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Must We Obey the Police? Understanding the Power of Law Enforcement

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Itzel Aurora Garcia

Dissertation Committee:
Professor Aaron James, Chair
Distinguished Professor Margaret Gilbert
Associate Professor Jeffrey Helmreich

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DEDICATION

To

Everyone, except the police.

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VITA

Itzel Aurora Garcia

2016 B.A. in Philosophy, University of California, Santa Barbara

2018 M.A. in Philosophy, University of California, Irvine

2022 Ph.D. in Philosophy, University of California, Irvine

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ABSTRACT OF THE DISSERTATION

Must We Obey the Police? Understanding the Power of Law Enforcement

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Professor Aaron James, Chair

The field of political and legal philosophy has for too long assumed that our obligations to obey law enforcement are justified by our obligations to obey the law. In this dissertation, I show that this is an assumption that cannot, and should not, be made easily for the case of policing institutions in the United States. The conspicuous injustice in the way law enforcement exercises its authority should raise doubts about this assumption.

What then, does it meant to say that police officers have authority? And when can this authority be said to be morally justified? This dissertation answers the former question: Police authority is the liability inducing moral power to change the normative situations of the people they have authority over. My work suggests helpful ways to begin to answer the latter question: Police do seem to currently have some sort of genuine political authority, yet if we recognize this authority as a *power* that makes people *liable* to them and not, as has been commonly assumed, an obligation entailing the right to be obeyed, we can begin make sense of the particular problems that modern police pose for our conceptions of political and legal obligations, and for our moral statuses as members of the United States.

The first chapter of the dissertation outlines and analyzes traditional theories of political and legal obligation, I show that these theories do not yet adequately justify obligations of obedience to police institutions or officers. In some cases the views fail to justify obligations to the police for factual reasons about how the police in the United States actually work, in other cases this justification fails for conceptual reasons unique to the theorist's views on what it means to have legal or political obligation. In other cases still, this justification fails because the topic of law enforcement or policing is wholly ignored. Here I examine legal positivism and show that neither Hans Kelsen nor H.L.A Hart nor Joseph Raz adequately justify obedience to police as "organs of the law." I also examine arguments from membership or voluntaristic theories of political obligation, including those of Margaret Gilbert and John Rawls, I argue that they too fail to ground prima facie obligations of obedience to the police.

In the second chapter, I present Arthur Applbaum's power liability account of political authority and apply it to the case of modern policing. A power liability account of police authority holds that the authority of police officers is a liability-conferring moral power to change the normative situations of the people officers have power over. I explore what it means to say that police authority is a moral power, how officers might change the normative situations of people, and what it means for a person to be liable to the police. I draw out a significant if neglected implication of this view for police authority: even if fully legitimate, the authority of police (to change normative situations) does not necessarily nor conceptually entail a duty to comply with police directives.

The third chapter of the dissertation develops this implication. I argue that the power liability view of police authority is agnostic on the moral question of when and how

police directives can be said to properly, or justifiably, obligate individuals to obedience, if at all. Indeed, this a natural position to maintain in the face of the realities of police abuse. I suggest that the power liability account is nevertheless compatible with Rawlsian duties of justice that might be said to independently establish qualified reasons for obedience to police, or at least respect for law enforcement institutions. Here I compare the power liability view of police authority with Tommie Shelby's Rawlsian treatment of modern policing. Both accounts justify disobedience to the police, but for quite different reasons. In Shelby's view, we have content and context dependent reasons not to obey law enforcement. I remain agnostic about whether we have such moral reasons and take the power liability view to, prima facie, justify disobedience to the police.

In chapter four defend the power liability view of police authority by offering three arguments for the view. The *argument from resistance* maintains that public debates about the need for obedience among people abused by the police are fundamentally misguided and morally unfounded. The *argument from debate capture* points us to where the proper moral center of debates between police reformists and police abolitionists is, namely, in the question of which moral powers police should have, and in which ways we can reasonably ask people to be liable to law enforcement. Finally, *the argument from targeted significance* tells us that it is possible to reach the radical conclusion that police are not morally owed obedience without having to deny the legitimacy of political and police authority and without having to deny the legitimacy of the authority of law. One need not be an anarchist to think that disobedience to police may be justified.

Although my arguments in this dissertation are confined to the authority of policing in the United States, I believe my analysis can be extended to the case of border

enforcement agencies. This is a point I plan to develop in future work

CHAPTER 1: POLITICAL OBLIGATION AND THE PROBLEM OF MODERN POLICING

I. Introduction

The field of western political and legal philosophy is rich in theories of what it means for us to be obligated to obey the law, along with the directives of those who wield political, legislative, or judicial authority. Correspondingly, the field is also rich in theories of when and how members of political and legal communities, henceforth polities, have obligations to obey the directives of law.[1] Despite providing careful analyses of these topics, however, traditional theorists do not examine rigorously, or sometimes even consider, the topic of those who enforce the law specifically.

The aim of this chapter is to present some standard assumptions about legal obligation and the obligation to law enforcement officials, and suggest why, in view of the reality of modern policing in The United States, they require more careful examination and justification. I leave aside the question of what police authority is for now, and work to establish two main points. First, traditional political philosophers—sometimes explicitly and sometimes implicitly—tend to assume the premise that, if one has the obligation to obey the authoritative directives of the law generally, then one equally has the obligation to obey the directives of law enforcement officials. Second, that this assumption that should

[1] I use the term "directives" here as opposed to "commands" or "orders". Following Margaret Gilbert, I take the latter two to presuppose a legitimate political authority, whereas here the word "directive" is open to the possibility that the directive does not come from a legitimate authority and to the possibility that it does not entail an obligation to obey the issuer of the directives (Gilbert, A Theory of Political Obligation: Membership, Commitment and the Bonds of Society 2006, 5-7).

not be made easily.

My aim in this chapter is to cast doubt on the widely accepted view that obligations of obedience to the law conceptually or morally entail obligations of obedience to policing institutions and officers. Indeed, I claim we should not assume obligations to police from obligations to the law. By first showing that we have pressing, non-theoretical reasons to be skeptical of police—this sets the stage for a deeper examination of our political, legal, and moral assumptions about them in the remainder of the dissertation.

II. The State of Policing in The United States

In an ideal political society, it could be that we would have no especially pressing reason to think carefully about the connection between the authority of law enforcement and the supposed obligations people of any state have in relation to law enforcement. But in our less-than-ideal societies, features of law enforcement and policing require us to question whether there is indeed an obligation to obey law enforcement officials. In particular, the many ways policing powers are unjustly exercised, for example within the United States, require more careful conceptual analysis of the very nature of police authority. To make matters concrete, I begin by outlining three problematic features of policing in the United States.

The first feature of police institutions that poses questions about the nature of police authority is the role of officer discretion.[2] The choices individual officers make are,

[2] I follow R.E. Worden and S.J. McNeal here, who define police discretion as the capacity of an individual officer to choose between courses of action based on that officer's own judgment (Worden and McLean, "Police Discretion in Law Enforcement" 2014).

in most cases, based on the officer's own interpretation and assessment of the situations they find themselves in. This of course is true of everyone: Aristotle famously argued that ethics is grounded in our judgements of our particular situations, and in our capacity to make choices and act accordingly.[3] Yet, as Hobbes famously emphasized, this freedom to judge and act for ourselves also must be constrained lest we find ourselves at war with one another.[4] If law backed by a measure of police authority is our general basis for social order, what makes officer discretion a unique moral problem is the fact that its abuse is often institutionally rationalized, protected, or even encouraged, even upon review in courts of law. Because officers do not normally work under direct supervision, the outcome of their interactions with non-officers depends heavily on how they themselves choose to exercise their discretion over the often asymmetrical use of force.

In the United States, at least, the situation described above is made even worse by a second feature of policing that calls for an examination of police authority: a phenomenon widely known as police militarization. Following Peter Kraska, we can define police militarization as the embrace and implementation of the use of force through military tactics as a means to resolving ordinary civilian issues.[5] The Congressional 1997 Defense Authorization Act best exemplifies the phenomenon in the United States: section 1033 of this act allows the Department of Defense to give excess military equipment to law enforcement agencies such as the police.[6] From January to March of 2022 alone, for example, the Los Angeles Police Department has received at least $1.5 million in equipment

[3]Aristotle, *The Nicomachean Ethics,* Book II.
[4] Hobbes, *Leviathan* 1996, 76-103.
[5] Kraska, *Militarization and Policing—Its Relevance to 21st Century Police* 2007.
[6] Congress 104th 1997.

ranging from rifles and thermal night vision goggles, to military trucks. Similarly, in Sacramento County, policing units have acquired $9.3 million in equipment, including two military helicopters.[7] Scholars have theorized that, besides the obvious dangers of allowing individual officers to yield military grade weapons at their discretion, the sheer amount of force available at any given officer's discretion creates a power imbalance in favor of police officers. Consequently, as Aziz Huq explains, brutality routinely "falls especially hard on racial minorities," in a "surefire formula for cruelty."[8] And this only exacerbates a long history of racialized brutality, which, James Baldwin lucidly explained in his 1966 "A Report from Occupied Territory."[9]

This is in turn completed by a third standard feature of policing: the systemic lack of police officer accountability. Legal systems in the United States make it extremely difficult to hold officers accountable for misconduct. It is notoriously difficult to prosecute officers for improper use of force in the United States. given: the nationwide influence and power of police unions in officer contract negotiation and implementation; the power of these unions in criminal proceedings against officers; the lack of real authority of civilian oversight programs over police departments; and court sanctioned doctrines such as qualified immunity, which protect officers from personal lawsuits.[10]

In noting the foregoing three standard features of contemporary policing, my goal is not to provide an in-depth analysis of ways that police perpetuate and uphold systemic injustice in the United States. This work has already been done by sociologists and social

[7] Defense Logistics Agency 2022.
[8] Huq, *Dignity Not Deadly Force* 2017, 42.
[9] Baldwin, "A Report from Occupied Territory" 1966.
[10] See Barbaro 2020 for an in-depth report of "the systems that protect police".

scientists. I only wish to show, briefly, what is at stake in our philosophical analyses of policing. I submit that the persistent and egregious realities of policing, past and contemporary, give us reason to examine the connection more carefully between any putative general duty to obey the law and the duty to obey police directives.

Here I don't mean simply to raise the question of how we could have an obligation to obey unjust police directives, much as one might ask how we have an obligation to obey an unjust law. A larger question we could ask is what police authority is and whether, and in what circumstances, it creates obligations of obedience in polity members. I return to those broader questions elsewhere. My aim in this paper is to show that traditional legal and political philosophers assume that obligations to the police are inherited from obligations to the state or to the law, and that this assumption requires more careful examination.

In addition, the hard realities of police abuse are enough to warrant suspicion of theories of political obligation that ignore the question of obedience to police, or simply assume that an obligation to obey the law simply carries over to or generates a duty to obey police directives. As we'll now see, this suspicion is fully justified once we more closely analyze prominent philosophical views of the authority of law—including what they say, what they do not say, and what they could say about policing. The standard views, it is fair to say, have simply failed to raise the issue.

III. The Positivists and Policing

In the next sections I present and analyze accounts of legal and political obligation in the

positivist tradition. Following Joseph Raz I take legal positivism to be, roughly, the combination of two theses: the social thesis, which holds that what is or is not law is a matter of social fact and is "posited"; and the moral thesis that argues that there is no inherent or fundamental connection between law and morality.[11]

Kelsen and Police as "Organs"

In Hans Kelsen's Pure Theory of Law, a classic treatment of legal positivism, Kelsen takes individuals to have obligations to behave in particular ways, i.e. perform or refrain from performing certain actions, if the behavior is the subject of particular sanctions.[12] I must perform an action A because *not* A-ing is illegal, as defined by there being a penalty or punishment attached for not A-ing.[13] The law then, is conceived as being inherently coercive, meant to bring about certain behaviors by prohibiting "the opposite" of that behavior.[14] If, for example, my polity wants to ensure that I pay my taxes, it would establish a law that makes not paying my taxes illegal, and would attach a particular sanction, such as a fine or imprisonment, to my failure to do so.

Police institutions, for Kelsen, are special organs of this coercive system.[15] By imposing sanctions, law creates obligations of obedience on the part of the people living under the law, and police are the mechanism by which these sanctions are literally imposed. The law assigns to individual officers the power to use coercion, thus the obligation one has to obey a police officer is the same obligation one already has to obey

[11] Raz, *The Authority of Law* 1979, 37-53.
[12] Kelsen, *Pure Theory of Law,* 1976.
[13] Kelsen, 33-44.
[14] Kelsen, 33.
[15] Kelsen, 40.

the law.[16] Indeed Kelsen is very clear that legal obligation and obligation to the police are one and the same thing. He writes:

> "The individuals who perform these legal functions are organs of the law just like the legislative organs or judges, and their function might be attributed to the state just as much as legislation or jurisdiction […] Apart from the independence of the judicial organs there is no difference between the function of a court which in case of theft imposes jail and in case of insult a fine, and the function of an administrative organ who in case of a violation of tax, sanitary, or traffic law orders the execution of analogous sanctions."[17]

Elsewhere Kelsen tells us that police qualify as "administrative" organs of the law.[18] As such, police officers are authorized to apply legal norms by executing the sanctions that go along with violations of law. If someone parks her car on a red curb, for example, it is a police officer who notices and gives her the parking ticket for the violation, and not a disembodied ghost known as "the laws", like those that visited Socrates in his prison cell in Athens.[19]

While his work is not, in itself, an account of the obligations members of polities have towards law enforcement agencies, Kelsen's account of legal obligation does provide us a framework from which to understand our obligations towards law enforcement, and in particular, towards police: the police, as legal institution, are part of the coercive order which administers the sanctions of law. Kelsen expresses no skepticism about our obligations to police, or to law enforcement generally, but he has no reason to.[20] Without policing and other enforcement mechanisms, there would be no real sanctions attached to

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[16] Kelsen, 19.
[17] Kelsen, 33.
[18] Kelsen, 263.
[19] Plato, *The Trial and Death of Socrates, 3rd Edition.*
[20] Kelsen makes passing references to the existence of policing institutions and writes in various places that officers are authorized as organs of the law to coerce and act on behalf of the law. I take this to show a lack of skepticism regarding the nature of their authority and regarding the obligations members of polities have to officers. See footnotes 13-18, and 21-24.

law breaking, and thus no obligation to obey the law, as he understands it, in the first place. Yet this picture is open to at least two objections, which I elaborate presently.

Kelsen's Problem of Obligations to Police

In the few instances he mentions the police specifically, Kelsen ascribes them neither legal, political, nor moral authority.[21] This is notable because in traditional legal theory, it is part of the meaning of the concept of authority that entails an obligation to obey the directives of the authority.[22] Yet Kelsen stops short of actually telling us that the authority of police is the authority of law. By avoiding the use of the word "authority" Kelsen avoids definitively grounding obligations to police in virtue of their having authority. He instead tells us that police are authorized by the law to coercively enforce legal norms.[23]

Being authorized to perform an action, he writes, means that one is allowed to perform the action, it does not mean that one ought to perform the action, nor that one has to perform it.[24] Crucially, authorization also does not entail obligations of obedience moral, legal, or otherwise, on the people the action has an effect on. The authorization of police to enforce the law, in itself, does not, conceptually and morally speaking, entail obligations of obedience to the police for members of polities.

