NEWSLETTER | The American Philosophical Association

Philosophy and Law

FALL 2014 VOLUME 14 | NUMBER 1

FROM THE EDITORS

Steven Scalet and Christopher Griffin

ARTICLES

ISSN 2155-9708

APA NEWSLETTER ON

Philosophy and Law

STEVEN SCALET AND CHRISTOPHER GRIFFIN, CO-EDITORS VOLUME 14 | NUMBER 1 | FALL 2014

FROM THE EDITORS

Steven Scalet
UNIVERSITY OF BALTIMORE

Christopher Griffin
NORTHERN ARIZONA UNIVERSITY

In April of 2014, the *APA Newsletter on Philosophy and Law* hosted a conference featuring four emerging scholars working in legal philosophy. This volume contains revised versions of the essays delivered at Northern Arizona University. Mark Budolfson of the Woodrow Wilson School of Public and International Affairs and University Center for Human Values at Princeton University argues against what he takes to be a standard view in political legal theory. This standard view asserts we should aim to bring about the most legitimate feasible institutions and that individual persons have a *prima facie* duty to obey the law. After presenting counterexamples to this standard view, Budolfson argues that there may be no straightforward connection between facts about institutional legitimacy and what reasons, rights, and obligations we actually have or about what institutions we should actually attempt to realize.

Nate Olson, a post-doctoral teaching fellow at Stanford University, investigates the moral and legal relationships between medical researchers and medical research participants, arguing in part that there is reason, contrary to common treatment, to regard the researcher-participant relationship as similar to, but still distinct from, the fiduciary relationship that characterizes the doctor-patient relationship. Olson argues in particular that since participants in medical research are vulnerable in a way similar to patients in doctor-patient relationships, the law ought to regard researchers as having fiduciary obligations to medical participants as do doctors towards their patients even if these duties are not identical.

Philosopher Katherine Schweitzer, University of Nevada, Reno, investigates the cognitive division of labor that tends to separate inquiry into jurisprudence with normative moral, political, and social concerns for justice. In examining questions about the legal good—or the good law ought to do—Schweitzer draws substantially on the scholarship of Robin West, Frederick J. Haas Professor of Law at Georgetown Law, who is concerned that the legal system in which we live has abandoned to a large extent normative theorizing about how law promotes or fails to promote human flourishing. But Schweitzer aims to build on West's thoughts, connecting the project of integrating legal analysis with normative philosophy West calls for to a pragmatist methodology.

Finally, Luke Maring of Northern Arizona University examines the implications for retributive theories of legal punishment, at least as these aim to provide justifications for punishment at the harsher end of the continuum, of taking seriously the truth in public reason theories of political legitimacy. Maring begins by sharpening up the horns of a dilemma for the retributive theorist offered by Hugo Bedau, and proceeds to refine the public reason requirement that coercive measures by the state be justified to those subjected to the coercion. Maring argues that this requirement varies from law to law, primarily as a function of two factors: the degree of coercion a legal rule threatens against violators, and the presence of adequate but less coercive alternatives. Maring concludes that retributivism cannot satisfy this justificatory requirement for the harsh punishments with which it is traditionally associated.

ARTICLES

*Are There Counterexamples to Standard Views about Institutional Legitimacy, Obligation, and What Institutions We Should Aim For?**

Mark Bryant Budolfson
WOODROW WILSON SCHOOL OF PUBLIC AND INTERNATIONAL AFFAIRS AND UNIVERSITY CENTER FOR HUMAN VALUES, PRINCETON UNIVERSITY

A standard view in legal and political theory is that, to a first approximation, (1) we should aim to bring about the most legitimate institutions possible to solve the problems that should be solved at the level of politics, and (2) individual people are required to follow the directives of legitimate institutions, at least insofar as those institutions have the authority to issue those directives, and insofar as other considerations are nearly equal.[1] On this standard view, the philosophical analysis of institutional legitimacy can appear to be of the utmost importance because it can seem to answer the most important questions about what we should actually do in the realm of law and politics, and because it may also seem to serve as the crucial bridge between ideal and nonideal theory, at least if institutional legitimacy is analyzed as it often is as a matter of *doing well enough* along dimensions that are familiar from ideal

theory (e.g., ideal justice, universal consent, respecting basic rights, social welfare maximization, and so on).

