

# *The Service Conception and Normative Collective Action*

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## 1. INTRODUCTION

JOSEPH RAZ'S SERVICE conception of authority<sup>2</sup> is the most influential account of normative authority available today. It capably describes and explains the 'right to rule'—understood as the power to impose duties to obey upon subjects—as fulfilling the role of servicing the governed. However, its straightforwardness and flexibility also pose a potential obstacle. It has been argued that the criteria for legitimate authority as specified in the service conception are unfitting, as they allow directives to bind subjects where it is clear that no authority exists, like in the case of financial advice.<sup>3</sup> It has also been argued that it cannot explain parental authority<sup>4</sup> or the authority of criminal law.<sup>5</sup> The goal of this article is to add further details and observations to the service conception that may also help to clear up possible misapprehensions in regard to the theory, showing that some of these objections are misplaced.

The main point is that, according to the service conception, when there is no independent, prior obligation to obey, authority is only legitimate when it helps in solving certain problems that I will refer to as 'normative collective action problems'. These are familiar types of problems such as coordination problems and prisoners' dilemmas, which hamper the agent's ability to conform to reason. The involvement of individuals other than the agent creates a situation in which

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<sup>2</sup> Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 *Minn L Rev* 1003.

<sup>3</sup> See, for example, Stephen Darwall, 'Authority and Reasons: Exclusionary and Second-Personal' (2010) 120 *Ethics* 257 (2010).

<sup>4</sup> Scott Hershovitz, 'The Role of Authority' (2011) 11 (7) *the Imprint* 1, 11–12.

<sup>5</sup> See Scott Hershovitz, *Accountability and Political Authority* (unpublished draft, <[http://sites.google.com/site/nicosstavropoulos/Hershovitz\\_AccountabilityandPolitica.pdf](http://sites.google.com/site/nicosstavropoulos/Hershovitz_AccountabilityandPolitica.pdf)>).

acting in accordance with rational capacity alone may lead to actions that would not be rationally justified, were the agent capable of relying on the behaviour of others. The purpose of authority, according to Raz, is to enable us to ‘secure preexisting goals in ways not otherwise possible.’<sup>6</sup> It is the very issuing of the directive that expands our capacity for rational action, overcoming the natural obstacles that stem from living in a society where brushing up against each other is unavoidable. It opens up new possibilities, hitherto unavailable to conform better to reason. Relying on the behaviour of others is key if a more rational action is to be taken in such cases, and it is only this need—when compliance is central for the achievement of our own goals as individuals in a society—that can provide the moral justification for substituting one’s own judgment with that of the authority. This also means that, in such cases, *de facto* authority—descriptively, successfully exercising power over subjects—is a precondition of legitimate authority. In this respect, this interpretation of the service conception further specifies the circumstances in which legitimate authority can be said to be established.

It is important to stress that the term ‘collective action problems’ is employed here in a broad sense, beyond its regular use in the game-theoretical economic context. In its usual meaning, actors have the sole objective of maximising their self-interest. But the collective action problems I refer to—those relevant for practical authority—are not particularly those in which the agent is trying to act in her own best interest. Normatively, agents have reasons that apply to them regardless of their self-interest, such as reasons to keep promises or to respect one another. In other words, ‘[T]he coordinated schemes of action that political authorities should pursue are those to which people should be committed, or those needed to secure goals that people should have, which are not always the goals which they do have.’<sup>7</sup> John Finnis similarly observed that

The first difference, then, between the concept of co-ordination problem used in game theory and the concept appropriate for political or legal philosophy is that the latter must extend to include situations where, in relation to the ‘situation’ itself and the interests of the parties in that situation as such, there is no convergence or sharing of interests. And the second difference will be that political and legal theory must take into consideration a type of ‘interest’ systematically excluded from game theory (and whose exclusion is particularly evident in the game-theoretical handling of Prisoners’ Dilemma problems), viz. interest in the fairness of the game’s play and outcome, which any player can prefer to an increment in the advancement or protection of his ‘own’ interests.<sup>8</sup>

The term is therefore borrowed to reflect the fact that acting rationally without some type of coordination would not be the best way of conforming to our normative reasons. This demands that the agent take all of the relevant reasons for

<sup>6</sup> The Problem of Authority, (n 2), 1034.

<sup>7</sup> *ibid* 1032.

<sup>8</sup> John Finnis, ‘Law as Co-ordination’ (1989) 2 (1) *Rat.Jur* 97, 100.

action into consideration,<sup>9</sup> not just those that concern her self-interest. Hence the addition of the word ‘normative’ to the otherwise familiar term.

It seems that Raz himself remains vague on the precise nature of the connection between collective action problems and the service conception. In several places, Raz acknowledges that securing coordination is a ‘major, if not the main factor in establishing the legitimacy of political authorities’,<sup>10</sup> and he also mentions the disentangling of prisoners’ dilemmas in this context.<sup>11</sup> However, Raz avoids describing this connection in detail or explaining the difference between parental and political authorities in this respect. This article will tackle these issues and attempt to outline the connection between collective action problems and legitimate authority.

