

MISTAKEN AUTHORITY AND OBLIGATION

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Abstract

Massimo Renzo argues that, as long as it is acting in good faith, an authority can issue orders that require subjects to act in ways that are morally wrong and still be acting within the scope of its jurisdiction, so that the orders are binding. This, however, is incorrect. If the authority is permitted to issue an order, it is acting within the scope of its jurisdiction and so the order creates an obligation. But if the authority is not permitted to issue the order, it is not acting within the scope of its jurisdiction and so the order does not create any obligation whatsoever. I develop my position and provide a model of mistaken authority through engagement with Renzo's view.

I. INTRODUCTION

A legitimate authority creates obligations by exercising its normative power of directly conferring those obligations on subjects simply by executing an intention to do so.¹ And yet, in different circumstances, an authority does not create any obligations whatsoever, not even pro tanto obligations that are overridden by competing duties. One such case is when an authority issues orders that clearly fall outside the scope of its jurisdiction. But what about cases in which an authority issues orders that *seemingly* fall within the scope of its jurisdiction but that require subjects to act in ways that are (seriously) morally wrong? What about, for example, an order that—if followed—would result in the violation of a person's right to life? The

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1. VICTOR TADROS, *TO DO, TO DIE, TO REASON WHY* (2020), at 60–62.

problem is especially acute if one uses moral notions in the fact-relative sense rather than the evidence-relative or the belief-relative senses; it is in the fact-relative sense, then, that I will use moral notions in this essay, unless I explicitly indicate otherwise.²

Some scholars argue that, at least in some circumstances, an authority can create obligations in such cases. The view presented by Massimo Renzo is perhaps the most compelling, and is surely the most refined. He argues that, as long as it is acting in good faith, an authority can place a subject under the obligation to act in a way that is morally wrong. But he also says that, if the subject is justified in believing that the authority made a mistake, she should disobey the order. And this, it seems, is because by acquiring the belief that the authority made a mistake, the subject is placed under a new duty that overrides the obligation created by the order the authority issued.³

One of Renzo's key points is that a mistaken authority can issue an order that requires a subject to act in a way that is morally wrong and still be acting within the scope of its jurisdiction. This is why he says that sometimes subjects are obligated to obey orders that are morally wrong. But this is incorrect. As I will show, if the authority is permitted to issue an order, it is acting within the scope of its jurisdiction and so the order creates an obligation. But if the authority is not permitted to issue the order, it is not acting within the scope of its jurisdiction and so the order does not create any obligation at all. Thus, two of Renzo's theses are false. A subject is not obligated to obey a morally wrong order, even if the authority issuing it acted in good faith. And the acquiring of the belief that the authority made a mistake does not give rise to a duty that changes the subject's normative situation.

The paper is structured as follows. In [Section II](#), I introduce and put some pressure on Renzo's view. In [Section III](#), I develop my own position through engagement with his account. In [Section IV](#), I provide a model of mistaken authority. I round off the paper in [Section V](#) by discussing some implications of my own view.

II. A DUTY TO DO WRONG?

Renzo develops his account of mistaken authority in the context of a discussion in just war theory. He stresses that combatants do not fight as private agents, but rather as members of political bodies. If we assume that combatants qua citizens of legitimate states are duty-bound to obey the law, Renzo argues, this opens the door to the idea that they can become obligated to

2. For the distinction between these three senses, see I DEREK PARFIT, *ON WHAT MATTERS* (2011), at 150–162.

3. Massimo Renzo, *Political Authority and Unjust Wars*, 99 *PHIL. & PHENOMENOLOGICAL RSCH.* 336 (2019). For related views, see David Estlund, *On Following Orders in an Unjust War*, 15 *J. POL. PHIL.* 213 (2007); Jonathan Parry, *Authority and Harm*, in 3 *OXFORD STUDIES IN POLITICAL PHILOSOPHY* 252 (David Sobel, Peter Vallentyne & Steven Wall eds., 2017).

obey orders that require them to act in ways that are morally wrong. This is because their states, acting in good faith, can order them to fight in unjust wars. At the same time, he emphasizes that these obligations are only pro tanto, so that, all things considered, a combatant who has been ordered to fight in an unjust war may not have to act as instructed, for she may also be subject to a competing duty. In his words:

If my state is reasonably just and the war I am required to fight is unjust, I have a pro-tanto obligation to obey, provided that my state is acting in good faith, but this obligation may be overridden, under certain conditions, by the independent moral obligation I have not to contribute to the unjustified killing of innocents.⁴

