

# A

## Authority of Law



Veronica Rodriguez-Blanco  
University of Birmingham, Birmingham, UK

### The First Thread of the Web: Grasping the Question

Law transforms our lives in the most important way: it changes how we act and because of this it gives rise to fundamental questions. One such question concerns legal authority and individual autonomy and asks: if we are autonomous agents how do legislators, judges and officials have legitimate authority to change our actions and indirectly change how we conduct our lives? We conceive ourselves as active agents who determine how and when to act, and we conceive ourselves as the planners of our own lives and the creators of change. Law asks us, however, to perform actions that range from the trivial to the complex. But how is it possible for me to do, in full awareness, as the law asks and, at the same time, be in control of my own destiny? How is my free will affected by the law?

But how is this possible when I am simply trying to conform with what the law says? This means, I am trying to follow what the law says without giving much thought or without engaging my will or intention.

Legal and political philosophers have tended to examine legal authority and autonomy and have

consequently put forward the following questions: (a) Can there ever be legitimate authority? (b) What are the conditions of legitimate authority? and (c) Does the possibility of legitimate authority diminish or assuage the antagonism between authority and autonomy?

I find that posing the problem and the questions in this way is unsatisfactory because it presupposes what we need to explain, i.e., the nature of authority and whether there is a “genuine” antagonism between autonomy and legal authority. Within this framework authority is given, and the starting point of the theorist is the following statement: If there is a legitimate authority then conditions x, y, and z need to be fulfilled, but it is not shown how there is or whether there could be something such as legitimate authority. The received view begins by recognizing the phenomenological fact that legal officials and authorities issue commands and directives. It is usually said that if authorities have the right to command and addressees the duty to obey, then the officials have legitimate authority.

Theorists usually argue in favor of a particular political theory, for example, liberalism or perfectionism, and engage with a set of key values, for instance, expert knowledge or democratic values that provide the grounds for “rights” and “duties” and that enable us to grasp the conditions of legitimate authority. The traditional strategy, therefore, begins top-down from a plausible view on political theory that leads to the framework that justifies authority. There is no doubt that

the traditional strategy has provided us with a rich understanding that has advanced our grasp of the normative conditions that make possible legitimate legal authority. However, the traditional strategy fails to provide a microscopic view of the phenomenon of legal authority and falls short of explaining how legal authority truly operates on individual human beings.

By contrast, the strategy of this entry is to focus on the agent, i.e., the addressee of the legal command or directive who performs the action requested by the legal official. This strategy is bottom-up, from the level of agency and practical reason to the justificatory framework of authority. It also begins with the naive phenomenological observation that X commands Y to perform the action p (an action p-ing to Y.) Thus, it is intelligible to us that Y performs the action p as requested by X. The key question that this entry aims to investigate is how a legal command or directive, *just because* it is a legal command or directive, effectively changes the agent's course of action. A set of sub-questions arise: Does the command intervene in the practical reasoning of the agent or addressee? If this is the case, how does this intervention operate? Moreover, what are the limits of our phenomenological observations, in other words can I truly observe that you are performing an action because you are complying with a legal directive or command? What happens in the agent that enables her to comply with the legal command or directive? When we perform an action because we are complying with the legal command or directive, are we still active, self-governed, autonomous agents? In what sense are we still autonomous agents? The task is to explain what legal authority is and the premise of the study is that this question can only be answered through understanding of how legal authority operates upon the agent: if we recognize that legal commands or directives intervene upon, affect, and change the agent's practical reasoning, then we need to understand and explain how this happens.