In Part A of this Section, I will briefly present the service conception. In Part B, I shall then utilise Enoch’s observations regarding authority as a particular case of robust reason-giving, which is essential if we are to understand what sort of cases are relevant for the Normal Justification Thesis. Thereafter, Section 2 of this Article will apply the previous Sections and Section 3 will address possible objections, arguing that if Raz and Enoch are correct—and assuming it is not one of the instances where there is no prior, independent obligation to obey—practical authority is only legitimate when it solves normative collective action problems: problems pertinent to complex societies, which hamper the agent’s ability to conform to the reasons that apply to her.

### *A. The Service Conception, in a Nutshell*

The service conception addresses the paradoxical nature of authority. Assuming that our concept of authority entails the capacity to manufacture duties for subjects out of thin air, requiring one to abandon autonomous discretion, an account of authority must address the troubling moral problem of ‘how can it be consistent with one’s standing as a person to be subject to the will of another in the way one is when subject to the authority of another?’<sup>12</sup>

Raz’s answer is comprised of several theses. The core thesis, and the focal point of this article, is the Normal Justification Thesis (hereinafter ‘NJT’): that ‘the normal way to justify authority is that the subject would better conform to reasons

<sup>9</sup> Raz limits the relevant reasons to categorical reasons. These are reasons ‘whose application is not conditional on the agent’s inclinations or preferences, and so on.’ See Joseph Raz, ‘On Respect, Authority, and Neutrality: a Response’ (2010) 120 *Ethics* 279, 291.

<sup>10</sup> *The Problem of Authority* (n 2) 1031.

<sup>11</sup> Joseph Raz, ‘Authority and Justification’ (1985) 14 (1) *Philos Public Aff* 3, 17, 21; see, also, *On Respect* (n 9), 301.

<sup>12</sup> *The Problem of Authority* (n 2) 1014.

that apply to him anyway, if he intends to be guided by the authority's directives than if he does not.<sup>13</sup>

The second condition is the independence thesis: that the matters regarding which the NJT is met are such that, with respect to them, it is better to conform to reason than to decide for oneself.<sup>14</sup> This condition requires that, in the respective case, self-judgment will have no such intrinsic value that will outweigh the benefits of yielding to another's discretion. This condition is not the subject of this article.

Raz explains that we should recognise that self-judgment is very much of instrumental value, at least in part. Our rational capacity 'derives from the fact that there are reasons that we should satisfy, and this capacity enables us to do so.'<sup>15</sup> Self-judgment is not, however, the only means to achieve the end of conforming to reason. If yielding to a directive makes us conform to the reasons that apply to us anyway better than we would without it, we now have a reason to abide by it. Authoritative directives, therefore, must enable subjects to conform better to the background reasons that apply to them anyway if these directives are to be legitimate.

This, however, is only part of the story, as legitimate authoritative directives do not simply produce another reason for action, adding to our set of existing background reasons to factor into our deliberations, eventually using our self-judgment to decide what action to perform. After all, the significance of the duty to obey is that we are to carry out the task required without contemplation. We are not to 'second-guess the wisdom or advisability of the authority's directives.'<sup>16</sup> When we receive an authoritative directive, we are to set aside certain other reasons for action—specifically, reasons such that acting on them might lead to a failure to perform the task specified in the directive. This is what sets authority apart—its directives preempt the background reasons that 'might militate against the authoritative directives and replace them with their own requirements,'<sup>17</sup> thus entailing an obligation to obey. Self-judgment is therefore normatively removed through the concept of preemption, or the preemption thesis—the mechanism behind the creation of a duty. But how exactly does preemption take place?

Raz explains this by using the notion of exclusionary reasons. An exclusionary reason is a second-order reason. More specifically, it is a reason not to act for a first-order reason (or reasons). It excludes them. Once a legitimate authoritative directive is issued, it provides us not only with reason for action, but also with an exclusionary reason: a reason not to act for some of the first-order reasons. Particularly, these first-order reasons are reasons which acting on them would result in failure to perform the task required by the directive. These reasons are

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

<sup>15</sup> *ibid* 1017.

<sup>16</sup> *ibid* 1018.