Even if we grant that, as citizens of legitimate states, combatants are duty-bound to obey the law, it is not really clear that Renzo's further claim that they can become obligated to fight in unjust wars can be maintained, even in the very special circumstances that he is considering.⁵ This is because the very idea that a moral agent can become obligated to act in a way that is morally wrong by receiving an order is difficult to accept. Admittedly, an authority that is legitimate and even just sometimes places its subjects under the obligation to act in ways that, in some sense, are wrong.⁶ But in no circumstances can an authority place a subject under the obligation to act in a way that is *morally* wrong, and hence impermissible. Let me develop the idea by trying to articulate the contrary claim.

There seem to be three possible interpretations of the thesis that, as long as it is acting in good faith, an authority can place a subject under the obligation to act in a way that is morally wrong. None, however, looks plausible. The first is that the authority places the subject under an obligation that is systematically overridden by the subject's preexisting duty not to act in that fashion, so that, all things considered, the subject should act in the way that she is already required to. This admits that the order is normatively irrelevant and so it does not add anything of substance. The second possibility is that the authority places the subject under an obligation that, as it were, exists alongside the subject's preexisting duty not to act in that fashion,

4. Renzo, *supra* note 3, at 346. Renzo refers to the justice of the state because he believes that whether a state is legitimate depends, among other factors, on whether it is reasonably just.

5. Needless to say, the claim that citizens are duty-bound to obey the law is itself controversial. The recent philosophical debate suggests that establishing the existence of a duty to obey the law is much more difficult than has been traditionally considered. Renzo attempts to ground political authority/political obligation in a natural duty not to pose unjust threats to others. Massimo Renzo, *State Legitimacy and Self-Defence*, 30 *LAW & PHIL.* 575 (2011). For criticism of this view, see Uwe Steinhoff, *Renzo's Attempt to Ground State Legitimacy on a Right to Self-Defence, and the Uselessness of Political Obligation*, 29 *RATIO JURIS* 122 (2016).

6. As Joseph Raz explains, an authority can exist only if it can impose obligations even when it gets things wrong. This is because the benefits of possessing authorities to regulate human behavior would disappear if orders were binding only when correct. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986), at 47–48, 61.

so that, all things considered, the subject should and should not act in one and the same way. This just looks plain wrong. The third possibility is that the authority places the subject under an obligation that overrides the subject's preexisting duty not to act in that fashion, so that, all things considered, the subject should act in a way that she is otherwise required not to. This looks like an extraordinary form of moral alchemy.⁷

The thesis that an authority can place a subject under the obligation to act in a way that is morally wrong is, then, difficult to accept. But Renzo is not convinced. Moreover, he argues that the idea that authorities have the power to transform the impermissible into the obligatory is not mysterious at all. Authorities perform their necessary tasks by creating obligations in those subject to them. Furthermore, and this is key, they are not infallible, and so sometimes they get things wrong:

as we know, states unfortunately are not perfect. All states will make mistakes and require us to sometimes act unjustly. The crucial point, however, is that legitimate states will make mistakes (or at least, serious mistakes) "in good faith" – i.e. they will try to pass, and normally succeed in passing, laws that enable their citizens to act as they should (or at least as they are morally permitted to).⁸

In short, Renzo's way of squaring this circle involves stressing that all authorities make mistakes, and that legitimate authorities acting in good faith are no exception, so that they inevitably issue orders that require subjects to act in ways that are morally wrong. He then provides an example that, allegedly, shows that such orders are binding. Let us see whether it does the trick.

III. MISTAKEN AUTHORITY AND OBLIGATION

To ground the idea that, as long as it is acting in good faith, an authority can place a subject under the obligation to act in a way that is morally wrong, Renzo introduces the example of a doctor exercising authority over a nurse on her ward:

By virtue of this authority, doctors do place nurses under a pro-tanto moral obligation to act as they require, but this is not to say that doctors can direct nurses to do anything they want. For example, a doctor cannot place a nurse under a pro-tanto moral obligation to sing for her, as this would clearly fall outside the scope of the doctor's authority. For the same reason, she cannot place a nurse under a pro-tanto moral obligation to kill a patient for her. This also falls outside the scope of the doctor's authority. But here is a complication: a doctor who is genuinely trying to save a patient's life *can* place a

7. The expression "moral alchemy" comes from Jeff McMahan, who makes a related point. See JEFF McMAHAN, *KILLING IN WAR* (2009), at 82.

