the action that violates a person's liberty. That is, we should prefer X (i.e., liberty) as opposed to not-X (i.e., not-liberty). Moreover, in cases of conflict among goods, we are told that we ought to prefer liberty over other goods (e.g., social coordination, equality, etc.) when the promotion of the other good conflicts with the promotion of liberty. That is, we should prefer X to Y in cases where the promotion of Y entails not-X. What defense can skeptics give for each context?

Skeptics have a very intuitive defense for why we should prefer liberty as opposed to not-liberty. It is the observation that the non-violation of liberty simply enjoys a presumption of correctness, as opposed to the violation of people's liberties. The presumption of correctness explains why the other side has a burden of justifying

liberty-violations. Joel Feinberg expresses the idea this way: "If a strong general presumption of freedom has been established, the burden of proof rests on the shoulders of the advocate of coercion".[39] I call this the "presumption of correctness" defense.

How about cases of conflict among goods? How can skeptics defend the claim that we ought to prefer liberty over other goods when they conflict? William Edmundson states one bad defense: the defense that simply consists of the statement "because liberty is good".[40] Edmundson states that there are many goods (e.g., security, happiness, a good night's sleep). The defense "because liberty is good" wouldn't tell us which situation is to be preferred in cases of conflict among goods.

Another defense claims that there is a hierarchy of political goods and that liberty is at the top of that hierarchy. This defense explains why we should favor liberty over all other goods. However, Edmundson states that this defense is also unsatisfactory because "not since the heyday of G.E. Moore's *Principia Ethica* have philosophers felt at ease ranking the goods".[41]

But Mack and Gaus supply a good reason for ranking liberty at top, "Liberty as non-interference by others is thus a good that everyone with aims, goals or projects has an interest of demanding from all others, it can only be supplied by others, and it can be universally supplied at modest costs".[42] The argument is that everyone has an interest to be "left alone" in one's activities, and the good of being left alone can be universally supplied by all others at modest costs. Mack and Gaus can argue that a

[39] Joel Feinberg, *Social philosophy* (Prentice-Hall 1973) at 22.
[40] Edmundson (n 17) 92.
[41] Ibid, 93.
[42] Mack and Gaus (n 14) 117.

hierarchy of goods ought to be ranked on these criteria. And no other good, perhaps, satisfies these criteria (or, at least, does not as well as liberty does). I call this argument the "universally supplied at modest costs" defense.

Moreover, skeptics don't have to claim that a hierarchy of goods exists. They merely may insist that liberty always outweighs these other goods. This defense would suffice to show that a presumption favoring liberty over all other goods exists. Moreover, this defense could be combined with the presumption of correctness defense in a compelling way. Suppose that John gave an argument about the value of promoting social coordination; hence, John concludes that imposing a law that restricts jaywalking is justifiable. A skeptic may simply respond that, even though promoting social coordination is valuable, it can never outweigh the value of liberty. And since John has the burden of proof because the non-violation of liberties enjoys a presumption of correctness, John must defend the claim that the good of social coordination outweighs the good of liberty. Since the success of John's critique is conditional upon his ability to meet this burden, justifiably or not, skeptics can resist John's critique by insisting no other values can outweigh the value of liberty.[43] I call this the "liberty always outweighs all other values" defense.

Another defense asserts that people have a certain inviolability. Jason Brennan writes,

> [L]ibertarians advocate radical freedom. Each person may decide how her life will go. We need not justify ourselves to others. Each of us possesses an

[43] Shelly Kagan also gives this point. Shelly Kagan, *The Argument from Liberty* (Cambridge University Press 1994) at 16-41.

> inviolability, founded on justice, that forbids others from sacrificing us to achieve greater social stability, economic efficiency, or desirable cultural ends.[44]

On this view, it is not a matter of whether liberty is at the top of a hierarchy of goods. It is also not a matter of whether liberty outweighs other goods. Rather, what matters is that we have a certain inviolability that disallows others to promote some other good over our liberty. As Matt Zwolinski writes, "respecting the moral status of individuals, such critics argue, entails giving them a certain primacy or inviolability in a theory, refusing to subordinate them for the sake of the greater good".[45] For these critics, restricting one's liberty for the sake of some public good disrespects that person's inviolable moral status. I call this the "inviolability" defense.

In the next section, I present counterexamples that show that all the defenses for the justification-demanding force behind liberty-violations fail. These counterexamples show that all four defenses don't support the claim that liberty is the supreme value governing our relations with others.

5. Counterexamples to the Presumption of Liberty

In this section, I offer counterexamples to the presumption of liberty. These counterexamples undermine the presumption of liberty in two ways. First, they show

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[44] Jason Brennan, *Libertarianism: What Everyone Needs to Know* (Oxford University Press 2012) at 4.
[45] Zwolinski (n 14) 150.

that none of the defenses for the justification-demanding force behind liberty-violations works. Second, if we agree that a justification is not needed in certain liberty-violation cases, yet it is needed in other liberty-violation cases (i.e., when a state violates our freedom of speech), then we need a principled way to distinguish when a justification is needed and when it is not. This result shows that we can no longer operate on presumptions; instead, we must have a principled way for adjudicating the need for a justification.

I proceed in the following manner: First, I assess what a counterexample needs to show to undermine these defenses for the presumption of liberty. Next, I identify all the ways in which A violates B's liberties. Finally, I present counterexamples that undermine the defenses for the presumption of liberty.

The defenses for the presumption of liberty are as follows.

(d1) the non-violation of liberty enjoys a presumption of correctness

(d2) liberty can be universally supplied at modest costs

(d3) liberty simply always outweighs all other goods

(d4) persons possess a certain inviolability against liberty-violations

What does a counterexample need to show to demonstrate that each of these defenses for the presumption of liberty is implausible?

In response to (d1), it needs to show that a justification is not needed to permissibly violate B's liberty. If the non-violation of B's liberties enjoys a presumption of correctness, then we should expect that violating B's liberties requires

a justification. But if a justification is not needed to permissibly violate B's liberties, then the non-violation of B 's liberties doesn't enjoy a presumption of correctness.

In response to (d2), it needs to show that A must give up something of equal or more value to refrain from violating B's liberty. If A must give up something of equal or more value to refrain from violating a liberty, then the good of leaving people alone could not be universally supplied at modest costs.

In response to (d3), it needs to show that A does not wrong B by violating B's liberty without receiving B's consent. If the good of liberty simply outweighs all other goods, then A could not promote some other good over B's liberty without wronging B. But if A may promote some other good without wronging B, then the good of liberty does not simply outweigh all other goods.

In response to (d4), it needs to show that A does not wrong B by violating B's liberty without receiving B's consent. If each of us possesses a certain inviolability that forbids others from promoting some other good at the expense of our liberty, then other people wrong us by restricting our liberty without our consent. But if A may restrict B's liberties without wronging B, then B doesn't possess a certain inviolability against liberty-violations.

In sum, assuming that A did not receive B's consent, a counterexample shows that each of these defenses for the presumption of liberty fails if it demonstrates that either (a) A may permissibly restrict B's liberty without giving B a justification or (b) A may restrict B 's liberties without wronging B.

To strengthen the plausibility of my counter-objection, I identify all the ways in which someone may violate another person's liberties. A violates B's liberties

when A renders a morally eligible course of conduct substantially less practically eligible.46 The following are ways in which A may violate B 's liberties:[47]

(r1) A commands B not to perform a morally permissible action.

(r2) A deliberately interferes with B 's performance of a morally permissible action.

(r3) A credibly threatens to withhold a benefit from B if B performs a certain morally permissible action.

(r4) A credibly threatens to impose a cost on B if B performs a certain morally permissible action.

Consider an example in which we intuitively don't believe that a justification is needed for violating our liberties in each of these ways.

(r1) A commands B not to perform a morally permissible action.

The Priest Commands: One religion requires its members to eat only blessed meat of a certain cut. A priest from this religion commands that all others (members and nonmembers alike) to eat only blessed meat and warns that

[46] This definition of "A violates B" is a modification of Berlin's definition of "*A* makes *B* unfree." Berlin uses the term "prevent", and I use the term "substantially less practically eligible." I also add "morally eligible course of conduct" because the controversial cases are the morally permissible ones.

[47] There are more ways in which *A* can violate *B*'s liberties (e.g., *A* arbitrarily punishes *B*). However, since I restrict the focus of uses of political power on making laws and threatening the imposition of sanctions in this paper, this is the set of liberty-violations that I am concerned with.

they will go to purgatory otherwise. In full-faith, the priest believes that he is fulfilling his moral duty by making such commands.

Assuming eating meat is morally permissible, the priest is restricting others from committing a morally permissible action—that is, eating non-blessed meat.[48] However, the priest doesn't owe people a justification for commanding them to eat blessed meat. Moreover, if the priest refrains from commanding people to eat blessed meat, it would not be at modest costs given his belief in the weight of his moral obligation to make such commands. This example shows that liberty cannot be universally supplied at modest costs.

Skeptics might object that they aren't concerned with cases in which people simply command others not to do a morally permissible action. They are concerned only with cases in which people back their commands with credible threats. (I inspect more coercive type cases below.) However, skeptics are indeed concerned with simple command cases since many of them believe that states cannot command anybody what to do without violating that person's liberty.

In response, skeptics may argue that states are subject to a higher moral standard than ordinary citizens. While ordinary citizens make occasional commands, states systematically command people what to do, and skeptics may argue that this difference sets a higher moral standard for states to satisfy. I answer this objection in section 5 when I give my positive account.

[48] Insert another command if you don't believe that eating meat is morally permissible.

(r2) A deliberately interferes with B 's performance of a morally permissible action.

Missed the Train: Jeffery sees the train at the platform and bolts towards its open doors. However, before Jeffery is able to reach the doorway, a beggar stops Jeffery to ask for some change. This action delays Jeffery long enough that he misses his window of opportunity to get on the train. The train whizzes off.

It is morally permissible for Jeffery to get on the train on time. However, I think that most of us would agree that the beggar doesn't owe Jeffery a justification for deliberately interfering with Jeffery's ability to get on the train. Moreover, the beggar doesn't wrong Jeffery for asking Jeffery for some change. And finally, the beggar relies on each handout to survive. The beggar cannot refrain from deliberately interfering with people at modest costs.

One might object that if the beggar adamantly stood and refused to get out of Jeffery's way without Jeffery's consent, then the beggar acts impermissibly. However, this case would be different than the previous example. In the previous case, the beggar merely interferes with Jeffery's ability to get on the train long enough to ask for some change. In this case, the beggar arbitrarily dominates Jeffery's will. And, as I have stated previously, I believe that all cases in which a person or institution arbitrarily dominates the will of another are impermissible.

(r3) A credibly threatens to withhold a benefit from B if B performs a certain morally permissible action.

No Soup For You: George is banned from purchasing soup from a certain soup stand with an eccentric owner. George begs (and begs) Jerry to purchase the soup for him to get around the ban. Jerry finally agrees to buy soup for George but threatens that George can't flirt with any of Jerry's love interests, as George has a habit of doing, otherwise Jerry won't purchase soup for George.[49]

It is morally permissible for George to flirt with Jerry's love interests. However, Jerry doesn't owe George a justification for threatening to withhold a benefit if George flirts with one of Jerry's love interests. Moreover, Jerry doesn't wrong George for making such a threat.

One objection is that Jerry has the liberty-right to state conditions under which he will provide benefits for George. Hence, this is simply a case of a conflict of liberty- rights between Jerry and George. Nevertheless, the presumption of liberty states that it is wrong to restrict a person's liberty-right without sufficient justification. If we take this claim seriously, notwithstanding Jerry's liberty-rights, Jerry still owes George a justification for threatening to withhold a benefit against George for performing a morally permissible action otherwise Jerry acts

[49] This example is modified from a storyline on Seinfeld. To note, George has not promised Jerry not to flirt with any of Jerry's love interest. Hence, it would not be morally impermissible for George to flirt with Jerry's love interests.

impermissibly. And I think that most of us would agree that Jerry doesn't act impermissibly in this case.

(r4) A credibly threatens to impose a cost on B if B performs a certain morally permissible action.

Frivolous Lawsuit: Harris attempts to burglarize Jessica's house. However, as he breaks in through the window, he slips on a banana peel and has a serious concussion. Harris demands that Jessica pay his hospital bills, and she refuses. In response, Harris threatens to sue Jessica unless she pays his hospital bills.

It is morally permissible for Jessica not to pay Harris's medical bills. Harris is at fault for his accident. However, Harris doesn't owe Jessica a justification for threatening litigation if she doesn't pay his medical bills.

One might object that Harris does owe Jessica a justification for threatening to sue since he is clearly in the wrong. This frivolous lawsuit would cost Jessica undue burden on her time and money. However, I don't think that this conclusion is warranted. The presumption of liberty entails that, in this case, Harris must receive Jessica's consent to threaten to sue her otherwise he acts impermissibly. But it is counterintuitive to think that a threat of lawsuit is morally impermissible unless one has the consent of the defendant to threaten to sue.

I believe that we sometimes must give a justification to permissibly restrict a liberty (e.g., freedom of speech). However, these counterexamples demonstrate that not all liberties have a justification-demanding feature, since we may sometimes permissibly violate a person's liberties without a justification and without wronging that person. This result demonstrates that we need a principled way to adjudicate when a justification is needed and when it is not. I offer my positive account in the next section.

6. When We Are Owed a Justification

Sometimes we do need to give a justification to permissibly restrict a liberty and sometimes we do not. Given this fact, we need a principled way for adjudicating when a justification is needed and when it is not. In this section, I explain the type of justification that is needed to permissibly restrict a liberty. Then, I explain when a justification is needed to permissibly restrict a liberty. Finally, I show that, on this account, states do not need to be entitled to authorize the use of coercion in order to permissibly restrict people's liberties.

What kind of justification is needed to permissibly restrict a liberty? Skeptics give one answer. They argue that the only adequate justification for permissibly restricting a liberty is the receipt of personal consent.[50] And if a state hasn't received unanimous consent to impose a general law, according to skeptics, then that state cannot permissibly impose or enforce that law.

[50] Simmons (n 7)

On my account, a state simply needs to promulgate a compelling justification to permissibly restrict certain liberties. To give a compelling justification, an official must engage in moral reasoning to analyze the relevant facts for permissibly restricting a protected liberty. In moral reasoning, they weigh the reasons for regulating the liberty under question against the reasons for not regulating that liberty. A compelling moral justification, in this case, is a reason for regulating the liberty under question and is the stronger reason on the balance of reasons.

Consider a concrete example. In *Schenck v. United States*,[51] for instance, the Supreme Court held that speech that is directed to incite "clear and present danger" is outside the scope of protected speech. One cannot shout "Fire!" in a crowded theater. In this case, legal officials concluded that causing "clear and present danger" is a reason for regulating free speech and is the stronger reason on the balance of reasons.

To permissibly restrict certain liberties, I now argue that supplying a compelling moral justification is more appropriate than receiving personal consent. Consider the regulation of hate speech. Suppose that a society, Munta, doesn't have a legal institution, and it uses severe moral censure to regulate behavior. There is a fact of the matter as to whether hate speech should be meet with moral condemnation. To justify imposing moral censure, the inhabitants of Munta must engage in moral argumentation to inspect the reasons for and the reasons against condemning hate speech. If they find a reason for censuring hate speech is the stronger reason on the balance of reasons, it seems that they are justified in censuring hate speech. Moreover, not having the consent of a person who wants to engage in hate speech is

[51] *Schenck v. United States* 341 U.S. 494 (1951)

not relevant to the grounds for condemning hate speech. Rather, the more appropriate justification for applying moral condemnation is the existence of a compelling moral justification.

I argue that the reasoning that applies to the justification for moral condemnation also applies to the justification for legal prohibitions. But to finish this argument, I must first present my account of when a justification is needed to permissibly restrict a liberty.

I propose that a justification is needed to restrict peoples' liberties when a certain deontic constraint exists. That deontic constraint is as follows: X 's liberty to perform y is protected by a certain corresponding claim-right. Call these liberties "protected liberties". (On the other hand, call liberties that aren't protected by a corresponding claim-right "unprotected liberties.") The corresponding claim-right has the following form: if X has a claim-right to perform y, then all others have a duty not to interfere with X's performance of y.[52]

For instance, John's liberty-right to say whatever he wants is protected by a corresponding claim-right (i.e., John's claim-right to say whatever he wants). Given that John has a protected liberty to say whatever he wants, all others have a duty not to interfere with John's exercise of free speech.

Moreover, this duty of non-interference is defeasible. A defeasible duty is one that, under certain circumstances, reasons to not perform the duty are sufficiently compelling such that the non-performance of the duty is permissible. To deduce

[52] This claim-right is a right in rem. A right in rem is a right that holds against an indefinite class of people. See Hohfeld (n 29). One classic example is the right not to be assaulted. You have this right against everyone, and everyone has a duty to refrain from assaulting you. Similarly, if *X* has a claim-right to perform *y*, then everyone else has a duty to refrain from interfering with *X*'s performance of *y*.

whether a duty of non-interference is defeasible under certain circumstances, we must engage in moral argumentation and deduce whether, on the balance of reasons, the reasons for interfering are sufficiently compelling such that the nonperformance of that duty is permissible.

Suppose that people have a moral duty not to interfere with the parenting of others. To deduce whether this duty is defeasible under certain circumstances, we must engage in moral argumentation and inspect whether sufficiently compelling reasons exists such that interfering with the parenting of others under certain circumstances is permissible. Say, for example, caring about the wellbeing of children is a sufficiently compelling reason to interfere with certain antiquated parenting practices (e.g., using a belt to enforce discipline). In this case, a person has a compelling moral justification to interfere with a parent who uses a belt to discipline his children. Moreover, having the consent of the parent to interfere is immaterial to the grounds of whether one should interfere or not.

I may now finish my argument regarding my claim that issuing a compelling justification is more appropriate than receiving consent to permissibly restrict a liberty. It is due to the fact that a duty of noninterference is a defeasible duty. To decide whether this duty is defeated under the circumstances in question, we engage in moral argumentation to find sufficiently compelling reasons to interfere such that, on the balance of reasons, they make the non-performance of the duty permissible. And having the consent of the interferee, the person who is to be interfered with, is immaterial to the grounds of whether the duty is defeated in the circumstances under question.

On my account, a person may have a compelling justification to interfere with X's performance of y. Given this analysis, a person, Z, owes X a compelling justification, if Z has a duty of non-interference, and if Z interferes with X's performance of y. Hence, Z must give X a compelling justification for interfering with X's performance of y, otherwise Z commits a moral wrong. Hence, for instance, a state owes John a compelling justification for limiting John's exercise of free speech (e.g., shouting "Fire!" in a crowded theater causes clear and present danger) otherwise it commits a moral wrong.

On the other hand, unprotected liberties, or liberties that are not protected by a corresponding claim-right of non-interference, cannot explain why someone owes a compelling moral justification for interfering with that liberty. These liberties are simply morally permissible actions. They are equivalent to the absence of a moral obligation. A corresponding claim-right is needed to explain when a compelling moral justification is owed since someone must have violated a duty of non-interference to owe a compelling moral justification for interfering. And since (again) mere liberties are simply the absence of an obligation, there is nothing about them that explains why someone owes a justification for violating them.

The counterexamples that I have given in section 5 were examples of unprotected liberties. I gave cases in which a person may restrict the liberty of another without justification and without wronging the other person. The reason is that those liberties are not protected by a corresponding claim-right against interference.

Even so, skeptics may respond, states still must justify restricting unprotected liberties because states systematically restrict unprotected liberties while the cases I gave were of ordinary citizens restricting the liberties of others in one-off situations.

To justify systematic restrictions of people's unprotected liberties, I argue that states must create such restrictions for the reason that it promotes some public good or furthers its subjects' interests. For example, to justify systematically restricting people from jaywalking, on my account, a state must enact a law against jaywalking for the reason that it promotes public wellbeing or social coordination or etc. Since a state isn't violating a duty when restricting an unprotected liberty, a state does not need a moral justification to restrict unprotected liberties. It simply must have its subjects' interests in mind to create systematic restrictions of unprotected liberties.

Recall that skeptics claim that the only justificatory grounds for the uses of political power without consent is to prevent or nullify a harm. I have defended an account in which states can permissibly use political power to make laws and to threaten the use of sanctions without consent in non-preventing-harm cases. On my account, to permissibly restrict a protected liberty, a state must give a compelling moral justification; and to permissibly restrict an unprotected liberty, a state must create such a restriction for the reason that it promotes some public good or furthers its subject's interests—it cannot enact restrictions just to satisfy its own whims because that would be a case of arbitrary domination.

I present the deficiency of the skeptics' view with the following views concerning the scope of liberties that are protected by a corresponding claim-right.

Wide-scope view of protected liberties: All liberties are protected by a corresponding claim-right against others not to interfere with the performance of the action specified under that liberty.

Narrow-scope view of protected liberties: Some liberties are protected by a corresponding claim-right against others not to interfere with the performance of the action specified under that liberty.

Skeptics must hold the wide-scope view because they think that a state acts impermissibly when it violates any liberty. Recall also that they believe that each person has a general negative right against interference. They believe that each legal restriction and each liberty-violation must be morally justified.

However, I argue that the more modest view, the narrow-scope view, is true. All of the examples that I gave in section 5 are counterexamples to the wide-scope view. However, Missed the Train is an especially crippling counterexample to the wide- scope view. It clearly shows that certain liberties such as getting on the train on time aren't protected by a corresponding claim-right. If getting on the train on time is a protected liberty, the stranger owes Jeffrey a compelling moral justification for deliberately getting in his way and asking for some change. However, this result would be absurd. Hence, we should reject the wide scope view in favour of the narrow-scope view of liberties. There are some liberties that are not protected by a corresponding claim-right.

The implications of my view are that states can permissibly use political power when making laws or enforcing them. Skeptics state a challenge which entails that most exercises of state power are impermissible. In contrast, I offer a view that requires us to look at certain contingent factors to decide when a state impermissibly uses political power (i.e., the kind of liberty that was violated, whether a compelling moral justification was given, etc.).

7. Why the Entitlement View is Implausible

Entitlement theorists, such as Lockeans, distance themselves considerably from the extreme skeptics, or anarchists, that I have addressed in section 5. In this section, I show how the Lockean skeptical position on the permissible use of state power is distinguished from the extreme skeptic. Finally, I address the Lockean skeptic.

The extreme anarchist holds that governments always wield morally indefensible political power, and she uses the presumption of liberty as the basis of her defense. The Lockean position is distinct from the extreme anarchist in that Lockeans hold that states can be justified on rational grounds. In the following paragraph, Simmons begins to distance the Lockean skeptic from the extreme anarchist,

> The background objection against which such attempts to justify the state are intended to be mounted must be understood to come from the anarchist, who denies that any state can be morally and prudentially justified. A common

> anarchist view, of course, is that anything that is sufficiently coercive (hierarchial, inegalitarian, etc.) to count as a state is also necessarily, and for that reason, morally indefensible and prudentially irrational.[53]

Lockeans think that limited states, states that are sufficiently just, are a good bargain to non-state alternatives. According to Lockeans, limited states are rationally preferable to the state of nature, for a person in the state of nature is subject to all the incommodities of insecurity, lawlessness, and vulnerability that living in such a state could be expected to involve."[54] In addition, Lockeans recognize that states perform many important functions that improve people's lives. Simmons writes,

> [S]tates have the salience and the power to solve various coordination and assurance problems, to resolve "Prisoners' Dilemmas," to institutionalize and enforce rights and justice, to empower the suppression of violence, and so on.[55]

Lockeans are able to distinguish themselves from the extreme skeptic because the former makes a distinction between justification and legitimacy. Justification and legitimacy are different kinds of moral evaluations of states. For Lockeans, justifying a state involves a *comparative* moral evaluation between states and all feasible non-state alternatives. Simmons writes,

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[53] A. John Simmons, "Justification and Legitimacy," Ethics 109, no. 4 (July 1999), at 742-743.
[54] Simmons, "Justification and Legitimacy," at 742. John Locke, *Second Treatise of Government*, sec. 137.
[55] Ibid, 752.

