9

MY UNIVERSITY'S YACHT: MORALITY AND THE RULE OF LAW

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THE MORALITY OF LAW

The long-running debate over the putative moral obligation to obey the law seems, in recent decades, to be sparked by the generally accepted fact that much of the content of actual law is conventional and is not deducible from moral first principles. Yet, this conventional content seemingly becomes right, so that one should abide by the rule of law. Varied arguments have been proposed to back this claim. In recent decades it is commonly supposed that no argument will do the trick.¹

The question whether there is a moral obligation to obey the law is typically posed as though one may have a particular morality that the law may violate. For example, a utilitarian or a Kantian cannot be obligated or have a duty to obey a Nazi government's laws where these are utterly immoral by utilitar-

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205
ian or Kantian principles. Despite its virtually total neglect, however, a more difficult issue is whether one has *eo ipso* a moral obligation to obey a law that is derived from one's own moral principles.  

The vast standard literature on whether one has an obligation to obey the law asks and answers that question almost entirely in the abstract, as though the issue were whether anyone and everyone can have the same obligation. To put the issue in this abstract form one must assume a unique answer to the question of what is moral, as though the issues between utilitarians, Kantians, Aristotelians, and others are settled, or one must assume there is a metatheoretic reason for thinking the law is separate from moral theory.

Instead of posing the question of legal obligation at the most general, abstract level, I wish to ask whether one who shares the apparent morality of a given law or legal system is therefore morally bound to obey the law. *Even in this most congenial case for a moral obligation to obey the law, the answer is often no.*

In the justification of law there are two compelling classes of normative claims we can make. First, we may be able to say directly that something is wrong, as many would want to say killing under certain circumstances is wrong. Such claims may be grounded in any standard moral theory, including utilitarianism, various rationalist deontologies, contractarianism, virtue theory, the ethics of caring, and, of course, atheoretical intuitionism for those who just happen to know right from wrong or good from bad. And second, we may be able to say that a particular institutional arrangement for handling social interactions is right. We may then say that particular actions are wrong by arguing indirectly through the institutional arrangement. Consequentialist moral and political theories such as utilitarianism and John Rawls’s theory of justice, in its concern with distribution, generally give such overarching normative defenses of institutions.

We might associate the first class of direct claims with Hume’s category of natural duties that we can more or less see on their face in relevant situations, and associate the second class of indirect institutional claims with Hume’s artificial duties. Artificial duties are duties that could be otherwise if we had other particular institutional arrangements, which might work just as well as the arrangements we do have. For example, the traffic laws of England and the United States differ in many ways, but drivers in either country may reasonably be thought bound to that nation’s laws.

The striking fact is that these two classes of justifications can yield conflicting conclusions even when they both derive from the same basic moral principle or theory. We generally must have institutions to regulate various interactions. They are often useful for handling motivational problems, as legal institutions do. And they are generally necessary for determining relevant facts, as police investigation and trials do. The second, epistemological, consideration is of greater interest here. The legal system may have capacities for discovering facts that individuals cannot match. But it may also face constraints on gathering and using information that individuals, including individuals in the legal system, need not face in a particular case. Legislative enactments may address certain kinds of fact, such as average tendencies of the population, while ignoring other kinds, such as idiosyncratic personal preferences. Not only the legislature but also implementing agencies may have much better access to the former kinds of fact than to the latter. Conflicts between direct and institutional claims of rightness may arise when an individual has better specific knowledge than relevant institutions can have or can generally be expected to have. There may even be conflicts when the individual has poorer knowledge.

Although I will generally address arguments to utilitarian justifications, justifications from other moral principles may be supposed to have similar structures. This is not an issue that has been of great concern to exponents of certain theories, and one cannot be sure of the structures of some theories. Utilitarianism is grounded in some notion of welfare, which applies as well at institutional and individual levels. Even at the individual level, a utilitarian must take account of the welfare of others in justifying her actions. Contractarian consent, in the rationalist variant of most contemporary contractarianism, is inherently about institutional-level choices. It would be preposterous in general to apply rationalist consent theory to ordinary dyadic exchanges and then to enforce the “agreement” (although parents may often do this for—or to?—their children when they impose
resolutions on their children that they think the children would accept if only they knew enough to understand the issue. Therefore, unless a rationalist contractarian theory is coupled with something beyond a principle of agreement, say, with fairness, or it justifies some consequentialist general principle, it may not be subject to the conflict I address here. But if it escapes this conflict, its advocates should avoid falling into contractarian discussions of morality at the individual level. Libertarian consent, because it must always be actual, applies identically at both levels, although it may be incapacitated at the institutional level by the near-impossibility of universal agreement. Fairness may have very different content at the two levels, although I will assume it is not a bifurcated notion. If it is bifurcated, fairness theorists face a difficult task in elucidating the notion.

