

PERSONS PURSUING GOODS

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John Finnis's powerfully and deservedly influential modern classic, *Natural Law and Natural Rights*, expounds a theory of law and morality that is based on a picture of "persons" using practical reason to pursue certain "basic goods." While devoting much attention to practical reason and to the goods, however, Finnis says little about the nature of personhood. This relative inattention to what "persons" are creates a risk—one that Finnis himself notices—of assuming or importing an inadequate anthropology. This essay suggests that the "new natural law" developed by Finnis suffers in places from the inadvertent adoption of (or, more likely, acquiescence in) a flawed anthropology—an anthropology under the thrall of modern individualistic commitments. To explain this suspicion, this article discusses three difficulties (or so they seem to me) in his natural law theory: difficulties in accounting for the basic good of friendship, for obligations we owe to others, and for legal authority. These difficulties may seem disconnected, but this article suggests that they may all reflect an inadequate anthropology—one that Finnis does not exactly embrace (in fact, I suspect that he would reject it) but that is pervasive today and that in places may affect his theorizing.

Persons act to obtain or realize goods; goods are goods *for persons*. That statement seems innocuous enough¹—though, of course, it does not yet sort "goods" in all the various subdivisions that theorists are wont to mark out—and it seems like a proposition that should be congenial to the so-called new natural law, of which Professor Finnis is the leading proponent. After all, Finnis's seminal book describes an enterprise in which persons use practical reason to realize or participate in "basic goods," and the book's treatment of law, authority, rights, obligations, and ultimately God consists of sustained reflections on some of the implications of that enterprise.² Nonetheless, it seems to me that the picture of "persons pursuing goods" is fraught with difficulties and that these difficulties reflect, if not shortcomings in, at least challenges for the new natural law.

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1. Or at least it seemed innocuous at the time I wrote a draft of this essay—innocent as I was of the vigorous debates between partisans of "good" and partisans of "good for." See, e.g., Connie Rosati, *Objectivism and Relational Good*, 25 *SOC. PHIL. & POL'Y* 314 (2008).

2. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

WHICH COME FIRST—THE PERSONS OR THE GOODS?

Start with an issue about which natural lawyers have diverged. If persons pursue goods and goods are goods for persons, then plainly persons and goods stand in some sort of relation.³ So, then, in trying to understand and elaborate on that relation, at which end should we start? With persons? Or with goods?

Traditional natural law critics of the “new natural law” sometimes suggest that we should begin by expounding some conception of nature—in particular some conception of “human nature,” or some philosophical anthropology—and then show how moral or legal values and principles derive from nature, so understood. Proponents of the new natural law in turn respond by arguing that the critics have gotten things backwards, at least so far as human understanding is concerned.⁴ It is true that in asserting, say, that knowledge or friendship are “basic goods”—meaning goods *for human beings*—natural law theorists are making claims, at least implicitly, about the sort of animal or entity we humans are: we are the sort of creatures for which things like knowledge and friendship are goods.⁵ Even so, we do not derive or deduce moral principles from any prior understanding of human nature.⁶ Instead, we first apprehend that knowledge or friendship are goods and we can then go on if we like to reflect on what human nature must be for this to be so.⁷

This approach resonates with human experience. Very early on, for example, most of us come to appreciate the value of having friends—and thus the “good” of friendship—before we do any reflecting on human nature (if, indeed, we ever get around to that sort of reflection at all). The point might be offered in more abstract and general terms. In approaching the problems of practical reasoning, it may seem, we do not need to begin by working out “what persons are” because we already *are* persons. It is *we*—we *persons*, whatever that amounts to—who find ourselves caught in the current of life, with questions and decisions swirling around us, and who in this situation are trying to figure out how to reason and how to live in matters small and large. A piece of chocolate cake is on the plate in front of me. I do not have to pause and reflect: What sort of being am I? A human being, yes, a person, . . . but then what exactly *is* a person, really? None of those questions

3. Cf. CHARLES TAYLOR, *SOURCES OF THE SELF* (1989), at 3: “Selfhood and the good, or in another way selfhood and morality, turn out to be inextricably intertwined themes.”

4. For a helpful discussion of the disagreement, see Robert P. George, *Natural Law and Human Nature*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 31 (Robert P. George ed., 1992).

5. Cf. *id.* at 34: “As human perfections, ‘basic goods’ belong to human beings, as parts of their nature.”

6. *Id.* at 37: “Basic reasons for action are simply ends (goods) whose intelligible point can be grasped without the benefit of a deduction or inference by anyone who knows what the terms referring to them signify.”

7. Thus if you look at the table of contents of Finnis, *supra* note 2, you will see that after two introductory chapters, the book goes directly to the subject of basic goods. There is no chapter explicitly devoted to “persons,” or “human nature,” or “philosophical anthropology.”

will pass through my mind (and if they do, somebody else will probably get to the cake before I do). What I have to resolve, rather, is simply: Would the cake be good to eat? “Good *for me*,” yes, but the “for me” (and especially the “me”) can remain unelaborated.

In short, it may seem that we can take persons (or, in other words, *ourselves*) as given, provisionally at least, and move immediately to thinking about what things are good for us—for us persons. But this way of putting the point overreaches, I think, and reflection on *how* it overreaches may help us see a risk in going directly to goods without reflecting more deliberately on the nature of persons. It may be that in *living* I can appreciate the value of friendship without giving any thought to human nature and that in *acting* I can ponder what is good for me without worrying overmuch about the nature of the “me.” But in *understanding*, or in *theorizing*, we cannot think or make assertions about the relation between A and B without having some conception of *both A and B*. Thus in order to assert, for instance, that “friendship is a basic good for human beings,” we need to have at least *some* conception of what humans are—of “human nature.”

In the first place, obviously, we need to know that human beings exist. And unless the term “human beings” is for us merely an empty label, then in knowing that human beings exist we would need to have some understanding of the sort of entity we are referring to when we talk about “human beings.” More specifically, we need to understand humans to be the sort of creature about whom it makes sense to say that we can have or enjoy or participate in “goods.”⁸

Moreover—and this is the more pregnant point—if it happened that our tacit preliminary conception of human beings or human nature was somehow flawed or inadequate, then our reflection on morality and law might be corrupted from the outset. This might be a special concern if we find ourselves in a time or place in which flawed conceptions of persons or of human nature happen to be pervasive—“in the air,” so to speak—because then, by leaving our philosophical anthropology merely implicit and by attempting to converse with people who may subscribe to familiar but flawed anthropologies, we might risk inadvertently adopting these premises in our own thinking, thereby distorting our reasoning about goods themselves and about their implications for matters such as authority and obligation and law.

Professor Finnis himself has clearly articulated this concern. “Ethics is not deduced or inferred from metaphysics or anthropology,” he contends.

8. It would make little sense, for example, to ask whether knowledge or friendship are basic goods for asteroids, not because the answer would be “no,” but because it is not apparent how asteroids could even have “basic goods” at all. So it seems that in order to participate in the sort of inquiries that new natural law theorists undertake, we must understand humans to be real and importantly different from things like asteroids such that statements about “goods” *do* make sense with respect to *us*.

“But a mistaken metaphysics or anthropology will block one’s reflective understanding of the way in which one participates in the human goods.”⁹

So is this risk realized in the new natural law? Given the difficulty of the subject matter and the meagerness of my own qualifications, anything I say should be taken as highly tentative—uttered under the compulsion of my assignment. But with that caveat, I would tentatively suggest that for all of the insight it provides, the new natural law suffers in places from the inadvertent adoption of (or, more likely, acquiescence in) a flawed anthropology—an anthropology under the thrall of modern individualistic commitments. To explain this suspicion, I want briefly to notice three difficulties (or so they seem to me) in John Finnis’s natural law theory. These may seem disconnected, but I want to try to explain how they may all reflect an inadequate anthropology—one that Finnis does not embrace, exactly (in fact, I suspect that he would reject it), but that is pervasive today and that in places may affect his theorizing.

THE PARADOX OF FRIENDSHIP

Start with what we can call the paradox of friendship. This is a problem that most of us have probably noticed or maybe experienced. Suppose I am basically an unhappy person, a miserable high school student perhaps, and someone—a teacher or my mother—tells me, “You know, son, your problem is that you’re too self-absorbed. You need to get out and make some friends.” I perceive the wisdom in this advice and so I make some halting efforts to mingle and mix, but to no avail. My advisor then says, “Well, it’s good that you’re trying, but the problem is that you’re just associating with other people for your own benefit. You’re just trying to make *yourself* happier. What you need to do is to really care about other people *for their own sake*. Remember what Emerson said: To have a friend you must be one.”