Though the point of this chapter is to explore skepticism regarding our obligations to police, note that Kelsen's framework leaves us with room to doubt that police must exist at all. Authorization to perform an action, unless necessarily connected to a more general

[21] Kelsen 40-42, 146, 263, and 298.
[22] For more on the conceptual connection between *authority* and *obligation* in traditional legal and political philosophy, see Perry 2012.
[23] Kelsen, 241.
[24] Kelsen, 15-17.

normative order like the legal order, is a contingent feature of particular persons or institutions in a given polity—there is no reason to think that police, as they exist in the United States today, must exist or that they must be the "special administrative organ" that enforces the law in our polity.[25] Even if their being authorized to enforce the law did yield obligations of obedience on the part of people being policed, or even if Kelsen had told us, specifically, that police have authority and not authorization, there is no reason to think these obligations would necessarily exist or necessarily bind us. Furthermore, his conception of law already includes non-police special organs of law that are designed to compel obedience and impose the sanctions of law. I am talking here about the judicial system through which judges, courts, and to some extent lawyers, impose and interpret the sanctions of law.[26] We have no reason to think the law must be enforced using the particular mechanism that is policing, if this is so then our obligations to police (even if they are grounded in authority and not authorization) begin to look uncomfortably arbitrary.

I have so far made two objections to Kelsen's justifications of obligations to police officers in Pure Theory of Law. First, Kelsen himself does not tell us that police have authority, only that they have authorization from the state to coerce people to obey the law. If this is true, I argue, Kelsen has still given us no reason to think that the ability of police to coerce entails an obligation to obey their directives. Next, even if Kelsen had substituted the words "police may be authorized by the legal order" with "police have the authority of the legal order", I argue that he has given us no reason to think that the obligations we

[25] Kelsen, 33-35.
[26] For a discussion on the broad powers of prosecutors see Luna, *Prosecutor Kings* 2014.

would have to police in the latter case exist necessarily.[27] Any obligations that would arise out of this picture would be merely contingent, legal obligations, and not moral ones originating in the authority of police, in itself.

I imagine Kelsen making three points in reply to my objections. Regarding my complaint that our obligations to police are contingent and merely legal: Kelsen might agree, and remind me that his project is a positivist project—there is no necessary connection between the law and morality, thus we have no reason to think our obligations to the police should be moral or extra-legal. To positivists, what is and is not law is a matter of fact, separate from the question of what should be law.[28] Similarly who we are and are not legally obligated to is a matter of fact to be separated from the question of who we ought to be obligated to. I concede this point, yet would point out that this reply is based on my assumption that he revise his work and assign police authority and not authorization. As is, his work does not yet justify obligations to the police even legally. Partly because he says so little about them, and partly because he does not use the word authority when he does write about them.[29] Still, I think his work provides us a valuable framework for thinking about our obligations to police: if they exist at all, we have legal and not prima facie moral reasons to do what police officers say. I can comfortably remain skeptical of political and moral accounts of obligations to law enforcement.

Second, Kelsen might point me to the section of his book titled "The State as a Juristic Person", in which he discusses the relationship between our obligations to the law

[27] Ibid.
[28] Hart "The Separation of Laws and Morals" 1958, 594.
[29] Kelsen, 19.

and our obligations to directives issued by individual officers of the law.[30] In this section he explains that state action is not the same as individual action. We can never examine an action and determine immediately that it was performed by the state, just as we could not look at the actions of a corporation and determine whether it was the corporation, as an entity, that performed the action, or the individual actors of the corporation that performed the action. Instead to determine whether an act is a state act, Kelsen tells us to ask ourselves "under what circumstances a function rendered by a certain human being may be attributed to the state".[31]

Determining these circumstances has important bearing for the case of policing. If a police officer's actions are the state's actions, then we have no reason to separate or conceptually distinguish between our obligations to the state and our obligations to the police. We don't need to wonder if the police have authority, nor do we have to think about whether and how it is connected to the authority of the state, or if it generates obligations in the same way that the authority of law does. In this view police actions are state actions, and if we are obligated to the state, we are obligated to the police.[32]

Kelsen tells us that a function rendered by a human being can be attributed to the state when the following conditions hold:

1. The individual is called to their function by an administrative act of government or of an authorized administrative authority and are legally subordinate to government.
2. The execution of the individual's function is made the content of a specific

[30] Kelsen, 290-311.
[31] Kelsen, 292.
[32] This is because he takes police actions to be state actions. See Kelsen, 33.

obligation, whose fulfillment is guaranteed by disciplinary penalties.

3. The function must be carried our permanently and professionally.[33]

I will for the purposes of argument, accept that conditions 1 and 3 hold for the case of policing in the United States. The authorization police have to perform various functions (such as writing traffic tickets, performing arrests, and conducting searches and seizures) comes from the state in a way that is legally subordinate to the government itself. I also grant that police officers conduct their jobs permanently (i.e. not as a part time or seasonal job), and professionally (they are paid by the public funds to be police officers).

My challenges to Kelsen's second condition for determining when the function performed by an individual can be attributed to the state are twofold. First, the function of police has thus far been accepted to be law enforcers. While I agree that this is one of the functions of policing institutions, I do not think this is the only function they have, nor do I think it is the most socially important one. I echo here the arguments made by Eric J. Miller, who argues that police act, not only on behalf of the state, but also on behalf of the values and interests of dominant social groups in the United States.[34] As such, the police not only enforce the law on the books but they also enforce unjust social hierarchies. Police, for example, not only enforce trespassing laws but also enforce social ideas regarding who does and who does not count as a trespasser and when, a process is often delineated along socio-economic lines. These social ideas have the result of enforcing and re-enforcing our

[33] Kelsen, 296-297

[34] Miller, "Knowing Your Place" 2021. It is unclear whether Miller takes this role to be an offical or unoffical role of police. I take this question to be a question regarding how deeply engrained injustices are to policing institutions in the United States. Following Potter, I take the view that policing *as it was set up* prepetuates and upholds injustices in the country and thus, though there might not be "official" rules codifying the enforcement of unjust practices, the police do enforce these as a rule. This view could yield the conclusion that the police act on behalf of the dominant social groups officially, but I take this understanding of "officially" to correspond do *de facto* rather than *de jure* official enforcement.

norms of civility, or our extra-legal codes of conduct which often have little to do with the actual law.[35] So, while in their capacity to enforce actual legal codes, the function of police might be the content of specific obligations, it is not clear to me that in their capacity as enforcers of civility police directives generate obligations at all.

One might argue that this aspect of policing is not a legitimate part of the job, as it does not have the correct institutional ties to government administration. If this is the case, one could argue, Kelsen's framework does not have to justify the obligations generated when police enforce our norms of civility, the framework only justifies our obligations to police when they enforce actual law.

I am skeptical, however that the above is true, given the close connections between the policing institutions and unjust hierarchies such as class and racism.[36] I am not sure that we can separate the function of police as law enforcers from their function as enforcers of injustice. Policing in the United States developed in part as a response to challenges to unjust hierarchies—recall their history of enforcing slavery in the south, for example, and union busting in the north.[37] If we cannot neatly separate the function of police as law enforcers from their function as enforcers of unjust hierarchies any legal obligations we have to police, by Kelsen's own lights, are on shaky ground.

My second objection concerns the fact that Kelsen qualifies his second condition for determining when an act can be attributed to the state by telling us that sometimes the organ fulfilling the state's function might be given "more or less latitude". This latitude, he writes, might be so wide, "and the discretionary power of the official may be so little

[35] Miller 2021, 1609.
[36] See Potter "The History of Policing in the United States" 2013.
[37] Ibid.

limited that the element of 'obligation' seems to be absent".[38] To Kelsen the acts of an officer of the law generate obligation only when there is a specific penalty attached to not meeting our obligations towards the officer.[39] In the case of police, I take the argument to be that the directives of a police officer obligate us when there is a penalty attached to not obeying their directives. The qualification he attaches to his second condition then, seems tailored to the case of policing. Because police enforce such a wide variety of legal and social statutes, and because it is up to individual officers to decide whether, and how, to enforce these statutes, it is hard to see how there the execution of the police's function might be the content of a *specific* obligation. That it is, it is hard to see that there is a specific sanction attached to non compliance with police, when the directives of police cover such a wide variety of scenarios. Kelsen tells us this obligation "must be assumed to be present".[40]

I disagree with Kelsen and think that it is precisely because the latitude and discretionary power police are given is so wide, that we should not assume that there is an obligation to obey any given police officer. I do not wish to say that there is no argument possible for establishing the premise that the execution of the function of police is the content of a specific obligation for members of polities, and simply want to motivate the idea that the assumption that we have obligations to obey the directives of police merits some argument. Specifically, it merits more argument than is given in Kelsen's theory, and, as I will show, more argument than is given in any of our "best" theories of legal obligation.

I turn my attention next to H. L. A. Hart who does explore differences between our obligations to police and our obligations to the law, but ultimately fails to consider the

[38] Kelsen, 297.
[39] Kelsen 44-50.
[40] Ibid.

implications of these differences for an account of the authority of law enforcement.

Hart and Obligation

Hart, as I'll now explain, does theorize the difference between our obligations to law and our obligations to law enforcement. But even so, he ultimately fails to consider what might or might not follow for our obligations to police officers.

Here is a rough sketch of Hart's views on legal obligation. The law is a system of rules, primary and secondary, backed by a social demand for conformity that makes human conduct non-optional or obligatory. The seriousness of this obligation depends on the seriousness of the social pressure that demands conformity to the law.[41]

Like Kelsen, police officers are officials of the legal system whose function is to ensure the existence of law by personifying the social demand of conformity. [42] The judicial system deters people from "doing what they want," but it does so by imposing the threat that they "may be arrested by a policeman and sentenced to prison by a judge".[43] Here, Hart also assigns police officers the ability to work "in general" to ensure rule following. Think of the urge to check one's cell phone while driving. Knowing that a police car is close by surely stops people from doing so, this would be the case even absent higher moral commitments to obeying the traffic laws of their state, and absent a deep connection between our obligations to the state and our obligations to the police.

Even in their preventative roles however, it is unclear how Hart imagines police to function as an arm of the penal system. The penal system in this scheme is part of a

[41] Hart, *The Concept of Law* 1961, 81-82.
[42] Hart 1961, 61.
[43] Ibid.

secondary system of rules that directly bind individuals by guiding the application and creation of primary rules.[44] This secondary system includes, broadly speaking, the legislative and judicial organs of law which work together to make and apply law. Yet here it is not clear why any additional safeguards against non-conformity, such as the police, are needed other than the social pressure and existence of a penal system. Hart does not tell us why we, conceptually and morally speaking, need police looking over our shoulders to ensure we don't check our phones while driving. Perhaps knowing that police do this gives some members of society peace of mind, but the need for this extra precaution is given no argument in Hart's scheme. We still need a reason why this further safeguard against people breaking the law is necessary and legitimate as a part of a secondary system of rules.

Why are any additional safeguards against non-conformity, especially in the form of a policing institution that enforces legal and extra-legal norms, necessary? In fact, a big part of policing, as it currently exists in the United States, is the ability to provide this safeguard by patrolling communities.[45] But precisely this power has also rightly been the subject of criticism by those who aim to reform or eliminate police forces. Police reformists tend to take this power to be essential to the safety of communities, and thus argue for changes to the policing system that would maintain this key power while, for example, eliminating barriers for accountability. Abolitionists go farther, seeing the patrolling function as irredeemable. I return to this dispute in chapter two. Here is what Hart does say about policing:

Even in a complex large society, like that of a modern state, there are

[44] Hart, 80-81.
[45] See Kelling, "Broken Windows and Police Discretion" 1999.

> occasions when an official, face to face with an individual, orders him to do something. A policeman orders a particular motorist to stop or a particular beggar to move on. But these simple situations are not, and could not be, the standard way in which the law functions, if only because no society could support the number of officials necessary to secure that every member of the society was officially and separately informed of every act which he was required to do.[46]

For Hart, the limitations of an individualized legal system are more than just practical. Yes, it would be difficult to design a society such that every member of that society was designated an official to help guide and ensure their conformity to the law. But here he also seems to see a deeper difference between individualized applications of the law and the law's general standing to demand obedience, as a general authority. A known system of rules is thought to tie each individual in its jurisdiction without face-to-face interactions with directives. Evidently police officer authority, on the other hand, is taken to be particularized: it does not bind a person until they have an interaction with a particular officer and a specific directive is given.

Hart does not explain this particularizing aspect of police authority. In Hart's own conceptions of the authority of law and the authority of law enforcement, the two are very different. And yet, despite his recognition of the difference, it's not clear how he takes himself to move from a general obligation to obey the law to a particular obligation to obey police officers. Hart tells us that police are necessary parts of the penal system, and that they are part of this system in virtue of their role in recording law breaking and bringing individuals to the court system.[47] But, again, these roles say nothing about their authority to deter crime by patrolling communities or neighborhoods. Perhaps it would be perfectly

[46] Hart, 20-21
[47] Hart, 61.

reasonable, in Hart's own account, to have a society in which social pressure is enough to enforce rule following.[48] Were a police force to exist in a society such as this, deterrence enforcement would be an unnecessary feature of its job. But then, this is far cry from policing as it exists today, we might wonder why, in their function as law enforcers, the police aren't more akin to Hart's gunman, who demands that one hand over money "or else".[49] The law has a general standing directive that obligates people bound by it to obey, but the gunman does not; he only has the temporary ability to make a threat and demand compliance. But then why should police officers with guns be any different once they set out on patrol, when they could instead effectively perform more modest, far less dangerous functions?[50]

One might argue that Hart's gunman and Hart's police officers are different in the nature of the kinds of directives that they provide. One demands that a person give them money for their own gain, while the other directs compliance to the law (with or without a gun to back up the directive). Perhaps it makes a moral difference that officers command compliance to the standing order to obey the law that people already have. The officer thus has the authority to demand compliance, while the gunman does not. A bank clerk has no obligation to obey the gunman, while a person breaking the law directed to stop by an officer does have an obligation to obey.

But notice here that, in this case, the obligation that individuals have to obey officers of law enforcement is not to the officers themselves, not in virtue of their own authority and say-so, but to the law itself. An officer telling me not to check my phone while driving is

[48] Hart, 82-91.
[49] Hart, 19.
[50] It is important to note that Hart had in mind British police officers who did not carry guns.

no different than a friend reminding me of the same who is in the car with me: I'm reminded that I owe it to them and to the drivers around me to not text while driving. My friend "enforces" my obligation to drive with care, but I do not have reason not to check my phone on her own authority or "say so." Whether the directive comes from an officer or a friend, I might have a moral obligation to refrain from checking, but this would be the case regardless of whether there is an officer looking into my car to ensure that I do not, or a friend riding along who reminds me. So, the present line of argument that we ought to follow the directives of officers does not establish a separate content-independent duty to obey police. And yet "content independence" has long been held as a standard for conceptions of the authority of law, and does indeed seem to be what Hart himself has in mind.[51]

While Hart suggests a distinction between the directives of law and the directives of law enforcement, he ultimately fails to connect them adequately. Hart's framework provides no actual justification of the authority of law enforcement, certainly not as it exists in the United States, nor does it help establish a moral duty to obey the directives of police officers.