Finally, although I do not focus on it here, the problem of conflict of motivations is central to institutionalist moves. One can consistently say that, for one's own interests, the best arrangement for handling some problem would be a law that would be enforced, even against oneself, and yet also say that it would be in one's own interest to try to dodge that law when happenstance allows. The success of a legal order may turn on getting individuals to act for their more general collective interest and to overcome their momentary particular interests, typically by establishing incentives to change the latter. Indeed, that is the central purpose of the legal order in Hobbes's theory of sovereignty, which gives a clear introduction to the institutionalist structure of a combined moral and legal theory. If self-interest is taken as a general moral principle, its main problem in bridging from institutions to individuals would presumably not be epistemological but motivational. The issue I address here, however, is the problem that arises when the motivational problem is absent because we are focusing on individuals who share the moral vision of the law.

**Hobbesian Legal Order**

I have discussed the strategic structure of Hobbes's theory of sovereignty elsewhere and will not spell it out fully here. In brief, Hobbes supposes that life without government would be so bad that all would happily accept any government in preference to continued anarchy. This is sometimes seen as a resolution of a prisoner’s dilemma. In fact, Hobbes’s portrayal of life without order imposed by government is the constant failure of exchange in various dyadic prisoner’s dilemmas. Lack of political order is not simply a supervision of failed exchange. It is a matter of coordinating some form of government to bring order to us. Included in the order that we get is, of course, the power of sanctions to coerce peaceful behavior as the government thinks necessary. Yet, each of us would have assented to government with such sanctioning power as better for each of us than disorder. It is to our mutual advantage to have coercive government. Hence, the strategic problem we face when we choose government over disorder is merely a coordination of all of us on an outcome we all prefer to disorder.

The Hobbesian choice is not a pure coordination, because, although we may all prefer any of several possible governments to no government, you may prefer democracy while I prefer aristocracy. But the choice is not impure merely in the sense that, whatever regime we choose, some will freeride by violating the law while others abide by it. What no one of us can do is face a different system of law with different expected probabilities of punishment for violations than others face. That is what we coordinate on: a system for and a level of effectiveness of law enforcement. (The level we choose or get may seem far more draconian for the risk averse than for daredevils.) I cannot meaningfully freeride on our creation or maintenance of government by, say, secretly crossing my fingers while voting the government in. Once it is in, that is the end of it. The Hobbesian choice of a system of government and law is relatively complete: we coordinate on a whole system, including its organization of sanctions for illegal actions. No one can freeride on the general choice, although one might freeride on others within the system, if one can successfully avoid sanction. Hence, Hobbes’s general problem is simply one of coordination on a system, not of collective action with all its enticement to freeriding.

If Hobbes’s vision of anarchy, including the anarchy of revol-
utionary times when government fails, is compelling, then his account fits the problem of maintenance of an extant government against revolutionary threats better than it fits the problem of choosing an initial government. We can all more readily coordinate on the unique extant government than on any of the many possible forms of government we might create out of our anarchy. Mutual advantage is essentially the central moral claim for Hobbesian order. We obey a particular government because failure of the government through revolution will be worse for virtually all of us, at least for all of us in the present generation.

We may go further with the Hobbesian argument to apply it even to a particular legal rule when considered ex ante. We can justify many rules as an expected improvement for everyone. Hence, ex ante the adoption of a rule may be a matter of simple coordination. However, when the rule is applied in a particular case, the interaction it governs may be partly or entirely conflictual. But in general the Hobbesian argument applies to the overall choice of government, not to particular laws.

The central strategic problem at the core of law is well implicated in Hobbes's partly positive, partly normative theory of sovereignty and law. Here my purpose is not to argue further for this Hobbesian vision of the law but merely to accept it in broad outline and then investigate what it means for life on the ground under law. The genius of Hobbes's solution is to recognize that we might find order to be an intermediate good on which virtually all could coordinate ex ante to justify government. When we face a particular legal rule, however, the interaction it governs may be partly or entirely conflictual. It is only in the vastly larger context of the need for capacity to resolve such interactions that we can speak of the shared interest in coordination. Law in its applications is almost entirely marginal, while in its Hobbesian justification it is inherently holistic.