This advice again seems right, but it may also seem useless and almost cruel—much like the advice to the aspiring salesman that if he really wants to achieve his sales goals, he must forget about sales and truly care about the customers, or like the counsel given to the agnostic but sincere inquirer that she will come to know of God’s reality only if she will pray with unwavering faith that God will answer her prayer.¹⁰ By hypothesis I *am*, at this point anyway, a self-centered person—one who wants to make friends so that I will be less miserable. I am sorry, but it *is* for my sake that I am trying to form friendships. What else can I do, given the sort of person I am? How can I transform myself into someone who cares about others “for their own sake”?

The problem is not just one of getting from here to there—developing out of being a basically selfish person into one who sincerely cares about others.

9. JOHN FINNIS, *FUNDAMENTALS OF ETHICS* (1984), at 22.

10. See James 1:5–6.

If that were the sole problem, then maybe I could make the transition by acting “as if” I cared about others and finding myself somehow transformed in the process. But the deeper problem is how “there”—that is, caring about others for purely other-regarding reasons—is even possible. Suppose that I *could* somehow manage to transcend my own motives and thus care about you for your sake. I might then say that because I sincerely care about you, when you are happy, I am happy, and when you are sad, I am sad. But even then, when I give you a gift or console you in a time of grief, it seems that I’m ultimately acting for my own happiness (which I have now associated with *your* happiness). The difficulty, it seems, is not in acting for other-regarding reasons—that sort of action seems common enough and not especially difficult to understand—but rather in acting for other-regarding reasons that are not incorporated into and operative by means of self-regarding reasons.

Could we avoid this difficulty, perhaps, by approaching friendship on a purely rational plane? Maybe you realize intellectually that as a person your neighbor has intrinsic value, and you act to benefit him not because his happiness makes you happy or because his sadness makes you sad, but simply because you apprehend that benefiting him is the right thing to do. Let us suppose, suppressing doubts, that this sort of action driven by the rational apprehension of rightness is achievable. It seems to me that such a detached, duty-oriented relationship is simply not what we mean by or seek in “friendship.”

As it happens, friendship is a basic good in Finnis’s theory,¹¹ and he explains friendship in terms that point us to the paradox I have noted. Finnis explains (persuasively, I think) that genuine friendship exists only when each friend maintains the relationship for the other’s well-being, not his own. Consequently, “if A treats his relationship with B as being for his (A’s) own sake, then the relationship will not be one of friendship and the benefits (if any) that A derives from it will not include the benefit of real friendship.”¹² The paradox is already looming, and it becomes explicit with this statement: “Thus self-love. . . . requires that one go beyond self-love.”¹³

The problem is not that Finnis’s claim is false: on the contrary, it has the ring of truth. But how is the self-transcendence that Finnis describes possible? On a picture of persons rationally acting to participate in basic goods, it seems that a dilemma presents itself. If I act to befriend you because I want to enjoy and participate in the basic good of friendship, then I will be acting for self-serving reasons and hence will not realize the good. But if I act not to realize and enjoy the basic good of friendship *for myself* but only because I rationally apprehend that friendship (or some other benefit that I seek to confer on you) is a good *without regard to myself*, then it seems

11. See FINNIS, *supra* note 2, at 88, 141–144.

12. *Id.* at 142.

13. *Id.* at 143.

I will be acting in the more detached and duty-oriented way that, though perhaps admirable, is arguably not what friendship consists of. In short, it is hard to locate and satisfactorily account for friendship within a picture of persons pursuing goods.¹⁴

The paradox of friendship is hardly unique to Finnis's ethical theory. But it is starkly posed there, and though Finnis says a bit more about it than I report here—we return to what he says below—I see no solution to the paradox in the new natural law. On the contrary, an account of ethics and practical reason centered on the image of persons rationally pursuing goods makes the problem look next to hopeless.

WHY IMPARTIALITY?

This difficulty segues into the next one that I want to notice. In articulating the requirements of practical reasonableness, Finnis explains that in pursuing goods, we have a (qualified) duty of impartiality.¹⁵ Impartiality means that we should not act to promote and prefer our own interests over those of other people. This injunction is qualified by the consideration that as finite beings, we have special responsibilities for ourselves, our families, and so forth. So there is “reasonable scope for self-preference.” Even so, we are required to follow the golden rule and duly respect “the requirement that one's moral judgments and preferences be *universalizable*.” And this requirement precludes “selfishness, special pleading, double standards, hypocrisy, indifference to the good of others whom one could easily help.”¹⁶

But *why*? The counsel is edifying, no doubt, and I certainly do not want to be understood to be opposing it or to be campaigning for selfishness.¹⁷ But why is this sort of regard for the interests of others *required by practical reason*, as Finnis claims?

In *Natural Law and Natural Rights (NLNR)* the discussion is brief, but it seems that Finnis offers the same kind of argument that one sees over and over again in modern moral discourse—in Kantian claims that we ought to act only on universalizable principles and Gewirthian pleas for human rights that turn on the contention that if we claim something as a right

14. At the conference, Les Green suggested a formulation that in his view avoids the dilemma. Might not the proper statement, he suggests, be: “It is wonderful that we are friends.” On my view, this formulation does not help. There is no such thing as “wonderfulness in the air”: if a state of affairs is wonderful, it is wonderful *to someone*. Perhaps to me, but then we are back to the problem of self-serving friendship. Or perhaps to you, but then the question is: Why should I act for your good? See *infra* notes 15–23 and accompanying text.

15. FINNIS, *supra* note 2, at 106–109.

16. *Id.* at 107.

17. I do not want to be perceived as accepting this point either. In fact, I do have doubts about both the duty of impartiality and even greater doubts about the requirement of universalizability, but this is not the place to present those doubts.

for ourselves then we must concede the same right to others.^{18,19} So again, the problem with the argument (if there is a problem) is not uniquely Finnis's. Still, the duty of impartiality is crucial in Finnis's overall theory—it seemingly informs the duty to promote the common good, which in turn is central to Finnis's account of authority—so if this is a problem, then it would seem to be a large one for the new natural law position.

So *is* the argument problematic? Although in this point (as in many others, no doubt) I am out of sync with a good deal of high-level modern theorizing, I have to confess that this sort of Kantian-type argument has always seemed to me to be blatantly question-begging. I have tried to elaborate on my doubt (or my confusion) at greater length elsewhere, and others have done so more carefully and learnedly than I could.²⁰ But for now, and to be brief, perhaps we can put it this way: presumably an argument for impartiality is offered on the (very plausible) assumption that there is a legitimate question to be addressed. *Why* should we care about the good of others? Why should we modify or sometimes forego our own good for that of others? These questions do not deny (indeed, they assume) that goods for others *are* goods—goods *for them*, that is. The question is why *we* should care about *their* goods.

If it were self-evident (or if we already took it for granted) that we should care about goods regardless of whose goods they are, then the question would not have arisen in the first place. But the question *does* arise, and it hardly seems responsive simply to point out that something is as much a good for others as for us. We knew that already.

Or if someone asserts that caring about others just is what “morality” means, the questioner could simply rephrase: Okay, then why should I be moral?²¹ Nor does it help to couch the issue in more moral- or justice-laden terms of “merit” or “deservingness” or “entitlement.” This familiar tactic typically tries to smuggle a moral assumption into the initial question and then later pulls out that moral assumption as an answer to the question. So the questioner who asks “Why should I care about the good of others?” is taken to be asserting or assuming that he himself *deserves* or is *entitled to* or *has a claim* to some good and then asking why he should respect anyone else's claim to it. Having set up the issue as one about *desert*, the respondent can

18. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* (H.J. Paton trans., Harper & Row 1964) (1785), at 70.

19. See ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* (1996), at 15–20.

20. For my own criticism of the argument, see Steven D. Smith, *Nonsense and Natural Law*, in *AGAINST THE LAW* 100, 112–114 (Paul F. Campos et al. eds., 1996). For a more careful philosophical presentation, see RICHARD JOYCE, *THE MYTH OF MORALITY* (2001), at 91–95, 123–134. In his response to the articles in this symposium, Finnis addresses this challenge carefully and at length; see John Finnis, *Grounds of Law and Legal Theory: A Response*, 13 *LEGAL THEORY* 315–344 (2007), but I confess that I remain unable to see how his discussion persuasively answers or explains away the basic difficulty.

21. See MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS* (1998), at 29–32. Perry elaborates on this difficulty in his contribution to this symposium. See Michael J. Perry, *Morality and Normativity*, 13 *LEGAL THEORY* 211–255 (2007).

then triumphantly proclaim, “Ah, but your claim of desert or entitlement is no different from or stronger than your neighbor’s. So if you think *you* are entitled to the good, then logical consistency forces you to admit that *he* is entitled to it as well.”