Answering the question above raises other, difficult, questions, however. For instance, we quickly come to see that the question of legal authority is closely tied up with the issue of the

normativity of law. Raz (1999a), for example, has asserted that to understand what normativity is, we need to understand what reasons for actions are.<sup>1</sup> But reasons for action are not “free-standing” reasons in the world where agents play no role, they do not stand independently of the agents and their practical reasoning. The philosophical literature on reasons for action is vast, and for the last 30 years philosophical studies have focused on the notion of reasons for actions, but few philosophers have concentrated on the nature and structure of practical reason.<sup>2</sup> Paraphrasing Raz, understanding the nature of legal normativity involves understanding the nature and structure of practical reason in the context of the law (Raz 1999a, p. 67). We have, now, two very closely related issues. The point can be summarized as this: if we are able to understand how practical reason under legal commands, directives, and rules operates and how practical reason operates by following reasons for actions, then we can fully grasp the nature of legal authority and legal normativity. There will be paradigmatic cases<sup>3</sup> of legitimate legal authority, but it is also important to explain cases of legal authority where there is only “apparent” legitimacy.

In this entry, I examine the “anarchist” view as formulated by Wolff who aims to show that there can never be legitimate authority since this inevitably undermines our autonomy. We are then faced with two irreconcilable options: if we recognize that the State can have authority on us, then we need to give up the idea that we are autonomous agents, but we cannot give up this idea because it will involve the absurd view that we are not responsible. We, therefore, give up the idea that is least threatening to our self-understanding, i.e., that the State has authority over us. In §2 I show that the view of authoritative commands

<sup>1</sup>I will use ‘reasons in action’ and ‘reasons for action’ interchangeably. At the end of the book it will become clear the reason for this interchange of terminology.

<sup>2</sup>For some exceptions, see Velleman (1989).

<sup>3</sup>The notion of paradigm follows the idea of core-resemblance that is defended in my article Rodriguez-Blanco (2007).

as advanced by Wolff is implausible. In §3 and §4 I demonstrate that Wolff's conception of autonomy is ambiguous and advance a more promising way of understanding the "apparent" antagonism between autonomy and authority. The entry provides a clear framework for understanding how practical reason and intentional action are intertwined and are key to better understand legal authority. A detailed explanation of the relationship between authority, the structure of practical reason, and intentional action is provided in my book *Law and Authority Under the Guise of the Good*.<sup>4</sup>

### **The Implausibility of Performing a Complex Action: Because an Authority Has Said So**

Let us imagine the following two scenarios:

Scenario 1 (REGISTRATION): you are asked by a legal authority to fill in a form that will register you on the electorate roll.

Scenario 2 (ASSISTANCE AT A CAR ACCIDENT): you are asked by an official to assist the paramedics at the scene of a serious traffic incident (i.e., by helping injured parties into the ambulance and by providing reassurance and basic first aid).

The scenario in REGISTRATION involves the performance of a simple action, i.e., completing a form as clearly instructed. The scenario in ASSISTANCE AT THE CAR ACCIDENT involves performance of a more complex series of actions: it requires awareness of the situation and the possible dangers of moving the injured in one way rather than another, and it requires providing emotional and physical assistance to others. It also requires to overcome obstacles in order to succeed in the purpose of saving the lives of the victims and therefore complying with the command.

According to Wolff, the model of authority (in both scenarios) can be formulated as follows:

X performs an action p-ing because Y has said so (Wolff 1970).

In the case of REGISTRATION, we could say that the agent has filled in the form because the legal authority has said so; in the case of ASSISTANCE AT THE CAR ACCIDENT, the agent has also performed a series of action, because the legal official or authority has said so.

At first glance this seems to be a sound characterization of "authority" but closer inspection reveals discrepancies. That an agent acts in a particular way because they are directed to do so by a legal authority is, I will argue, an implausible formulation that does not grasp the depth and richness of what is truly happening in cases like ASSISTANCE AT A CAR ACCIDENT which involves the performance of a complex series of actions. It might explain simple cases such as REGISTRATION but it cannot account for complex ones. To act "because someone has said you should do so" means that you are acting because of an empirical fact that is presented to you. But we have previously noted that to perform that action requires awareness of the situation and its dangers; it involves engaging and directing the will towards the action; and it involves making judgments about how to succeed in the action. The question that arises is how a mere empirical fact, i.e., the order or command to do something, can engage the will in the complex performance of the action. I believe that many different factors are entailed. My aim in this entry is simply to make the point that a mere empirical fact cannot engage our will in cases where we perform complex actions.