In this respect, Hobbes is not alone. Many of the contemporary justifications of law are really justifications of a legal system, not of particular applications of laws. Indeed, I think we must generally want justification to be at the systemic and institutional levels, not at the individual level. That is true despite my view that all that matters is individuals and their welfare. There is no intrinsic value in the law or in any particular law, and there is no intrinsic value in a given state or legal order. There is only the value that comes to individuals.

The strategic problem in Hobbes's theory infects many other theories as well. But it may not affect all. For example, one of the leading candidate theories of law and government in our time is some variant of contractarianism. In its most common contemporary variant, contractarianism is Kantian and rationalist; it is grounded in what one ought to consent to, not in what anyone either actually or tacitly has consented to. The object of contractarian thought is the form of government. Once that form is put in place, it should run on its own without constant recourse to direct contractarian devices. Indeed, the choice of form should be influenced by understandings of what could be made to work, which, in societies with which we are familiar, is unlikely to include ongoing contractarian commitments. If an individual should do a personal assessment of what it would ideally be contractarian to do, that assessment could be contrary to what the constitutional arrangements stipulate in many contexts. But a theory that allows such individual revision might be rejected by most rationalist contractarians.

In an institutionalist account, there is no conceptual connection between what system would be good and what I ought to do, but only a contingent, causal connection. Hence, contingently it can happen that what the system requires of me is not what I ought to do. It may have been a recognition that there is no conceptual connection that led Hobbes to make a connection merely through the threat of sanction. In any case, Hobbes's and John Austin's view of the definitive role of sanctions in law is not merely a psychological claim about human nature or moral incapacity. Rather, they claim that sanction is conceptually implied by their justification for law. Law is justified more or less holistically, not piecemeal. To connect the holistic system to piecemeal contexts in which individuals act, Hobbes and Austin think sanctions are necessary. This is a conceptual, not a moral, move.

To show that Hobbes and Austin are wrong, one who shares their institutionalist perspective must show that something other than sanction could make the holistic and piecemeal justifications match. The successful creation of Socialist man or the
widespread belief in the divine inspiration of the law and the
intention of the deity to punish in the afterlife for legal infrac-
tions in this life would be adequate if they could generally be
made to work. In smaller communities, the pressure of social
rebuke might work well enough to take the place of legal san-
cctions. But this is a device that, for the sanctioned individual,
is closely related to legal sanctions. Hobbes, who inadequately
understood social norms in ongoing small-scale interactions,
would rule this device out as ineffective, whereas Austin, with a
richer understanding of informal possibilities, would count this
device as part of a broader range of devices for maintaining
social order.

All of these alternatives to legal sanction seem to fail for
positive reasons, at least in large-scale modern societies. Yet it is
a commonplace claim that the law, more broadly, social order
stands on the moral commitments of the populace. Indeed, this
claim is at the core of the Parsonian sociological vision. It is at
the core because it is a dogma, an assumption from which much
of the Parsonian world follows. It is not something demonstrated
in its own right or shown to follow from anything else.

Daniel Bell says, "The ultimate support for any social system is
the acceptance by the population of a moral justification." If
this is meant in any strong sense, it is an astonishing claim.
Perhaps Bell means very little. The "a" in "a moral justification"
might be a different moral justification for each of many groups
of citizens. Or perhaps the "a" is meant more strongly as "a
single." Then there must be at least a core of consensus. For the
United States, to which one might suppose Bell meant to apply
the claim, one may reasonably doubt even that much. The core
of moral and political consensus may be an empty domain.

Various fundamentalist religious groups and various racial su-
priority groups seem to agree with some of us about nothing,
not even procedurally. They may use and insist on using civil
libertarian procedures to protect their own interests, but they
would immediately abrogate them in dealing with others.

It is plausible that the only consensus we have, and we do not
always have even it, is that which Hobbes claims. We almost all
prefer order to anarchy. But, as already noted, that is no very
specific point of agreement; it does not uniquely select out a
form of government for us. And there are times when even this
much is not in agreement—or, rather, when some think the
risk of tumbling into anarchy, as the result of challenging the
political order, is outweighed by the potential gains. Something
like this must have been the view of many in the times of the
American Revolution and the Civil War. It may also have been
the view of some in the time of the black power and anti-Viet-
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nam War movements and of many in (now formerly) Commu-
nist nations in recent years.

