10-28-2009

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WHEN AND HOW (IF AT ALL) DOES LAW CONSTRAIN OFFICIAL ACTION?

Frederick Schauer*

"No man is above the law," it is said,¹ but what does this venerable adage mean? To many people, it announces that officials should themselves be subject to law—a principle often understood to be a central component of the rule of law itself.² Yet while the principle that officials are subjects as well as makers of law is now a commonplace, it has not always been so,³ and is not always so in the world today.⁴ But is the view that officials are legally constrained—that even the sovereign must obey the law—a normative or an empirical claim? And if the latter, is it true? And

* David and Mary Harrison Distinguished Professor of Law, University of Virginia. This Article is based on the author’s John A. Sibley Lecture at the University of Georgia School of Law, delivered on October 28, 2009. Earlier drafts were presented at the Harvard Law School Public Law Workshop, where comments from Jack Goldsmith, Daryl Levinson, Richard Fallon, and student participants were unusually helpful; at the University of Toronto Constitutional Theory Roundtable; and at a University of Virginia School of Law Faculty Workshop. A still earlier version, under the title “Incentives to Constitutional Compliance,” was presented to the American Constitution Society at the Yale Law School and at the Harvard Law School conference on Constitutions and Consequences, where comments from Roderick Hills and Matthew Stephenson helped greatly in shaping the current version. Comments on a draft of the final version from David Klein, Sarah Lawsky, Barbara Spellman, Simon Stern, and François Tanguay-Renaud provided valuable correctives and research suggestions.


³ This principle is a large part of why Magna Carta, which subjected the monarch to law, was such a signal achievement. For discussion of the development of Magna Carta and its consequences, see J.C. Holt, Magna Carta 15–16, 97–98 (2d ed. 1992); and A.E. Dick Howard, Magna Carta: Text and Commentary 3–20 (rev. ed. 1998).

⁴ Debatable cases undoubtedly exist, but it is difficult to imagine the leaders and their close allies in North Korea and Zimbabwe, for example, being subject to legal sanctions. And much the same can be said about the kings, queens, and princes in various real (and not just ceremonial) monarchies throughout the world.
if it is true, what makes it true, and are there domains in which it may be false? The goal of this Article is to explore, in a preliminary manner, some of the empirical dimensions of official obedience to the law. There are many reasons to pursue such a project, but my motivation here is the suspicion that once we draw on modern and not-so-modern jurisprudence to clarify what we mean when we talk about “obedience to law,” we may discover that some officials who are in theory subject to the law may consider themselves less so than is commonly believed, and may accordingly take legal constraints on their actions and decisions less seriously than the standard slogans assume.

I. ON THE SEEMING UNIMPORTANCE OF LAW—A FEW EXAMPLES

A few anecdotes, admittedly unrepresentative, will help focus the issue. So let us go back to December 2005, when New York City Transit Workers Union Local 100 went on strike against the Metropolitan Transit Authority, bringing New York City’s subway and bus system to a complete halt for sixty hours.5 The work stoppage was a plain violation of the state of New York’s Taylor Law, which prohibits strikes by public employees.6 The illegality of the union’s action, however, seemed of little moment to Roger Toussaint, the president of Local 100, who declared that “[t]here’s a calling that is higher than the law, and that’s the calling of justice.”7 The strike was eventually settled, and Toussaint served a ten-day jail sentence for violation of the Taylor Law.8 But the strike’s unlawfulness appeared to have little purchase either in public debate or in the settlement negotiations. Those who opposed the strike made frequent reference to its illegality, and those who supported the strike echoed Toussaint’s sentiments, but there was nearly complete consistency between the degree of opposition to the

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strike and the degree of concern about its legal status. If there were people who supported the moral, political, and economic goals of the strikers but took the illegality of the strike as nevertheless important, they seem few and far between. And if there were those who condemned the strike for moral, economic, political, or prudential reasons but dismissed its illegality as of little consequence, they seem equally rare.

Consider also the question of the use of federal troops for disaster assistance in New Orleans during and after Hurricane Katrina, also in 2005. When the Bush Administration initially refused to send troops on the grounds that doing so in the absence of a formal request from the Governor of Louisiana would violate the Posse Comitatus Act, Mayor Ray Nagin of New Orleans expressed his exasperation by insisting loudly and publicly that he did not “care about the law” and needed the troops immediately. Nagin’s approach was promptly endorsed by a prominent business school dean, who criticized President Bush and the Homeland Security Secretary Michael Chertoff for taking the law seriously. “Despite all the laws about what a president can or can’t do—or what approval you need from state governors—when the chips are down, leaders step up and take action and worry about the consequences later.”

Examples such as these are legion. Time and again, public officials who violate the law in the service of the greater good, or who urge others to engage in such violation, are recipients of praise and not blame when the actions they take or advocate are perceived as correct on moral, political, prudential, or policy grounds. When Senator Menendez of New Jersey was mayor of Union City, for example, he applauded those who broke federal law in support of the liberation of Cuba, and supporters of affirmative action often praise

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9 For one such debate, see Greenhouse & Chan, supra note 7.
10 18 U.S.C. § 1385 (2006). Whether the Posse Comitatus Act actually did prevent the use of federal troops may not be quite so obvious, but that question is not germane here.
11 Interview with Ray Nagin, Mayor of New Orleans, in WHEN THE LEVEES BROKE: A REQUIEM IN FOUR ACTS (HBO Documentary Films 2006).
13 Id.
14 See Jonathan Miller, In New Jersey Contest, A Senator with Tough Friends, N.Y.
the surreptitious violators of California Proposition 209's absolute prohibition on taking race into account in making university admissions or hiring decisions.\(^\text{15}\) When the mayors of San Francisco, California, and New Paltz, New York, married same-sex couples contrary to the prevailing law in those states, approval or criticism almost exactly tracked the approvers' or critics' view of the substantive question of same-sex marriage.\(^\text{16}\) Likewise, the importance of illegality in debating the issue of unlawful immigration appears to closely reflect underlying substantive views about immigration policy. Similarly, support or condemnation of President George W. Bush for violating the Foreign Intelligence Surveillance Act of 1978\(^\text{17}\) by authorizing warrantless domestic surveillance of American citizens mirrored underlying substantive views about whether such surveillance was a good idea, the law apart.\(^\text{18}\) Indeed, on this last issue and many others, the *New York Times* frequently excoriated President Bush for violating the law,\(^\text{19}\) but rarely does it criticize a president for violating the law in the service of what the *Times* believes to be the wise moral or political or policy decision. Nor has it worried—at least publicly—about the inconsistency of its appeals to the law when criticizing policy actions it believes wrong and its willingness to defend to the hilt those *Times* reporters who violate the law in the service of source confidentiality.\(^\text{20}\)

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\(^{15}\) Cf. Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 696, 710 (9th Cir. 1997) (discussing Proposition 209).

\(^{16}\) For examples of the different opinions, see Jennifer Medina, Charges Dropped Against Mayor Who Performed Gay Weddings, N.Y. TIMES, July 13, 2005, at B5; and Dean E. Murphy, California Supreme Court Considers Gay Marriage Licenses, N.Y. TIMES, May 26, 2004, at A14.