Protected Reasons to Obey the Police?

Hart distinguishes between our standing obligation to obey the law and our particular

[51] Content independence here refers to the condition that the authority of law must itself be a reason for action. As Robert Wolff writes, "[o]bedience is not a matter of doing what someone tells you to do. It is a matter of doing what he tells you to do because he tells you to do it" (Wolff, In Defense of Anarchism 1970, 9). For more discussion on content-dependence, and its importance to the subject of legal obligation see Perry 2012.

obligations to the police but stops short of theorizing about what these differences might entail for our obligations to each institution. I will show that Joseph Raz, similarly, grants that we have particularized, piece-meal, obligations to the police, but denies that the obligation to obey the police is of a different sort than our obligation to obey the law. Instead, he argues that the obligation we have to obey the law is also particularized and piece-meal. For Raz, in general, "there is no obligation to obey the law", even in a good and just society.[52]

Raz tells us that actions are obligatory when the action is required by a protected reason, a reason that is both a reason for action and exclusive against reasons not to act.[53] We have reason to do what the law says but these reasons are not grounded in the content of a law's merit or demerit. Instead the law creates obligations in us to obey it by replacing and preempting reasons we already have to act in the relevant ways.[54]

Here the relevant question for my project is whether police officer directives create protected reasons for us to act in the relevant ways. Raz himself does not provide an answer to this question, nor does he tell us much about whether he thinks police directives are legal directives. If they are indeed legal directives, the answer to my question would be "yes": obligations to the police would come in the form of protected reasons, much as our obligation to the law does. But Raz is not clear on this point. He writes that police "may" be considered necessary primary organs, in the way courts and tribunals are necessary.[55] He also claims that police are merely law enforcing organs that are not necessary to the

[52] Raz, *The Authority of Law: Essays on Law and Morality* 1983, 233.
[53] Raz, *Practical Reason and Norms, Second Edition* 1975, 35-84.
[54] Raz 1975, Chapter 1.
[55] Raz 1983, 110 and 286.

existence of a state.[56] Since it's not clear what role Raz takes police play in a legal and political system, it is also unclear how he thinks our obligations to police might be grounded, if at all. Regarding whether police directives are legal directives, he writes the following:

> "Is it not because of moral grounds that a policeman's order, for example, is a reason for action? Be that as it may, some of these grounds are legal while others may not be. The policeman's order is a valid reason because, generally, policemen act to preserve the peace and are reliable. This is not a legal ground. Another ground for accepting that the policeman's order is a reason for action is that Parliament conferred on him power to give such orders. There may or may not be non-legal grounds for accepting legal sources as reasons […]".[57]

I take it that, according to Raz, the broad role that police play in societies muddies any potential connection between law and police and, consequently, between obligations to [obey/comply with] the police and to the law. In their role as public officials, for example as when arresting a suspect, it is clearer that they perform necessary law-applying acts. But Raz also notes that public officials that physically enforce the law "cannot be regarded as key".[58] Though modern legal systems use force to ensure compliance, not all legal systems need to have law enforcing institutions, strictly speaking.

Still, despite the absence of a clear diagnosis of police authority in Raz's theory, we may use Raz's "normal justification thesis" to further explore how we might be obligated to obey the police. That is, in Raz's view, for there to be an obligation on part of ordinary

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[56] Ibid.
[57] Raz 1983, 68
[58] "The prison service or public officials instructed to pull down a house against which a demolition order has been issued to [,] physically enforce the law. I shall call norm-applying institutions of this kind norm-enforcing institutions. There is no doubt that norm-enforcing institutions play an important role in all modern legal systems. Yet they cannot be regarded as key to the identification of all legal systems. Though all legal systems regulate the use of force and ultimately rely on force to ensure compliance with law, not all of them need to have law enforcing institutions" (Raz 1983, 107).

citizens to obey the directives of an officer, it must be the case that people, in general, have a better chance of complying with the law along with any other reasons they may have than if the matter were left to their own judgement.[59] But do police officers have this sort of authority over us?

I find it implausible to suppose that police officers, or the United States police institutions in general, might reasonably be considered better judges than any given member of a polity of how to follow reason and law. It would be more plausible if, as a necessary part of their job, officers were well-trained in matters of the law. As it is widely known, however, police officers in the United States have very little training in that regard. [60] Most of the legal training officers receive concerns what they themselves may or may not legally do in interactions with the public. It may be for this reason, perhaps, that Raz is clear that courts and tribunals are a necessary feature of legal systems while remaining uncommitted about the necessity of police officers. But in that case, Raz would take what I regard as the more reasonable position: police officers are not a primary norm-applying institution, and their directives do not create protected reasons to do as they say.

IV. Membership and Voluntaristic Theories of Legal Obligation

In this section I will present and analyze theories of political and legal obligation that ground our obligations to the law in terms of circumstantial factors such as membership in particular polities, consent, fair play, and association. I will examine what dominant

[59] Raz, *Authority, Law, and Morality* 1994, 214.
[60] For information on officer training see California 2022, Arkansas Department of Public Safety 2022, and Florida Department of Law Enforcement 2022.

theorists in these traditions say, or could say, about obligations to law enforcement and, in particular, about policing in the United States.

A Joint Commitment to Obey the Police

Margaret Gilbert defines "joint commitment as a "kind of commitment of the will" that two or more people create and are committed by.[61] The general form of a joint commitment is that [the] parties involved jointly commit to *X* "as a body".[62] Because joint commitments happen in a wide variety of social situations, the *X* involved varies. It can be to paint a house together, take a walk, promote an ideology, and crucially, as in the subject of her book on political obligation, uphold political institutions together.[63]

Gilbert defines polities as constituted of people who jointly commit to support and uphold a particular set of political institutions as a body.[64] She takes membership in a polity to yield political obligations to the person's fellow polity members.[65] The joint commitments of the United States, for example, may be taken to concern the laws and practices enumerated in the country's Constitution and supporting legal rulings and

[61] Gilbert, *A Theory of Political Obligation* 2006, 134.
[62] Gilbert 2006, 136-137
[63] Gilbert 2006, Chapter 11.
[64] Gilbert, 2006, 183.
[65] An interesting upshot of this view of what it means for a country to be one's own helps explain how immigrants may come to claim a country, rather than their original country, as theirs legitimately despite one's legal status. Suppose a person moves to the United States from Mexico. By expressing readiness to uphold the United States' laws with the relevant others while living in the territory, the person can become party to the joint commitments that constitute the United States and so call it their country, regardless of legal citizenship status, as long as the relevant others play their parts. Under this framework, an undocumented immigrant might be viewed as a citizen in a full sense if they uphold the laws of the country as their own. This definition is also compatible with the idea of having multiple countries or claiming a country other than the one might currently reside in. Take the American immigrant in the last example, if the joint commitments of the United States and that of their home country are not incompatible, it is perfectly plausible that one might adopt new commitments and remain party to the old ones. Dual citizenship can also be viewed as a person who is party to the joint commitments that constitute both countries of which they are citizens of. Similarly, physical location might not release a person from these commitments which is why someone may continue to claim to be an "American" even when abroad.

enactments. For this reason, the people of the United States, i.e. those party to the commitment to jointly uphold the constitution and its legal order, are obligated to one another to obey the laws of the country. Putting aside issues of what it might mean to be part of "the people of the United States" for now, in this scheme a failure to obey the laws of the country constitutes a failure to uphold one's commitments.

Gilbert could argue that policing exists as the political institution that assists the penal system by recording law breaking and ensuring that people submit to legal requirements. Police might also work as a mechanism to compel law-following: those who might be tempted to break laws, or in fact engage in illegal activity, would do so at the risk of being caught by police officers. It's important to note here, however, that in Gilbert's scheme the connection between the authority of the penal system and the authority of the police is not conceptually necessary. What matters is that policing, as an institution, exists and is jointly upheld by the people of the country. An underlying joint commitment would generate an obligation to comply with the directives of individual officers.

Among the views considered, this view of policing authority seems best placed to establish a content independent obligation to obey the commands of police officers. The positivist thinkers considered provide an independent account of the obligation to obey the law, and then assume an obligation to obey law enforcement somehow derived from that obligation. Gilbert, by contrast, can take a more direct approach. First, she can simply notice that the policing institution is one that exists. Second, she can argue that its joint acceptance by mainstream society itself entails an obligation to obey the directives of police officers.

Despite the theoretical merit in this view, it is not clear to me that, at least in the

United States, there in fact exists a legal[?] joint commitment to uphold the police as an institution. For starters, note that the Constitution of the United States makes no mention of policing or even enforcement. Additionally, whether and when the directives of police officers are even lawful is the subject of legal debate.[66]

Legal scholars typically justify the existence of a police force with reference to the Tenth Amendment, which grants states rights and powers "not delegated" to the federal government. That the police are not part of a federally mandated mechanism of law enforcement demonstrates the limited nature of any joint commitment that might exist to support and uphold the police. The commitment, if it exists, would come in virtue of membership to one's state polity, and not in virtue of membership to the United States. There is no federal joint commitment to a police force. To complicate matters further, the adoption of such a joint commitment does not exist even in most state constitutions, it is instead accepted as a given. The state constitution of California, for instance, makes no mention of police except to acknowledge their existence in order to grant certain exemptions for officers or guide involvement with other agencies.[67]

In Gilbert's view, there need not be explicit laws that officially give police officers the right to enforce the law. That the institution is in fact accepted as part of the state or federal government is enough to warrant the conclusion that the United States as a body is committed to upholding a police force. This thesis is, however, far from uncontroversial. I will not recount the long and painful history between the police and Black American communities in the country, nor will I rehearse a history of the movement towards police

[66] For a discussion on the lawfulness of police directives see Mooney 2020.
[67] The State of California Constitution 2020.

abolition. For present purposes, it suffices to note the historical ties between police and slave patrols in southern states, and with union busting in the northern states, as well as the well-documented way policing has been used in the country to uphold white supremacy. This ugly history is, I submit, enough to warrant the suspicion that there is, or ever has been, a jointly accepted commitment to support and uphold, as a body, in conditions of common knowledge, a police force.[68] Certainly such support has never been unanimous, or perhaps even close to unanimous, especially not in communities directly subject to often racialized police abuse.

A possible objection to this line of reasoning is that, while the joint commitment to uphold the police as dedicated to "protect and serve" communities is not universally accepted, it is clearly accepted by "mainstream society" in the United States. So, while the country might be divided along political ideological lines about whether or not the police should exist, the country as a body in some sense is not.

But here, again, the police's historical ties to racism in this country make this claim doubtful. What is accepted as "mainstream" is itself a product of racial and economic oppression. At best, one might contend that some communities endorse a joint commitment to the police institution. I concede that these communities might make up the majority in the country. However, as Gilbert explains, to jointly commit to act in a particular way "as a body" is distinct from the aggregation of preferences of the individuals involved. We are thus left with a piece-meal account of obligation to the police in the United States: if one belongs to a subpart of a political society that is jointly committed to uphold

[68] For a detailed history of policing in the United States see Potter 2013.

the police institution, then one has the obligation to uphold [?obey/comply with] the police; if not, one has no obligation. This could very well track the current state of affairs in the United States today, but is a far cry from establishing general duties of obedience to police in virtue of them having some form of authority.

Furthermore, the question of which communities are or are not jointly committed to having police institutions has in fact been the subject of research for many political and social scientists, if not in so many words. Elijah Anderson, for instance, takes non-cooperation with law enforcement as part of the "code of the street", a code of conduct in the inner-city neighbors which were the object of his study.[69] In a study published in the British Journal of Criminology, Rosenfeld et al. recorded in inner city communities consistent attitudes of suspicion towards the police; hostility between officers and individuals; and a refusal to engage with police from individuals, even sometimes at cost to individuals of these communities themselves.[70] This and many others studies suggest that the joint commitment to support police as law enforcement, and importantly, the obligation to uphold the police institution, would be at best divided among socio-economic lines.

Elsewhere I plan to further explore the theoretical possibility of joint commitments to policing established through community policing, along with its constructive implications for police authority in Western states. My present point is that a joint commitment view of political obligation cannot, on its own, justify obligations to the police as they currently exist in the United States. The view might justify some form of obligations

[69] Anderson defines the code of the street as "a set of prescriptions and proscriptions, or informal rules, of behavior organized around a desperate search for respect that governs public social relations, especially violence, among so many residents, particularly young men and women" (Anderson, *The Code of the Street* 1999, 32-34.

[70] Rosenfeld, Bruce and Wright, "Snitching and the Code of the Street 2003.

to police when the groups policed are part of a joint commitment to the institution. However, absent serious reform or abolition of our current systems of policing, those most subject to abusive treatment by the police are often not members of such supportive groups. In that case, the present view of police authority is no more helpful to our current state of affairs than traditional positivists account of authority and obligation.

Here I might add that I do not believe that reforming the institution alone would be enough to properly obligate individuals to obey the commands of police officers. For certain communities have been deliberatively excluded from being party to a joint commitment in the United States, including, especially, joint commitments concerning our criminal justice systems. Even if the system were reformed significantly, those historically excluded would not necessarily be party to any joint commitments that might have upheld the system in the first place. Indeed, the system might become perfectly just and even that would not, without the requisite actual acceptance, properly obligate members of previously excluded communities to obey the directives of police officers.

Arguments from Fair Play

According to arguments from fair play, if a number of people engage in a joint enterprise, those who accept the benefits of that enterprise must do their fair share to uphold the enterprise.[71] It would be unfair, in other words, for a person to benefit from the

[71] See Hart 1955, and Rawls, "Legal Obligation and the Principle of Fair Play" 1964.

cooperation of others without themselves cooperating in the relevant ways.

There are different conceptions of what counts as "benefiting from the cooperation of others". Hart, for example, writes that "when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission."[72] For John Simmons, by contrast, mere benefit is not sufficient. It is, instead, "acceptance of benefits within certain cooperative schemes" that creates the obligation to help maintain the practice.[73]

Hart, Simmons, and other fair play theorists never apply fair play considerations to obligations to law enforcement. They do assume that, if there is an obligation to obey the law, then there is also an obligation to obey the directives of law enforcement officers. And it is unclear how fair play arguments could justify this view.[74] An account as to why one should follow the rules/laws of one's state or community does not necessarily justify an obligation to submit to police enforcement. Fair play might explain why I have must submit myself to a penal system upon failing to uphold the cooperative scheme I benefit from: perhaps I should show up to court when directed to. But fair play would not equally explain why I have an obligation to obey a police officer on patrol who attempts to ensure that I am upholding the scheme before I break any rules of cooperation.