Is the Hobbesian minimalist's consensus adequate for Bell's
thesis? Surely not. That thesis is reduced to the empirical asser-
tion that order serves our individual interest better than the
alternative. Moreover, such a consensus still fails to motivate
individuals in the face of actual laws, even individuals who go
further and agree with the laws in principle. For this purpose,
there is no serious candidate to replace sanction at the concep-
tual core of the law.

No Parking

The most straightforward objection to the obligation to obey
the law is to claim that it would be moral in some context to
violate the clear law. It is an easy claim to make. Perhaps it is
best to make it with a real-world example, preferably a trivial
example that will not provoke disagreement about its actual
structure. Suppose we have no-parking areas so that, for quick
errands or emergencies, people may stand briefly while doing
their business. Unless there is someone in a waiting car who will
move it when directed to by a police officer, the car gets a ticket.
Obviously, this is inefficient for those who do not otherwise
need or want to have a second person along for the errand.
Moreover, if it were possible for me to know no one else would
need a particular space for a brief stay, it would be efficient in a
narrow sense for me to park there without fear of causing
disruption and without need of an extra person. It is only at the
global level of determining what information system we will use
for allocating no-parking spaces to brief parkers that it would
be inefficient for me to park there.

Suppose I know that today the police are pulled off their
usual duties of ticketing minor traffic offenses to provide crowd control and protection for visiting dignitaries during a major political march and demonstration. I am confident there is negligible chance of a ticket for my illegally parking while I do an errand. Moreover, suppose that the considerations that bring me to need to do the errand are exceptional and that I would want the system to be able to exempt people in such dire straits from having to obey the parking laws—if the institutional burden of handling such exemptions were not egregious. My moral theory might be based on consent, fairness, or utility. And the law could be built on my background moral theory, which, contrary to the law, tells me to park. Indeed, it might even tell me to park on occasions when I could expect a ticket but when I would think the benefits of parking outweighed not only the likely benefits of keeping the space free for others but also the cost of my fine.

The claim that I might morally violate the law may seem devastating to the thesis that there is an obligation to obey the law. But in the parking case and in many others, all that is at stake is roughly the ancient concern with equity. The law cannot be sufficiently detailed to get everything right. Hence, ideally there should be the possibility of overriding the letter of the law to adjust for hardship or perverse implications. I can morally violate the parking law precisely because I can credibly think legal authorities would agree with my formally illegal choice. There may be practical obstacles to invoking equity and it may nevertheless be right for the individual to violate the law when the individual acts from the same moral principles as those that lie behind the law.

Equity depends on the possibility of bringing relevant officials and lawbreakers to common knowledge and understanding of the formally illegal action. Once the case is clearly understood, sanctions may be waived, perhaps already by the apprehending police officer, perhaps only by the court. For many reasons, however, it might be impossible to make the issues clear. What should happen then? Let us turn to cases in which it is generally implausible, even incoherent, to say that equity should govern violations of the law that are apparently moral.

My University’s Yacht

Under recently changed laws in the United States, the expenses of using a yacht cannot be charged to federal government grants for research. A few years ago, using a yacht was permitted, just as using a resort hotel for an intensive meeting is permitted, and one might imagine there were cases in which using yachts for research conferences was less expensive than using hotels or conference centers. The reason a university should not now charge federal research grants with expenses for the use of a yacht is not that such economic considerations have changed. The reason is that it is now illegal to charge federal expenses to a yacht and the university will be subject to sanction if it does.

Here there may be no person who is forbidden from the action; there may be only the institution. I, as a federal research grant holder, should not let expenses for use of a yacht be charged to my grant. Various officials in the comptroller’s office should also not allow such charges to go through.

Has any of us been immoral if we let such expenses be charged to the federal account? Suppose we are all utilitarian and we all want the results of our actions to be utilitarian. Moreover, if we have looked at the evidence, we might all agree that, while our particular use of a yacht would be fully utilitarian (it would be cheaper and more effective than using a hotel in Oakland), the availability of federal funds to cover for yachts invites abuse that can best be blocked by simply outlawing any yacht charges to a federal account. There is therefore no disagreement on moral principles or on what the law ought to be.

Perhaps such expenses do go through nevertheless because, say, of flaws in the revision of auditing procedures after the change in the law that newly prohibits yacht expenses. And perhaps I as a professor cannot seriously be thought competent to know the federal rules—I do not even know the rules for obtaining a degree in my department. After all, my whole understanding of the world is that division of labor is welfare enhancing, and I entrust university financial matters to my grants office and to the comptroller, whose specialty is to keep up with relevant rules. I cannot keep up with all the federal
rules that apply to me (who can?), and the rule on yachts may have been changed since my last grant. If grant holders could handle all these matters well enough on their own, there would be no need for the massive bureaucracy of auditors and so forth. Although I have to grit my teeth to write it, it may be utilitarian to have such a bureaucracy. And it may be utilitarian for most grant holders to be relatively ignorant of the finer rules of what can and cannot be charged to direct and indirect costs.

