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A Taxonomy of Legal Control

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I. Introduction

A taxonomy—a systematic scheme of classification—can be a powerful tool. When Dmitri Mendeleev created a periodic table of elements all he did, at one level, was arrange some items in a list. He simply grouped the sixty-three then-known elements in rows by their atomic mass and in columns according to their properties. Yet the resulting pattern allowed Mendeleev to predict the properties of as-yet unknown elements based on gaps in the table and it prefigured the discovery of the electron structure of the atom.[1] Alexander Rosenberg has observed, "Every successful scientific typology is a miracle of question begging and the result of pulling oneself up by one's own bootstraps."[2] In the natural sciences, any "miracle" is no doubt underpinned by the physical universe being organised according to beautifully ordered patterns. Man-made systems, such as legal orders, are, by contrast, no doubt less beautifully ordered. And many of the relevant ideas, being products of human minds, are already partially systematized. Might efforts at classification in this area nonetheless prove valuable?

This article proposes a taxonomy of ideas about how legal systems might get individuals to do as their laws require. Readers will be familiar with several such theories and their accompanying nomenclature. The law has been said to secure compliance, or aim to do so, by presenting agents with *exclusionary reasons for action*,[3] *commands*,[4] a union of *primary and secondary rules*,[5] a *coordination equilibrium*,[6] or *obligations*,[7] among other things. A frequent procedure in legal theorizing is to treat each such idea as a more-or-less independent topic for investigation. The process begins with a writer setting out a theory offering an impressive, comprehensive account of law, with a single guiding idea at its apex. If such a theory is considered interesting, others produce a secondary literature

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1. Alexander Rosenberg, *The Structure of Biological Science* (Cambridge University Press, 1985) at 186, 188. The other classic example is the biological classification system pioneered by Carl Linnaeus. Although Linnaeus did not, by modern standards of phylogenetics, get everything right, the correspondence between his taxonomy and what we now understand about evolutionary relationships is remarkable.
2. *Ibid* at 186.
3. Joseph Raz, *Authority of Law*, 2nd ed (Oxford University Press, 2009) at ch 2 [Raz, *Authority of Law*].
4. John Austin, *The Province of Jurisprudence Determined* (John Murray, 1832) Lecture I, especially at 5-7.
5. HLA Hart, *The Concept of Law*, 2nd ed (Clarendon Press, 1994) at 79-99.
6. Gillian K Hadfield & Barry R Weingast, "Microfoundations of the Rule of Law" (2014) 17 Annual Rev Political Science 21.
7. E.g., John Finnis, *Natural Law and Natural Rights*, 2nd ed (Oxford University Press, 2011) at 14-15. Or (defining the term very differently) Austin, *supra* note 4 at 7-12.

in which each one of its component manoeuvres is unpicked. That approach—what might be termed methodological "one-at-a-time-ism"—has its drawbacks. It may encourage one to overgeneralize about concepts at the periphery of one's enquiry. It may also tend to smother insights that can emerge at the intersection of different conceptualisations.[8]

The approach adopted here assumes that we can improve our understanding of differing types of explanation for compliance if we consider them side by side. This permits them to be compared and categorised. The exercise forces us to consider what is conceptually important. In this context, important features are, I propose, ones that are salient—present in some cases but not others—and consequential practically and/or morally. A feature is consequential in practical terms if it affects the ease by which compliance may be secured. It is consequential in moral terms if it raises or abates some ethical concern around the law's intervention in the lives of individuals.

Important features, so understood, include those captured in these four separate questions:

(1) Given the explanation for compliance, can one be said to be acting *willingly*?
(2) Given the explanation for compliance, does one act on one's *own assessment* of the merits of action or else defer to the assessment of others?
(3) Given the explanation for compliance, is one conforming for *content-dependent* or *content-independent* reasons?
(4) Given the explanation for compliance, will one regard the law's intervention as having *changed one's moral position*?

My method is this. Each of these questions will be posed of each putative explanation for compliance. The resulting pattern of answers will be used to set out the emerging taxonomy.[9] I argue that all compliance-generating mechanisms can be grouped into three categories: 1. *collateral motivation*, a category that includes coercion and reward, 2. *authority*, and 3. *strategic intervention*, or, broadly speaking, what is often referred to as "coordination". Along with these one must consider, in due course, *mere conformity* as another possible type of motivating relationship between the law and an individual.

The major point where this three- or four-part categorisation departs from other categorisations (generally speaking, other *implicit* categorisations) is in its treatment of the law's coordinating effect, the third category. Other discussions tend to assimilate this effect to authority and/or to place it as a unifying concept at the top. Such a treatment, I will argue, obscures important differences

8. This limitation is evoked by Robert Nozick's caricature of a methodology in which "One brick is piled upon another to produce a tall philosophical tower, one-brick wide," for others then to seek to topple, thereby "burying even those insights that were independent of the starting point." Robert Nozick, *Philosophical Explanations* (Belknap Press of Harvard University Press,1981) at 3.

9. I will not seek to offer a justification here for the selection of these four questions. The usefulness or otherwise of classificatory criteria can only really emerge "on the job", as it were. As has been noted, taxonomy-formation is necessarily a bootstraps exercise.

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between coordination and other mechanisms. For coordination, as here conceived, implies at least some individuals comply wholeheartedly and without surrendering autonomy.

II. The Particular Remedial Goals of My Taxonomy

If we are considering how the law might secure compliance, a many-conceptions-at-once approach (as opposed to a one-at-a-time approach) makes good sense for two main reasons. One is that, plainly, different motivations for compliance can coexist within the same legal system. That being the case, an account of law that does not seek to collapse various forms of relationship between law and subject into a single, idealised paradigm might be rather more realistic than one that does. The possibility of coexisting motivations is recognised, for example, in H.L.A. Hart's contention that there is a distinction between the attitudes of officials towards the law and those of ordinary citizens.[10] On that view, officials need to buy into the legitimacy of the system whereas such acceptance is less necessary, and usually less true, of the rest of us.

My suggestion, however, is not merely that a theory of law should capture the diversity of possible explanations for compliance. It is that to understand adequately *any one* of those explanations—authority, coercion, and so on—one must pay attention to the possibility space within which that explanation sits. This, then, is the second reason for the approach taken here. For a taxonomy is a way of representing the full range of possible explanations side by side.

In this connection, active consideration of the range of possibilities can counter the risks of both under- and overgeneralization. The risk of undergeneralization is obvious enough where one may fail to appreciate that what one writer describes as the law's "legitimacy" is equivalent to what another calls its "authority," or that "social pressure" ought to be considered a form of "coercion", and so on. But what of *over*generalization? My suggestion is that this occurs when the operation of law is seen to boil down always to one of two fundamental mechanisms of compliance: either coercion or authority. In some accounts, *coercion* expands out to include rewards and, perhaps, other motivational tools. The law's *authority*, meanwhile, might be expounded using different language (e.g., *providing a guide to practical reasoning*) or regarded from the perspective of the subject (*obedience*). At any rate, the implicit dichotomy is supposedly between complying because of an incentive or else complying because one considers that one ought to do as the law says. We are invited to conclude that if the law makes a difference at all, compliance must be characterised in one or other of these two ways. The assumption that law-as-an-incentive-mechanism sits opposed to law-as-a-guide-to-practical-reason is implicit, for instance, in Leslie Green's summation of a jurisprudential near-consensus that "[l]aw is … not essentially a motivational device, it is essentially an informational device."[11]

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10. Hart, *supra* note 5 at 60-61.

11. Leslie Green, "General Jurisprudence: A 25th Anniversary Essay" (2005) 25:4 Oxford J Legal Stud 565 at 573 [Green, "General Jurisprudence"]. A further example of the same dichotomy

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This article shows that such a conceptualization is incomplete and misleading. There is a third, distinct mechanism by which a person may come into compliance with the law. This involves a person complying as a result of the law's securing the compliance of *others*, and it thereby solving some problem of social coordination. The notion of law's coordinating potential has been recognised by several writers, yet they have, I contend, tended to assimilate it to other forms of legal control, authority in particular. Joseph Raz, for example, states, "Authority can secure co-ordination only if the individuals concerned defer to its judgement and do not act on the balance of reasons, but on the authority's instructions."[12] I argue that there is good reason for regarding coordination as a separate mechanism. For it generates, we will see, a unique pattern of answers to the four classificatory questions identified above.

III. Notes on the formal structure

The items in this taxonomy are all formulated as explanations. Someone does as the law requires: how might we explain that fact? In formal terms, where S is a subject of a law (a person to whom it applies) and ϕ is some action or forbearance, we are considering explanations for a concurrence of two facts, namely: (a) the law requires S to ϕ; and (b), S does, in fact, ϕ.