<sup>17</sup> *ibid* 1019.

those on the ‘losing side of the argument’;<sup>18</sup> those which acting on them would not lead us to conform better to reason. (Even though acting on them would satisfy these reasons in particular, conforming to reason overall demands that all relevant reasons that apply to the agent be taken into consideration and assigned the appropriate weight in determining what action will make us conform best to it.) The reasons excluded are only those that the authority has taken into account in its calculation; if an unexpected circumstance arises which the authority has not taken into account, obeying the directive will not necessarily make us conform better to reason, thus rendering the directive unbinding.<sup>19</sup>

Once the NJT is satisfied, it is easy to see how an authoritative directive provides not only a first-order reason to follow the directive, but also an exclusionary reason. The authority considered and weighed our background reasons for us, and gave us an answer that reflects how to act on them. If the NJT is satisfied, following it will enable us to conform better to our own independent background reasons. (Even though it may not always be the optimal answer that could be given). Once we are given such an answer, we have a reason not to act on reasons that may lead us astray, failing to conform to reason in the manner we would otherwise achieve. In Raz’s words, ‘the mediating role of authority cannot be carried out if its subjects do not guide their actions by its instructions instead of by the reasons on which they are supposed to depend.’<sup>20</sup>

Reasons for action that also act as exclusionary reasons are sometimes referred to as ‘protected reasons’,<sup>21</sup> and according to Raz, protected reasons amount to obligations. Thus, the service conception explains how authority manufactures duties, or at least protected reasons, out of thin air.

### *B. Robust Reason-Giving and the NJT’s Theoretical Appeal*

Before moving on to Section 2, it is useful to employ David Enoch’s analysis in respect to the type of reason-giving that the service conception attempts to explain, as ‘reason-giving’ can be an equivocal term. This analysis is necessary to clarify the precise nature of authoritative reason-giving.

Enoch distinguishes three senses of reason-giving. The first kind is epistemic reason-giving, which operates on a purely epistemic level. Its ‘giving’ is in fact *showing* or *indicating* a reason that is already there, as a background reason already applying to the agent.<sup>22</sup> To borrow Enoch’s example, suppose I decide to tell a colleague how much I dislike him. You urge me not to do so. My response goes

<sup>18</sup> *ibid* 1022.

<sup>19</sup> *ibid*. See, also, Timothy Endicott, ‘Interpretation, Jurisdiction, and the Authority of Law’ (2007) 6 (2) American Philosophical Association Newsletter on Philosophy and Law 14, 16.

<sup>20</sup> Joseph Raz, ‘Authority, Law, and Morality’ in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1994) 198–199.

<sup>21</sup> Joseph Raz, ‘Reasoning With Rules’ (2001) 54 CLP 1, 14.

<sup>22</sup> David Enoch, ‘Authority and Reason-Giving’ (2014) 89 (2) *Philos Phenomen Res* 296, 3–4.

something along the lines of ‘give me one reason not to!’ and you, in turn, reply by noting the negative implications for the intellectual atmosphere in the department. In this example, it seems you have indeed ‘given’ me a reason not to share with my colleague my opinion of him, but this giving was in the form of showing me a reason that was already there, irrespective of your giving it to me.

The second type of reason-giving is what Enoch terms as *merely-triggering* reason giving. It is different from the former type in how it triggers dormant reasons, which are independent background reasons already applying to the agent. The triggering is achieved by manipulating the non-normative facts; but that is all they do. They merely trigger a dormant reason for action. To use one of Enoch’s examples again, if your neighbourhood grocer raised the price of milk, one might say she has given you a reason to reduce your milk consumption; you had had no reason to do so before she raised the prices, and now you do. But notice the particular kind of giving here. You have a general, independent background reason to save money. This reason does not depend on the grocer’s actions. The grocer has simply manipulated the relevant non-normative circumstances. This manipulation has indeed given a reason, but this giving has merely triggered acting on a reason that was there all along.

These two types differ from the third type of reason-giving, which represents a more robust sense thereof. This type triggers a background reason and, moreover, it seems to create a new one, in a more robust manner, as in the case of requests and promises. Requesting and promising create a new reason for action that was not there before. It normatively changes the addressee’s set of current reasons for action. They not only reflect the existing set of reasons but actually change them, just by communicating the intention of doing so.<sup>23</sup> If I promise my mother to visit her on the weekend, I now have a new reason to visit her that did not exist before the promise. I have triggered a general reason to keep promises, but also created a reason that was not there before, adding it to my current set of reasons.

This latter type of reason-giving is the one relevant for practical authority. This is due to the fact that we perceive the dictate itself—the very communication of it—as providing a new reason for action, which we did not have before. Given our intuitive proclivities regarding its ability to impose new duties by expressing an intention to do so, our concept of authority is a particular instance of robust reason-giving. The consequences of this observation will be elaborated later in this article. It is, however, important to emphasise at this point that, since practical

<sup>23</sup> *ibid* 5, 15–16.

authority is a particular case of robust-reason giving, any reason-giving that is beside this type will simply render the NJT irrelevant in the first place.<sup>24</sup>