Our action in charging yacht expenses might therefore be entirely a matter of incompetence, not of venality. We did nothing morally wrong, only legally wrong. Moreover, we might stand back to look over what we did, including the changes in auditing practices in response to changes in the law, and conclude that reasonable, moral people would have done what we did. Against the possibility of future failings, we might be able to say nothing more than that certain people should be even more assiduous in their jobs than they evidently were this time. Perhaps even Congressman John Dingell would have to agree in a private moment that our actions overall were morally right, although illegal.\textsuperscript{15}

In this case, as in many others, a moral theory such as utilitarianism may direct our construction of the law even while it also directs our individual violation of the law. The morality at the foundations of the law may be identical in principle to my personal morality but strategic and informational considerations lead to conflict between the two in practice. In the case of the yacht expenses, both applications of moral reasoning face constraints on information that are peculiar to the relevant agency. Congress imposes a prohibition because its members suppose the Internal Revenue Service and federal granting agencies cannot adequately discriminate between reasonable and unreasonable uses of yachts.\textsuperscript{16} And my university and I face ordinary problems of institutional knowledge and monitoring. Gathering information and monitoring actions, of course, do not come free and must therefore be done at a reasonable level that will not be perfect in some ideal sense.\textsuperscript{17}

The conflict between the moral reasons for the law and those for my actions can be merely empirical and not at all moral theoretic. The derivation of what behavior is required differs for the two cases (legal mandate versus individual choice) principally because of differences in the epistemological capacities of institutions and individuals. In that sense, the difference is merely empirical. The same moral principle gives the police, judges, jurors, and free agents the same advice on how to deal with available knowledge. Conflict occurs when these different parties to the judgment of the same individual action have conflicting factual assessments of causal relations. That conflict finally undercuts any claim that my actions under the law are bound by moral obligation. In some contexts, they are bound only by whatever sanction is in the law. In those contexts, to say that my actions are bound by moral obligation to the law under my moral theory is effectively to say that my theory must have an exception clause that turns moral judgment over to institutions in relevant circumstances.

In the cases of my university's yacht expenses and of my parking in a no-parking zone, there are two different problems of knowledge. In the yacht case, the problem at the time of the infraction is with my (or the university comptroller's) passive knowledge, knowledge that was already gained at an earlier time but that may be wrong. This problem may have effect only because of the common organizational problem of less-than-perfect auditing and control, a similarly passive problem. In the no-parking case, I actively know what the law says I should do and yet I violate it. Yet in both cases, my actions could flow from moral considerations. In the yacht case those considerations are \textit{ex ante} because, before I ever charged the yacht expenses, I chose to invest time in other activities that I might have put into learning the government's grant rules. In the no-parking case, those considerations may be in direct assessment of the relative merits of following and violating the law.

In the yacht case, I fail to abide by the law when I would follow it if only I knew better. The problem is that I have traded off the limited moral value of knowing better for the supposedly greater moral value of doing other things, such as teaching, when time and intellect do not permit perfection in everything at once. In the no-parking case, even in the face of adequate knowledge of the law, I should actively act against the law if I directly follow the moral injunction that grounds the
law. In such cases, the threat of sanction may be applied independently of whether there is good reason to do what brings down the sanction. For example, one might see that potentially sanctioned action would be best for the institution and the society in this instance. Hence, the connection via sanction may actually violate positive causal connections.

Finally, suppose—what has not been a charge against Stanford—that relevant officials at Stanford were fully aware of the change in law that made it no longer legal to charge their yacht expenses to federal grants, but that they did so anyway. Perhaps they reasoned that the change in the law was not really intended for them, but was intended to stop abuses by business executives who were suspected of charging yachts to tax deductible business expenses partly in order to increase their personal rewards tax free. As a tax-exempt corporation, Stanford could not abuse the tax laws to offset some of the costs of owning a yacht for occasional personal pleasures. And perhaps it was genuinely putting the yacht to good use for research and conference purposes by providing cheaper and better conferences for their federal grants.