Given that formal structure, the items in this taxonomy, it is important to see, all relate to the actions of *one individual subject at a time*, not of subjects (plural), still less those of the population at large. Hence, we are not talking about how authority *et al* gets "people" generally to comply with the law, but rather, quite specifically, how any such mechanism gets an individual to comply. Hence, given a certain explanation for S's compliance, other individuals may be complying with ϕ simultaneously for different reasons. The significance of the point becomes clear when it comes to the discussion of strategic intervention below.

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being drawn, albeit by a writer who places himself outside of the consensus referenced by Green, is provided in Frederick Schauer, *The Force of Law* (Harvard University Press, 2015). Schauer announces that he intends to probe the existence of the person who "discovers the law requires not-ϕ, and who then, *because of the law*, proceeds to do not-ϕ …without regard to the possibility of punishment or any other form of legal coercion". *Ibid* at 52. This much is fine. Although the notion of acting 'because of the law' is vague, here it can be understood as a residual category (all instances of law making a difference other than via coercion). But in the next paragraph this residual category is, without warning, liquidated to that of treating the law as authoritative: "The question now before us is whether there are people, and if so in what quantity, who take the law *qua* law, and without the prudential reasons that threats of sanctions for violation may provide, as a reason for action… [I]f those who take the very fact of law as a reason for action … are few and far between, then coercion resurfaces as the likely most significant source of law's widespread effectiveness."

12. Joseph Raz, *Practical Reason and Norms*, 2nd ed (Oxford University Press, 1999) at 64. The quoted statement needs parsing a little. Since the feat of getting people not to act on (their own assessment of) the balance of reasons is for Raz definitional of authority, to avoid tautology the statement must be interpreted something like: "Persons or institutions (such as law) that aspire to secure coordination can only do so by exercising authority." Finnis, at any rate, is clear in affirming that coordination requires authority: Finnis, *supra* note 7 at 232. Coordination is also invoked in this context in Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) at 105-08 [Waldron, *Law and Disagreement*]. The approaches of Finnis and Waldron are discussed further in Section IV.D.

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IV. The four explanations

A. Mere conformity

> *S 'merely conforms' to a legal requirement to ϕ when S will ϕ regardless of the fact that the law requires this act.*

The statement above indicates a null category. It does not describe a form of legal *control* because the law effects, on the definition above, no difference to the subject. Were the law to cease requiring ϕ-ing, S would continue doing so nonetheless. Still, the statement *is*, like the other items in this taxonomy, an explanation of a connection between the facts of (a) the law requiring S to ϕ, and (b) S in fact ϕ-ing. It is therefore possible to analyse it in the same way as the other explanations to be considered—and for comparisons to be drawn in due course.

Note that the above definition of 'mere conformity' might still be satisfied even if the fact that the law required ϕ-ing at some past time causes S's conformity today. Suppose a legal ban on smoking in bars is introduced. As the owner of a bar, S complies reluctantly. Later, S comes to see the benefits. Hence, if the ban were reversed tomorrow, S would keep the bar smoke free. To satisfy the proposed definition it is sufficient that the law *as it is now* does not control S's conformity. On this definition, S's continued conformity with what the law was is a matter of mere conformity; the earlier, reluctant (not mere) alignment would need to be explained on some other ground (specifically, by one of the other explanations comprised in my taxonomy), since at that point the law *did* control S's behaviour.

Whilst there is no warrant for being dogmatic about this,[13] there is a certain conceptual clarity in having a definition that pinpoints the attitude of a single subject at a particular moment. Historical enquiry might in many cases reveal a long, winding chain of influence, from individuals who obeyed purely out of fear of punishment, through those who sought reluctantly to align themselves with those original coercees, down to S, whose experiences of the norm in action may have led to an acceptance of its rationale. If our interest is in the present relationship between S and the law, we should avoid collapsing those varying attitudes into a single, diachronic but rather muddled picture—a kind of palimpsest of the law's effects over time. It seems better to frame the definitional question as: what factor determines S's decision to conform *now*?

When S is in mere conformity with the law, we can say the following about that relationship. Here I am following the four questions I set out in the Introduction.

1. *In ϕ-ing, S acts willingly.* If S ϕs regardless of the law, in mere conformity with it, it is reasonable to presume that S unreluctantly desires to ϕ. The notion of willingness is, of course, difficult philosophical territory. Clearly, one needs to give precision to the notion; but it is sensible for this to await

13. One could, alternatively, define 'mere conformity' in terms that would exclude cases where the historical intervention of the law is a cause of S's behaviour. If one did so, the scope of this category would be smaller. A somewhat lower proportion of the trillions of acts of compliance that take place each year within a given legal system would fall under this head of explanation and a correspondingly larger proportion would be apportioned to other explanations.

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the consideration, below, of instances when the law makes a difference as it does not here. This will be where difficulties do arise of deciding whether the law's intervention overpowers S's willingness. Here it is reasonable to presume S acts willingly, free of intervention.

2. *In ϕ-ing, S is acting on S's own assessment of the considerations affecting S*. If the law has no bearing on one's conduct, this suggests that one is acting on one's own, and not the law's, assessment of what to do.

3. *In ϕ-ing, S is acting for content-dependent rather than content-independent reasons*. One follows the law for content-dependent reasons to the extent that one's compliance depends on the merits, as one sees them, of what the law requires—depends on, in short, what ϕ-ing involves.[14] It is true that talk of one's attitude to the content of *the law* may be strictly inapt where one is not following the law at all. Content-dependence seems to be a concept that is more pertinent to cases where the law is making a difference. Nonetheless, it is more reasonable to say that S is acting for content-dependent reasons and not content-independent reasons in the case of mere conformity. This is because where the law itself is making no difference one can reasonably presume that S is acting for reasons that relate to the merits of ϕ-ing.

4. *In ϕ-ing, one will not consider that the law has altered one's own moral position*. If S considers that ϕ-ing would remain obligatory (or permissible) even if the legal requirement was dropped, then S will surely also consider that ϕ was morally obligatory (or permissible) independently of what the law had required. This will be so even if S is someone whose views have shifted historically in the train of a change in the law (as in the earlier discussion of smoking-ban example). One would regard the legislative change as having changed *one's mind* but not the rightness or wrongness of ϕ-ing.

Several writers have emphasised the value of keeping in mind the possibility of mere conformity. Frederick Schauer rightly cautions vigilance against observing instances of conformity and falling into the trap of reflexively (mis-) ascribing

14. More formally, a statement (or advice, request, order, and so on) can be said to provide a content-dependent reason where the force of that reason depends on one's assessment of the *situation that the statement speaks to*, and a content-independent reason to the extent that the force depends on something else. That something else might be the identity or status of the issuer of the statement (or, as in the case of coercion, their likely next move). Advice, for example, is generally content-dependent. Whatever reasons it provides are liable to be invalidated if the facts of the matter are different to what the advice-giver understood. An order, though, has the force that it has because of the status, or capacity to inflict punishment, of the person issuing it. Note that the concept of content-independence is only intelligible in the context of reasons *provided by statements*, particularly speech acts (orders, laws). See NP Adams, "In Defense of Content-Independence" (2017) 23:3 Legal Theory 143. As Adams puts it, it can apply only to reasons that have 'containers'. For example, it would make little, if any, sense to ask whether the desire to increase profits is a content-independent reason for reducing costs (content of *what*?). A failure to grasp this aspect fatally undermines Paul Markwick's argument that either the law cannot provide content-independent reasons or else all reasons are content-independent. P Markwick, "Law and Content-Independent Reasons" (2000) 20:4 Oxford J Legal Stud 579.

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these to the law's authoritative guidance, and hence granting authority a greater explanatory role than it deserves.[15] Raz, similarly, points out that one has reasons to eschew killing or assault which have "no connection with the law."[16] Mere conformity is a useful null category.