As noted, robust reason-giving still depends on triggering our background reasons, and duties themselves constitute such reasons. For example, agents can have a background duty to obey someone or something. Some believe that there is a duty to obey the dictates of a regime elected with the proper procedure (such as a treating its subjects as free and equal, or something of the sort). Some argue that this serves as a counterexample to the Razian account: if the legitimacy of authority also depends on such inputs as procedural conditions rather than on the output—the substance of the directives themselves—then the service conception is mistaken to ignore this central element. Raz maintains that such cases are not counterexamples; on the contrary: these are cases when the NJT is satisfied almost trivially. An agent's obligation to obey the regime's commands constitutes a reason, and obeying the command is naturally the best way to conform to such reason.<sup>25</sup>

It is clear, however, that this kind of explanation provided by the NJT for authority is somewhat unsatisfactory. Presupposing a prior duty to obey so that the NJT simply 'confirms' authority is just not that interesting. The interesting question of authority is how it can create a new obligation to obey without the need to rely on some preexisting obligation to obey someone or something (one that the service conception does not attempt to determine). In other words, in such cases the NJT is not a very helpful criterion for the determination of an obligation to obey.<sup>26</sup> (I will call this the 'boring' scenario.) This is particularly important in political contexts, in which presupposing a prior obligation to obey authority is problematic from a liberal point of view. But there are cases in which the service conception need not rely on such prior conditions to determine the legitimacy of authority. It is in these instances—those without a prior obligation to obey—that the NJT performs meaningful theoretical work. These are situations involving collective action problems, as will be elucidated in the following Part.

## 2. AUTHORITY AS SOLVING NORMATIVE COLLECTIVE ACTION PROBLEMS

Agents have strong background reasons to drive safely and efficiently, as well as to avoid endangering the lives of others. Drivers will better conform to these reasons if they act according to the directive to drive on the right than if they do not; due to the disorder in the derelict roads, this would probably result in very slow

<sup>24</sup> Some have an altogether different concept of authority. This concept does not assume that authoritative directives necessarily constitute a new reason for action. Rather, they allow for a more lenient sense of reason-giving, with more room for epistemic components in reasons and reason-giving. See, for example, Donald Regan, 'Authority and Value: Reflections on Raz's *Morality of Freedom*' (1989) 62 *So Cal L Rev*, 995, 1021. The service conception as I understand it, however, does assume that authority entails reason-giving in the robust sense, and I shall proceed in light of this assumption.

<sup>25</sup> *The Problem of Authority* (n 2) 1030.

<sup>26</sup> See Enoch (n 22) 19–20.

or dangerous driving. When a directive instructs us as to which side to drive on, its decree is not intended to affect the agent alone. It also addresses the relevant community—other drivers. De facto authority allows for changing non-normative facts in the world—in this example, that everyone should drive on the right. But the issuing does more than merely changing the non-normative facts. By doing so, it also creates new, better options for rational action that were not there before. The driver is now able to predict the behaviour of others with a high degree of certainty, allowing her to drive more safely and efficiently than before; that is, with improved conformance to her background reasons.

Thanks to this improvement, the driver has now been given a reason to drive on the right, as dictated by the command. Since doing otherwise would make the driver conform worse to her background reasons, this is also a reason to avoid referring to reasons that conflict with the command. Like promises and requests, this reason is given in a robust manner, creating a new reason for action that was not there before, by the mere successful communication of the intent to do so. Thus, the driver is robustly given a protected reason to obey.

It is also worth noting that, in such cases, the ability to solve coordination problems depends on the existence of a non-normative factor: de facto authority. The capacity to address a wide array of people who would actually follow the directive and perhaps even use force to guarantee compliance is a prerequisite of the ability to solve coordination problems. The reaction of other drivers to the decree is thus crucial for a reason to be given, since the reason to drive in the right lane only holds if all or at least a substantive majority of other drivers do the same.

This outcome is not limited to coordination problems of this kind. Similarly, another example of this type of situation is prisoners' dilemma cases. Here, too, there is a sort of collective action problem in which individuals cannot achieve desired results without outside interference that would secure certainty. The authoritative directive changes the way others behave, giving the agent a reason to obey as well, since obeying in this new situation—and reaping the fruits of cooperation made possible through the obedience of others—will have the agent conform better to her independent background reasons.<sup>27</sup>

There are other possible instances, beyond problems of the types described above. These are instances in which we have certain prior general obligations, but conforming to them may prove difficult. This is because we live in large, complex societies and it can be unclear how to discharge obligations towards the people constituting a large moral community. These obligations provide us with independent background reasons, because the obligations themselves constitute reasons for action. An authoritative directive, with its de facto power and capacity

<sup>27</sup> Authority and Justification (n 11) 17–18.

to address and be obeyed by a large number of people, can help us to better conform to these reasons.

This is illustrated by the following example. Let us assume a public good, which needs to be funded by the entire community, as they are all beneficiaries. Let us also reasonably assume that I have a general obligation to carry my own weight in the community. It is unclear to me, however, how exactly to discharge this obligation towards my fellow members. What amount should I pay and to whom? This duty requires further specification if it is to be fulfilled in a meaningful way. Only a body that can calculate the correct amount and distribute it between all relevant members of the community, while possessing the ability to ensure its collection, can specify how to fulfil this duty, thanks to its *de facto* authority. Once the proper amount is set and the relevant directive is given to all relevant members of the respective community, obeying the directive will enhance my capacity to conform to reason and fulfil my obligation.