8. Renzo, *supra* note 3, at 343.

nurse under a pro-tanto moral obligation to give the patient a certain pill, even if the pill then turns out to kill the patient. For it falls within the scope of the doctor's authority to place nurses under an obligation to do what doctors reasonably believe to be in the interest of their patients. And the practical reasons created for the nurse by directives that fall within the scope of the doctor's authority are binding independently of their content.⁹

This example, I admit, is powerful. Of course, Renzo is right in saying that a nurse is not obligated to sing for a doctor. And the reason is the one that he mentions: ordering a nurse to sing falls outside the scope of a doctor's jurisdiction. This, however, does not mean that, insofar as issuing medical orders is something that normally falls within the scope of a doctor's jurisdiction, a nurse is obligated to give a lethal pill to a patient. This is because ordering a nurse to give such a pill to a patient is *also* something that falls outside the scope of a doctor's jurisdiction. In particular, while ordering a nurse to give a lethal pill to a patient is something that falls *within* the scope of a doctor's jurisdiction in the sense that it concerns medical matters, it falls *outside* the scope of her jurisdiction in the sense that is relevant here: whether a doctor has the right to order the killing of a patient, so that a nurse is obligated to obey the order.¹⁰

Let me make a point of clarification before proceeding. I will analyze the problem at stake without adopting a particular theory of legitimate authority. This is because the discussion does not require that one adopt a specific account. That is, it is obviously true that a doctor has authority over a nurse with respect to medical matters, so that their normative relationship must be accommodated by any reasonable theory of legitimate authority. Notice that this assumes that although the doctor's expertise in medical matters makes her, in general, an epistemic rather than a practical authority, her authority over the nurse is genuinely practical. Yet, there is no reason to assume that her expertise is what grounds her practical authority over the nurse. This is important because the case is not idiosyncratic.¹¹

Let us go back to Renzo. He argues that the feature that allows one to say that the nurse who is ordered to give the lethal pill to the patient is obligated to obey is that the doctor is trying to save rather than kill the patient. The doctor is making a mistake in good faith or, as he also puts it, she is making an "honest mistake."¹² Another way of characterizing the situation is that the doctor is trying, but failing, to pursue a justified course of action.

9. *Id.* at 344 (emphasis in original).

10. For the relevant understanding of jurisdiction, see JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (2d ed. 1999), at 192. Admittedly, under a possible interpretation of the example, a doctor acts within the scope of her jurisdiction when ordering a nurse to give a lethal pill to a patient. Under the correct characterization, however, she does not act within the scope of her jurisdiction. For further discussion, see *infra* note 18 and text accompanying note 20.

11. I would like to thank an anonymous reviewer for pressing me to clarify this point.

12. Renzo follows David Estlund: a mistake is "honest" if and only if it is the result of a "competent and legally legitimate, though necessarily fallible, effort to inflict the harm only if it is just to do so." Estlund, *supra* note 3, at 221.

That the doctor is trying unsuccessfully to pursue a justified course of action is not, however, sufficient to oblige the nurse to obey the order. The key issue, instead, is whether the doctor is justified in ordering the nurse to act in a particular fashion, or at least permitted to do so. (Whether the doctor is permitted to order the nurse to act one way or another is, in turn, a function of what she orders him to do, that is, of the content of her order. It does not make sense to say that an authority acts permissibly in issuing an order if obeying the order involves acting in a way that is impermissible.)¹³ If the doctor is permitted to issue the order, whether she makes a mistake in good faith, or not, does not matter, because either way the nurse is obligated to obey just because the doctor orders him so to act. And if the doctor is not permitted to issue the order, whether she makes a mistake in good faith, or not, is also irrelevant, for in both cases the nurse is not obligated to obey.

Let us start with the first kind of situation. Imagine that a doctor orders a nurse to give a pill that will save a patient's life and that the patient authorizes them to proceed. Assume, however, that there are two pills with this effect, but while the first pill will save the patient's life without making him sick, the second pill will save his life while making him a little sick for a moment. The case in which the doctor orders the nurse to give the first pill to the patient is straightforward: she is permitted to issue the order. The case involving the second pill is perhaps less clear. A moment's reflection shows, however, that the issuing of the order is also permissible here. This is because the ordered act is best characterized as permissible but suboptimal rather than impermissible. Thus, the doctor is also permitted to order the nurse to give the second pill to the patient.¹⁴