Nonetheless, it is worth considering how fair play arguments, particularly those explicated by Simmons, might be applied to law enforcement. Whether we have an

[72] Hart writes that the rules of the enterprise might give "official" individuals the authority to enforce the rules. Here, again, he separates the authority of the rules themselves from the authority to enforce without going so far as to say that they are different in kind or source (Hart 1955).
[73] Simmons, "The Principle of Fair Play" 1979.
[74] See for instance Rawls 1964, 117.

obligation to obey police officers would depend on what we think the "cooperative scheme" in question is. One possibility here is the political societies themselves, seen as complex schemes of cooperation that yield all the benefits of organized living. If these schemes are made up of rules that govern the behavior of the individuals involved, one might view police as a mechanism needed to ensure generally compliant behavior.

I think it is possible to be bound by fair play to follow the rules in virtue of accepting the benefits of the existence of one's polity. Still, it is not clear to me that, even in that case, one would also necessarily be bound by fair play to accept the practice of enforcing rules with police forces, as opposed to other measures of encouraging general compliance, if any enforcement is needed at all. Simmons' argument from fair play is voluntaristic: the obligation to obey the commands of authority in a cooperative scheme is contingent upon one's acceptance of the benefits of such cooperation. This presumably entails the ability to decline or not accept benefits of a given sort, at least in theory. But it is not clear how one would have the option if one is simply subject to cooperative rules of a polity by a police enforcement mechanism.

A further possibility is to take the police institution itself to be a scheme of cooperation from which one benefits directly. It might be said to ensure goods such as public safety, or simply the peace of mind in knowing that those who break laws will be held accountable. Might we therefore have fair play obligations to cooperate with law enforcement?

For starters, it is clear that not all people receive benefits from policing, on balance. Some are in fact systemically and irreparably harmed. If we add Simmons' requirement that benefits be not only received but also accepted, it is fair to say that many groups have

not accepted benefits they may or may not have received. And so particularly poor Black and Brown communities in the United States, many people would have no obligation of fair play to obey the commands of police. Indeed, it is not clear what sort of obligation to law enforcement, if any, would get off the ground from fair play arguments given the police's deeply ingrained role in enforcing societal hierarchies to the general detriment of poor Black and Brown people.

Here we might briefly note Tommie Shelby's argument that Rawlsian fair play considerations often do not apply in the United States. Far too often, Shelby argues, we find a state sponsored failure of reciprocity towards inhabitants of the poor in the inner cities of the United States.[75] Following Rawls, Shelby takes justice to be a matter of reciprocity between people who, viewing each other as equals, come together to support the basic institutions that make cooperation possible. But because of systemic injustices, people in the poor inner cities in the United States are not offered fair return on their societal cooperation, and so do not have an obligation to reciprocate by upholding laws or other expectations. Though Shelby does not apply this thought to police authority specifically, the idea might be as follows. Many social groups in the country do not receive the supposed benefits of the police institution, and so they are not obliged by reciprocity to obey it. I will return to a more detailed application of Shelby's Rawlsian arguments in chapter three.

[75] Shelby, *Dark Ghettos: Injustice Dissent and Reform* 2018.

Policing and Consent

The objections raised in the previous two sections also pose related problems for consent-based justifications of obligations of obedience to police. According to consent theories of political authority and obligation, only consent to be governed creates the power to enact laws that create obligations to obey the law. Where Simmons takes the acceptance of benefits from a state to ground the obligation to obey the law, consent-based theories hold that mere consent to be governed is necessary and sufficient for political obligation. Such views tend to divide over whether consent is an act or a state of mind, which might blur the difference from Simmons' theory.[76] But here it suffices to say that taking consent, however construed, as the justification for the obligation to obey the law does not necessarily yield the obligations to the police.

Against theories of actual consent, I find it doubtful that most people have in fact consented to policing. Consent-based theories tend to focus on consent to be governed by their state, which is not the same thing as consent to be policed. While one might argue that consent to be governed by a state entails a consent to be policed, this cannot be taken for granted. If consent requires some intentionality, be it a mental attitude, action, or somewhere in-between, the arguments offered earlier about the lack of joint commitment to policing, in at least some parts of the United States, also apply here. It is not clear that people are jointly committed to upholding policing, and it is also not clear that people consent to be policed.[77]This is true historically, in the absence of a founding moment of policing, but also true in ongoing practice, since many people have expressed opposition to

[76] Simons, "Actual, Apparent, Hypothetical, and Implied Consent" 2021.
[77] For a detailed discussion of what she calls the "no agreement" objection to consent based views of political obligation, see Gilbert 2006, Chapter 5.

both the existence of policing and its present versions. Though these arguments are not part of the Western philosophical canon, the now glaring realities of police abuse mean that philosophers can no longer ignore advocates for policing abolition or reform.

V. Why There are No Associative Obligations to Police

To close this chapter, I consider Ronald Dworkin's argument that there is a general "associative" obligation to obey the law of the same kind that arises in friendships or relationships with family. For Dworkin, if the laws of a state meet certain conditions of integrity, such as equal treatment and concern under the law, people living in that state acquire the obligation to obey the laws of their state in the same way they would have the obligation to act in particular ways to keep a friendship or a good familial relationship.[78]

In the matter about the police and the authority of law enforcement, Dworkin says very little. He writes that the public standards of society should be enforced "if necessary" by police.[79] Later, he argues that it is not unjust for judges to enforce rights by using the police.[80] Yet Dworkin also explains early on that his book is limited in scope to the law itself, and not on the practical matters of the application of law. He acknowledges that "a more complete study of legal practice would attend to legislators, policemen, district attorneys, welfare officers, school board children", and "a great variety of other officials".[81]

Dworkin's theory of legal obligation faces a number of objections. Most relevant for

[78] Dworkin, *Law's Empire* 1986, 176.
[79] Dworkin 1986,153.
[80] Dworkin 1986, 244.
[81] Dworkin 1986, 12.

present purposes is the objection that while associative obligations might mandate that parties involved trust or respect each other, they don't seem to mandate obedience. Dworkin might be right to argue that the relationship between individuals of a society and the law is akin to one between friends, but he does not show how such a relationship is one of authority and obedience.[82]

Dworkin's view of legal obligation is even more difficult to justify in the matter of law enforcement for two reasons. First, on whether associative relations would arise at all between police and ordinary citizens, the kind of a relationship individuals are likely to have with the police is contingent in part on the kind of community they live in. It is a well-studied phenomenon that in poorer and inner-city neighborhoods with a high density of Black and Brown people, police-officer and community relations are strained at best. In white suburbia, people are more likely to keep up good relations with the police. Second, and relatedly, given the realities of police abuse, it is clear that the police in the United States do not meet the standard of "integrity" required by Dworkin's account. For these reasons, I take Dworkin's views on legal obligation to be inapplicable to the subject of police in this country.

VI. Conclusion: No Traditional Theory Justifies Obligations to Modern Police

Our obligation to obey the police is not yet justified by the law's power to sanction us,

[82] See Green, *Associative Obligations and the State* 2004, and Réaume, "Is Integrity a Virtue?" 1989.

because the authority of policing in this case is arbitrary, and many different institutions can be and are in fact used to sanction violators. Our obligation to obey police cannot come from membership to the United States, because a member or faction of the polity can be committed to upholding its laws without being committed to upholding the institution of policing. Additionally, for reasons of injustice, the conditions of membership in this country are complicated to the point of making membership commitments to policing implausible. I can be obligated to obey the law due to considerations of fairness or reciprocity to my fellow citizens, while lacking such relations of reciprocity to the police. I may consent to be subject to the rule of law without consenting to be subject to modern policing. I may recognize that some persons occupy authoritative roles that give me reason to obey, but deny that the police are one such role. I may have associative obligations to my fellow members of polity that demand that I obey the law, but lack such obligations to the police. I conclude that traditional legal and political theorists are not justified in their assumption that our obligations to obey the law conceptually or morally entail an obligation to obey the police.

The fact that traditional theories can maintain an obligation to obey the law without also being committed to obligations to obey police might be considered an advantage given the controversial nature of modern policing. Proponents of these traditional views of legal obligation might be rather pleased to hear that they can remain committed legal obligation without also being committed to obligations to the police or any particular institution of law enforcement. But despite this positive result, here I find it wise to follow in the footsteps of Charles Mills and remain circumspect about the extent to which racialized

understandings have informed political and legal theory.[83] Accordingly, I remain skeptical of a canon that would assume obligations to a system of law enforcement without engaging in critical analysis of the real-world implications of avowing these obligations.

In that case, we should assume the important questions remain unanswered. What is the nature of policing authority? Under what conditions, if any, is it normatively and conceptually justified? What corresponding obligations, if any, do ordinary people have to it or its officials? I explore these questions in the following chapters.

[83] See Mills, "Black Radical Kantianism" 2018.

Chapter 2: THE POWER OF POLICE

I. Introduction

The history of traditional political philosophy about legal and political obligation often uncritically treats obligations to the state and obligations to obey a state's police authorities as a package deal. This is because, as I argued in the previous chapter, traditional accounts of legitimate political authority simply assume that obligations to the state entail obligations to the police. They make the correlated assumption that political authority, if legitimate, creates obligations to obey with its directives for its subjects, as exercised and interpreted on the ground by its police.[84] In this chapter I will argue that there is no conceptual or logical contradiction in maintaining both that (a) the authority of a polity can be legitimate and yet (b) the people of the relevant polity lack a moral obligation to comply with its lawful police directives.

My aim here is to present a view of political authority that helps us begin to make sense of the basic problems with obligations to police in the United States. To do so, I move from theorizing about obligations to the police to conceptualizing police authority. Getting clear on what, exactly, the authority of police *is* and getting clear on when it binds members of polities will help provide answers to what, exactly, our obligations to the police are.

In this chapter I will primarily focus on the question of what police authority *is*. Though I will begin to explore the question of when police can be said to justifiably have

[84] Gilbert is not committed to there being a moral obligation, i.e., a moral requirement to obey the law, and emphasizes this.

authority, the main aim in this chapter is to put forth an account of police authority that, as I will argue in chapter four, tracks our pre-theoretical intuitions about what the police are, and our political and legal relationships to them.

That being said, I do take the main challenges of state police authority to be both conceptual and moral. Conceptually, an account of police authority should explain what it means to say that any given officer has authority over any given person in a state. Morally, an account of police authority should explain when this authority is justified and how it can be properly exercised. The account should, in other words, provide us answers to the question of when and how police authority, as defined conceptually, properly binds individuals and under what circumstances we can justifiably say that individuals have a moral obligation to obey the directives of police officers. The focus of this chapter though, is the conceptual question regarding what it means to say that a police officer has authority.

In order to develop this account of police authority, I draw from the novel account of political authority offered in Arthur Applbaum's book, *Legitimacy: The Right to Rule in a Wanton World*.[85] In chapter 1, I argued that mainstream political and legal philosophy has mainly ignored the difference between general legal obligation and obligation to law enforcement officials. That is also true of Applbaum's book, which does not take up the issue of obligations to police as a separate issue from state obligations.[86] At the same time, I want to suggest that Applbaum's larger argument is suggestive and helpful. It offers a framework within which we can begin to theorize properly about the nature of police

[85] Applbaum, *Legitimacy: The Right to Rule in a Wanton World* 2019.
[86] Though police are mentioned in few instances (save for his salient motorist example) Applbaum runs the ability to make law with the ability to enforce law together. Notably on pages 48-60, 162-165, and 203-205.

authority. And, I submit, it gives us the correct way to understand police authority—if we wish to think police have authority at all.[87]

II. Applbaum's Power Liability Account of Authority

The power liability account of political authority, as Applbaum calls it, holds that legitimate political authority is a moral power, in the Hohfeldian sense:

> On my account, legitimacy is a kind of moral power, the power to create and enforce nonmoral (or perhaps I should say not yet moral) prescriptions and social facts. A legitimate authority has the moral power to author legal, institutional, or conventional rights and duties, powers, and liabilities, and create social facts and mechanisms of coordination that change the legal, institutional, and conventional situation or status of subjects.[88]

According to legal theorist Wesley Hohfeld, rights, not powers, correlate with obligations.[89] If I have a right (legal, moral, or otherwise) that you keep your promise to me, for example, it can be said that you have a corresponding obligation (legal, moral, or otherwise) to keep your promise. Powers are instead moral or legal advantages one person, or group of persons, can have over another person, or group of persons. If I own a piece of property, for example, a house, I also have the power to transfer ownership of it to another person, either by selling the house or gifting it. The ability to do this changes the normative situation of the new owner of the house, in this case by creating a right to the house that

[87] Applbaum 2019.
[88] Applbaum 2019, 48.
[89] Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" 1913.

the person did not have before.[90] Margaret Gilbert in her foundational work provides the following helpful schema of powers:

> To have a power in the relevant sense is to be in a position to do something to the addressee of power. [...] According to the standard characterization of the actions to which powers relate, to have power is to be in a position to effect an alteration in the existing Hohfeldian relations of the addressees of the power. [...] Rounding things out, Hohfeld's equivalence for powers introduces the Hohfeldian relation of a liability [...].[91]

Importantly however, the power to change the normative situation of a person is not necessarily conceptually tied to changing their normative status through creating and removing rights. The power to change normative situations might also be exercised in other ways, such as in the creation of rights, duties, liabilities, or even by assigning powers to those the authority has domain over. Here Applbaum takes himself to build on the Razian insight that the exercise of authority is the ability to change the normative situations of others. Applbaum argues that there are more ways to do this than by creating moral duties of obedience to authorities, as is traditionally theorized. The ability to change the normative situation of a person to Applbaum, just is what it means to have legitimate political authority.

Note that all the traditional views examined in my first chapter grounded legal and political obligation in the law's authority. Part of what it means, to those theorists, for the law or the state to have authority is that they create obligations in us to obey the directives of the polity. Yet, for Applbaum, the relationship between subject and authority is

[90] Following Applbaum I use the term "moral powers" to describe the power liability conception of authority, yet moral powers may also be understood as what other theorists call "normative powers". Also following Applbaum I take the existence of normative powers as a given. For more explanation of what they are, and a defense of their existence, see Tadros, "Appropriate Normative Powers" 2020.
[91] Gilbert 2018, 20-23.

fundamentally different. It is not based in a right-obligation relationship but is instead based in a power-liability one between subject and authority. As described above the liabilities created in subjects might be realized in a variety of different ways, just as authority can be exercised in a variety of different ways, but the relationship between subject and authority remains, at its core, one of power and liability. To traditional theorists, who conceive of the relationship between subject and authority as one of right and obligation, political and legal authority may also be realized and exercises in a variety of different ways, but the relationship remains one of right and obligation.