But should this sort of compliance be of any interest to legal theorists beyond this? Yes, I suggest. The reasons for this are connected with the following propositions: A) securing *obedience* is only a secondary aim of a legal system, because ultimately such control is a mere means to the end of having people act a certain way; B) whilst the law *per se* cannot influence rates of mere conformity, society at large can, by educating people in an attempt to bring their views into line and/or, conversely, by picking its battles in passing and retaining only those laws that command widespread support; and C) if individuals conform based on their own assessments so much the better, because under this condition their autonomy is preserved and because one thereby also avoids depleting the resources of authority and coercion. One might have imagined that these propositions, which imply that attainment of high rates of mere conformity is a desirable social goal, would be uncontroversial. However, Green contends that mere conformity is, from a legal system's perspective, secondary to obedience. As he describes it, those who conform to the law for law-independent reasons are, far from celebrated, excused, merely given a pass: "Luckily for them, the law does not generally punish failure to obey unless it is accompanied by failure to conform. … The law claims obedience, but it mostly settles for conformity."[17] That seems to me an odd proposition. In a modern democracy one would think that laws were passed with the aim of securing, for rational reasons the conduct that they require—getting people to ϕ—rather than putting citizens to a tyrannical test of loyalty by asking that they do what they would otherwise not do. Whenever people ϕ of their own accord, it can hardly be an occasion for disappointment or grudging toleration from the perspective of the system**.**

B. Collateral motivation (coercion and reward)

> *S's compliance is secured by collateral motivation to the extent that S's reason for ϕ-ing is some advantage imposed by the law for ϕ-ing or disadvantage for not ϕ-ing.*

A motivating factor imposed by the law is a "collateral" one inasmuch as S is motivated by something other than the advantages inherent in the action of ϕ-ing. When one does up one's seatbelt to avoid injury, there is a case of mere conformity. In the case of collateral motivation, the law has injected an additional motivating factor into the situation faced by S and this influences S's decision to ϕ. This category is wide. Following Grant Lamond, action can be regarded as *coercive* if it makes the taking of an option the condition for the imposition of any

15. Schauer, *supra* note 11 at 52-54.
16. Raz, *Authority of Law*, *supra* note 3 at 233-34.
17. Leslie Green, "The Forces of Law: Duty, Coercion, and Power" (2016) 29:2 Ratio Juris 164 at 170.

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sort of disadvantage and this is designed to induce one not to take that option. This would include not just criminal or regulatory sanctions or even damages, but arguably also the loss of entitlements or the imposition of taxes designed to price a certain activity out of the market.[18] One might debate whether certain legal effects are *primarily* coercive in character (for instance, Hart disputed that this was true about nullity for want of formalities)[19] but such questions are not in issue the way the matter is framed here. What matters here is simply whether S is motivated by the effect in question. Even adverse effects not formally authorised by the law but entrained, such as social pressure, would count.

But my category goes wider still because it bundles coercion and reward. This is by no means idiosyncratic. As earlier mentioned, Green posits a fundamental difference between "motivational" and "informational" approaches to influencing human conduct in arguing that the latter approach (i.e., providing a guide to practical reasoning) is more characteristic of law as a technique of social control.[20] Bentham portrayed rewards and sanctions as equivalent for virtually the opposite end, namely to promote the idea that law should be understood in motivational terms,[21] and recently Schauer has emphasised the role of incentives for similar purposes.[22] My reason, though, for joining coercion and reward together at this high rank in a taxonomy is that the relationship between S and the law's directive can, in light of each of the four tests applied throughout this article, be analysed in similar terms whether S is coerced or bribed**.**

1. When coerced or rewarded, *S, in ϕ-ing, acts unwillingly*. Questions of what it means to act *willingly* (or else *voluntarily*, *freely*, and so on) are problematic if one attempts to grasp these terms in some essentialist, absolute sense. The meaning is surely clear in everyday discourse, though, when the speaker is understood to refer, at least tacitly, to a particular constraint the removal of which would change the agent's intentions. "I don't want to go into work today," is perfectly intelligible, said by someone struggling into the office, as a statement about the slenderness of that person's present desires: but for my job I wouldn't be on my way there. Similarly, we can say that a person complying with a directive to ϕ does so willingly *if that person would have no desire to edit the directive, given the opportunity, so as no longer to require ϕ-ing*.[23] In this sense, S does not act willingly if S is

18. Grant Lamond, "The Coerciveness of Law" (2000) 20:1 Oxford J Legal Stud 39 at 56-57. Lamond would, however, reserve the concept of a "sanction" for a disadvantage prescribed for a breach of a duty. *Ibid* at 59.
19. Hart, *supra* note 5 at 33-35.
20. See text to note 11.
21. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1823) at 24: "pleasures or pains … capable of giving a binding force to any law or rule of conduct … may all of them be termed sanctions." Austin disagreed with Bentham on this conceptualization, on the ground simply that it involved "a wide departure from the established meaning of the terms." Austin, *supra* note 4 at 10.
22. Schauer, *supra* note 11 at 110-23.
23. Such an unsophisticated analysis of willingness might be inadequate in other contexts—for example, if it were applied to the question of the moral responsibility of a person coerced into committing a crime. But it *is* adequate, I suggest, for the present purpose. That purpose is the

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coerced. Such an S would change the directive to remove the requirement to ϕ and hence be free to act otherwise. But, on this view, neither does S act willingly where S is bribed to act, albeit the analysis bifurcates here. For an unscrupulous S would narrowly edit the directive merely to remove the condition that one must ϕ to be entitled to the reward; a more conscientious S would remove not only the condition but also any entitlement to the reward (since this would then be unearned). But either way, neither the fair nor the unscrupulous S would ideally wish to leave intact the requirement to ϕ where they regard ϕ-ing as harmful or simply not worth doing, reward apart. That a person can be considered at once motivated and unwilling is not paradoxical. One might be very eager to earn a reward. But, as the earlier example of work-dread highlights, it is quite normal to distinguish one's desire to perform an action in light of some defined reward from one's general desire (or lack thereof) to perform the action reward apart.

2. *In ϕ-ing, S is acting on S's own assessment of the considerations affecting S.* When one or more of one's options have been eliminated as an eligible choice by a threat and one acts a**s** demanded, can one really be said to act on one's own assessment of the relevant considerations? I think so. Note, again, that the question applies to the moment of S's decision. In acting on the threat, S is presumed, not the least by the person issuing the threat, to be acting rationally, balancing the advantages and disadvantages of the contemplated courses. Coercion is, as Lamond says, "rational compulsion …. It is 'rational' in the sense that it works through our reasoning faculties—it involves making a choice—and it presupposes that the person presented with the choice will act rationally by settling for the lesser evil."[24]

   Coercion undoubtedly has this obvious morally troubling aspect: it removes otherwise viable choices from agents and, in this way, interferes with their autonomy. Hence, Lamond is surely right to suggest that coercion is *prima facie* wrong, something in need of justification.[25] Yet in another respect coercion holds up well against its rival technique of politico-legal control, authority. The morally challenging aspect of authority is that it leads one to act blindly, to untether one's moral judgement from one's actions. That *particular* problem does not apply to coercion. Generally, whatever the other ways coercion may interfere with one's autonomy, it does not interfere with rational agency, as do successful claims of authority. There is a special case, however, of a form of coercion which *does* interfere with rational agency: torture.

   Jeremy Waldron points out that torture involves the application of pain (or its immediate apprehension) deliberately to *break the will* of its victim,

yielding of some meaningful grounds of distinction between the various forms of law-subject relationship considered in this article (i.e, mere conformity, coercion, authority and coordination). If it succeeds in this, then I would pray in aid of Occam's Razor.

24. Lamond, *supra* note 18 at 44.

25. *Ibid* at 49.

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"by reducing him to a quivering mass of 'bestial, desperate terror'."[26] In this respect, Waldron explicitly distinguishes ordinary forms of coercion such as threats of incarceration, confiscation and so on: "If law is forceful or coercive, it gets its way by nonbrutal methods which respect rather than mutilate the dignity and agency of those who are its subjects."[27] So to the extent torture can be regarded as a form of collateral motivation (or indeed a form of legal control at all) it should be distinguished at the next available branch of a taxonomy from all other such forms.

3. *In ϕ-ing, S is acting for content-independent reasons* to the extent motivated by coercion or reward. Again, a reason for action provided by a directive is content-independent if it does not relate to the matters that the directive seeks to govern.[28] The notion is often connected with authority. If I act on someone else's say-so, I am acting on reasons other than those connected with the intrinsic merits of that action. But, as Raz correctly points out, the same can be said of responding to a threat.[29] If I act because I am threatened, the decisive thing is my desire to avoid the threatened eventuality. This concern is something aside from any reasons provided by the features of the situation that the directive seeks to govern. (Hence the taxonomic description: *collateral* motivation.)

4. *One will not consider that the law has changed one's own moral position*. If, the law aside, I would think that not-ϕ-ing is acceptable, or even mandatory, and if the law would need to coerce me to get me to ϕ then following the imposition of the law I must continue to think not-ϕ-ing is acceptable or (as the case may be, and to the extent I can escape the sanctions) mandatory. It is true that in the case of action that I consider to be mandatory my moral position may be changed to the extent that coercion may excuse me from complying with what would otherwise be my duty. But then it would not strictly be the law that would be changing my moral position—not even the part of the law purporting to impose the sanction—but the contingency of effective coercion, that is, *actually feeling threatened*—that is making the difference. If I possessed the Ring of Gyges (the mythical invisibility ring deployed by Plato in a thought experiment to probe human motivations for acting ethically),[30] and so could be sure of avoiding the sanction, I would be obliged still not to ϕ in compliance with my background moral duty.

