

ON THE SUPERIORITY OF DIVINE LEGISLATION THEORY TO DIVINE COMMAND  
THEORY

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The view that human law can be analyzed in terms of commands was subjected to devastating criticism by H. L. A. Hart in his 1961 *The Concept of Law*. Two objections that Hart levels against the command theory of law also make serious trouble for divine command theory. Divine command theorists would do well to jettison *command* as the central concept of their moral theory and, following Hart's lead, instead appeal to the concept of a *rule*. Such a successor view—*divine legislation theory*—has the attractions of divine command theory without the unacceptable limitations of command theories that Hart identifies.

Contemporary philosophy of law has utterly rejected the notion that ordinary human law can be analyzed in terms of commands. But one of the most promising varieties of theistic moral theory, divine command theory, offers an account of moral law in terms of divine commands. In light of these facts, I want to discuss two questions. First, do any of the objections to analyzing ordinary human law in terms of commands also apply to giving an account of the moral law in

terms of commands? And, second, are there alternatives to characterizing ordinary human law in terms of commands that those sympathetic to divine command theory might appropriate to their own advantage?

I will first briefly describe the key features of the sort of divine command theory under consideration here, noting that it is the central version of theological voluntarism now defended (§1). I will then turn to a well-known episode in the recent history of philosophy of law: H. L. A. Hart's nearly-unanimously endorsed demolition of John Austin's command theory of law (§2). I argue that some—not all—of the key objections leveled by Hart against Austin's theory of law apply against divine command theory's account of morality (§3). I conclude by recommending that divine command theorists jettison *command* as the central concept around which they build their theory of morality, and instead, like Hart, focus on the notion of a *rule* (§4). Morality is, the divine command theorists think, about divine lawgiving; but if laws are not commands but rules, the divine command theorists should rethink the way that they construe the divine activity that accounts for morality. Divine *command* theorists should become instead divine *legislation* theorists.

### §1 “Divine command theory”

“Divine command theory,” as I will mean it in this paper, names a theory that aims to explain the deontic side of morality.<sup>1</sup> Morality of course has more than a deontic side; it has, for example, an axiological side, regarding that which is good, or valuable. But divine command theory as such has no theory of the axiological part of morality, though some divine command theorists embrace a theistic account of the axiological.<sup>2</sup> Similarly, divine command theory as such has no

theory of the virtues, though some divine command theorists offer an account of character that complements their theories of the deontic.<sup>3</sup>

Divine command theory presupposes that there are two things more explanatorily fundamental than the deontic aspect of morality: God and commands. Thus it cannot be constitutive of *being God* that God (e.g.) acts in accordance with some moral requirements, and it cannot be constitutive of some act's *being a command* that it meets, say, some moral requirement. Some may find those presuppositions suspicious and will want to use them as a basis to object to divine command theory.<sup>4</sup> But I do not take them to be obviously objectionable features of the view and will take them for granted in what follows.

There are different ways that one might characterize the explanatory relationship between God's commands and moral requirements—whether as some causal relationship, or as constitution, or as identity, or as some asymmetric supervenience relationship, or simply as grounding of some sort. Whatever it is, the relationship is supposed to be immediate (God's command is not merely one link in an explanatory chain leading to the holding of a moral requirement, but is instead the direct explanation of it with no intervening explainers) and, with respect to that immediate explanation, complete (God's command is not merely a proper part of the immediate explanation of the holding of a moral requirement, but is the immediate explanation entire).<sup>5</sup>

This view is not some abstract position singled out for the purposes of this paper. While there are other varieties of theological voluntarism,<sup>6</sup> divine command theory remains the preeminent type, defended by (the early) Quinn, Adams, Hare, and Evans, among others,<sup>7</sup> and my characterization of divine command theory fits their views.

§2 *Austinian legal theory and Hart's response*

The argument of this paper makes use of a bit of philosophy of law to illuminate issues in theistic moral theory. So I need to rehearse an episode in mid-20<sup>th</sup>-century jurisprudence.