The Stanford officials' act of charging yacht expenses was then illegal. But was it immoral? When the charges were supposed to be from error of a kind one can expect in large bureaucratic organizations—error due to reasonable choices about how careful to be with audits and so forth—they were not necessarily immoral. M. B. E. Smith seems to hold with "most people" that an illegal action is a matter for moral concern only if it is wrong on grounds other than its illegality. It may be extremely difficult to make a case against Stanford's charging its yacht to federal indirect cost accounts on the grounds of general welfare, fairness, or other standard moral principles. On Smith's dictum, then, Stanford's officials were not morally wrong even if they deliberately flouted the new law. Against Smith's view, we might deem Stanford's actions immoral for the reason that the judgment involved a conflict between Stanford's interests and its commitment to moral resolution.

For psychological reasons, we might think people should defer such judgments to other parties or, as in this case, to the law written by relatively neutral parties. This is still partially an empirical and not merely a moral claim.

Nevertheless, one might think it possible that, despite the conflict of motivations, one can sometimes rightly say the weight of evidence in favor of the morality of violating the law is overwhelming. For example, if in Stanford's case the deliberate flouting of the law on yachts led Congress to rewrite the laws to make such action legal, we might suppose Stanford officials were right to violate the law. Those who think such action by Congress implausible may conclude that Stanford wrongly violated the law and should be properly punished.

Fairness

A standard criticism of utilitarianism is that it leads to self-contradictory implications—that the utilitarian thing to do is sometimes not utilitarian. The conflicts in the accounts of yacht expenses and no-parking violations might therefore be supposed peculiar to utilitarianism. They are not. They are a function of the institutionalism of the law in a utilitarian theory of law, not of the theory's utilitarianism per se. Other moral theories of the law are similarly institutionalist. Indeed, virtually every standard theory of law, except perhaps intuitionist variants of natural law, is inherently institutionalist. These theories also generate conflicts between what is morally justified in the law and what an individual might be morally justified to do. The chief reason for the conflict, as in the cases above, is the differences in the epistemological capacities of institutions and individuals.

Briefly consider other theories. A moral theory based in autonomy, such as many recent authors propose, may yield similar conflicts between individual and institutional requirements. Joseph Raz, who is strongly committed to autonomy, evidently holds that, if autonomy is to underlie the law, the concern with autonomy must be consequentialist. We need institutions to enhance autonomy, but those institutions will, as in the argument above, have different epistemological capacities than individuals have. They may therefore be expected sometimes to
reach different conclusions about what ought to be done than an individual committed to autonomy might reach. 21

Suppose we have a system of legal entitlements based on principles of fairness. And suppose those entitlements affect income and wealth, largely in an egalitarian direction. I may fully share the moral commitment to fairness that underlies our law. But I may also have a child, a relation, or merely an acquaintance who, on evidence I think compelling, has been slighted by our entitlements program. Although the evidence is compelling to me, it may be that, for reasons of, say, procedural fairness, it cannot be used by the institution or that the institution would be incapable of gathering such information without gross distortion. I therefore may act from considerations of fairness to violate the law to correct for the miscarriage of fairness by the law.

Charles Beitz recognizes the possibility of conflicts of fairness in democratic voting procedures even when these are grounded in fairness. He concludes that, if we have properly designed our voting institutions from the relevant principle of fairness, then I do not have grounds for complaint if my lot is unfair from some abstract perspective. 22 That is to say, the empirical constraints on what institutions can be designed and how well they can work partially determine what it is right for me to get from the institutions. Similarly, if we choose a distribution of wealth and other basic goods on the basis of Rawlsian principles, then I have no ground for complaint if my share is relatively paltry. It is the system of distribution that must be fair, not the instances.

Despite the apparent problem that fairness may have with conflict between institutional- and individual-level assessments of its duties, fairness has been proposed as the overarching ground for obedience to many—but not all—laws. Suppose the utilitarian as such is not bound to many particular laws, such as parking laws. One might argue from fairness that all are bound to what any are bound to. H. L. A. Hart makes such an argument for cases of mutual advantage, and one can plausibly argue that parking restrictions are for mutual advantage. 23 But then we must wonder whether the fairness criterion, which applies to the whole system of law, can meaningfully apply to a particular application of it. 24

Theorists other than those committed to fairness can reject Hart's argument from mutual advantage as simply not consistent with their moral principles. For example, the law of restitution in the United States seems to reject Hart's argument from mutual advantage. According to the Restatement of the Law of Restitution, "A person who, incidentally to the performance of his own duty or to the protection or the improvement of his own things, has conferred a benefit upon another, is not thereby entitled to a contribution." 25 The Restatement is virtually libertarian or actual-consent-contractarian on this matter. It requires prior consent from me for me to owe you any contribution toward the costs of the order you provide to our mutual benefit.