It is also important to note that Applbaum intends this account of authority to be the correct way to conceptualize all state and legal authority, he provides no distinction between that and authority of law enforcement officers. He, like most other political philosophers, runs these two conceptions of authority together, suggesting in various places that one of the typical powers of an authority is the power to enforce.[92] I am interested only power liablity as a way to understand the authority of law enforcement, specifically for the case of policing in the United States. So, strictly speaking, I need take no position on the general matter of the conceptual details of the authority of law.

If, as Applbaum seems to suggest, the authority of law enforcement is conceptually tied to the authority of law because the state grants enforcement powers to police officers, the conceptual problem of policing is solved: either law enforcement has no authority, they are simply an institution granted the power to use force and coercion by the state, or the authority of police just is the authority of the state. Relatedly, any obligations we have to the state, we also have to its policing institutions.

[92] Applbaum, 48-60, 162-165, and 203-205.

Recall my arguments in the first chapter, whose correlates also apply here: while I am open to the thesis that there is some connection between the authority of the state and the authority of law enforcement, I reject the assumption that this connection necessarily holds. Furthermore, police abuse of power creates the obligation for us, as philosophers, to either reject the assumption that police powers must exist or provide arguments to why this is the case.

The former possibility about police authority that I suggested, that police have the ability to impose threats backed by force, merits some discussion: it suggests that the authority of police is a just the authorization to use force, granted by the state, as a method of enforcement. One might argue, as the positivists do, that this authorization grants police a kind of authority.[93] The possibility of authority however, as threat backed by force, is a controversial one. Though a version of this view is often attributed to Hobbes, one of the central aims of political philosophy has been to provide an account of authority conceptualized as more than coercive force.[94] Recall Hart's interest in differentiating between the authority of law, and the directives of a gunman robbing a bank.[95]

I will explore the question of whether police actually do have authority in my last chapter. For now, I continue by providing an account of how the power-liability view of authority might be applied to the case of United States' policing to give us a view of what it means to say that policing, as an institution, has political authority, and what it means to say that any given police officer has authority over a person.

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[93] See footnote 18.
[94] For more on Hobbes see Williamson, "Hobbes on Law and Coercion" 1970.
[95] Hart 1961, 18-25.

III. Power Liability of Policing

According to the power liability view of authority, the authority of a state's police forces is the power of officers and the institution to change the normative status of individuals in their jurisdiction. There are different ways this power might be exercised, and I will try to point us at an answer towards determining which of these ways are morally justified in what follows, but here are a few familiar examples: police can write traffic tickets, conduct searches, or arrest people. Officers may also patrol neighborhoods and exercise their power in a wide variety of ways to prevent illegal activity, and can respond to cases of people in distress in a wide variety of situations including medical emergencies, domestic disputes, and animal encounters. Following Kelsen, I will call police actions that result in the imposition of hard treatment on a non-police officer (such as writing a traffic ticket, conducting searches and arrests, or the myriad of other actions police might take against individuals), sanctions.[96]

To explain the application of the power liability view to policing in more detail, consider Applebaum's motorist example:

> For many years a stop sign regulated traffic at a sparsely traveled intersection at the outskirts of town with unobstructed views of flat desert for hundreds of yards in all directions. The town council, under pressure after a highly publicized fatal accident at a stop sign at a very busy intersection in the center of town, and taking advantage of a temporary price reduction offered by the local distributor of traffic control equipment, has decided to replace every stop sign under its jurisdiction with a traffic light and to post "No Turn on Red" signs at every one. It turns out that this model of traffic light is a bargain because the lights are preset to change at long intervals and their timing mechanisms are cumbersome to reprogram. Motorist, who wishes to turn right at the sparsely traveled intersection,

[96] Kelsen 1967.

> approaches just as the light turns red, and she knows from prior experience that she is in for a very long wait. It is a clear day. No pedestrians, bicyclists, or other cars are in sight. Taking great care, she turns on red. A police officer on a motorcycle hidden behind a cactus stops Motorist and writes her a ticket [...].[97]

If law enforcement authority is understood as the power to change the normative status of another person as Applbaum suggests, it is not only conceptually possible but also quite plausible to hold all three of the following premises: (a) the motorist ought not to have turned on red, (b) the motorist should pay the ticket, and (c) the motorist does not have a moral obligation to obey the officer during the traffic stop. By choosing to turn on red, the motorist has made themselves liable to a fine and an interaction with a police officer. The authority of a police officer is the authority to exercise their powers by imposing the fine, ignoring the infraction, or perhaps even searching the persons car. Importantly for my purposes, the exercise of police power, on its own, does not conceptually entail a moral duty to obey the officer's directives during the traffic stop.

This is not to say that the motorist never has or cannot have a moral obligation to obey a police officer's directives. But if it is the case that one has a moral obligation to obey a police officer, in virtue of the person being a police officer, this conclusion would have to be the conclusion of a moral argument, and not the conclusion of a conceptual analysis of what it means to say a police officer has legitimate political authority.

This is also not to say that police officers may wield their power in whatever way they think is best, or that it is morally permissible to allow a system that gives so much discretionary power to police officers. I assume any legitimate form of legal or police authority will come with robust moral and legal constraints. The project of police reformist

[97] Applbaum, 56-57.

and abolitionary groups is to determine which of these constraints apply (more on this in a later section). The present case suggests only that, insofar as police in the United States and countries like it do have authority, refusal to comply with police directives may make one liable to that the power they hold, but this is different than saying disobedience to police is even prima facie morally wrong, or that obligations to obey the police are conceptually entailed by the fact that police have authority. One is never morally or conceptually pre-bound to obey the directives of police officers, even when the exercise of power is just and legitimate.

IV. Liability to Law Enforcement

If police authority is a moral power to change the normative situations of people bound by police authority, then law breakers, through the exercise of police powers, might become liable not only to police, but also to other individuals or institutions. Take the case of a traffic ticket again: by issuing fines, police change the normative status of the offending individual by creating a new legal obligation either to pay the fine or show up in court to contest it. This power to change the normative status of a person conceptually entails a correlated liability, on part of the subject of the authority, that might be realized in a number of different ways (depending on which power is exercised and how it is exercised). In the case of the traffic ticket the corresponding liability could be as simple as being liable

to have a routine interaction with an officer. But, because of the amount, kind, and discretionary nature of police force, at least in some cases, one is liable to lose their life.

Though they vary in consequence, liabilities all affect the normative status of people in weaker ways than obligations do. When we speak of obligations, we mean to say that people are in some way bound to act (or refrain from acting) in particular ways. If we say that Will has a has an obligation to refrain from striking Chris, we mean, roughly, that the domain of Will's behavior is normatively limited such that striking Chris is not one of the things Will should do.[98] The sense of "should" involved in this case can be both legal and moral. In this case it is both— Will has both a legal and moral duty not to strike Chris, his behavior is restricted both legally and morally.

To say that Will is liable to Chris, on the other hand, invokes a different sort of moral relationship between the two. If Will is liable to Chris in some way, we can say that he lacks the appropriate moral claims against Chris in regards to a particular kind of actions against him. If he strikes Chris, for example, Will might become morally (and maybe even legally) liable to be hit back. This doesn't restrict the normative domain of Will's behavior in any way, except perhaps by limiting the kinds of moral claims he might justifiably make against Will. In this instance by hitting Chris, it is plausible to think that Will loses the right to not be slapped back. I take it that, like obligations, liabilities can be institutional, moral, or can belong to a "third realm" of normativity like the one prescribed by Gilbert.[99] Thus by striking Chris, Will might be legally liable to a fine and/or morally liable to be judged harshly in the court of public opinion.

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[98] I take this constraint-based understanding of rights from Judith Jarvis Thomson's seminal work on rights (Thomson, *In the Realm of Rights* 1990).
[99] Gilbert, *Rights and Demands: A Foundational Inquiry* 2018, Chapter 2.

It is useful to keep in mind that my claim here is only that people are not morally bound to obey the directives of police in virtue of what it means for an officer to have authority. What it means for police to have authority is for them to have the power to do things like create moral, legal, or institutional duties. So, we could have a duty to obey police directives consistent with the very meaning of police "authority". But, I claim, we in fact do not, at least not in virtue of what it means for a police officer to have authority, in itself. The relevant moral powers of police do not, on their own, correlate to a moral duty of obedience, only to a liability. This also leaves open the possibility that one might be bound to obey the directives of an officer in virtue of the directives' content or context. Yet even this is different than saying police officer authority, as such, binds people to obedience, or that people have, in general, a prima facie obligation to obey police.

To illustrate these abstract points, suppose that Will is a police officer and Chris is an ordinary civilian, both living in the United States. Will's authority over Chris is the moral power to create or change Chris's duties, claims, privileges, immunities, etc. Chris is liable to have his duties, claims privileges, immunities, etc. changed by Will with respect to Will himself or with respect to a third party. Perhaps Chris had no duty to pay a traffic ticket to the courts of California before the exercise of Will's authority. Chris, being an ordinary member of polity, is liable to have his normative status with respect to the State of California changed in this way.[100] Chris can claim that Will's exercise of power in this way was stupid, unfair, or racially motivated. But, assuming that police justifiably have the

[100] Note here that while I am saying police authority can create the duty to act in certain ways, I am not saying this is the case necessarily, which makes my view different than the claims made by theorists I examined in my first chapter. Police authority can change the normative status of people in a wide variety of ways, including, but not limited to, the creation of duties.

power to write traffic tickets, he cannot claim that Will's action was an unauthorized abuse of power.

V. Which Powers are Justified?

The power liability account, applied to policing, provides us with a picture of what it means to say that police have legitimate political authority. If correct, the view can tell us what policing authority is—what the concept of policing authority does or does not entail. For a full picture of policing authority, I still need to give an account of why and how we may say that any given police officer, or any particular realization of a policing institution, actually has legitimate political authority. Legitimate policing authority changes the normative situation of the people they have authority over, but we still need an explanation of who police have authority over and why.

Note that the answer to this question will inevitably involve moral argument, and this argument could conceivably result in the conclusion that there is a moral obligation to obey the directives of police officers and institutions. Crucially, however, this conclusion would have to be the result of a moral argument, and not the result of conceptual analysis. Such an obligation would not be necessarily conceptually tied to the policing authority or to state authority, and would largely depend on the content and contexts of the police directives in question. One might argue that this still counts as a moral "obligation to obey"

on the authority of police officers, but this picture of authority would not refer to the concept in the deep meaningful way scholars traditionally take our obligations to be tied to authority. In traditional legal and political philosophy authority binds its subjects through content independent, often moral, obligations to obedience.[101]

One might also find a certain appeal in the conclusion that police directives are mere threats backed by force, which ultimately cannot be morally or conceptually explained in terms of political authority. Anarchists about police authority, or about state authority in general, might take this to be a reason to discard the thesis that police have authority at all. Like me they would also accept that there are no prima facie moral obligations to obey the police. Unlike me, however, anarchists would argue that it is impossible to justify such obligations, and that, ultimately, police authority, perhaps along with state authority, is simply illegitimate. But if we set aside the anarchist challenge for now, we can explore the more interesting question of when and how policing powers are justified. More specifically, we can think about what constraints police officers should be subject to, and why this is the case.

Applbaum points us at an answer in his book: authorities are subject to procedural and substantive constraints.[102] Procedurally, authorities and subjects must be connected to each other in the right way. Substantively, authorities must provide adequate protection of subjects' basic human rights. In his view, the creation of a moral group agent, when conscription of members is successful, meet these constraints. While his account is helpful, I find the possibility of the police institution as a group agent doubtful, for the many of the

[101] Perry, "Legal Obligation" 2012.
[102] Applbaum, 90

same reasons I doubt there is a joint commitment to policing. I see no evidence that one exists, and even those we can theorize about would most likely rely on deeply unjust methods of conscription. As it is, policing in the United States fails both of Applbaum's tests of legitimacy: it does not connect people and police officers in adequate ways, nor does it secure the basic rights of the people that officers have authority over.

I see no reason to accept Applbaum's moral constraints on authority over any other moral standard for authority. Perhaps a more fruitful exercise would be to analyze the constraints on policing posited by various reformist/abolitionist groups of policing. The question of determining in what ways police powers should be constrained is at the moral heart of the disagreements between groups that advocate against the systemic policing issues described in my first chapter. In my view, the interesting moral questions surrounding police concern the scope of the police's liability conferring powers. Which powers should the police have? In what ways should people be liable to the police? In what ways should people not be liable to officers? Though groups of activists and thinkers have long disagreed on answers to these questions, they tend to agree that people should not be liable to lose their lives in interactions with police officers. With the help of viral videos recording police brutality and killings, mainstream society has finally realized just how pressing an issue limiting the scope of police power is, especially for overpoliced Black and Brown communities.

Much before the modern social media interest in policing reform, Oakland's Black Panther Party instituted self-defense measures against police through policies like cop watching.[103] Cop watching involved armed citizen patrols aimed at keeping watch over

[103] Nelson,"'Policing the Police': How the Black Panthers Got Their Start" 2015.

police officers to record and deter police brutality against people in the city. It is clear that because of regular harsh treatment on part of cops against Black people in the city these measures might be primarily understood in terms of self-defense. However, if we are correct to understand police authority as a bundle of powers, perhaps in addition to the moral claims of self-defense the party was making, Black Panthers were also drawing moral constraints on the power of police for us. Perhaps one of the powers police should *not* have is the power to routinely harass, beat, and kill people on the street. By taking up arms and policing the police, the party might have also been understood as sending the message that people cannot be justifiably made liable to taking this regular treatment from police, at least not without measures of self-defense.

Similarly, modern policing abolitionists argue that the moral and/or legal constraints on policing powers should be such that they allow us to completely abolish policing institutions. I take abolitionists to include a wide array of scholars and activists, ranging from those who only argue against the institution's practical or philosophical necessity, to those who actively call for an immediate and total call for the end of policing on ground of injustice.[104] An in-depth analysis of each of these positions is a fruitful exercise, but outside the scope of this chapter. My brief mention of abolitionists here is meant to show how the power liability account of policing can be used to analyze the different claims these groups make. The Black Panthers were, in addition to making many other moral and legal claims against the federal and local states, showing us where they thought the limits of policing were. Abolitionists are also making these claims on philosophical, legal, practical, and moral grounds. The People's Budget coalition, an LA

[104] See Davis 2020, Kaba 2020, @ACP-CSU, 8 to Abolition.

based group dedicated to advocating for almost total defunding of the county's police budget, for example, see the solution to problems posed by police as financial constraints to the institution.[105]

Communitarian models of policing, such as the ones proposed by activists M. Adams and Max Rameau, and defended by Olúfẹ́mi O. Táíwò in a recent article in Dissent magazine, take a wider approach to limiting police powers.[106] Taiwo argues that while defunding measures do help by making the problem smaller, these proposals leave "the basic political structure intact", a better solution is to transfer policing powers to people, thus inverting the authority-subject relationship so that police answer to members of the communities they police. It is interesting to note that Táíwò maintains, as I do, the conclusion that police have authority while at the same time recognizing that the core of policing authority is their allotted powers. "The problem with policing," he writes, "is power, not prejudice [...] Until we demand and organize for power itself—rather than pleading for those who have it to take the actions we'd like—we will never get it. And until we get it, we will always be at the mercy of those who have it."[107]

Táíwò's assessment of policing, and his corresponding endorsed proposals, demonstrate the powerful implications of understanding policing authority as liability conferring powers. Still, the question of determining which powers are justified remains. For more traditional models of policing the question is left to state institutions to figure out—Táíwò's solution does not provide, nor was it meant to provide, an answer to the question. The important part of his proposal is that the power to determine answers to the

[105] The People's Budget, LA .
[106] Táíwò, "Power Over the Police" 2020.
[107] Ibid.

question is transferred to community members. His view still does not give us guidelines for the moral or legal constraints these members should use once they have the power.