\(^{19}\) See, e.g., Editorial, Compromising the Constitution, N.Y. TIMES, July 8, 2008, at A20 ("Mr. Bush decided after 9/11 that he was above the law."); Mr. Bush v. The Bill of Rights, supra note 18 ("Mr. Bush's powers do not supercede laws passed by Congress or the Constitution . . .").

\(^{20}\) See, e.g., Don Van Natta Jr. et al., The Miller Case: A Notebook, a Cause, a Jail Cell and a Deal, N.Y. TIMES, Oct. 16, 2005, at 1 (telling story of Judith Miller, who spent eighty-five days in jail for refusing to provide a source); see also In re Miller, 438 F.3d 1141, 1183 (D.C. Cir. 2006) (requiring Miller to testify).
Questions of constitutional interpretive supremacy are hotly contested these days, and consequently the issues become more complex when the question of following the law or the Constitution is tied up with the question of whose interpretation of the law or the Constitution is determinative. Still, if one takes the further step of accepting judicial interpretive authority or supremacy, the examples increase exponentially. Presidents from Jefferson to Jackson to Lincoln to Roosevelt to Bush have claimed and sometimes exercised the power to disregard Supreme Court interpretations that


23 Id. at 326.

24 See ABRAHAM LINCOLN, THE DRED SCOTT DECISION: SPEECH AT SPRINGFIELD, ILLINOIS (June 26, 1857), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 352–66 (Roy P. Basler ed., 1969) (refusing to accept that Dred Scott v. Sanford, 60 U.S. (How.) 393 (1857), which declared that black slaves were not citizens, was binding on the political decisions of the other branches).

25 See MURPHY, supra note 22, at 332 (chronicling Roosevelt’s attempt to “pack” the Supreme Court).

diverge from their own moral, policy, political, or constitutional judgments. Congress acts in much the same way, rarely treating inconsistency between a desirable policy and a Supreme Court decision, even a recent one squarely on point, as much of an impediment. Moreover, the nonacquiescence policies of agencies such as the Internal Revenue Service, the Department of Health and Human Services, and the Social Security Administration, pursuant to which the agencies will refuse to abide (except in the immediate case) by rulings of the federal courts of appeal, is of much the same flavor. It should be apparent, therefore, that the extent to which members of the legislative, executive, and administrative arms of the government treat court-made law as a constraint just because it is the law is very much open to question.

II. ON THE OBLIGATION TO OBEY THE LAW

The foregoing anecdotes are just that: anecdotes. Moreover, they are unrepresentative anecdotes intentionally selected to raise an issue, not to prove a point. Still, they are valuable in helping us perceive hitherto hidden problems and in assisting us in framing falsifiable hypotheses for more systematic investigation. Moreover, many of the anecdotes allow us to link the political and empirical question of obedience to the law to philosophical debates dating back at least as far as Socrates in The Crito and The Apology.

27 Consider, for example, Congress's overwhelming decision to pass a flag-desecration statute immediately in the wake of Texas v. Johnson, 491 U.S. 397 (1989), which invalidated a strikingly similar statute. The Supreme Court similarly invalidated that statute in United States v. Eichman, 496 U.S. 310, 318-19 (1990).


29 For the original claims of Socrates and subsequent commentary, see PLATO, THE LAST DAYS OF SOCRATES: EUHYPHRO, APOLOGY, CRITO, PHAEDO 43–96 (Hugh Tredennick trans., 1969); R.E. ALLEN, SOCRATES AND LEGAL OBLIGATION 22–32, 100–14 (1980); THOMAS C. BRICKHOUSE & NICHOLAS D. SMITH, SOCRATES ON TRIAL (1989); and A.D. WOOLLEY, THE
As properly framed, the question of obedience to law is the question of whether the fact of a reason being a legal one is a basis for following it, independent of the grounds for acting as the substance (or content) of the reason would indicate.\(^{30}\) Does the existence of a law, solely because it is a law, and not because of the content of what the law actually provides, furnish the conscientious subject with a reason—albeit not necessarily a conclusive one—to do what the law says?\(^{31}\)

To Socrates, Hobbes,\(^{32}\) Locke,\(^{33}\) John Rawls,\(^{34}\) Lon Fuller,\(^{35}\) Philip Soper,\(^{36}\) and many others, the answer to this question is “yes.”

ARGUMENTS OF PLATO’S CRITO (1979).


\(^{31}\) For philosophical discussions of obedience to law, see generally The Duty to Obey the Law: Selected Philosophical Readings 17–41 (William A. Edmundson ed., 1999) [hereinafter The Duty to Obey the Law]; Kent Greenawalt, Conflicts of Law and Morality (1987); George Klosko, Political Obligations (2005); Christopher Heath Wellman & A. John Simmons, Is There a Duty to Obey the Law? (2005).


\(^{35}\) Lon L. Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630 passim (1958). As with others in what might loosely and broadly be called the natural-law tradition, Fuller’s views were bound up with his understanding of the criteria for legality. Accordingly, Fuller, and possibly Thomas Aquinas and Philip Soper as well, all tied their views regarding legal obligation to their positions about what counted as law, asking not only the question of whether the law should be obeyed, but also the question of what is law that it should be obeyed. As to the views of Aquinas, see Cristóbal Orrego, Natural Law Under Other Names: De Nominibus Non Est Disputandum, 52 Am. J. Juris. 77 (2007). For Soper’s view, see infra note 36. And for Ronald Dworkin’s related views on the connection between the nature of law and the obligations it imposes on lawyers, judges, and citizens, see generally Ronald Dworkin, Law’s Empire 400–13 (1986).

Whether for reasons of consent, social contract, reciprocity, social coordination, the duty of fair play, or any of a host of other arguments, the law, for these thinkers, is something—presumptively but not necessarily absolutely—to be obeyed. In insisting that the law that had unjustly condemned him was still to be followed, Socrates launched a long tradition of supporting obedience to law simply because it is law, independent of the moral and political worth of particular laws.

There is a competing tradition, however, albeit of less ancient lineage. This tradition denies that there is an obligation, even prima facie, to obey the law. Numerous scholars, including Heidi Hurd, M.B.E. Smith, Robert Paul Wolff, John Simmons, Joseph Raz, JURIS. 103 (1996); Philip Soper, Legal Theory and the Claim of Authority, 18 PHIL. & PUB. AFF. 209 (1989).


38 See id. at 43–45 (discussing Rousseau’s social contract theory); LOCKE, supra note 33, § 119 (discussing necessary consent to be governed).


41 For an extended discussion of the principle of fair play, see generally GEORGE KLOSKO, THE PRINCIPLE OF FAIRNESS AND POLITICAL OBLIGATIONS (1992); and Rawls, supra note 34.

42 For example, the argument of natural duty explicated in Jeremy Waldron, Special Ties and Natural Duties, 22 PHIL. & PUB. AFF. 3 (1993).

43 Or, as it is sometimes put, “prima facie.” For an exploration of the logical complications of prima facie obligations and rights, see Frederick Schauer, A Comment on the Structure of Rights, 27 GA. L. REV. 415 passim (1993).