Those committed to fairness might, if the move works, actually escape the conflict between institutional- and individual-level moral conflict. To achieve fairness overall, we create institutions. Once these are in place, they contingently affect what it is fair for individuals to do. The existence of utilitarian institutions also affects what it is utilitarian for an individual to do, but this is merely a causal relation that adds institutional effects to the range of impacts one must assess to justify one's actions. For the fairness theorist, the creation of fair institutions partly constitutes what it is fair to do.

Again, Hart argues that, if our law serves the mutual advantage of all of us and some obey it, then it is only fair for the rest of us to obey it. Does Hart's move work? Rawls seems to think it does. But Hart may since have rejected it. 26 Robert Nozick rejects it for the libertarian reason that it could be thought to apply to someone who shared in the mutual advantage of some institutional arrangement but who did not actively consent to the burdens of that arrangement. 27 This objection might be compelling if we were striving to find an overarching principle to apply to all moral and legal theories. But if our principle of an obligation from fairness is only to apply to those committed to fairness, something like Hart's move may work, at least prima facie. It may work not because institutions trump individual
considerations, but because they help to constitute some of these.

Although the logical structure of the argument from fairness for an obligation to abide by legal institutions grounded in fairness is consistent with that principle, the argument still does not carry the day. All it does is add extra weight to the claim that abiding by law is fair. That still leaves open the possibility that the totality of fairness considerations available to an individual trumps the fairness of following the law. Hence, the fairness theorist cannot escape the problem of the utilitarian or other moral theorist. Institutions are required in order to achieve greater fairness or greater welfare because institutions have capacities for making things happen that individuals, acting spontaneously, do not have. But their capacities come at the cost of partially offsetting incapacities that individuals may not have. We cannot trick our way out of this empirical conflict with a conceptual move.

The discussion here of moral theories of law other than a utilitarian theory is admittedly sketchy. Unfortunately, that is largely because these theories are so far very sketchy. Few of them have been brought down to ground and applied systematically to real institutional problems. Beitz’s treatment of political equality in a fairness theory is nearly unique in its focus on institutional possibilities. In contrast, there are extensive utilitarian accounts of such grounded problems. Not surprisingly, therefore, there are also remarkably many criticisms of utilitarianism that are far less sketchy than the slight account I have given here of other theories. It is much easier to do more than sketch a criticism when the theory under review is highly articulated and occasionally even fairly precise.28

**IRRESOLVABLE CONFLICT**

Apparently we cannot salvage a general claim to obey the law even for those who share the morality that might underlie the law. We may move these people closer to obedience by imposing sanctions for disobedience, just as we may affect the behavior of those who reject the morality of the law, even if this is little more than *ex ante* mutual advantage as it is in Hobbes’s theory.

But sanctions are likely only to raise the level of obedience, not to make it perfect. And, for any standard moral theory, at some point we must think greater severity of sanctions would be worse—no longer utilitarian, no longer fair, or no longer rationally consensual.

The conflict between individual- and institutional-level moral demands is a strategic conflict. Because “ought” implies “can,” what either an individual or an institution ought to do depends on what it can do. For empirical epistemological reasons they can often do quite different things and they cannot match each other. Hence, what each ought to do need not be what both ought to do. But the differences in moral requirements are not moral theoretic—the same general moral principles can apply to both individuals and institutions.

Can we bridge the conflict? No. Or at least we cannot do so in principle, although we might be able to in some particular cases. We cannot do so in principle because we get into the conflict by applying to its fullest the moral principle we have. Once at impasse, we have no further resources for addressing our problem. All we can do is attempt to bridge the gap between the epistemological capacities of our institutions and relevant individuals. Whether we can succeed in that move is not a subject for conceptual or logical analysis within our moral theory. It is out in the empirical world, where the need for institutions arises.

It is plausible that some institutions should be designed to include devices to block action from contrary individual motivations, including moral motivations, by its own office holders. For example, there may be good strategic reasons for blocking officials from being able to hear claims for moral justifications for violations of laws or agency rules. If they cannot hear such claims, they will be less likely to bend before false claims. Or perhaps officials can reasonably be expected to master the rules they enforce but not to master all the evidential tasks necessary for justifying violations of those rules. In either case, we might expect better results on our moral theory from strong constraints on official actions to conform to the law. This is particularly true if individuals have incentive to seek special treatment and to rationalize their illegal actions, even though they need
not actively think they rationalize but may think they are fully committed to relevant moral principles. But, again, such claims are about empirical matters and are not part of moral theory beyond the constraint they may impose on what is possible.