In what follows I identify a number of possible counterexamples to this standard view, which suggest that there may be no straightforward connection between institutional legitimacy and facts about what reasons, rights, and duties we actually have, and what institutions we should actually try to bring about, contrary to what the standard view assumes.

SHOULD WE AIM FOR LEGITIMATE INSTITUTIONS?

Consider the following view about what institutions we should try to bring about, which might be called the *Aim for the Most Legitimate Feasible Institution View*:

> First, identify the set of institutions that are *feasible*; then, rank those institutions by *legitimacy*. The institution we should actually try to bring about is the most legitimate feasible institution.

This view is mistaken because it ignores the fact that it might be unacceptably risky to aim for the best feasible institution. As an initial toy example to illustrate, suppose that an asteroid will destroy the planet unless the world cooperates to stop it, and suppose that there are only two feasible solutions, A and B. Solution A is slightly more legitimate than B, but the probability that we will succeed if we aim for the more legitimate solution A is only 90 percent, whereas it is 99 percent certain we will succeed if we aim for the slightly less legitimate solution B. In such a case, it could easily be true that we should aim for the less legitimate solution and its associated institutions, on the grounds that the expected outcome of pursing the less legitimate solution is sufficiently better in all respects than the expected outcome of pursuing the more legitimate solution, even though the more legitimate solution may well be feasible in light of its sufficiently high likelihood of success.

This objection can also be illustrated by real-world cases in which there is no emergency in play. For example, suppose that overfishing threatens many species of fish that travel through international waters, and to curb it we need an effective international treaty that creates the right kind of incentives to ensure more sustainable fishing. Suppose that in order for such a treaty to succeed, we need a critical mass of nations to join as initial compliant nations and impose penalties on nations that do not comply, leading over time to more and more nations complying with the treaty.[2] In such a case, a simple treaty that ignores many of the interests of developing nations might have a much higher probability of success than a slightly more legitimate and also feasible treaty that includes provisions to subsidize developing nations for the costs that the treaty will impose on them that ideally they should not be expected to bear. However, if the probability of success of the simpler and slightly less legitimate treaty is sufficiently higher than the probability of success of the slightly more legitimate redistributive treaty (because the developed nations might have trouble selling the idea of subsidizing the economic activity of developing nations to their legislatures, and thus might have trouble securing as quick or as smooth of ratification of the slightly more legitimate treaty), and if the costs to the developing nations of the slightly less legitimate treaty are not onerous, and if the costs of a failure to adopt any treaty are high (because that would mean additional decades of overfishing), then we should introduce and promote the slightly less legitimate treaty, even though there is another treaty available that is both feasible and more legitimate. Once again, this shows that if we must choose which institution to aim for, and one is more legitimate than the other feasible alternatives, it does not follow that we should try to bring about the most legitimate feasible institution.

The upshot is that we will often go wrong if we rely on the common Aim for the Most Legitimate Feasible Institution View, because that view ignores the probabilistic complications of real-world decision making. At the very least, what we need instead is a familiar sort of decision theory that takes into account facts about the expected probability of success, failure, unintended consequences, and so on that could result from attempts to bring about the various possible institutions that we have to choose from—and sometimes the institution that such a decision theory will say that we should try to bring about will be less legitimate than other feasible institutions, contrary to what theorists who discuss institutional legitimacy tend to assume. As this makes clear, the point here is not about the legitimacy of the *decision procedure* we should use in deciding what course of action to choose—for all I've said, it remains true that we should always use the most legitimate *decision procedure*. The current point is not about the *decision procedure*, but rather about the *goal*—the current point is that our goal should not always be merely to bring about the most legitimate feasible institution.[3]

In light of this objection to the Aim for the Most Legitimate Feasible Institution View, theorists might drop that view and instead adopt what might be called the *Maximize Expected Legitimacy View*:

> First, evaluate all possible institutions with respect to legitimacy; then, figure out the probability of success of aiming for each of those institutions, etc.; then decide which institution to aim for in a way that *maximizes expected legitimacy*.