> So, I suggest, we can justify the state by showing that some realizable type of state is on balance morally permissible (or ideal) and that it is rationally preferable to all feasible non-state alternatives. In the course of such a justification we will typically argue that certain virtues that states may possess or goods they may supply—such as justice or the rule of law—make it a good thing to have such states in the world.[56]

On this analysis, a state could be justified but still be illegitimate. This is because, on their view, the requirement to be legitimate involves the satisfaction of a different set of conditions. A morally legitimate state has received the unanimous consent from its subjects to wield political power.[57] Simmons writes,

> Political power is morally legitimate, and those subject to it are morally obligated to obey, only where the subjects have freely consented to the exercise of such power and only where that power continues to be exercised within the terms of the consent given.[58]

A conclusion from this analysis is that a state can wield political power that is justified but illegitimate. This is a very poignant point. The upshot is that illegitimate

[56] Simmons, Justification and Legitimacy," at 742.
[57] Simmons, "Moral Principles and Political Obligations," 52.
[58] Simmons, "Justification and Legitimacy," 745.

uses of political power lacks legitimate authority. As a result, they are still impermissible uses of political power even if they are justified.[59]

On the Lockean view, they lack authority because the source of state authority comes from a transfer of rights from the subjects to the state, and that transfer of rights occurs only via the receipt of unanimous consent from the governed.[60] I have already provided an argument that the receipt of consent is immaterial to the permissible use of political power. What I now focus on is the part of the Lockean view which claims that an entitlement, a right to rule, can be an adequate justification for restricting people's liberties. I argue that it cannot be an adequate justification. To begin, let's take a closer look at the Lockean description of this right. Simmons writes,

> A state's (or government's) legitimacy is the complex moral right it possesses to be the exclusive imposer of binding duties on its subjects, to have its subjects comply with these duties, and to use coercion to enforce the duties.[61]

If Simmons is correct, a state's possession of this complex moral right would allow it to impose binding duties that restrict people's liberties. What's at stake is whether such a complex moral right can be the source of an appropriate justification to permissibly restrict people's protected liberties.

My criticism is that a right to rule lacks the properties of a compelling justification to restrict a person's liberties within a specific context. Those properties

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[59] In Chapter 3 of this dissertation, I address the authority critique at length. In addition, in Chapter 4 of this dissertation, I lay out a way in which states can have authority without having a right to rule.
[60] Simmons, "Justification and Legitimacy," 747.
[61] Simmons, Justification and Legitimacy, 746.

include referencing relevant facts and reasons that can only be determined within the particular context in which a government proposes a restriction to a protected liberty. This conclusion entails that a compelling justification can only be given on a contingent basis by an actual legal official who is in the position to weigh competing concerns within that particular case.

To help illuminate and justify my claim, I provide a closer examination of *Schenck v. United States*. In this case, the justices were considering whether the defendant's actions were punishable crimes that violated the Espionage Act of 1917. The context of their decision included the fact that United States was fighting in World War I at the time.

The defendants in the case were distributing fliers to draft-aged men, urging resistance to induction, which is a criminal offense; in their defense, they stated that were exercising their First Amendment rights. A unanimous court, in an opinion written by Justice Oliver Wendell Holmes Jr, concluded that the defendants could be convicted of an attempt to obstruct the draft because the First Amendment did not cover their situation. The court's justification was that the circumstances of wartime allow greater restrictions on free speech than would be allowed during peacetime because new and greater dangers are present. Holmes writes, "when a nation is at war, many things that might be said in time of peace are such hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right."[62]

I use *Schenck* to provide support for the following argument.

[62] *Schenck v. United States*, 249 U.S. 48-53.

Premise 1: A compelling justification for restricting a protected liberty must reference relevant facts and reasons.[63]

Premise 1 stipulates criteria for what counts as a compelling justification. Since a compelling justification is essentially the conclusion of an argument, critical reasoning has us build an argument that consists of relevant facts and reasons as premises to develop a compelling justification.

As a result, a compelling justification must be developed and delivered from a legal official who in the appropriate standpoint to assess which facts and reasons are relevant within a specific context, the one that is currently under consideration. A compelling justification can be given only on a contingent basis because it must be built and promulgated to the relevant parties from someone that has judged the particular case of a particular defendant.

Imagine instead that the defendant in *Schenck* wanted to seek the counsel of a philosopher and asked the philosopher whether the government's use of political power, punishing him for distributing flyers, was permissible. Suppose that the philosopher responded that the government has the right to rule, which it obtained from the defendant's free consent on an earlier occasion. Suppose that the defendant responds that he didn't expect the government to enter World War I, a governmental action that the defendant disapproves, when he provided his free consent. Suppose

[63] I have argued that a government must provide a compelling justification for restricting a protected liberty. This argument has been the subject-matter of sections 1-6.

that the philosopher responds that what's relevant is the fact that the government has the right to rule, which includes the ability to enter wars and punish people from attempting to avoid the draft.[64]

To provide a compelling justification, this philosopher develops an argument with the premise that the government as a right to rule; subsequent premises would only consider what that right entails; and whether that right applied to this case or not. But a right to rule is insensitive to the particular facts that we find in *Schenck*. This is unfortunate because it seems that substantive reasoning requires us to be sensitive to relevant facts.

Premise 2: Facts that govern the relevance of a reason are context-sensitive to particular facts about the situation in which a government proposes a restriction to a protected liberty.[65]

The facts that govern the relevance of Holmes's reason are facts that qualify as important considerations when assigning proper weight to competing values. When a restriction to a protected liberty is proposed, a compelling justification consists of an assessment of whether the promotion of a competing value requires a restriction of that liberty.

In *Schenck,* Holmes's reason for restricting the defendant's liberty of free speech is that the circumstances of war allow for greater restrictions of a person's

[64] It is controversial whether states can permissibly enter wars.
[65] I intentionally do not put a quantifier before "facts".

freedom of speech than would be allowable during times of peace. To give a compelling justification, Holmes assigned a certain weight to the value of safety in comparison to the value of exercising free speech within the very specific context of this case.

Conclusion: Facts about the particular context in which a government proposes a restriction to a particular liberty governs what counts as a compelling justification for restricting that particular liberty within that specific context.

Holmes would concur with this conclusion. The most often cited passage of Holmes's opinion in *Schenck* is the following paragraph.

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. … The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[66]

It seems that many people agree that the value of exercising one's freedom of speech in certain cases jeopardizes people's safety to a degree where one is justified in assigning greater weight towards protecting people's safety over protecting one's

[66] *Schenck v. United States* 249 U.S. 47.

exercise of free speech. In the written opinion for *Schenck*, Holmes gives us his now famous example of falsely shouting "Fire!" in a crowded theater.

Moreover, a proper assignment of weight, as Holmes states, involves the considerations of proximity and degree. And the relevance of these considerations is context-dependent. If Holmes followed Simmons's reasoning, in Schenck, all Holmes would need to cite in his written opinion is the United States' right to rule.

This conclusion entails that a "right to rule" is too general to serve as a compelling justification for restricting protected liberties. A general "right to rule" cannot settle a conflict between competing values within specific contexts.

A response from the entitlement theorist is that Holmes has a right to rule, which provides him the legitimate authority to settle the conflict between values.[67] For the sake of argument, suppose that Simmons's is correct about the fact that a right to rule confers legitimate authority to a government. Simmons has provided the poignant position that a state could be justified but still be illegitimate. An implication of my discussion is that a government could be legitimate, on Simmons's terms, but still be unjustified. It uses political power in an unjustified, i.e., impermissible, manner where it lacks a compelling justification for restricting a protected liberty. This conclusion is unfortunate for Simmons because he claims that people are morally bound to obey the laws of a legitimate state authority. But Simmons's

[67] I provide a full response to this objection in the upcoming chapters of this dissertation. In Chapter 3, I argue that a state needs a requisite authorization, not a legitimate status, to have authority. In Chapter 4, I argue that a state has that requisite authorization when it is granted a certain decision-making authority. The conclusions of these chapters demonstrate that a right to rule cannot explain a government's decision-making authority. Hence, a right to rule does not give Holmes the decision-making authority to settle the conflict of values in *Schenck*.

position entails that citizens are morally bound to obey laws that lack a compelling justification.

8. Conclusion

In this paper, I address central complaints that skeptics have regarding the permissibility of exercising political power. I have argued that it is not wrong for the state to restrict any morally permissible actions without a compelling moral justification; it is problematic only if the state restricts a special class of liberties without a compelling moral justification. And it is a contingent matter whether a legal system violates this special class of liberties without providing a compelling moral justification.

Chapter 3: What Authority Is and What Authority Is Not

1. Introduction

This essay is on what authority is, and what authority is not. Orthodoxy has it that authority is a species of power over others, regardless of whether that power is *de facto* or *de jure.* I argue that the orthodoxy is false. Instead, I argue that authority is a status that authorizes a person to change one's normative situation.

Two questions frame the discussion of this paper.

(1) What is "authority"?[68]

Question (1) is a conceptual question. In this paper, I explore what this question is asking prior to answering it.

(2) What is a proper method for deriving a correct answer to the first question?

Question (2) asks us to figure out a proper method for answering the conceptual question. A *method* is a technique that theorists use to explain, study, or develop accurate findings about some phenomenon. Question (2) is just as important as question (1). In my perspective, most theorists have not given enough consideration

[68]My convention for denoting that I am strictly referring to the concept of authority is when I use. quotes like so.

to the method that they use towards answering the first question, and this result is detrimental to their argument, or so I argue.

This paper is structured as follows. In section 2, I establish certain important constraints that a good method for conceptual analysis observes. In section 3, I describe a simple method that a theorist might use for discovering conceptual truths about a concept. In section 4, I show why the simple method is unreliable. In section 5, I describe the paradigmatic method, a method that I claim is the dominant method for understanding "authority" among theorists who study the concept "authority". Note that any theorist who appeals to our intuitions about what counts as a "clear" or "paradigm" case of authority as a premise in her argument is a user of the paradigmatic method. In section 6, I demonstrate that the paradigmatic method is unreliable for the same reason that the simple method is unreliable. In section 7, I provide counterexamples that show that the control model of authority, which is the result of using the paradigmatic method, is incorrect. This conclusion should be unsurprising if the paradigmatic method is unreliable at producing a correct answer. In section 8, I present an objection that the standard theorist may give and provide a reply. In section 9, I present my definition for "authority" and explain the method that I use to develop it. In addition, I discuss the implications of my account and respond to some objections. In section 10, I conclude the paper.

2. Some constraints for a good method

In this section, I establish important constraints that a good method for conceptual analysis observes.

I begin with a modest proposal that any good method ought to observe. A good method is, at minimum, reliable at producing a correct answer.

A1: A good method reliably produces a correct answer.

The next constraint tells us what kind of object forms a correct answer in conceptual analysis. This question delves into major debates that form some of the deepest divides concerning the status of conceptual analysis and the nature of philosophy itself (Chalmers 1996, Jackson 1998, DePaul & Ramsey 1998, Block & Stalnaker 1999), where the study of concepts is at center of these disputes. I take the classical approach, which states that concepts have a definitional structure (Margolis & Laurence 1999). For the classical approach, a correct answer takes the form of an accurate definition.

A2: A good method is reliable at producing an accurate definition for the concept under study.

The next constraint tells us what an accurate definition of a concept helps us understand. For theorists who study the concept "authority", it widely assumed that it is the task of a philosopher to discover and explain what the nature of that phenomenon is—i.e., what the nature of the concept under study is (Dickson 2001, ch 1, Schauer 2010).[69]

A3: A good method is reliable at producing an accurate definition that helps us understand the nature of the concept under study.

[69] The legal philosophers that I have cited study the nature of the concept "law".

This task, explaining the nature of a concept, requires a philosopher to explain what it is for some phenomenon—e.g., law, coercion, authority—to have a nature, and what it is for a theorist to attempt to ascertain the nature of that concept. This topic is very controversial (See Dickson 2001, p.17, Green 2008, p.1036, Ehrenberg 2009, p. 91, Raz 1994, 1996, 2005). But, again, I take the standard view governing what a theorist is doing when she attempts to ascertain the nature of a concept.[70] The standard view is that understanding the nature of a concept requires discovering its necessary and essential properties. A *necessary property* is a proposition about the concept under study that is necessarily true, as opposed to being contingently true. An *essential property* is a proposition about the concept under study that is not only a necessarily true proposition about the concept but is also one that is a *constitutive* feature of that concept (Dickson 2001, ch 1). It makes the concept is what it is. On this view, the task of explaining the nature of a concept consists of describing its essential properties. Thus, we may derive another constraint governing a good method for conceptual analysis.

> **A4**: A good method is reliable at determining the essential properties of the concept under study.

Finally, since an essential property is also a necessary property, another constraint governing a good method for conceptual analysis is as follows.

[70] My opponents also take the standard view on this position.

A5: A good method is reliable at determining which properties are necessary truths about the concept under study.

These constraints have the following relationship among them. If a method violates constraint **A5**, it also violates **A4**. If a property is not a necessary property, it cannot be an essential property. If a method violates constraint **A4**, it also violates constraint **A3**. We need to know which properties are the essential elements of the concept under study in order to understand its nature. Finally, due to certain standard assumptions regarding conceptual analysis, if a method violates constraint **A2**, it also violates constraint **A1**. This result would be unfortunate. If a method violates **A1**, then we should reject its use. We shouldn't use any method that is less than reliable at producing a correct answer.

In sum, in this section, I have established certain constraints governing a good method for conceptual analysis.

3. A simple method

In this section, I describe a simple method that a theorist might use to discover necessary and essential properties of a concept.

In conceptual analysis, philosophers take themselves to be discovering objective truths about a concept, i.e., truths that are observer-independent. This aim presents the following problem: How can philosophers infer conceptual truths, or

observer-independent truths, about the concept that they are studying? A simple method provides a solution via four general major steps.

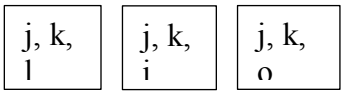
The first step of this method is as follows.

Step 1: Pick cases of that concept.

For the concept "bird", on this method, we start with an examination of what we take to be cases of the concept "bird". For instance, we might examine penguins, eagles, hawks, humming birds, and so on. The following diagram is a representation of this examination.

Examining Cases of a Concept

Suppose that each box represents a case of the concept "bird". Suppose further that each lower-case letter represents a feature of that case.



The next step is used to deduce necessary truths about the concept under study from our examination of cases.

Step 2: Figure out what feature(s) all of the examined cases share.

From the above diagram, all the examined cases of the concept “bird” share features “j” and “k”. Suppose that “j” is the feature of “having feathers” and that k is the feature of “being warm-blooded”. We reach the following proposition.

> **B1**: All the examined cases of the concept “bird” share the features of having feathers and being warm-blooded.

According to the simple method, we can infer that our examination has produced a necessary truth about the concept under study if we make the following inference.

> **Step 3**: Make the inference that one’s examination from Step 2 has produced necessary truths about the concept.

Continuing the example of the concept “bird”, for this step, a theorist makes the inference that having feathers and being warm-blooded are necessary truths of the concept “bird”. From **B1**, this theorist asserts the following proposition.

> **B2**: Having feathers and being warm-blooded are necessary properties of the concept “bird”.

This statement, **B2**, becomes a premise in an argument that a theorist makes regarding the essential properties of the concept “bird” when she takes the next step.

> **Step 4**: Make a sound argument about the essential features of the concept under study from premises stating necessary truths about that concept.

Our theorist might reason that, since other mammals are also warm-blooded, what demarcates birds from other mammals is that birds have feathers. As a result, this theorist might reason that having feathers is an essential feature of the concept "bird". That is, having feathers is what makes a bird is what it is. Hence, this theorist reaches the following conclusion.

B3: Having feathers is the essential property of the concept "bird".

At this point, from using the simple method, a theorist has derived a conclusion that allows her to produce a theory about the nature of the concept "bird". She may then build a definition for the concept "bird" from her conclusion.

In sum, the simple method is ambitious in that it attempts to derive a true fact, an observer independent truth, about a concept through an examination of cases of that concept.

4. Why is the simple method unreliable?

In this section, I argue that the simple method is unreliable and discuss the main reason for this criticism.

On the simple method, to make a sound argument in Step 4, a theorist must use true premises. The premises that a theorist uses ultimately come from the examined cases that a theorist studies in order to deduce necessary truths about the concept under study. To deduce that her examination has produced necessary truths, a theorist who uses the simple method must appeal to the following principle.

Representative Sample: If all our examined cases of the concept C have feature j, and our examined cases is a representative sample of the population, i.e., all the cases of the C, then feature j is a necessary truth about C.

Representative Sample tells us that, for a theorist to succeed, she must appeal to a constraint in statistical reasoning: the cases that we examine are a good representation of the phenomenon that we are studying. The *population*, on this analysis, consists of all the cases of a concept. This set of cases is an observer-independent fact. What counts as a representative sample of the population is an observer-independent fact as well.

We can put **Representative Sample** in the form of a question.

Are the examined cases a good representative sample of the population such that we can deduce necessary truths about the concept under study?

The following counterexample shows why examining a representative sample is needed to reliably produce necessary truths from our examination.

The Penguin Counterexample

Suppose that the following suppositions are true.

We are attempting to figure out the nature of the concept “bird.

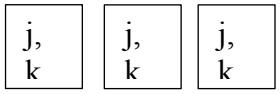
We live on a continent that is native to only birds that have an ability to fly and have no access to continents that is native to birds that do not have the ability to fly.

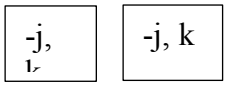
The boxes are cases of the concept “bird”.

Feature “j” represents the feature “ability to fly”.

We examined only the cases in Set A for discovering the essential elements of the concept “bird”.

A representative sample of the concept “bird” is the union of Set A and Set B.

Set A: 

Set B: 

If we examined only the cases in Set A, we could reasonably infer that the ability to fly is a necessary truth about the concept “bird”. Nevertheless, our inference would still be invalid due to the fact that not all birds have the ability to fly. Possessing the ability to fly is not a necessary truth about the concept “bird”. This analysis shows that examining an unrepresentative sample is unreliable at deducing necessary truths because there are scenarios where we may reasonably infer that a contingently true proposition is a necessary truth.

This analysis supports the conclusion that a theorist cannot reliably determine which properties are necessary truths about a concept without examining a representative sample of the population. The simple method tells a theorist to simply choose cases. But simply choosing cases does not guarantee that a theorist is examining a representative sample. The upshot is that the simple method violates constraint **A5**—i.e., it does not reliably determine which properties constitute necessary truths about the concept under study. This result entails that it is also unreliable at producing true claims about which properties are essential to the concept under examination, and this result is a violation of constraint **A4**. Thus, the simple method also violates constraint **A3**—i.e., it does not reliably produce a definition that tells us the nature of the concept under study. Hence, it also violates **A2**—i.e., it does not reliably produce an accurate definition. As a final result, it also violates constraint **A1**—i.e., it is not reliable at producing a correct answer. And this principal is a very modest constraint that any method that is used in an attempt to obtain a correct answer to a question should observe.

In sum, the simple method is unreliable because it provides a poor justification for determining which cases count as a representative set of the concept under study. It tells us to simply pick some cases. As a result, the simple method assumes away the very problem that it is supposed to diagnosis—i.e., do the cases that we examine allow us to make true claims about the concept under study?

5. The paradigmatic method

In this section, I describe the paradigmatic method, a method that I claim is the dominant method for understanding "authority" among theorists who study the concept "authority". Note that any theorist who appeals to our intuitions about what counts as a "clear" or "paradigm" case of authority as a premise in her argument is a user of the paradigmatic method.

I present two approaches towards describing the underlying reasoning process of the paradigmatic method. The first way consists of presenting a simplified model of the paradigmatic method. The simplified model of the paradigmatic method is the subject matter of section 4.1. The second approach to presenting the paradigmatic method consists of stipulating the unique turns in reasoning that a user of the paradigmatic method takes. This presentation of the paradigmatic method is the subject matter of section 4.2.

In section 4.3, I provide a flow chart that shows how the distinctions about "authority" and positions on legitimate authority all share the same underlying premise: "authority" is a species of power over others. I call this position "the control model of authority" (hereafter, "control model" for shorter reference). The control model is the result of using the paradigmatic method.

5.1 The paradigmatic method simplified

In this section, I provide a model of the paradigmatic method. This model is supposed to be a representation of the core steps of the underlying reasoning process of theorists who use the paradigmatic method.

Before I begin discussing this model in detail, I provide the following note: This model is a simple representation of the general steps in reasoning of theorists who use the paradigmatic method. The details of each theorist's conclusions differ, but this model tells us something important about the core of their underlying reasoning: how is that they can persuasively appeal to what counts as a "clear" or "paradigm" case of the concept "authority" in their argument when it is unknown what constraints determine membership to the population of the concept "authority".

A Simple Model of the Paradigmatic Method

The stipulations of this model are as follows:

(1) A theorist examines potential cases of the concept "authority".

(2) The boxes represent potential cases of the concept "authority".

(3) The theorist demarcates the cases into two sets: Set A and Set B.

(4) Each letter, "j" and "k", represents a feature of each case.

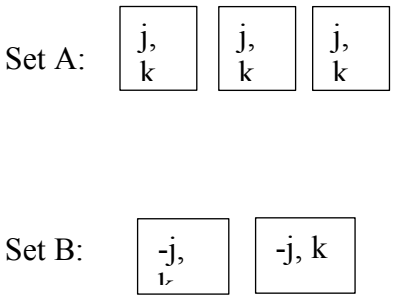
(5) The letter "k" is the feature "telling someone else what to do".

(6) Feature "j" is unknown, at first, but discoverable from examining what distinguishes cases in Set A from cases in Set B.

(7) The theorist makes an appeal to our intuitions about which cases test "positive" as bona fide cases of the concept "authority".

(8) For cases in Set A, the theorist forecasts that our intuition will test "positive", and she uses this forecast as part of her argument.

(9) For cases in Set B, the theorist forecasts that our intuition will test "negative", and she uses this forecast as part of her argument.



This model's core attribute is how it picks cases for further examination for understanding the nature of the concept "authority". It exclusively picks cases that have the feature of "telling someone else what to do". This core attribute comes from the reasoning that "paradigmatic" or "clear" cases of the concept "authority" are cases where a person is giving another person or group of people directives, rules, or commands to follow. This core attribute is the defining feature of the paradigmatic method.

The following points are the rest of the core steps in the reasoning process of a theorist who uses the paradigmatic method:

Each theorist rejects that feature "k", telling someone else what to do, is the essential feature of the concept "authority"—albeit, it remains as a necessary property of the concept "authority".

Each theorist believes that it is important to explain how feature "k", telling someone else what to do, is distinguished in authority cases from non-authority cases. To perform this examination, she discovers a feature that cases that test positive for "authority" have that cases that test negative for "authority" do not have.

Each theorist concludes that cases in Set A have feature "j" and that cases in Set B do not have feature "j".

For each theorist, feature "j" explains why feature "k", telling someone else what to do, is different in authority cases from non-authority cases. Often, they assume that the difference has to do with the fact that telling someone what to do is justified or successful in the authority case but not justified or successful in the non-authority case.

Each theorist provides an argument that feature "j" is an essential feature of the concept "authority".

At this point, the theorist ends with a theory about the concept "authority". The theory is usually a definition about some aspect about the concept "authority"[71] or a

[71] For example, Leslie Green has an account of "authority over" that requires a notion of a command as one of the conditions for "A's authority over B", (Green 1988, 41-42).

definition for the concept “authority” (Anscombe 1978, Enoch 2014, Friedman 1973, Hobbes 1991[2003], Ladenson 1980, Simmons 1979, 1993, 2001, Raz 1979[2002], 1985, Ripstein 2003, Wolff 1970).