The case in which the doctor orders the nurse to give the first pill to the patient poses no problem because she is not making any mistake: the nurse is therefore obligated to obey. But what if the doctor, acting in good faith, orders the nurse to give the second pill to the patient? There are two possibilities: either the nurse is not aware of the fact that the doctor made a mistake, or the nurse is aware that the doctor mistakenly ordered him to

13. This is true, I think, in situations like the one I am considering here, that is, ones in which an authority issues a specific order. But I admit that things may be different when an authority issues general rules rather than specific orders. One may also argue that there are some exceptions, even in the case of an authority that issues a specific order. For instance, a doctor may be permitted (even required) to order a nurse to act in a certain way, because issuing the order has good consequences, even though obeying the order involves acting wrongly, so that the nurse is placed under no obligation. To this, I reply that that the doctor may certainly be permitted to issue orders of this sort, but these are "orders" only in a linguistic sense, for they are nonbinding by definition. I would like to thank an anonymous reviewer for pressing me to clarify this point.

14. This point, of course, just assumes that at least some suboptimal acts are permissible. As far as I can see, this commitment is conceptually independent of and, in fact, prior to, an account of legitimate authority. For this reason, I believe this is a feature that any minimally convincing theory must accommodate, but which does not imply or commit one to a particular view. I would like to thank an anonymous reviewer for pressing me to develop this thought.

give a pill to the patient that will save his life although it will also make him feel sick for a little while.

The scenario in which the nurse is not aware of the fact that the doctor made a mistake does not seem problematic either: the nurse is obligated to obey. This is because, by assumption, giving the second pill to the patient is suboptimal but permissible, and so obeying the order does not involve acting wrongly. The scenario in which the nurse is aware of the mistake, however, looks different. In this scenario, it seems that not only is he placed under no obligation, but in fact that he has a powerful reason to disobey. If we leave aside the fact that the doctor ordered him to act in a particular fashion, it would be true that the nurse should give the patient the pill that will save his life and will not make him feel sick at all, instead of the pill that will save his life but also make him feel a little sick. This is because, all else being equal, the nurse should not cause the patient to suffer any unnecessary pain, even if doing that, in the case at hand, does not amount to acting wrongly, and also because it is apparent to the nurse that obeying the order has this result. And yet, this does not mean that, in the scenario under consideration, the nurse is free to act as he thinks fit. The nurse should give the pill that will save the patient's life but will also make him feel sick for a moment, instead of the pill that will save his life without making him feel sick at all. This is because all else is not equal, for the doctor ordered the nurse to give the patient a pill with that side effect, and that order places the nurse under an obligation to act as instructed.¹⁵

This seems clear enough, but to make the point crystal clear let us picture the scenario in which the nurse disobeys the order as well as that in which he obeys it. Assume first that the nurse gives the pill that will save the patient's life without making him feel sick. Reacting to his act of disobedience, the doctor would claim that she issued an order, which—if it had been followed—would have done the job, that is, it would have saved the patient's life. Even if the doctor were to realize that she made a mistake, she might stress that it was not up to the nurse to decide which pill is the best one to give to the patient. It also seems to me that we—impartial spectators—would have mixed feelings about the nurse's act. On the one hand, we would say that the nurse acted in a way that is correct for reasons other than the fact that he was ordered to act in a certain way, but, on the

15. A critic may resist this claim, pressing the Razian idea that orders that are “clearly wrong” are not binding. Although this is how his position is usually interpreted, Raz does not really say this. Instead, he writes that he reserves judgment about whether clearly mistaken orders are binding. *See Raz, supra* note 6, at 62. In any event, I think the analysis shows that subjects are obligated to obey some mistaken orders, even if it is apparent to the subjects that they are mistaken. For this reason, I am prepared to argue that, if Raz's service conception entails that subjects are not obligated to obey clearly mistaken orders that an authority is permitted to issue because the authority, in such kind of case, does not provide its subjects with the required normative service, his view, just for this reason, is unacceptable.

other hand, we would also recognize that he acted in a way that is morally wrong, for he disobeyed a binding order.¹⁶

Let us now consider the scenario in which the nurse acts as ordered. To be sure, the nurse would feel frustrated: he is a professional, he would say, whose job does not consist in making people suffer unnecessarily; he might in fact say that his professional duties prevent him from acting in that way. At the same time, he would be reassured by the fact that an authority had issued a binding order. If the patient asks for an explanation for his act, the nurse can legitimately reply that he was only following orders. And this shows that even the nurse himself would understand that he was under the obligation to obey the order issued by the doctor.¹⁷

Let us now turn to the second type of situation. Here we can concentrate on Renzo's original example, that is, the one in which a doctor orders a nurse to give a pill that will kill a patient and in which the patient does not authorize them to proceed.¹⁸ It is morally wrong, and so impermissible, to issue an order that, if followed, would result in the death of an innocent person. Accordingly, the doctor is not permitted to order the nurse to give the lethal pill to the patient.