Although somewhat vague, this idea is clear enough for our purposes because it gestures at the sort of view that theorists may initially find most attractive. Basically, the idea is to adopt a familiar sort of decision theory, where the point of this particular decision theory is to identify the course of action that can be expected to best promote the aim of institutional legitimacy given the real-world facts.

Unfortunately, this view is also mistaken, because the values that are relevant to institutional legitimacy are not the only values that we should care about, even from a "purely political" point of view; as a result, the course of action that best promotes the aim of institutional legitimacy might fail to be the course of action we should actually take, because it might fail to best promote the broader

set of values we care most about even from a "purely political" point of view.[4] As an example, imagine again a scenario in which overfishing threatens some fish stocks in international waters, but where this time if nothing is done the fishery collapse will devastate the poor nations in the immediate vicinity and will also cause some lesser harm to other nations around the world. Fortunately, although it will be quite costly to solve the problem, it can certainly be done. Furthermore, the poor nations in the immediate vicinity of the impact are willing to pay the entire cost of solving the problem because of the even more important things they stand to lose. So, one possibility is for the rich nations to stand by as free riders and simply let that small group of mostly poor nations pay the entire cost of the solution, which will then benefit the rich nations at no cost to them. However, although such an outcome and its associated institutions would be legitimate because everyone and all nations would *freely consent* to them in the right sort of way, it would by no means be the best feasible course of action all things considered, because a consequence would be that most of the world would free-ride on an important and expensive global public good in a way that is very unfair, especially given that very poor nations would pay most of its cost. Instead, we can imagine that there is a way to secure a better much outcome, although it is less legitimate because it requires a powerful nation such as the United States to threaten and cajole other nations into contributing to the public good in a way that is, as far as such things go, fairly benign, but which also makes the consent of those other nations not freely given—and we can imagine that such a power play also favors American interests in a way that is itself slightly objectionable. Nonetheless, although we can suppose that the result of such a power play would be less legitimate because of the lack of full and freely given consent and the slight favoritism shown to the most powerful nation, it might easily be preferable because it would be much more fair on balance than the more legitimate institutional outcome in which the small group of nations is allowed to bear the entire cost of a global public good themselves.

As this case shows, even when the probabilities of success are held constant, sometimes we should aim for institutions that are less legitimate. As a result, there appear to be counterexamples to the idea that we should always act to maximize institutional legitimacy, and more generally to the idea that there is a straightforward connection between institutional legitimacy and what institutions we should try to bring about.[5]

IS THERE A PRIMA FACIE DUTY TO OBEY THE LAW?

The arguments so far suggest that the notion of institutional legitimacy may not be the key to explaining what institutions we should actually try to bring about. In what follows, I argue that there also may not be a straightforward connection between institutional legitimacy and what political obligations we have—that is, what rights and duties individuals have with respect to the directives of nonideal institutions. This is contrary to what is surely the standard view, which might be called the *Prima Facie Duty to Obey the Law View*:

> If an institution is *legitimate* (and/or has *the authority to issue directives* and/or has *the right to rule* and/or has been *freely consented to by everyone*), then individuals have content-independent moral reasons to obey its directives (at least when those directives are themselves legitimate).[6]

Here is the general form of a counterexample to this view: Imagine that a particular institutional arrangement is the uniquely reasonable solution to a real-world problem, and that in order to function efficiently the institution must assert authority over and issue directives in its domain to everyone. At the same time, such an institution must offer mistaken directives in some localized areas in a way that is easily foreseen (including by those locals), because it would clearly introduce a very counterproductive amount of complexity into the institution if it tried to take these particular local subtleties into account. Such a case is possible because, for example, a global problem might require consent of everyone to an optimal-in-practice set of directives, which are known to give mistaken verdicts in a range of cases that local individuals can readily identify, where those directives cannot be improved upon because of feasibility constraints, such as information gathering and processing constraints at the institutional level, too great of expense associated with a more subtle set of directives, or that giving discretionary powers to locals to override the simple directives when appropriate would be predictably misused in too many cases, thereby undermining the global solution. In such a case, everyone might be required to consent to such an institution and its directives, which might well be sufficient to make the institution a legitimate authority and all of its directives legitimate, but yet locals who are issued the foreseeably mistaken directives might well have no "content independent reason" to follow those directives, and so would have no *prima facie* duty to obey those directives, contrary to the *Prima Facie* Duty to Obey the Law View.