But in fact the question makes no assertion of “entitlement,” any more than it denies that the good is a good for others. “I never said I *deserved* X or was *entitled* to X,” the questioner might reply. “I only said X was a good for me. So if I take X for myself, there’s no contradiction in that. I concede that X is a good for my neighbor as well. But the question, once again, is why that should matter—to me?”

I confess that I see no answer to that question in Finnis—or in Gewirth, or Kant, or most of the other theorists who make this move.²² On the contrary, the move seems more like, as Richard Joyce suggests, “well-entrenched bluff.”²³ So insofar as anything important (like morality, or legal obligation) hinges on this move, this seems a serious problem.

THE PROBLEM OF AUTHORITY

The third difficulty I want to notice will require more elaboration. In *NLNR*, Professor Finnis gives an account of legal authority based on the necessity of officially promulgated rules for the coordination of the activities of a diverse citizenry in pursuing their respective goods. Finnis’s account is persuasive and insightful and better than most theories of legal authority, I believe, but it has one minor (or perhaps major) limitation: like other modern theories it is not ultimately a theory of legal *authority* at all. Rather, these theories attempt, with varying degrees of success, to provide an account of *reasons* we have to act in accordance with officially promulgated rules and directives. But these reasons do not flow from any authority in the rules or the rulers; rather they derive from independent considerations and moral principles.

This is my conclusion, at least—a conclusion that awaits both explanation and supporting argument. I try to explain and argue for this conclusion at length elsewhere;²⁴ here only a short synopsis will be possible. We should start by looking at Finnis’s account of authority more closely.

The Coordination Account of Authority

In Finnis’s theory, legal authority arises from a convergence of the necessity of social coordination and the capacity of an individual or institution to

22. See, e.g., MICHAEL P. ZUCKERT, *LAUNCHING LIBERALISM: ON LOCKEAN POLITICAL PHILOSOPHY* (2002), at 331–367.

23. JOYCE, *supra* note 20, at 134.

24. See Steven D. Smith, *Hart’s Onion: The Peeling away of Legal Authority*, 16 S. CAL. INTERDISC. L.J. 97 (2006).

provide that coordination.²⁵ A community requires some sort of coordinating authority in order to function and to promote the common good; it needs some person or institution to say which side of the road to drive on, how property can be transferred from sellers to buyers or from generation to generation, how commercial or other associations can form themselves into corporate bodies and interact with others, what obligations citizens have for military defense—in short, how to behave in the whole host of matters, trivial or momentous, in which coordination is needed to permit citizens to work together in the pursuit of their common and sundry interests.²⁶

Needing a thing, of course, is usually no assurance of having it. We need coordinating authority, but how do we get it? Here Finnis has a distinctive answer: authority derives from—or perhaps simply consists of—the ability and inclination to provide the needed social coordination. Suppose someone—the czar, say—has the capacity and inclination to provide the coordination that a community needs. In that case, citizens in that community have a good reason to follow the czar’s coordinating directives. But this state of affairs—namely, capacity to coordinate coupled with reasons to comply—is just what it means to have legal “authority.” So a government and its officials have authority by virtue of “the sheer fact of [their] effectiveness” in providing the social good of coordination.²⁷

The coordination account of authority has conspicuous virtues. It illuminates a central function that law, when it is effective, undoubtedly does perform. And the coordination account is refreshingly realistic in declining to invoke the sorts of fictions often deployed to explain legal authority. As Finnis observes, the value of following decrees that provide social coordination does not rest on the usual (and usually fictional) notions of “[c]onsent, transmission, contract, [or] custom.”²⁸ And the theory is comfortable enough with the fact that legitimate governments can exist in “the very frequent case where bad men establish their rulership over a realm.”²⁹

But the coordination account also provokes criticisms. Some of those criticisms merely challenge the details of Finnis’s particular account of authority—initially, at least. For example, Timothy Endicott argues that Finnis’s account supports an understanding of legal obligation that is both under- and overinclusive.³⁰ Commenting on Endicott, I make similar

25. FINNIS, *supra* note 2, at 231–59.

26. The need for coordination, and hence the need for law and legal authority to facilitate such coordination, is not merely an unfortunate consequence of human ineptitude and wickedness. On the contrary, Finnis observes that “the greater the intelligence and skill of a group’s members, and the greater their commitment and dedication to common purposes and common good . . . the more authority and regulation may be required, to enable that group to achieve its common purpose, common good.” *Id.* at 231.

27. *Id.* at 247.

28. *Id.* at 248.

29. *Id.* at 251.

30. Timothy Endicott, *The Subsidiarity of Law and the Obligation to Obey*, 50 AM. J. JURIS. 233 (2005).

criticisms.³¹ These criticisms might seem peripheral—quibbles to be addressed by clarifying or adjusting the details of the account. But the criticisms may be more substantial, because they point us to a different kind of objection—one that would suggest that even if Finnis’s account is persuasive, it is not really an account of legal *authority*.

Take an instance of what might be thought of as overinclusiveness. A tree falls in the road, and a capable and helpful bystander steps in to direct traffic around the tree. In this situation coordination is needed, the bystander has the capacity to provide that coordination, and motorists accordingly have a good reason to comply with the bystander’s directives. Even so, it would seem odd to say that the bystander has “legal authority.” Suppose you are driving and carrying a passenger. We can imagine a conversation like this one:

PASSENGER: Why are you stopping just now? You could have made that turn and been on your way—on *our* way—instead of idling around here.

YOU: Yes, but didn’t you see the man give me a “stop” signal with his hand?

PASSENGER: Sure, but so what? That guy’s not even a police officer. He has no authority. If you don’t stop, he can’t do a thing to you.

YOU: I know all that. But he seems to know what he’s doing. It’s generous of him to step in and help. Things will go better for all of us if we follow his directions.³²

In this situation the coordination account seems overinclusive because it covers someone who we would normally say does not have legal authority.³³ Such situations are relatively uncommon, perhaps, so that the “overinclusive” criticism might seem negligible. And in a sense it may be; but in another sense the criticism seems important because it suggests that what the coordination account is explaining—namely, the fact that we have good reasons to follow the directives of a person or institution with the capacity to provide coordination—is not the same thing that we typically understand “legal authority” to be.

The “underinclusive” criticism may point to the same conclusion. Legal authorities provide coordination, no doubt, but they do other things as well. Sometimes they deliberately act in ways that seem to disrupt established modes and patterns of doing things (and that thereby *undermine* social coordination) in order to achieve what they take to be a more desirable or just state of affairs: think of civil rights legislation, for example,

31. Steven D. Smith, *Cracks in the Coordination Account: A Comment on Endicott*, 50 AM. J. JURIS. 249 (2005).

32. If we change the hypothetical to confer coercive power on the bystander—he has a stick and might break your windshield if you disobey—the analysis remains the same. We still do not typically think that such a bystander has “legal authority.”

33. I initially surmised that Finnis might regard this bystander as possessing legal authority, but Finnis has corrected this surmise. See FINNIS, *supra* note 20.

or *Brown v. Board of Education*. Once again it seems that “authority” and “coordination” are related but nonetheless distinct notions.

A different criticism may reinforce this suspicion. I argue elsewhere that Finnis’s account of the relation between effectiveness and authority gets things backwards.³⁴ In Finnis’s explanation, a government has authority by virtue of its effectiveness in securing obedience and hence in providing coordination. But this description seems to reverse the real order of things: in fact, a government is effective in securing obedience because the citizens by and large believe it has authority. Authority, it seems (or at least perceived authority), is a precondition for practical effectiveness, not the other way around.³⁵ Authority *precedes* coordinating power; it does not follow and derive from that power. Once again, though, this observation suggests that however persuasive and insightful it may be, Finnis’s account arguably is not actually talking about what we understand by “authority.”

If this criticism is right, though, it again points to a difficulty that is hardly unique to Finnis’s theory. In fact, it is arguable that most modern understandings and theories of “authority” miss their target; they are not really talking about “authority” at all.

Authority and Reasons for Action

Modern accounts of authority typically try to explain why we have reasons to act in conformity to the laws of the state or the directives of some set of recognized officials. They typically derive these reasons from the power to coerce, or the subjects’ consent, or the mutual obligations of fair play, or something of that sort. The accounts may or may not be persuasive in arguing that the normative source they appeal to in fact supplies good reasons to follow the law. But even if they are persuasive, do the reasons they provide derive from “authority” on the part of the state or the legal regime? Are the accounts really talking about “authority”?

