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978-0-521-03751-8 - Three Anarchical Fallacies: An Essay on Political Authority

William A. Edmundson

Excerpt

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Introduction

"Tired: Blaming your parents; Wired: Blaming the government."

—*Wired* magazine

As the century and millennium draw to a close, it is hard not to notice how visions of the "end" of various things have come to dominate popular thinking.¹ As never before, we are impatient to get on with the future and be done with whatever is stale, makeshift, or established. Even the staid print journalists seem unable to conceive a topic except in terms of walls crumbling, bastions falling, myths exploding, highways to the future opening out. And of all the bric-a-brac of the past, nothing seems quite so dated, quite so discredited, quite so stifling, as government.

Manifestations of our antistate *Zeitgeist* range from the lawful (such as deregulation and privatization in the industrialized democracies), to the ragged (such as the devolution and disintegration of the Soviet bloc), to the apocalyptic (such as the Oklahoma City bombing). Underlying these instances is a fundamental *distrust* of state power. Auschwitz, the Gulag, and even (if you insist) Waco and Ruby Ridge should and will refresh this distrust. Suspicion of state power has a long and venerable intellectual pedigree, encompassing figures ranging from Locke, Jefferson, Madison, and Mill to antibureaucratic Marxists, libertarians, and Rawlsian liberals. But when chronic suspicions combine with millenarian enthusiasm, damage can result. As Garry Wills has put it, "Where the heated deny legitimacy and the cool are doubtful of it, a crisis is in the making."²

My intention in writing this book is to reinforce – or, if necessary, reestablish – your conviction that legitimate political authority is

¹ See, e.g., John Lancaster in *The New Yorker*, December 25, 1995, p. 9.

² "The New Revolutionaries," *The New York Review of Books*, August 10, 1995, p. 55.

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possible and that living in a just state is a worthy ideal. If necessary, I also hope to persuade you that thinking about legitimacy is not a mere “pastime to be resisted,”³ as Laurence Tribe has claimed, but a responsibility that we are capable of meeting, and one that we would shirk at our own and each other’s peril. A democratic state can only be vitiated by popular doubts about its right to exist, and a weakened state is to that extent less able to do what only it can do, for example, protect the weak and meek against the strong and loud. But confidence is no substitute for wisdom; nothing I say here is meant in any way to lead anyone to think that state power is a panacea, or that it has somehow expended its capacity to do great harm.

Specifically, in this book I address three views that I impertinently call *anarchical fallacies* – I add to the impertinence by shamelessly stealing a phrase of Jeremy Bentham’s.⁴ By “fallacy” I mean an example of bad reasoning; by “anarchical” I mean tending to undermine confidence in the legitimacy of the state.

The first fallacy trades on an abstract linkage between the idea of the state having a *right to rule* and the idea that its subjects have a *duty to obey* its commands. It is natural enough to think of a *legitimate* state as one that has, in some sense, the right to rule. Once we begin to scrutinize the scope and nature of the duty to obey, doubts accrue, and they appear to accrue directly against the state’s reserve of legitimacy. If these doubts are taken as seriously as many contemporary thinkers have taken them, the very possibility of a legitimate state is foreclosed.

The second fallacy rests on the commonsense thought that law – the distinctive tool of civilized states – is distinctively *coercive*. From this apparently uncontroversial datum it is tempting to infer that the state bears some special burden of justifying its existence. It is also tempting to infer that state inaction is, in general, preferable to action. “State interference is an evil, where it cannot be shown to be a good,” as Oliver Wendell Holmes, Jr., put it.⁵ Even the most popular and beneficial measures a state might undertake remain, therefore, somehow tainted because whenever, wherever the state acts, somebody, somewhere, has to have been coerced.

³ Laurence H. Tribe, *Constitutional Choices* 6 n.9 (Cambridge, Mass.: Harvard University Press, 1985).

⁴ Jeremy Bentham, “Anarchical Fallacies” in vol. 2 of *The Works of Jeremy Bentham*, John Bowring, ed., 491–534 (Edinburgh, 1843).

⁵ Oliver Wendell Holmes, Jr., *The Common Law* 96 (Boston: Little, Brown, 1881).

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The third fallacy involves a certain view of the relation between law and morality. Morality is divided into two concentric spheres, an inner and an outer. The outer sphere is one that the law may help police, but the inner sphere the law may not enter. What goes on in the inner sphere is subject to appraisal as right or wrong and may be policed by the informal pressures of opinion and ostracism, but morality itself forbids the law from taking a hand.