As an initial toy example to illustrate, imagine that we build a sophisticated system to manage our nation's transportation system that will benefit everyone greatly. For example, it will provide near-perfectly efficient management of traffic signals, which will generate additional economic growth and leisure time, lower accident rates, and so on. However, as the system is in its final test stages, a computer glitch emerges that implies that the system will offer many mistaken directives at a few specific locations each leap year on February 29. Furthermore, because the software and the hidden bug are so complex, it will likely take many years to develop a superior replacement for this near-perfect system, and there is no practical way of preventing the system from issuing the localized mistaken verdicts every February 29, because this would undermine the optimal directives that it will still issue everywhere else on that date. All of this information is conveyed to the public, and a referendum is held to decide whether to implement this system despite the glitch, and everyone votes enthusiastically in favor of implementing the system and making it the centerpiece of the nation's transportation-system governance institution, including those who live in the few locations where it will issue many

mistaken directives on each February 29. As a result, the ensuing institution and its directives are clearly legitimate. Nonetheless, in the few localities where its directives are known to be completely unreliable on February 29, individuals there have no "content-independent reason" to obey its directives issued on that date—instead, they should form their own judgment, without consulting the directives of the legitimate institution at all. In other words, it is not as if those locals need to recognize any *prima facie* reason to follow the directives of the traffic lights in their locality on February 29 in a way that can then only be overridden by conclusive evidence that the directives of those traffic lights are mistaken. On the contrary, it would be a mistake for them to reason in such a way (e.g., it would simply be a mistake to think that those traffic signals provided anything like "exclusionary reasons" on that date in those locations), and instead locals should simply ignore the traffic signals entirely on that date, and make decisions directly on the basis of the non-institutional reasons as they judge them. (In a longer version of this paper, I suggest, based on further arguments, that there may be no such thing as the sort of "content independent," "exclusionary" reasons commonly cited in connection with these issues.[7])

This sort of case suggests that, contrary to the *Prima Facie* Duty to Obey the Law View, the directives of an institution do not necessarily create special reasons to obey even if that institution is fully legitimate, has the right to rule, has the authority to issue directives, has been freely consented to by everyone, and issues directives that are themselves legitimate.

For a more realistic example, imagine again a world in which a new institution is necessary to prevent overfishing of the oceans, where some small fishing villages realize that such an institution, although necessary, will inevitably issue mistaken and counterproductive directives to their small corner of the ocean for the sort of basic practical reasons indicated above. In such a case, if the institution is necessary to avoid a global calamity, everyone—including those locals—might have sufficient reason to vote in favor of its creation—and could even have a moral obligation to do so—but yet its directives might not give them any content-independent moral reasons, and so they might not be under any obligation to comply with its directives even if they and the entire world freely consented to the institution knowing it would issue exactly those directives.[8] Such a case is possible, again, because a global problem might require consent of everyone to an optimal-in-practice set of directives, which are known to give mistaken verdicts in a range of cases that local individuals can readily identify, where these directives cannot be improved upon because of feasibility constraints, such as information constraints that the institution faces, too great of expense associated with a more subtle set of directives, or that giving discretionary powers to override the simple directives would be predictably misused in too many cases, thereby undermining the solution.

In evaluating the significance of these examples, it is important to see the crucial disanalogies between these cases and the familiar stoplight in the desert case where a person permissibly runs through a traffic light in the middle of the desert that directs her to stop because she can see that there are no other cars around for miles. In this stoplight in the desert case, it is plausible to argue that the driver has *some* special reason to stop at the light simply because the light directs her to stop, but that that reason is *outweighed* by the other considerations that are present in the case. As a result, the stoplight in the desert case does not provide a counterexample to the *Prima Facie* Duty to Obey the Law View, because it is easy to maintain that the driver has some important *prima facie* duty to obey this traffic light regardless of its signal, but that that *prima facie* duty is outweighed in this particular case.