Leslie Green, and Matthew Kramer, have argued that the fact that a norm or a directive is a legal one (or the fact that an alleged duty is a political one) provides no reason, not even prima facie, to follow it. If the content of the norm justifies compliance, they maintain, then compliance is morally dictated, but the compliance is dictated solely by the moral content of what the norm demands. Thus, when the content of the norm does not provide any reason for obeying it, then, so the argument goes, it is simply irrational law worship, authority worship, or rule worship to take the norm's legal status as supplying a reason for compliance not provided by the content of the norm itself. And that is why many of the arguments in the philosophical literature feature examples in which the content of the norm, whether applied generally or on a particular occasion, does not itself, the law aside, provide any reason for compliance. Were we to encounter a “stop” sign in the middle of the desert, and could clearly see that no other vehicle was approaching and that there was no possibility of apprehension, there would seem to be no reason to stop just because the sign said to. Examples like these, it is argued, isolate the question of obedience to a legal norm solely


50 MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS 2 (1999) (distinguishing between legal and moral mandates, and denying that the former produce moral obligations).

51 This position is often known as “philosophical anarchism.” See GANS, supra note 46, at 1–2, 41 (“[P]hilosophical anarchism . . . amounts to a denial of the very existence of a duty to obey the state.”); A. JOHN SIMMONS, Philosophical Anarchism, in JUSTIFICATION AND LEGITIMACY 102, 108–12 (2001) (defining political anarchism); A John Simmons, The Anarchist Position: A Reply to Klosko and Senor, 16 PHIL. & PUB. AFF. 269, 278–79 (1987) (arguing that people have no “duty to obey the law”). A compatriot of philosophical anarchism is the literature in the social sciences on authority, a literature that tends to be normatively skeptical of deference to authority and that treats deference to authority as more of a pathology than a virtue. See, e.g., HERBERT C. KELMAN & V. LEE HAMILTON, CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY 75–76, 338 (1989) (finding that people will harm when instructed to do so by an authority); STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 2, 5–8 (1974) (analyzing deference to authority).

52 See Donald H. Regan, Law’s Halo, in PHILOSOPHY AND LAW 15, 18–19 (Jules Coleman & Ellen Frankel Paul eds., 1987) (positing this hypothetical); see also Donald H. Regan, Authority and Value: Reflections on Raz’s Morality of Freedom, 62 S. CAL. L. REV. 995, 1010 (1989) (concluding that some rules should be ignored in cases where the “normal justification” does not apply); Donald H. Regan, Reasons, Authority, and the Meaning of “Oblige: Further Thoughts on Raz and Obedience to Law, 3 CAN. J. L. & JURISPRUDENCE 3, 14 (1990) (arguing that legal rules have only indicative significance).
because of the norm's attribute of being a legal norm. And for the theorists just named, such examples illustrate that following the law for no other reason than that it is the law appears to be quite irrational.

III. THE EMPIRICAL SIDE OF LEGAL OBLIGATION

These venerable normative debates are important, but no less important is the question whether people in general, and officials in particular, really do act as if they have, or perceive that they have, an obligation to obey the law. This empirical question, however, has received much less attention than has the normative one. In a way, this neglect of the empirical side of the obedience question is not surprising. As we will see, the methodological obstacles to a rigorous empirical examination of the question are formidable, and conceivably insurmountable.\(^5\) But the difficulty of the empirical inquiry does not diminish its significance. The empirical inquiry is significant, first, because it is so often simply assumed that officials have and subscribe to an obligation to obey the law. Were it otherwise we would not see nearly as much criticism of officials couched in the language of "disregarding the law" as opposed to the language of first-order substantive wrongfulness.\(^5\) But if, as an empirical matter, neither officials nor their constituents believe they have such an obligation, then our political and public understanding of official behavior and rhetoric will need to be rethought. In addition, if it turns out that there is less obedience to law qua law

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\(^5\) I note at the outset, however, that there are at least three possible responses to insurmountable obstacles to rigorous empirical examination. One is to ignore the subject entirely, no matter how important it may be. A second is to rely on hunches and intuitions, and the third is to conduct an imperfect empirical examination. Some empirical economists tend towards the first, which has the advantage of maintaining a purity of empirical rigor, but runs the risk of treating the quality of a data set as being a better indicator of the importance of an inquiry than the social significance of the matter being investigated. Law professors tend to prefer the second, sometimes explicitly relying on their own intuitions but more often resting their conclusions on a simple but undocumented empirical assertion. Yet however common this approach may be, it is hardly clear that the intuitions of law professors are superior sources of data than second-best (or even third-best) empirical studies.

than many have supposed, then it will be important to focus more attention on the role of sanctions and coercion in producing compliance. If the prevailing view about the proper role of sanctions in inducing official compliance with the law is premised on an inflated assessment of the extent to which officials believe themselves obligated to follow the law, then substituting a more accurate picture of officials' sanction-independent inclination to compliance may lead to increased attention to sanctions as a way to foster compliance. Finally, if coercion is more important to law than is sometimes supposed, especially by practitioners of contemporary legal philosophy, then recognizing the comparative scarcity of perceived official legal obligation may have valuable theoretical as well as practical implications.

The empirical question of the obligation to obey the law is actually (at least) two questions. The first is about the extent to which people in general and officials in particular really do believe that they should obey the law just because it is the law. And the second question, separate from (but probably causally connected to) the question of abstract belief, is whether and to what extent people and officials actually do obey the law solely because it is the law.

In order to investigate these questions, it is necessary, methodologically, to isolate the question of obedience to law qua law. To do this, we must remove those instances in which people appear to be obeying the law but are in fact only doing what they believe is right. That is, we need to exclude from consideration those decisions by citizens and officials that might be publicly justified in terms of the law, but in which those who are offering such justifications would have made the same decisions even if the law were not part of the equation. Speaking only for myself, I am not obeying the law when I refrain from robbery, murder, cannibalism, and insider trading, for these are activities I would avoid even were they not...
illegal, whether for reasons of morality, or reasons of preference, or both. That the law prohibits such behavior is, for me, beside the point, and thus I need not confront the question of whether I would commit murder or cannibalism if they did not happen to violate the law.

There is something of an empirical literature on this question, and the most prominent name is the social psychologist Tom Tyler. In an important book entitled *Why People Obey the Law?*, Tyler concludes that people obey the law when they perceive it legitimate, and when they believe that the law has been produced under circumstances of procedural fairness. Tyler thus admirably attempts to answer the question about when and why people obey the law for reasons other than fear of sanctions. It turns out, however, that he answers only one of three possible questions about the circumstances in which following the law qua law matters. And however important the question he does answer is, it may be that Tyler's question is the one that is least important when we turn, as we shall in the ensuing section, to officials rather than ordinary citizens.