The scenario in which the doctor, with full knowledge of the consequences of her act, orders the nurse to give the pill to the patient is not an issue. Renzo says, and I concur, that, in cases like this, the nurse is placed under no obligation. But what if the doctor issues the order under the impression that the pill will save rather than kill the patient? That is, what if the doctor, acting in good faith, makes a terrible mistake? Again, there are two possible scenarios: either the nurse is not aware of the fact that the doctor made a mistake, or the nurse is aware of that fact.

Let us start by developing the first of these. Insofar as the nurse is not aware of the fact that the pill will kill the patient, Renzo argues that he is obligated to give it to him. This, I acknowledge, seems plausible—but only because the example as originally presented is misleading because underdescribed. When we develop it properly, we realize that things are rather different. To see this, consider the following elaboration:

16. The idea that we would have mixed feelings in such a scenario is indebted to related remarks by Raz. See Raz, *supra* note 10, at 43, 75.

17. I feel tempted to say that the patient too would recognize the validity of the nurse's explanation. And this may certainly happen, sometimes. But surely some patients would also be less sympathetic to such explanations.

18. Renzo does not say in so many words that the patient does not authorize the doctor and the nurse to proceed. This, however, is clearly part of the example, for otherwise the doctor does have the right to order the nurse to give the pill to the patient, so that it is not morally wrong to issue the order. The reason is that, if the patient authorizes the doctor and the nurse to proceed, their killing of the patient does not violate his rights, especially his right not to be killed by reasonable mistake. Furthermore, the assumption is consistent with Renzo's whole view, especially with his claim that the combatants who are being fought against in an unjust war are innocent in the sense that they are not liable to be killed.

Poisonous Pill: A mechanical failure forces a doctor and a nurse to land their flying hospital in a remote region. As soon as they descend from the plane, they happen upon an apparently unconscious person. The doctor diagnoses that the person has a disease that will kill him unless quickly taken care of. She then orders the nurse to give the patient a pill that, unbeknownst to the doctor, is poison and will kill her patient instantly. The nurse obeys the order and the patient dies as a result. As a matter of fact, the patient was a heavy sleeper and did not have the disease.

It is clear that, in *Poisonous Pill*, the doctor does not have the right to kill the patient, who instead has the right not to be killed by the doctor. Now, if the doctor does not have the right to kill the patient, nor does she have the derivative right to *indirectly* kill him by giving the nurse an order to this effect.¹⁹ And this entails that the order does not place the nurse under the obligation to act as instructed. The nurse, then, is not obligated to give the lethal pill to the patient.

Needless to say, a key feature of the example at hand is that, when the doctor kills the patient through a person whom she effectively controls and over whom she normally has authority (that is, the nurse), she *violates* the patient's right to life. This peculiarity, I admit, is unrealistic; patients normally alienate their right not to be killed by reasonable mistake when they voluntarily admit themselves to medical centers or otherwise authorize medical practitioners to proceed. But the issue at stake is whether the nurse is obligated to obey the order that results in the death of the patient *just because* the doctor instructs him so to act. Accordingly, we have to assume that the patient did nothing that somehow affected his moral status. In particular, we have to assume that the patient neither consented to the treatment nor somehow made himself liable to be killed by reasonable mistake.²⁰

Am I missing something? The fact that the doctor is acting in good faith is, without a doubt, an important feature to take into consideration when evaluating the example morally. Indeed, it is highly relevant, but even in the most favorable reading it does not make the issuing of the order justified and therefore permissible, so that, in the circumstances, the nurse is obligated to give the pill to the patient. Assuming that the doctor is non-culpably mistaken about the fact that the pill will kill rather than save the patient, the act of issuing the order is justified in the evidence-relative sense rather than in the fact-relative sense. That is, she believes that issuing the order is justified, this belief is sufficiently justified, given the circumstances, and she is not to blame for having the belief. Thus, she issues the order on the basis of a belief, which, although false, if true, would make her act justified in the fact-relative sense. But this is *not* equivalent