John Austin's early 19<sup>th</sup> century account of law's nature<sup>8</sup> dominated Anglo-American legal theory for a century and a half until its decisive refutation by H. L. A. Hart.<sup>9</sup> There are a number of extremely dubious features of Austin's view the inadequacy of which Hart discusses at length<sup>10</sup> but which are not particularly important for our purposes and which I will pass over without further comment. Our focus will be on Hart's attack on the centerpiece of Austin's theory, Austin's characterization of what it is to be law.<sup>11</sup>

Austin claims that to be law is to be the command of a sovereign, and so to be under a legal duty is to have been commanded by one's sovereign.<sup>12</sup> Austin's position is that within every legal system there is a party that is supreme over all others within that system.<sup>13</sup> This supremacy is to be understood descriptively, not normatively, in terms of habits of obedience: the sovereign is that party with respect to whom the bulk of the populace has a habit of obedience but who does not have a habit of obedience with respect to anyone else.<sup>14</sup> What unifies the laws into a single legal system is their single origin, their being issued by a sovereign.

In *The Concept of Law*, Hart criticizes a conception of law as command of the sovereign that he describes abstractly but which derives entirely from Austin's position. He makes trouble both for the "command" part and the "of the sovereign" part of Austin's analysis.

With respect to the "of the sovereign" part, the crucial line of objection is that there is in contemporary legal systems no party that is capable of giving commands that can be identified as *the sovereign*, using Austin's criteria or anything in the ballpark of Austin's criteria.<sup>15</sup> The

objective of determining the source of the existence of law and the unity of systems of law by fixing on a sovereign, the status of which is determined by a descriptive criterion, seems misguided given the structure not only of possible but actual legal systems.

Even in light of this difficulty, it is not surprising that Austinian legal theory includes an appeal to sovereignty, given its trumpeting of *command* as the “key to the science[] of jurisprudence.”<sup>16</sup> As Austin’s guiding commitment is that law is a species of command, law must proceed from a commander, and it is hard to see how one could account for the systematicity of law without unifying the laws of a legal system somehow under a single commander. But this appeal to command is also a deep mistake.

Hart summarizes the difficulties with holding that law is a species of command under three headings: “mode of origin,” “range of application,” and “content of laws.”<sup>17</sup> Hart’s objections have a common form: commands have certain features essentially that laws can lack altogether. When we have a command, a situation in which A commands B, here are three things that we know: (1) that A is a commander, a being who is capable of having the mental states and performing the relevant communicative action toward B; (2) that A and B are distinct parties;<sup>18</sup> and (3) that the content of A’s command is an action, something that B is to do. (*Refraining* from doing something counts as an action.) But these features, which are essential to commands, are not essential to laws.

*Modes of origin.* The “command of the sovereign” model has most promise when we think of those laws that are generated by legislative enactment. But not all laws are generated in this way. Some laws arise from custom, and judges applying the law are explicit about their having their legality from that source; some laws are generated due to particular judicial decisions, and judges rely on those holdings as the basis for those laws. As it is plain that some

law actually comes into existence in these ways, and not by being commanded into existence by a commander, the Austinian view fails to capture clear cases of law.<sup>19</sup>

*Range of application.* Some laws apply even to people who make the laws. It is possible for a legislature to make law that binds that legislature—for example, it can make laws that preclude that legislature from taking up certain bills for consideration. It is possible for a monarch to make a law that the monarch will not make further law governing some group of subjects without first consulting that group. As it is plain that there can be such laws, and that such laws cannot be explained on the Austinian model—for commands are always directed *toward another*—the Austinian view fails to capture clear cases of law.<sup>20</sup>

*Content of laws.* The command-of-the-sovereign picture of law makes most sense when we are considering duty-imposing laws—laws that restrict conduct. But not all laws are like that. Some laws are power-conferring laws, which confer on public or private parties new abilities. These new abilities are new *normative* abilities, such as conferring on legislators the capacity to make new laws or to alter the existing legal landscape of duties and rights by making contracts, making wills, creating corporations, and so forth. But the limitations in the possible propositional objects of commands—that they are always *that the commanded do something*—preclude our being able to explain all laws as species of commands. So the Austinian view fails to capture clear cases of law.<sup>21</sup>

Hart considers and blocks various Austinian maneuvers to attempt to avoid these difficulties, to which I will return below. Unlike in the case of many other philosophical disputes, which seem to leave matters uncertain and unstable, the upshot of Hartian criticism of the Austinian position was a near-universal abandonment of the Austinian paradigm and a

movement toward Hart's own proposed alternative. (I will discuss Hart's own alternative to Austinian jurisprudence below, §4.)