The following excerpt from Robert Paul Wolff (1970) demonstrates how closely this model fits his study of the concept “authority”. Wolff writes,

> Authority is the right to command, and correlatively, the right to be obeyed. It must be distinguished from power, which is the ability to compel compliance, either through the use of the threat of force. When I turn over my wallet to a thief who is holding me at gunpoint, I do so because the fate with which he threatens me is worse than the loss of money which I am made to suffer. I grant that he has power over me, but I would hardly suppose that he has authority, that is, that he has a right to demand my money and that I have an obligation to give it to him. When the government presents me with a bill for taxes, on the other hand, I pay it (normally) even though I do not wish to, and even if I think I can get away with not paying. It is, after all, the duly constituted government, and hence it has a right to tax me. It has authority over me. Sometimes, of course, I cheat the government, but even so, I acknowledge its authority, for who would speak of “cheating” a thief? (Ibid, 20-21).

In the first sentence, Wolff starts with a definition for the concept “authority”. This definition tells us what, according to Wolff, are the essential features of the concept “authority”: a possession of a right to command and a possession of a right to

be obeyed. The rest of the paragraph shows us how Wolff has reasoned to this definition for “authority”.

Wolff argues for his definition for “authority” from examining two types of cases: robbers and governments. For each case, an entity is telling Wolff to hand over his money to the respective entity. In referring to these two types of cases, Wolff is appealing to our intuitions, and his own, about which type of case tests “positive” for being a case of the concept “authority”. Wolff forecasts that our intuitions will test “positive” for government cases and test “negative” for robber cases, or else his argument is a non-starter. Wolff reinforces this intuition with the reason that it doesn’t make sense to cheat a thief while it makes sense to cheat one’s government.

Furthermore, Wolff argues that what distinguishes government cases from robber cases—that is, with respect to the feature of telling people to hand over their money—is that governments have a right to rule—or, more specifically, in this case, a right to tax—that robbers do not have. The possession of this right is the essential property of “authority”, according to Wolff’s analysis, because it demarcates governments from robbers. Finally, Wolff’s reasoning process concludes with a definition for the concept “authority”—i.e., a right to rule and a right to be obeyed.

This exegesis of Wolff’s argument shows how well the simplified model of the paradigmatic method fits Wolff’s reasoning process. Moreover, I have chosen to present Wolff’s analysis for a reason. Wolff uses his definition for “authority” as a

premise in his argument for the existence of a dilemma, "the problem of authority".[72] Wolff's version of the problem of authority questions how it can be rational to surrender one's judgment to another? Wolff's dilemma, the problem of authority, has been one of the most influential discussions on authority in contemporary philosophical literature. One could easily argue that the literature on authority has grown as a response to Wolff's dilemma.[73] The literature on authority has largely grown in response to Wolff's analysis that is perhaps a paradigm case of a theorist who uses the paradigmatic method.

In this section, I have explained the underlying reasoning process of theorists who appeal to our intuitions of what counts as a case of the concept "authority" as premises in their argument that develops a definition for "authority".

5.2 The paradigmatic method with more context

In this section, I provide more substantive context of the reasoning of theorists who use the paradigmatic method than what the simplified model of the paradigmatic method provides.

[72] Wolff's version of the problem of authority questions how can it ever be rational to surrender one's judgment to another when obligations of autonomy require us to think for ourselves, (Ibid, 25-31).

[73] Reponses to Wolff come from Joseph Raz (1979 [2002], 1985). Raz develops his theory of authority based on a response to Wolff's dilemma. Raz's aim is to reconcile authority with rationality. And Raz's account of authority is, perhaps, the most influential account of authority among legal and political theorists. Other discussions of the problem of authority include (Murphy 1997).

The paradigmatic method uniquely determines which turns in reasoning that a theorist who uses it takes—albeit, theorists reach different conclusions about "authority" from using it. Although they reach different conclusions, philosophers who use the paradigmatic method uniformly reach the same broad conclusion: the conditions that make an authority legitimate or justified are the same elements that constitute the essential features of the concept "authority".

As we shall see, the theorists who conclude with a definition for "authority", or a definition for an aspect about "authority", provide a definition that refers to the grounds for authority—i.e., the conditions that make authority legitimate or justified. For instance, as we have already seen, Wolff defines "authority" as a right to rule and a right to be obeyed. For a number of important theorists, the actual receipt of this correlative right makes the authority in question legitimate (Wolff 1970, Simmons 1979, 2001).

The point of this section is to examine why this uniformity exists—i.e., why do philosophers, who use the paradigmatic method, uniformly think that the conditions for legitimacy are the same elements that define the concept "authority". The existence of this uniformity can be attributed to the following three general major steps.

Step 1: A theorist takes some action or feature of a clear case of authority to be significant for analyzing what "authority" is.

What kinds of cases that a theorist uses is important, for the theorist attempts to discover which elements are essential to the concept "authority" from the cases that she examines. The standard theorists use exclusively examples of someone telling another person what to do or an example of a type of entity that is usually known for telling other people what to do (e.g., governmental authorities). These types of cases are supposed to be clear cases of the concept "authority".

For instance, in "Authority and Reason-Giving", David Enoch (2014) opens his paper with a case of parental authority. He writes,

> Arguably, you have authority over your 7 year-old son. This means, perhaps among other things, that you can, by your mere say-so, create duties for your son. You just have to tell him to go to his room, and suddenly he is under a duty to go to his room, a duty that just until a minute ago he did not have. Suddenly, by not going to his room—something that until just a minute ago was perfectly permissible for him to do—he will be acting wrongly? How did this magic happen? (Enoch 2014, 296).

Enoch uses a case of parental authority where you are telling your 7 year-old son to go to his room. What Enoch takes significant for further analysis is the fact that your mere say-so creates a duty for your son. Other standard theorists have a similar analysis. What each theorist takes to be significant about her case presupposes the fact that the authority in question is giving a command, directive, or rule to follow.

To verify the truth of this observation, I provide a sample of the type of cases that theorist cite for discovering the essential elements for the concept "authority". The following list is such a sample.

> Wolff: robber, governmental entity (1970).
>
> Ladenson: governmental entity (Ladenson 1980).
>
> Raz: arbitrator, court judge, legislative entity (Raz 1985)
>
> Green: governmental entity (Green 1988).
>
> Enoch: parental authority, governmental entity, dean, emergency situations, a dictator's son (Enoch 2014).[74]

All these cases fit a certain type. I call them "authority over conduct" cases.[75] "Authority over conduct" cases all share the feature of telling another person what to do. All these cases have the feature of a person or entity giving commands, directives, or rules for other people to follow. Moreover, in all these cases, "authority" results in controlling another person's actions or behaviors. For telling another person what to do is a mechanism used to control another person's actions or behaviors.

> **Step 2**: A theorist provides an argument that develops the conditions for that feature to be justified or legitimate.

---

[74] An emergency situation is the case where there is an emergency and one person needs to shout commands at others in order to coordinate a solution. It is often thought that the person shouting the commands is an authority. In Enoch's child of a dictator scenario, the child orders you perform some actions, and Enoch appeals to our intuitions that the child does not have authority as premises to his account of authority, (304-305).

[75] Raz calls these cases "authority over people" (Raz 1979[2002], 19).

When someone, Person A, commands or directs another person, Person B, to perform some action in an authoritative manner, it is widely agreed that Person A requires Person B to surrender to Person A's judgement. Most theorists concede that it is problematic for Person A to require the "surrendering of private judgment", "deference", and "submission" to Person A's commands or directives. How authority can be justified in requiring the surrender of one's judgment has been called one of the "foremost puzzles" on authority (Raz 1979 [2002], Murphy 1997).[76]

This issue has been called the "problem of authority", and responding to it has been the starting point for discovering the essential elements that make up the concept "authority" for nearly all theorists who attempt to define "authority". The result is that a theorist provides an argument that stipulates the conditions for when telling another person what to do is justified or legitimate.

The standard theorists think that the conditions that make an authority legitimate or justified are the same elements that constitute the essential features of the concept "authority". I demonstrate that the reason for this result is due to the cases that they examine.

The types of cases that the standard theorists examine suggest that the conditions that give Person A authority are the very same conditions that ground Person A's authority over Person B's conduct. Let's examine these cases in detail.

[76] Note that Raz doesn't think that authority requires surrender of judgment. His aim is to reconcile authority with rationality.

Robber: A robber tells a victim to hand over her wallet.

Parent: Jack tells his son to pick up his toys.

Stranger: John tells a passerby to mow his lawn.

State: A government tells a citizen what to do.

Most people agree that robbers do not have authority over their victims and that strangers do not have authority over other strangers. In addition, barring exceptional circumstances, most agree that parents have authority over their children. However, it is controversial whether governments have authority over their subjects.

In the table below, I summarize the intuitions that people, theorists and laypeople alike, would probably have about these cases. My claim is that theorists forecast that we would have the following intuitions when we read their respective arguments.[77]

Figure 1: Appeal to Our Common Intuitions

Case	Case of "Authority"?	Legitimate?
Robber	No	No

[77] Theorist forecasts and appeals to common intuitions about these type of cases.

Parent	Yes	Yes
Stranger	No	No
Government	controversial	controversial

The question "Case of Authority?" asks if people often have a positive intuition that the respective case counts as a case of authority. If the response is "yes", the case tests positive for the variable "authority". If the response is "no", the case tests negative for the variable "authority". If the response is "controversial", it is controversial what people think about the case.

The question "Legitimate?" asks if people often have a positive intuition that the respective case counts as a case of a legitimate authority. If the response is "yes", the case tests positive for the variable "legitimate". If the response is "no", the case tests negative for the variable "legitimate". If the response is "controversial", it is controversial what people think about the case.[78]

The reason that I talk about "authority" and "legitimate" in terms of variables is that we do not know exactly what reference they have—e.g., what element that each variable refers to. Nonetheless, we usually think that there is some relationship between them.

[78] The reason that I talk about "authority" and "legitimate" in terms of variables is that we do not know exactly what reference they have—e.g., what element that each variable refers to. Nonetheless, we usually think that there is some relationship between them.

The table shows that, among these cases, “authority” has a co-extensive relationship with the variable “legitimate”: the cases that test positive for “authority” also test positive for “legitimate”. A co-extensive relationship suggests that “legitimate” is a necessary variable for “authority”. A case is not a case of “authority” unless it is “legitimate”.

The table also shows that, among these cases, “authority” has a dependent relationship upon “legitimate”. The cases that test positive for “authority” test positive *because* it also tests positive for “legitimate”. The cases that test negative for “authority” test negative *because* it also tests negative for “legitimate”. A dependent relationship suggests that “legitimate” is an essential variable to “authority”.

Moreover, in the controversial case, **Government**, people often think that if a government has authority, it is because it legitimate. Thus, our intuitions in the **Government** only confirms the above results.

From examining these types of cases, people often come to the following conclusion:

Legitimacy is a necessary and an essential element to authority.

The popularity of this conclusion is confirmed through the next step of the paradigmatic method.

Step 3: A theorist provides a definition for "authority" that is identical to the conditions for legitimacy that she has identified in the previous step.

Below are some examples.

G.E.M. Anscombe: "Authority on the part of those who give orders and make regulations is: a right to be obeyed. More amply, we may say: authority is a regular right to be obeyed in a domain of decision," (Anscombe 1978, 144).

Robert Paul Wolff: "Authority is the right to command, and correlatively, the right to be obeyed," (Wolff 1970, 20).

Joseph Raz: "Authority is ability to change reasons. Power is ability to change a special type of reasons, namely protected ones...we should regard authority basically as a species of power," (Raz 1979 [2002], 19).

David Enoch: "So authority is an instance of the power to give reasons robustly," (Enoch 2014, 300). "And so we get that authority consists in the Hohfeldian power to create duties or something close enough to duties (some suitably delineated quasi-protected reasons)," (Enoch 2014, 322).

Each theorist provides a definition for authority that is identical to what the theorist takes to be the conditions for the authority to be justified or legitimate.

In sum, I have shown why theorists uniformly think that the conditions for legitimacy are the same elements that define the concept "authority".

5.3 The control model

In this section, I discuss how the control model is the result of using the paradigmatic method. Moreover, I show how distinctions about authority and positions on legitimate authority all share the premise that "authority" is a species of power over.

The following claim from Steven Lukes presents the general consensus on the topic of authority: "authority appears to be part of that network of control concepts that includes power, coercion, force, manipulation, and persuasion, etc," (Lukes 1987 [1990], 206). In my view, the reason for this consensus is due to the cases that they examine. They only examine cases that corroborate the idea that authority is necessarily tied to controlling another person's behaviors.

As a result, the standard theorists exclusively examine "authority over conduct" cases. "Authority over conduct" is about having some (normative) power that allows one to (legitimately) control another's behaviors. This kind of authority is exercised over other people. It is also usually thought that only certain types of authorities have this kind of authority—e.g., state authorities, parents, etc.[79]

"Authority over conduct" is synonymous with "power over": To have authority over someone is to have power over that person's conduct. And if the concept "authority" refers to what gives someone power over the conduct of others, the following claim holds.

[79] Raz states, "A person is an authority if he has relatively permanent and pervasive authority over persons, that is, either authority over a large group of people or with respect to various spheres of activity, or both," (Raz 1979[2002], 19).

Authority is a species of “power over”.

The above statement is not precise enough to be an adequate definition for “authority”, but it offers a theorist a clear direction towards developing one. To be more precise, a theorist would need to specify which species of “power over” that “authority” is. And that is exactly what the standard theorists do to develop a definition for “authority”. I call this model of developing a definition for the concept “authority” the “control model”. On the control model, to develop a definition for “authority”, a theorist specifies which species of “power over” that the concept “authority” is.

The control model is the result of using the paradigmatic method. A user of the paradigmatic method exclusively uses “authority over conduct” cases for discovering the essential properties of the concept “authority” because these cases count as clear cases of the concept “authority”.

The literature on authority has largely developed on a major distinction between *de jure* authority and *de facto* authority. This distinction usually comes first in an exegesis about major debates on authority or the literature of authority in general. For instance, in the first major section of his entry “Authority” in the Stanford Encyclopedia of Philosophy, Thomas Christiano begins with these words,

> Let us start with the distinctions between political authority as a normative notion (or morally legitimate authority) and political authority as a non-normative notion (or *de facto* authority) and between political authority in either of these senses and political power. To say that a state has authority in the normative sense is to say something normative about the relationship between the state and its subjects. This is the relationship that we will concentrate on in what follows.

As Christiano's quote points out, philosophers make the distinction between *de* facto and *de jure* authority because they that we should distinguish "authority" from the *de facto* use of power over people. For philosophers, "authority" is the use of a normative power over people's behaviors. This distinction is usually the accepted starting point of a theory on authority.

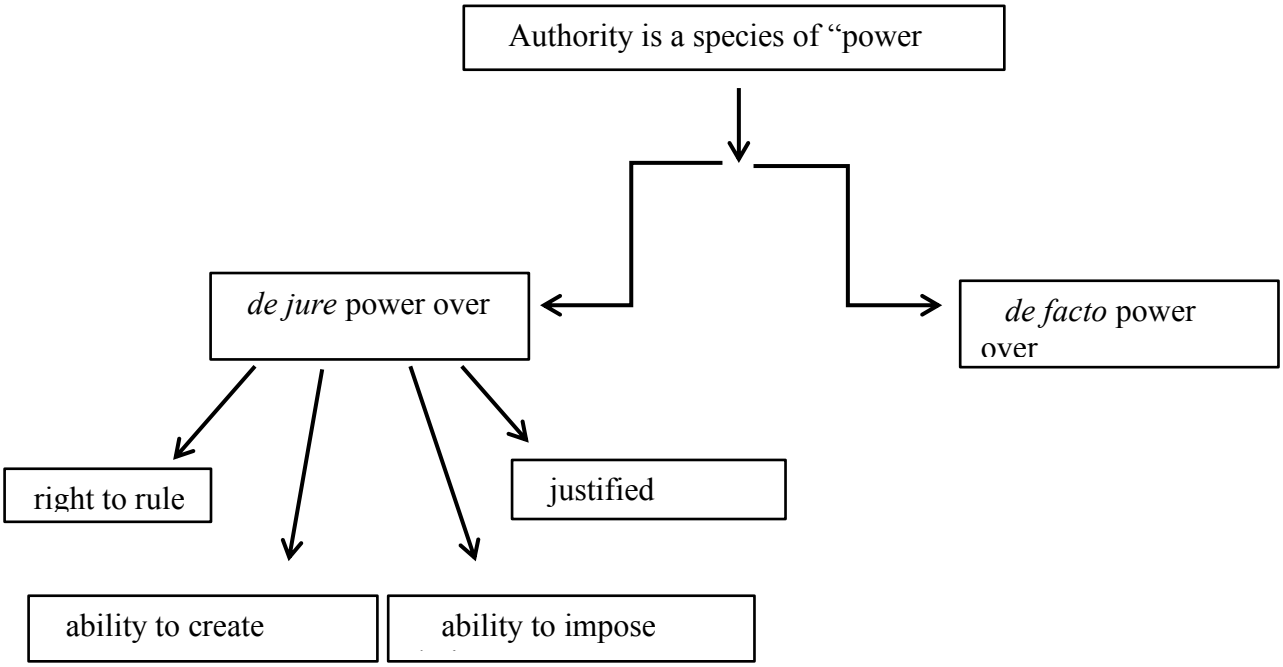
Notice, however, that the *de jure* and *de facto* distinction presupposes the proposition that authority is a species of power over. *De jure* power is a species of a normative power over people's conduct. *De facto* power is a species of an effective power over people's conduct. In other words, *de jure* power and *de facto* power are the broadest types of "power over".

Philosophers usually think that "authority" is a type of *de jure* power (for e.g., Raz 1985, Enoch 2014). In contrast, social scientists usually think that "authority" is a type of *de facto* power (Weber 1918[1970]). In the development of their view, philosophers often quickly reject the position that social scientists hold on authority and continue their argument to discover which species of *de jure* power that

"authority" is. The end result is that the standard theorists develop a definition for "authority" that references a species of a normative power over others. The three most basic accounts define "authority" as a "right to rule" (Hobbes 1991[2003], Wolff 1970, Simmons 1979, 1993, 2001),[80] "ability to impose duties" (Enoch 2014),[81] and "justified coercion" (Ladenson 1980). And Raz's (1979[2002], 1985) influential account defines "authority" as the "ability to change reasons".

Figure 2 is a flowchart that presents these positions.

Figure 2: The Control Model



[80] More accurately, Hobbes defines authority as follows: "And as the Right of possession, is called Dominion; so the Right of doing any Action, is called Authority and sometimes warrant. So that by Authority, is always understood a Right of doing any act," (*Leviathan* XVI).
[81] Christopher Morris (1998) has a weaker version of this position. Morris states that people have a duty of non-interference vis-à-vis an authority.

The upshot is that the literature on "authority" has developed upon one major underlying premise: "authority" is a species of power over. The substantive result is that nearly all theorists who study "authority" have a theory of authority that fits the control model, one that assumes that "authority" is a species of power over. I have argued that this result isn't surprising because nearly all theorists use the paradigmatic method to discover the essential elements of the concept "authority". Nonetheless, all these theories of authority stand and fall upon one major underlying premise—i.e., "authority" is a species of power over.

6. The problem of the existence of a pattern of false negative cases

In this section, I describe the problem of the existence of a pattern of false negative cases. I argue that the mere possible existence of a pattern of false negative cases show that the paradigmatic method is unreliable at producing a correct answer.

The paradigmatic method makes an improvement upon the simple method in that it provides a justification for choosing which cases are further examined for discovering which elements constitute the essential properties of the concept "authority". It tells us to pick "clear" or "paradigm" cases of the concept "authority". In contrast, the simple method tells us to simply pick cases. As a result, the simple method provides no guidance of how to choose a representative sample of the population. On the other hand, the paradigmatic method tells us that a representative sample can be achieved from choosing "clear" or "paradigm" cases.

Perhaps, the reason why the paradigmatic prescribes a theorist to choose "clear" or "paradigm" cases of the concept "authority" is that choosing "clear" or "paradigm" cases guarantees that the theorist is choosing true positive cases. *True positive cases*, on this analysis, are cases that are correctly identified as true cases of the concept under study. For the concept "authority", these cases are the cases that are correctly identified to be true cases of the concept "authority". For instance, parent cases are often treated as true positive cases of the concept "authority".[82] Hence, a charitable reading of the paradigmatic method states that choosing true positive cases allows a theorist to examine cases that are a representative sample of the population—i.e., all of cases of the concept "authority".

Nonetheless, I argue that choosing only true positive cases is insufficient toward reasonably inferring that a theorist is examining a sample that is representative of the population. There could be a pattern of false negative cases, ones that show that a feature that a theorist takes to be essential property of the concept under study is only contingently true. *False negative cases*, on this analysis, are cases that are incorrectly identified to be false cases of the concept under study.

A Pattern of False Negative Cases

Suppose that the following suppositions are true.

[82] To a lesser extent, government authority cases are treated as true positive cases of the concept "authority". False positive cases, in this analysis, are cases that are incorrectly identified as true cases of the concept under study.

(1) The boxes represent cases of the concept "authority".

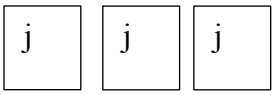
(2) The letter "j" represents the feature of "being legitimate".

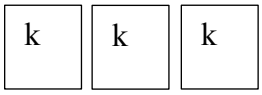
(3) The letter "k" represents an unknown feature of the case.

(4) Clear cases of the concept "authority", ones that fit the control model, are cases in Set A.

(5) Unexamined cases of the concept "authority", ones that do not fit the control model, are the cases in Set B.

(6) A representative sample of the population is the union of Set A and Set B.

Set A: 

Set B: 

From these suppositions, the first observation to make is that choosing "clear" cases creates a selection effect. A *selection effect*, on this analysis, is the event where a theorist selects a collection of cases due to a feature that all the cases share. On the control model, all the cases share the feature of exhibiting "authority over conduct".

A selection effect causes a selection bias.[83] A *selection bias* occurs when one's selection of cases is not representative of the population. A selection bias is

[83] In statistics, theorists define selection effects and selection bias interchangeably.

problematic when the unexamined cases shows that a feature that we take to be essential to a concept is more particular to the kinds of cases that we are examining—mainly due to another particular feature that these kinds of cases share.[84]

In our situation, the selection effect of choosing "clear" cases governs which cases are further examined for discovering the essential elements that make up the concept "authority". However, if there is a selection bias, there may be a pattern of false negative cases, which shows that feature j is only a contingently true proposition about the concept "authority". That is, feature j is true for only a subset of cases of the concept "authority". Yet, the selection effect of choosing "clear" cases has us reasonably infer that j is not only a necessary feature but also a candidate for being an essential property of the concept "authority".

A Pattern of False Negative Cases suggests that the following conclusion is true: Since concerns about legitimacy are only applicable to "authority over conduct" cases, the feature of "being legitimate" may be a feature that is more particular to "authority over conduct" cases rather than being a necessarily true proposition about the concept "authority".

I return to the **Penguin Counterexample** as an analogical counterargument to argue for this result. In the **Penguin Counterexample**, we have a bias towards thinking that all birds have the ability to fly. This bias results in the inference that

[84] Since concerns about legitimacy are only applicable to "authority over conduct" cases, legitimacy conditions may be a feature that is more particular to "authority over conduct" cases rather than being a necessarily true proposition about the concept "authority".

there are no non-flying cases of the concept “bird”, such as penguins. However, if we examined penguins, we would see that the following results are true.

(1) Flying cases are only a subset of all the cases of the concept “bird”.

Thus,

(2) The feature of “having the ability to fly” is only a contingently true element about the concept “bird”. (This conclusion follows from (1).)

Thus,

(3) Some other element, other than the ability to fly, must be the essential element of the concept “bird”. (This conclusion follows from (2).)

The following case is the equivalent of the **Penguin Counterexample** with respect to the concept “authority”. (Many more similar cases will be examined at the end of section 7.)

Sex Refusal: John pressures Jane to have sex with him, but Jane refuses.

In this situation, Jane does not exert power over John’s conduct when she refuses to have sex with him. This case is not an “authority over conduct” case. She

also does not hold pervasive authority over a body of people or spheres of activity. Yet, Jane has the authority to refuse giving John her permission to have sex with her.

A theorist may have a bias towards thinking that *Sex Refusal* does not count as a case of the concept "authority" because it is unclear whether it counts as a case or not. But, if it did count as a case, we would reach the following conclusions.

> (1') Legitimacy cases are only a subset of all the cases of the concept "authority".