In contrast, in the examples provided here there is no clear way of maintaining that the locals are under any special obligation to comply that needs to be outweighed in the situations described. Instead, in the situations described here, the directives of the institution provide them, in their idiosyncratic location, with *no positive reasons to obey*, despite their freely given consent to such an institution and its directives, including knowledge that it would issue *these very directives*. In other words, while it is plausible to claim that in the stoplight in the desert case reasons to obey are present but outweighed, in contrast in the cases described here there appear to be no reasons to obey at all and thus no reasons that need to be outweighed. As a result, the cases here appear to provide counterexamples to the *Prima Facie* Duty to Obey the Law View, and thus go well beyond familiar examples such as the stoplight in the desert case in which obligations to obey the law are outweighed by other important considerations.[9]

CONCLUSION

In sum, I've identified a number of objections to a standard view in legal and political theory according to which, roughly, (1) we should aim to bring about the most legitimate feasible institutions, and (2) individual people have a *prima facie* duty to obey the law. Contrary to this standard view, the examples here suggest that there may be no straightforward connection between, on the one hand, facts about institutional legitimacy and facts about what reasons, rights, and duties we actually have and what institutions we should actually try to bring about, contrary to what the standard view assumes. These results threaten the idea that the analysis of institutional legitimacy is of particular importance because they threaten the idea that institutional legitimacy is the key to answering important questions in and about non-ideal theory.

* For a more in-depth discussion of these and related issues, see my paper, "Questioning the Relevance of Legitimacy and Authority to Nonideal Theory." Thanks to John Devlin, Chris Griffin, Luke Maring, Kevin McGravey, Nate Olson, Steve Scalet, and Katharine Schweitzer for helpful comments.

NOTES

1. See, for example, Allen Buchanan and Robert Keohane, "The Legitimacy of Global Governance Institutions," *Ethics and International Affairs* 20, no. 4 (2006): 405–37; Thomas Christiano, "The Legitimacy of International Institutions," in *The Routledge Companion to Philosophy of Law*, ed. Andrei Marmor (New York: Routledge, 2012); A. John Simmons, *Justification and Legitimacy* (New York: Cambridge University Press, 2001); David Estlund, *Democratic Authority* (Princeton, NJ: Princeton University Press, 2009); Christopher Heath Wellman, "Samaritanism and the Duty to Obey the Law," in *Is There a Duty to Obey the Law (For and Against)*, eds. Christopher Heath Wellman and A. John Simmons

(New York: Cambridge University Press, 2005); John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Belknap Press, 1999); John Locke, *Second Treatise of Government* (1690); and many others who endorse one or both of (1) and (2).

2. For discussion of structurally similar treaties to combat global environmental problems, see Scott Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty-Making* (Oxford University Press, 2003), especially chapter nine. For discussion of such a treaty in connection to climate change, see Joseph Stiglitz, "A New Agenda for Global Warming," *The Economists' Voice* 3, no. 7 (2006); and my paper "Global Justice, Political Realism, and the Ethics of Collective Action," Available online at http://www.budolfson.com/papers.

3. As a result, my discussion here does not apply to "more theoretical" discussions of legitimacy that have no clear upshot for what we should actually do in the real world, such as John Rawls's discussions and many other ideal theory discussions. My goal in this paper is to engage with views in legal and political theory that have implications for what we should actually do about the world's problems.

4. Whatever "purely political" is taken to mean—here I have in mind "public reason" views, and so on.

5. An important consequence of all this is that even when the probabilities of success are held constant, sometimes we should prefer an institution that is *not legitimate* to one that is legitimate. To see how this result follows, consider the case just described in which we should prefer a less legitimate institution (call it "B") to a more legitimate institution ("A"), even though the probability of success of both institutions is the same. Now interpret the case so that A is ever-so-slightly above the threshold for legitimacy simpliciter while B is ever-so-slightly below; in that case, we should still shoot for the institution that is more fair but not legitimate (B) rather than the institution that is legitimate (A) even though the probabilities of success are the same.