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26. Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House" (2005) 105:6 Colum L Rev 1681 at 1727 (here quoting Hannah Arendt) [Waldron, "Torture and Positive Law"].

27. *Ibid* at 1726.

28. See discussion, *supra* note 14.

29. Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) at 36. Oddly, though, Raz here describes threats as reasons "for belief" that the unwelcome eventuality will occur. They are surely reasons for action too [Raz, *Morality of Freedom*].

30. Plato, *Republic*, 2:359c-2:360d. Glaucon, the character who invokes the myth, asks whether we would take advantage of the invisibility to steal and make havoc as we pleased. The text to this note posits the converse possibility, namely the use of the ring to fulfil duties from which one would otherwise be excused.

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C. Authority

> *S's compliance is secured by authority to the extent that S treats the law's requirement as a reason to ϕ, and such reason makes no reference to the merits or consequences of ϕ-ing.*

This description of authority requires that the subject be motivated to act at least partly by considerations independent of the merits, and consequences, of undertaking or not undertaking the required conduct. But it permits authority to have a dimension of motivational weight. It may be added to one's other considerations; it may merely tip the balance. This is at odds with Joseph Raz's well-known "pre-emption thesis," which asserts that treating a directive as authoritative involves disregarding at least some of the considerations that would otherwise bear on one's decision. However, I suggest that the definition proposed here is defensible and appropriate, particularly in the context of an inclusive taxonomy.

First, it must be noted that the proposed definition involves a stricter notion than does Raz's theory about what it means to treat the directive itself as a relevant reason for action in the first place. Raz would apparently regard an anarchist, who complies with an order to evacuate a ship purely because he assesses that this will avert chaos, as treating the order as a reason for action—just as someone who accepts the captain's authority would be treating the order as a reason for action.[31] The anarchist's denial of authority comes because he does not then cede considerations of the consequences of non-compliance to the judgment of the captain. In my one-step analysis of authority, however, one would simply say that the anarchist's reason for action does not fall within the set of reasons that count as authority-motivated reasons, because it is a reason bound up with the consequences of compliance.

Both Raz and I are emphasising that obedience to authority involves a disregard of the merits of the action in question. But the architecture of our respective analyses is different. On the view advanced here, such disregard enters in the immediate way that a directive regarded by a subject as authoritative is brought to bear in the subject's reasoning—namely, via a reason which in itself incorporates no assessment of the merits of compliance in this case. On Raz's analysis the disregard (exclusion) of merits enters in at a second stage (which my analysis makes do without) with the *ousting* of some or all of S's other considerations. Given the structure of the approach proposed here, the argument that Raz makes from his "dependence thesis" (the proposition that decisions reflect and replace their underlying reasons)[32] to the pre-emption thesis has no application, I suggest. Raz's argument is that one cannot without logical violation (in particular, double-counting) treat a decision as authoritative and add to it the same sort of considerations that were factored into the decision itself. But to the extent that (as my definition of an authority-motivated reason requires) the relevance one assigns to a directive relates not to one's assessment of the merits of the action

31. Raz, *Authority of Law*, *supra* note 3 at 26.
32. Raz, *Morality of Freedom*, *supra* note 29 at 42-47, 57-62.

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but rather to a concern for, say, institutional loyalty, or the premium one places on the decision-maker's expertise, or any other content-independent ground, there is no double-counting or similar violation when one adds such reason to one's own balance-of-the-merits assessment.

Secondly, authority and obedience (I take "obedience" to be authority's perspective-of-the-subject correlate: *the conferring of authority*) are often discussed in terms which do not express the notion of pre-emption. Typically, what, instead, is implied to be focal about the concept is simply the treating of another's word as a content- (and consequences-) independent reason for action. Schauer, for instance, isolates the notion of complying with "the law just because it is the law."[33] This phlegmatic formulation—which Schauer equates with "taking the very existence of law as at least a *prima facie* reason to follow it"—seems a not unreasonable summation of what is involved. A tolerant taxonomy ought to be able to accommodate such approaches.[34]

Thirdly, real-life exercises of authority *do* sometimes operate as if they have dimensions of weight and not just domains of application. Consider how, in contexts where there are two or more co-possessors of authority (parents, teachers, bosses) over the same subject we often talk about one having more or less authority than the other—meaning not that they possess different jurisdictions but that their respective words weigh more or less heavily on those in their charge. Or consider the experience of faithfully following a requirement that seems increasingly absurd up until some mental tipping point is reached and one snaps and abandon the rule. Such behaviours and psychologies indicate that it is not only perfectly intelligible but in line with our normal conceptions to describe authority as something which has a dimension of weight and which creates reasons for action that may be placed in the balance with one's own assessment of the situation.[35]

As done with collateral motivation, let us now subject authority, as conceived, to the fourfold questioning that is being applied to each element in the emerging taxonomy. Here are the results.

1. In ϕ-ing, as authority demands, *S acts unwillingly*. This seems a reasonable conclusion given S's conception of what the balance of reasons requires is at odds with the authoritative directive. Apart from the law, S would not ϕ, e.g., serve in the military. If S could change the directive to eliminate the requirement of military service, presumably S would. One might

33. Schauer, *supra* note 11 at 55.

34. On one view, even Raz's own theory might need to avail of such tolerance, ironically enough. For Emran Mian contends that Raz's account of how authority is to be justified implies a weighing up of the reasons for according authority in the balance with other reasons, contrary to the pre-emption thesis: Emran Mian, "The Curious Case of Exclusionary Reasons" (2002) 15:1 Can JL & Jur 99.

35. A similar observation is made in Kenneth Einar Himma, "Just 'Cause You're Smarter than Me Doesn't Give You a Right to Tell Me What to Do: Legitimate Authority and the Normal Justification Thesis" (2007) 27:1 Oxford J Legal Stud 121 at 128. However, the relevant passage is focused on the somewhat narrower question of whether we give legal directions pre-emptive weight in our purely prudential (non-moral) deliberations.

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wonder, though, whether such conclusion always holds. Does it depend on the nature of the authority in question? Suppose the person issuing a directive has Weberian *charismatic* authority over S.[36] Isn't a hallmark of charismatic leaders that their subjects are devoted and follow directives with enthusiasm?[37] Perhaps. Charismatic leaders are, let us assume, good at persuading us as to the rightness of their demands. But such an assimilation of belief cannot have yet happened if we are talking about an exercise of authority. At the point of compliance there must be a conflict present between what S considers is appropriate and what the charismatic leader has ordered. The same point applies to expertise-based justifications of authority. One way that theoretical authority (*believing* on another's say-so) differs from practical authority (*acting* on another's say-so) is that the former implies a transitory rather than a continuing state: once we accept the advice we update our beliefs and the prior scepticism ends. By contrast, practical authority presupposes a present conflict between what S thinks is correct to do and what the law requires.

2. *In ϕ-ing, S is acting not on S's own assessment of the considerations affecting S*, but that of the person in authority issuing the directive. Where authority is making the difference, what matters is the fact of the directive having been issued, which in turn results from someone else's assessment of the relevant considerations.

3. *In ϕ-ing, S is acting for content-independent reasons*. As discussed above, to the extent that S follows an authority, S's decisive reason for compliance is collateral to the content of the directive itself, collateral to the merits of ϕ-ing. On the analysis proposed here, S may be influenced by other reasons as well and these need not be content-independent, whereas on Raz's view content-dependent reasons are pre-empted. But on either view, it is a content-independent reason that is making the difference where obedience to authority is the decisive factor.

4. In ϕ-ing, as authority demands, *one will (generally) consider the law to have changed one's own moral position*. I would suggest that being motivated by obedience to authority generally will alter, in one's thinking, the permissible into the proscribed or the obligatory as the case may be (or the impermissible into the obligatory). Such a change in one's moral assessment would appear to be implied by most cases of obedience to authority. If, for instance, I comply with a directive because I consider that morally I must always follow the majority's decision or because I must always obey a certain religious leader's ruling, any such belief implies I would not have considered myself obligated/prohibited had the authoritative directive not made it so.

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36. Max Weber, "Politics as a Vocation" in HH Gerth & C Wright Mills, eds and translators, *From Max Weber: Essays in Sociology* (Oxford University Press, 1946) 77 at 79-80.