19. For the notion of indirect killing, see ADIL AHMAD HAQUE, *LAW AND MORALITY AT WAR* (2017), at 64–65.

20. I thank Uwe Steinhoff for discussing the example and pressing me to clarify these issues.

to saying that the act of issuing the order is truly justified and so permissible: the belief that something is the case, even if sufficiently justified in the circumstances, does not make it the case. Instead, it only means that the doctor has a fully mitigating excuse and so is blameless for indirectly killing the patient.²¹

Let us now consider the scenario in which the nurse is aware of the fact that the doctor made a mistake. If it is apparent to the nurse that the pill will kill the patient, it is clear, he would not be doing something morally wrong in disobeying the order. Instead, his disobedience would be justified and arguably required, for by disobeying he would prevent the death of an innocent person.

That we are willing to argue that, if he were aware of the fact that the pill will kill the patient, the nurse would not be doing something wrong in disobeying does not put any pressure on my analysis of the example. In fact, it provides a strong reason to believe that the nurse is not obligated to obey the order. As the nurse is not obligated to give the pill to the patient, by disobeying the nurse would not be doing something morally wrong.²²

Interestingly, Renzo also argues that, if he is aware of the fact that the pill will kill the patient, the nurse should not give it to him. His explanation, however, is different from mine. The nurse is obligated to act as required by the doctor, but this obligation is overridden by a more stringent duty. He puts this as follows:

Notice that none of this is supposed to suggest that authoritative directives can never be disobeyed. We can imagine cases in which a nurse has very strong evidence that a certain pill will kill the patient, and in these cases we will want to say that the nurse's all things considered duty is to not give it to him, at least if the nurse is sufficiently confident in his belief that the pill

21. The discussion of the relationship between evidence-relative justification and excuse is indebted to related remarks by McMahan. See McMAHAN, *supra* note 7, at 43, 62, 144. I should note that not all theorists agree with my understanding of these notions. In addition, a critic could perhaps argue that, as by hypothesis the patient did not authorize the doctor and nurse to proceed, the act of issuing the order is not even justified in the evidence-relative sense. But this seems exaggerated. Unless the patient expressly refuses the treatment, a doctor is surely permitted to try to save a patient. Indeed, plausibly she is required to.

22. The explanation, I believe, is straightforward. But it seems to entail a counterintuitive claim, namely that, if he were not aware of the fact that the pill would kill the patient, the nurse also would not be doing something morally wrong in disobeying. I grant that this claim is difficult to accept. In particular, I believe that if the nurse were to disobey unaware of the fact that the pill would kill the patient, his act of disobedience would be morally wrong. (Notice, however, that it would be morally wrong only pro tanto, and that it would arguably be justified all things considered, for it would save an innocent person.) But this does not put pressure on my understanding of the example, that is, it does not force me to admit that the nurse is obligated to obey. For, in my view, what is morally wrong in this scenario is not that the nurse would be disobeying a binding order; it is rather that he would be disobeying an order that is not binding but that he believes to be binding, and that he would be doing this with no apparent justification.

would be lethal to the patient. The point here is that this duty overrides an existing pro-tanto duty that the nurse has to act as required by the doctor – a pro-tanto duty that is created by the exercise of the doctor’s legitimate authority, even when the doctor makes a mistake.²³

This explanation is difficult to accept. To see this, assume that the nurse acquires the belief that the pill will kill the patient, and even that this belief is sufficiently justified in the circumstances (he takes a quick look at the bottle label, say, and notices an ominous image and a message that reads: “WARNING. Deadly Poison”). Renzo’s reasoning entails that reading the label creates a new duty on the part of the nurse, namely the duty not to give the pill to the patient. Furthermore, his view is that this duty changes the nurse’s normative situation, in the sense that he should now act in a way opposite to the way he was required to act before reading the label.²⁴

There is no reason, however, to consider that reading the label creates that duty on the part of the nurse, one whose consequences are, moreover, of such great importance. This is because reading the label is not something that has normative consequences. Reading the label, instead, only provides evidence to the nurse as to what his duties really are. In particular, it makes it apparent to the nurse that he is duty-bound not to give the pill to the patient, which is a moral requirement grounded in the patient’s right not to be killed rather than based on the exercise of a normative power.