Tyler is primarily concerned with people who obey laws that personally disadvantage them, but much of the research in this vein is focused on the question of obedience to those laws whose value would rarely be doubted even by the subjects whose compliance inconveniences them. Some of Tyler's own work focuses on traffic laws, for example, but few people who consider violating the traffic laws would consider traffic laws in general or even the one they are

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59 See Tyler, supra note 57, at 40–66.
contemplating violating to be misguided. Taxation is another example, because we suspect that most people who might consider not paying their taxes would nevertheless believe that taxation is in general necessary and desirable. Moreover, much of this research is largely, even if not exclusively, focused on applications of those laws in circumstances in which the subjects would not doubt the abstract wisdom of even that particular application despite the fact that they are personally disadvantaged by the application. When people voluntarily obey the tax laws even at personal expense, or voluntarily refrain from exceeding the speed limit even when they are in a hurry, they are obeying laws whose importance they accept and whose application to them, even in those circumstances, seems right in the abstract. Tyler’s question of why people in such circumstances are not selfish—sanctions aside—is a crucial one, but it is important to distinguish it from two other and more difficult questions that little of the existing empirical research is devoted to answering.

One of these questions is about the apparently unsound application of a sound law. As has been understood at least since Aristotle, legal rules, like all rules, are actually and potentially both underinclusive and overinclusive with respect to their background justifications. As a result of this phenomenon, literal, formal, or rigid applications of legal rules may on occasion produce outcomes that appear unwise, silly, absurd, or in some other way suboptimal. Lon Fuller made much of this in arguing that application of H.L.A. Hart’s hypothetical “No Vehicles in the Park” rule to a military truck

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61 See supra notes 57–60 and accompanying text.

mounted on a pedestal in the park as a war memorial by a group of patriots would be inconsistent with the idea of law itself, and his earlier “Case of the Speluncean Explorers,” a fictional variation on the nonfictional *The Queen v. Dudley and Stephens*, made much the same point in the voice of the mythical Justice Foster. For Fuller—as well as for much of the mainstream twentieth-century American legal point of view—it makes no sense to apply a legal rule rigidly, or formalistically, as the omnipresent epithet puts it, when doing so would frustrate either the point of having the rule in the first place or would be inconsistent with larger understandings of justice. And to move from the hypothetical to the real, those who successfully urged disobedience to international law in order to intervene in Kosovo did not argue that refraining from intervention—as in the kinds of instances that Tyler and others have investigated—would have been the right thing to do in the abstract even though it was inconvenient. Rather, they argued that refraining from intervening in Kosovo represented, like the scenarios in Fuller’s hypothetical examples, an unsound application of a sound principle against intervention, and consequently that the


64 Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 618–20 (1949) (concluding that men who intentionally ate a companion while trapped in a cave were not murderers at all).

65 (1884) 14 Q.B.D. 273.


69 See *supra* notes 57–60 and accompanying text.

70 See *supra* notes 63–65 and accompanying text.
abstract principle should be disregarded in favor of—in the words of the prominent legal theorist Spike Lee—"Do[ing] the right thing."\textsuperscript{71}

Once we see that the question of obedience to unsound applications of sound laws is different from Tyler's question of personally inconvenient sound applications of sound laws, we can understand that there is an empirical question to be asked that is also different from Tyler's: the question of when individuals—sanctions aside—would obey the law just because it is the law in such cases of unsound or unnecessary application of law.\textsuperscript{72} Do people refrain from walking against "Do Not Walk" signs in the middle of the night when there is not a car or law enforcement officer in sight?\textsuperscript{73} Do people adhere to rigid legal deadlines when little point would be served in doing so?\textsuperscript{74} And what about officials who apply and enforce the law? Sanctions aside, do police officers comply with the warrant requirement when it seems silly to do so? When do various bureaucrats enforce the letter of the law and when do they take the position that sensible interpretation and enforcement should trump faithful obedience to laws, rules, and regulations exactly as they are written?\textsuperscript{75}

These questions certainly deserve more empirical inquiry than they have received to date. Yet the need for extensive and systematic empirical investigation is even greater for what is perhaps, in the official context, the third and most important

\textsuperscript{71} Do the Right Thing (Universal Pictures 1989).
\textsuperscript{72} For research suggesting that decision makers are more motivated by outcomes than by procedures, see generally Larry Heuer, Steven Penrod & Ayelet Kattan, The Role of Societal Benefits and Fairness Concerns Among Decision Makers and Decision Recipients, 31 LAW & HUM. BEHAV. 573 (2007); and Linda J. Skitka, Do the Means Always Justify the Ends, or Do the Ends Sometimes Justify the Means? A Value Protection Model of Justice Reasoning, 28 PERSONALITY & SOC. PSYCHOL. BULL. 588 (2002).
\textsuperscript{73} That is, when it appears completely safe to do so? My own nonsystematic but extensive investigation of this question leads to the tentative conclusion that the answer varies dramatically, with the residents of Cambridge, Massachusetts and Palermo, Italy at the disobedient end of the compliance spectrum, and the residents of Turku, Finland and pre-1990 East Berlin occupying the opposite end.
\textsuperscript{74} See United States v. Locke, 471 U.S. 84, 93–100 (1985) (upholding rejection of claim when filing deadline was missed by one day and statute appeared to be mistakenly drafted). See also Schauer, supra note 66, at 515–16 (describing the unreported Vermont case of Hunter v. Norman).
question about obedience to law qua law. If the first is Tyler’s question about the inconvenient or personally disadvantageous obedience to wise applications of wise laws, and the second is Socrates’s question about obedience to the unwise application of wise laws in the regions of their misapplication and underinclusiveness and overinclusiveness, then the third is the question about obedience to unjust or unwise laws. It is to this that I now turn.

IV. THE QUESTIONS OF OFFICIAL COMPLIANCE

Many of the classic treatments of civil disobedience have arisen in the context of the obligation to obey those laws whose subjects believe to be unsound, unwise, or, most commonly, immoral. This is the context in which some commentators have argued that there is no such obligation, in which others have stressed that an obligation does not follow from the fact that the legal system claims there is one, and in which still others—including Robert Cover in discussing the northern judges who enforced the Fugitive Slave Laws, David Dyzenhaus in focusing on South African judges and the apartheid laws, and Lon Fuller and Gustav Radbruch with respect to Nazi law—have all attributed to something they call “legal positivism” the view that laws should be followed just because they

76 See supra notes 39–52 and accompanying text.
77 JOSEPH RAZ, The Obligation to Obey the Law, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979) (arguing there is no moral obligation to follow laws); Joseph Raz, Facing Up: A Reply, 62 S. Cal. L. Rev. 1153, 1196–98 (1989) (arguing that voluntary obligation to obey law is an expression of trust in government); Joseph Raz, The Obligation to Obey: Revision and Tradition, 1 Notre Dame J.L. Ethics & Pub. Pol’y 139, 155 (1984) (arguing that if there is an obligation to follow law, it is voluntarily undertaken).
80 LON L. FULLER, Lecture I, in THE LAW IN QUEST OF ITSELF (1940); Fuller, supra note 35, at 658–59.
81 See Gustav Radbruch, Gesetzliches Unrecht und übergesetzliches Recht [Statutory Lawlessness and Supra-statutory Law], 1 SÜDDEUTSCHE JURISTEN-ZEITUNG 105 (1946) (Ger.), translated in 26 OXFORD J. LEGAL STUD. 1, 6–8 (Bonnie Litsewski Paulson & Stanley L. Paulson trans., 2006).
82 That legal positivism encourages or requires obedience to all laws regardless of their immorality is a widely held view for which there is almost no evidence in the positions of
are laws even when they are perceived to be, and are in fact, gravely immoral.