Indeed, coordination does play a role here, but this example is different from the previous ones, where the role played by collective action problems is intrinsic to the difficulty of conforming to reason. In this case, the problem is not collective action itself but rather the difficulty of discharging certain abstract prior obligations. The focus here is on the authority's ability to help us discharge obligations in a way we could not pursue without the directive. Collective action problems thus only play an instrumental role in the existence of a difficulty to discharge a prior obligation. Therefore, cases of further specification of obligations do not entail collective action problems by definition. But this example nevertheless describes a type of normative collective action problem. It is difficult to discharge the obligation precisely *because* we live in large, complex societies, and it is a collective action problem—in this case, funding a public good (as a result of a free rider situation, for instance)—that gave rise to the normative problem in the first place. Without collective action problems, this difficulty would not have been incurred, as it pertains to interacting with other individuals. Therefore, collective action problems, albeit instrumental in this context, are inherent to this type of difficulty of discharging obligations.

Analysis of the requirement for robust reason-giving and its application as described above leads to the observation that, when no prior obligation to obey exists, reasons for action can only be robustly given when normative collective action problems are involved. If there is no problem limiting our capacity for rational action, the command will fail to provide a reason for action in the robust sense—the sense relevant for authority. We would simply not be robustly given a reason to follow the command. The common element shared by all instances where the authority succeeds in giving a protected reason without relying on a prior obligation to obey is that they all have to do with how we behave and interact with other persons. One of the consequences of living in a complex society is a reduction in the ability to conform to reason in some situations, as the conduct

of others is often difficult to rely on. This reduction is manifested in collective action problems. Another implication of this analysis is that, when there is no prior obligation to obey, *de facto* authority is a prerequisite of legitimate authority.

Raz himself states that ‘the case for the legitimacy of any political authority rests to a large extent on its ability to solve coordination problems and extricate the population from prisoner’s-dilemma type situations.’<sup>28</sup> But, given the nature of robust reason-giving (more accurately, robust duty-giving of the sort authority engages in), it is difficult to see how in fact *any* authority, not just political ones, can be legitimate without this ability (again, prior obligations to obey put aside).

The main paradox of authority, which Raz called ‘the moral problem’ and Robert Paul Wolff referred to as ‘the anarchist challenge’,<sup>29</sup> addresses the incompatibility of authority and autonomy. Raz has made great advancements in settling these two concepts with the service conception. If we take autonomy seriously, we should aim to find a reasoning that can limit the relinquishment of self-judgment without forfeiting the benefits of authority. In my account, the justification for authority lies in the need for a device to help us overcome the obstacles stemming from the commonplace nature of interaction between individuals, ultimately diminishing our options for rational action, crippling the ability to achieve our own goals. Yielding to authority is the way—perhaps the only way, or best way—for humans to overcome these hurdles. Self-judgement will, in such cases, only limit our capacity for acting rationally, compared with being bound by directives. This means, for example, that on an island with only one person, no one can have authority.

This understanding is reinforced by the nature of preemption as an inherent feature of authority. The directive must normatively bind the subjects if it is to fulfil its role. It must guarantee the proper reaction of each member of the relevant community, and this is achieved by the binding power of the directive. In the absence of preemption, a reason for action might not be given at all. There may very well be theoretical authorities capable of producing reasons for belief, but these are not practical authorities that produce reasons for action. They can neither ‘change things in the world’<sup>30</sup> nor produce duties by mere say-so. The nature of directives in normative collective action problems is that they must be treated as binding if they are to enable us to solve problems. It is this nature that brings the ability to morally bind subjects (or, at the least, create protected reasons).

A refined outline of the cases in which we are morally obligated to obey holds a theoretical advantage. Duties are a serious matter, and an account that sets a high bar for their production by mere say-so seems to balance the tension between

<sup>28</sup> *ibid* 21.

<sup>29</sup> Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper & Row 1970). I understand Raz’s moral problem of authority as reiterating what Wolff referred to as ‘the anarchist challenge.’

<sup>30</sup> The Problem of Authority (n 2) 1034.

autonomy and authority in a satisfying manner.<sup>31</sup> This is consistent with our conception of liberty and seems to take on, with relative success, Wolff's challenge regarding the incompatibility of authority and autonomy. Only problems that could not be otherwise redressed in a significant way and which the redressing thereof ultimately serves the subjects can justify this (normatively speaking) drastic measure of relinquishing self-discretion that happens when one is subject to authority.