The questions prompt another, more basic one: What *is* authority? What does it mean for a person or a legal regime to have “authority”? In everyday conversation, a common but curious answer pops up: somebody has “authority,” people say, if “you have to do what they tell you to do just because they said so.” And sophisticated legal theorists often employ a similar locution in explaining what it means for law to have authority. Thus Jules Coleman suggests that “the law purports to govern our conduct by telling

34. Steven D. Smith, *Radically Subversive Speech and the Authority of Law*, 94 MICH. L. REV. 348 (1995).

35. In Finnis’s account, the difference between real and perceived authority seems to dissolve: if people follow someone’s directives because *they think* she has authority, then she has power to provide coordination and hence she *does* have authority. But in fact we commonly distinguish between real and perceived or apparent authority and between *de jure* and merely *de facto* authority. Hence an account that dissolves this distinction seems to depart from our usual understandings of what authority is.

us that we have an obligation to act in a certain way *for no reason other than that the law commands it.*"³⁶

This "just because they said so" conception of authority is familiar but it is also puzzling. How could it be that we do something "just because" someone said to do it or "for no reason other than" that it is commanded? Surely a rule or order interacts with other facts in the world, especially including the subjects' own motivations, to produce action.

My suggestion, though, is that we can make sense of this locution by recognizing two key distinctions. The first is between reasons to act that are personal in some sense and reasons that are either impersonal or only incidentally or contingently personal. If I want to leave the house after dark but do not do so because my father told me not to, this would be a personal reason and it might plausibly be taken as expressing respect for my father's authority. But if I do not go out because it is storming outside, the storm would be a reason for acting, but it would seem odd to say that the storm had "authority" over me.

We associate authority with persons, it seems, not with natural facts or occurrences like storms. But here is the crucial complication: if I stay indoors because there is rioting and bullets are flying in the streets, then in a sense my reason for not going out is connected to the actions of persons, but so far as I am concerned, the fact that persons are involved is only incidentally or contingently relevant. *To me*, staying indoors because bullets are flying is no different in character from staying indoors because lightning bolts are flashing. So once again we would not associate "authority" with reasons that are only contingently personal.

So the first distinction separates reasons that emanate from or attach to persons ("because father said to") from reasons that are impersonal or only contingently personal. The second distinction requires us to sort the factors that lead to action into what we might call our *internal* principles of actions—our desires, commitments, objectives—and the *external* facts in the world that implicate those internal principles, and then further distinguish between external facts that are *directly and essentially related* to our principles

36. JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* (2001), at 121 (emphasis added). See also R. B. Friedman, *On the Concept of Authority in Political Philosophy*, in *AUTHORITY* 56, 63 (Joseph Raz ed., 1990): "[W]e describe such situations [of authority] by saying that an order is obeyed or a decision is accepted *simply because* X gave it or made it." (quoting R.S. Peters). Scott Shapiro seems to point to a similar notion in discussing the idea of a legal rule's motivational guidance. Scott Shapiro, *Law, Morality, and the Guidance of Conduct*, 6 *LEGAL THEORY* 127, 146 (2000): "We can say that an agent is 'motivationally' guided by a rule when the agent takes the rule as the sole source of his motivation for conformity, i.e., when he conforms simply because the rule regulated the conduct in question." Cf. BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* (2d ed. 1999), at 156: "The question is whether the legal status of a command, authorization or prohibition, by itself, without more, adds any *moral* reason for doing or not doing the action indicated."

of action and other facts that are only *incidentally or contingently related* to our principles of action.³⁷

Suppose you love classical music, so that hearing classical music could be said to be a principle of action that motivates you. In that case, the fact that the symphony orchestra is playing Haydn tonight at the concert hall is an external fact that is directly and essentially related to one of your principles of action. Asked why you went to the concert, you could say, “Because they were playing Haydn,” and for those who know you, no further explanation would be needed. Suppose, though, that I am deaf to music’s charms—but not to yours. I might go to the concert to be with you. And in a sense (the “but for cause” sense familiar to torts students), it would be true to say that I went to the concert “because” the orchestra was playing Haydn. But for me, that fact would be only contingently related to my principles of action. *You* went because of Haydn, and *I* went because of you, but I would have been as happy to go with you if you had wanted to attend a baseball game or a NASCAR race.

It seems a permissible or at least understandable locution to say that we act “just because” of something when that something is directly and essentially related to our principles of action. Conversely, when a fact is only contingently related to our principles of action, the “just because” seems inapt. Thus *you* might say that you attended the concert “just because” they were playing Haydn; it would be misleading if *I* said this.

Putting these distinctions together, we come up with the following elaboration of the “just because they said so” account of what “authority” is: a person has authority if the fact that he or she gives a directive is directly and essentially related to someone else’s principles of action. Conversely, if an agent’s reason for acting is only contingently personal or if the reason is only contingently related to the agent’s principles of action, then even though a directive may have provided the agent with reasons to comply, authority is not at work.

We can apply this analysis of authority to see why authority is not present in command-sanction scenarios. H.L.A. Hart criticizes such theories with his famous gunman example: if the gunman orders you to hand over your money or die, you may be “obliged” but you are not “obligated” to obey, and the gunman accordingly lacks genuine authority.³⁸ Hart’s point seems sound as far as it goes. But *why* does the gunman not have authority? His threat does, after all, provide a powerful reason to act. So what does he lack that would be needed for authority? And what about a situation in

37. William Edmundson observes that “[d]esires, wants, values, interests, needs, pleasures, pains, aims, projects, commitments, intentions, ends, goals, beliefs, and facts—whether singly or in combination—may furnish reasons for action.” William A. Edmundson, *When Reasons Obligate* (Apr. 19, 2004) (unpublished draft, available at <http://law.gsu.edu/wedmundson//Reasons%20Obligate.pdf>), at p. 4. All of these items, except perhaps the last one, appear to refer to what I am here calling internalized “principles of action.”

38. See H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994) (1961), at 82–83.

which you *do* have an “obligation” to obey, as in the scenario in which you reluctantly hand over your money because you have children for whom you are responsible and who would be left hapless orphans if the gunman killed you? In that situation of genuine “obligation,” does the gunman suddenly acquire authority?

Our analysis of the common “just because” conception suggests why Hart’s conclusion is correct—even for situations involving “obligations.” It is true that the gunman’s threat gives you a reason to act. But in the first place, that reason is only contingently personal in nature. Your real reason for acting is a desire to avoid death. As it happens, the risk of death emanates from a person, but that fact is not critical to your motivation. If, say, a super-high-tech, out-of-kilter vending machine is on the verge of exploding and the only way to prevent the catastrophe is to keep feeding quarters into the slot, you would have the same kind of reason to pay money into the source of the risk. Moreover, even in the situation in which you pay because you have an obligation *to your children*, the gunman’s threat is only contingently and indirectly related to *that* principle of action.

The Disappearance of Legal Authority?

I argue at some length elsewhere that Hart’s critique of the command-sanction account of law cannot be confined to that sort of account: it applies to all other leading modern accounts of legal authority as well.³⁹ I cannot rehearse that argument here, but perhaps one illustration will serve. Possibly the most common account of legal and political authority in modern times tries to derive such authority from consent or from promise, perhaps in the form of a social contract.⁴⁰ Just government, as the Declaration of Independence says, is based on “the consent of the governed.” So we are taken somehow to have promised to obey the law, and the law and the government derive their authority from our promise.

The usual criticism argues that this sort of account is wrong on factual grounds: we never actually did consent to the government’s authority or promise to obey its law. Much learned discussion has grown up around this issue.⁴¹ Suppose, though, that we set aside these doubts and imagine that

39. See generally Smith, *supra* note 24.

40. Kent Greenawalt observes that “[f]or most of the history of liberal democracies, the dominant theory about why citizens are obligated to obey the law has been social contract.” Kent Greenawalt, *Promissory Obligation: The Theme of Social Contract*, in *AUTHORITY* 268, 268 (Joseph Raz ed., 1990).

41. Compare, e.g., A. John Simmons, *The Duty to Obey and Our Natural Moral Duties*, in *IS THERE A DUTY TO OBEY THE LAW?* 91, 118 (2005): “Real citizens in real political communities seldom do anything that can be plausibly described as either a promise to obey or any other kind of freely made commitment to comply with domestic laws”; with Mark C. Murphy, *Surrender of Judgment and the Consent Theory of Political Authority*, in *THE DUTY TO OBEY THE LAW* 319, 320 (William A. Edmundson ed., 1999) (proposing a “refurbished” consent theory to overcome the standard objections).

in fact all of us have freely entered into an agreement in which we explicitly and solemnly promise to obey the laws adopted by some legal regime clearly designated in the agreement. On the assumption that promises should be kept, our promise would give us a reason to obey the laws. But would this collective promise or set of promises actually generate *authority*?