As discussed above, the moral, political, and jurisprudential arguments over this issue have been well-rehearsed for generations, but on this question of obedience to perceived unjust or otherwise unwise laws the empirical research, apart from the historical analyses just mentioned, is almost nonexistent. Neither Tyler nor others have devoted attention to the question of whether people obey the law or believe they should obey the law (which is not the same thing, although the former is arguably causally related to the latter), when the law itself, and not just some application of it, strikes them as unsound, unwise, imprudent, silly, impolitic, or immoral.

The question of obedience to immoral or otherwise unsound laws is undoubtedly applicable to ordinary citizens. The citizenries of apartheid South Africa and Nazi Germany also faced the question whether to follow the laws of the regime in which they existed, and most of the questions about the Fugitive Slave Laws were questions confronted not only by judges, but also by northern citizens faced with deciding whether to return a fugitive slave who arrived, literally or figuratively, on their doorstep. Indeed, citizens in a democracy frequently face the question indirectly when they must choose whether to vote against or condemn those officials who immorally follow the law, and whether to vote for or praise those officials who break the law in the service of morality or sound policy.

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actual positivists. See H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593, 616–17 (1958) (emphasizing that positivism treats the question of obligation as a moral one distinct from the question of whether a norm is a legal one); Frederick Schauer, Positivism as Pariah, in THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 31, 32 (Robert P. George ed., 1996) (arguing against common and misleading caricatures of positivism). Even Bentham, who famously urged people “to censure freely; to obey punctually,” was talking about the imposition of sanctions and not about the moral responsibility of the citizen or official when faced with an unjust law. JEREMY BENTHAM, A Fragment on Government, in 1 THE WORKS OF JEREMY BENTHAM 221, 230 (John Bowring ed., Russel & Russel, Inc. 1962) (1776); see also H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593 (1958), reprinted in H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 49, 53 (1983) (pointing out that Bentham recognized that law’s commands could be so evil that the question of resistance had to be faced).

See supra Part 2.

For a resounding argument against citizen acquiescence to governmental injustice, see generally HENRY DAVID THOREAU, CIVIL DISOBEDIENCE (Fleming H. Revell Co. 1964) (1849).
Yet although these questions are confronted by ordinary citizens, there are good reasons to focus on the behavior of officials in considering the empirical dimensions of obedience to law in general and unsound laws in particular. One reason is that officials are important, and a central question for public law should be the extent to which, if at all, officials take the fact of a norm being a legal one as a component of their decisional calculus. More precisely, public law ought to be interested in the empirical question of when and whether, if at all, officials follow the law when doing so would be inconsistent with their own best all-things-other-than-the-law-considered judgments about what to do.

In addition to being important in its own right, the empirical question of official compliance with law qua law also offers a valuable methodological advantage in addressing many of the larger questions of obedience to law. That methodological advantage comes from the fact that in many contexts officials are immune from legal sanctions for disobeying the law. When we investigate citizen compliance with the law, we cannot normally disentangle the question of how much the citizen feels genuinely committed to the law as law from how much the citizen is afraid of the punishment likely to follow on account of disobedience. Even when citizens are asked in survey instruments to assume away the possibility of punishment, as they are in much of Tyler's work, one cannot avoid the lingering suspicion that citizens' commitments to obeying traffic, criminal, and tax laws, among others, are partly infected by an ingrained belief that bad things happen to us when we disobey the law.

For many officials, especially at lower levels of government, the same fear of sanctions is often a component of their motivation. The police officer who obeys a legal restriction that she believes unsound in terms of law enforcement effectiveness—giving a Miranda warning, for example, or restricting a search to the area encompassed by the warrant—is likely influenced in part by the

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85 See, e.g., TYLER, supra note 57, at 8–15 (discussing study in which people were asked to reflect on past experiences of breaking the law and on the legitimacy of those laws); TYLER & HUO, supra note 57, at 28–30 (discussing study in which people were asked to reflect on past interactions with police personnel, judges, or both, and on the fairness of those interactions).

possibility of personal liability in a civil rights action, in part by the sanction of scuttling a subsequent prosecution, and in part by the prospects of internal administrative sanction, sanctions that are themselves based indirectly on the same prudential considerations. The same applies—if less pervasively and less dramatically—to the actions of city councilors, mayors, and countless administrative officials whose actions take place in the shadow of a decidedly sanction-assisted legal regime.

With respect to other officials, however, the possibility of legal sanctions for violating the law is nearly nonexistent. Such a low likelihood of sanctions might be a function of the absolute immunity from civil rights actions or their equivalent for the president, legislators, judges, and most prosecutors performing most prosecutorial functions. And with respect to those officials who do not enjoy absolute immunity, even qualified immunity substantially lowers the probability of sanctions in practice for vast numbers of other officials. Perhaps most importantly, the simple unlikelihood—technical questions of immunity aside—that many classes of officials will be subject to personal criminal or civil liability in the performance of their official duties, even when that performance violates the law, makes the prospect of personal liability remote.

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91 See, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 813, 818 (1982) (finding that in instances where absolute immunity is unavailable, qualified immunity may still apply).
92 See MICHAEL J. KLARMAN, BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT 223–24 (2007) (discussing how officials were able to avoid sanctions for violating
For the significant portion of officialdom that is legally or practically immune from civil or criminal punishment, therefore, the felt obligation to obey the law can be isolated from the possibility of punishment for violation. Police officers can be subject to personal civil liability for violating clear and well-known judicial precedents restricting police practices, but members of Congress are at no risk when they do the same in voting for legislation that violates clear and well-known, and even recent and highly unlikely to be reversed, judicial precedents. The members of Congress who voted for a flag-desecration statute immediately after *Texas v. Johnson,* or who voted to enact a plainly unconstitutional ban on non-obscene telephonic pornographic conversations by way of a law that was promptly struck down by a unanimous Supreme Court in *Sable Communications of California, Inc. v. Federal Communications Commission,* were not at any risk of nonpolitical sanctions for refusing to follow Supreme Court decisions with which they and their constituents disagreed. And the same applies not only to judicial precedents but also to statutes and the Constitution. A member of Congress who votes to reduce the number of witnesses required in a treason trial to one, or to refuse to seat a new member who satisfies all of the formal requirements for the office, would do

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93 See supra notes 87–88 and accompanying text.


95 491 U.S. 397, 420 (1989) (finding flag burning constitutionally protected). See also supra note 27 and accompanying text.


so with the assurance that nothing outside of political sanctions could be threatened. Moreover, the same applies to a vast number of other officials at various levels of government. Training our attention on legally or practically immune officials, therefore, enables us to see the question of obedience to law in the clearest light.