We might nevertheless suppose legal institutions could, under perhaps exceptional circumstances, correct for their own incapacities. Suppose I have acted from utilitarian motives in breaking the law. If arrested and brought to trial, I might put my own utilitarian assessments up as a defense. The court could then hear my evidence and act on it to do what the institution might have wanted to do if not for its epistemological incapacities. But the court might still finally face incapacities that I do not, and it might reject the claimed utilitarianism of my move. Its sanction might then apply to one who acted rightly. We face a pragmatic contradiction. The contradiction does not turn on internal conceptual problems, but only on contingent facts. At bottom, it can be moral to break even a moral law. And, on the same principle of right, it can be right for the law to punish an individual who has acted rightly.

NOTES


2. An alternative view is that there is something about law that gives us an obligation to obey it independently of our own personal moral principles. This view is implausible if law is a means—for example, a means of achieving or maintaining order. H. L. A. Hart raises such a view in "Are There Any Natural Rights?" Philosophical Review 64 (1955): 175–91, at 185.


4. Thomas Scanlon characterizes his contractarian vision as motivated strictly by commitment to reasonable agreement. Scanlon, "Contractualism and Utilitarianism," in Amartya Sen and Bernard Williams, eds., Utilitarianism and Beyond (Cambridge: Cambridge University Press, 1982), 103–28, at 115n. Although Scanlon evidently thinks contractualist arguments are counter to utilitarianism, one plausible ground of reasonable agreement is the overall welfare effects of the choices before us.


8. I do argue for it in Hardin, "Hobbesian Political Order" and "The Morality of Law and Economics."


10. Consider one particular problem with such revision. We might agree, either in the rationalist sense of many contemporary contractarians or actually and ex ante, to contractarian restrictions on possible exchanges. For example, we might suppose that certain classes of exchanges lead to exploitation that blocks more productive or beneficial exchanges. We could not then resolve a particular potential, restricted exchange by dyadic appeal to the contractarian principle, because the restriction is grounded in a whole-society contractarian principle and is specifically desirable only because the dyadic appeal produces contrary results. A contractarian argument in defense of the original restriction on these exchanges just is a denial of the permissibility of subsequently making such exchanges. For fuller discussion, see Russell Hardin, Morality within the Limits of Reason (Chicago: University of Chicago Press, 1988), 108–13.

11. This move may, however, simply reflect a supposition that there are no moral constraints at work at all. Against this supposition, however, is Hobbes's concern with mutual advantage.


13. In fact, my university has no yacht. My university's president at the time of this writing, Hanna Gray, said that to her knowledge we did not even have a rowboat.
14. One can construct similar arguments for other institutionalist moral theories.

15. In return, we should agree, even in a public hearing, that our actions in violating the grant rules were legally wrong and should be corrected.

16. They may also rightly worry that the public cannot discriminate enough even to recognize a category of reasonable uses of yachts at public expense.

17. Even the National Science Foundation in its auditing practices recognizes the trade-off between costs and effectiveness of auditing (Science 254 [4 October 1991]: 24).

18. Smith, "Is There a Prima Facie Obligation to Obey the Law?" 975.

19. These claims are generally silly (Hardin, Morality within the Limits of Reason, 22–29). Many of these claims come from the Monty Python school of moral philosophy, but they may get much of their impetus from vague recognition of the conflict between institutional and individual choices.


21. Unfortunately, autonomy theory is not yet well developed beyond assertions that autonomy is superior to, say, welfare as a moral principle. One cannot say very much about how autonomy works through legal institutions until autonomy theorists deepen the theory. There are beginnings, often little more than hints, in some of the contributions to John Christman, ed., The Inner Citadel: Essays on Individual Autonomy (New York: Oxford University Press, 1989), and in Gerald Dworkin, The Theory and Practice of Autonomy (Cambridge: Cambridge University Press, 1988), Lawrence Haworth, Autonomy: An Essay in Philosophical Psychology and Ethics (New Haven, Conn.: Yale University Press, 1986), Raz, The Morality of Freedom, 367–429, and elsewhere.


24. Russell Hardin, "Sanction and Obligation," Monist 68 (July 1985): 403–18, esp. 415–16. In addition, of course, there may be issues of equity, because the particular laws may be insufficiently nuanced to capture all the interests at stake or to represent these fairly.