### 3. OBJECTIONS

The above analysis of Raz's service conception might raise some objections. Relevant though they are to my interpretation, I will refrain from repeating all the general objections levelled against Raz's account and focus rather on difficulties that stand out in particular, in light of my suggestion to limit the service conception to normative collective action problems.

The first objection, raised by Scott Hershowitz,<sup>32</sup> is a general objection to the Razian account. According to this objection, the service conception leads to the odd conclusion that criminal law has no legitimate authority. This is due to the fact that most criminal laws simply set the floor for acceptable behaviour, while most of us are perfectly able to conform to our reasons and obligations to respect the lives and property of others without a directive ordering us to do so. In other words, the directive does not enable us to conform better to reason, leaving the NJT not satisfied. The implausible result of criminal law having no authority renders the NJT an unfitting criterion for authority.

However, asserting that criminal laws do not give reasons in the robust sense might be too hasty. Consider Hobbes and his State of Nature. In this State, rational agents acting by their rational capacity cannot achieve optimal results as they might if they could rely on the behaviour of others and secure valuable cooperation. Indeed, the reason to respect the lives of others might exist for them independently, but in a world where many others fail to act on this reason and threaten the agent (as the lack of the directive and its enforcement will have a causal

<sup>31</sup> A somewhat surprising advantage of this understanding lies in its appeal to consent-oriented theorists. There is no consent in this account, actual or hypothetical, and Raz famously denounces a consent-based theory of authority. But hypothetical consent theorists focusing on normative notions of consent may find this appealing. See David Estlund, *Democratic Authority* (Cambridge: Cambridge University Press 2007). Situations like free rider problems and coordination problems are cases in which the subject's actual consent isn't given not because she finds it against her interests or reasons for action, but because she does not have the capacity to act on them. Given the fact that a lack of obedience can manifest itself in results harmful to society, normative consent can be said to be given in these cases.

<sup>32</sup> See *Accountability and Political Authority* (n 5).

effect in the world), the agent's reason for self-preservation is likely to outweigh the contradicting reasons.

As we know from the familiar game theory analysis of *Leviathan*, outside interference is needed to solve this prisoner's dilemma successfully and avoid living a 'nasty, brutish, short'<sup>33</sup> life. This is a collective action problem in the narrow economic sense, focusing on the interest of the agent, but self-interest is a normative reason for action as well, and therefore it is also included in the wider sense that I address. In this instance, regardless of the reason we all have to respect the lives of others, the directive increases the capacity to conform to reason by eliminating risks posed from interacting with others. The issuing of the directive, along with a de facto ability for enforcement, is what coordinates and gives the agent the ability to rely on the behaviour of others. This makes possible developing a life free of constant fear and benefiting from cooperation with others. This makes for better conformance to reason, thus constituting reason-giving in the robust sense. Consequently, the typical prohibitions on murder, robbery, assault, etc. (accompanied by the enforcement of which) are authoritative by virtue of their coordinative quality.<sup>34</sup>

Alternatively, one may remain unconvinced by the Hobbesian example. But perhaps the fact that many criminal ordinances do not have authority over their subjects is not such an implausible conclusion after all. Most persons do not need the law prohibiting murder to enable them better to conform to reasons applying to them anyway (namely, an obligation to respect the lives of others). If one's reason to respect another individual's life is indeed sufficient for her to conform to reason and not take the life of another, her actions are the same as they might be, were she to follow the directive. If the end result is the same, the lack of authority of criminal laws has no physical impact in the world. Albeit applying only to causal rather than normative aspects, this already makes the conclusion of criminal law having no authority less scandalous than it may have sounded at first. Similarly, even if criminal law has no authority over the general public (or at least the law-abiding majority thereof),<sup>35</sup> it does not follow that the lack of authority of these provisions leads to a situation in which violating them is somehow permissible or

<sup>33</sup> Thomas Hobbes, *Leviathan* (first published 1651, Indianapolis: Hackett Publishers, 1992).

<sup>34</sup> It is possible that not all criminal prohibitions always carry such coordinative quality. Perhaps legal norms such as prohibiting certain drug use or requiring wearing a seat belt in a car generally lack this quality. It seems quite plausible to me that a legal system would have authority in some cases but not in others.

<sup>35</sup> It can be argued that criminal law has authority over certain persons in their official capacity, such as judges, prosecutors, or other law enforcement personnel. This however is not the critique Hershovitz aims for, as I understand it. His critique refers to the common notion that criminal prohibitions such as the prohibition on murder or theft must be obeyed by the general public.

less morally grave. Nor does it follow that the use of coercive force by the state on those who commit such acts is not justified.<sup>36</sup>

Another part of Hershovitz's argument includes a person with a duty to financially support her family who goes to hear the advice of a financial expert as to how to invest money for the future in the best way possible. Abiding by the expert's utterance as to which fund to invest in would make an investor conform to reason better, thus creating a binding directive from a financial advisor—an implausible result.<sup>37</sup> In addition, is it not arbitrary or even random that I am obliged to obey this particular expert who happens to advise me? Isn't it odd that the 'right to rule, understood as correlated with the obligation to obey on the part of those subject to the authority',<sup>38</sup> can be so arbitrarily exercised?