IV. MISTAKEN AUTHORITY: A MODEL

Renzo argues that, as long as it is acting in good faith, an authority can issue orders that require subjects to act in ways that are morally wrong and still be acting within the scope of its jurisdiction, so that the orders are binding. In the previous section, I argued that this view is wrong. If the authority is permitted to issue an order, it is acting within the scope of its jurisdiction and so the order creates an obligation. But if the authority is not permitted to issue the order, it is not acting within the scope of its jurisdiction and the order does not create any obligation whatsoever. I will now develop my view further by providing a model of mistaken authority.

23. Renzo, *supra* note 3, at 344–345 (footnote omitted).

24. This understanding of Renzo’s position is strongly suggested by the expression “and in these cases.” It is also suggested by related remarks about combatants’ obligation to fight in unjust wars being overridden only “under certain conditions.” The issue is that, if the duty not to give the pill to the patient were not created by the acquiring of the belief that the pill will kill him, Renzo must say that, all things considered, the nurse should never give him the pill, even in the scenario in which he does not have the belief that giving him the pill will kill him. This is because the duty not to give the pill to the patient would preexist the nurse’s acquiring of the belief that the pill will kill him, and, according to Renzo, this duty is weightier than the obligation created by the doctor’s order. Admittedly, if the nurse did not have the belief that the pill would kill the patient, he would not be aware of his duty not to give him the pill. But this does not make it not binding or less stringent.

Remember, Renzo says that while knowingly ordering a nurse to kill a patient is something that falls outside the scope of a doctor's jurisdiction, it is within the scope of her jurisdiction to order a nurse to give a pill that the doctor believes will save, rather than kill, the patient, even though, by assumption, the patient neither waived nor forfeited his right not to be killed by reasonable mistake. This, I believe, is false. But this does not entail that it is completely irrelevant whether the doctor mistakenly—or not—issues the order. There is clearly an important moral difference in whether an authority knowingly orders a subject to act in a way that is morally wrong or does so as a result of making a mistake.

A way of construing that difference is by stressing whether an authority is permitted to issue an order in both the fact-relative and the evidence-relative senses, or whether it is permitted so to act only in the evidence-relative sense. If the authority is permitted to issue an order in both the fact-relative and the evidence-relative senses, the order is binding. But if it is permitted to issue an order only in the evidence-relative sense, the order is not binding although the authority is blameless. In my opinion, the distinction between the two senses of permission allows us to develop cases of mistaken authorities issuing orders that require subjects to act in ways that are morally wrong—like the doctor in Renzo's original doctor/nurse example—in a more natural fashion.

Let us see whether this is true. Given the doctor's expertise in medical matters, and assuming that she is nonculpably ignorant of the fact that the pill will kill the patient, one can plausibly say that the doctor is permitted, in the evidence-relative sense, to order the nurse to give the lethal pill to him. This establishes that the doctor is not to blame for issuing the order, and so cannot be blamed for indirectly killing the patient. Insofar as the pill will kill a patient who neither waived nor forfeited his right not to be killed by reasonable mistake, however, the doctor is not permitted, in the fact-relative sense, to order the nurse to give him the pill. And this entails that the nurse is not obligated to act as required by the doctor.

This analysis does not rely on the two claims that undermine Renzo's understanding of the example. To begin with, it does not say that the nurse is obligated to obey the order. Nor does it say that, if the nurse acquires the belief that the doctor made a disastrous mistake, he is placed under a new duty that changes his normative situation. And yet, my view establishes the conclusion that Renzo is after, namely that if the nurse is sufficiently justified in believing that the pill will kill the patient, he should not obey the order.

One may wonder what this model says about a subject who does not recognize that an authority is not permitted to issue an order in the fact-relative sense and so acts as instructed. What if the nurse, not aware of the fact that the doctor made a mistake, gives the pill to the patient? The first thing to say, which my remarks so far should have already made clear, is that I do not think that, even in such a scenario, the nurse is

obligated to obey. Obeying the order involves killing an innocent person without justification, and this is not something that a subject can have the obligation to do by virtue of being given an order by an authority. At the same time, the fact that the nurse acts on the basis of an order issued by an authority that is permitted to issue it in the evidence-relative sense is not without consequence. The nurse is not to blame, for, in this scenario, he is acting under the impression, caused by the doctor's order, that he is under the obligation to give a pill that will save, rather than kill, the patient. His wrongful act, then, is nonculpable.²⁵

To conclude, I would like to emphasize that my account of mistaken authority is consistent with an important point stressed by Renzo, namely that binding orders create content-independent reasons for action, that is, reasons to act as ordered just because an authority orders it, rather than because of the merits of what the authority orders. I do not question this feature of the authoritative guidance of human action; in fact, I also believe that binding orders introduce content-independent reasons. But we have to properly understand the scope of this thesis. Orders that require subjects to act in ways that are otherwise permissible introduce content-independent reasons for action. However, orders that require subjects to act in ways that are morally wrong, and so to act in ways that are impermissible, do not create content-independent reasons.