An examination of whether Jane is a legitimate authority does not apply in her case. She simply has the *authority to* refuse to have sex with John. As we can see, examining what makes an authority legitimate is only applicable to "authority over conduct" cases. In contrast, Sex Refusal is an example of an "authority to" case. Thus,

> (2') The feature of possessing legitimacy is only contingently true element about the concept "authority" (follows from 1').

The possession of legitimacy is only a contingently true element because it is only applicable to "authority over conduct" cases, which is a only subset of all cases of the concept "authority". Thus,

> (3') Some other element, other than the element that makes an authority legitimate, is the essential element of the concept "authority" (follows from 2').

An element that is true for only a subset of cases cannot be the element that is essential to the concept "authority".

So far, what I have argued is that the above conclusions would follow *if* there were an existing pattern of false negatives cases. I now argue that it is likely that there is an existing pattern of false negatives from choosing "clear" cases. However, just the mere existence of this possibility entails that we cannot reasonably infer that examining only "clear" cases (or "authority over conduct" cases) provides a representative sample.

In turn, this result entails that we cannot reasonably infer that the paradigmatic method is reliable at producing conceptual truths about the concept "authority". This result is a violation of **A5**. Given a violation of **A5**, the final conclusion is that we ought to reject using the paradigmatic method because it is unreliable at producing a correct answer. To note, this rejection of the paradigmatic method is the same reason that we ought to reject the simple method.

I now make good on this final argument for this section. If we leave "authority to" cases unexamined, just like if we left non-flying birds unexamined, we would have a blind spot from seeing that "authority to" cases count as cases of the concept "authority" just like how we have a blind spot from seeing that non-flying cases of birds count as cases of the concept "bird" in the **Penguin Counterexample**. And we could easily see how the criterion of choosing only clear case would create such a blind spot, which leaves room open for the likelihood that a pattern of false negative

cases exists, ones that show that facts about "authority over conduct" cases are only contingently true.

In sum, in this section, I have described the problem of a pattern of false negative cases. It shows that the paradigmatic method fails for the same reason that the simple method fails—i.e., we cannot reliably determine whether our examination has yielded conceptual truths about the concept "authority".

7. Correlated Fact

In this section, I argue that the control model's core underlying claim—i.e., "authority" is a species of power over—is false. The upshot is that not only is the paradigmatic method unreliable but it also produces invariably incorrect results.

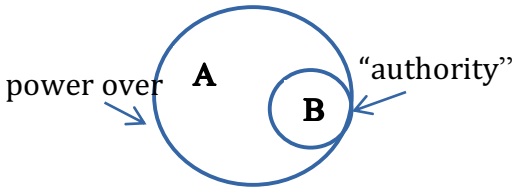
The standard theorists are committed to the following claim:

"Authority" is a species of "power over".

This statement serves as the core underlying assumption for every position on legitimate authority where the respective theorist defines "authority" with the elements of "legitimate authority". These include the following accounts: right to rule (Wolff 1970, Simmons 2000), power to impose duties (Enoch 2014), justification to coerce (Ladenson 1980), and power to change reasons (Raz 1979, 1985). They all stand or fall on the veracity of this statement.

Necessary Fact represents the statement that "authority" is a species of power over.

Necessary Fact



For **Necessary Fact**, some non-authority cases are also a species of "power over". For example, **Robber** is an example of such a case. **Robber** fits in the area labeled "A" in **Necessary Fact**.

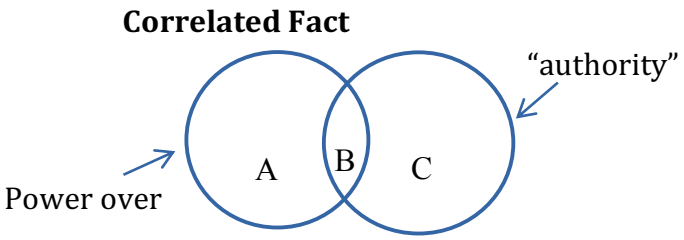
Moreover, for **Necessary Fact**, all cases of authority are species of power over. For instance, **Parent** is an example of such a case. **Parent** fits in the area labeled "B" in **Necessary Fact**.

Notice that if you examine only cases where someone is telling another person what to do, you are examining only cases that fit inside the entire circle "power over". Examining only these type of cases—i.e., "authority over conduct" cases—corroborates the position that authority is essentially about controlling another person's behavior or conduct. But, to put it colloquially, use of the paradigmatic method prevents a theorist from thinking outside the control model box.[85] Many

[85] A notable exception is Joseph Raz. Raz is, perhaps, the most meticulous thinker about "authority". He examines "authority to" cases.

standard theorists have not examined any cases outside the "power over" circle.[86] Moreover, if **Necessary Fact** is false, then the paradigmatic method has invariably produced incorrect results for the standard theorists who use it.

Correlated Fact represents the situation where the standard theorists are wrong—i.e., "authority" is only correlated with "power over".



Each category has the following respective description.

A: Non-authority cases that exhibit power over others—e.g. **Robber**.

B: Cases of "authority" that exhibit a species of power over others—e.g., **Parent**.

C: Cases of "authority" that do not exhibit a species of power over others.

To argue for **Correlated Fact**, I show that there is a reason why there is a correlation between "authority" and "power over" and their correlation depends on an element

[86] However, a notable exception is Joseph Raz, who is perhaps the most meticulous thinker about "authority". He does examine "authority to" cases. I respond to his objections regarding "authority to" during a presentation of my account.

that isn't essential to "authority". In addition, I present some cases that fit area "C" in **Correlated Fact**.

I must introduce a term to provide this counterargument. *Scope of authority* is the domain or area that a person has authority over. For instance, a pilot's scope of authority includes the power to command customers to put on their seatbelts, but commanding customers to stay at a certain hotel franchise is outside that pilot's scope of authority.

The variable "scope of authority" provides depth to our understanding of "authority" because it helps us understand a dimension about "authority". But we ought to be clear about a critical issue: it only tells us something about the domain or scope that a person has authority over rather than whether that person has authority or not.

The cases that fit category "B" in **Correlated Fact** are cases of authority where the authority's scope of authority includes power over people's conduct—e.g., **Parent**. The cases that fit category "C" in **Correlated Fact** are cases of authority where the authority's scope of authority does not include power over people's conduct. Hence, whether a case of authority exhibits power over another person's conduct is dependent upon a dimension of "authority" rather than an essential element of "authority".

Consider the following case.

Self-determination: Mei has the authority to determine what her life goals are.

Mei's scope of authority extends to determining what her own life goals are. In **Parent**, Jack's scope of authority extends to commanding his son to pick up his toys. These cases present examples of different scopes of authority, but they both still have authority over a certain domain. The variable "scope of authority" provides us more information about each case, information that is more particular to the case in question. It tells us a dimension about a person's authority rather than an essential element of it, an element that tells us what makes "authority" is what it is.

A response from the standard theorists is that "power over" is not dependent on the variable "scope of authority". They might argue that existence of "power over" is dependent upon the *type* of authority it is—e.g., government, parents, arbitrators. These authorities are the ones that have "relatively permanent and pervasive authority over persons, that is, either authority over a large group of people or with respect to various spheres of activity, or both," (Raz 1979[2002], 19).[87] This objection continues: It is nature of these type of authorities to have power over others. And we must examine these types of cases to discover what the nature of "authority" is.

To argue that "power over" is dependent upon "scope of authority" rather than the type of authority it is, I present an example of where the paradigm "power over"

[87] For example, Raz states that authority over himself is a degenerate form of authority.

case of authority—i.e., governmental authority—does not include "power over". Consider the following case.

> **Ultra-Libertarian Government**: An ultra-libertarian government creates only immunities for its citizens against the governmental use of power.[88]

This ultra-libertarian government creates disabilities against governmental actors from exerting power over citizens. For example, in this ultra-libertarian government, governmental officials have a disability against declaring a national emergency to tax people in order to build a wall. In addition, they also have a disability against making laws that tax citizens for wealth redistribution schemes or for funding a foreign war.

This government's scope of authority includes the ability to create disabilities and immunities in society. From its distribution of disabilities and immunities among members in society, it has no power over the citizen's behaviors or conduct. It has created constraints against only its own actors.

This example shows that power over is dependent on the variable "scope of authority" rather than the type of authority it is. In addition, **Ultra-Libertarian Government** does require its citizens to surrender their judgment to its rules because it is granting them an immunity rather than directing them to a requirement. As a result, the problem of authority doesn't apply to this case of government.

In sum, in this section, I have argued that **Correlated Fact** is true. If so, "authority" is not a species of "power over". As a result, the control model's core

[88] Immunities is a Hohfeldian term, (Hohfeld 1913). Hohfeld provides a definition for jural relations in terms of each other as correlatives and opposites.

claim is false. This result shouldn't be surprising. In the previous section, I have argued that the paradigmatic method is unreliable, and the control model is the result of using the paradigmatic method.

8. An Objection Against Necessary Features

In this section, I provide an objection that comes from a charitable reading of the standard position.

An objection that a standard theorist may give is that **A4** does not entail **A5**. That is, we need not reliably determine which properties are necessary in order to determine which properties are essential elements to the concept "authority". According to this objection, we determine a concept's essential elements or its nature through identifying what features are important or fundamental to the concept under study. Hence, according to this objection, a violation of **A5** does not entail a violation of **A1**.

Schauer provides this kind of argument for the concept "bird". He writes,

> [W]e should ask whether there is not something about *flying* that will help us to "understand" the "nature" (in the non-technical sense) of birds. It is true that penguins and emus are birds and do not fly, and that bats fly but are not birds, so flying is neither necessary nor a sufficient condition for birdness. But it is surely of great interest that almost all birds fly and almost all nonbird vertebrates do not fly, and thus if we think about why, how, and when birds fly

> we are likely to learn something of great interest about birds. Moreover, what we learn may increase knowledge for its own sake, but may also have practical importance for understanding birds and understanding the physics of flight, (Schauer 2013, 25).

Schauer argues that having the ability to fly is not necessary to be a bird, but it is still an element that tells us something essential about the nature of the concept "bird". For Schauer, it is surely of great importance that almost all birds fly.

The standard theorists may provide a counter-objection that has the same structure as Schauer's argument. They may argue that the conditions that make an authority legitimate are fundamental to the concept "authority". And what's fundamental to the concept "authority" tells us about the nature of authority.

A charitable reading of the standard position replies as follows: A theorist need examine only a fundamental case. After examining that fundamental case, a theorist may correctly reason about what element is essential to understanding the nature of the concept "authority".

Indeed, the standard theorists seem to be making this kind of argument. For instance, Raz writes,

> The advantage of the power analysis of authority is that is successfully meets the objection to the simple explanation and dissolves the paradoxes of authority, (Raz 2002[1979], 21).

Raz states that a power analysis of authority successfully replies to important objections and solves important puzzles. Philosophers often pose important objections and puzzles that need to be resolved in order to figure out a fundamental aspect about the concept that they are studying. On this method, the philosopher makes no claim about examining a representative sample of cases of the concept that they are studying. How conceptual analysis is carried out, on this method, is through figuring out some issue that is important to the concept under study. And, through resolving that important objection or puzzle, we come to an understanding about the nature of that concept.

More precisely, the standard theorists think that a theory of authority must resolve an issue posed by the problem of authority. Raz puts the "problem of authority" most succinctly in the following quote: "How can it ever be that one has a duty to subject one's will and judgment to those of another?" (Raz, 2006, 1012). And the problem of authority, according to the standard theorists, requires us to determine what makes an authority's claim upon our conduct justified or legitimate?

The problem with this reply, however, is that these theorists are still attempting to provide a definition for the concept "authority". If they were simply giving a theory about legitimate authority, one that stipulates necessary and sufficient conditions for legitimacy, their results would be limited to a subset of cases. I concede that the standard theorists are providing a theory about legitimate authority but deny that they are providing a theory about the concept "authority".

This result shows that an essential property is indeed a necessary property. For if what's essential is just what's considered to be important or fundamental, even if only contingently true, then the result would be a definition that doesn't apply to all cases of the concept "authority", such as **Sex Refusal**, **Self-Determination**, and **Ultra-Libertarian Government**.

In sum, in this section, I argue that the standard position on "authority" is more limited in scope than they claim. They can't claim to be giving a definition for the concept "authority".

9. Authority as Authorization

In this section, I present my theory regarding the nature of authority. I first stipulate what my definition is. In section 9.2, I discuss the method that I use to develop it. In section 9.3, I discuss the implications of my view. In section 9.4 and 9.5, I respond to two different set of objections. In 9.6, I provide some final remarks about my view.

My definition for the concept "authority" is as follows:

Authority as Authorization

Authority is a status that authorizes a person or entity to change one's normative situation.

In the following sections, I discuss the method that I use to build this definition, the meaning of each component, and the implications of my view.

9.1 The Tree of Elements Method

In this section, I discuss the method that I use to build my definition for "authority".

To build a definition for "authority", I start with figuring out the best evidence for determining the essential and necessary properties of the concept "authority": roots of authority. *Roots of authority* are pairings between the concept "authority" with a preposition that modifies the meaning of "authority" in order to address a relevant context at hand.[89] For example, we might pair "authority" with the preposition "over" to apply "authority over" to a context in which the concept "authority" is applicable.

Roots of authority provide the best evidence for discovering the essential and necessary elements of the concept "authority". The reason is because they are modifications of the concept "authority" as it applies to a particular context. As a result, they are just one notch less abstract than the concept "authority".

On the other hand, examining types (or cases) of authorities has proven to be ineffective in allowing us to reasonably determine whether we are examining features that are more particular to the case at hand or facts about the concept "authority". In

[89] Other theorists who extensively examine (what I call) "roots of authority" are Friedman (1973) and Raz (1979 [2002], ch 1).

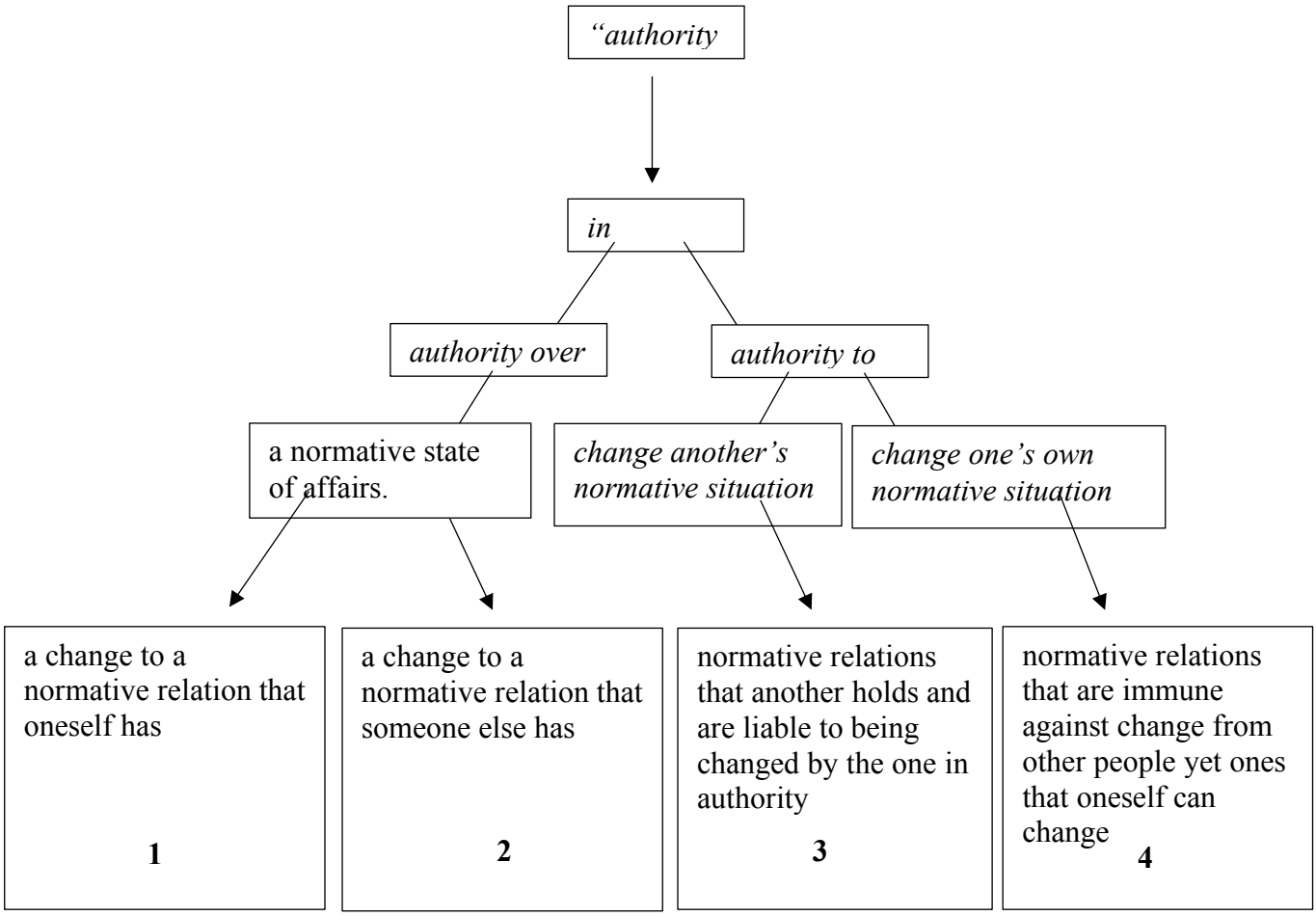
contrast, roots of authority allow us to determine facts about "authority" from examining its structural properties as we modify its meaning simply with the addition of a preposition.

The following list includes all the roots of authority.

in authority
authority to
authority over

In my view, the roots of authority are the essential elements that make up the concept "authority". I structure the essential elements of the concept "authority" with a method that I call the "Tree of Elements Method"**.** On this method, I stay truer to the classical approach of conceptual analysis, one that examines a concept through its definitional structure. This method consists of breaking down the elements of a concept into smaller components. For example, the term "bachelor" breaks down into the components "unmarried" and "male. I present the full breakdown of my analysis of the concept "authority" in the following tree. I call the tree "The Taxonomic Tree of Authority".

Figure 3: The Taxonomic Tree of "Authority"



At the top of the tree is the concept “authority”, I then identify the closest element to the concept “authority”: *in authority*. This root, *in authority*, does not refer to an object external to the concept “authority” like how the roots *authority over* and *authority to* do. The root *in authority* indicates that there is a fact about the concept “authority” that has us understand “authority” to be in relation to a status that the person or entity *in authority* holds.

The root at the top of the tree constitutes the essential element of the genus of the definition for “authority”. The genus of a definition tells us the type of thing that the object being defined is.

Authority is a certain status.

The next level of the tree consists of the roots *authority over* and *authority to*. The root *authority over* indicates that there is a fact about the concept “authority” that has us understand “authority” to have a relation *over* something else, an external object. The root *authority to* indicates that there is a fact about the concept “authority” that has us understand “authority” to be in relation *to* performing a certain action.

I place *authority over* and *authority to* at the same level because together they carve out a really special status that persons or entities *in authority* have. That is, the roots *authority to* and *authority over*, together, constitute the essential properties of the genus. In combination, they demarcate “authority” from other types of statuses. More specifically, together they constitute a species of an authorization, an

authorization that the person *in authority* has. I discuss this authorization more thoroughly in the sections that follow.

The next level of the tree consists of the objects that, I claim, *authority over* and *authority to* stand in relation to. The root *authority over* stands in relation to a normative state of affairs. The root *authority to* stands in relation to a change to a person's normative situation. I make a distinction between a change to another person's normative situation and a change to one's own normative situation.

The last level of the tree consists of the components that form one's normative state of affairs or normative situation: specific normative relations. *Normative relations* consist of both Hohfeldian relations and deontic relations. A Hohfeldian relation is an element from the following set: {claim-right, duty, liberty, no-right, power, liability, immunity, disability}.[90] A deontic relation is an element from the following set: {permitted, prohibited, required}.

Normative relations have two parts: *persons* that the normative relation applies to and the *content* of that normative relation. Examples of specific normative relations include the following: Jane has a duty to drive slower than 55 mph; U.S. residents have a liberty to camp on BLM land for 14 days maximum; movie-goers have a prohibition against shouting "FIRE!" in a movie theater; John has a permission to go to Jane's party.

[90] I make a common modification to Hohfeld's view in changing a "privilege" to a "liberty".

The last level corresponds to four different outcomes, which I label “1”, “2”, “3”, and “4”. They correspond to different types of cases of the concept “authority” on my framework. In the next section, I explain each type in detail.

Each type follows from my theoretical view of authority. An argumentative task that I hold is to provide the theoretical underpinnings of why each type counts as a case of the concept “authority”. This task is the subject of the next section.

9.2 Meaning of The Elements of “Authority”

In the previous section, I layout the elements that constitutes my definition for “authority”. I also provide a diagram of how they are structured. In this section, I discuss the meaning of each element.

I start with a discussion of the essential element “authority to”. To perform certain actions, a person needs to have the *authority to* perform them. There are many kinds of actions that a person is able to perform through just possessing a mere physical ability to perform them. For instance, the ability to drive my car can be explained through physics alone. However, the performance of certain types of actions cannot be explain through physics. Consider the following example.

The Refund

Suppose Paul wants a refund of his money because he is unhappy with his meal. Paul approaches Evelyn and requests Evelyn to give him a refund.

However, Evelyn declines Paul's request for a refund because she lacks the requisite authorization to do so. Paul then approaches Abigail, another worker at the restaurant, and requests a refund. Abigail responds that she has the ability to give Paul a refund but declines his request for one.

Suppose that, instead of declining Paul's request, Evelyn opens the cash register and gives Paul a refund without the requisite authorization. In this scenario, Evelyn lacks the requisite authority to give Paul a refund. Instead, Evelyn is simply stealing cash from the register to give Paul a "refund".

In contrast, what explains Abigail's ability to give Paul a refund is not explained purely through what physics tells us. Abigail has the deontic ability, a power, rather than a mere physical ability to give a refund.

Moreover, what occurs if Paul gets a refund from Abigail is that his prohibition from taking money from the cash register turns into a permission. On the other hand, Evelyn does not have the ability to change Paul's prohibition into a permission—only Abigail has the authority to do so.

As we can see from this analysis, the authority to perform certain actions pertains to actions that change a person's normative situation. A change to a person's normative situation occurs where there is a change to a normative relation that the person holds.

Furthermore, only a power can change a normative relation into another normative relation—e.g., a prohibition into a permission. Hence, having the *authority*

to change a normative relation entails having the Hohfeldian *power to* change that normative relation.

The next essential element to explain is “authority over”. Abigail has authority over who gets a refund. And if getting a refund entails a change from a prohibition against taking money from the cash register into a permission to take the money, another way of understanding what Abigail has authority over is as follows: Abigail has authority over a change to a normative relation.

Having authority over a change to a normative relation entails two further conditions. Consider the following example to see what they are.

It’s My Car

I have the *authority to* determine who uses my car. This situation entails that I have the power to determine who uses my car. However, I also have the *authority over* the use of my car. For it is only me who has the authority to determine who uses it.

This situation entails two further conditions.

First, other people have a disability against exercising my power to determine who uses my car. If Karen decides that she wants to loan my car out to Jack, she still couldn’t do so without my permission. For Karen has a disability against exercising my power to determine who uses my car.

Second, I have an immunity against other people exercising my power to determine who uses my car. This conclusion entails that my governance of the normative state of affairs over the use of my car is immune to change from others. That is, my prohibition against Karen using my car cannot be changed by another person, such as Karen. I retain control over who has a permission to use my car.

The essential elements *authority to* and *authority over* combine to form a species of an authorization. Let's list the components below.

Authority as Authorization

Person A exercises authority if and only if

(a) Person A has a power to change a certain normative relation

(b) Person A has an immunity to others exercising Person A's power to change that normative relation.

(c) Others have disability against exercising Person A's power to change that normative relation.

It's My Car provides a context to better understand these conditions.

In **It's My Car**, I exercise authority, in this situation, if and only if

(a') I have the power to determine who uses my car, which changes another person's normative situation.