A first (and charitable) reading of the empirical account will suggest something like the following: the legal command or directive is an empirical fact that causes the agent to act in a certain way by virtue of the agent having certain beliefs and desires. Sanctions or threats, in particular, cause an impulse or desire in the agent to act in a certain way. This view, however, is implausible because it entails that for each movement there is a compulsive desire or impulse in the agent that causes each of the actions and series of actions. Legal

<sup>4</sup>Rodriguez-Blanco (2014), paperback edition 2016.

commands as merely empirical and contingent cannot guarantee the continuity and direction that characterizes the performance of complex actions. The diachronic structure of future-directed intentions in action requires rational governance within discrete times, and simple empirical causation cannot guarantee such continuity. A second, more interesting, reading is that the intention of the official is grasped by the agent's mental state and the agent's mental state causes performance of the action. In this case, we also have a notion of causation between a mental state and the complex action and again the appearance of deviation in the causal connection cannot be avoided. This account is more promising because it directs our attention to the role that intention plays in practical reasoning, but it is limited because it conceives intention within the restricted model of mental states and empirical causation.

With these preliminaries clarified, we can now concentrate on Wolff's anarchist account and the antagonism between authority and autonomy.

The argument that Wolff presents us with is the following:

1. If I perform an action because someone says so, then I am not acting according to my own will.
2. If I do not act according to my own will, then I do not act autonomously.
3. Most cases involving the authority of a State involve 1).
4. I cannot act according to 1) because the authority of the State undermines my autonomy.
5. Therefore the authority of the State cannot be legitimate.

In the following section "[The First Thread of the Web: Grasping the Question](#)" concentrate on premise 2).

## Autonomy Versus Heteronomy

Wolff advocates the Kantian view which presupposes that we are metaphysically free because we ascribe responsibility for actions to ourselves and others (Wolff 1970), p. 12. This view does not

demonstrate that we *are* metaphysically free, merely that this is presupposed. Being "responsible" involves the task of deciding what we ought to do; it involves resisting impulses and desires, and it entails engaging ourselves with what we believe to be worth pursuing and achieving, and disengaging ourselves from our desires, moods, traditions, and practices. (This means that I am the only judge of the maxims or principles that will determine my actions.) According to Wolff, and in a Kantian vein, autonomy is the capacity that all human beings have to legislate for themselves and create maxims in the form of imperatives that guide their actions: "He may do what another tells him, but not because he has been told to do it. He is therefore, in the political sense of the word, free." (Wolff 1970), p. 14. If a man performs an action because another man has told him to do so, then the man has refused to engage in moral deliberation and therefore has refused to be autonomous. Wolff concludes that "for the autonomous man, there is no such thing, strictly speaking, as a command." (Wolff 1970), p. 15.

But what does it mean to say that human beings ought to "legislate for themselves"? Does it mean that human beings are the authors of their own moral laws and therefore that self-legislators impose on themselves the principles and maxims that they have authored? This existentialist and romantic interpretation of Kant's notion of autonomy has been rejected by Kantian scholars (Wood 2008; O'Neill 1989) who criticize those interpretations of autonomy in which human beings behave as gods, creating their own moral world and imposing upon themselves their own principles and rules of conduct. There are, however, some passages in Kant that lend themselves to such an interpretation (Kant 2002). This kind of interpretation is, moreover, suggested in the tension that arises in Kant's formulation of autonomy and self-legislation. Kant's self-legislative thesis appears on a number of occasions in his *Groundwork for the Metaphysics of Morals*. See, for example, the two following extracts: "the supreme condition of the will's harmony with universal practical reason is the Idea of the will of every rational being as a will that legislates universal law" (Kant 2002, p. 4:43); and, "The will is