I won't pretend to provide a full account of these guidelines here, and instead end this section by pointing us to Eric J. Miller's analyses of policing which can give us a helpful starting point for determining the moral constraints we should apply to policing authority (ideally these moral constraints would inform our legal ones).[108]

Miller argues that is a normatively important difference between the investigative and preventative aspects of police work. Police may justifiably have the power to help bring known offenders to justice. But why should they also have the power to try to stop crime before it happens? Miller later re-conceptualizes policing in terms of the role the institution plays in upholding unjust hierarchies.[109] Part of the function of police, he argues, is to enforce and uphold norms of civility. These norms might themselves be influenced by unjust social structures such that police end enforcing racialized conceptions of human behavior.

My aim here is not to give a full list of which powers can be morally justified for the police, but distinguishing between investigative and preventative powers seems a good starting point. Investigative policing, because of its connection to justice systems, is plainly on better moral footing to appropriately make people liable to those powers. Preventative policing powers, on the other hand, as well as those powers that help to enforce and reinforce white supremacy (conceived here, following Charles Mills, as a socio-political system), are not.[110] Miller's insights can provide a framework through which communities

[108] Miller, "Role Based Policing" 2006.
[109] Miller, 2021.
[110] Mills, *White Supremacy as Sociopolitical System: A Philosophical Perspective* 2003.

may analyze each policing power in terms of its justifiability.

I am open to the possibility that it may very well turn out that none of them are justified. I take it that this would depend upon a proper piecemeal assessment of power that might be granted, and I won't offer an exhaustive evaluation of that sort here. I will, however, briefly discuss the merits of three current powers police have in the United States.

To that end, consider the following three police encounters:

A. Summons: Alma, who has never broken the law, is a suspect in a theft investigation and is summoned by the local police for questioning.

B. Witness statement: Bella is walking down the street and sees Carla commit murder. A police officer happens to be on the scene and catches Carla before he gets away. The officer knows that Bella witnessed the whole thing and asks her to provide a statement against Carla.

C. Information request: There are a series of thefts in Dylan's neighborhood. On the night of one of the thefts, he notices his neighbor Eddie acting suspiciously. He sees Eddie leave his house alone and notices him returning home with a large trash bag full of what look like valuables. Police, having previously canvassed her neighborhood, ask that Dylan volunteer any information if he comes by it.

In my own view, whether police should have these powers is an open question, and certainly if they do, these powers do not themselves entail a general moral obligation to obey officers. Alma, Bella, and Dylan might all still have an independent reasons to do as police say. It could be the case, for example, that there exists a moral duty to never lie, including by omission. If this is the case Alma, in virtue of being asked questions about her

involvement in the theft case, has a duty to answer everything she is asked. Bella might have good reason to believe that Carla's killing spree is not over, and because of this is morally obligated to the people in her community to help officers apprehend her. Likewise, if Dylan had already made a promise to the officer to report any information on the thefts, he could be morally bound by fidelity to volunteer the information he has. My claim is that people may indeed be morally obligated to obey commands issued by police institutions or officers for such independent reasons. If we understand police authority as a moral power that entails liability and not a moral obligation to obedience, as I do, any obligation that arises to obey the police will be a moral or legal obligation separate from the authority of officers to command.

There are good reasons to believe that police justifiably should have the power to command compliance in (A)-(C). Assuming that some accountability is required by a functioning penal system (though I don't think this penal system needs police or prisons), the power to compel compliance might morally be justified. However, this power confers only liability to the police. In the power liability view of policing, we can coherently say that police officers involved in these scenarios have the moral powers to investigate and might have the moral power to command compliance with these investigations, yet Alma, Bella, and Dylan still do not have a prima facie, necessary moral obligation to help with these investigations by obeying police.

VI. Conclusion

In this chapter I explained and applied Arthur Applbaum's power liability account of political authority to the case of police in the United States. I showed that the view yields an account of police authority that conceptualizes it as a moral power to change the normative situations of the people police have authority over. The conceptual question of when police, morally speaking, ought to have such a power was left open. This is a deep, and complicated question that I will explore a bit more in my last chapter. For now, I wish to show that the issues posed in my first chapter—that is that it is not clear whether our obligations to law can be properly justified by our obligations to law—can be illuminated by a power-liability understanding of police authority. With such a view, we no longer need to ground our obligations to law enforcement from our obligations to law. This is not simply a pragmatic result: it is not just because it is difficult to justify obligations to police from our obligations to law that such a view is attractive. Instead, we can make room for an understanding of the authority of law enforcement as being fundamentally different in kind than the authority of law, a result hinted at by the legal philosophy of H.L.A. Hart.

CHAPTER 3: POLICING POWERS AND JUSTICE

I. Introduction

In the previous chapter I applied Arthur Applbaum's power liability view of political authority to the case of policing authority. Police thus *may* have political authority despite the fact that this authority does not necessarily yield even prima facie moral obligations of obedience to police officer directives. Police authority, in other words, is the moral power to affect the normative situation of the people police have authority over. A person might acquire an obligation to appear in court, an obligation to pay a fine or volunteer information to the police, the right to stay in a particular place, the obligation to leave a certain area, or the right to leave a particular area. I also suggested that the limit and scope of policing powers is at the heart of disagreements between policing reform and abolitionists groups, who agree that there is a problem of policing in the United States but disagree about what ought to be done about it. I argued, following Applbaum, that the disagreements about the limits of police power might be resolved using *moral* and not conceptual arguments about police authority.

One might argue here that my application of Applbaum's view to the case of policing in the United States is redundant, or useless, for helping us deal with the very real problem of police abuse of power in the United States. Perhaps it is thought to be intellectually interesting but of no real consequence for policy and decision making in the country. But I take my analysis to be a fruitful for the following reason: If the power liability account is correct (for the case of United States police officers and departments), then, no matter how or when a police officer exercises power, it is not a matter of necessity that the person, or

group of persons, the officer exercises power over, has a moral obligation to obey police directives. To put the point in a different way: a police officer's command/request/directive will never *necessarily* obligate a person. When people have a moral obligation to obey police officers, they will have only content-dependent reasons for the obligation. One's obligation to obey the police will not be on the officer's say so. A moral power to change the normative situation of another person makes that person *liable* to you. This is a very different thing than them being *bound to obey* you.

In this chapter I explore moral arguments one might make regarding police authority, I focus on arguments that are grounded in a Rawlsian conception of justice. In the first section, I argue that the power liability view of police authority is compatible with a Rawlsian duty of justice. It tells us only what police authority is conceptually and leaves open the possibility of moral arguments establishing content-dependent, context-sensitive obligations to comply with the police.[111] In the second section I examine Tommie Shelby's claim that law breaking, in some cases, is justifiable, and consider how these arguments might apply to the case of obeying the directives issued by modern police.[112] The third section of this chapter rejects the possibility of a Shelby-like justification of disobedience to the police; I suggest, instead, that obligations to the police, if they exist at all, should be established content-independently and in general for all members of polity.

[111] Given that in what follows I do not take a stand on whether police have authority or not, I switch from using the term "obedience" to using "compliance" when referring to power liablity police authority. I take the former to presuppose authority and the latter to not. I did not use "compliance" in the previous chapters given that, in the first one, obedience really was at stake in the theories of legal and political obligation that I analyzed. In my second chapter explained the power liability view of police authority, which if police *do* have it could possible generate obligations of obedience (though not necessarily)

[112] Shelby 2018, 212-218.

II. Policing Liability and the Natural Duty of Justice

My aim in the previous chapter was to provide a conception of policing authority that allows police to have legitimate political authority without this authority conceptually entailing a moral obligation to comply with police directives. As I explained, this does not preclude us making moral judgements about when the exercise of police authority is or is not morally or legally appropriate. Although these judgments would not conceptually change whether there is a prima facie obligation to comply with the directives of police, we may still inquire into the moral value of the powers and liabilities in play. In this chapter I make a similar point about moral duty. While policing authority does not entail moral obligations of obedience to police directives, the power liability view of police authority nevertheless is compatible with a general moral obligation of obedience to the law, and in a looser sense, moral duties of respect for law enforcement.

Recall Rawls's principle of fair play, which requires that people do their part to uphold institutions when they are fair and when one has "voluntarily accepted the benefits of the arrangement" or taken advantage of it to further their own interests.[113] In chapter 1 I discussed why principles of fair play do not bind us to comply with the police. For one thing, because of their role in upholding racial injustice, it is pretty clear that not all segments of the population "accept the benefits" of having a police institution.[114] But this problem does not immediately arise for a *natural duty* account of political obligation. Fair play obligations towards particular institutions, and to the people involved in those institutions, are based on the contingent ties of mutual benefit between individuals and

[113] Rawls,1971 (1999), 96.
[114] Potter, 2013.

those institutions. Natural duties are owed to people generally and hold irrespective of institutional ties. What Rawls calls the *natural duty of justice*, for example, binds us to support and uphold just institutions that exist and apply to us and to further just arrangements when this can be done without too much cost to ourselves.[115]

Does the natural duty of justice apply to the case of policing in the United States? Certainly policing is not a fully just institution, in the United States, or anywhere else. Nor is it clear that we "further just arrangements" by simply comply with police directives, as opposed to, say, lobbying for police reform. In any case, obedience to police authority often comes at great cost to people, especially in marginalized groups. Taken at face value, Rawls's natural duty of justice therefore gives us no reason at all to comply with police.

I myself do not think we are bound by natural duties of justice to support and uphold policing institutions in the United States. But note that a power liability understanding of police authority is itself conceptually compatible with a natural duty of justice that says otherwise. Recall that the power liability account of authority does not exclude independent moral arguments in favor of compliance with institutions.[116] The authority of police is the moral power to change the normative relationships of the people police have authority over. For all that says, we may have reasons of justice to comply with the directives of police. A would-be duty to comply with police may also be *defeated* for reasons of injustice. If the police institution exceeds a threshold of injustice, for instance, a natural duty of justice might instead bind us, at a reasonable to cost to ourselves, to seek a just arrangement in its place. (I return to Shelby's version of this view momentarily.)

[115] Rawls, 293.
[116] See Applbaum 2019, Chapter 3.

In addition, aside from simple compliance with police directives, there may be other, better ways to support and uphold institutions. In that case even a natural duty of justice directed towards policing institutions would not necessarily generate obligations or moral duties of obedience to police officers giving directives, making requests, and so forth. One may have a duty to volunteer information about crimes involving children, even if no duty to comply with the directives of police during traffic stops. One could even maintain that a natural duty of justice requires one to submit oneself in obedience, on the assumption that upholding or supporting an authority always entails a duty to comply. Though this point might be argued, obedience can be seen as but one way of relating to police institutions: just as there are numerous ways to assert moral powers, there are numerous ways to support and uphold institutions.

III. Injustice and Unfairness

There is of course a rich history of philosophers who reject any duties to support and uphold policing. Philosophers, activists, and scholars in the Afro-modern political tradition have long argued that there is no moral obligation to comply with the police, and that disobedience to the state and police is justified.[117] Yet despite the importance of these

[117] Here are a few examples: Malcolm X, after the police killing of Ronald Stokes in 1962, condemned the idea that people should be subservient and obedient to the United States' ideals and institutions, urging Black Americans to "come together against a common enemy" and to stop "sweet talking" or compromising with them (X 2021). The common enemy he was in part referring to here, was the police. Decades later the rap group N.W.A applied the sentiment in their 1988 song "Fuck Tha Police" which challenges police officers to go "toe-to-toe in the middle of a [jail] cell" (NWA 1988). Angela Davis, following the police murder of George Floyd in the summer of 2020, argued against the premise that existence of a police institution yields safety (Davis 2020). For more on the Afro-modern political tradition, its general methodology, and its relationship to modern liberal traditions, see Mills 2013.

arguments, and despite an increased mainstream awareness of police abuse, this conclusion remains hard for mainstream Western societies to accept. The counter argument tends to be that police are at least ideologically committed to principles of justice and social ideals such as "law and order." And despite their obvious failure to uphold these ideals fully and fairly, the authority of a police force that strives towards justice and fairness still properly binds people to obedience to police.

In *Dark Ghettos,* Tommie Shelby provides a helpful framework for diagnosing these arguments.[118] In what follows I will provide and analyze possible applications of his theory to the case of policing in the United States. Following Rawls, Shelby takes justice to be a matter of reciprocity between people who, viewing each other as equals, come together to support a basic system of cooperation for the mutual benefit of those involved.[119] In the spirit of fair play, and for reasons of reciprocity, people living in legitimate states have a natural moral duty to obey its laws and to do their part to uphold the institutions that make the benefits of living in the state possible.[120] But this is true only up to a point. When reciprocity fails, and a state exceeds a threshold of tolerable injustice, its legitimacy is weakened, and disadvantaged people have a correspondingly weakened obligation to comply with the laws of that state, to cooperate with institutions, or even to hold down a steady, legal job.[121]

Shelby's view of injustice as unfairness helps account for the significance of deep systemic injustices in the United States and other countries like it. The idea that people

[118] Shelby 2018.
[119] Shelby 2018, 19-21.
[120] Shelby 2018, 148.
[121] Shelby 2018, Chapter 8.

have obligations to comply with police directives is especially complicated for racial minorities in the country. In what sense can we say that these groups have a moral obligation to comply with the systems that work against them? Do regularly abused Black and Brown people really have moral obligations to comply with the police? In Shelby's framework, one can maintain that they do not have such obligations: injustice signifies a failed reciprocity to these groups and, consequently, at least some of the laws of the state do not legitimately bind them. They have either no obligation to obey these laws or, if they do have them, have them in a significantly weakened form.[122]

To be sure, Shelby's picture is more complicated than this. Missing from Shelby's discussion is a detailed account of the political and moral relationship between police officers and non-officers, especially in the "ghettos" where the relationship is especially problematic. Much as with Applbaum, the obligation to obey the law and the obligation to law enforcement seem to stand or fall together. For Applbaum they fall together for conceptual reasons. For Shelby they fall together for reasons of justice.