(b') I have an immunity against other people exercising my power to determine who uses my car.

(c') Others, including Karen, have a disability against exercising my power to determine who uses my car.

It is these conditions combined that provide me a certain authoritative status over the normative state of affairs that govern the use of my car.

Suppose that Karen makes a request to borrow my car, but I decline her request. In this situation, I fail to exercise a power to change Karen's prohibition against using my car into a permission. That is, I do not exercise a power at all. Nonetheless, I still exercise authority through my refusal of letting Karen use my car. Karen cannot exercise my power since I maintain control over it.

This example demonstrates that an exercise of authority does not amount to an exercise of a power, as the standard theorists have us think, but rather it is an exercise of a certain authorization, one that is formed through a combination of the essential elements *authority to* and *authority over*.

I have explained each component of my tree except for the four outcomes at the bottom. For easy reference, I list them again here.

A person *in authority* has *authority over*

1: a change to a normative relation that oneself has

2: a change to a normative relation that another person has

A person *in authority* has *authority to*

3: change a normative relation that another person has and is liable to being changed from the person in authority

4: change a normative relation that oneself has and is immune to change from others

These outcomes correspond to instances of an authorization that amounts to an exercise of authority (**1** combines with **4**, and **2** combines with **3**)**.** I provide an example for each combination.

The following is an example of an authorization to change another person's normative situation that amounts to an exercise of authority (**2+3**).

Funding: A graduate department rescinds Jane's funding offer based on a poor teaching evaluation.

Upon acceptance to graduate school, a graduate department extends a funding offer to Jane. The funding offer provides Jane a claim-right to receive funding for attending graduate school. Nonetheless, the department retains control over Jane's claim-right to receive funding. After a terrible display of teaching a class, the department decides to rescind Jane's funding offer. In this situation, it changes Jane's claim-right to receive funding into a no-right to receive funding.

In this situation, the department exercises a status that it has which authorizes it to change Jane's normative situation. Jane has a disability against exercising the department's power to reinstate her funding offer. Moreover, the department's decision is immune to change from others. Hence, it exercises authority when it rescinds Jane's funding offer.

The following situation is an example of an authorization to change one's own normative situation that amounts to an exercise of authority (**1**+**4**).[91]

It's My New Car: John uses his car as a down payment towards a new car at the dealership.

In this situation, John changes his claim-right to exclude others from using his car into a no-right to exclude others from using it when he sells his car to the dealership. John exercises authority, in this case, because he is exercising authority over the normative state of affairs that governs the use of his car. The dealership has no authority over how John's car is used until John transfers that authority to the dealership.

In sum, in this section, I have explained each element of my view.

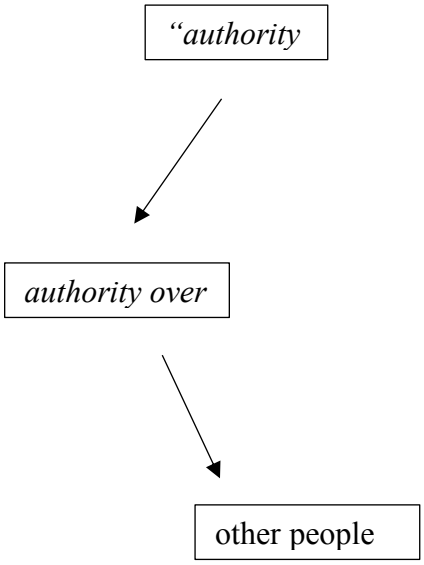
9.3 "Authority to" and "Authority over"

[91] I expect these cases to be controversial, and I provide more defense for them in a later section.

In this section, I discuss two important differences between my view and the standard theorists.

A way to discuss the implications of my view is to discuss how it compares to the standard view. Hence, I compare my tree to one that resembles the standard position on authority.

Figure 4: The Standard Position on "Authority"



Some important differences are as follows.

Authority Over. The standard theorists consider "authority over" to be a relation over other people. As a result, the standard position discounts authority over oneself to be cases of the concept "authority". In contrast, I consider "authority over" to be a relation over a normative state of affairs. Furthermore, I count authority over oneself as cases of the concept "authority".

Authority to. Certain notable standard theorists explicitly deny that "authority to" cases count as cases of the concept "authority". In contrast, in my view, they do count as cases.

I examine these differences in full detail in the next two sections.

9.3 Authority over

In this section, I compare our positions on "authority over" in full detail.

The standard position discounts authority over oneself to be cases of the concept "authority". For instance, Raz writes, "Power over others is authority over them. There is one exception to this characterization. Sometimes we say that a person has authority over himself. This is a degenerate case of authority: an extension by analogy from the central cases of authority over others. It is interesting to note that when speaking of a person's authority over himself, we always refer to his power to

grant himself permissions or powers. We never refer thus to one's power to undertake voluntary obligations," (Raz 2002[1979], 19).

Raz thinks that authority over himself cases are "degenerate" cases of authority. I argue otherwise. Consider the following case.

Vegan: Alex has a liberty to eat a plant-based diet.

I argue that Alex exercises authority while she exercises her liberty to eat a plant-based diet. Suppose that Dan dislikes vegans and wants to prohibit Alex from eating a plant-based diet. Alex exercises authority while exercising her liberty to eat a plant-based diet because only she has authority over a change to her liberty to be a vegan. No one else has the authority to change that liberty other than Alex.

A liberal political view would concur that exercising one's liberty, where that liberty is immune to being changed from others, amounts to an exercise of authority. On this liberal political thought, for instance, exercising one's liberty to express oneself amounts to an exercise of one's authority. That authority does not come from simply exercising one's liberty—rather, it comes from exercising a liberty that no one else can takeaway.

If we continue to think that "authority over oneself" cases cannot be cases of the concept "authority", then we would have to reject this liberal political view. However, it seems more reasonable to simply say that we can have authority over ourselves than to reject the claim that we exercise authority while exercising a dearly

held liberty—e.g., a liberty to express one's own opinion when a bully wants to silence it. It seems that, in this case, we are exercising our authority in the face of that bully through exercising a liberty that he cannot deny us—to express our own opinions.

The other issue to address concerns whether *authority over* is a relation to "other people" or "a normative state of affairs". I argue that my position is more precise than the standard position.

The standard position is that an authority, e.g., a government, has authority over other people, and it exerts its authority over them via the use of commands or directives. In contrast, my position is that the person in authority has authority over a change to a normative relation. The following example is helpful for understanding the difference between our views.

> **Nancy Pelosi:** The Speaker of the House, Nancy Pelosi, disinvites The President of the United States, Donald Trump, from giving the State of the Union Address at the United States House of Representatives during the shutdown. She suggests that he can still give the speech at the Oval Office. In return, Donald Trump prohibits Nancy Pelosi from using military planes to make an international trip. He suggests that she can still use a commercial airline to make the trip.

The standard view has it that one person, Person A, has authority over another

person's conduct, Person B. This view entails that Person B does not have authority over Person A. However, the standard view can't make sense of **Nancy Pelosi**. Nancy Pelosi and Donald Trump are both governmental authorities. It would be a mistake to say that Nancy Pelosi has authority over Donald Trump or vice versa.

More precisely, what Nancy Pelosi has authority over is the normative state of affairs in which Donald Trump gives the State of the Union Address at the House of Representatives. This normative state of affairs consists of a permission to give the State of the Union at the House of Representatives, a permission that Donald Trump had prior to being disinvited. Nancy Pelosi retains authority over the permission, and she may change it to a prohibition to give the speech at the House of Representatives. And Nancy Pelosi did just that when she disinvited Trump—she changed a permission into a prohibition.

In addition, Donald Trump does not have authority over Nancy Pelosi. More precisely, in this situation, he has authority over Nancy Pelosi's permission to use military planes to make an overseas trip. He may change it to a prohibition to use military planes to make the trip. And Donald Trump did just that when he said that she can't use military planes to make the international trip.

What this example shows is that it is imprecise to say that an authority figure has authority over people. Rather, it is more precise to say that the person in authority has authority over a change to a normative relation.

The normative relation has very specific content. That content includes the person or entity who holds the normative relation and the domain over which the

normative relation pertains. Nancy Pelosi has authority over Donald Trump's permission to give the speech at the House of Representatives, but she does not have authority over Donald Trump's permission to give the speech at the Oval Office.

The upshot is that my account need not reference the people or the domain that an authority has authority over. The normative relation has all the content that provides the specifics that we need.

However, **Funding**, for instance, shows that it is more precise to say that persons or entities have authority over normative relations instead of people. The department doesn't have authority over its graduate students. More precisely, it has authority over certain normative relations that its graduate students hold, ones that the department has the power to change. One of these normative relations includes a graduate student's claim-right to receive funding to attend graduate school. When a department extends an invitation to someone to attend graduate school, it extends a claim-right to receive funding for attending its program. It retains control over that claim-right, instead of control over its graduate students. In particular, the department has authority over whether there is a change to a graduate student's funding offer.

In sum, I argue that a class of authority over cases, "authority over oneself", does count as cases of the concept "authority". In addition, I argue that my account of "authority over" is more precise than the standard position.

9.4 Authority to

In this section, I defend my position on "authority to" against Raz's view on "authority to".

In my view, "authority to" cases count as cases of the concept "authority". Moreover, the root *authority to* is an essential element of the concept "authority". The best opposition to my view exists in Raz's (1979[2002]) book *The Authority of Law*, pages 19-20. I quote these pages extensively throughout this section.

On page 19, Raz writes,

> We should distinguish between authority over persons and authority to perform certain actions. The two overlap but are distinct notions. Everyone who is an authority has authority over people, but not everyone who has authority is an authority. The difference is not of great philosophical moment, but its neglect can be a source of endless confusion. A person is an authority if he has relatively permanent and pervasive authority over persons, that is, either authority over a large group of people with respect to various spheres of activity, or both, (Ibid).

It is here that Raz first tells us that we should distinguish "authority over" and "authority to". Raz emphasizes that "authority over" is essential towards understanding authority while implicitly saying that "authority to" is not. To make this argument, Raz appeals to a type of authority—i.e., ones that have "relatively permanent and pervasive authority over persons".

However, in most of this paper, I have argued that we should not appeal to types of authorities or cases of authorities to figure out the essential features of the

concept “authority”. We just don’t know whether we have a representative sample to confidently assert that we have discovered a conceptual truth about the concept “authority”, or whether we have simply discovered a more particular feature of the type of case that we are examining. I have argued that it is more likely that the latter is happening.

Further down the same page and continuing on the next page, Raz writes,

> One of the main obstacles to an analysis of authority is the frequent failure to distinguish between authority to perform an action and authority over persons. A person has authority to perform an action if he has been given permission to perform it or has been given power to perform it by somebody who has power to do so. Thus, I have authority to open your mail if the censor has given me permission to do so, assuming that he has power to do so, (Ibid).

Raz states a necessary condition for possessing the “authority to perform an action” is that the person “has been given permission to perform it.” He has not given us a theoretical reason for accepting this necessary condition but rather he provides a case of “authority to” where that necessary condition holds. I have given you the permission to open my mail; hence, you have the authority to open my mail. This analysis of “authority to” is more particular to the case that Raz is examining rather than being applicable to every case of “authority to”. **Funding** is one counterexample to Raz’s necessary condition. The department does not need permission from someone else to rescind a graduate student’s funding offer.

In the next paragraph, Raz asserts

> My authority to open your mail is not authority over you. I cannot change your normative situation in any way though the censor changed it by giving me the authority to open your mail, thereby diminishing your right to privacy, (Ibid).

Raz implicitly states that "authority to" cases do not result in changes to a person's normative situation. That might be true in the case of opening someone else's mail, but it is not true for every case of "authority to". For instance, in **Funding**, the department changes Jane's normative situation through a change to one of her normative relations—i.e., a claim-right to receive funding to a no-right to receive funding.

In fact, at the center of my account is the claim that a person *in authority* has the *authority to* change a person's normative situation. A change is made when there is a change to a normative relation that a person holds. Raz's position, perhaps, is that a change to a person's normative situation occurs where there is a change to a person's reasons for acting.[92] In response, I claim that a change to a normative relation that a person holds is sufficient to change that person's normative situation. Certainly, a person's normative situation changes where there is a change to one of her normative relations such as Jane's situation in **Funding**.

Raz finishes his analysis of "authority to" with these words,

> One has authority to do only those things that one is given permission to do by somebody who has authority over the person whose interests are affected. We

[92] Raz's view is that authority is a power to change reasons, (Ibid, 19).

can now define X has authority to Φ as: there is some Y and there is some Z such that,

(1) Y permitted X to Φ or gave him power to do so

(2) Y has power to do so

(3) X's Φ-ing will affect the interests of Z and Y has authority over Z.

At the end of his analysis, Raz provides an account of "authority to" that has three necessary conditions and one of them, the third condition, presupposes an account of "authority over". Through providing this account, he argues that "authority over" is more basic than "authority to". It also serves as Raz's account of *authorization* since Raz thinks that "authority to" is an authorization to perform some action.[93]

Raz's account of "authority to" assumes that "authority to" is an authorization to perform some action. If so, he seems to be justified in providing a complicated account to understand "authority to".

Perhaps, we need to a complicated account, one complete with stipulations of necessary or sufficient conditions, to understand what an authorization is. But we do not need such a complicated account to understand "authority to". The term "authority to" is synonymous with "power to" or "ability to": to possess the authority to perform a certain action is to possess the power to perform that action. My

[93] In the same section, Raz states "Only when the interest of another person will be affected by the act do we speak of it as authorized," (Ibid, 19). This condition is Raz's third condition in his account of "authority to".

response to Raz is that we should not understand "authority to" in terms of an authorization. The latter concept is much more complicated than the former.

A result is that "authority to" does not presuppose "authority over" like Raz thinks it does. They are at the same level—i.e., one of them is not more basic than the other for understanding the concept "authority". In fact, I argue for an account of authorization that is the combination of *authority to* and *authority over*. I provide this account in the next section. And it forms the heart of my account of "authority".

In sum, I argue that Raz's objections against accounting "authority to" as an essential property of the concept "authority" are ungrounded. He gives us a complicated account of "authority to" that presupposes "authority over", but his support comes from features that are more particular to the case that he is examining than facts about "authority to".

10. What difference does "authority" make?

In this section, I discuss the implications between my view and the control view.

"Authority" makes a difference to our actions. It is controversial what kind of difference that "authority" makes. We all think that an act of authority, e.g., making a command, results in something happening, such as the creation of a duty, which would not have occurred without that act of authority. In this section, I develop this thought with greater precision, present my position on the matter, and show where other views are deficient in comparison.

An *act of authority* is an exercise of authority. It is an action that serves as the vehicle through which an exercise of authority occurs. I am careful about not saying that only authorities commit an act of authority, or exercise authority, because it is expressly my view that *anyone* can exercise authority provided certain conditions obtain. On my view, an act of authority occurs only where a person (or thing) is authorized to change a normative relation and either changes it or preserves it against change.[94]

In contrast, the standard theorists develop an account of the concept "authority" through examining what allows an authority to have authority. This method includes two (seemingly) small assumptions, but I reveal the true magnitude of these assumptions. They pinpoint the basis from where my view diverges from the standard theorists.

The first assumption is that "authority" is something that someone *has*. For instance, in explaining what it needed to develop a theory of legitimate authority, Raz states, "It must explain what one has when one has authority."[95] Raz's explanation reveals the way that we typically think about authority. It is often thought that "authority" is something to be possessed over others.[96]

On the other hand, it is my view that "authority" is something that is *exercised*. "Authority" is those set of conditions that allows someone to commit an

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[94] The **Refund** case is supposed to show a case where someone exercises authority even if she decides not to make a change to a normative relation—i.e., Abigail decides not to change Paul's duty against taking money from the register to a liberty to take money from the cash register. I call these cases a preservation of a non-change to a normative relation in order to emphasis that the non-change is an active act.

[95] Raz, *The Authority of Law*, 7. This quote is also important because it shows that the standard theorist think that "legitimate authority" and "authority" are the same things.

[96] Game of Thrones.

act of authority or to exercise authority. This distinction is important because, on one hand, when someone has authority, it is something that the person has continuously. On the other hand, when someone exercises authority, it is something that simply occurs at a specific moment in time.

The second assumption is that "authority" is something that *an authority* has. This assumption, perhaps, has the most influence over how we think about "authority". For it requires us to also have further assumptions about what "an authority" is. Raz states, "A person is an authority if he has relatively permanent and pervasive authority over persons, that is, either authority over a large group of people or with respect to various spheres of activity, or both."[97] Raz believes that an authority is one that fits the control model.

The combination of these two assumptions have an important implication for the standard theorist:

> "Authority" is the set of conditions that a certain set of people (or things) have that others do not have.

Once this implication is combined with the standard analysis of "authority over", we have the result that "authority" is the set of conditions that confers a set of people (or things) *authority over* another set of people. Leslie Green, for instance, provides an analysis of "authority" as the relation "authority over"; and he states, "A

[97] Raz, *Authority of Law*, 19.

has authority over B if and only if the fact that A requires B to φ (i) gives B a content-independent reason to φ and (ii) excludes some of B's reasons for not-φ-ing."[98]

In contrast, I do not make a distinction between two sets of people: the "authority" set and the "non-authority" set. No relation or information about these two sets informs my theory of authority. Instead, my theory of authority simply discovers the conditions in which an exercise of authority occurs.

Our respective structures of "authority" differ as follows.

Two Different Structures of "Authority"

Standard Theorists: A has authority over Y.

Authorization View: A exercises authority.

A structure of authority tells us what the basic framework that the concept "authority" consists of; in addition, it tells us what essential elements that the concept "authority" contains and how those elements are organized.

The structure of authority that the standard theorists use tells us that the concept "authority" has "authority over" as its main essential element within its framework. In addition, it tells us that "authority" is a relation between two different elements: the set "A" and the set "Y".

The structure of authority that I use tells us that what is essential about the concept "authority" is simply the determination of whether an act counts as an exercise of authority or not. This analysis puts me on a different path than the standard theorists.

[98] Green, *The Nature of Authority*, 41-42.

The reason for this conclusion is as follows. From one's framework of the structure of authority, a theorist builds her account of authority via specifying the conditions that satisfy her proffered structure. The structure that I use requires that I examine the conditions where an exercise of authority occurs. I build an account of authority from determining the conditions that satisfy the criteria of whether or not an exercise of authority has occurred.

In contrast, the standard theorists examine the conditions in which "A has authority over Y". This analysis has uniformly led them to consider that the conditions for justified or legitimate authority are the conditions for "authority".

However, I believe that the standard theorists' structure of authority captures only one type of authority—i.e., the control model. While this type of authority is certainly prevalent and conspicuous throughout many societies and the history of our world, it is not as pervasive as the ones that fit the structure that I have described. People exercise authority all the time without noticing; and when they notice it, it is because they usually want to make a point about it.

Consider self-determination cases. Jack determines that his life goal is to be a successful actor. It is my view that Jack exercises authority when he determines what his life goal is. Jack's friends may try to dissuade him and say that being a successful actor is near-to-impossible, considering his odds of making it in Hollywood. Yet, Jack may point out that it is *his* decision to make and not theirs.

A case that usually goes unnoticed is when we let others borrow something that we own. Chris is exercising his authority over who is allowed to borrow his Ostrom book when he lends it to his doctoral advisee. Chris does not need a special

title, such as the "Department Chair", in order to exercise this authority. Anyone can let another person borrow a book, and when he does so, he is exercising authority over who can have his book for a certain period of time. We do the same with cars, clothes, and our favorite pens.

What I want to say is that exercising authority is a pervasive fact about our lives. We exercise authority all the time—sometimes, without even noticing it. And it is not just certain people or things that have authority; it is something that we all have.

I affirm that my view is theoretically superior to the standard theorist because the structure of authority that I use allows me to develop a theory of authority that is flexible, precise, and extensionally robust. Moreover, I provide cases that demonstrate that these qualities are the defining virtues for a theory of authority. These cases also show that the structure of authority that the standard theorists use is too rigid to build a tangible theory of authority upon it.

Flexibility is needed where authority conflicts exist and we need to understand different nuances of "authority" to account for that conflict. Consider the issue of abortion within the United States. Alabama's state legislature recently approved an extreme abortion ban that imprisons doctors who perform abortions up to 99 years. In response, many females claim that they have autonomy over their body. In addition, the context in which this law is enacted is to challenge Roe v. Wade. Multiple authority conflict exists; and my theory of authority has the flexibility to account for them all in addition to explaining why they exist in the first place.

Suppose that Alabama's state legislature has the authority to come to a majority vote which enacts a law within its territory. On my view, what has occurred is that Alabama has enacted a prohibition against performing abortions and created a liability to be imprisoned for up to 99 years for committing an abortion.

It is my view that an act of authority occurs where there is an authorized change to a normative relation. Alabama's state legislature is authorized to make changes to normative relations that belong to its legal system.[99] Alabama authorized a change to a specific normative relation: a permission to have an abortion within Alabama is changed to a prohibition against having an abortion within Alabama. Alabama's state legislature authorized a change to a normative relation within a specific normative system, Alabama's state legal system.

It is my view that an act of authority occurs where a person authorizes the preservation of a non-change to a normative relation.[100] In response to Alabama's act of enacting an anti-abortion law, female protesters assert the existence of their bodily autonomy. What they are asserting is that they are authorizing the preservation of a non-change to a normative relation—i.e., their right to choose. This authorization preserves a non-change to a normative relation within in a specific normative system, the set of rights that makeup one's bodily autonomy.[101]

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[99] One might quibble about the fact that Alabama doesn't have a "legal system". I address this concern in Chapter 4. For now, Alabama has a state legal system.

[100] I have argued for this point in **Refund** of section 9.2.

[101] It is of course controversial whether a "right to choose" is a right that morality prescribes. We are uncertain about what normative relations exist within morality (as a normative system). Nonetheless, the point is that female protesters must be asserting a preservation of a non-change to a normative relation in order to declare that Alabama's state legislature is encroaching upon their authority. Another issue is that one might object that females cannot change the "right to choose". My response is that a female may waive her right to choose if she wishes to.

In sum, female protesters are authorizing a preservation of a non-change to a normative relation—i.e., a right to choose—while Alabama is authorizing a change to normative relations that exists within its legal system. Female protesters and Alabama state legislature are both respectively authorized to preserve and to change a specific normative relation within a specific normative system; however, these normative systems are different normative systems. As a result, an authority conflict occurs because they are both able to assert their authority with an act of authority, and these acts of authority entail a practical conflict.

The view that I prescribe has the flexibility to account for important nuances in authority conflicts in order to explain why an authority conflict occurs in the first place. In contrast, consider Simmons's "right to rule" view. Either Alabama's state legislature has the moral right to enact the abortion ban or it does not. If it has a "right to rule", it has authority. If it does not have a "right to rule", it does not have authority.

Suppose that Alabama has a moral right to enact an abortion ban. In this case, the female protesters, at least, the ones living in Alabama, are morally bound to obey its laws. If so, in this case, an authority conflict is non-existent.

Suppose, on the other hand, Alabama does not have a moral right to enact an abortion ban. In this case, an authority conflict does not occur because Alabama's state legislature does not have authority in the first place.

The conclusion is that Simmons's view cannot account for an important authority conflict between Alabama and the female protesters. An objection is that there isn't an authority conflict. Simmons may simply respond that Alabama lacks a

moral right to rule. But this response would betray the experience that many women face when it comes to anti-abortion laws. It is not due to Alabama's act of enacting an anti-abortion law that it lacks the power to enact which encroaches upon a female's bodily autonomy. But rather, what encroaches upon their authority is Alabama's power to enact an extreme abortion ban that conflicts with a female's authority over her bodily autonomy.

The reason that Simmons's view is unable to account for this authority conflict is due to the structure of authority that Simmons uses. It is too rigid: One set of people has authority over another set of people; and either the first set of people has authority or it does not. These binary conditions for "authority" cannot account for nuanced facts about "authority". On the other hand, once we see that the concept of "authority" is something that is exercised rather than something that a set of people continuously has over another set of people, we can account for these important nuances.

Precision is another defining virtue of a theory of authority. A theory of authority is precise when it is able to locate the difference that "authority" makes. What results from an act of authority?