6. See, for example, John Rawls, *A Theory of Justice*, rev. ed., (Cambridge, MA: Belknap Press, 1999), 312 (Section 53); Allen Buchanan and Robert Keohane, "The Legitimacy of Global Governance Institutions," *Ethics and International Affairs* 20, no. 4 (2006): 411; Thomas Christiano, *The Constitution of Equality* (New York: Oxford University Press, 2008), 240-41; A. John Simmons, *Justification and Legitimacy* (Cambridge, MA: Cambridge University Press, 2001), 106 and 130; David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton, NJ: Princeton University Press, 2009), 154-155; Christopher Heath Wellman, "Samaritanism and the Duty to Obey the Law," *Is There a Duty to Obey the Law (For and Against)*, eds. Christopher Heath Wellman and A. John Simmons (New York: Cambridge University Press, 2005), pp. 52-53; John Locke, *Second Treatise of Government* (1690), and many others. For our purposes, we can understand the *Prima Facie* Duty to Obey the Law View as agnostic on the issue of whether the relevant duty is owed to the state or to the citizens of the state.

7. See my paper, "Questioning the Relevance of Legitimacy and Authority to Nonideal Theory" (unpublished manuscript). Thanks to John Devlin for particularly helpful discussions here (I don't know whether or not he would agree with my commentary about this example).

8. In fact, despite having freely consented to the institution, those locals would not necessarily have an obligation to show any interesting kind of respect to the institution at all—for example, they might foresee that in all of their interactions with the institution in their corner of the world the thing to do will be to actively interfere with its operations, by moving monitoring equipment and marker buoys, etc., because in their corner of the world the institution's directives will be reliably misguided in a way in which the best redress is clearly to interfere in such a way. (Here I disagree with the view defended in Buchanan and Keohane, "The Legitimacy of Global Governance Institutions," see especially page 411.)

9. For other familiar examples that are also consistent with the *Prima Facie* Duty to Obey the Law View, see Kent Greenawalt, *Conflicts of Law and Morality* (New York: Oxford University Press, 1987).

Fiduciary Obligations in Medical Research

Nate W. Olson
STANFORD UNIVERSITY

1. INTRODUCTION

Traditionally, the roles and obligations of medical clinicians and researchers have been thought to be quite distinct. Clinicians' primary objective is to look after the health of their patients, and, as a result, both professional organizations, such as the American Medical Association, and courts have held that the physician-patient relationship is a fiduciary one.[1] In a fiduciary relationship, one individual, the entrustor, gives another individual, the fiduciary, the authority to look after some aspect of his or her well-being. The fiduciary must then use that authority to act in the best interest of the entrustor. In a physician-patient relationship, a patient entrusts his or her health to his or her physician, and the physician bears a responsibility to always act in the patient's best interest. A physician therefore clearly bears the marks of a fiduciary.

Medical researchers, on the other hand, are commonly thought not to be fiduciaries for the participants in their trials. After all, the point of medical research is not to benefit a trial's participants, but to produce generalizable knowledge. Consider, for instance, that many trials of new medical treatments are placebo trials, where participants in one arm of the trial receive the experimental treatment being tested and those in the other receive a placebo. While study participants often harbor the "therapeutic misconception," the view that a trial is intended to benefit them, the use of placebos makes trials' true purpose clear: to produce scientific data about the effectiveness of a treatment.

It is understandable then that the common view in research ethics has been that while researchers have obligations to inform their participants about the details of trials and not expose them to excessive risks, they have very limited obligations to provide benefits to their study participants. Provision of some benefits may be required to achieve an acceptable risk/benefit ratio for participants and so protect them from being exposed to excessive risks.[2] But a researcher's obligation to benefit her participants stops at such protections. A researcher's primary responsibility is to follow her study's protocol, not to provide such benefits. Unlike physicians, researchers do not seem to be fiduciaries.

However, some ethicists have begun to argue for a more capacious understanding of researchers' obligations. Two developments in medical research have helped spur this turn away from the traditional view. First, as diagnostic tools have continued to improve, the prevalence of incidental findings in research is dramatically increasing. For instance, in studies involving CT colonographies, which produce an image of one's colon and the surrounding area, researchers find conditions outside the colon of potential medical significance in approximately 10 percent of study participants.[3] Ethicists are increasingly arguing