V. DOES THE LAW REALLY MATTER?

We can now clearly formulate the question before us: Having arrived at what they believe to be the best law-independent decision, when, if at all, are officials willing to set that decision aside in the service of a legal constraint they believe mistaken? Thus, with respect to the law-independent decision, we can postulate in the official context what Joseph Raz has referred to as the best decision on the "balance of reasons." Taking into account that mix of morality, policy, politics, and prudence that informs official decisions, what would the official do if law were in no way part of the picture? When, if at all, do officials subjugate that decision to the law just because the law is the law? Although it is not analytically necessary that all such cases be ones in which the officials believe the law to be mistaken, those are the instances that present the question with the greatest clarity. And that is true because those are the instances in which the law's legal status alone, apart from its substantive desirability, is—or is not—a reason for doing what the law requires.

Even when so precisely (some would say narrowly) framed, the question is hardly unrealistic. Most of the examples with which I commenced this Article are ones in which an official chose to disregard what he believed was a mistaken law, or a mistaken

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99 A law-independent decision may well be a principled and norm-driven one, and need not be one inspired by selfish motivations. In that respect the question I address in this Article is very different from that in Fallon, supra note 88, at 981–82. Fallon distinguishes norm-driven obligations from egoistic ones, but does not distinguish content-based from content-independent norms, and thus does not address the question of when, if at all, officials who are relying on the law or the Constitution are relying on the content-independent authority of the law or the Constitution.

100 JOSEPH RAZ, PRACTICAL REASON AND NORMS passim (1975).
application of law, in favor of his best all-things-other-than-the-law-considered judgment about what to do. Those officials might have insisted on other occasions that the law matters to them a great deal, but if the law only matters to them a great deal when in fact it does not matter at all, then we can seriously question what role the law as law plays in informing official decisions. If the law does not matter when it matters, and matters when it does not matter, it acts as little more for sanction-immune decision makers than a form of rhetorical piling-on with respect to decisions that are made on other, law-free\textsuperscript{101} grounds.

VI. FORMULATING A TESTABLE HYPOTHESIS

The examples that opened this Article are only examples, and were selected not for their representativeness but to raise an issue and clarify the inquiry. There are certainly examples going in the opposite direction. President Eisenhower's decision to send troops to Little Rock, Arkansas, to enforce \textit{Brown v. Board of Education},\textsuperscript{102} despite his personal disagreement with the Supreme Court's decision, is a prominent example. Widespread rule observance in bureaucratic settings has been well-documented, and may be another.\textsuperscript{103} And there are undoubtedly many other examples. Such examples seem comparatively rare, however, although it is possible that I am suffering simply from a failure of imagination. And so it

\textsuperscript{101} I do not claim that the notion of "law-free" is a static one. On occasion, second-order legal values may become so internalized that they become matters of first-order substance and not second-order constraints on first-order substance. Freedom of speech, for example, may be one of these, and it is possible that people's occasional unwillingness to punish genuinely bad people saying genuinely bad and dangerous things out of respect for freedom of speech is largely a matter of free speech having become, at least in the United States, the kind of first-order value that for many people is to be balanced against other first-order considerations in making the right decision. In this regard, however, I suspect that freedom of speech is anomalous, and that similar claims could not be made about many other legally protected values. Still, if law has an effect in shaping social values, then it would be true that the best all-things-other-than-the-law-considered decision might still be a decision that in more remote ways has been influenced by law. This too is an empirical question, and perhaps it is unwise to excessively credit the potentially self-interested views of legal insiders on the pervasive importance of law in molding social, cultural, moral, economic, and political values.\textsuperscript{102} 347 U.S. 483 (1954).

\textsuperscript{103} See BARDACH & KAGAN, supra note 75, at ix–xix, 1–119 ("[P]olicymakers . . . have indulged overregulation that has generated unreasonable and inflexible behavior on the part of the official inspectorate.").
is unwise to prejudge the empirical inquiry by counting anecdotes and battling with dueling intuitions. We can do better, therefore, by setting out a testable hypothesis formulated as follows: When officials are freed from the possibility of personal civil or criminal punishment, their official decisions will not be influenced by the illegality or unconstitutionality of what would otherwise have been the outcome of their moral, policy, political, and prudential calculations. And for those who are reluctant to see social scientific hypotheses formulated in anything other than causal terms, the hypothesis would be that the sanction-independent existence of a legal constraint is not a cause of an official decision.

As just formulated, the hypothesis is assuredly false, but so too would be a hypothesis formulated in terms of what officials always do. What we are really after is a measure of just how frequently—somewhere between never and always—officials set aside their Razian “balance of reasons” determination in the service of laws whose only virtue, from their perspective, is that they are laws. The inquiry is inevitably quantitative, and if the classic method of hypothesis formulation is inadequate for posing questions of “How much?” or “How often?”, then the problem is with the method and not with the nature of the question.

Perhaps, then, the hypothesis to be examined is simply that law qua law matters less than is commonly supposed. Even as so expressed, it is worth emphasizing that the hypothesis appears to have remarkably little political valence. We have heard much criticism over the last eight years about violations of law by the Bush Administration, but the still-unconfirmed nominee for Director

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104 RAZ, supra note 100, at 15–48.
105 There may be a class of officials for whom the conclusions would be very different, and that is the class of officials who are lawyers performing law-specific tasks. Jack Goldsmith, for example, reports that Bush Administration lawyers performing legal tasks were often seen as obstructionist when they insisted that the law needed to be followed. Jack Goldsmith, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 90–94, 154 (2007). It is not clear from Goldsmith’s account whether those lawyers were insisting on the law even against their own substantive judgment. If they were not, then it is not clear that the law was genuinely a second-order constraint on their own first-order policy preferences. But if they were, it is possible that lawyers performing legal tasks internalize the law qua law even if others officials do not, or internalize the norm of legality more than do other officials. Yet the question remains about why officials who internalize law less than lawyers do listen to the lawyers if law does not matter very much, and this is one of the questions that a serious empirical inquiry would attempt to investigate.
of the Office of General Counsel reaffirmed, shortly before her nomination, her view that the president can on occasion refuse to follow Supreme Court decisions with which he disagrees, can on occasion refuse to enforce or even disobey federal laws he believes unconstitutional or inconsistent with "vital national interests such as national security or fundamental liberties," and can rely on "longstanding practice" as well as "constitutional values" to satisfy his constitutional obligations.\(^{106}\) Although Professor Johnsen believes that the Bush Administration dramatically overused and abused its powers to do all of these things,\(^ {107}\) it is not immediately apparent from what she has written that the existence of law as law rather than the existence of morally and politically unacceptable practices (waterboarding comes immediately to mind) does very much of the work in distinguishing for her the wise uses from the abuses. Similarly, if the fact of the invasion of Iraq being a violation of international law is relevant for evaluating that action, apart from its moral, political, foreign policy, and economic consequences, then the fact of the American-led NATO action in Kosovo being roughly equivalently violative of international law\(^ {108}\) ought to be a substantial basis for evaluating that action. But if the fact of the action in Kosovo likely being a violation of international law, as it was then understood, is of little or no moment in political debate, then those who have helped it to be so should not be surprised when it is of little or no moment when the question arises in the context of Iraq.