therefore not merely subject to the law, but subject in such a way that it must be considered as also giving the law to itself and only for this reason as first of all subject to the law (of which it can regard itself as the author).” (Kant 2002, p. 4:431). Kant advances the view that we need to regard ourselves as having the idea of legislating universally. The emphasis is on the perspective taken: we regard ourselves as the authors of the law<sup>5</sup> and this does not mean that we are actually the authors of the law, merely that we consider ourselves to be such. Some authors, like Wolff, reject this interpretation and ask the following: if we have sovereignty of our actions, how can we be subject to external law and regard ourselves as legislators without truly and effectively creating our own law? For Wolff, we are the creators of the law and this explains our submission to it and our motivation to obey it. Kant’s argument, however, is that because we have engaged in a deliberative process of creating the law, our created laws are intelligible to us and therefore (we have acquired the intelligibility of our “created” law and therefore) we are motivated to act according to them. In the case of moral laws we have created them independently of our interests and desires and therefore we submit to them unconditionally (are able to impose it on ourselves categorically and not conditionally). As an agent, I will follow the moral law and it is imposed on me as a practical necessity, regardless of my desires and wants. Heteronomous deliberation opposes autonomous deliberation. In the former I am driven by my desires, interests, and wants and in some sense they are external to me. The reasons and rules that guide my actions are derived from desires and wants. They might be presented as mere impulses, e.g., my desire to drink a glass of water if I am thirsty, or they might be manifested as more sophisticated desires, e.g., if I want to be rich then I need to study the stock market to learn to invest my money appropriately. In autonomous deliberation, the maxim that is part of the major premise of the practical syllogism<sup>6</sup> becomes a

universal principle, because it is what every rational human being wills, independently of the contingencies of human nature (such as different desires, inclinations, characters, ways of life, social conventions, traditions, and so on). Subjective maxims, therefore, can become objective and universal principles and can ground our moral actions. Because the agent is the one who engages in this deliberation, he or she is motivated to act according to it.

For Wolff, however, an inescapable tension arises in Kant’s thoughts on autonomy. If we are subject to objective standards, then in which sense do we legislate and in which sense are we the creators of moral laws? We are not free to decide how the law will be, and we cannot shape moral laws according to our conceptions and worldviews. On the contrary, autonomy entails that we are determined as rational beings to engage in the right process of moral deliberation whose result will be universal objective standards. There is no room for subjective worldviews or and creative conceptions of moral law. The conflict is now between legislation which involves creation and subjectivity, and moral law that involves universality and objectivity. Wolff believes that this tension cannot be resolved and that, therefore, one of these ideas needs to be abandoned. He advocates the view that we need to give up the idea that there are objective standards that determine moral law (Wolff 1973).

It is now apparent what motivates Wolff in his adherence to an existentialist or romantic reading of Kant’s notion of autonomy. To take seriously autonomy, freedom, and responsibility, we need to abandon the idea that there are constraints in terms of absolute and objective standards. In this way we are truly sovereign and the authors of moral laws. The price of this, however, is the abandonment of an important Kantian insight, i.e., the view that there are objective standards to evaluate the moral law. Alternatively, if we take seriously that reading of sovereignty and legislation in which we merely *consider or regard*

<sup>5</sup>This interpretation is also advocated by Reath (2006) and Wood (2008).

<sup>6</sup>For a criticism of this interpretation of “practical syllogism” Rodriguez-Blanco (2014), at §4.2.1.

ourselves as creators of the law, then a more plausible form of diminished autonomy emerges. Let us scrutinize this interpretation. Can we say that because the source of the principle or value that will guide our actions is not created by us (i.e., it is an objective standard in either natural or non-natural elements), we are autonomous in a diminished form? Let us examine what this diminished form of autonomy might look like.