Well, if we like we can surely describe whatever it is that arises from the promises as “authority.” But I would suggest that this is still not authority in the core, commonsensical sense in which persons have authority if you are obligated to do what they say “just because” they say to do it.⁴² That is because in this scenario, legal decrees are only contingently related to our principle of action—that is, the obligation to keep promises. After all, you can make promises about anything. You might have promised to follow the directives of Dear Abby, or the radio psychologist, or the fortune cookie you will get at lunch tomorrow. Surely those sources would not thereby acquire “authority” over you: they are in fact oblivious to your existence and your promise. Or you might have promised to do *the opposite* of whatever the law commands. As it happens, you promised to obey the law—so we are supposing—and as a result you now have a reason to do that. But the legal directives do not *in themselves* give you a reason to act; they are merely facts that, given the contingent content of your particular promise, happen to implicate your primary reason for acting.

In short, the moral obligation in consent or promise cases arises from the moral obligation to keep promises, not from any authoritative status in someone’s directives. John Simmons explains that for many laws, such as laws prohibiting murder, theft, and fraud, “it is perhaps plain in these cases that there is a moral duty or obligation to do . . . what the law requires.” Even so, “this duty should not be seen as equivalent to a duty to *obey* the law.” That is because “[a] moral duty to obey the law would be a duty to do as the law requires *because* it is required by valid law, . . . a duty to obey the law as such, not to do as it requires just insofar as it happens to overlap with independent moral duties.”⁴³ Simmons’s observation is persuasive, I think, and it can be extended to the case of consent or promise.⁴⁴

Indeed, though we cannot go through the argument here, his observation covers other leading accounts of authority as well. Nor is this just a surprising or unfortunate coincidence. Legal theorists do not think and write in a vacuum; as with all theorists, their theorizing works within a framework of assumptions and in response to particular problems or questions

42. Cf. Michael White, *The Disappearance of Natural Authority and the Elusiveness of Nonnatural Authority*, in *CIVILIZING AUTHORITY*, (Patrick Brennan ed. forthcoming), at 16: “So, if something remains within this world-view that we wish to call ‘authority,’ it must be quite different from authority as we usually conceive of it.”

43. Simmons, *supra* note 41, at 94–95.

44. An extension is required to apply Simmons’s observation to reasons based on promises, it seems; that is because although the content of the promise is contingent, the promise by hypothesis does *refer to* the law or the government. The obligations not to murder, steal, or defraud, by contrast, need make no reference to the law at all.

that are perceived to be important.⁴⁵ Much recent theorizing about legal authority has operated within what we might call a Kantian framework committed to the value of personal autonomy,⁴⁶ and it has arisen in response to what Joseph Raz describes as the paradox of “the alleged incompatibility of authority with reason or autonomy.”⁴⁷ We are or at least aspire to be autonomous beings; our moral worth and dignity inhere in that autonomy,⁴⁸ and as Robert Paul Wolff explains in a much debated essay, autonomy entails self-legislation, or “submission to laws which one has made for oneself.” Hence, “[t]he autonomous man, insofar as he is autonomous, is not subject to the will of another. He may do what another tells him, but not because he has been told to do it.”⁴⁹ The state and its law, on the other hand, are heteronomous relative to us: they are outside forces ordering us to obey *their* commands because we have been commanded. And that is a claim that, as autonomous beings, we can never recognize.⁵⁰

Some theorists, like Wolff, explicitly draw the conclusion that although some laws and legal regimes are, of course, more worthy of our respect than others, “[a]ll authority is equally illegitimate.”⁵¹ Others want to disagree,

45. Cf. ALASDAIR MACINTYRE, *Some Enlightenment Projects Reconsidered*, in 2 *ETHICS AND POLITICS: SELECTED ESSAYS* 175 (2006):

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

46. For overviews of this development, see J.B. SCHNEEWIND, *THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY* (1998); LOUIS DUPRE, *PASSAGE TO MODERNITY: AN ESSAY IN THE HERMENEUTICS OF NATURE AND CULTURE* (1993), esp. chs. 4 and 5. Though the commitment to autonomy is strongly associated with Kant, it is hardly limited to his views. Gerald Dworkin explains that the “view of the moral agent as necessarily autonomous” is “a philosophical view that is shared by moral philosophers as divergent as Kant, Kierkegaard, Nietzsche, Royce, Hare, Popper, Sartre, and Wolff.” GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* (1988), at 34.

47. JOSEPH RAZ, *THE AUTHORITY OF LAW* (1979), at 3.

48. See ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* (1998) (1970) *Id.* at 71–72:

It is out of the question to give up the commitment to autonomy. . . . When I place myself in the hands of another, and permit him to determine the principles by which I shall guide my behavior, I repudiate the freedom and reason which give me dignity. I am then guilty of what Kant might have called the sin of willful heteronomy.

49. *Id.* at 14.

50. For a helpful discussion, see Neil MacCormick, *The Concept of Law and The Concept of Law*, in *THE AUTONOMY OF LAW* 163, 181–185 (Robert P. George ed., 1996). MacCormick concludes that “[l]aw may then engage our autonomous assent, but in its own character it is relatively, if not absolutely, heteronomous.” *Id.* at 185.

51. WOLFF, *supra* note 48, at 19. See also *id.* at 18:

The defining mark of the state is authority, the right to rule. The primary obligation of man is autonomy, the refusal to be ruled. It would seem, then, that there can be no resolution of the conflict between the autonomy of the individual and the putative authority of the state. Insofar as a man fulfills his obligation to make himself the author of his decisions,

and a central purpose of their theorizing has been to reconcile authority with autonomy. But how? In a framework including a strong commitment to autonomy, the common and almost mandatory strategy attempts to show that obeying authority can be consistent with—indeed, reasonably required by—what *we ourselves* choose and will *for ourselves*. Consent accounts are an instructive example: you do what the law says *not* because the law inherently has authority over you but because *you* promised to obey it.

Suppose some such account can plausibly explain why we should do as the law commands and why such compliance is consistent with our autonomy. The hard question now is whether this explanation allows us to say that we are doing as the law commands *because* the law so commands. Something like this, once again, is what the familiar locution takes “authority” to mean and to be.⁵² But under modern theories of authority, it seems that this description is no longer apt. Rather, we do what the law directs only because—and only if and insofar as—we believe that following the law will enable us to act on the reasons we already embrace without regard to the law.⁵³

So it seems that in attempting to save authority, modern theorizing has in fact undermined it. Perceiving the central problem for authority to be the need to show how obeying authority can be consistent with prevailing modern commitments to autonomy, theorists have struggled to reduce authority to something else—something less conspicuously heteronomous. Our obligation to obey flows from reasons we independently embrace or from choices we independently make. In this effort the theorists may or may not succeed, but insofar as they do succeed, they thereby show that in fact we do *not* follow a legal directive *because* it is authoritative. In short, in attempting to explain authority, modern theorists end up explaining authority away.

Finnis himself quietly and somewhat obliquely concedes this point with respect to his own theory, I think. Thus, he acknowledges that “the ruler has, very strictly speaking, no right to be obeyed . . .; but he has the authority to give directions and make laws that are morally obligatory and that he has the responsibility of enforcing.”⁵⁴ In addition, Finnis (following Aquinas) carefully explains how, in the case of *unjust laws*, subjects are not obligated by the laws themselves but may nonetheless have a moral reason to obey them

he will resist the state’s claim to have authority over him. That is to say, he will deny that he has a duty to obey the laws of the state *simply because they are the laws*.

52. See *supra* note 46 and accompanying text.

53. In this vein, Heidi Hurd explains a variety of considerations that make it “generally appropriate, indeed, generally obligatory, to comport one’s conduct in accordance with social and legal rules.” But “[n]one of these considerations gives us a reason to follow the law *because it’s the law*.” Heidi Hurd, *Why You Should Be a Law-Abiding Anarchist (Except When You Shouldn’t)*, 42 SAN DIEGO L. REV. 75, 80–81 (2005).

54. FINNIS, *supra* note 2, at 359.

so as to avoid injury to fellow citizens.⁵⁵ But although just laws surely claim more respect than unjust laws, insofar as the *obligation to obey* derives from a general duty owed *to our fellow citizens*, there seems to be no difference in this particular respect between just and unjust laws.⁵⁶ In neither case does the law itself provide the “just because” sort of reason that is the mark of authority.