Not necessarily. Firstly, again following Enoch, I suggest that the right to rule needs to be understood simply as the capacity to create an obligation to follow its directives. It does not contain an element of directionality. This, as Enoch contends, is because the duty to obey is not owed to authority itself. To demonstrate this, Enoch describes an arbitrator,<sup>39</sup> agreed upon by two opposing parties and possessing practical, legitimate authority. The arbitrator has produced a decision in favour of one of the parties, but the losing party refuses to pay. To whom does the losing party owe the duty to obey? Who is the injured party whose rights have been breached? It is much more plausible to say that the injured party here is not the arbitrator herself. If anyone, it is the winning party, even though she is not the possessor of authority in this case. Consequently, the right to rule should not be understood as obeying authority *as an entity*. As Raz puts it, one cannot *be* a practical authority; one can only *have* practical authority.<sup>40</sup>

Without directionality, the randomness of attaining the right to rule is less of a surprise, since no special standing with the authority is necessary. It may come as no great surprise that the right to rule is achieved with what can be viewed as random or arbitrary factors. It might be the case that the financial advisor was simply the first option to come up in the telephone directory. But this does not seem to hold particular relevance for the authoritativeness of the directive. It is unlikely that the way some people have gained political authority is excused of elements

<sup>36</sup> It might be worthwhile to stress that I am not positively claiming that criminal law does not require any justification. Rather, I raise a more modest negative point: that Hershovitz's objection is less powerful than it might seem at first glance, in the sense that even if criminal law does not generate duties according to the service conception, this would not lead to counter-intuitive conclusions such as murder or theft being morally permissible, or that imposing criminal sanctions is not justified (see, also, Joseph Raz, 'The Obligation to Obey: Revision and Tradition' (1985) 1 *Notre Dame JL Ethics & Pub Pol'y* 139, 143–144). However, other counter-intuitive ramifications of this assertion might remain, and are not tackled in this article.

<sup>37</sup> *The Role of Authority* (n 4), 10.

<sup>38</sup> Joseph Raz, *The Morality of Freedom* (1986) 23.

<sup>39</sup> See Enoch (n 22) 28–29.

<sup>40</sup> *The Problem of Authority* (n 2) 1032–1037. The same is not true of theoretical authorities. With them, someone *is* the authority. See *ibid*.

such as chance or opportunity. If the main role of legitimate authority ultimately is to serve its subjects, focusing on elements other than this feature as a necessary condition for authority seems ad-hoc, in this aspect.<sup>41</sup>

This understanding contradicts Darwall's and Hershovitz's approach, which assumes the existence of some normative standing or status between ruler and ruled. For Darwall, the authoritativeness of the command is expressed in the accountability of the subject towards the authority.<sup>42</sup> Similarly, Hershovitz posits that the 'ordinary way' of understanding the right to rule is in the form of the particular relationship between the ruler and the ruled.<sup>43</sup> For them, authority necessarily includes an element of directionality: the duty to obey is owed *to the authority*. Hershovitz and Darwall alike share this conception. What can be the source of this anthropomorphic view of authority?

Perhaps because directives usually come from a person or perhaps because of the ambiguity of natural language, authority can be misconstrued to have person-like attributes. Indeed, authority can be tightly connected to the identity of the person giving directives—so much so that they may sometimes seem interrelated. This holds particularly true if authority stems from a prior obligation to obey a certain person, perhaps a parent. But these are usually those cases where a prior obligation to obey exists and the NJT simply 'confirms' authority (the 'boring' type of cases discussed earlier, when the NJT is not an interesting criterion for determining an obligation to obey). Here too, the existence of practical authority is more of an inference drawn from the special relationship and the obligation it already contains, rather than an inherent part of the relationship.

Authority is an intangible instrument at our disposal (admittedly, an instrument that must be used by people if it is to fulfil its purpose), and it is people who are ultimately the possessors of practical authority. Nevertheless, authority is an instrument. The person issuing the directive is not an authority; he only *has* authority. Indeed, Raz convincingly states that he is more used to the idea that the authority is accountable to its subjects than the other way around.<sup>44</sup> This does not contradict the fact that authority can stem from prior obligations rooted in special relationships.<sup>45</sup> As stated, standings involving prior obligations can be sufficient to establish authority, but not every instance of authority necessarily entails it. This

<sup>41</sup> Raz leaves room for such considerations, as an alternate sufficient criterion. He explains that along with the Normal Justification Thesis, which is the normal way to accept authority, there are other, 'deviant' reasons for one to accept authority. This is beyond the scope of the NJT and this Article. See *Authority and Justification* (n 11) 19–21.

<sup>42</sup> See Darwall (n 3).