There is nothing puzzling about the idea that orders that require subjects to act in ways that are impermissible do not introduce content-independent reasons for action. For instance, H. L. A. Hart argues that, in addition to orders, promises also create content-independent reasons.²⁶ But, of course, this obtains only in the case of valid promises, that is, in the case of promises that satisfy the validating conditions for creating promissory obligations. And here we have to bear in mind that one such condition is that immoral or wicked promises are void *ab initio*, for promisors cannot voluntarily acquire the obligation to do something that is impermissible.²⁷ Immoral

25. The analysis here is indebted to Alejandro Chehtman, *Revisionist Just War Theory and the Concept of War Crimes*, 31 LEIDEN J. INT'L L. 171, 178–179 (2018). Notice, however, that Chehtman makes further remarks that suggest he believes that misguided subjects are not merely excused but rather act with justification.

26. H. L. A. HART, *ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY* (1982), at 254–255. See also RAZ, *supra* note 6, at 35; Joseph Raz, *Is There a Reason to Keep a Promise?*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW* 59–63 (Gregory Klass, George Letsas & Prince Saprai eds., 2014).

27. The thesis that promises to do something that is impermissible are void *ab initio* is defended by both early modern and modern philosophers. See, *inter alia*, HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* (Richard Tuck ed., 2005), at bk. II, ch. XI, §VIII.I; JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., 1988), at bk. II, §§23, 24, 135, 149, 168, 172; Seana Valentine Shiffrin, *Immoral, Conflicting, and Redundant Promises*, in *REASONS AND RECOGNITION: ESSAYS IN THE PHILOSOPHY OF T. M. SCANLON* 159–163 (R. Jay Wallace, Rahul Kumar & Samuel Freeman eds., 2011); Gary Watson, *Promises, Reasons, and Normative Powers*, in *REASONS FOR ACTION* 167–178 (David Sobel & Steven Wall eds., 2017). At the same time, I should also stress that some modern philosophers dispute this idea. See especially DAVID OWENS, *SHAPING THE NORMATIVE LANDSCAPE* (2012), at 245–249; David Owens, *Promises and Conflicting Obligations*, 11 J. ETHICS & SOC. PHIL. 1, 10–18 (2016). Thomas Hobbes also assumes

or wicked promises, then, do not create promissory obligations and so do not introduce content-independent reasons. Thus, the thesis that orders that require subjects to act in ways that are impermissible do not create content-independent reasons for action is consistent with standard analyses of phenomena that also involve the exercise of a normative power and utilize the notion of content independence.

V. FINAL REMARKS

An account of mistaken authority has substantive implications. Renzo develops his view in defense of a distinctive position in just war theory. He argues that, as long as they are citizens of legitimate states acting in good faith, the combatants who have been ordered to fight in an unjust war have the *pro tanto* obligation to kill their enemies. Given that he grants that their enemies are innocent in the relevant sense, that is, that they are not liable to be killed in war, Renzo also argues that their obligation to fight, in certain circumstances, may be overridden by their duty not to contribute to the killing of the innocent without justification. In this sense, Renzo places himself somewhere in between the traditional position that just and unjust combatants are moral equals, that is, that as long as they respect *jus in bello* principles, they are permitted to kill one another, and the revisionist view that only just combatants may kill enemy combatants.

My analysis of mistaken authority supports the revisionist position. I argued that a subject is not obligated to obey a morally wrong order, even if the authority is making a mistake in good faith. Thus, the combatants who have been ordered to fight in an unjust war are not obligated to kill combatants who are only defending themselves and other innocent citizens, even if the unjust combatants are citizens of a legitimate state acting in good faith. These unjust combatants are not permitted to kill their enemies. Insofar as they are misguided by their superiors, they are only excused for their wrongful acts. And they should disobey the orders once they realize that the war in which they have been ordered to fight is unjust rather than just.

that it is false. See THOMAS HOBBS, *LEVIATHAN* (Noel Malcolm ed., 2012), at ch. XIV, 202, 214; ch. XXI, 336–338, 344; ch. XXVII, 454, 464; ch. XXVIII, 482.