Imagine the following scenario (APPEARANCE OF AN ANGEL): you are a young adult who is trying to decide whether to go to university, travel around the world, or find a job. You are sitting on the balcony of your house at midnight trying to decide what to do with your life. A luminous figure appears and you believe it is an angel. She says to you: "Knowledge is valuable" and then adds, urgently, in an imperative voice: "you ought to go to university." Suddenly you grasp the value of knowledge and the truth in the command, and consequently you decide to go to university instead of finding a job or travelling around the world. If you are asked why you have taken the decision to go to university you will answer that it is because an angelic figure *told you to do so*. If you are asked why you should obey an angelic figure you will reply, "because the command is grounded in the idea that knowledge is valuable." The story sounds both incomplete and absurd because it does not explain how the agent grasps the value of knowledge. It might be argued, however, that this is self-evident.<sup>7</sup> Thus, in the same way that we grasp that the law of excluded middle in logic is true, we grasp that "knowledge" is a value. Furthermore, to assert that knowledge is not a value is self-refuting, therefore to be coherent in my assertions about the world I need to accept the value of knowledge. But this comparison between theoretical reasons, i.e., how it is self-evident that knowledge is a value that ought to be pursued and how it is self-evident that knowledge is an objective value, is misleading. The comparison mistakenly characterizes practical reason as theoretical reason plus volition. It encourages a conception of practical

reason as operating along the lines of theoretical reason. It is then believed that something needs to be "added" to guarantee the performance of an action. The additional element is a volitional element. It is a mystery, however, how the volitional element can be "added" or "stuck" to the theoretical reasoning of the agent. This way of understanding practical reason is criticized in my book *Law and Authority Under the Gushie of the Good*.<sup>8</sup> For now it is sufficient to assert that practical reason should be understood as a diachronic process rather than as a static theoretical process plus volition. The dynamic and diachronic process of practical reason is unfolded by the exercise of the actuality of reason in action. It is an actuality which all human beings have the capacity to engage in and involves the idea that reason is manifested in action. It also entails belief, but it is the content of the belief that determines the action.<sup>9</sup>

For Kant, practical reason also has a structure and involves a process: that process of assent of the will.<sup>10</sup> The major premise of the practical syllogism is a subjective maxim that if it is universalizable, it becomes an objective principle that guides action. Our rational nature guarantees the result of the process of practical reason which is the objective and universal principle that will guide the action. I am not the author of the principle, rather I discover,<sup>11</sup> construct,<sup>12</sup> or re-construct<sup>13</sup> the principle by engaging in sound practical reasoning. Because I have engaged in this process of practical reasoning, I can regard myself as the creator of the law, as a *legislator*. I can reasonably consider myself as a creator of the law and am now bound by my "as if a

<sup>8</sup>Rodriguez-Blanco (2014), at §4.1 and §4.2.

<sup>9</sup>This point has been emphasised by Dancy (2002). In contemporary debates this conception was first advanced by Raz (1999b).

<sup>10</sup>See especially Frede (2011).

<sup>11</sup>See Wood (2008) for a critique of the constructivist reading of Kant.

<sup>12</sup>See Reath (2006); Korsgaard (1996) and Rawls for a constructivist reading of Kant, Rawls (1971, 1980).

<sup>13</sup>Wood argues that Kant's view concerning the objectivity of principles should be understood along realist lines.

<sup>7</sup>A version of this argument can be found in Finnis (1980).

legislator” own creations. I am satisfied and can be proud of my task because I have followed a rational procedure engaging my full capacities as a rational human being. I can regard myself as a good or right creator of the moral law because I did not create the law through arbitrary processes according to my moods and psychological constitution. Arguably, the source of the objective principles is external to me, but because I have engaged in a process of deliberation, I can regard myself “as if I am the legislator of the law.”

## Conclusion

Let us now go back to our example APPEARANCE OF AN ANGEL. The creator of the objective value or principle is the angelic authority, but the agent can regard herself or himself as if he or she were the creator of the law because he or she would have engaged in the process of practical deliberation, and possibly moral deliberation.