The anarchical fallacies I am concerned with are not confined to the thinking of anarchists – they would be of limited interest if they were. As it happens, though, ACLU liberals, cultural conservatives, middle-of-the-roaders, free-marketeers, libertarians, and Marxists seem to be equally susceptible to them. And you? If at this moment you are saying to yourself, “Yes, I think I understand what these three views are, but what in the world is supposed to be ‘fallacious’ about them?” you are ready to proceed.

I cannot claim that once the three fallacies have been exposed we will find ourselves occupying a single, synoptic point of view from which we might together survey the whole field of political and legal philosophy. I will conclude the book, however, by suggesting some ways in which the state might be valuable to us – ways that, no longer cast as mere compensating benefits, we might be able to appreciate afresh. Thus, although the book is largely devoted to the task of clearing conceptual underbrush, I hope the effort of reading it will expose some of the capabilities of an estate that is usually lovelier when viewed from a distance.

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Part One

**The Fallacious Argument from the
Failure of Political Obligation**

“Government and obedience go hand in hand.”
Bentham, *Anarchical Fallacies*, 504

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In 1970, Robert Paul Wolff pronounced that “the fundamental problem of political philosophy [is] how the moral autonomy of the individual can be made compatible with the legitimate authority of the state.” The reconciliation proved impossible for Wolff because “the defining mark of the state is authority, the right to rule[, while] the primary obligation of man is autonomy, the refusal to be ruled.” The state, in Wolff’s view, is necessarily illegitimate, and “political philosophy, as the study of that legitimate political authority which distinguishes civil society from the state of nature, is dead.” Although political philosophy has not died, it has not yet recovered from Wolff’s assault.¹

Wolff and others have been able to persuade most of their attentive colleagues that the idea that citizens owe the state, even a just state, a duty of obedience – even only a provisional, nonabsolute, *prima facie* duty – has to be given up. Accordingly, one might say that the fundamental problem confronting political philosophy today is that of explaining how the state can be legitimate if there is no general duty to obey its laws. This is the problem that I will attack. What I hope to show is that we can make sense of the idea of a legitimate political authority without positing the existence of a general duty to obey the law.

¹ Robert Paul Wolff, *In Defense of Anarchism*, 2d ed., vii, 18, 110 (New York: Harper & Row, 1976) [hereafter, Wolff, *In Defense of Anarchism*]. Throughout the early postwar period it was widely reported in Anglo-American philosophical circles that political philosophy had died of its own linguistic confusion. See, e.g., John Plamenatz, “The Use of Political Theory,” and P. H. Partridge, “Politics, Philosophy, Ideology,” in Anthony Quinton, ed., *Political Philosophy* 19, 32 (Oxford: Oxford University Press, 1967).

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AN INCONSISTENT TRIAD

The problem I want to address can be put another way. Consider the following set of propositions:

1. A state is legitimate only if it claims to impose and, in fact, does impose on its subjects a general, at least *prima facie*, duty to obey its laws.
2. There is no general, even *prima facie*, duty to obey the laws of a state, not even those of a just state.
3. Legitimate states are not only possible, but actual.

A logical tension within this set should be plain. This is an example of what has been called an “inconsistent triad” of propositions. It is so called because the truth of any pair of the three entails the falsity of the third. The three cannot be all true together, although any pair taken from among them can. Two or even all three may be given up as false, of course, but if our aim is simply to resolve the logical tension within this set, we should be reluctant to do more than reject its most dubious member.

Of the three, only the second seems to lack initial plausibility. No general duty, not even a *prima facie* one, to obey the laws of a just state? On what grounds have “mainstream” philosophers embraced so radical a proposition?

DOUBTS ABOUT THE EXISTENCE OF A *PRIMA FACIE* DUTY TO OBEY THE LAW

Philosophical doubts about the existence of a general, *prima facie* duty to obey the law have had four chief sources. The first source is the difficulty of stating such a duty precisely without reducing its scope and force so drastically that it ceases to have significant practical “bite.” The second is the difficulty of resisting the subsumption of such a duty to deeper, more general moral principles that make such a duty superfluous. The third is the difficulty of reconciling such a duty with other moral values, such as personal autonomy. The fourth is the difficulty of providing a satisfactory foundation for such a duty. Let us consider each of these four sources in turn.

The Duty Eroded by Its Qualifications and Exceptions

The duty to obey the law cannot be a duty incumbent upon everyone, everywhere, to obey every law, every time. In other words,

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unlike some moral duties, the duty to obey the law cannot be an absolute and universal one. Laws differ from jurisdiction to jurisdiction and one cannot be expected to obey the laws of every jurisdiction, especially if they conflict. One is normally expected to obey only the laws of the state where one resides or is present. If one happens to be in an inhabited place beyond the territorial claims of any state, then there may be no law for one to obey – although the demands of morality are not so limited.