We might thus be tempted to conclude that authority in the core “just because” sense does not exist. And indeed some thinkers have drawn this conclusion. Thus Hannah Arendt made the intriguing announcement that “authority has vanished from the modern world. . . . Practically as well as theoretically, we are no longer in a position to know what authority really *is*.”⁵⁷ Her assertion echoed Kierkegaard’s earlier declaration that “the concept of authority has been entirely forgotten in our confused age.”⁵⁸ Contemporary theorists sometimes make similar claims.⁵⁹

Whether the disappearance of authority is something to be lamented or celebrated is no doubt debatable. Arendt worried that the “loss [of authority] is tantamount to the loss of the groundwork of the world.”⁶⁰ On the other hand, it might be that “reasons for action”—authority lite—can give us everything of value that full-blown authority could, but without treading on our autonomy. Either way, though, it ought to be a notable discovery that, for better or worse, something that seemed so central not only to theory but to life has gone missing.⁶¹

Artificial Authority

Or has it? The diagnosis offered by thinkers like Arendt and Kierkegaard may seem unduly apocalyptic. If authority has vanished, we might ask, how

55. See *id.* at 359–361.

56. Among other reasons, just laws may command what we have an independent moral obligation to do anyway. Consider, for example, laws prohibiting murder, rape, or theft.

57. Hannah Arendt, *What Was Authority?* in *I AUTHORITY: NOMOS 81*, 81–82 (Carl J. Friedrich ed., 1958).

[T]he moment we begin to talk and think about authority, after all one of the central concepts of political thought, it is as though we were caught in a maze of abstractions, metaphors, and figures of speech in which everything can be taken and mistaken for something else, because we have no reality, either in history or in everyday experience, to which we can unanimously appeal.

Id. at 105.

58. Quoted in Friedman, *supra* note 36, at 57.

59. See, e.g., White, *supra* note 42, at 3: “An enduring problem concerning authority for us post-Enlightenment moderns, it seems to me, is that natural authority has largely disappeared from our most common world-views.” R.B. Friedman observes that the claim “that the very concept of authority has been corrupted or even lost in the modern world” is “an opinion frequently expressed in some of the most well-known discussions of authority in recent years.” Friedman, *supra* note 36, at 56.

60. Arendt, *supra* note 57, at 112.

61. R.B. Friedman observes that “authority is a notion intimately bound up with most, if not all, of the central questions of political philosophy.” Friedman, *supra* note 36, at 56.

is it that we at least *seem* to have (or in practice *think* we have) a working conception of it? How is that we manage to conceive and talk about and indeed depend on authority in all sorts of practical contexts? We easily suppose that not only judges but also CEOs and coaches and generals and school principals have authority, and this supposition seems to work well in practice.

Take a case where authority seems at its most solid and uncontested—the military. General Alpha orders Private Zeta to polish his (Alpha's) boots. Everyone familiar with the military will understand that a general has authority to issue this order and that a private is obligated to obey the order. But could this assumption of authority be subverted by the sort of analysis we have just been considering?

Well, we *could* treat this situation as just another command-sanction scenario. The private knows that if he disobeys the order, he will be punished. So maybe the general is like the mugger in Hart's gunman situation, and the private, for his part, is "obliged" but not "obligated" to obey. Or we might say that by entering the military service, the private has tacitly or explicitly promised to obey orders from his superiors. So he is obligated to obey the general's order; but that is only because of his more fundamental obligation to keep promises, coupled with the contingent fact that he has promised to obey military officers. It is not really or primarily "authority" that is the source of his obligation.

We *could* try to depict the case in one of these ways. But these analyses seem to miss something important. We might say that in the military, obeying superiors is an essential part of *what it means*—or what it *is*—to be a private or, more generally, a soldier. Such obedience is constitutive of the role or the position. A person is not a sort of wandering, unattached "private," for example, who then happens to hook up with an army: a person is a "private" only in his or her role in and relationship to an army. And what it means to be a private is thus defined and constituted in part by that relationship of subservience. Being subject to superior officers is essential to the very meaning and being of a "private." Consequently, when a superior officer gives an order to a private, that order is not simply an external fact that may contingently happen to bear upon principles of action that the private independently has. Rather, an obligation of obedience flows from the very nature of what a private is.

A similar analysis might be supplied for other instances of acknowledged authority within institutions. For example, doing what the boss tells you to do is part of what it is and means to be an employee. Once again, no one is an autonomous, freestanding "employee"; one is an employee only by virtue of belonging to some business or collective enterprise, and what it is to be an employee is defined and constituted by the position's relation to that enterprise. Part of what constitutes such a position is a responsibility to follow the boss's orders; how else would it be

meaningful to describe some individuals as “bosses” or “employers” and others as “employees”?⁶²

Of course, privates and employees often receive orders that seem to them onerous or imprudent or unfair, and their intrinsic obligation to obey does not necessarily require blind or unqualified obedience. Faced with an objectionable order, an individual might try to justify noncompliance in either of two ways. First, an individual might challenge an interpretation of his or her position that makes compliance with orders—or at least with *this* type of order—essential to and constitutive of the position. To be a private entails obedience to military superiors—but perhaps *not* to superiors who order their subordinates to commit atrocities or violate international law.

Second, an individual might explain and justify noncompliance by choosing to suspend or abandon her institutional identity and role. “If being a soldier in this army (or an employee in this business, or a player on this team) requires doing *that*, then I quit!” After all, an individual in an institutional setting has in a sense two identities—the more specific and institutional role or identity and the more general personal identity. So one is a private (or an employee or a player) *and* a person or a human being. In many institutional settings, the institutional identity predominates. But it is possible to relinquish that identity, permanently or temporarily, and to revert back to one’s identity as person. “I quit!” amounts to just such a reversion.

So might this discussion of authority within institutions help us out of the predicament of accounting for obligation and authority under the law? One obvious possibility, paralleling the description of armies and businesses, would be to assert that obedience to law and to duly constituted legal authorities (identified, perhaps, by a rule of recognition that in turn enjoys its status as the rule of recognition by virtue of being accepted as such) is just what it *means* to be a citizen. Being a citizen is like being a private, perhaps, or an employee; the very nature of the role or position entails obedience to those who within the legal system are deemed authorities.

This is no doubt a possible response to the predicament of legal authority discussed earlier—but it is not a satisfying response. Authority seems relatively secure in the institutional settings considered above because or insofar as (1) there is a generally accepted understanding that the essence or constitution of some positions involves following directives issued from other

62. Similarly, following the coach’s instructions is arguably an essential part of what it means to be a player on a team. One is not a freestanding quarterback, or center fielder, or goalkeeper; one can claim these identities or positions only by being part of a team, and the meaning of these positions is constituted by their role in and relationship to the team and the sport. One role within a team and sport is typically that of “coach,” and that role by its nature involves instructing the players on what to do. It would make no sense to ask, say, whether coaches should be given the right to direct their teams: without such authority one would not *be* a coach. Conversely, insofar as you are a player on a team, the coach’s instructions are more than just facts that may happen to bear upon desires or objectives that you already and independently have. Rather, following such instructions is part of the essential meaning of being a player on a team.

positions; and (2) for individuals working in the institutional framework, their institutional identities (as soldier, or employee, or player) normally predominate over their more personal identities. Insofar as either of these conditions does not prevail, authority becomes problematic. But at least in liberal societies, both conditions seem doubtful.

Thus a person unpersuaded of her duty to obey some law or ostensible legal authority can readily contest the sort of “love it or leave it” account that makes obedience constitutive of her status as citizen. In these societies, how some people get to be “authorities” and who they are, what such “authority” entails and how far it extends, and what obligations citizens have relative to such “authorities” are typically deeply contested questions. To try to resolve such questions by asserting that “obeying legal officials is just what it means to be a citizen” seems like an attempt not so much to solve such problems as to crush them by definitional fiat.⁶³

Even more important, in liberal societies people typically do not think of themselves primarily as “citizens.” We are first of all and mainly “persons,” and only secondarily “citizens.” Indeed, the sorts of societies that obtrusively call attention to and make central their members’ citizenship (as when people are commonly addressed as “Citizen Dupont” or “Comrade Borodin”) thereby offend the liberal sense that persons enjoy an inherent “*human dignity*” as *persons*.

Insofar as we think of ourselves primarily as persons or as human beings and only secondarily as citizens, the institutional account of authority is unavailable. But reflection on the nature of authority within institutions may nonetheless point us to what would be needed to remedy the difficulties in explaining authority and in remedying the other difficulties we have noticed in the new natural law position.

BEYOND AUTONOMY?

We have seen that the difficulties that modern theories, including Finnis’s, have in explaining authority can be traced back to commitments to personal autonomy—commitments that seem to conflict with the possibility of authority in the core “just because” sense. Conversely, we have little difficulty in recognizing authority in institutional settings where no such assumption of autonomy prevails and where, instead, roles and identities are defined and constituted by their relationship to the institution and to others within the institution. In the army, there is no assumption that a private is an “autonomous man, . . . not subject to the will of another. He may do what [the general] tells him, but not because he has been told to do it.”⁶⁴ Quite

63. Cf. LESLIE GREEN, *THE AUTHORITY OF THE STATE* 195 (1990): “So long as the concept of good citizenship remains a complex and contested one, political argument will infect every level of inquiry.”