One problem is that multiple events may result from an act of authority. In response to this issue, I stipulate that a theory of authority is maximally precise when it is able to locate the *exact* difference that "authority" makes. That is, it is able to tell us the exact result from an act of authority. An event is the exact result of an exercise of authority if and only if an exercise of authority has caused that event.

Consider Raz's view that an act of authority creates a protected reason for acting. A *protected reason* is the combination of a reason to act and a reason not to act upon an excluded reason.[102] Suppose an authority commands that I turn in a report on Monday. On Raz's view of protected reasons, I have a reason to turn in the report on Monday, and a reason not to act on any reasons that would disallow me from turning the report in on Monday.[103]

Raz has provided us some important and interesting insights about the dynamics of reasons. However, the creation of a protected reason for acting is not the exact result of an exercise of authority.

A creation of a protected reason, if one is created at all, is the result of a change to a normative relation instead. In other words, authorities do not change one's reasons for acting. They change a normative relation that in turn changes one's reasons for acting.

Consider **Funding** again. The graduate department has committed an act of authority from rescinding a graduate student's funding offer. It has exercised its authority to determine which graduate students are qualified to receive funding. Certainly, the department has the authority to make this determination. In rescinding

[102] Let's assume that Raz is correct about the claim that reasons are facts. Hence, reasons exist externally to our mental states. This supposition gives Raz the room to claim that a change has occurred, a protected reason has been created, even if a person's mental states is not aligned with that protected reason. That is, even if a person does not recognize that an authority has created a protected reason for acting that applies to her, her lack of recognition is immaterial whether she has a reason or not.

the funding offer, it has changed the graduate student's claim-right to receive funding into a no-right to receive funding.

Raz's theory of protected reason applies only when an authority gives a command. But, in this case, the department does not make a command at all. The department did not command the graduate student to leave the university. Rather, the department notified the graduate student that his funding offer has been rescinded with a letter.

It is immaterial to the defense of my account whether a change to a normative relation changes a person's reasons for acting.[104] The pertinent point is that an exercise of authority does not change a person's reasons for acting.

Raz's theory of protected reasons is most appropriate in command cases. However, even in command cases, Raz's theory is imprecise about what occurs as a result of that command. A command is a performative utterance that one's liberty to φ, an optional action, has changed into a duty to φ, a requirement, or a duty to refrain from φ-ing, a prohibition.[105] What immediately occurs from an utterance of a command is a change to a normative relation, not a change to a person's reason for acting.[106]

The problem is that Raz's theory of protected reasons only makes sense in the context of commands, duties, prohibitions, and requirements. For instance, it is not clear how an immunity gives a person a protected reason for acting. An immunity

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[104] My guess is that it probably does.
[105] J.L. Austin, *How to Do Things with Words*, Oxford: Clarendon Press. 1962.
[106] A creation of a protected reasons may occur from an exercise of authority. To demonstrate this conclusion, a theorist would need to make a connection between normative relations and reasons for acting. Raz has requirements about a need to be in a correct epistemic position in order to be a legitimate authority. I address the epistemic aspect about Raz's theory of authority in Chapter 4.

against self-incrimination doesn't give a person a protected reason for acting. Hence, a change to one's reasons for acting does not occur in all cases where an exercise of authority has occurred. In other words, a change to a person's reason for acting may be a result from an exercise of authority, but an exercise of authority does not cause a change to a person's reasons for acting.[107]

The last defining virtue of a theory of authority is that it is extensionally robust. A theory of authority qualifies as being extensionally robust if it is able to tell us all the cases where an exercise of authority has occurred.

In my view, a person exercises authority where she authorizes a change to a normative relation or authorizes a preservation of a non-change to a normative relation. The normative relations that I explicitly include in my theory of authority are the following sets.

Deontic relation: {permission, prohibition, requirement};

Hohfeldian relation: {claim-right, duty, liberty, no-right, power, liability, immunity, disability};

I assert that my view is extensionally robust in comparison to the standard theorists because they explicitly talk about only rights, duties, and commands (or directives) as part of their conceptual framework of authority.[108] Consider, for example, Simmons's view that "a state's (or government's) legitimacy is the complex moral right it possesses to be the exclusive imposer of binding duties on its subjects."[109]

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[108] Raz talks about a power to change reasons.

[109] Simmons, "Justification and Legitimacy," 746. One may object that Simmons is simply talking about "legitimate authority" and not "authority". I provide a response in the next section.

A command (or a directive) is performative utterance that states that a certain action is required or prohibited. The result is that the notion of a command incorporates an understanding of all the deontic relations {permission, prohibition, requirement} but only a subset of the Hohfeldian relations {right, duty, liberty, no-right}.

Simmons's theory of political authority is subject to the same conclusion. It can incorporate an understanding of only a subset of Hohfeldian relations—namely, the relations that are the jural correlative and jural opposites of a right and a duty. The implication is that the following set of Hohfeldian relations are left out of an entitlement view of authority: {power, disability, liability, immunity}.[110] Moreover, Hohfeld pointedly argued that a "right" does not entail a "power".[111]

H.L.A. Hart's famous critique of John Austin's command theory of law is that the notion of a command cannot account for the variety of law.[112] I assert that an entitlement theory of authority commits a similar conceptual mistake: it cannot account for the variety of exercises of authority. The reason that Hart's critique was so damaging yet illuminating is that, once we are able to see what exists beyond the notion of a command, a rich and expansive variety of legal rules becomes clear.

Moreover, Hart demonstrates that an expansive vocabulary of the different kinds of legal rules is crucial to our understanding of legal systems and institutions.

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[110] Simmons has used the word "power" in certain places, but he has clarified that he means a "moral right to rule". He does not mean a Hohfeldian "power".
[111] Hohfeld, Wesley Newcomb & Cook, Walter Wheeler (ed.): Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays (*Yale University Press,* 1919).
[112] Hart (1994).

For instance, Hart has shown that a system of rules is static unless it includes a rule of change.

I think that the same point applies to a full understanding of the concept "authority". An imposition of a duty upon another person does not exhaust the variety of exercises of authority that may occur. In my view, an exercise of authority involves an authorized change to a normative relation. This result allows us to see the variety of ways in which an exercise of authority may occur.

From this analysis, we can see that the structure "A has authority over Y" is indeed too limiting of a structure for the concept "authority", where "Y" is another person. However, once we change "Y" to a normative relation instead of a person, the result is a structure of authority is aligned with my view.[113] It states that "A has authority over a change to a normative relation". This structure means that A has the authorization to change the normative relation in question and that it cannot be changed unless a change is authorized.

Consider **Sex Refusal**. Jane has authority over the permission of who can have sex with Jane. No one else but Jane is authorized to change this "permission" into another normative relation such as a "right" to have sex with Jane. And, even if Jane is part of a forced marriage, cultural dictates have not changed that normative relation for Jane. Jane may refrain from exercising authority if she coalesces with her arranged husband's demands for sex with Jane against her wishes. But she also may

[113] In control cases, it is more precise to say that an authority has authority over a change to a normative relation, i.e., the imposition of a duty, than a person. The authority may effectively control the other person's behavior via an imposition of a duty. However, what the authority most precisely has control over is the normative relation, not the person.

silently exercise of authority if she refuses to recognize that her arranged husband has a right to have forced sex with Jane.

In this section, I have argued that my theory of authority is theoretically superior to the standard theorists on the grounds that it is more precise, flexible, and extensionally robust. In the next section, I discuss two important implications of this discussion.

10.1. Resolving two important debates on "authority"

A foundational debate on authority considers what kind of question is "what is authority?" asking. Lukes claims it could be asking two different questions.

> The question is, on the face of it, at least two questions. It could be the analytical question: what are the elements of the concept of authority and how are they structured? What are the criteria by which we may recognize the possession, exercise, and acceptance of authority? How is it distinguished from other forms of influence over persons and from, say, persuading, threatening, advising, and requesting? Or it could be the normative question: what is legitimate authority? What is it that renders authority legitimate? What justifies the claims of authority as being worthy of acceptance? When should utterances be treated as authoritative?[114]

[114] Lukes, "Perspectives on Authority," 203.

Analytical Question: What are the elements of the concept authority? How are they structured?

Normative Question: What is legitimate authority? What makes authority justified?

The debate is over whether the analytical question is separate from the normative question. The standard theorists think that they are the same questions.[115]

My discussion demonstrates that the underlying reason why most theorists think that these questions are the same is due to the structure of authority that they standardly use to build an account of authority: A has authority over Y, where Y is a different person or set of people from A. It is cases of authority that have this structure, i.e., the control model, where justification and legitimacy become a concern.

I have provided an extensive set of arguments showing that it is a mistake to think that they are the same questions because the normative question only applies to a limited amount of cases—i.e., the ones that fit the control model.

[115] Lukes is an exception. He develops an account of authority where an identification of authority occurs from multiple perspectives. "More particularly, I claim that every way of identifying authority is relative to one or more perspectives and is, indeed, inherently perspectival, and that there is no objective, in the sense of perspective-neutral, way of doing so," (Lukes, "Perspectives on Authority" 204).

Another foundational debate on "authority" considers whether there are multiple grounds for authority. The theory of authority claims that there are multiple grounds for authority because multiple normative systems exist.

These two foundational debates on "authority" are linked in an important way. In the past, theorists who defend the position that the analytical question is separate from the legitimacy question have argued that different grounds for authority exists;[116] hence, the essential elements of the concept "authority" are separate from the conditions that makes an authority legitimate since one set of conditions stays fixed and the other varies.

In response, Raz argues that these questions must not be separate. Raz provides the criticism that to separate these questions is to "relativize the notion of authority…which severs the connection between authority and practical reason."[117] Raz holds the view that a theory of authority that allows different grounds of authority to exist is a relativistic conception of "authority".

For Raz, a relativistic theory of authority cannot show what difference that authority makes to our practical reasoning. The idea that "authority" must make a difference to our practical reasoning is ubiquitous within legal theory. In response, I have argued that a change to one's reasons for acting is not the exact the result of an act of authority. Instead, an act of authority results in a change to a normative relation and that change in turn (may) change one's reasons for acting. Hence, Raz's objection is misguided.

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[116] Lukes, "Perspectives on Authority".
[117] Raz, The Authority of Law, at 11.

As a result, Raz's objection is no longer a reason to reject the view that multiple grounds for authority exist. It is an implication of my view that multiple grounds for authority can exist. And I believe that they in fact do.

What my theory provides is a conceptual structure for understanding the essential elements of the concept "authority". On my account, the concept of "authority" involves the exercise of an authorization that consists of a certain power, immunity, and disability; "authority" is a status that authorizes a person to change a certain normative relation or to preserve it against change from another person. My account demonstrates that the analytical question should be separated from the legitimacy question. It does not provide the grounds for this power, immunity, and disability for all authorities.

It is also my view that multiple grounds for authority indeed exists. The reason is because the respective power, immunity, and disability is in relation to normative relations with only very specific content. Consider my power to change Abigail's prohibition from using my car into a permission to use my car. The ground for this power is different from the one that establishes Abigail's power to refuse giving a refund to Paul.

Multiple grounds for authority allows us to have a variety of different types of "authority". A woman may still retain authority over her bodily autonomy even when a state legislature declares otherwise. A woman in a forced marriage still retains authority over the exercise of her consent to have sex. The CEOs of corporations exercise a certain kind of authority when they make decisions for their corporation to which the concept of legitimacy does not apply. And even institutional political

authorities have different grounds for their authority (e.g., Nancy Pelosi versus Donald Trump). An account of the concept "authority" that can account for these different types of authorities is more persuasive than accounts that cannot because we seem to think that people exercise authority in these different ways all the time.

11. Conclusion

In this essay, I have developed a definition for the concept "authority". I have argued that authority is a status that authorizes a person or entity to change one's normative situation. In addition, I have shown that the method that the standard theorist use is unreliable.

Chapter 4: Law's Function as a Decision-Procedure

1. Introduction

In this essay, I argue that the law's essential function is a decision-making function. More specifically, I argue that the law's function is to enable humans to make decisions for a group of people under conditions of uncertainty and disagreement in order to solve practical problems.

To start, that is an essential function must be explained. Legal theorists explain an essential property of law as one that is not only a necessarily true proposition about the law, as opposed to a contingently true one, but also one that is a constitutive feature of law (Dickson 2001, ch 1). It makes a legal system is what it is. A legal system cannot exist without it. Hence, I claim to be specifying a function that makes a legal system is what it is. This view entails that a rule system that does not have a decision-making function cannot be a legal system.

That it is an essential function must also be explained. My view of the law's function is built upon an understanding of law as fundamentally a tool of human creation, or a human artifact.[118] Consider what makes a chair what it is. It gains its identity as a tool that is designed and created for the purpose of having something to sit on. A boulder may perform this function too; however, it only accidently performs this function as a result of human usage. The chair is demarcated from other objects

[118] This view is best clarified and defended by (Ehrenberg 2016).

that people can sit on due to its artifactual nature that is self-consciously designed (Ehrenberg 2016).

Hence, I claim to be specifying a function that humans self-consciously design legal systems to serve. It is one that serves a human need, for we create tools to serve our needs. I identify a need that certain human groups have. Since legal systems exist all over the world, especially in modern times, it must be a ubiquitous need that human groups have once they reach a certain population threshold. That need is the ability to make decisions under the conditions of uncertainty and disagreement in order to respond to practical problems, or so I argue. On my view, the decision-making function that legal systems perform is an enabling one. They enable humans to make decisions in the face of uncertainties and disagreements.

I argue that this deciding function is an essential function by way of grounding two desiderata that I claim that any theorist who gives an account of the law's function must satisfy. Each explains why a function is an essential function differently.

One desideratum is that a theorist must demonstrate that her candidate function explains the existence and purpose of all the other essential properties of law. If we create a tool to cut other things, we would expect it to have features that enable us to cut other things. A function is precisely the purpose for why humans create a legal system when it explains the existence and purpose of its other essential properties. I call this desideratum the "precision desideratum". It states that a function of law is an essential function when it is precisely why humans create legal systems.

The other desideratum is that a theorist must demonstrate that her candidate function explains the existence of every occurrence of a legal system in all possible human worlds closest to this one.[119] I call this desideratum the "robustness desideratum". It states that a function of law is an essential function when it is true in every occurrence of a legal system.

2. Theories on the Function of Law or Political Societies

In this section, I provide a description of competing views of the law's function. The purpose of this section is to provide the reader an understanding of where my account is situated among other accounts on the function of law.

The question "what is the function of government?" within political theory is a similar question to "what is the function of law?" within legal theory.[120] The difference is that political theorists provide an answer that is usually more value-laden. They build their account with background theories about "moral permissibility", "legitimacy", "justice", "liberty" and so on. In contrast, legal theorists study the characteristics and components of a legal system in order to develop an answer. I build an account of the law's function that is more within the legal theorist tradition.

[119] I say closest to this one because, if we are to explain the occurrence of legal systems in the actual world, it cannot stipulate implausible facts about humans or facts that actual human groups are unable to achieve.

[120] There are some places where I diverge from the on my understanding of what counts as a "legal system" from the way that political theorists think

Nevertheless, within both traditions, the most common answer is that political society is created with the intention of maintaining social order. This answer includes a grouping of functions that involve solving coordination games, such as the prisoner's dilemmas (Hobbes *Leviathan* XIII, Morris 1998, 82-92), the stag hunt (Hume *Treatise* Book III, Pt. II, Sec. III, Rosseau *Discourse* Pt. II, para 9), assurance games (Simmons 1999, 745), and trust dilemmas (Locke, *Second Treatise*, ch. 9). These accounts aim to show that players receive a higher payoff from engaging in cooperation than from defecting, which is individually rational to do. Other accounts discuss how political authorities have achieved social order through a belief in its legitimacy (Weber 1968) or through a claim of authority (Green 1988, ch 1, Raz 2002[1979]), ch 2). And yet, other accounts discuss the importance of social conventions for coordinating behavior (Postema 1982). In general, the maintenance of social order is the most popular answer to why political societies exist.

Another cluster of accounts on the law's function identify some important value that is the target of the proper function of law. For instance, Ronald Dworkin (Dworkin 1986, 93) argues that legal systems have the function of justifying coercion. John Finnis (Finnis 2011, 334-336) argues that the law's function is to pursue the common good.

One of the most salient capabilities that governments have is the ability to distribute goods and values. Another cluster of theorists develop a theory of the function of government upon its distribution abilities. Some argue for a just distribution of goods (Nozick 1974, Rawls 1985) and others argue that a state's function is the authoritative allocation of values (Easton 1965).

Another important grouping of theorists observe that political societies exist to control violence among its members and outside threats (Hobbes, Weber). It also includes a long list of theorists who examine the coerciveness of law (e.g., Ripstein 2003).

Raz (1979 [2002], ch 9) provides a list of four main functions of law which are grounded upon its ability to regulate human behavior. This list includes preventing undesirable behavior and securing desirable behavior, providing facilities for private arrangements between individuals, the provision of services and redistribution of goods, and settling unregulated disputes.

One of the most important accounts on the function of law comes from Hart (Hart 1994 [1961], 249) who argues that legal systems have a guidance function. Hart argues that the transition from pre-legal society to legal society is the creation of a rule of recognition which determines membership criteria for the category "law".

In section 8, I provide a full response to Hart. And I respond to all the other theorists in section 10.

3. The Decision-Making Authority Account of Law

In this section, I lay out foundational claims regarding my account of the law's decision-making authority. In section 3.1, I describe the human reasoning process and why humans often reach a state of indecision. In section 3.2., I show how decision-procedures enable people to make decisions through the creation of decision-rules. In

section 3.3., I present an account of the normativity of decision-procedures. In section 3.4, I apply this account to group decision-making.

3.1. Decision-making

In this section, I describe the deliberation process that people engage in when making decisions. I then explain how people may reach a state of indecision when they reason about what to do.

A person is faced with a decision when more than one available option exists. A person makes a decision when she intentionally undertakes a course of action, *C*, and does not intentionally undertake any other course of action that conflicts with *C* at time *t*. Importantly, she stops deliberating about the merits of C at time t and undertakes C. Making a decision results in an action.

Reasons stand in the relation "in favor of" to actions.[121] To make a decision, people sometimes deliberate about the reasons for choosing one option over another. Deliberation involves weighing and assessing the relative strengths of the reasons for choosing competing options.[122] Value theorists often argue that the option with the greater weight should be selected.[123]

Given human uncertainty and disagreement, herein lies the problem: Conflict among these reasons can be resolved only through a process of weighing and assessing the relative strength of reasons. However, if someone is uncertain about

[121] Stephen Finlay and Mark Schroeder (2015) state this relation between "normative reasons" and actions.
[122] (Broome 2004, 37).
[123] See, e.g., (Schroeder 2007, 130), (Harman 1975).

what the relative strengths of the reasons in favor of an action are, she cannot assess which set of reasons carry the greater weight. Moreover, if we disagree about the relative strengths of reasons for and against an act, we cannot arrive at a conclusion about what ought to be done as a group.

A ubiquitous fact about humans is that we place different priorities on values and different weights on reasons all the time; this is a common source of group disagreement. Moreover, we have often have cognitive limitations that generate normative uncertainty about what we ought to do and epistemic uncertainty about empirical facts that we need to know in order to make decisions. Our conflicting value systems and cognitive limitations cause us to remain indecisive about what to do in many decision-making contexts.

Sometimes we may remain indecisive because what's at stake doesn't matter much to us at all. But, in many cases, what's at stake does matter a lot to us, and we feel compelled to make a decision in that situation. In what follows, I analyze a device that enables humans to make decisions despite the conflicts that practical deliberation produces for humans.

3.2. What are Decision-Procedures

In this section, I explain the logic of decision-procedures.

Decision-procedures are a set of decision-rules that enable humans to settle upon a course of action among two or more viable sets of conflicting options.

Decision- procedures have the aim of stopping deliberation and resulting in an action for their users.

Decision-rules are rules of the form A→B. The first statement of a decision rule is the premise, and the second statement of a decision rule is the conclusion. Hence, the premise of A→B is A, and the conclusion of A→B is B.

The premise of a decision-rule maps to an easily identified empirical event in the world. For example, the Red Sox won the World Series or the coin landed "heads" or the vote passed a two/thirds threshold. It is important that the premise of a decision-procedure maps to an easily identified empirical event in the world because it cannot be an item that leaves any opening for further deliberation.

A decision-rule is triggered when an event in the world (e.g., the coin lands on heads) entails that its premise has the value of true. Given the decision-rule A→B, if an event in the world entails the value of true for A, then we conclude B.

The conclusion of a decision-rule maps to an action-outcome that is made in the form of a command (e.g., stay at a hotel or drive home). If an event in the world entails the value of true for the premise of a decision-rule, then we conclude that the action-outcome in the conclusion is required.

The logic of decision-procedures is that they produce a mechanism for making decisions through refraining from making a reference to any of the reasons or facts that caused a state of indecision. If a decision-procedure referred to those facts or reasons that caused a state of indecision, it would not resolve the users' state of indecision.

3.3. How Decision-Procedures Make A Difference in Our Practical Reasoning

In this section, I provide an example of how a decision-procedure works. In addition, I provide an account of the normativity of decision-procedures.

Consider the following case.

> **The Rescuer**: Two lifeboats are sinking. A girl occupies the first lifeboat. A boy occupies the second lifeboat. A rescuer is able to reach only one of the lifeboats in time in order to save its inhabitants. The rescuer is in an unenviable position. He doesn't know what to do; he has to make a decision quickly while under enormous pressure; and children's lives are at stake. Moreover, if the rescuer does not make a decision at all, then both children will die when he could have saved one of them.

The rescuer has a (.5) credence that he should save the boy, given the boy's claim to be saved, and a (.5) credence that he should save the girl, given the girl's claim to be saved. Since the reasons for saving each child creates a tie, he is in a state of indecision.

Given the urgency of the situation, the rescuer flips a coin to settle what to do. He stipulates the following decision rules: If the coin lands on "heads", save the girl. If the coin lands on "tails", save the boy. These decision rules can be represented as $H \rightarrow G$ and $T \rightarrow B$.

The rescuer's decision-procedure consists of two decision-rules and the use of a mechanism that triggers only one of them. The rescuer flips the coin, and it lands on "heads." What difference does the coin-flip make the rescuer's practical reasoning? I argue that the result of the coin-flip generates three norms.

(required-action outcome): save the girl

(cannot-act-upon): acting on any reasons against saving the girl[124]

(internalize): a reason to forgo deliberation and to just save the girl

Decision-procedures enable a person to decisively act on the triggered decision rule in virtue of certain normative background conditions that we internalize when agreeing to use a decision-procedure.

The first background condition is a requirement. I shall call it "**required action-outcome**". A user of a decision-procedure is required to perform the action-outcome of the triggered decision-rule. This requirement is independent of the reasons for saving the girl. Instead, it is a normative conclusion that is derived from the aim of escaping a state of indecision.

The second background condition is a prohibition. I shall call it "**cannot-act-upon**". A user of a decision-procedure is prohibited from acting on a reason against the action-outcome of the triggered decision-rule. Since the reasons for each course of action are completely taken out of consideration through the creation of decision-rules, they become immaterial to which course of action should be undertaken. A reference to those reasons would reintroduce the state of indecision that led the use of a decision-procedure. Given this logic, another normative conclusion is that the

[124] This reason is an example of Raz's exclusionary reasons, or reasons not to act upon a reason. See Raz (1999) *Practical Reasons and Norms*, Oxford: Oxford University Press, 39.

rescuer cannot act on any conflicting reasons against the action-outcome of the triggered decision-rule.[125]

The final norm is an instrumental reason. I shall call it "**internalize**". A user of a decision-procedure has an instrumental reason to internalize the two other norms **required-action outcome** and **cannot-act-upon**. If required action-outcome were not properly internalized, then the decision-procedure would not result in an action for an uncommitted decision-maker.

In general, the strength of this reason is contingent on how badly people want to escape a state of group indecision. In some cases, people face a suboptimality from not making decision at all. The degree of the need to escape a state of indecision depends on how worse-off they perceive facing that suboptimality would be.