In Shelby's view, obedience to the law and fulfilling one's civic obligations is required by natural duty, in principle, but the realities of systemic racial injustice justify a standing exception for the ghetto poor.[123] Though Shelby does not extend his conclusions on injustice to our obligations to police officers in particular, one might use his views to consider whether one must comply with a police directive and see that the answer depends

[122] Another answer he could give, but that I will not explore here, is that the existence of a policing institution, and obedience to police officers[comma] are justified in virtue of being in a non-ideal state. Perhaps ideally, an institution like modern policing would not exist but since Shelby is concerned with *partial compliance* theory, he might argue that we would agree to some form of policing behind the non-ideal version of the original position because we know that people will not comply with the law. I thank Danny Underwood II for raising this possibility, and look forward to thinking about it more.
[123] Shelby 2018.

on what one's natural duty of justice requires—a matter that, even in Shelby's refinement, is not straightforward.

The Rawlsian framework that Shelby uses tells us that the duty of justice "requires us to support and comply with just institutions that exist and apply to us", and to "further just arrangements" when they do not exist (if the cost to do so is not unreasonable).[124] This poses many questions: What, exactly, does it mean to support and comply with a just institution? How do we figure out what institutions apply to *us*? What does it mean to further a just arrangement? What counts as an unreasonable cost? What do the answers to these questions tell us about policing in the United States?

Rawls leaves these questions open. Shelby tells us that the strongest way to interpret the duty of justice is as a demand to help establish just social orders and reform unjust institutions.[125] On this weaker interpretation, the duty of justice might bind us to simply not actively lend support to unjust institutions or, weaker still, to only to care about injustice. For Shelby, then, disobedience to police could be justified as a reform effort, or to not support an unjust institution. If we are merely bound to care about injustice, on the other hand, it is not clear that non compliance with the police is morally unjustified in the first place, since caring about injustice tells us nothing about whether or not compliance to police is necessary.

The power liability view of police authority avoids this ambiguity. It tells a simpler normative story: whether one should comply with police, and whether or not a person does something wrong in resisting arrest, is not a matter of whether he or she is reciprocating in

[124] Rawls 1979, 293-294.
[125] Shelby, 57.

a system of just cooperation. The matter does not depend on what the duty of justice binds us to, nor is it even conceptually necessary that obedience to police is a matter of respect or disrespect for law. There simply is nothing presumptively immoral about a failure to comply with the police.

In other respects, our accounts are similar. As Shelby interprets Rawls's natural duty of justice, it does not entail a content-independent duty to obey. Whether or not disobedience is justified thus depends in part on what one is being directed to do, which is to say, on the content of police commands. Shelby can accept, as I do, that a citizen might be justified in ignoring an officer's directive in one setting and yet remain bound by the natural duty of justice to submit evidence against a person in cases where one thinks that by doing so it will uphold justice. Likewise, providing a witness statement in a murder investigation, or information about robberies in one's neighborhood, might be required by moral duties one has qua moral agent towards others—and here again Shelby and I agree.

Here I should highlight one key difference between Shelby's possible justification of disobedience to police and my own. In my own narrow application of Shelby's arguments to the case of policing, he would take legitimate police authority to necessarily entail an obligation, unless a state falls short of a legitimacy threshold. So, in a society that meets the ideal theory requirements of justice, a police directive would generate a content-independent obligation to obey.

On the power liability view, by contrast, it is not a matter of conceptual necessity that the authoritative directives of police morally bind people to comply with those directives, even if society is fully just. The content-dependence of any natural obligation one may have to comply with police commands holds even in situations that are close to or

fully ideal, even, that is, were police institutions to satisfy principles in ideal theory. This is because according to the power liability view, policy authority is simply a moral power to make people liable to the exercise of their powers. The exercise of police authority never creates prima facie duties of obligation, even in fully just systems.

IV. Justice and Authority

In Shelby's view, whether one has the obligation to obey the police will always depend on the background conditions justice.[126] In this picture we are bound primarily to justice and then to the just laws of our state. We are bound first to justice only, then to just realizations of *law enforcement*, if indeed it is necessary for justice.[127] But, in that case, it's not clear how police have genuine *authority* over us.

In contrast, the power-liability account of police authority the content of a police directive determines how we morally assess the directive, but it does not necessarily, conceptually speaking, determine whether or not the issuer of the directive has authority. The view can side-step the larger question of justice and still explain why it is counter-intuitive to suggest that people who are routinely marginalized by police have moral obligations to comply with them. It is not that they ideally might have had the obligation and as it were lost it for reasons of injustice: they never had it at all, and no one, necessarily speaking, does, even in ideal circumstances.

[126] See Shelby 2018, Chapter One.
[127] Shelby 2018, 18-21.

Moreover, the possibility of a prima facie morally binding duty of obedience to police might itself seem to be counter-intuitive, and the power liability account can explain why: There is no prima facie morally binding obligation to comply with the police, even in conditions of justice.

V. The Authority of Police Cannot Be Relativized

Rawlsian views political obligation raise questions regarding what injustice for *some* entails for *everyone else*. Do non-disadvantaged groups still have a duty to "support and uphold" the unjust system simply because it is not unjust *for them*?

Shelby's project is to provide an account of of the moral and political lives of groups along "dimensions of race, gender, and class."[128] As such, he draws powerful conclusions about the weakened political obligations of the ghetto denizens but leaves open questions regarding how these same injustices affect the political and moral lives of those not disadvantaged by them. He tells us, for example, that crimes are not always "unreasonable" for the ghetto poor, yet tells us only that the duty of justice binds everyone to, at the very least, not be indifferent to injustices.[129]

It makes sense that his view justifies disobedience in the particular case where conditions of justice are not upheld because, in all other cases, disobedience would violate principles of fairness and justice.[130] Assuming the police have authority, the power-liablity view of policing does not differentiate the relationship between a suburban housewife and the police from the relationship between the police and racially disrespected inner-city

[128] Shelby, 4.
[129] Shelby, 58 and Chapter 8.
[130] Shelby, Chapter One.

youth. Yet, one might argue that these relationships are different in a morally significant way, and that this moral significance makes disobedience justified in the former case, but not in the latter.

Even using Shelby's framework however, it is odd to suggest that whether the police have legitimate authority is a piecemeal matter. That is, when considering systemic abuses by the police, it does not seem correct that whether the suburban housewife has a duty to comply with the police depends on whether or not the police act in a fair and just manner *for her*.

Shelby might respond to my worry by telling us that legitimate political authority, and the moral obligation it generates, is a matter of reciprocity. The suburban housewife receives reciprocity by the state and by the police, therefore *she* has a duty to comply with the police. Even though some are excused from their civic obligations for reasons of justice, everyone else is not.

I take this argument to entail what I will call the *Legitimacy-Over* thesis of police authority:

> If the police have legitimate authority over some persons, then those persons have a moral obligation to obey the requests of police officers.

Shelby suggests this thesis, or one in the vicinity of it, while he is clear that injustices in systems weaken the political obligations of those affected by injustice, he writes only that beneficiaries must not be indifferent to the injustice and should do their part to bring about just conditions.[131] Thus, Shelby argues that beneficiaries should do their part to bring about justice, but it is unclear whether complying with the law enforcement mechanism of

[131] "Beneficiaries" here, refers to those who are not oppressed by unjust social structures and who do not actively partake in injustice (Shelby 2018, 57-58).

an unjust state can be considered complicity. It is clear that while the conclusions in his book are compatible with the suggestion that no one in the United States has a moral obligation to obey the law, he nevertheless is hesitant to extend his more radical conclusions to privileged groups in the United States.

I would also take him to be hesitant to extend the justification to disobey the police to everyone in an unjust state. I take the apparent relativization of his conclusions to the ghetto poor to suggest the Legitimacy Over Thesis. The ghetto poor's weakened civic obligations are weakened not just because they live in an unjust state, but because they are the *target* of such injustices. These groups, for example, have special justification for partaking in criminal activity that he does not extend to everyone else.

To be sure, Shelby's point is an intuitive one: suppose a small bakery owner treats all her customers fairly except for one family that she consistently and systematically cheats. Though the family she cheats might be under no obligation to pay her fairly, everyone else, having received cakes from her, must still pay her what she is owed. If they learn that she cheats the one family, they might reasonably opt out of supporting her business, but it seems wrong to suggest that everyone else can cheat or steal from her as well, given they have benefited from doing business with her.

While I share the intuition that in this case everyone else should, if they choose to continue buying cakes from the business owner, pay her what she is owed, and the intuition that cheating or stealing from her is not morally justified, it is not obvious that the analogy can be extended to the case of a deeply unjust policing system. For one thing in the case of the business owner, assuming that the business does not provide an essential service that cannot be obtained in other ways, patrons can easily choose to not engage in

business with her given the unfair treatment of the one family. In the Rawlsian framework, this makes the obligations patrons have towards the bakery owner a matter of the principle of fairness. People are required to do their part and pay the bakery owner because they have voluntarily accepted the arrangement they are now a part of: the owner makes baked goods, and they choose to purchase them. It would be wrong, or unfair, to benefit from this arrangement without doing what is required of them and pay. This condition of voluntariness simply does not apply in the case of police officer authority because people cannot choose to not be policed in the way that people can just choose not to enter a particular bakery. This is why my discussion of obligations of obedience to the police has so far been based on the duty of justice, and not on principles of fairness.

For better or worse, in some cases people have no other choice than to turn to the police to seek help with civil and legal matters. This analogy, which seeks to show that in some cases one might be required by fairness to uphold an unjust institution because one is not themselves the victim of these injustices, fails because of the ingrained nature of policing in our society.

Still, it could be possible to recognize the privileged status of everyone else without drawing the conclusion that their obligations are weakened such that it is morally permissible for them to not comply with police officers. This would be the case if, for example, the reason why obligations to the police are weakened is that the person in question is oppressed. One might argue that the obligations of the privileged are weakened in virtue of the deep systemic injustices of the state, but they are not weakened to the point that makes disobedience morally permissible because they themselves are not being oppressed. To suggest that the privileged are in the same moral position with respect to the

state as the ghetto poor would be to stretch the meaning of what it means to be "oppressed"—a pitfall Marilyn Frye, for one, cautions us to avoid.[132] To suggest that everyone else is as adversely affected as racialized minorities would be to discount the direct impact the state's oppression has on the ghetto poor.

Though I accept that oppression by the police brings particularly onerous disadvantages, I am skeptical of the suggestion that this fact weakens only their obligations to police. If legitimacy is a macroscopic concept rooted in reciprocity and social cooperation, then I take it we should not make social and moral exceptions or grant justifications for individuals based on the socio-economic class that they belong to. As Reverend Martin Luther King Jr. cautioned us, "injustice anywhere is a threat to justice everywhere".[133] Just so, morally legitimate authority and our obligations to it, including legitimate police authority, is universal, for everyone or for no one at all.

VI. Conclusion

Although Shelby and the power liability view of police authority can both justify disobedience to police officers, and while each of the views is compatible with a natural duty of justice of respect towards police officers, there are important theoretical differences in the way we reach these conclusions. According to Shelby, disobedience to police might be justified when one is continually disadvantaged by state and/or policing institutions. Power liability policing, on the other hand, maintains that duties of obedience

[132] Frye , *The Politics of* Reality 1983.
[133] King, "Letter From Birmingham Jail" 1963.

do not exist prima facie, and don't need to be overridden; police have authority, but it is the kind of authority that yields liability to the police, and not duties to comply with their requests. On my view, since the permissibility of disobedience is not premised on injustice, whether one is themselves on the receiving end of injustice makes no difference.

Here it is worth noting the importance of the long-standing debate over how and when ideal theory can be applied to non-ideal circumstances. It seems to me that the starting point for a theory of policing, as it exists today, should hinge on ideal egalitarian premises, or even premises of equal protection under the law. We do better to begin from its history. Following Mills, we should in the first instance view policing in the United States *as it was set up*, so as to assign sub-personhood status to Black and Native Americans, and by extension, to subordinate everyone else who in varying degrees did not fit nicely into the country's mainstream society.[134]

Mills does not make this claim for policing in particular. His claim is that classic liberal frameworks do not give us the appropriate tools for understanding and correcting our non-ideal world because they assume an ontology of equal personhood. In reality, racialized systems of domination and gendered and class oppression have long resulted in a social ontology that counts some people as less than others.[135] Though the liberal tradition benefits from using language familiar to the average westerner to explain issues of oppression, it does not go far enough in explaining the intricacies and complications present in relationships between socially disadvantaged individuals, between them and

[134] Potter 2013.
[135] Mills, *The Racial Contract*1997.

socially advantaged individuals. Nor does it help explain issues socially disadvantaged individuals might have with themselves.

I take an important relationship in this scheme to be the one police officers bear to non-police officers. If in fact policing was implicitly or explicitly designed to maintain status quo power relations, it necessarily had to deem certain individuals as unworthy, denying them the self-respect assumed by the traditional methodology in political philosophy. I don't mean, and neither does Mills, that the self-worth and personhood of individuals targeted by police for abuse was actually degraded. But the actions of police arguably did lower and degrade their status socially. In a Millsian analysis of policing, it is easy to see that relationships between police officers and non-officers will be inherently gendered and racialized, as are all other social and political relationships.[136]

A power liability view of police authority fits nicely into this larger picture. It can help support the conclusions of those in the Afro-modern political tradition that argue against complicity with police, without appealing to a broader liberal framework these authors may want to avoid.

Gender, racial, and classist power dynamics fundamentally shape the world we live in. Policing authority can be understood as an instantiation of these dynamics. Officers hold the power to change individual's relationships with other people, with themselves, and with their state institutions. This power does not on its own yield a moral duty to comply with the requests of officers. Thus, all else being equal, under the power liability view of police authority, individuals are always morally justified in not complying with or ignoring police officers. It is not that people should, by default, comply with the police but just don't

[136] Mills 2018.

have to if they're targeted by systemic injustice, it's that the duty never existed in the first place. The authority officers have is liability conferring power, not an obligation yielding right to obedience.

CHAPTER 4: AGAINST ANARCHISM

I. Introduction

In Chapter 1 I showed that canonical theories of law often unjustifiably assume the premise that, if one has an obligation to obey the law, one also has the obligation to obey law enforcement. This posed the question of how police authority should be understood, in positive terms. In my second chapter I then adapted Arthur Applbaum's power liability view of political authority to the case of policing: police authority is a moral power to change the normative situations of people in their jurisdiction. This power might be exercised in a variety of ways, and the exercise of this power might yield people new institutional or moral duties, liberties, privileges, disabilities, etc. Yet the exercise of police power does not conceptually entail a moral obligation to obey the directives of police officers.

In the previous chapters I remained open to the possibility that there might be other, context and content dependent reasons why there might be a moral obligation to comply with some of the directives of police officers. My point in the first two chapters was to argue against a content-independent, prima facie binding obligation to obey police. I showed how power liability authority in policing is compatible, in principle, with moral arguments that might establish a moral obligation to obey police. It is, for instance, compatible, at least in theory, with a Rawlsian duty of justice that binds us to "support and uphold" just institutions that exist and do our part to create them when they do not. I also offered substantive moral reasons to doubt that there any such natural duty.

As a picture of police authority and of our obligations to comply with police, this project would be incomplete without exploring the anarchist view that rejects political and police authority entirely. In this final chapter, I both contrast my final position with anarchism and offer some arguments against it, while reinforcing the appeal of the larger picture I hope to offer.