64. WOLFF, *supra* note 48, at 14.

the contrary. It would not be too much to say that the private does not even exist *as a private* or as a soldier except in subservient relation to superior officers including the general.

In short, where identities are not regarded as independent or self-constituting but rather as relational, the possibility of genuine authority seems more promising. So it would seem that if personhood itself were conceived as a relational entity or status, then a recovery of authority might be possible. But a more relational conception of personhood not only might help in understanding authority; it might help with the other difficulties we have noticed.⁶⁵

Friendship Again

Start with friendship. As we noticed above, friendship presents a paradox, because it would seem that genuine friendship does not exist when persons fraternize with each other for their own personal benefit. But what else could we do? Starting as individual persons pursuing the various goods, and recognizing that friendship is one such good, we naturally seek to make and have friends. But how can we overcome the self-regarding orientation that we start with and that the persons-pursuing-goods description of ourselves seems to entail?

As noted, this is a problem not just for Finnis's theory. Charles Taylor observes in modern culture "a common picture of the self, as . . . drawing its purposes, goals, and life-plans out of itself, seeking 'relationships' only insofar as they are 'fulfilling.'"⁶⁶ There is an assumption of what Alistair McFadyen calls "the ontological priority and independence of the individual from relations."⁶⁷ On that picture, it is indeed hard to discern how genuine friendship could arise. Instead, friendships seem inescapably instrumental in character—and thus not friendship at all in the fullest sense.

But suppose that, setting aside this picture, we instead think of ourselves not as beings for whom friendship is a "good" to be obtained but rather as creatures who are partly *constituted by* our relationships with others—with friends, spouses, children, colleagues. Lacking such relationships, we are not merely impoverished, as we would be if a stock market crash depleted our retirement account; rather we are incomplete beings, not fully ourselves. Conversely, relations with others do not merely add benefits to our lives; they allow us to *be* ourselves. "All this may be summed up," John MacMurray explains:

65. I should emphasize at the outset of this part of the discussion that I have not worked out a conception of persons-as-relational and I am not sure that I would be at all attracted to such a conception if it were fully worked out. So what follows is meant to be merely suggestive of how a more relational understanding of persons *might* help with the difficulties we have been noticing.

66. TAYLOR, *supra* note 3, at 38–39.

67. *Quoted in* COLIN E. GUNTON, *THE ONE, THE THREE AND THE MANY* (1993), at 45.

by saying that the unit of personal existence is not the individual, but two persons in personal relation; and that we are persons not by individual right, but in virtue of our relation to one another. The personal is constituted by personal relatedness. The unit of the personal is not the “I,” but the “You and I.”⁶⁸

Imagine two longtime and loyal friends—Tom and Dick. It might be that this friendship is partly constitutive of their very identities: asked to identify himself or to explain who he is, Tom’s most cogent answer might include “I’m Dick’s friend.” Take away the friendship, and Tom and Dick would not merely be deprived of a particular benefit or satisfaction; they would in an important sense not be the people they are.

On this understanding of what persons are, friendship appears in a different light. You do not merely make and use friends for instrumental purposes. And it would not be quite accurate, or at least not sufficient, even to say that in a genuine friendship you care about another person—an *other* person—because it makes you happy to see her happy, sad to see her sad. Neither do you act on a purely rational or intellectual judgment that another’s good is to be served. On the relational conception, rather, the I-other divide is to some extent dissolved, so that your friend’s good is not something independent of you or something that might merely *contribute to* your good. Insofar as your friendship is in part constitutive of who and what you are, your friend’s good *is* your good. And if your friend departs, it is not sufficient to say that her absence leaves you lonely or forlorn; rather, without the friend you are not fully yourself.

There are suggestions of this conception, I think, in Aristotle. Aristotle distinguishes between friendship maintained for utility or for pleasure and true or “perfect” friendship, in which a friend cares about another for the friend’s own sake.⁶⁹ Finnis, as we have seen, makes the same point. But then Aristotle offers the (to me) obscure but intriguing observation that in true friendship, a person serves himself in serving his friend, because “he is related to his friend as to himself (for his friend is another self).”⁷⁰ The assertion seems to point to a more relational conception of the self.

Finnis, it seems to me, tries to advance a similar notion. He describes friendship as the most communal form of community and then elaborates more formally on what is needed for this sort of community to exist:

There is community in a full sense when (i) A makes B’s well-being and self-constituting participation in human goods *one of his (A’s) own self-constituting commitments*, and (ii) B makes A’s well-being likewise one of his (B’s) basic

68. JOHN MACMURRAY, *PERSONS IN RELATION* (1999) (1961), at 61. *See also* GUNTON, *supra* note 67, at 169 (asserting that “persons mutually constitute each other, make each other what they are”).

69. ARISTOTLE, *III NICOMACHEAN ETHICS* ch. 3.

70. *Id.* at Bk. IX, ch. 4.

commitments, and (iii) A and B collaborate in pursuance of these commitments.⁷¹

This is a dense statement, and I am confident that I have not fully grasped all that it asserts. But insofar as friendship is described as involving a mutual commitment that is not merely instrumental but “self-constituting,” it seems that Finnis is moving in the direction of the relational conception of personhood I have referred to above.

Perhaps he has traveled as far in that direction as it is possible to go on the terrain of the pervasive modern commitment to autonomous individuals.⁷² And yet it seems to me that Finnis has not actually arrived at a relational conception. That is because his description still suggests that we are not *inherently* constituted by relations. Rather we can, *if we so choose*, make a commitment to the well-being of another and we can choose to make that commitment constitutive for ourselves.

For me at least, that notion remains puzzling. If I am already fully myself at Time 1, already fully constituted as a person, how can I choose to make my relationship with you “constitutive” of me and my personhood at Time 2? How can a commitment that can be chosen or not also be *constitutive* of the chooser?⁷³ In any case, it seems to me that the paradox of friendship remains and that the solution to that paradox, if there is one, would require

71. FINNIS, *supra* note 2, at 143–144 (emphasis added).

72. This commitment—or better, perhaps, this loose and often bickering family of commitments—seems to me to be conspicuous and undeniable; see *supra* note 46, even if its precise content is elusive. See GREEN, *supra* note 63, at 191–192 (noting that the “individualism in a social theory may be manifest in different forms,” including “ontological,” “methodological,” and “ethical” versions). Michael Sandel argues that the liberal thought associated with John Rawls “presuppose[s] a certain picture of the person” that Sandel describes as “the unencumbered self.” Among other things, this conception of the self, though allowing for “community in the cooperative sense,” rules out the possibility of “constitutive” community that “would engage the identity as well as the interests of the participants.” MICHAEL J. SANDEL, *PUBLIC PHILOSOPHY* (2005), at 162–163. But Sandel’s interpretation is contested. Thus it is familiar to observe partisans of “liberalism” protesting that “communitarian” critics like Sandel have misunderstood their individualistic commitments or assumptions; see, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* (1996), at 26–27; and it is familiar as well for friends of tradition or religion to protest that the modern partisans of rationalistic individualism have misunderstood or misdescribed *their* views; see Steven D. Smith, *Separation as a Tradition*, 18 *J.L. & POL.* 215, 241–252 (2002). Such disputes make it unlikely that one could set forth in uncontroversial terms just what the modern commitments to individualism or autonomy consist of. For present purposes, though, the limited point is that modern theorizing has operated upon an intellectual landscape significantly shaped by themes of individualism and autonomy; there is no need to try to specify exactly what the content of such themes is or to decide whether there is a coherent or meaningful way to sort out and separate the partisans of autonomy from those who supposedly do not embrace it.

73. These questions are meant to be genuine, not rhetorical. It may be that we are usefully thought of as partial or potential protopersons who aspire to become full persons and whose choices in our protostate help to shape the realization of the more complete persons that we may (or may not?) ultimately become.

a more direct and sustained engagement with the issue of what constitutes personhood.

Obligations to Others

What I have said about relational personhood and friendship should already suggest the direction one might take in addressing the problem of obligation to others. As noted, the problem arises in response to a real question: Why should I care about the good of other people? Why shouldn't I pursue my own good, promoting the good of others only insofar as that will contribute to my good? The familiar, Kantian-style responses try to import some claim of desert into the question and then show that since the questioner is no more deserving than others, he would be acting irrationally to prefer his own good over theirs. But since the initial question does not make (or at least does not need to make) any claim of desert, this answer seems unavailing. Or a response may assert that caring about others just is the moral thing to do, but then the question can just be rephrased: What is this "morality" and how did it come into the picture? And what non-question-begging claim does it have on me?