### *§3 Hartian objections to divine command theory*

What is the relevance of the previous section's excursus into philosophy of law? The point is that the similarity between divine command theories of the moral law and Austin's theory of human law suggests a hypothesis: that at least some of the difficulties that Austin's theory of law faces from Hart's criticisms are also difficulties for divine command theories of the *moral* law. It is not obvious at the outset that this hypothesis will be borne out. Law and morality are very different, with differing formal features, and what might be a devastating criticism of a theory of human law could be no objection at all to a theory of morality. But I will argue that in this case, the hypothesis is confirmed: while not every serious objection that Hart raises to Austin's view generates a corresponding serious objection to divine command theory, some of these objections do carry over in ways that make genuine trouble for the divine command view, weakening its explanatory power or burdening it with commitments that a divine command theorist should prefer not to have.

Here is one important difference between the extent to which Hart's criticisms apply to Austin's theory of law and the extent to which they apply to divine command theory's account of the moral law. I do not think that any of the difficulties for Austin's view that arise from Austin's trying to place the source and unifier of law in sovereignty make trouble for the divine command theorist, at least not in any way that is plausibly neutral between divine command theory and rival theistic metaethical theories. Austin's troubles come from its being implausible

that there exists something that fits the role set by the Austinian concept *sovereign* in all possible (or even actual) legal systems. Austin needs the relevant habits of obedience to be pointed toward a single, privileged being, a being that is personal, so that it has the right sorts of beliefs and intentions to be able to command, and with the effective power to hold subjects accountable for failing to adhere to those commands. Modern legal systems simply do not have a sovereign, in that sense, and so if human law exists, then Austin's theory is false. But theism affirms that there *is* such a being as God, who is personal and who can command and hold accountable all those who are the subjects of the moral law.<sup>22</sup> So the "no plausible sovereign" line of objection to Austin's view of human law carries no weight against divine command theory, at least if the divine command theorist's theism is taken for granted.<sup>23</sup>

I also would say that there is a massive difference between the great force that Hart's "modes of origin" objection has against Austin's view and whatever weight the corresponding version of that objection has against divine command theory. The force of Hart's objection against Austin is that it is a plain fact, known by all competent observers of the law, that there are laws that have their existence other than through enactment. Transformed into an objection against divine command theory, this becomes the objection that there are ways in which moral requirements have their existence other than by being brought into existence by divine enactment. While this objection can be developed to some effect,<sup>24</sup> it does not rely on facts that are plausibly neutral between divine command theorists and their rivals, and so it is much weaker dialectically.

By contrast, I think that the correlates of the "range of application" objection and the "content of laws" objection are more important and count as real problems for the divine command theorist.

Hart's range of application objection holds that Austin's view cannot in principle explain legal limitations on the lawmaking authority. For what sets legal limits are commands, and *commands* is an antireflexive relation; so no sovereign can, on Austin's view, legally limit itself. But this will also be true of God, on the divine command theory account. If God cannot command God, then necessarily, God is bound by no moral requirements. If it is undesirable for a moral theory to entail that necessarily, God is under no moral requirements, at least given the existence of very nearby theistic ethical views that do not have this entailment, then that is a strike against divine command theory.

That a very nearby theistic moral theory does not have this implication is something that I will show in the next section. Let me focus for the moment on the undesirability of having to commit to the thesis that, on divine command theory, God necessarily is bound by no moral requirements. Some divine command theorists might grant that this is an undesirable implication, but will say that the other features of divine command theory should make us willing to accept that implication. My remarks are not addressed to them; they have granted what I want to say, which is that this is something that counts against divine command theory, and is to be avoided all other things equal.

My remarks are instead addressed (a) to those who are uncertain whether this is an undesirable implication, (b) to those who think it is a matter of indifference, and (c) those who think that it is in some way desirable.