Legal authority involves both freedom and submission. It involves freedom because we are responsible if we do not obey legal directives and rules, or if we follow them wrongly. For example, if I am asked by the local authority to recycle my rubbish and do not do so, or do so wrongly, then I can be held to be at fault and subject to penalties or other sanctions. If we assume a purely empirical perspective and assert that your actions are only determined by your mental state of fear of punishment, then our notion of responsibility is weakened. Thus, if you fail to adopt the adequate mental state that will cause the action, i.e., the belief and desire to organize your rubbish according to the instructions of the local authority, we can only say that you are responsible for not having the mental state necessary to cause the appropriate actions. The question that arises is how can we force ourselves to acquire specific (determinate) mental states? How can we control our mental states? Is it our responsibility or the responsibility of an authority to ensure the adoption of the requisite mental states? Furthermore, when we do not comply with legal rules or directives, or when we follow them wrongly, we do not consider that we have failed to acquire the

requisite mental states. We say that we are free to act in certain ways and that we are responsible because we have a certain scope of freedom. But how should submission be conceived and explained if we need to leave room for freedom? The strategy is to reduce the gap between freedom and submission. The idea of self-legislation “as if” we were the creators of the law enables us to explain how something that is external to the agent, such as a legal directive or rule, can be part of the agent through his or her engagement in practical deliberation.

If we accept this reading of “as if” self-legislation in the domain of law, then we see that the antagonism between legal authority and autonomy is mitigated. We also see that Wolff’s “anarchist” conclusion is not granted and that a sound understanding of the nature and structure of practical reason can illuminate both legal authority and normativity.

## References

- Christiano T (2004) The authority of democracy. In: *Journal of Political Philosophy*, pp 245–270
- Dancy J (2002) *Practical reality*. Oxford University Press, Oxford
- Edmundson W (1998) *Three anarchical fallacies*. Cambridge University Press, Cambridge
- Estlund D (2007) *Democratic authority*. Cambridge University Press, Cambridge
- Finnis J (1980) *Natural law and natural rights*. Oxford University Press, Oxford
- Frede M (2011) *A free will: origins of the notion in ancient thought*. University of California Press, Berkeley/Los Angeles. Long AA, Sedley D (eds)
- Green L (1989) *The authority of the state*. Cambridge University Press, Cambridge
- Hurd H (2001) *Moral combat*. Cambridge University Press, Cambridge
- Kant I (2002) *Groundwork for the metaphysics of morals*. (trans: Zweig A and eds Hill TR, Zweig A). Oxford University Press, Oxford.
- Korsgaard C (1996) *Creating the kingdom of ends*. Cambridge University Press, Cambridge
- O’Neill O (1989) *Constructions of reasons*. Cambridge University Press, Cambridge, pp 75–76
- Rawls J (1971) *A theory of justice*. Harvard University Press, Cambridge, MA
- Rawls J (1980) Kantian constructivism in moral theory. *J Philos* 77:515
- Raz J (1986) *The morality of freedom*. Oxford University Press, Oxford

- Raz J (ed) (1990) *Authority*. New York University Press, New York
- Raz J (1999a) *Engaging reason*. Oxford University Press, Oxford, p 67
- Raz J (1999b) *Practical reason and norms*. Oxford University Press, Oxford, p 17; (originally published in 1975 by Hutchinsonn & co.)
- Reath A (2006) *Agency and autonomy in Kant's moral theory*. Clarendon Press, Oxford
- Rodriguez-Blanco V (2007) *Is finnis wrong?* *Leg Theory* 13:257
- Rodriguez-Blanco V (2014) *Law and authority under the guise of the good*. Hart, Oxford
- Velleman D (1989) *Practical reflection*. Princeton University Press, Princeton
- Wolff RP (1970) *In defense of anarchism*. Harper Torchbooks, New York/London, p 9
- Wolff RP (1973) *The autonomy of reason*. Harper Torchbooks, New York
- Wood A (2008) *Kantian ethics*. Cambridge University Press, Cambridge