A more relational conception of the person suggests a different sort of response. Rather than attempting to smuggle moral commitments into the question, the relational response would challenge the I-others depiction of the world that is implicit in the question: Why should I care about the good of others? Put differently, the response would suggest that the "others" are actually not as "other" as the question assumes: the others (or at least some others) are necessary to the questioner himself not merely because they may be instrumentally useful to him but because they contribute to making him who he is. They are to some extent constitutive of him. Consequently, their good does not merely contribute to his good from the outside, so to speak; their good is to some extent his good.

This is, to be sure, only the barest sketch of a response—little more than a gesture. I am unsure whether it could be satisfactorily elaborated or whether as elaborated it would be plausible or attractive. My sense, though, is that most of us are already inclined to take something like this view with respect to many "other" people—our close friends, spouses, children, perhaps. Prevalent individualistic assumptions may make it difficult to articulate this view. But we know that we do care about others, and we recognize (if we pay attention) that any merely instrumentalist account of how and why we care about them misrepresents the reality we know and live. We understand that deprived of these relationships, we do not merely incur a deficit in a category of goods: rather, we are not quite, not fully, ourselves.

Conversely, a more relational response may be less persuasive if the questioner is asking, say, why he should care about people on the other side of the world whom he will never meet. How are those people in any sense

constitutive of him? Still, it may be more fruitful to regard that question as open and confront it directly⁷⁴ rather than to smuggle in commitments to universalizability or ask the questioner to take the perspective of a fantastic and fictional character that he never has been and never will be—an “ideal observer” or “benevolent spectator”⁷⁵—and then in any case to have to qualify the duties that would follow from this denatured perspective by recognizing a “reasonable scope for self-preference.” If the relational approach does not end up demonstrating that we should care as much about complete strangers as we do about ourselves and our family and friends, perhaps that is a strength of the approach, not a weakness.

Authority Again

So a more relational philosophical anthropology might be more useful in accounting for friendship and for our obligations to (at least some) other people. Could it be helpful in explaining authority? In our discussion of institutional authority, we have already seen how it might be helpful. And the discussions of friendship and of obligations to others may already be laying the groundwork for an account of authority.

What the discussion suggests, I think, is the possibility of viewing authority as a sort of “vertical friendship.” Surely friendship provides reasons for acting, and these may sometimes be of the “just because” type. If the relationship of friendship is partly constitutive of the personhood of the friends, then acting to benefit the friend is not merely instrumental in nature; rather, it is essentially related to one’s primary principles of action. “Because he’s my friend” might actually be the best explanation for a particular charitable action and not merely the declaration of a contingent fact that implicates some more primary reason for acting. Remember Tom and Dick: just as “I’m Dick’s friend” might be essential to how Tom conceives of who he is, so “Because Dick asked me to” might be the best way for Tom to explain why he did some particular act. In short, it might be that directives from a friend (though in the case of friends they would more likely be something like “requests” than “commands”) would in themselves provide reasons for acting.

Friendship, to be sure, is typically taken to describe a horizontal relation among equals, whereas authority is typically understood to be a vertical relationship.⁷⁶ But there is no apparent reason why the relations that are formative of persons need to be horizontal. They might be—indeed, they surely are, sometimes—more vertical. Thus, “I am my father’s son” might

74. For opposing arguments, see, e.g., Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229 (1972); Richard Miller, *Benevolence, Duty and Distance*, 32 PHIL. & PUB. AFF. 357 (2004); SAMUEL SCHIFFLER, *HUMAN MORALITY* (1992), at 115–132.

75. See FINNIS, *supra* note 2, at 108.

76. Cf. Arendt, *supra* note 57, at 82 (asserting that authority is “always hierarchical”).

be expressive of personal identity, and a relationship with a parent or other superior might be constitutive for at least some people. Aristotle, while observing that friendship is typically between equals, maintained that there can also be a type of friendship between unequals, as between father and son.⁷⁷ Moreover, there is a type of political friendship that characterizes relationships in virtuous political communities.⁷⁸

On this picture, it becomes at least imaginable how one person might be in a position to issue directives that relate directly, and not merely contingently, to the principles of action of the addressees. And it is not surprising that relations among parents and children are the context in which modern theorists find the notion of genuine or natural authority most plausible.⁷⁹

Whether *political* authority could be justified along similar lines is uncertain, however; I confess to being at least uncertain (not only on theoretical grounds but on practical and religious grounds as well) about whether political authority can be explained and justified but also about whether we should want or welcome any such justifying explanation. In a highly instructive discussion, Leslie Green notes that it is plausible to suppose that individuals are socially constituted, but it does not follow from this assumption that they must be constituted by the sort of association of which hierarchical authority is one component.⁸⁰ Green describes this approach to authority as “communitarian,” and he observes that “[f]or it to do the work expected of it, we would have to show that political obligation is constitutive of one’s identity as a person.” Green then goes on to observe that “[i]t is not impossible that this should be so, although it does seem much less plausible than the claims of religion, values, or ethnicity.”⁸¹ Plausibility aside, would such an account of personal identity be attractive? Green is doubtful:

In the political communitarian view, however, the person has lost any conception of himself apart from what others tell him to do. I do not know how common that attitude is, but it is hard to imagine why it should be thought to have any moral value. . . .

An identity constituted by authority relations is communitarianism at its least appealing.⁸²

Green’s doubts seem well taken, but of course their force may vary depending on what sort of community we are thinking of, on who is exercising the authority, and on how the responsiveness to directives is integrated with other components of personhood. Whether a plausible account of authority

77. ARISTOTLE, *supra* note 69, at Bk. VIII, ch. 7.

78. *Id.* at Bk. VIII, ch. 9.

79. *See, e.g.*, White, *supra* note 42.

80. GREEN, *supra* note 63, at 195–200, 209–215.

81. *Id.* at 214.

82. *Id.* at 214–215.

could be developed on a more relational conception of the person is a question on which I find myself agnostic. So I merely venture the observation that if political authority (as opposed to mere reasons for obedience) is to be rediscovered, it may turn out that Sir Robert Filmer is not as irrelevant as we have long supposed him to be.⁸³

CONCLUSION

Though this essay may sound as if it is a criticism of the new natural law and of the thinking of John Finnis, I expect and hope that there is much in the essay with which Finnis ought if not to agree, at least to sympathize. Much of his work—particularly his insistent criticism of consequentialist approaches to ethics⁸⁴ and his defense of moral absolutes as affirmed by the Christian tradition⁸⁵—appears to be an effort to resist what we may loosely call “subjectivism” in ethics. So insofar as subjectivist approaches to ethics are themselves animated by presuppositions that exalt individual autonomy, Finnis can plausibly be viewed, I believe, as resisting the dominance—or at least the implications—of the modern commitment to or even obsession with personal autonomy.

Short of directly challenging the anthropological assumptions that pervade modern thought, however, Finnis seemingly is left to acquiesce in and work from a picture of individuals using practical reason in an effort to achieve a variety of goods. Persons pursuing goods. The picture evokes images of investors pursuing gains in the market—or maybe, going back an epoch or two, of hunters pursuing their quarry. This picture makes the subjectivist orientation in ethics seem natural, plausible—even irresistible. Finnis nonetheless tries to resist by adopting the strategy of asserting that many goods are objectively good for persons whether or not those persons desire the goods or experience satisfaction in connection with those goods. Like Brussels sprouts, aesthetic experience (opera?), or forms of sociability (traditional marriage?) just *are* goods; they are goods whether or not we think we want them and even if they leave us bored or cramped or miserable.⁸⁶ And, conversely, mere pleasure is *not* a good—not *objectively*—even if virtually everyone steadfastly desires and pursues it.⁸⁷

For myself, I doubt that this “objective goods” strategy can succeed in overcoming the limitations that the “persons pursuing goods” framework imposes. The difficulties that the new natural law has with friendship, and

83. See ROBERT FILMER, *PATRIARCHA AND OTHER WRITINGS* (Johann P. Sommerville ed., 1991).

84. See especially FINNIS, *supra* note 9.

85. See JOHN FINNIS, *MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH* (1991).

86. Finnis does insist, however, that depending among other things on their individual “capacities, circumstances, and even . . . tastes,” different individuals properly realize these goods in different forms and combinations. FINNIS, *supra* note 2, at 105. Indeed, his emphasis on the freedom for such individual variations is, for me, a powerfully attractive feature of his position.

87. See *id.* at 95–97.

obligations to others, and authority are manifestations, I believe, of the limitations of that framework. At least for some purposes, it seems more helpful to think of ourselves not as formed persons seeking to realize or participate in “goods” but rather as “protopersons” seeking to become real or full persons—in part by entering into constitutive relations with others. But in order to develop that possibility, it seems advisable to devote more explicit attention to the question of what it is to be a person than Finnis’s classic treatment in *NLNR* does.