To those who (a) are uncertain about whether it is an undesirable implication: my claim is that, in this specific dialectical context, it counts as a strike against divine command theory that it forces its adherents to hold that God is necessarily subject to no moral requirements. We need to be careful here. There are obviously cases when, in a comparison of Theory A and Theory B,

the fact that Theory A entails that some proposition *p* is true and Theory B does not is a mark in favor of Theory A, or at least not a mark against it. If we have independent reason to believe that *p* is true, then Theory A's entailing it and Theory B's not entailing it constitutes Theory A's being more informative in some respect than Theory B is, and that counts in favor of A. And if we have independent reason to believe that Theory A is a better theory than Theory B, then A's entailing that *p* may provide us with good reason to believe that *p* — we will treat Theory A as enabling us to learn that about which we were previously uncertain, and that again can count in favor of Theory A.

But note that neither of these conditions hold here. Because I am addressing at this moment those who are uncertain about whether it is correct to say that necessarily, God is not bound by moral requirements, these folks should not hold that divine command theory, by entailing that proposition, shows itself in that respect more informative than theories that do not have this entailment. And while it must remain a promissory note until the next section, there is at least one theory that is equally well-supported as divine command theory but that does not generate the entailment that God is necessarily not bound by moral requirements. So neither of the conditions in which a theory's having an extra entailment can count in favor of that theory over a given rival holds in this context. Yet there is something clearly *undesirable* about divine command theory's having this extra entailment: divine command theory's entailment of that proposition means that it enjoys a smaller logical space in which divine command theory could possibly be true. Divine command theorists who are uncertain about whether God could be under moral requirements thus have reason to look with favor on alternative positions that have the features they find attractive in divine command theory but without committing them to this dubious entailment.<sup>25</sup>

Should we believe that it is (b) a matter of indifference whether a theory entails that necessarily, God is not bound by moral requirements? One might grant that there is something unhappy-sounding about the view that God is not morally bound not to kill the innocent or not to break promises or not to tell lies. But one might say that, really, there is no problem here. Even if God is not morally bound by such requirements, we do not need to hold that God is morally bound to refrain from these actions in order to hold that God reliably refrains from performing them and that God's so refraining is an aspect of God's complete praiseworthiness as an agent. This is a standard divine command theorist maneuver: to hold that God necessarily acts (e.g.) justly or kindly, though these are entailments of perfect divine virtue and not due to God's being under any moral requirements.<sup>26</sup> Since divine action can be adequately reliable and praiseworthy without there being any moral requirement to which God is subject that explains such action, it does not really matter whether it turns out that God is necessarily not under moral requirements.

This response succeeds as a basis for being indifferent to whether a theory entails that necessarily, God is not under moral requirements only if the sole reason for being concerned about God's necessarily not being under moral requirements is that one would thereby lack an account of the praiseworthy pattern of action that we expect from a being that counts as God. But that is not the sole reason for concern. Moral requirements, or at least a subset of them, are important inasmuch as they make possible relationships of accountability between those bound by them.<sup>27</sup> As Evans has noted, ties of accountability are not only instrumentally valuable but can also be themselves a valuable aspect of personal relationships.<sup>28</sup> It may be very important to me that you have lunch with me once a week: I treasure your friendship and our time together. I may know that you are a creature of habit and will reliably show up week after week. A new relationship is introduced between us, though, if you promise that you will join me every week.

Here you have made yourself accountable to me in a new way. Even if I am confident that I will never have to hold you to account—as I said, you are a creature of habit—we are more intimately related by there being such ties of accountability between us.

Similarly, God may be necessarily just, or kind, and it is entirely compatible with the divine command theory that we can fully count on God's acting toward us in just and kind ways. But God's being morally required to be just or kind to us could place God in a new sort of relationship to us, one in which not only can we count on God's being good to us in these ways, but we can also know that God is accountable to us for acting in those ways. This is a form of intimacy with us.

So I don't think that it is a matter of indifference that divine command theory entails that God is bound by no moral requirements. There is a valuable form of intimacy between God and humans that would be impossible were it impossible for God to be bound by moral requirements; and it would (for Hartian reasons) be impossible for God to be bound by moral requirements were divine command theory the truth about the deontic side of morality. (Evans, who has been pressing the distinct sorts of value borne by accountability relationships, should be particularly concerned that his own divine command view does not have conceptual room for God's being morally accountable to us.<sup>29</sup>)

Some divine command theorists may reject this. Some may even think (c) that it is positive feature of divine command theory that it entails that God is under no moral requirements. They may take this to be a *desirable* entailment, due to its reflecting God's sovereignty over the world, including the moral world.