On the other hand, a person cheats from not properly internalizing the norms of the decision-procedure. If I play the game "rock, paper, and scissors" with a friend to decide who gets the last cookie, I may very well run off with the cookie if I lose. I have not internalized **required action-outcome** and **cannot consider** because I want the cookie more than being a good sport.

However, extenuating circumstances can strengthen the instrumental reason **internalize**. The rescuer faces a grave suboptimality if he doesn't make a decision at all: both children will die when he could have saved one of them. In this situation, it is crucial that the rescuer internalizes **required action-outcome** and **cannot consider** to avoid this suboptimality.

[125] This is an example of Raz's famous exclusionary reasons.

3.4. Group Decision-Making with Decision-Procedures

In this section, I explain how decision-procedures enable human groups to make decisions.

Suppose that a group must decide whether to legalize abortion or not. Suppose further that (.51) of the group support legalizing it and (.49) of the group support outlawing it. This group of individuals cannot act as a group to legalize abortion because (.49) of the group disagree. Conversely, they cannot act as a group to outlaw abortion because (.51) of the group support legalizing it.

How can they act as a group without a consensus or the use of force? They need a common-framework that enables them to accept the same action-outcome notwithstanding their persistent disagreements. Decision-procedures provide such a common-framework.

If this group unanimously agrees to using a set of decision-rules in which the premises of those decision-rules specify an empirical condition that is more easily satisfied than reaching a consensus (e.g., majority rules), one that can also be indisputably satisfied, then they are creating a common-framework to make decisions. In the rest of this section, I demonstrate how the properties of decision-procedures create this common-framework, which in turn allows me to explain what a common-framework for group decision-making is.

The first two properties of decision-procedures promote a consensus for their use by individuals who otherwise persistently disagree with each other on substantive

issues. Successfully achieving this consensus entails that each member accepts the framework in order to make decisions as a group.

First: Building a consensus over using a decision-procedure is achievable because the conclusions of its decision-rules map to an action-outcome that each member of the group wants. The decision-procedure offers each member of the group a chance that her desired action-outcome is pursued–e.g., hiring candidate A or candidate B. I claim that a common-framework for group decision-making is one in which it is possible that each member obtains her desired action-outcome.

Second: Since the premises of the decision-rules do not reference the same reasons that lead to conflicting beliefs about whether abortion should be legal or not (e.g., life begins at conception), decision-procedures are able to achieve a consensus for their use through setting those substantive issues aside.

The third property of decision-procedures promotes group cohesion around their results regardless of what those results are. A common-framework for group decision- making is one in which group cohesion forms a group commitment to the results.

Third: Decision-procedures create a reliable commitment to their results from the losing side. As I have argued, decision-procedures have normative background conditions, ones that are automatically agreed to when using a decision-procedure.

These normative background conditions include a requirement to act on the triggered decision-rule and a prohibition against acting on any non-triggered decision-rules. Hence, decision-procedures create norms that participants automatically endorse at their use. That is, they provide the setup. And external circumstances often reinforce group commitment to the results of a decision-procedure.

External circumstances can create a strong motivation for participants to internalize the normative background conditions of decision-procedures. For instance, the need for governance engenders those circumstances for many groups. If legislators think they must come to a decision about whether to make an action legally permissible or not, they have already agreed that it would be suboptimal not to make decisions at all. The group would fail to be a functioning decision-making body without the ability to make decisions.

Other external sources of group commitment are the normative expectations of each member of the group. The winning side expects the losing side to be committed to the result notwithstanding a loss. The losing side expects the winning side to be committed to the result in the counterfactual situation where the actual winning side loses. These expectations form a group commitment to the results of the decision- procedure regardless of what those results are.

In summary, I not only explain how decision-procedures enable groups to make decisions, but I also argue that they possess underlying properties that build a consensus for their use and other normative properties that form their participants' commitment towards carrying out their results. Finally, I have argued that the properties of decision-procedures explain the properties of a common-framework for

group decision-making in which persistently disagreeing individuals are able to act as a group. That is, they explain the basis on which individuals are enabled to accept the same action-outcome despite their persistent disagreement.

4. Normative Systems

In this section, I change the topic of discussion to normative systems. A legal system is a normative system. A *normative system* is a system of norms or rules that govern behavior of individuals within groups and societies. We must understand the components of all or many normative systems in order to understand the kind of normative system that the law is. This purpose of this section is to accomplish this aim.

The overall argument of this paper is that my account of decision-procedures applies to an understanding of the law's essential function. In particular, I argue that the law's decision-making authority is essential to the performance of its function; and the law's essential function is to make conclusive decisions about normative relations within society. The law's decision-making authority consists of certain components that no other normative system has. These components are constitutive elements of the law's decision-making authority. In addition, they are elements that distinguish the law from other normative systems.

The first step of this argument is to show what components that all or most normative systems share. This issue is the subject-matter of section 4.1-4.2. In section 4.3, I discuss the components that distinguish legal systems from other normative

systems. I am able to deliver the rest of the argument about the law's decision-making authority in subsequent sections.

6.1. Normative relations

Normative systems consist of rules, and rules contain normative relations. An understanding of normative relations is needed to understand the components that makeup a normative system.

The first type of normative relations that rules contain are deontic relations. *Deontic relations* are prescriptions about what the normative status of an action is. The normative status of an act can be forbidden, permitted, obligatory. The following set is a basic set of deontic relations.

Deontic relation: {permitted, forbidden, required}

Here are some examples.

(1) It is *forbidden* to go into the theater without a ticket.

(2) Catholics are *required* to confess their sins.

(3) Drivers are *permitted* to park their cars on the street.

The second type of normative relations come from the scholarship of Wesley Newcomb Hohfeld. Hohfeld (2001) was a legal scholar who sought to clarify the law

in general and the concept of rights in particular. He introduced terminology to uncover and remove serious ambiguities in the term "rights". The following are the eight terms that he introduced.[126]

> **Hohfeldian relation**: {claim-right, duty, liberty, no-right, power, liability, immunity, liberty}

Hohfeldian relations have three parts: two agent and a content. Consider the statement that Evelyn has a claim against Abigail that Abigail not drive Evelyn's car. The two agents are Evelyn and Abigail. Evelyn is the subject of the claim and Joshua is the object of the claim. The content of this relation is "that Abigail not drive Evelyn's car." The content of an Hohfeldian relation is the act with respect to which one has a claim, duty, liberty, etc.

Rules consists of either a deontic relation or a Hohfeldian relation. Some normative systems have rules that consists of only deontic relations, such as the ten commandments. Some normative systems have rules that consists of both deontic relations and Hohfeldian relations, such as rules of etiquette or games.

6.2 Rule-configurations

[126] A common modification is changing Hohfeld's term "privilege" to be a "liberty" instead.

In this section, I discuss the next level of sophistication that a normative system may have. Normative systems consist of rules, and those rules can be different types of rules.

Elinor Ostrom and Vincent Ostrom (2014, p. 76) state that there are seven types of rules that configure our choice situation in an institutional context.[127] Those seven types of rules are as follows.

(r1) **entry and exist rules**: "affect the number of participants, their attributes and resources, where they can enter freely, and the conditions they face for leaving"

(r2) **scope rules**: "delimit the potential outcomes that can be affected and, working backward, the actions linked to specific outcomes"

(r3) **authority rules**: "assign sets of actions that participants at particular nodes must, may, or may not take"

(r4) **position rules**: "establish positions in the situation"

(r5) **aggregation rules**: "affects the level of control that a participant in a position exercises in the selection of an action at a node"

[127] These rules originate from Elinor Ostrom's (1986) work on public choice. I have slightly modified her description of some of these rules to fit my model of a legal system in the list that follows. These rules should be thought of as secondary rules.

(r6) **information rules**: "affect the knowledge contingent information sets of participants"

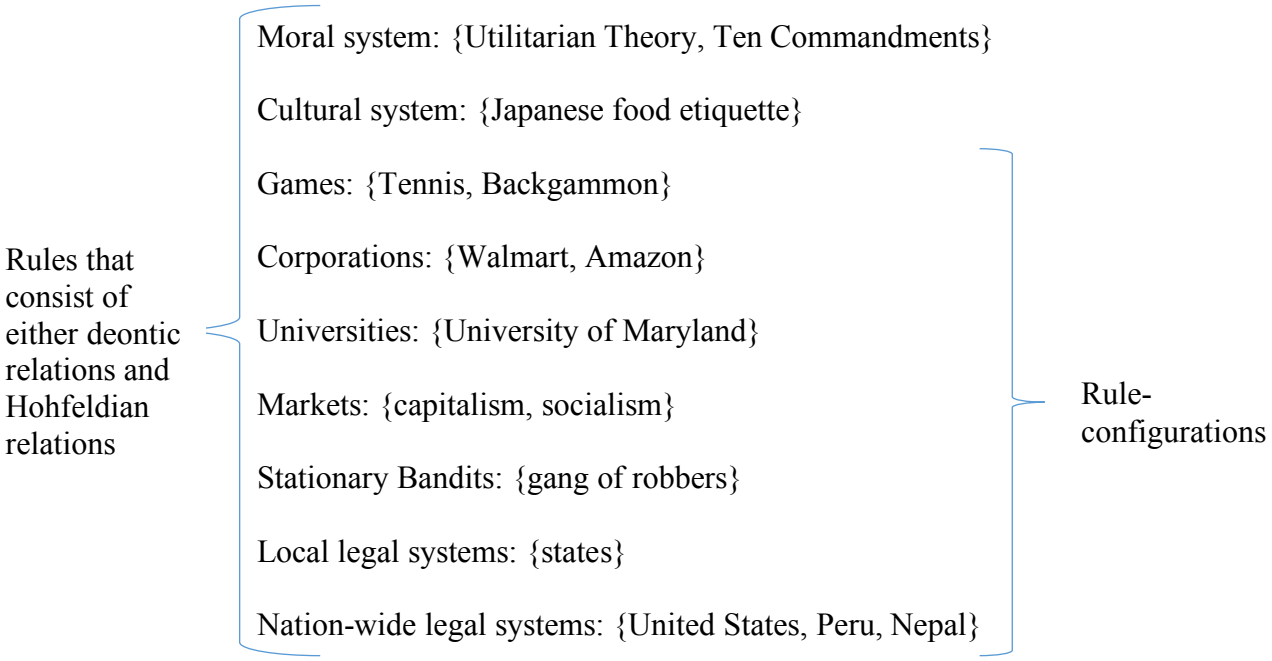
A *rule-configuration* is a combination of rules (r1) to (r7).[128] A rule configuration is needed to structure the collective actions of a set of individuals to produce an outcome. For instance, collective decisions about which person should hold a certain political office are made through the use of rule-configurations. The conditions to be an eligible voter for an election is determined through entry and exit rules. In the United States, for instance, a voter must be a citizen and over the age of eighteen. In addition, aggregation rules determine how the votes are to be aggregated to produce a final collective decision. The combination of the aggregation rule and the entry and exit rule is a rule-configuration that structures individual actions in order to produce a collective action.

6.3 How Are Legal Systems Different from Other Systems?

In this section, I describe the components that distinguish a legal system from other normative systems.

Below are some normative systems.

[128] It does not have to include a rule from each category.



All normative systems have rules that contain either deontic relations or Hohfeldian relations or both. Many normative systems also contain rule-configurations.

Normative systems that have rule-configurations are distinguished from normative systems without rule-configurations with respect to the fact that the former kind of normative systems are able to self-generate more rules, including nested rules or rules about rules, or are able to change or modify rules within its normative system.

What distinguishes a legal system from other normative systems is that a legal system is authorized to change *any* normative relation within society. In contrast, other normative systems, e.g., universities, corporations, and even local legal systems, can change only certain normative relations within society.

The result is that legal systems have the following components that no other normative systems have. (These components come from my theory of "authority" from Chapter 3).

Distinguishing Components of Legal Systems

1. a power to change any normative relation within society
2. an immunity against others changing that normative relation
3. others have a disability against changing that normative relation

I have completed my argument about what components distinguish legal systems from other normative systems. In subsequent sections, I argue that these distinguishing components are essential the law's decision-making authority; and the law's decision-making authority is essential to the performance of its function.

7. Precision Desideratum

In this section, I argue that a desideratum for anyone who gives an account of the law's function is that her account must demonstrate the truth of F1.

F1: The law's function explains the existence and purpose of each essential characteristic of legal systems.

If there were a view of the law's function that necessitates every element in its set of essential characteristics, it would explain precisely for what purpose the law was designed. For if the law's function explains the existence and purpose of each

essential feature, then a view of the law's function that necessitates each essential feature is the most precise explanation of the law's function. Hence, I call this desideratum the "precision desideratum".

To argue for this desideratum, I start with a defense of the following claim: The law's function plays an essential role in determining what other essential properties of the law are. I state this claim more precisely as follows.

$$\text{Let } E = \{x \mid x \text{ is an essential property of the law}\}$$

The function of law determines whether x is an element of set E in virtue of relation R in the following statement.

$$x \in E \text{ only if } \langle x,y \rangle \in R$$

According to this statement, x is an element of E only if x stands in relation R with y. Where y is the law, the function of law restricts the relation between x and the law to the following R-terms.

R1: x is necessary for the law to fulfill its overall function.

R2: x contributes to the law's performance of its overall function in a characteristic way.[129]

[129] To clarify, the term "characteristic way" means in a way that demarcates it from other objects.

I justify R1 as follows: Presumably, theorists who give an account of the law's function think that its function is an essential property of the law. If the law's function is an essential property of the law, then what's necessary for the law to fulfill its function must also be an essential property of the law. A theorist who makes a claim about law's function rejects R1 on pain of incoherence, for it is incoherent to claim that the law has a function but deny that a feature that is needed for it to fulfill its function is essential.

I justify R2 as follows: If the law's function is an essential property of law, then whatever contributes to the law's performance of that function in a way that demarcates the law from other normative systems must also be an essential property of the law. A theorist who makes a claim about the law's function rejects R2 on pain of incoherence, for it is incoherent to claim that the law has a characteristic function that demarcates it from other objects but deny that a feature that is needed for it to fulfill its characteristic function is essential.

Some clarifications are necessary. A legal system is a type of a social institution. It may share the same function as other social institutions, e.g., common law systems, and even other objects, e.g., decision-making algorithms. The function that it has in common with other objects is its overall function. However, legal systems are designed in a different context than other social institutions. Hence, they have different necessary conditions that enable them to perform their overall function in that context. The necessary conditions for a person to make a decision using a coin-flip to decide what to eat for dinner are different from what is needed for people to

make decisions in other contexts. Hence, we must examine the contexts for which people designed legal systems to determine what that purpose is and what features about legal systems allow them to fulfill that purpose in such contexts.

In addition, we must explain how the law performs its function in a characteristic way. For instance, Hart argues that the law's characteristic guidance function is to tell us which rules are legal rules. If we were able to satisfy our needs with an object that has the same overall purpose as the law (e.g., coin-flips), we could not explain the need to design legal systems.

Finally, we should expect that not only is the law's function a determiner of which elements are in the set E, but it should also explain how each element satisfies a R-term. A set of bristles is part of the design of a broom, for instance, because something is needed to pick up dirt. The broom's function explains that brooms need a set of bristles and why brooms need a set of bristles. Analogously, the law's function explains the membership of each essential element of the law. Hence, my desideratum is vindicated.

In sum, I have argued that a burden for any theorist who gives an account of the law's function is that they must satisfy the precision desideratum.

7.1 The Law's Open, Comprehensive, and Supreme Decision-making Authority

In the last section, I have argued that we may discover the law's essential function through determining which feature is essential to the performance of the law's function. I identify that feature to be the law's unique decision-making authority.

The law's unique decision-making authority can be characterized through three features: it is open, supreme, and comprehensive (Raz 1975 [2002], 152-153).[130] These three features provide the law its ability to have a decision-making authority over all other normative systems.

I now argue that the distinguishing components that I have provided are *necessary* and *sufficient* to explain the law's open, supreme, and comprehensive authority.

Raz explains the law's open authority as follows:

open authority – "A normative system is an open system to the extent that it contains norms the purpose of which is to give binding force within the system to norms which do not belong to it," (Raz, 1975 [2002], 152-153).

For Raz, the law's open authority allows it to bind any norms that are external to a legal system. I describe the open quality of the law's authority in a different way: The law has the power to decide that any normative relation with respect to any act for any subject within a legal system is a valid legal rule.

[130] In Raz's analysis of the law's authority, he includes the conceptual element that the law *claims* authority. I do not include this conceptual element within my analysis. The reason that Raz thinks that the law *claims* authority is that he thinks that the law is often wrong about its claim to authority. I do not hold this view. Hence, I drop references about the law's *claim* to authority in my analysis of these features.

I use the following case to explain what I mean. Consider *Riggs v. Palmer* (1889).[131] Palmer executed a will that left his estate to his daughter and grandson upon his death. The grandson poisoned Palmer and was convicted of the crime. The daughter brought a claim to a district court to void the grandson's share in the estate. The court denied the claim stating that voiding the grandson's share would punish the grandson twice for the same crime. The appeals court repealed the lower's court decision with the claim that a person cannot benefit from his own crime.

In this case, we have two competing rules: One rule does not void the grandson's claim to Palmer's estate. The other rule does void the grandson's claim to Palmer's estate. Each rule consists of a normative relation with a subject and a content that specifies an action to which the subject has a duty, liberty, requirement, immunity, and so on. Those competing rules are as follows:

Cannot-be-punished-twice: The government is prohibited against punishing someone twice for the same crime.

Cannot-benefit-from-one's-crime: Citizens are prohibited from obtaining benefits for a crime that they have committed.

The open quality of the law's decision-making authority means that it has the power to determine that either of these rules are valid legal rules within a legal system. That is, it has the power to self-generate a valid rule within a legal system

[131] Dworkin (1977) originally discusses this case in response to Hart.

that corresponds to either of these two competing rules. In other words, the open quality of the law's authority enables it to self-generate a valid rule within a legal system that corresponds to any normative relation with respect to any act for any subjects within a legal system.

An important implication is that the law has the open authority to determine that even evil rules can be valid legal rules within a legal system. This conclusion is the subject-matter of a historical debate within legal theory.[132] It is the view of *legal positivism*, a view that I champion, which is the view that no moral criteria need to be included in the conditions for legality.

Other theorists believe that there is a fact of the matter that determines which rule is a legal rule—i.e., validity conditions. The lower court has determined that **Cannot-be-punished-twice** is a valid legal rule; and the appeals court has determined that **Cannot-benefit-from-one's-own-crime** is a valid legal rule. They are two conflicting rules that two different courts concluded were valid. To explain this conflict, many legal theorists believe that there is a fact of the matter that determines which rule is a valid legal rule; and it is a court's role to discover which rule is legally valid.

It is my view that neither rules are valid legal rules prior to a court's decision. Given certain rule-configurations, the lower court validated the rule **Cannot-be-punished-twice** as a legal rule within the legal system. In my view, the appeals court did not discover that **Cannot-be-punished twice** is not a valid legal rule when it

[132] A claim that natural law lawyers used to champion is the following: "If it is a legal rule, then it is moral." The implication of this claim is that there is no valid legal rule that is immoral. Legal positivism started as a view that denounced this core claim made by natural law theory because it is clear that there are evil legal regimes, such as Nazi Germany.

overturned the lower court's decision; instead, it invalidated **Cannot-be-punished twice** as a legal rule and validated **Cannot-benefit-from-one's-own-crime** as a legal rule.

In addition, it is the combination of a position rule and an authority rule, or a rule-configuration, that allows the appeals court to invalidate a rule that a lower court has validated. That is, it is a position rule that confers the power to invalidate a lower court's ruling to an appeals court (or overturn a lower court's ruling).

It is not the case that one rule is legally valid and that the other rule is not legally valid prior to the lower court's decision. In other words, it is not a court's role to discover which rule is legally valid. Instead, it is a court's role is to make decisions about competing rules.

As we can see, the law's power to self-generate a valid rule that corresponds to any normative relation with respect to any action for any subject, including the government itself, within a legal system enables the law to perform a decision-making function. Suppose that moral criteria legally validated one of the legal rules and not the other. In this case, the law *discovers* valid legal rules rather than makes decisions about which rules are legally valid.[133]

Raz describes the law's comprehensive authority as follows:

[133] This conclusion justifies the view of *exclusive legal positivism*, the view that states that it is neither necessary nor possible for moral criteria to be included in the conditions for legality. I have just argued that if moral criteria were included, the law discovers legally valid rules instead of decides which rules are legally valid. But this conclusion would vitiate the law's open authority (or in Raz's words, the law's *claim* to open authority).

comprehensive authority*:* the law "claims the authority to regulate any kind of behaviour," (1975 [2002], 150-151).[134]

To explain the law's comprehensive authority, I argue that the law's possession of a power to change any normative relation within a legal system is both necessary and sufficient to establish the law's comprehensive authority.

It is necessary because it would lack comprehensive authority if it could not change the normative relation of all persons within its society. Walmart's employee rules lack comprehensive authority because it applies to only Walmart employees.

It is often stated that the law establishes its comprehensive authority over all within its society. However, it is more precise to say that it establishes a decision-making authority over the status of all normative relations within society. The reason is because the content of a normative relation already includes a subject of that normative relation. For instance, in the statement "John is required to vote", "John" is the subject of the requirement. Hence, in determining the status of a normative relation, the law already determines who is subject of that normative relation.

It is sufficient because the power to change any normative relation is sufficient to regulate any kind of behavior. The reason is because the content of a normative relation already specifies which action is under regulation. Hence, for the regulation of any behavior, it is sufficient to control the normative relation.

[134] I do not include the conceptual element that the law claims authority within my analysis. The reason that Raz thinks that the law *claims* authority is that he thinks that the law is often wrong about its claim to authority. I do not hold this view.

An implication of this conclusion is that the law does not use coercion to regulate behavior. More precisely, it uses coercion to regulate instances of a behavior or to lower the expected frequency of future instances of a behavior.

This distinction is important. The use of a power to change a normative relation in an authorized way entails that the law is exercising authority. But the use of coercion to regulate a behavior entails that it is simply using coercion to regulate behavior; it is not exercising authority in this situation. Hence, it is more precise to say that the use of coercion regulates instances of a behavior or the expected frequency of future instances of that behavior instead.

Finally, Raz describes the law's supreme authority in the following way.

***supreme authority*:** the law claims "the authority to prohibit, permit, or impose conditions on the institution and operation of all the normative organizations to which members of its subject-community belong," (Raz, 1975 [2002], 151-152).

The respective power, disability, and immunity that I have described are necessary and sufficient for explaining the law's supreme authority. The law forms its supreme authority in a competitive environment. That is, it establishes its supreme authority through eliminating competition.

Suppose that the law competes with other persons and religious institutions, for instance, with respect to determining which marriage privileges that certain couples have. First, it has the power to determine every couple's marriage privileges due to its power to change any normative relation within society. Second, once it

makes a decision, it also has an immunity from others changing its decisions. In addition, other people and institutions have a disability against changing that decision in any unauthorized ways. This discussion shows that these components are both necessary and sufficient for the law to eliminate competition from other normative systems regarding the normative status of an act.

In sum, I have shown that the respective power, immunity, and disability that I have described are both necessary and sufficient for explaining the law's open, comprehensive, and supreme authority. Therefore, they are necessary and sufficient to explain the full range and magnitude of the law's authority.

As a result, I have argued that the respective power, immunity, and disability is necessary for the law to fulfill its overall function of having open, comprehensive, and supreme decision-making authority. These components stand in **R1** relation to the law for explaining its overall function.

7.2 The Law's Characteristic Way of Making Decisions

In this section, I argue that rule-configurations are essential elements of legal systems because they allow legal systems to make decisions in a characteristic way. The law's characteristic way of making decisions is that it has the capacity to evolve, or self-generate complex rule-configurations, in order to respond to human uncertainty and disagreement about which decisions should be made.

Rule-configurations and rules (r1) to (r7) are essential elements of legal systems. I give two arguments in support.