VII. METHODOLOGICAL PITFALLS

Methodologically, there are at least two substantial flaws in relying excessively on the kinds of examples with which I opened this Article, and that is why they have been presented much less as data and far more simply to expose the nature of the problem. The first flaw is that focusing only on instances in which a policy proposal has actually surfaced overlooks the potentially much larger


\(^{107}\) Id. at 419.

\(^{108}\) See supra note 68.
number of instances in which the law has prevented an inchoate policy proposal from becoming an actual policy proposal at all. If the law coupled with a felt need (whether from obligation or fear of sanctions) to obey the law keeps members of Congress from introducing some number of bills that would be popular if introduced, then the law's less visible import may in fact be much greater than that which we can observe. Thus, the kinds of examples on which I have been focusing are representative only if we assume that something other than law is preventing potentially popular or policy-sound proposals from surfacing. That could of course be so, given the intricacies of interest group politics, policy prioritization, legislative and executive and administrative deal making, variable degrees of salience of different issues for different constituencies at different times, and much else. But at the very least, it is important to recognize that there may be a serious selection bias in focusing only on the examples in which a policy proposal has surfaced without also considering the various factors, possibly including the law, that would prevent a potential policy issue or proposal from surfacing in the first place.

Second, it is important to bear in mind that a consideration or factor can be a reason without being a dispositive one. That the mayor of New Paltz was willing to marry same-sex couples in violation of law does not mean that he would necessarily have been willing to violate the law in cases in which the moral issues were less salient for him, or less pressing for him, or as to which he was uncertain. So there is the distinct possibility that law is a factor even if not an absolute or invariably overriding one, even though finding out when and how this is so would again be an empirically daunting task.

VIII. CAN THE HYPOTHESIS BE TESTED?

I offer my claims only as hypotheses that could and should be tested, but I will not address the question of what kinds of tests would be best suited to that task. As with many other social scientific hypotheses that may be subject to testing, the best test

109 I am grateful to Rick Hills for pressing me on this point.
110 See supra note 16 and accompanying text.
may turn out to be a combination of different tests with different methodologies. Systematic studies of official action will provide the greatest connection with reality, but will suffer from the impossibility of removing all confounding variables and the difficulty of examining actual motivations for official action. Surveys and interviews of officials can remedy some of the problems of determining motivation, but may still present questions about the extent to which what officials say they will do or have done comports with actual behavior. Well-designed experiments with experimental subjects who are unlikely to be officials themselves can provide rigorous isolation of actual behavioral motivations, but there are concerns about external validity. Combining all of these methods, as well as others, however, may enable us to approach some useful and reliable answers about the extent to which sanction-independent law is genuinely a factor in official decisions.

IX. COMPLIANCE WITH LAW UNDER UNCERTAINTY: A REVISED HYPOTHESIS

Any reference to sanctions, however, must take account of political sanctions as well as formal legal ones. Officials like to be promoted, elected, and revered, and do not like to be fired, defeated, and excoriated, and in this respect they do not differ from the rest of us. Accordingly, it may be useful to append an additional and more nuanced hypothesis to the ones described above. This additional hypothesis would be informed by the fact that officials, operating more or less rationally under conditions of uncertainty, can never be completely confident about the ex post public and

\[111\] For responses to these concerns, see Craig A. Anderson, James J. Lindsay & Brad J. Bushman, Research in the Psychological Laboratory: Truth or Triviality?, 8 CURRENT DIRECTIONS IN PSYCH. SCI. 3, 8 (1999); Leonard Berkowitz & Edward Donnerstein, External Validity is More than Skin Deep: Some Answers to Criticisms of Laboratory Experimentation, 37 AM. PSYCHOLOGIST 245, 255-56 (1982); Douglas G. Mook, In the Defense of External Invalidity, 38 AM. PSYCHOLOGIST 379, 386 (1983).

historical reaction to their decisions. If the suspicions about the less-than-often-assumed effect of law on official decisions that I have offered in this Article are sound, then officials who correctly assess public support for their actions on first-order moral, political, policy, and prudential grounds will rarely suffer if those publicly supported first-order decisions happen to violate the law. Kosovo may again be a good example, as are most of the examples that opened this Article. So too is the case of same-sex marriage, with particular reference to the actions of Governor Deval Patrick of Massachusetts. In the face of a decision by the Massachusetts Supreme Judicial Court, the very court that had recognized the right of same-sex marriage in the first instance, that the Massachusetts legislature was required to vote on a proposed constitutional amendment negating the court’s initial decision, Governor Patrick urged legislators not to vote. Patrick’s explicit and seemingly unashamed flouting of the Supreme Judicial Court’s decision is hardly mysterious, however. Governor Patrick presumably knew that if same-sex marriage had public support, the fact that he supported, in this instance, what even a plainly sympathetic court had said was unlawful would be of no moment. His assessment turned out to be correct, and he has appeared to suffer no negative political consequences from the fact of illegality itself, apart from the fact that many people obviously still disagree with him on the fundamental substance of the same-sex marriage issue.

Compare, however, the question of the violation of the Foreign Intelligence Surveillance Act by the Bush Administration. If the hypotheses offered above are sound, then this violation of law should

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113 The converse is that officials who do the wrong thing even with explicit legal authorization will be condemned, and at times legally condemned. See Ronald J. Allen, The Nature of Discretion, LAW & CONTEM. PROBS., Autumn 1984, at 1 (1984) (reporting case in which school officials were held liable in tort for following reasonable rule prohibiting transportation of injured students in vehicles other than ambulances).


118 See supra note 19 and accompanying text.
have produced few if any negative consequences if the war in Iraq had been successful; if American troops had been greeted as liberators; if the war had been warmly and widely endorsed outside of Iraq after the fact; if Osama bin Laden had been apprehended; and if the military actions in Afghanistan had been an unqualified and quick success. None of these states of affairs actually took place, of course, and as a result the political, moral, prudential, and policy assessments of the Bush Administration turned out to be highly unpopular. We have seen that these assessments often made reference to law violations, but it is plausible to hypothesize that the degree of condemnation for violating the law—including calls for prosecutions, show trials, truth commissions, and the like—would have been much lower had all of the counterfactuals just mentioned actually happened. And if this is so, then the hypothesis formulated earlier must be revised. The most plausible hypothesis is no longer that the law does not matter to high officials who are immune from the most obvious and immediate legal sanctions. Rather, we can hypothesize that the law does not matter, ex post, if and only if officials’ first-order substantive assessments turn out to be correct. But when officials’ first-order substantive assessments turn out to be incorrect, as they have largely turned out to be in the case of the Bush Administration’s predictions about Iraq and related issues, then the ex post political and social condemnation, including the possibility of legal sanctions, will be greater because of the fact of illegality than they would have been had the same substantive misassessments not been accompanied by illegality. To put it more bluntly, and slightly hyperbolically, if presidents and other officials guess right on the substance, no one will care that their substantive decisions happened to be illegal; but if presidents and other officials guess wrong on the substance, the degree of social and political punishment will be greater when there is illegality than when there is not.120

119 See Doug Bandow, Expand Torture Inquiry, PHILA. INQUIRER, Sept. 4, 2009, at A19 (calling for investigation into possible Bush Administration tortures); Jeffrey Rosen, Alberto Gonzales’s Spin, NEW REPUBLIC, Feb. 27, 2006, at 10 (calling for investigation into Bush Administration’s violation of FISA).