<sup>43</sup> Hershovitz has a slightly more nuanced account than Darwall's, based upon the roles individuals play in practice (see *The Role of Authority* (n 4) 11–19). The core point, however, remains the same, since the roles are 'played' by people.

<sup>44</sup> On Respect (n 9) 299.

<sup>45</sup> Joseph Raz, 'Promises and Obligations', in P.M.S. Hacker and Joseph Raz (eds), *Law, Morality and Society: Essays in Honor of H.L.A. Hart* (Oxford: Clarendon Press, 1977) 228.

narrow understanding coincides with the instrumental role of authority, as well as with Raz's wording.<sup>46</sup> It is consistent with the view of authority as a minimalistic mechanism, a device with no personality or human characteristics, intruding as little as possible, only when people have problems that could not otherwise be redressed in a significant way.

Secondly, and more importantly, it may be the case that the financial advisor does not have the capacity to impose duties according to the service conception at all. The expert did not in fact succeed in creating a reason for action, as the utterance itself only instructed the investor on how best to invest. The investor already had the rational capacity to choose to invest in that particular fund; she simply hadn't had enough information. The utterance itself is not what made it possible for her to conform to reason and invest in this particular fund. But how is this different from the difficulty to discharge obligations because we do not know how to do so, as in the tax example discussed previously? The financial advisor scenario is different because, in the tax example, the authority's setting of the correct amount and system of collecting, enforcing and coordinating could not have been achieved without the authority, as the correct amount for an individual to pay depends, among other things, on what his peers would pay. In this sense, the very existence of a 'proper' amount to pay is only possible thanks to the authority and its issuing of the directive. By contrast, the financial advisor has merely given the investor a reason to hold the *belief* that investing in a particular fund will make her best conform to reason; i.e., a reason for belief, rather than a reason for action. Accordingly, this is a case of theoretical, rather than practical, authority.<sup>47</sup>

Another objection focuses on a further implausible implication: the illegitimacy of parental authority. Arguably, parents have—in general—authority over their children. But if the above analysis regarding the conditions in which reasons are robustly given is correct, it is difficult to see how parents give a reason for action in the robust sense when they issue directives. Parents, at least those of a single child, do not coordinate anything, nor does it seem that they specify a prior unclear obligation of some sort. The NJT seems like a good account of political authority, but when it comes to parental authority, the NJT (or at least my account of it) apparently falls short. There does not seem to be any normative collective action problem that parental authority aims to solve. Similarly, the NJT seems to fall short in explaining why specific parents have authority over specific children.

Indeed, the collective action problems previously discussed seem beside the point here, and yet it appears very plausible that parents have authority over their children. (At least some parents, some of the time). But we have also said that this is not the only way to meet the NJT criterion and establish authority. There is another way to do so. As you may recall, there are instances where the NJT does not perform any interesting theoretical work. Those are the cases where

<sup>46</sup> Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) 16–20.

<sup>47</sup> On Respect (n 9) 301.

there is a preexisting, independent obligation to obey someone or something. This preexisting obligation constitutes a reason for action, a reason that would unsurprisingly be best conformed to by obeying the directive. But in this ‘boring’ scenario, we must still safely establish that there is a prior obligation for a daughter to obey her parents. Can this be achieved? The answer to this question requires a discussion that is beyond the scope of this article, but I will argue in short in the following paragraph that the answer is yes. It should be noted, however, that if an independent, prior obligation of a daughter to obey her parents cannot be determined, then it must be conceded that, according to my account and contrary to common intuition, parental authority is false, with all the bullet-biting rewards of this conclusion.

In his example, Hershovitz uses the example of a stranger with excellent parenting skills approaching another parent’s child and ordering them around. He uses it to establish that better parenting skills, i.e. making the child conform better to reason, are not enough to establish authority (thus disproving the NJT); rather, it is the special moral relationship between a parent and their children that establishes it.<sup>48</sup> Hershovitz agrees that parents and children have a special standing between them, one that can give rise to duties. Now, once we remember the ‘boring’ scenario and assume a prior obligation of children to obey their own parents, this example poses no special problem for the NJT.

#### 4. CONCLUSION

The notion that the main role of authority is to solve collective action problems is not a new one. However, Raz avoids any explicit reference to collective action problems as the *raison d’être* of authority. My aim was to show that when there is no special, prior obligation to obey, the solving of such problems is the only path for establishing legitimate authority, according to Raz’s own account. Another observation to be drawn from the analysis presented here is that, in these types of cases, legitimate authority can only exist when there is *de facto* authority, since only *de facto* authority has the physical capability to coordinate and solve these problems. This understanding of authority has the advantage of capturing the significance of autonomy while still fitting within our intuitive grasp of the concept of authority. Raz’s account seems to support this understanding, or at least not to contradict it.

<sup>48</sup> See *Accountability and Political Authority* (n 5) 13.