37. "Men do not obey him by virtue of tradition or statute, but because they believe in him". *Ibid* at 79.

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However, in one case some qualification seems necessary. This is where one obeys because one believes that one is thereby more likely to do what one should be doing *already*, prior to the directive being issued, than by following one's own judgement. We are here supposing that the subject defers to the lawmaker's presumed greater expertise or superior powers of judgement. Then, at one level, the subject will believe that one's moral position has changed. The previous, personal judgement was that ϕ-ing was not required—but, now, because of the directive, one considers one should ϕ. Yet, at another level, this person will suspect that the directive reflects what was required all along, implying *no real change* in the moral position. To that extent, expertise-based authority can be seen to operate differently from all other guises of authority.

Expertise-based authority is often associated with Raz's well known "normal justification thesis" (NJT). This holds that authority is justified where it helps you better comply with the reasons that apply to you.[38] Given the prominence of Raz's theory, it is interesting to ask, parenthetically,[39] whether the result derived above—no change in one's moral position—applies to authority justified via NJT. This turns on whether NJT really is equivalent to the notion of expertise-based authority articulated in the previous paragraph. The question is: if a given exercise of authority is justified according to NJT, does this necessarily imply that one is being directed to do what was already required?

Answering this question is hard because Raz is ambiguous on a crucial question: for the purposes of NJT, when we are considering the reasons that following the authority may help us promote, are we supposed to count those reasons that are only generated by the fact of the authority having issued a directive, or are such reasons supposed to be excluded from the calculus? Do the relevant reasons include, in other words, *standing reasons for treating the directives of a given authority as binding* (reasons such as, e.g., "democracy requires that I obey laws passed by Parliament"), and so does the thesis ultimately embrace *any* kind of valid justification for obedience? If such reasons are excluded, Raz's thesis does indeed imply that authority must only demand what was *already* required of S, directive apart. If, however, such reasons are admissible, then the two notions (i.e authority-getting-you-to-do-what-you-already-should and NJT) are not equivalent. And so, in this case, the law's intervention *may* potentially cause a change in one's moral position. It would also then be hard to see how NJT, since it would encompass any valid justification, avoids collapsing to the tautology that authority is rationally justified if and only if it is justified rationally.[40]

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38. For the canonical formulation see Raz, *Morality of Freedom, supra* note 29 at 53.

39. It is beyond the intended scope of this article to examine the validity of NJT. Instead, I ask the more limited, conceptual question: if one believes NJT to be valid and to justify obedience to a directive to ϕ, does this entails a belief that one was already obliged to ϕ prior to the directive being issued? Still, attempting to answer this apparently straightforward question exposes certain issues as to the coherence of Raz's account. See the following paragraph of the main text. For wider-ranging comments on NJT, see, e.g., Mian, *supra* note 34; Himma, *supra* note 35; Margaret Martin, "Raz's The Morality of Freedom: Two Models of Authority" (2010) 1:1 Jurisprudence 63.

40. One reason for thinking that Raz means to exclude reasons that are themselves standing, complete reasons for obedience is his contention that NJT is the corollary of his dependence

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D. Strategic intervention (coordination)

> *S's compliance is secured through the law's intervention in S's strategic situation to the extent that what is decisive in S's decision to ϕ is that the law secures, or is thought by S likely to secure, the compliance of others.*

Previous attempts to apply game theoretic ideas to the law have tended to embody three features which, for reasons explored below, undermine their effectiveness: they focus on "coordination problems" (in the conventional, rather specific sense of this phrase in game theory, shortly to be explained) to the neglect of other forms of strategic interaction; they propose, over-ambitiously, the resolution of such problems as a universalised explanation of law's operation; and connected to this last feature, they seek conceptually to assimilate to coordination other mechanisms of securing compliance (i.e., authority and coercion).[41]

What is meant by a coordination problem? The classic example is the choice of whether to drive on the left or the right side of the road. Matching the choice of everyone else by driving on the same side as them is clearly preferable to not doing so.

The situation where all parties are indifferent as between two or more outcomes so long as their selections coincide is a *perfect* coordination problem. A situation where the parties have different preferences and yet still prefer outcomes where their selections coincide is an *imperfect* coordination problem (sometimes called the "battle of the sexes" game). So, to give a second example, Alan and Bishi believe that rain will come only if they both perform a dance together on the same day. Alan would prefer to dance on Thursday, Bishi prefers Friday. However, both would prefer, above all, any day that the other also turns up. The scenario is represented in the pay-off matrix at Figure 1. (Here, Alan is row-chooser and, as is conventional, his pay-offs are indicated in the top-left corner of each cell; Bishi is column-chooser and her pay-offs are indicated in the bottom-right corner of the cell.) This is a case of a clear, if imperfect, coordination problem.

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thesis—the proposition that authorities should base their directives on reasons that apply to their subjects (Raz, *Morality of Freedom*, *supra* note 29 at 55). For it would be nonsensical for an authority to depend on its subjects' reasons to obey its directives in formulating the content of those directives. On the other hand, Raz has also claimed that NJT is satisfied where one has reason to obey on democratic or religious grounds. That suggestion is surely compatible only with the trivial/tautological, all-encompassing interpretation of NJT. Joseph Raz, "The Problem of Authority: Revisiting the Service Conception" (2006) 90 Minn L Rev 1003 at 1030.

41. In target here: Finnis, *supra* note 7 at 231-33, 255; Gerald Postema, "Coordination and Convention at the Foundations of Law" (1982) 11 J Legal Stud 165; and Waldron, *Law and Disagreement*, *supra* note 12 at 106-108. Hadfield & Weingast, *supra* note 6 displays the second feature, universalising ambition, in its conclusion that a "legal order" as a whole can be seen as a game-theoretic "equilibrium" (singular). However, that conclusion does not, if fact, seem to be warranted by the substance of their article. That substance consists of the construction of a model of the interaction between legal rules and individual decision-making in which the law would seem to play the kind of situationally contingent, albeit frequent, role in solving strategic problems (*equilibria*, plural) argued for by me here.

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Figure 1. (Impure) coordination problem

		Bishi: Th	Bishi: Fri
Alan	Th	2, 1	0, 0
	Fri	0, 0	1, 2

However, plainly there exist many social scenarios that do not have the structure of even imperfect coordination problems. Developing the last example, suppose another person, Dwayne: (1) believes that rain will come so long as enough others join the dance, yet not everyone need do so; (2) calculates that his presence is unlikely to tip the balance; and (3) has, rightly or wrongly, no qualms about free-riding on the efforts of others. In the terminology of game theory, people like Dwayne regard the situation in Prisoner's Dilemma terms.[42] Figure 2, which imagines the pay-offs of Dwayne, or one group of "Dwayne(s)", as against those of a similarly minded person/group, is a classic Prisoner's Dilemma matrix[43].

Or consider the position of a further character, Cayce. She simply does not believe that rain dances (or substitute: military interventions, vaccinations …) have any beneficial effect and would just prefer for the nonsense to end. There is, for Cayce, no strategic problem at all. Her preference (which is not to attend at all) remains the same whatever the choice of the others. It is hard to see how this situation—"Cayce's Case", represented at Figure 3—can have anything to do with coordination.

Figure 2. The Prisoner's Dilemma

		Other Dwayne(s): Go	Other Dwayne(s): No go
Dwayne(s)	Go	2, 2	0, 3
	No go	3, 0	1, 1

42. A Prisoner's Dilemma situation will occur when all participants would prefer an outcome where all take certain action over the one where nobody does, yet each realises that it would be in their interest to "defect" by failing to take that action whatever the other decides to do. See Edna Ullmann-Margalit, *The Emergence of Norms* (Oxford University Press, 1977) at 18-29.

43. On interpreting such matrices in the context of a multi-participant game, see note 55 below.

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Figure 3. Cayce's Case

		E.g., Alan: Go	E.g., Alan: No go
Cayce	Go	0, 2	0, 0
	No go	2, 0	2, 0

Gerald Postema side-steps the problem presented by such possibilities by assuming that "[t]he citizen, for his part, seeks coordination of interpretation because he wishes to live within the law, to seek the common good, to achieve his own ends with the assistance of the facilities provided by the law, or to avoid the sanctions threatened by the law."[44] This is questionable if intended as a general description; it also muddies the waters by referring to sanctions as a possible motivating factor. Postema's focus, in fairness, is in exploring the consequences of the (more plausible) proposition that judges and other law-applying officials, as opposed to citizens, generally seek to coordinate their respective interpretations of the law. The suggestion is that this creates a higher-order coordination problem which, for them, the law itself serves to solve. Waldron, in a similar vein, contends that a need for coordination may arise around the margins of an otherwise universal desire for regulating certain conduct. He alleges that, in this way, "many more issues addressed by the law can be associated with [imperfect coordination problems] … than might at first appear."[45] Even in the case of something as universally condemned as rape there are aspects of the law that are controversial, such as the nature of mistakes about consent that are exculpatory. People have an interest in a "common scheme" of law governing sexual offences that "deals unequivocally with such matters."[46] However, even if this example convinces on its own terms,[47] it is a long way from Cayce's Case, the occasion where the individual considers that it is just plain silly, or wrong, for the law to be regulating the situation at all.