II. Contrast with Anarchism

Philosophical anarchism is typically understood as a view about political authority and the state. To the philosophical anarchist the state and its political institutions lack the authority to compel us to comply with its directives. For John Simmons, for example, the fact that state power cannot be founded upon consent, understood as the voluntaristic acceptance of benefits, entails that there is simply no such thing as genuine political obligation and, consequently, no such thing as legitimate authority.

This is not yet a claim about police authority, per se. It leaves open the possibility of legitimate ad hoc police forces, perhaps as "community police," which are not backed or authorized by a legitimate state. In theory, a police squad could receive the requisite consent as a purely private association. But insofar as states now control the preponderance of the use of force over their territories, and insofar as conventional state-sponsored polices forces are at issue, we may assume their legitimacy depends on the legitimacy of the sponsoring state itself. And, in that case, if a state's laws are not generally authoritative for us, neither would its appointed enforcement officers be authoritative for us.

As I will understand it, then, *anarchism about police authority* is the view that no form of police authority is legitimate, and that we accordingly have no obligation to obey police directives. Like the state, any police officers there may be merely have the power to enforce law as they see fit. But they really are no different, morally speaking, than Hart's gunman, demanding that we hand over the money, *or else*.

If my power liability analysis is correct, it is indeed true that we do not have a moral duty to comply with police on their say so. Again, insofar as policing as an institution has legitimate political authority, and its officers have legitimate authority over a person or group of persons, a lawful police directive to those persons will change their normative situation. That will not necessarily amount to a claim right to compliance and corresponding moral obligation to comply with. The party directed may be morally liable to enforcement actions should he or she fail to comply, but the directive given does not, as such, generate a moral obligation to comply with. But unlike the anarchist position, the state's lack of a right to our compliance, and a corresponding duty for us to comply with, does not entail a lack of legitimate political or police authority, when the right limits are imposed. For, again, in either case genuine legitimate authority just is the moral power to change the normative statuses of people that the police have jurisdiction over, even with no duty to comply with.

Still, while my account differs from anarchism on this conceptual point, I have not yet said whether the police or the state actually have legitimate authority. That is, even if the exercise of legitimate authority is the exercise of a moral power, as I claim, that it is not quite to say any state or any police ever do have those moral powers. All things considered, state or police officers could still be seen as akin to a gunman demanding that we give him

our money—exercising mere power, and not legitimate authority. So, one might ask: am I a sort of anarchist after all, or not?

This is a difficult question, and it is broadly speaking outside the scope of this dissertation. Without taking a final stand on the matter, this final chapter will offer something of a defense of the view that police do have authority. I begin with my main argument against anarchism and then turn to several further arguments that highlight the attractions of my position.

III. The Argument from Targeted Significance

Why should we believe the police ever have legitimate authority in the first place, especially given the plain injustice of police abuse? The abuse of police powers is at least a central motivation for the anarchist position. But, I argue, the importance of that motivation does not lead where anarchists often take it to lead: towards an outright rejection of all genuine political authority. There is a more direct, better targeted explanation of our moral revulsion for officers that use their powers unjustly. Specifically, the best explanation is not that police entirely lack some of the powers they are granted under a legal order, but rather that they are too often misusing the powers they legitimately have, creating genuine liabilities where they should never have existed in the first place.

The point might be developed as follows. Suppose the promise of just freedom or equality always meant that we were never supposed to be liable to lose our lives, be racially profiled, or subject to physical violence in the first place. And suppose for the

moment that the police might still have genuine authority to shape what we are liable for, within their properly limited discretion. But, in that case, the fact that police use their legally recognized powers to go well beyond the scope of their legitimate exercise is especially egregious. It's egregious for the same reason we find abuses by teachers, advisors, parents, etc., outrageous. These actors hold positions of authority: using that legitimate authority to empower and perhaps rationalize abuses, exploiting the trust and relative vulnerability of those they mistreat, is highly objectionable—worse than if similar bad treatment had happened otherwise, not under color of authority.

I take this to be an intuitively attractive characterization of the evil in police misconduct. It is naturally understood, in the first instance, as a moral challenge to the conduct of police officials, to the ways police discretion is or is not limited, and to the foreseeable incidence of abuse under one law enforcement regime as compared to another. This might call for reform or outright abolition, and a particular action, set of legally defined powers, or powers regime might be said to be illegitimate. But this may or may not amount to a wholesale rejection of any police authority. Indeed, the argument for the illegitimacy of a particular action or system might be bolstered by background assumptions about the genuine legitimacy of police institutions.

All of this comports nicely with the power liability view, combined with the assumption that police forces can have the moral powers needed for political authority. Insofar as we are seeking to capture the targeted nature of the injustice, the anarchist position is not only unnecessary, it would seem to obscure it. It reduces the challenge to a complete rejection of any police authority whatsoever, both obscuring and diminishing the grave moral issue.

III. The Argument from Debate Capture

One test of a theory is whether it can be said to capture what is at stake in important political debates about that theory's subject matter. To the point just made about the targeted nature of the injustice in police abuse, we might add that the present account, unlike the anarchist position, offers a straightforward, charitable interpretation of the constraints on policing being advocated by various reformist/abolitionist groups. In general, these groups do not seek to qualify the legal or the moral obligation to comply with. Their hope, rather, is to rein in police powers themselves to help prevent their systemic abuse.

One can see why this should be the crucial issue on the power liability view: the important moral question is not about obedience to law, but about the proper scope of the police's liability conferring powers. Which powers *should* the police have? In what ways should people be liable to the police? In what ways should they *not* be liable? Though groups of activists and thinkers have long disagreed on answers to these questions, they tend to agree that people should not be liable to lose their lives in interactions with police officers. With the help of viral videos recording police brutality and killings, mainstream society has begun to realize how pressing the issue of limiting the scope of police power is, especially for overpoliced Brown and Black communities. No one's right to live rather than die should depend upon their perceived compliance with a legal or moral duty to "cooperate" in what may be their own mistreatment.

For example, well before relatively recent social media interest in policing reform, Oakland's Black Panther Party instituted self-defense measures against police. Armed

citizen patrols aimed at keeping watch over police officers were a way to record and deter police brutality against Black people in the city.[137] If we think of police authority as a bundle of powers, the Black Panthers can be said to have set moral and practical constraints on the power of police. Arguably, police never did legitimately have the power to routinely harass, beat, and kill people on the street. By taking up arms and policing the police, the citizen patrols can be seen as making that point: they are sending the message that people cannot be justifiably made liable to such treatment from police, at least not without those people having the power of self-defense.

Of course, many modern policing abolitionists do take a view that might seem close to the anarchist position: they argue that the moral and/or legal constraints on policing powers should be such that they allow us to completely abolish policing institutions. But I take "abolitionists" to include a wide array of scholars and activists, ranging from those who only argue against the institution's practical or philosophical necessity, to those who actively call for an immediate and total call for the end of policing. What is important here, is that the power liability account, but not the anarchist position, allows us to analyze the different claims these groups make.

For instance, the Black Panthers, in addition to making many other moral and legal claims against the federal and local states, showed us where they thought the limits of policing stood. *The People's Budget* coalition, a Los Angeles based group dedicated to advocating for near total defunding of the county's police budget, seeks to end police abuse by applying financial legal constraints to the amount of funding departments can receive from the state. The hope is to rein in the scope of police powers by making their sweeping

[137] Nelson 2015.

exercise unaffordable.[138] By contrast, communitarian models of policing, such as those proposed by activists M. Adams and Max Rameau, and defended by Táíwò in a recent article in *Dissent* magazine, take a wider approach to limiting police powers and the corresponding ways individuals are liable to police officers. Táíwò argues that while defunding measures do help the problems of police abuse, these proposals leave "the basic political structure", that perpetuates these abuses in the first place, intact.[139]

To Táíwò, the solution is to transfer policing powers to people, thus inverting the authority-subject relationship, so that police answer to members of the communities they police, and not the other way around. Táíwò maintains, as I do, that police have authority while at the same time recognizing that the core of policing authority *are* their allotted powers. "The problem with policing," he writes, "is power, not prejudice [...] Until we demand and organize for power *itself*—rather than pleading for those who have it to take the actions we'd like—we will never get it. And until we get it, we will always be at the mercy of those who have it."[140]

Táíwò's assessment of policing, and his corresponding proposals, demonstrate the powerful implications of understanding policing authority as liability conferring powers, along with the importance of not leaving the matter of *which powers* are justified entirely to the state to figure out. Still, Táíwò's proposal to include community members does not give us guidelines for the moral or legal constraints these members should use once they have the power.

[138] The People's Budget LA 2020.
[139] Ibid.
[140] Táíwò's 2020.

Here a helpful starting point is again Eric J. Miller's analysis of the moral constraints we should apply to policing authority, ideally in legal enactments. To Miller, as noted earlier, there is a normatively important difference between the *investigative* and *preventative* aspects of police work.[141] Policing done by investigative units can justify some policing powers (such as the use of force and coercion to impose fines, or summoning people to court), because of the connection between these powers and the (granted as necessary) penal system. But policing aimed to prevent crime, stops on an officer's suspicion, or surveillance efforts, face a much heavier burden of justification. Part of the function of police, Miller argues elsewhere, is to enforce and uphold norms of civility.[142] But since this proceeds against the backdrop of unjust social hierarchies, which are taken as given, enforcement of civility can amount to enforcement of racialized or sexualized conceptions of human behavior.

Investigative policing, because of its connection to justice systems, is plainly on better moral footing than preventative policing—certainly far more so than preventive powers that help to enforce and reinforce white supremacy (conceived here, following Charles Mills, as a socio-political system). Miller's distinction between investigative and preventive powers can provide a framework through which communities may analyze each policing power in terms of its justifiability. It may very well turn out that none of them are justified, but the matter is complicated. Here my claim is that this is the right question to ask about the legitimacy of police authority, and that the power liability view helps us see clearly why it should be. An anarchist position, by contrast, is too simple: it moves too

[141] Miller 2006.
[142] Miller 2021.

quickly from the mere lack of a duty to comply with to the wholesale rejection of any legitimate police authority. But even if there is no duty to comply with police, the matter of legitimacy really is complicated—a delicate matter of exactly which moral powers can be justifiably granted.

IV. The Argument from Resistance: Why Resisting Arrest is not Immoral

The anarchist and power liability theorists do agree on one point: we lack any authority-based obligation to comply with police directives. But they offer different reasons why. To the consent-based anarchist, for instance, there is no such obligation simply because it is not consented to in a required fashion. This reason may make no reference to the reality of police abuse or injustice, though of course that would naturally explain why people would not in fact consent to police authority. One way to motivate the power liability view, then, is to argue that it offers a better account of why we lack an authority-based obligation of obedience. Specifically, one may argue that non-compliance with police directives is often morally justified, and that the power liability view offers a natural and indeed the best explanation why.

If the power liability account is correct, then no matter how or when a police officer exercises power, it is not a matter of necessity that the person, or group of persons, the officer exercises power over has a moral obligation to comply with police directives. A police officer's command, directive, or request will never necessarily obligate a person, regardless of its content, simply on the officers say so. Consequently, it is never prima facie morally wrong to discomply with a police directive, never wrong to resist arrest, never

wrong to remain silent when questioned, never wrong to flee given a chance of escape, at least not simply because it amounts to disobedience. When or if it is the case that people have a moral duty to comply with police officers, there will have to be other content-dependent reasons for the person to have that duty. We are *liable* to the police, but never *obligated to comply with* them.

Notice that this bears directly on political and cultural debates surrounding how obedient a person subject to police brutality was (e.g. as in an arrest video). To the extent certain analyses assume that it is wrong to not comply with police directives and right to simply "comply" and "cooperate," those views are misguided and morally unfounded. The many tragedies debated also highlight the importance of our societal failure to restrict the legal scope of police authority, which is no more than legitimate power. On the present view, the false assumption of a duty to comply with obscures this fact. Were the debates less morally clouded than they are, we would not take for granted that a victim really should just have complied with an officer's commands, in which case he may be said to have brought the unfortunate outcome upon himself. While one might still make the case for an obligation to comply, a moral argument would be needed and, given systemic police abuse, in many cases such an argument would difficult to provide.

Here I assume that the familiar realities of police abuse establish, well enough for present purposes, that resistance to police can be and often is morally justified. This is not quite a consequence of the power liability view, but it is important that it is consistent with it: there is no necessary moral duty to comply that the fact of unjust treatment would have to rebut. A traditional duty to comply with might still be maintained, but it would have to be formulated so as to be defeasible as the case in question requires. The power liability

view, in this way, offers a natural, direct and simple explanation of why resistance is often justified.

To be sure, any account of political or police authority should also explain when and why we sometimes seem to have a duty to follow the law. Here it is a strength of the power liability view that, as I've explained, it can allow any number of further considerations, both prudential and moral, that may often or even normally weigh decisively in favor of doing what the law says. Aside from reasons of staying out of jail, there are, for example, reasons of general respect for law, custom, or established practice, respect for society, a natural duty to people, a natural duty to generally promote justice, or even obligations of fair play. All of these considerations are consistent with the power liability view, so long as they are not taken to entail a duty to comply with legal police directives on an officer's say so. And, we may readily add, a police directive is generally an unreliable guide to what it is either prudent or morally correct to do.

Moreover, as suggested earlier, on the present view it is even possible to be morally bound to comply with the directives of an officer in virtue of the directives' *content* or *context*. This is still different from saying that the authority of police officers bind people to obedience, or that people have, in general, a presumptive or, pro tanto or prima facie (if defeasible) duty to comply with police. Nor, of course, does the lack of a moral obligation to complyimply that police officers may wield their power in whatever way they think is best, or that it is morally permissible to sustain a system that gives great discretionary power to police officers. As I have emphasized, any legitimate form of legal or police authority will come with robust moral and legal constraints, and, again, it is the project of police reformist and abolitionary groups to tighten these constraints.

V. Conclusion

What difference does it make whether the power liability account is correct?

The *argument from resistance*, offered above, shows that, if my view of policing is right, arguments debating obedience and subservience of people killed by police are fundamentally misguided and morally unfounded.

The *argument from debate capture* shows us that the question at the moral center of debates between police reformists and police abolitionists is the question of which moral powers police should have, and in which ways we can reasonably ask people to be liable to armed law enforcement.

Finally, the *argument from targeted significance* tells us that it is possible to reach the radical conclusion that police are not morally owed obedience, without having to deny the possibility of legitimate political authority, and without having to deny that the authority of law enforcement is connected to the authority of law.

While these arguments hardly prove that police enjoy the moral power to change the normative status of a person, they do show us that thinking about police authority in the way I have proposed explains many pre-theoretical intuitions about police power and its abuse. All of this points to the larger attraction of the power liability account of police authority.

I have focused on policing in this dissertation, but I believe the same account applies to law enforcement in a wide variety of institutional situations, including institutions of border enforcement and those of the carceral system itself. I hope to develop the full picture of law enforcement in the future.

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