So, the duty to obey the law has to be understood to bind individuals to the laws of the states in which they dwell or visit, or at the very least to those with which they deal. Even so, the duty cannot be an absolute one. If there were an absolute duty to obey the law, then the German people would have had a duty to obey Nazi laws implementing the final solution to the Jewish problem. Of course there was no such duty. One might say that there was no such duty because there was no such law, in the proper sense of the word, but merely a command backed by threats. One might, in other words, take the “natural law” position that an unjust law is no law,² and maintain the view that a subject has a duty to obey every law that is law properly so called.

But circumstances can easily be imagined in which even a just law ought not to be obeyed. If, for example, my wife is in difficult labor and must be rushed to the hospital, the *moral* duty to observe the speed limit that I would otherwise have might not apply even if the legal duty were unaffected. Laws are normally drafted in general terms and in advance of events. It would be unrealistic to insist that every law – on pain of being held unjust – be deemed to contain or be subject to an implicit “exceptions” clause excusing noncompliance whenever the evils avoidable thereby outweigh the good effects of strict obedience.³ But, more than that, such a proviso would so subordinate the duty to obey the law to the wider calculation of costs and benefits that the duty – so qualified – would become not a duty to obey the law, but a duty to obey the law when, but only when, the

² Neither Augustine nor Aquinas flatly stated that “lex iniusta non est lex,” but this simplistic formula has become the popular stigma of natural law theories. For a fuller treatment, see John Finnis, *Natural Law and Natural Rights* 363–6 (Oxford: Clarendon Press, 1980).

³ See Rolf Sartorius, *Individual Conduct and Norms* (Encino, Calif.: Wadsworth, 1975); Larry Alexander, “Pursuing the Good – Indirectly,” 95 *Ethics* 315 (1985); Larry Alexander, “The Gap,” 14 *Harvard Journal of Law and Public Policy* 695 (1991).

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balance of all reasons favors doing what the law requires.⁴ Hobbes seems to be expressing this view in *Leviathan*, where he states: "When therefore our refusal to obey frustrates the end for which the sovereignty was ordained; then there is no liberty to refuse: otherwise there is." – But this bears little resemblance to any duty to "obey the law as it requires to be obeyed," in Joseph Raz's phrase.⁵

Philosophers have long understood the duty to obey the law to be a *prima facie* duty rather than an absolute duty, or duty *sans phrase*. A *prima facie* duty is, one might say, a candidate duty, one that will in fact be one's duty unless a conflicting duty or other moral consideration outweighs it. When this is the case, there still will have been a reason to have done what the *prima facie* duty would have required, and the actor will appropriately feel compunction and an obligation to somehow make up for the omission. If, for example, I promise to tape *Seinfeld* for you but can't because my wife has gone into labor, the *prima facie* duty created by the promise does not simply vanish despite the fact that it was outweighed and I ought, under the circumstances, not to take the time to tape *Seinfeld*.⁶ The weight a *prima facie* duty has may vary considerably from the very weak – as, for example, a duty not to annoy – to the very grave – for example, a duty not to take human life. But describing the duty to obey the law as a *prima facie* duty rather than a duty *sans phrase* does not eliminate the need for the qualifications mentioned already. I have no duty, not even a *prima facie* one, to obey the laws of Outer Mongolia. Germans had no duty, not even a *prima facie* one, to report the whereabouts of Jews to Nazi officials bent on annihilation.⁷

But, if there were such a thing as a *prima facie* duty to obey the law, shouldn't one say that the Germans in fact had a *prima facie but overridden* duty to report the whereabouts of Jews to Nazi authorities? This might at first seem to be the most natural way to employ the idea of *prima facie* duty. To say that there is a *prima facie* duty to ϕ is to say, at least, that there is a moral reason to ϕ . Sometimes to ϕ is also to ψ , and if in circumstance C there is a stronger *prima facie* duty

⁴ Thomas Hobbes, *Leviathan*, J. C. A. Gaskin, ed. (XXI:15) 145 (Oxford: Oxford University Press, 1996) [hereafter, *Leviathan*].

⁵ Joseph Raz, *The Authority of Law* 236 (Oxford: Clarendon Press, 1979).

⁶ This account follows that of John Searle, "Prima-facie Obligations," in Zack van Straaten, ed., *Philosophical Subjects: Essays Presented to P. F. Strawson* 238 (Oxford: Clarendon Press, 1980); see also David Ross, *The Right and the Good* 16–47, 56–64 (Oxford: Clarendon Press, 1930).

⁷ George Rainbolt forced me to confront this point.