44. Postema, *supra* note 41 at 192.
45. Waldron, *Law and Disagreement*, *supra* note 12 at 108.
46. *Ibid* at 108.
47. Plausibly, most people appreciate that empowering the courts to deal with rape necessitates agreed answers to controversial questions about where the lines of criminal responsibility should be drawn. But few would ever use those agreed answers to guide their own conduct. The idea using one's knowledge on the law surrounding mistakes as to consent so as to calibrate one's actions is obviously disturbing. Waldron would presumably concur with this last statement; elsewhere he has argued eloquently against the assumption that law must always provide the sort of precise guidance that would allow people more easily to push up against the limits of what is permissible. Waldron, "Torture and Positive Law", *supra* note 26 at 1698-703.

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John Finnis addresses more directly the possibility of situations where an actual desire for coordination is lacking amongst numbers of the participants.[48] Like Postema and Waldron, Finnis invokes, in effect, the notion of a second-order coordination problem—coordinating not between possible actions but between possible rules about such actions, i.e., legislative outcomes. But Finnis goes further by stipulating that such a problem arises simply because there is disagreement about which such legislative outcome should prevail. On this approach, it seems, granted that someone like Cayce sees no immediate, first-order strategic problem in the choice of whether or not to attend the rain dance, the fact that others do consider attendance to be important means that a problem does arise of coordinating—mediating between—the desire of the community that attendance be mandatory with Cayce's desire that it not be.[49] The preference for coordination in this second-order problem is, moreover, constructive—supplied by Finnis's political theory—rather than one that Cayce actually holds: "For a legislator or judge, considering the problems of social order generically, the pure conflict situation cannot be conceded to exist as between the members of a community."[50] But, as Green rightly suggests, a preparedness to ignore actual preferences is to throw away any explanatory advantage that the invocation of game theoretic ideas might have brought.[51] The challenge of a theory of political obligation such as Finnis seeks to advance is to explain why individuals ought to conform to laws that they regard as pointless or wrong. Such a project is not advanced by stipulating that one *ought* to discern a need for coordination in such circumstances.

Before we are tempted to dismiss entirely the relevance of game theory, what if, though, someone *does* find that the law in a given case resolves a strategic problem?

For sure, someone who regards the preferences of the community as *always* generating coordination problems effectively treats the expression of any such preferences as authoritative. (Edna Ullmann-Margalit proposes, drily, that a technical definition of a "conformist" might be someone who possesses such an attitude.[52])

But this cannot be said of those who, in a particular case, take advantage of the law resolving what they already regard as a coordination problem and who act in accordance with their own preferences. Authority is not required here

48. Finnis, *supra* note 7 at 231-33, 255.

49. Unless this is a situation where Finnis would regard the putative stipulation (mandatory attendance at a rain dance) as sufficiently against the principles of practical reason as to rob it of moral force. On this escape valve, see *ibid* at 359-60. It is unclear what the consequences are of such escape valve being invoked for Finnis's analysis of social coordination, beyond releasing the subject from the obligation to comply. Are we to suppose that the unjust nature of the majority's desires means that there is no problem of social coordination (again, by stipulation), or is there a problem of coordination that must simply remain unresolved?

50. *Ibid* at 255.

51. Leslie Green, "Law, Coordination and the Common Good" (1983) 3 Oxford J Legal Stud 299. See also Theodore M Benditt, "Acting in Concert or Going It Alone: Game Theory and the Law" (2004) 23:6 Law & Phil 615.

52. Ullmann-Margalit, *supra* note 42 at 93-96.

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at all. Finnis is wrong to suggest that there are "in the final analysis, only two ways of making a choice between alternative ways of co-ordinating action to the common purpose or common good of any group" namely "either unanimity, or authority."[53] Game theory's relevant insight is precisely that all that is needed for successful coordination is the *salience* to the participants of one of the potential equilibria. Such salience can be generated by accident (e.g., the happenstance of what the first person on the scene did) or by the coercion of some, as well as by anything resembling the exercise of authority. And once equilibrium has thus been established, by whatever means, continued conformity to it can be explained simply by reference to the fact that the participants, looking to their own preference matrices, have no reason to depart from it. As Ullmann-Margalit says, "one is *using* a co-ordination norm [her term for a norm pointing to a solution to a coordination problem], or … taking advantage of its existence by acting in accordance with it, rather than … just conforming to (complying with) it."[54]

In fact, the interesting point about the relationship between law and strategic interaction is almost the opposite of the one drawn by Finnis. In those cases where the law affects S's choice of action merely by altering the choice of others, *there is no need to invoke either coercion or authority to explain S's conformity*. In such cases, the law is not altering S's own pay-offs (as with coercion) nor need S be acting on the law's say-so (authority). Instead, S is simply looking to S's own preference matrix and acting accordingly.

So far, we have considered only "coordination problems" in the technical game-theoretic sense of the term, namely a situation where all participants prefer matching the preferences of others to any other outcome. In such cases, we have seen that the law can, simply by making one solution salient to the participants, secure a subject's compliance whilst avoiding overriding or manipulating that subject's preferences. But the law may also achieve this feat where it intervenes in another type of strategic context that in some respects more closely resembles the Prisoner's Dilemma paradigm.

Consider the matrix at Figure 4, representing the respective pay-offs of members of two segments of a community,[55] the A's and the B's, as to two choices: paying (P) a certain contribution towards some communal service, or withholding (W) that contribution. The A's are row-choosers; the B's are column-choosers.

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53. Finnis, *supra* note 7 at 232.

54. Ullmann-Margalit, *supra* note 42 at 98.

55. This illustration involves a pair of *classes* of participants rather than a pair of *individuals* because the realistic sort of situations that it seeks to model will involve (many) more than two individuals. This aspect does not ultimately affect the structure of the problem, for it can be conceived as a "generalised" version of an equivalent 2-person problem. *Ibid* at 22-25. To avoid the objection that one cannot represent a situation where each A and each B is an individual decision-maker on a 2-by-2 grid, one can perhaps view the matrix as representing the pay-offs of an individual A and an individual B in light of a homogenised choice by all (or, say, most) other A's and B's.

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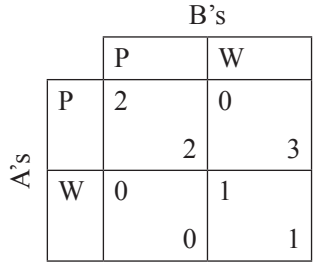
Figure 4. 'The Reasonable Person's Dilemma'



Here, the pay-off structure is asymmetric as between the participants. Both A's and B's would each prefer the situation where both groups pay (top-left cell) directly over the one where neither do (bottom-right cell). And both would rank the situation where they themselves pay and the other does not (top-right cell from the As' perspective; bottom-left cell from the Bs') as undesirable. But the two groups regard the opposite scenario, i.e., where they themselves withhold whilst the others pay, differently. The B's—the more unscrupulous lot—would prefer such outcome (top-right cell) above all others. Hence, the B's are motivated to withhold regardless of what the A's do. Their payoffs are ordered exactly as in the Prisoner's Dilemma. The A's, however, regard free-riding in this way as morally wrong. We can suppose they have internalised this attitude such that any sense of advantage they might otherwise have obtained from free-riding is for them stripped away (or counteracted by guilt?). So, in their preferences, this outcome (the bottom-left cell) is less desirable than the outcome where both they and the B's pay up (top-left cell). Consequently, the As' preferred action depends on the Bs' anticipated choice. If B's withhold payment the A's prefer to do likewise. But if the B's will pay then the A's wish to do so too.

Therefore, the law can make a difference to the A's decision by making it less likely—through the credible threat of sanction—that B's will escape payment. One could represent the effect of the law's intervention either by covering up the right-hand column of the matrix or by imagining a new matrix in which the Bs' pay-offs in the top-right cell are adjusted downwards to reflect the anticipation of a sanction being applied.