First, we need to structure joint actions and process what outcome is achieved by the aggregate of human interactions. Rule-configurations provide this structure. In contrast, the general picture that comes out of the current literature (and goes as far back as John Austin's (1832) command theory of law) is that political authorities make rules that they claim citizens must obey, and political authorities use coercive measures to enforce these rules. This picture is oversimplified. Human groups need a rule system to configure the joint actions that they intend to commit. When a large number of humans are in close proximity to each other, they interact with each other and want to perform certain actions as a group. For human groups, this aim is prior to making rules and enforcing them.

Second, we do not have to look any further than Hart's rule of change to see that rule configurations as essential elements of the law. Hart argues that a rule of change allows legal systems to be more dynamic than rule systems that do not have such a rule (e.g., pre-legal societies that have just primary rules). But what exactly is a rule of change? I argue that a rule of change is a rule-configuration—i.e., a combination of (r1) to (r7) rules.

For one thing, an authority rule is needed to specify who is allowed to change which rules. For example, the current President can change an executive order; however, people who held the office in the past cannot. Furthermore, scope rules are needed to specify the allowable changes. The President can annul an executive order from a past President; however, she cannot change the Senate's agenda-setting rules. A rule of change ought to be understood in terms of rule-configuration. If a rule of change is an essential element of legal systems, then so too are rule-configurations.

In this section, I argue that a characteristic function of legal systems is that they enable human groups to mitigate their uncertainties and to resolve disagreements in order for decisions to be made with respect to governance. Furthermore, I argue that this characteristic function necessitates rule-configurations as being part of law. Governance refers to all the processes of interaction and decision-making among the actors involved in a decision-making framework that lead to the creation or enforcement of orders, rules, policies of a social institution.[135] At the core of governance is the ability to make decisions. One governance system may use the Pope and the Bible to govern their affairs. However, a group must first make a decision about whether this system is what they want to use to govern society. They must make decisions about what affairs are governed, the constitution of the system, and the scope of its power. The rule system that they put in place to govern their affairs is a legal system.

However, people disagree about these issues and are uncertain about how much they should trust each other to make good decisions. These uncertainties and disagreements provide the context for which human groups produce a system that governs society. Given this uncertainty and disagreement, large human groups cannot make these decisions if they must reach a consensus to make those decisions.
On my account, uncertainty regarding governance concerns identifying suboptimal or unexpected outcomes that are a result of poor or wrong decisions[136]—e.g., people choose a bad leader, the leader proves to be unfit for office, legislators who make the

[135] Human groups do not need legal systems to govern.
[136] They are poor or wrong in the sense that they fail to satisfy a prior avowed condition or principle.

rules are unresponsive to their constituency. This kind of uncertainty asks "What if these situations happen? How do we design a decision-making framework that is able to prevent these situations from happening or allows us to mitigate their bad effects if they do happen?" This kind of thinking produces stress-tests for determining the effectiveness and stability of a governance system.

Consider, for example, the uncertainty of picking a President who later proves to be unfit to serve office. Given that we are uncertain that we will always choose a fit candidate as President, we ought to develop an exit strategy in case this situation arises. However, we are also uncertain about giving political parties too much power to impeach a President on simply political grounds.

To build responses to these uncertainties, the designers of governance systems must use a rule-configuration which includes, e.g., exit rules, procedural rules, and position rules. In the U.S., for example, the House must initiate the impeachment process with a majority vote and the Senate must decide whether to impeach or not with a two-thirds vote. Hence, we have a decision-procedure for impeaching the President where the decision is constrained by a number of different actors that balance each other's power to form an aggregate decision. Given this decision structure, the aggregate decision must pass a high barrier in order to be successful. The decision-rule for impeachment is the following: the vote for impeachment passes the House with a majority vote and passes the Senate with a two-thirds vote. This decision-rule is established by a number of different interconnecting rule-configurations (e.g., one that gives citizens the legal power to choose their representatives, one that establishes

how investigations occur in the House, one that establishes the impeachment process).

My account of the law's characteristic function necessitates rule-configurations. This is because decisions-procedures, such as the procedure for impeaching the President, consists of a number of rule-configurations. For instance, the premise of U.S.'s described as anything more than the Pope has de facto power over others.

Hence, I argue that my account of the law's function necessitates rule-configurations since they stand in R2 relation to the law. In sum, I have given an argument about the law's function that necessitates each component of legal systems, including the components that distinguish legal systems from other normative systems.

Before continuing on, I take a moment to summarize my argument so far. I have argued that the law's essential function tells us the existence and purpose of each essential feature of the law. I have argued that the law's unique decision-making authority is essential to the law's performance of its function. In addition, I have argued that the components that I have given to distinguish legal systems from other normative systems are both necessary and sufficient to establish the law's unique decision-making authority. These components are necessary to the law's performance of its overall function—to have an open, comprehensive, and supreme decision-making authority over all normative relations within society. In addition, I have argued that they are sufficient to explain its open, comprehensive, and supreme authority. This conclusion entails that no other component is needed to explain the

law's authority. Finally, I have argued that rule-configurations are needed to explain the law's performance of fulfilling its function in a characteristic way—i.e., to respond to human uncertainty and disagreement through an evolution of complex decision-making rules. In the completion of this argument, what I have shown is that my account of the law's function explains the existence and purpose of every essential feature of legal systems.

8. H.L.A. Hart's Guidance Function

My argument in the previous section entails that the rule of recognition is not an essential feature of the law. However, it is a consensus among legal positivists that Hart's rule of recognition is essential feature of the law. In this section, I argue that they are wrong. The arguments in this section also show that Hart is wrong about his views on the law's guidance function.

One can claim that Hart (1994, [1961]) changed the landscape of legal theory with his seminal book *The Concept of Law*. Hart's rule of recognition is considered to be one of the law's essential features.

Hart's explanation for the existence of the rule of recognition is as follows: In the pre-legal world, there are only primary rules, or rules that govern conduct. And they can come from many different sources. Sometimes disputes over which primary rules are binding occur. Hence, in the pre-legal world, according to Hart, we lack guidance over which rules to follow. For Hart, the introduction of a rule of recognition into a society marks its transition from the pre-legal to the legal world.

The key to this transition is the rule of recognition's ability to settle uncertainty over which rules are legally binding. To perform this function, Hart argues that the rule of recognition solves the validity regress problem. It is stated as follows: Of any legal rule, we may ask "Why is that rule legally valid?" We then refer to a higher legal standard to validate the lower legal standard. For example, to validate the legal validity of New York's state laws, we refer to New York's Constitution; and to validate New York's Constitution, we may refer to the federal Constitution. However, what validates the federal Constitution? A validity regress problem ensues, according to Hart, unless we come to Hart's ultimate rule, which validates but is not itself validated. Instead, its existence is formed through certain widespread practices among legal officials.

In sum, what Hart is saying is that the law has a very specific guidance function; its guidance function is to tell us which rules within society are binding through a recognition of legally valid rules. And the law serves this guidance function with the rule of recognition. For instance, the rule of recognition is supposed to provide guidance about which of the following rules is legally valid: **Cannot-be-punished-twice** or **Cannot-benefit-from-one's-crime.**

Here is the upshot: if the rule of recognition cannot guide conduct, then the law doesn't have a guidance function in the way that Hart says that the law does. The reason is because Hart explains the law's ability to guide conduct through the rule of recognition.

To vindicate that the rule of recognition can guide conduct, the following burden of proof must be met.

Burden of Proof: It must be shown that the rule of recognition is identifiable.

According to Hart, we identify legally valid rules through an identification of a legal system's rule of recognition. Hence, a legal system's rule of recognition must be identifiable in order for it to guide conduct.

A problem with its identification, however, is that we must rely upon legal experts to identify it. Hart argues that the rule of recognition is not stated, for the most part, "but its existence is shown by the way in which particular rules are identified either by courts or other officials or private persons or their advisors".[137]

Hart claims that legal experts identify the rule of recognition with statements made from the internal point of view, statements where a participant of a practice conveys her acceptance of it. Hart's example of such a statement is as follows: "It is the law that..." But these statements do not distinguish the rule recognition from legal rules validated by the rule of recognition, for all legally valid rules can be stated from the internal point of view.

Moreover, if the rule of recognition is identifiable, then we should be able to identify its basic conceptual properties. Unfortunately, the basic conceptual properties of the rule of recognition is one of the most contested and puzzling subjects within legal theory. Legal theorists dispute the basic form of the rule of recognition and are even confused about Hart's initial description of it.

[137] Hart, *The Concept of Law*, 94.

For example, Shapiro writes, "What is the basic form of the rule of recognition? Astonishingly, Hart was vague on this critical point."[138] In addition, Hart's initial characterization of it makes it sound like it's simply a list of criteria of validity. But Stephen Perry demonstrates the problem with this characterization: "A list, however, is not a rule...a list, considered simply as a list, has no normative character at all."[139]

In addition, legal theorists are unable to gain conceptual clarity over its content. They cannot agree whether it can include moral criteria or not. This is the subject of the internal debate between inclusive legal positivists and exclusive legal positivists. The former position states that it is possible to include moral criteria within the conditions for legality, but it is not necessary. The latter position states that it is neither necessary nor possible to include moral criteria within the conditions for legality.

In the Postscript of the 1994 version of his book *The Concept of Law*, Hart sides with inclusive legal positivists. However, as I have argued in section 7.1, this position entails that the law is discovering which rule is legally valid instead of deciding which rule to validate as legally valid.

This result is problematic: We are back to the state of indecision in cases where there is uncertainty and disagreement about which moral rule should be assigned greater weight when deliberating about what to do. If so, then the rule of recognition cannot

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[138] Shapiro, Scott. "What is the Rule of Recognition? (And Does it Exist?)." *The Rule of Recognition and the U.S. Constitution*. Ed. Matthew Adler and Kenneth E. Himma. Oxford: Oxford University Press, 2009, p. 55.

[139] Perry, Stephen. "Where Have All the Powers Gone?" *The Rule of Recognition and the U.S. Constitution*. Ed. Matthew Adler and Kenneth E. Himma. Oxford: Oxford University Press, 2009, p. 89

guide conduct under conditions of uncertainty and disagreement. However, Hart's initial reason for positing the existence of the rule of recognition was that it solved problems with respect to uncertainty and disagreement in the pre-legal world.

This result should force us to drop the existence of the rule of recognition. If it cannot perform its guidance function, then its existence and purpose can be neither justified nor explained. What's more is that Hart claims that we must rely on legal experts to identify the rule of recognition. But legal theorists are in longstanding disputes about basic properties that would allow us to identify it. Furthermore, if it were identifiable, then Hart should have been able to provide a clearer description of it.

In contrast, what my account shows is that the law doesn't provide guidance under the conditions of uncertainty and disagreement, rather it enables human groups to make decisions about which rule to validate as a member of the category "law" in contested conditions; and it can only do so with membership criteria that is empirically verifiable given the properties of decision-rules. In other words, in order for legal systems to fulfill its decision-making function, moral criteria cannot be part of the membership criteria for legality. This conclusion puts me squarely within the exclusive legal positivist camp.

9. Robustness Desideratum

In this section, I argue that a desideratum for anyone who is giving an account of the law's function is that her account must demonstrate the truth of F2. In addition, I argue that my account satisfies this desideratum.

F2: The law's function explains the existence of every legal system.
In order to justify that proposition P is a claim about the law, a theorist is required to show that P must be true of every actual and possible legal system.

Hence, any theorist who makes a claim about the law's function must show that her candidate function is true in every occurrence of a legal system. She must show that her explanation is robust. Hence, I call this desideratum the "robustness desideratum".

I have explained why a theorist's claim about the law's function must be a claim that is true about every legal system. But why must it explain the existence of every legal system? Consider the following premise.

Premise 1: Law is a tool that humans have created for a specific purpose.
Humans invent tools for a specific purpose in mind, and the law is a human artifact that is a tool.[140] The purpose for which a tool is invented explains why it was invented. Its purpose explains why it exists. Hence, I vindicate the robustness desideratum.

[140] For a discussion of this view, see (Ehrenberg 2016).

How should we explain the existence of a tool? Humans invent tools to fulfill a specific need. Hence, to explain its existence, we must examine the human need for inventing that tool.

Humans may invent different varieties of a tool that fulfill the same essential need. Although, it may satisfy it in a different way or in a different context, each variety of the tool still satisfies the same need. Moreover, each variety may fulfill other purposes too. I claim that if we look at every variety of a tool, if it has a function in common with each instantiation of that tool, that function is its essential function. It is helpful to illuminate these issues formally.

Consider two possible worlds: W_1 is a world where every legal system has at least one function in common. W_2 is a world where no legal system has a function in common. Each world has n number of legal systems as follows L_1, L_2, L_3, L_4...L_n. Each legal system has a n number of functions since I do not assume that legal systems have only one function. Let lower-case letters a, b, c... represent the functions of a legal system.

$$W_1\text{: } \{ L_1(a,b,c...), L_2(a,e,f...), L_3(a,h,i...), L_4(a,k,l...)... \}$$

$$W_2\text{: } \{ L_1(a,b,c...), L_2(d,e,f...), L_3(g,h,i...), L_4(j,k,l..)... \}$$

If each cutting tool (e.g., scissors, butter knives, shears, steak knives, axe, chef knives) has a function that it shares with other tools of its kind, that function is its essential function. It may satisfy that function in a different way or a different context

than other varieties of cutting tools. For example, we cannot use a pair of scissors to cut a branch down, for the branch is too tough. Instead, in this context, shears is more appropriate to use. Each variety may also have other functions. For example, butter knives are used to cut butter, and steak knives are used to cut steaks. However, each cutting tool has a function that it shares with all the other varieties. That function is its essential function, for it demarcates it from other tools such as hammering tools.

If I can demonstrate that each occurrence of a legal system has a function that it shares with the other instantiations of a legal system, and if I can demonstrate that that function is a decision-making function, I satisfy the robustness desideratum. The task is to rule out W_2 and argue that a consists of a decision-making function. In particular, a decision-making function that consists of enabling human groups to make decisions about practical matters in the face of disagreements and uncertainties. To rule out W_2, consider the following premise.

Premise 2: If every legal system has essential features, every legal system has an essential function.

Most legal theorists think that every legal system has essential features. It is beyond the purview of this paper to argue for this claim. If a theorist does not believe that every legal system has essential features, then my arguments do not address that theorist.

On an understanding of legal systems as human artifacts that are tools, I argue that the conditional statement, Premise 2, holds. The essential features of a tool tell us

that it has an essential function and tell us what its function is. For example, brooms have the essential feature of a handle and a set of bristles. Their essential features enable them to satisfy a function. And if their essential features demarcate brooms from other tools, such as hammering tools, the purpose for which they are invented demarcate them from other tools too. Hence, I am able to rule out W_2.

The remaining task is to argue that a is a decision-making function. I perform this task by way of examining the human groups that create each instantiation of a legal system. I deduce a need that each of these human groups have.

Humans are complex and diverse beings; but, given our common physical, biological, and psychological makeup, we converge on having the same needs. Humans have convergent needs out of natural necessity. For example, all human groups need to create things that cut other things, for we do not have hands or teeth that can cut. And so, divergent human groups all converge on creating objects with which to cut things. Moreover, their shared need to cut things explains the existence of cutting tools across different societies. These statements stand on empirical facts about humans.

I state another widespread empirical fact about human groups: they possess many uncertainties, stemming from their emotions and cognitive limitations, and disagreements, stemming from having different value systems and results in reasoning, about how they should govern themselves. These empirical facts are based on widespread psychological facts about humans.

In addition, all human groups need to make decisions about societal and other practical issues. However, they face uncertainties and disagreements concerning how

to settle them. Furthermore, they are unable to make a decision as a group about these issues, given their uncertainties and disagreements, without the use of decision-procedures. In the statements that I have made so far, I have made claims about the human groups that makeup L_1, L_2, L_3, L_4...L_n.

I have already defended statements about L_1, L_2, L_3, L_4...L_n themselves. I have argued that the essential feature of every legal system are rule-configurations. In addition, I have argued that rule-configurations enable humans to make decisions. Now, I shall make an argument about the law's function that fits the following structure: All human groups share a need to cut things. They invent tools to serve their needs. They are unable to cut (most) things without a cutting tool. All cutting tools (e.g., scissors, butter knives, steak knives, chef knives, shears) share an essential feature—a sharp edge—that enables humans to cut things. On an inference to the best explanation, for explaining the existence of each cutting tool across different human societies, I conclude that each human who has invented a cutting tool has done so for serving the purpose of cutting things.

All human groups share a need to make decisions on practical matters. Once they reach a certain population, they are unable to make decisions as a group. All legal systems have an essential feature—rule-configurations—that enables humans to make decisions. On an inference to the best explanation, for explaining the existence of each legal system, I conclude that each group creates a legal system to serve the purpose of making decisions in the face of uncertainties and disagreements about practical matters.

9.1 Other Normative Systems and Social Order

In this section, I respond to the other views on the law's function.

In "Authority and Convention," Leslie Green (1985) argues that conventionalist views about the law's authority cannot justify its authority. The basis of his argument is that the law's authority does not *uniquely* solve coordination problems, for other normative systems can solve coordination problems too.

The response that I give to the other theorists builds upon the logic of Green's argument. The claim of this paper is that I have identified the law's *essential* function. This claim is consistent with the view that the law has multiple other functions. But the law's essential function is the one that only the law can *uniquely* fulfill.

Most of the theorists that I have cited think that the law's function is to create social order. In response, I ask the following questions: Can other normative systems (or a combination of other normative systems) maintain social order? If the answer is the affirmative, then legal systems do not uniquely fulfill this function. The result is that the maintenance of social order does not uniquely justify the existence of legal systems. If so, I argue that the maintenance of social order does not explain the existence and purpose for which legal systems were created.

Instead, the maintenance of social order justifies the existence and purpose of normative systems in general. Suppose that a human group created a legal system to maintain social order, that legal system still does not maintain social order alone. Social order is maintained within a society through a combination of multiple normative systems prescribing a normative status to acts.

For instance, we need normative systems that make prescriptions about the act of lying in order to motivate people not to lie; people usually do not lie because they are sufficiently motivated by the prescripts of morality. Or, perhaps, people do not lie because there is a well-established social convention about not lying. Nevertheless, it would be unfeasible for a legal system to enforce a rule about lying. What's more is that sufficiently low rates of lying is needed within a society in order for other kinds of social cooperation to be possible, such as keeping promises and upholding contracts. If so, the law doesn't maintain social order alone. But rather, the maintenance of social order is accomplished through an assortment of normative systems.[141]

One might object that, even if social order is maintained through a variety of normative systems, nonetheless, it is the state's function to provide collective goods, and the most critical collective good is the basic security of person and possessions. For instance, Christopher Morris writes,

> The basic security of person and possessions is to a great extent a collective good… an important part of the service provided by public police and systems of criminal justice generally is to deter potential violators from harming people. And this deterrence is an indivisible, nonexcludable good. Insofar as social order is a collective good, we may predict that it will not be efficiently produced in a competitive market, even if all the other conditions of perfect competition are satisfied, (Morris 1998, 66).

[141] I think that we forget how much of our lives is ordered through non-legal means.

Morris is skeptical that a perfectively competitive market can adequately supply the collective good of security of person and possessions since it is rational for people to be free riders in a competitive market. Hence, Morris's response is that the maintenance of social order falls largely upon legal systems—i.e., they are needed to supply collective goods where it is rational for an individual person to defect.

The weight of Morris's argument sits on the claim that it is practically improbable that certain collective goods, ones that are crucial to a happy human life, could be supplied through other normative systems, such as the free market, without a legal system. A legal system is critical to the success of obtaining these collective goods.

The mistake that Morris and all the other theorists make comes from too much of an emphasis upon the law's ability to regulate human behavior. I certainly do not deny that the legal systems are very effective at helping human groups obtain collective goods from solving the free-rider problem. Nonetheless, the law's effective ability to regulate human behavior cannot be distinguished from the use of coercion.

Consider normative systems that stationary bandits create. Bandit rationality induces a ruler to provide a peaceful order and other public goods so that people make enough investments where the economy grows and to tax at a rate where the ruler's wealth is maximized in comparison to all the members within society (Olson 1993). The bandit keeps the rate of investment at a certain level so that no one can become rich enough to challenge his control over them. This situation describes the

normative systems that feudal lords, kings, and Chinese warlords have created in the past.

I have argued in Chapter 3 that "authority" is something much different from the use of coercion. It isn't the "justified" or "legitimate" use of coercion either. Rather "authority" is a status that authorizes a person or thing to change a normative relation or preserve a non-change to a normative relation. Hence, the ruler of bandit societies can create laws that make prescriptions about the normative status of acts, but they do not exercise authority when they make these laws. Rather, they make laws that are valid within their own normative systems.

In contrast, the law's authority is essential to the performance of its function.[142] That is, even when the law regulates human behavior, it precisely does so through an exercise of authority rather than through the use of coercion. To deny that the law's authority is essential to the performance of its function is to claim that its authority is non-essential to its existence. The result is a normative system that is no different from ones that stationary bandits create.

A stationary bandit doesn't tax people through an exercise of authority, a stationary bandit taxes people through an exercise of coercion. The exercise of authority is non-essential to the bandit's collection of taxes. That is, a stationary bandit is effective at functioning, i.e., extracting wealth from members within society, without the use of authority. The distinction between legal systems and old feudal

[142] Raz also makes this observation through his view that the law claims authority, but he thinks that it often doesn't have the authority that it claims.

systems is that the former type of normative systems exercise authority in order to fulfill their function.

The second mistake that political and legal theorists make is that they do not account for the evolution of institutions. A legal system is a kind of institution, and all institutions have rule-configurations.[143]

Consider a normative system that corresponds to one that a stationary bandit creates. A stationary bandit gives commands that people follow through the effective use of coercion and control. It consists of rules that contain mostly deontic relations, i.e., a set of behaviors that are permitted, required, or prohibited. This normative system is no different from a set of commands.

The normative system that Simmons's account creates also lacks the sophistication of an institution. Simmons argues that "authority" is not the use of *de facto* power over others, but rather it is an exercise of a "right to rule" which is correlated with a "duty to obey". This normative system consists of rules that contain *only* deontic relations or Hohfeldian relations. Every law is an imposition of a duty, and every duty is owed to the authority in question. This normative system is no different from a set of promises made between people.[144] It doesn't explain the law's unique authority.

There is a clear distinction between normative systems with rule-configurations and normative systems without rule-configurations. Normative systems with rule-configurations are able to self-generate a complex and rich set of

[143] Ostrom claims that all institutions have the broad types of rules that she has listed.
[144] This result isn't surprising given that "authority" on Simmons's framework is based upon the receipt of consent which is very similar to the practice of promising.

nested rules, or rules about a rule. That is, it is able to generate nested rules of (r1) - (r6). I have argued that this pattern is important for the formation of decision-procedures. In section 7.2, I have argued that the law's characteristic way of making decisions is that it has the capacity to evolve, or self-generate complex rule-configurations, in order to respond to human uncertainty and disagreement.

Hence, evolving modern legal institutions have a much higher complexity and richer set of nested rules or rule-configurations. My account of the law's function is able to explain this pattern. If the law's *essential* function is the maintenance of social order or to distribution of public goods, it would not explain the evolution of modern legal systems because these functions could be fulfilled through normative systems that resemble a set of commands or a set of promises. But legal systems should be distinguished from these other normative systems.

I have argued that what distinguishes legal systems from other normative systems is that legal systems have a power to change any normative relation within society, an immunity to its decisions from being changed, and others have disability against changing its decision. I have argued that these distinguishing components are necessary and sufficient for explaining the law's unique authority—i.e., its open, supreme, and comprehensive decision-making authority.

In sum, I have provided an account of the law's function which explains the existence and purpose of each of its essential components. In addition, I have shown how the law's decision-making authority is essential to the performance of its function: its essential function is to make decisions despite human uncertainty and

group disagreement about all sorts of normative relations that are in competition or conflict within society.

6. Conclusion

In this paper, I have developed an account of the law's function. I claim that it has a deciding function. It has this function because humans possess many cognitive limitations and differing value systems. Humans create legal systems to enable themselves to make decisions in the face of their uncertainties and disagreements. I argue that my account satisfies the precision desideratum and the robustness desideratum. Satisfying these desiderata places my view of the laws function at the highest level of explanatory power over other views.

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