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not to ψ , two alternative accounts of the situation offer themselves. On one account, we say that because ϕ -ing in circumstance C would also be ψ -ing, the prima facie duty to ϕ is overridden, *although there remains a moral reason to perform a ϕ -ing that would have been a ψ -ing*. Alternatively, we might say that because a ϕ -ing is so liable to be a ψ -ing or something as bad or worse than ψ -ing, or because the ψ -ing in circumstance C would be so much worse than a not- ϕ -ing, *there is no residual moral reason to perform a ϕ -ing that would have been a ψ -ing and, hence, no unqualified prima facie duty to ϕ* . The latter is the better way to handle the Nazi example. Because reporting the Jews would lead to their grossly unjust torment and death, there is no moral reason to report them even though to report them would be to obey the law. Failing to report the Jews is no occasion for compunction and leaves nothing to make up to the Nazi regime; and therefore it is better to say that there is a prima facie duty to obey *sufficiently just laws*, rather than that there is a prima facie duty to obey the law, period.

A methodological observation is worth making here: The two alternative ways of describing the Nazi case present an instance of what I will call the *Redescription Problem*. It is a type of problem that recurs frequently in deontic moral philosophy, that is, that part of moral philosophy that concerns concepts like duty, obligation, and their cognates.⁸ If there were no means of treating instances of the Redescription Problem, then substantive moral philosophy (of which political and legal philosophy are, in main, branches) would be to that extent afflicted with a serious degree of indeterminacy, for it would be next to impossible to determine what our prima facie duties, in fact, are. (Later on, we will encounter other instances of the Redescription Problem.) Fortunately, as the Nazi example illustrates, there is a way to determine which of the alternative descriptions of such cases best expresses our moral convictions. That way is to ascertain whether failure to perform a purported prima facie duty would leave an appropriate residue of regret or remorse, indicating the presence of moral reasons that are still operative even if, in the circumstances, they have been overridden.

Returning to our inquiry: At this juncture, we still have, intact, a prima facie duty of subjects, residents, and guests of a just state to

⁸ See Paul M. Pietroski, "Prima Facie Obligations, Ceteris Paribus Laws in Moral Theory," 103 *Ethics* 489, 504–5 n.21 (1993); Brad Hooker, "Ross-style Pluralism versus Rule-consequentialism," 105 *Mind* 531–52 (1996).

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obey the law. Though not absolute, a prima facie duty is not a triviality; for recognizing such a duty shapes not only how we evaluate options and conduct, but also how we educate the young and how we manage our feelings and opinions. But what weight can we assign this duty? Suppose I come upon a stop sign at an intersection in the middle of the desert.⁹ Both intersecting roads are straight and visibility extends for miles. It is just after dawn; there is no traffic; I am rested and alert. It is my legal duty to come to a full stop before proceeding. If I don't stop, there is no real chance that any harm will come; but there is no harm in stopping either. But do I have any real reason to stop, or even any merely prima facie moral duty to do so? My first (as well as my considered) impulse is to say, Yes, there is a reason for me to stop, and more than that, there is a duty to do so, simply and only because the law to which I am subject says I must. But my (and, I trust, your) saying so opens another powerful line of attack on the idea of a duty to obey the law "as it requires to be obeyed."

The Duty Subsumed by Deeper Principles

The qualifications that have to be made to the supposed duty to obey the law are demanded by other moral principles and values. But of course sometimes the duty to obey the law outweighs such other, conflicting moral considerations, as, for example, when I would want to speed across town during rush hour to get home in time to pay the housekeeper. My prima facie duty to do what it takes to pay the housekeeper promptly is overridden. But the outcome in this example is not haphazard; there must be a sufficient set of reasons in this case that subordinate the prima facie duty to pay debts promptly to the prima facie duty to obey the law. Should the particular nature of the law-breaking action matter in this calculation? Surely it should: Speeding under most circumstances endangers the safety of myself and others. If, on the other hand, meeting an important obli-

⁹ This example is discussed by M. B. E. Smith, "Is There a Prima Facie Obligation to Obey the Law?" 82 *Yale Law Journal* 950 (1973); Joel Feinberg, "Civil Disobedience in the Modern World," 2 *Humanities in Society* 37, reprinted in Joel Feinberg and Hyman Gross, eds., *The Philosophy of Law*, 5th ed. (Belmont, Calif.: Wadsworth, 1995); Donald H. Regan, "Law's Halo," 4 *Social Philosophy & Policy* 15 (1986); Frederick Schauer, *Playing by the Rules* 130 (New York: Oxford University Press, 1991); and Heidi Hurd, "Challenging Authority," 100 *Yale Law Journal* 1611 (1991), among others.