Prior to the law's intervention, one might call the unadjusted matrix, from the perspective of the As, the "Reasonable Person's Dilemma."[56] There are glancing references to the possibility of something akin to the Reasonable Person's Dilemma, and so to this mode of the law making a difference, in the writings of both Hart and Raz.[57] But neither one arrives at the conclusion drawn here,

56. Note that the structure of the dilemma does not change if the B's are entirely phantasmic, i.e., if their existence is a figment of the As' imagination. Indeed, the problem remains if the B's are phantasmic to, as it were, a second (or nth) degree. That is, suppose the participants all surmise (correctly) that all participants are A's but (incorrectly) that a number of them will incorrectly surmise that a number of others are B's (and so on). Such possibilities must significantly increase the practical opportunities for such dilemmas to present themselves in real life.

57. Hart, *supra* note 5 at 198: "except in very small closely-knit societies, submission to the system of restraints would be folly if there were no organization for the coercion of those who

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namely, that an explanation of S's compliance based on the law's control of others is a *competitor* to the explanations "S was coerced" and "S obeyed."

The interestingness of this conclusion, which should at a conceptual level be clear enough, would be reinforced by a finding that scenarios broadly corresponding to the matrix in Figure 4 are pervasive in the real world. Exploring the empirical validity of such a proposition is beyond the scope of this article. But suffice to say I can imagine pro-social actions that I do not currently undertake but might if, but only if, many others did as well (paying a little more tax perhaps?). And I can suspect that there are behaviours that are happily second-nature to me, such as restraint from the use of pre-emptive or punitive violence, which might not be the case, had I lived instead in a pre-modern milieu where the prospects of reciprocation were poor.[58]

When the law secures S's compliance by affecting the likelihood of the compliance of others, the following can be said.

1. *In ϕ-ing, S acts willingly, to a greater-or-lesser extent*.[59] This point is of significance if one considers the following possible objection: if coordination is parasitic on *some* people being either coerced or obeying, does it really deserved to be conceptualised as an entirely separate mechanism of legal control? The narrow answer to this objection is that there is certainly no double-counting. Those who are coerced (the B's in the example above) would be duly categorised as such when the time comes to consider their position *qua* S's. The broader answer is as follows. The ultimate purpose of drawing conceptual distinctions about how the law secures compliance is, I presume, to say something consequential—conceivably with some practical implications, however indirect—about the structuring of a legal order. Imagine two societies of 5 million people. In both, there exists a body of law that, for a minority of citizens, say, 1 million of them, is complied with only out of fear of sanction. In the first society, the remaining 4 million

would then try to obtain the advantages of the system without submitting to its obligations. 'Sanctions' are therefore required not as the normal motive for obedience, but as a guarantee that those who would voluntarily obey shall not be sacrificed to those who would not." See also Raz, *Authority of Law*, *supra* note 3 at 247-49. There, Raz refers to the kind of scenario under discussion, where "it is the existence of the practice that matters", in arguing that there is no general obligation to obey the law. This comes tantalizingly close to the conclusion that in such situations the law does not need to rely on (or claim?) authority to get its business done, but Raz does not say this. And elsewhere he (like Finnis) runs together the notion of coordination and authority. See *supra* note 12.

58. For an empirically based case for such a proposition as applied to human history in general, see Steven Pinker, *The Better Angels of Our Nature*: *A History of Violence and Humanity* (Penguin, 2011).

59. The willingness will be greater in a situation akin to the example above where S's preferred outcome is that all comply with the putative norm in question. It will be lesser where S considers the norm is somewhat inapt or inefficient, but nonetheless, S would derive some real benefit from the compliance of others and would not wish to free-ride. The assumption is that there is some margin of appreciation, some level of disproportion between benefit and burden, beyond which S would cease to comply. If, however, S goes further and treats the mere fact of others' anticipated compliance as a benefit to S in itself, even in the context of a law that S considers pointless—perhaps on the (questionable) assumption that a general disposition to blind obedience to the law is socially beneficial—one perhaps can regard this as obedience to authority. For S would in practice then be treating the law as a content-independent reason.

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think this body of law is unnecessary, or even unjust, but comply, through gritted teeth, out of loyalty to the system. In the second, the remaining 4 million instead comply wholeheartedly because they see the value in the actions required by the law, but only so long as virtually everyone complies, including the 1 million coercees.

It is an open question whether, all other things being equal, the long-term prospects of the legal order of the second society might be stronger than those of the first (my intuition is that they might well be).[60] Yet a conceptualization that chalks up any instance of compliance-conditional-on-coercion-of-others to coercion-in-general will tend to yield the misleading conclusion that one is looking at 5 million coercees in the second society as against only 1 million in the first and that hence, since coercion is regarded as "law's 'Plan B'",[61] the second legal order is in a more parlous condition than the first. Better, as was suggested in Section IV.A above, to separately assess the individual relationships between each S and the law before drawing overarching conclusions about the resulting society-wide legal order.

2. *In ϕ-ing, S is acting on S's own assessment of the considerations affecting S*. Where the law makes a difference to S's decision purely by getting others to comply, as noted before, this implies S is simply looking to S's own pre-existing preferences and is acting accordingly. There is then no room for authority as an explanation of S's decision.

3. *In ϕ-ing, S is acting for content-dependent reasons*. We have seen that coercion and authority move one to ϕ by appealing to something other than the merits of ϕ-ing as one sees them. Here, the merits of ϕ-ing as S sees them are decisive. If the pay-off matrix for ϕ-ing had been sufficiently different, S would have made a different choice.

4. *One will consider the directive to have changed one's moral position*. The logic of the Reasonable Person's Dilemma is that after the law intervenes, securing the compliance of enough others, the ethical position of S, as an A, does indeed change. The relevant action (paying the contribution in my example) switches to being the one that practical reason requires.

   It is true that this depends on a contingency, namely whether, in S's prediction, the law will actually succeed in securing the compliance of others. Earlier, in the case of coercion, the contingent nature of enforcement was found to be a reason for concluding that S will *not* consider the law to have changed S's moral position. However, the degree of contingency here is considerably lesser and of a rather different quality. The chances of breach occasioning sanction for a given individual will fluctuate continually (am I currently on CCTV?); individuals can continually update their view of

60. Such intuition appears to be shared in Hadfield & Weingast, *supra* note 6 at 23. That article identifies the "microfoundations" of the rule of law—the conditions that cause it to emerge and to strengthen—not in "particular institutions, beliefs, or behaviors" but in an "equilibrium arising from the interaction" of those things. *Ibid.*

61. Green, "General Jurisprudence", *supra* note 11 at 573.

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such chances. But society-wide levels of compliance are not something that will fluctuate from moment to moment. Nor will such society-wide compliance be within S's control. The key point is surely this: if S was supplied with the Ring of Gyges, S would *not* use this (as one would if coerced) as an opportunity to cease to ϕ. Incidentally, this was the point that I take Thomas Hobbes to be making about the changed stance of persons living within a civilised society towards the use of violence. Hobbes held that such persons living there are not entitled to act as they would in an anarchic state of nature, the famous "Warre of every man against every man." In a functioning social order, he considered that one ought (apparently in the full, moral sense) to refrain from the use of force and fraud.[62] That Hobbes combined that conclusion with a (rather humane) refusal to condemn those who act otherwise under different social conditions,[63] seems to have led to the canonisation in political philosophy of his view as being that ethical standards are merely a matter of expediency.[64] The modern association between Hobbes and the Prisoner's Dilemma is in line with such a reading.[65] Yet it might be fairer to say that Hobbes saw the problem of achieving a civil society in terms, instead, of the Reasonable Person's Dilemma outlined above. He assumed that his readers would readily assent to ethical demands about the restraint from force ("seek Peace, and follow it") that arguably correspond to the preferences of the A's in that scenario (Figure 4) and not necessarily to the purely selfish preferences of the B's.

V. Assembling the taxonomy

To recap, this article has explored four categories of explanation for compliance with the law. These are: Mere Conformity; Collateral Motivations (sanctions/rewards); Authority; Coordination, the law's intervention in the subject's strategic situation.

Of each explanation—each form of relationship between law and subject—four questions have been asked: (1) does the subject act willingly? (2) does the subject act on the subject's own assessment of the merits? (3) does the subject act

62. Thomas Hobbes, *Leviathan* (Penguin, 1985) at 190: "It is a precept, or generall rule of Reason, *That every man, ought to endeavour Peace, as farre as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of Warre.* The first branch of which Rule, containeth the first, and Fundamentall Law of Nature; which is, *to seek Peace, and follow it*. The Second, the summe of the right of Nature; which is, *By all means we can, to defend our selves*."