120 The same may apply to the argument that the law develops when officials who are subject to the law test, and therefore help to shape, the law. If testing the law by violating it is a way to shape the law, then the official who tests the law in this way may—as with much
Presidents and their close advisors are rarely characterized by humility and substantive self-doubt. Nevertheless, the rational official who predicts and desires public political support for his or her actions will take into account the possibility that the predicted, expected, and desired degree of ex post support will not come to pass. Thus, the rational official will take action with respect to the law knowing that the existence of illegality will make more of a difference if the expected support for the substantive policy does not materialize than if it does. It would be reasonable to expect, therefore, that illegality—even if rarely a factor for what turn out to have been substantively popular policy or political decisions—will induce at least slightly more ex ante risk aversion with respect to predicted-to-be-popular but illegal policies than would be present for predicted-to-be-popular policies whose legality could not plausibly be challenged. There will be political penalties regardless of legality or illegality when an action that is expected to be popular turns out not to be, but if the penalty is greater in cases of illegal unpopularity than it is for cases of legal unpopularity, the law may still have an effect, albeit a smaller one, in shaping the nature of official action before one can know whether the policy will turn out to be successful or widely accepted.

X. INCENTIVES TO COMPLIANCE

A longstanding jurisprudential debate has been waged over the question of what features a system of norms must have for that system to count as a legal one. John Austin, famously, equated legal duty or legal obligation with the existence of a threat of sanction for doing other than what the law commands. H.L.A. Hart, more recently and more famously, challenged Austin’s account, locating the essence of legal obligation not in the threat of sanctions, but...
rather in the internalization of a norm or norm system. For Hart and his followers, legal obligation flows from the internalization of legal norms, independent of the possibility of a sanction. This is of course an egregious oversimplification of far more sophisticated and nuanced positions on both sides of the debate, but it presents squarely issues that are of great importance in contemporary public law.

One of these issues is the importance of sanction in understanding legal obligation. Those who have called for legal or quasi-legal proceedings against members of the Bush Administration have sometimes observed that without punishment we have abandoned our commitment to law and to the rule of law, implicitly arguing that unsanctioned violations of law are scarcely violations of law at all. For generations, critics of international law have questioned whether what purports to be a system of law can really be so when sanctions for violations are toothless or nonexistent. Although this is not the occasion to delve deeply into either of these debates, the existence of sanction-free domestic legal duty shows that in many respects the questions about domestic and international law are not as distant from each other as is sometimes thought. Moreover, the possibility that as an empirical matter the norms of legality may be only weakly internalized by officials and their constituents shows that the worries about what the law means when people are not punished for violating it is as pressing a

126 See supra note 119.
127 For discussion of these debates, see Anthony D’Amato, Is International Law Really “Law”?, 79 NW. U. L. Rev. 1293 passim (1985).
128 See Jack Goldsmith & Daryl Levinson, Law for States: International Law, Constitutional Law, Public Law, 122 Harv. L. Rev. 1791, 1794 (2009) (stating that constitutional law and international law both lack “an enforcement authority capable of coercing powerful political actors to comply with unpopular decisions”).
question in the domestic context as it has been for years in international law.

This empirical question about the internalization by officials of law as law has even broader importance. We all internalize a range of norms that determine what actions we take and how we evaluate the actions of others. We may or may not believe in the values we internalize, but we have internalized them to the extent that they become part of the array of considerations that dictate what we do and what we think it wrong to do. A chess player who moves her bishop diagonally but not vertically or horizontally has internalized the rules of chess, and she has internalized the unwritten norms of chess when she refrains from moving her opponent’s knight when the opponent is not looking in the hope that he will not notice. This claim about internalization is true even if her goal in chess is primarily to become famous rather than to enjoy chess for its own sake.

Much the same applies to all rules and all norms. Most people and most officials internalize a range of political, moral, policy, prudential, and social norms, and these norms guide their own behavior and motivate their praise or condemnation of the behavior of others.\(^{129}\) But the question is whether law’s lawness is part of that array of norms and if so, how large a part, on what occasions, and for whom it is determinative.\(^ {130}\) If it turns out, as some of the examples used here suggest, that officials have not internalized legal norms in the law qua law sense, or have internalized a legality norm that is far weaker than their internalized moral, political, and prudential norms, then it may well be the case that in the supposedly law-soaked culture of the United States, law turns out to be less important than it has been in many other places,\(^ {131}\) and that it has been so for a very long period of time. Consider, as a final example, the fact that Michael Dukakis, while Governor of Massachusetts,
vetoed a bill that would have required all public school teachers in Massachusetts to lead the Pledge of Allegiance to the flag on a daily basis.\textsuperscript{132} When questioned about his veto during the 1988 presidential election, Dukakis defended his actions by saying that they were consistent with the content of an advisory opinion by the Massachusetts Supreme Judicial Court,\textsuperscript{133} and compelled by the decision of the United States Supreme Court in \textit{West Virginia Board of Education v. Barnette}.\textsuperscript{134} Dukakis was thus reporting, in effect, that he had internalized the norms of constitutional authority. He was announcing that the Constitution, the opinion of his state's supreme court, and the opinion of the Supreme Court of the United States were sufficient to motivate and justify his actions. What happened, however, was that this explanation immediately provoked sneers of derision from political insiders.\textsuperscript{135} Tom Wicker, for example, then among the most distinguished of \textit{New York Times} reporters and commentators, derided Dukakis's defense of his actions as "too legalistic."\textsuperscript{136} That phrase is telling. If being legalistic—taking the law as law as a reason for action independent of its substance—is understood to be political folly, the consequences should not be surprising. When officials whose substantive views differ from the law, and whose confidence in their ability to understand and influence the substantive views of the public is considerable, continue to treat the law, properly understood, as largely irrelevant to their decisions about what to do, they may be only reacting to the incentives and signals of the society in which they exist. If sanction-independent norms of legality are less present for officials than we have imagined, then in an important way the


\textsuperscript{133} See Opinions of the Justices to the Governor, 363 N.E.2d 251, 255 (Mass. 1977) (finding that compelling teachers to institute pledge under penalty of fine violated First Amendment).

\textsuperscript{134} 319 U.S. 624, 642 (1943) (holding that compelling one to salute the flag is unconstitutional).

\textsuperscript{135} See Lackland H. Bloom, Jr., Barnette and Johnson, \textit{A Tale of Two Opinions}, 75 IOWA L. REV. 417, 417 (1990) (stating that criticism of Dukakis's veto "was more appealing to the voting public" than his defense); Dennis J. Hutchinson, \textit{And Besides Gut Feelings, George?}, CHI. TRIB., June 30, 1989, at 25 (mentioning former President George H.W. Bush's "lambasting" Dukakis); Whitman, supra note 132 (attacking Dukakis's conservative critics).

remedy lies less with the officials themselves than with the public that those officials represent.