63. "[In a state of nature]… there is no way for any man to secure himselfe, so reasonable, as Anticipation; that is, by force, or wiles, to master the persons of men he can, so long, till he see no other power great enough to endanger him: And this is no more than his own conservation requireth, and is generally allowed." *Ibid* at 184. Again: "Justice and Injustice … are Qualities, that relate to men in Society not Solitude." *Ibid* at 188.

64. For instance, Karl Popper states (somewhat offhand) that the basis of Hobbes's theory was "an ethical nihilism." KR Popper, *The Open Society and Its Enemies, Volume 1, The Spell of Plato*, 5th ed (Routledge, 1966) at 118. Raz, meanwhile, is prepared to allow that (no more than) "rational enlightened self-interest" is at the basis of the covenant that Hobbes proposes between sovereign and subject: Raz, *Morality of Freedom*, *supra* note 29 at 80.

65. See, e.g., Ullmann-Margalit, *supra* note 42 at 62-73.

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for content-dependent, or content-independent reasons? and (4) will the subject regard the law as having changed one's moral position? A further question can be posed: simply, does the law make a difference to the subject's conduct? (The answer to this last question is plainly "yes" for all explanations excepting mere conformity, hence there being three forms of legal control.)

Each explanation yields a different pattern of answers to those questions. These findings are tabulated in Figure 5; they are represented in tree diagram form in Figure 6.

Figure 5. The taxonomy in table form

Relationship between law and S	Sub-category, if identified	Law makes a difference at all?	S acts willingly?	S acts on own judgement?	S acts for content-*dependent* reasons?	S considers moral position changed?
Mere Conformity	–	N	Y	Y	Y	N
Collateral Motivation (S acts due to sanction or reward)	Coercion by punishment or reward	Y	N	Y	N	N
	Torture			N		
Authority (S acts on the law's say-so)	Directive services S's pre-existing reasons (expertise)	Y	N	N	N	N
	Other reasons for according authority (e.g., loyalty)					Y
Strategic Intervention (S acts because of the coordination of others)	–	Y	Y	Y	Y	Y

It is worth clarifying that the categorization is not designed to pre-empt the question of whether differing motivations can be combined within the deliberation of a particular subject. A conceptual separation of various vectors of action implies no claim that each vector must operate in isolation. It looks merely to each explanation *pro tanto*: what is S's relationship to the law to the *extent* that such explanation applies? Might, for instance, a subject be moved to act out of a mixture of a sense of obedience and of coercive threat? Or where the law secures the conformity of others, might this tip the balance if one is somewhat, but not decisively, predisposed to comply—whether out of respect for the law or fear of sanction? A provisional view is that any such combination is both conceptually possible and psychologically plausible.

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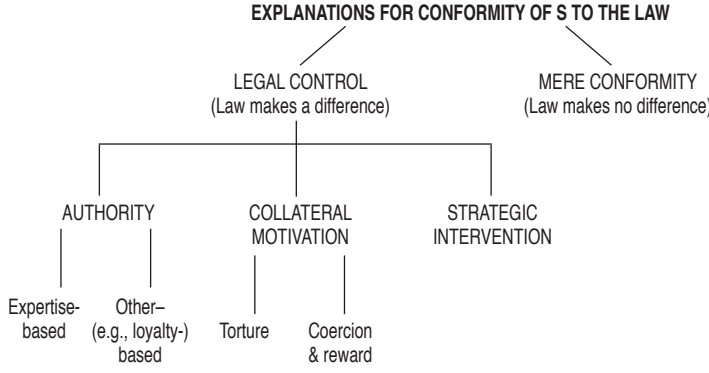
One proviso is that *if* obedience to authority does, or can, operate as a reason for action that excludes other considerations (as Raz argues) then, obviously, to that extent it might not be combinable with other motivations for compliance. Although I have earlier criticised the view that authority necessarily, or even typically, operates in such manner, it nonetheless seems reasonable to acknowledge the possibility that it may sometimes do.

Figure 6. The taxonomy in a tree diagram



VI. Implications and extensions

The taxonomy that emerges in this article is merely suggestive. It is only a sketch. Beyond the top-rank taxa only a few additional sub-divisions are considered. This might be as far as my category-building questions ("Does S act willingly?", and so on) will take us. Perhaps extension to further taxonomic ranks would require the injection of some new questions.

Another dimension in which the taxonomy could be extended is side-ways: to cover any form of social or political power in general. My sense is that this would not, in fact, require the creation of additional top-rank categories. True, individuals and organizations can influence others in one obvious way that "the law" or "a legal system" simply cannot: one can persuade, demonstrate, inform, educate, appeal. One can, that is, change someone's mind. But once S's mind has indeed been changed—once S is brought around to thinking that ϕ-ing is a good idea—a proper explanation for S's continued compliance is mere conformity, as was pointed out at Section IV.A above.

To put it another way, the ongoing conformity brought about by successful persuasion is more-or-less indistinguishable from mere conformity. A subject's "educated conformity," as it were, is not dependent on some ongoing exercise of power. It does not create the psychological tensions associated with coercion and authority; one is not pulled one way by the directive and another by one's desires or conscience. (In this feature consists, perhaps, the unique, if insidious, advantage of persuasion: once the persuasion succeeds it all but drops out of the picture.)

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The taxonomy is suggestive in another sense. It has something to tell us about the relative merits of the different forms of relationships between law and subject that it categorises. We may consider what is likely to make for a "healthier" (more stable? less harm-inducing?) legal order**.** Heavy reliance on authority or coercion is contraindicated, because those methods imply less than wholehearted compliance as well as interference with autonomy. No doubt a *minimum* condition for a stable, healthy legal order is widespread alignment of conduct to the pattern prescribed by the law. Beyond this, the analysis here indicates that the more such alignment can be explained in terms of subjects' mere conformity and/or the law's coordinating effect, the better. Those explanations imply wholehearted action and preservation of personal autonomy.

Such conclusions may escape the theorist who holds that one must focus on situations where the law is at odds with what people generally want—perhaps in the belief that there is little in need of explanation in any other case. Such an approach seems to be adopted by several of the writers discussed in this article. It is distortionary in a couple of important ways.

Firstly, such a focus frames the matter in a way that obscures the possibility of the law aligning itself with the attitudes of its subjects. This is a possibility that for the legislator or political scientist is arguably of more practical promise than its converse, namely, a strategy of exhorting greater respect for the law. For sure, it makes no sense to posit "a law" bringing about mere conformity with itself. But it is not nonsensical to say that the design of a legal system may bring about high levels of mere conformity with its constituent laws—in particular, by adjusting such laws in line with the views of its subjects.

Secondly, whilst writers from Hart onwards have acknowledged that people comply with the law for various reasons, the temptation is to "average out" such reasons, or else find excuses to leave some of them out of the account. The deficiencies of such an approach are particularly debilitating when seeking to understand the law's impact on strategic problems. It is impossible properly to conceptualize scenarios such as the Reasonable Person's Dilemma without carefully articulating the interaction of *differing motivations* of *differing groups* of actors. Such scenarios are well worth understanding. For, as this article has discussed, where the law operates to resolve strategic problems, it can make a difference to the actions of numbers of people without making them act against their preferences and without requiring that they suspend their judgement on the merits. On this view, if there was ever an "ideal" mode of action for the law, strategic intervention would surely be it.

What about the *least* ideal mode of action, the wooden spoon award? Traditionally, this has been awarded to coercion, law's alleged "Plan B."[66] Yet a glance at the table at Figure 5 above calls into question this placing. True, coercion makes you do things that you do not wish to do. But then so does authority. Yet at least in the case of coercion one acts on one's own judgement, whereas authority requires acting on someone else's say-so. Thus, authority is arguably more invasive of autonomy than coercion.

66. Green, "General Jurisprudence", *supra* note 11 at 573.

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True: that conclusion does not account—because the taxonomy is orientated around cases of compliance—for the broken eggs, that is, the costs incurred should the attempted exercise of control fail. In the case of coercion, these costs include the expense of enforcing the law in default of the subject's compliance as well as the suffering inflicted on the offender through punishment. With failed exercises of authority, the costs are limited to, at most, perhaps the undermining of future attempts to exercise authority. Failed coercion is messy, failed authority is not. (But one might argue that coercion being costly is in fact a feature in its favour *vis-à-vis* authority. There is an argument that getting other people to do what you want against their preferences shouldn't be made *too* easy, too frictionless.)

The fact that the taxonomy only speaks to *successful* rather than *failed* instances of legal control is a limitation, potentially a distorting factor even. Perhaps it is one that could, in principle, be addressed by supplementing the analysis (in a further extension) with a kind of "mirror" taxonomy focusing on such failed instances.

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