Though many would not, I agree that it is an undesirable feature of a moral theory if it holds that God is under moral requirements willy-nilly. That is: I agree that one should say that

if God is under moral norms, then that could be due only to God's placing God under them. Any other way for God to be limited by moral requirements would contravene divine sovereignty.<sup>30</sup> But divine command theory does not entail only that God is not under moral requirements willy-nilly. It entails that there is *nothing that God could do* to place God under moral requirements. And that is what seems undesirable. What is needed to preserve divine sovereignty is simply God's not being under the moral law willy-nilly. What is not needed, and seems even to tell against divine sovereignty, is that not only is God *not* bound by the moral law, but there is *necessarily* nothing that God could do about that fact.

I thus propose that the range of application objection generates a real worry for divine command theorists. The motivations that support divine command theory do not support God's necessarily not being under moral requirement; and yet divine command theory entails that God is necessarily not under moral requirement.

What about the "content of laws" objection? Recall the worry is that even if the commands of an Austinian sovereign would capture enough of the appearance of duty-imposing law, they are unable to provide a plausible explanation of power-conferring laws.<sup>31</sup> Power-conferring laws do not restrict conduct; they enlarge one's possibilities of agency by specifying what one can do in order to bring about certain legal effects. Commands are not even the right kind of action to confer powers; their whole point is the direction of conduct, of mandating some line of action and precluding others. So law as described by Austin would be incapable of conferring legal powers.

Here is a claim that is not entirely uncontroversial—nothing about the structure of first-order morality is—but which is part of ordinary commonsense morality, and is not something the acceptance of which characteristically is the outcome of adherence to a contentious moral theory:

*In addition to moral duties, we also have moral powers.* (It doesn't matter that we don't usually use the term "moral powers.") That is: In addition to our having a moral duty not to kill and a moral duty not to assault and a moral duty not to kidnap and a moral duty not to speak rudely, we also have a moral power to make promises and vows, and a moral power to consent to certain things, and a moral power to direct (some) others to do certain things. The moral rules that govern our lives not only constrain our conduct by telling us to do or not to do things; they also enable us to alter the fabric of the moral world by adding to people's duties (our own, as in promises and vows, and other people's, as in exercises of authority) or by subtracting from them (as when we consent to people doing things to us that they otherwise are under a moral duty not to do).<sup>32</sup>

If Hart's criticisms of Austin on the content of laws issue are correct, then we would expect that divine command theory would be unable to account for these features of morality. As Hart's criticism of Austinian legal theory depends simply on power-conferring rules' being part of the law and commands not being able to account for the conferral of powers, we should expect that a view on which the moral law is fixed by divine commanding would be unable to account for moral powers. And this is borne out on inspection. Power-conferring rules enable the bringing about of a normative effect through the performance of some action by the powerholder. Divine commanding as the sole source for moral rules does not have the flexibility of structure to confer powers. All divine commands can do is to dictate action. Thus divine command theory is unable to explain fully the content of the moral law, in particular, its containing norms that confer moral powers.

Hart considers one of the most promising responses to this objection against the Austinian command theory of law to be the proposal to treat power-conferring laws as if they

were very complex commands, not addressed to the power-holders, but to the persons whose normative status would be altered were the conditions that constitute the exercise of the power realized.<sup>33</sup> So, for example, legal rules that confer the power on persons to create wills should instead be conceived as legal rules directed to courts to dispose of deceased persons' property in certain ways upon the performance of certain actions by those deceased persons when they were alive (along with other qualifying events). Legal rules that give parties the power to consent to medical procedures that would otherwise constitute assault would have to be read as modules that will be plugged into all of the commands to parties not to assault, qualifying the scope of those commands. And so forth.

This strategy does not look very promising in the case of human law, not least when it becomes clear that the power to make new law is itself often conferred by law, and this power resists assimilation using the sort of strategy outlined above. But even putting that to the side, this technique seems deficient for multiple reasons. First, it requires wholesale ignoring of the surface features of legal rules, which seem on their face to be of different types and to be individuated in an obvious way. Instead we have to re-interpret those rules and treat them as fragments of commands, or commands to other parties than those laws seem to be addressed to, or as modules of commands to be plugged into commands that appear elsewhere in the system. Second, carrying out this strategy is obscuring rather than illuminating. It conflates two kinds of rules, each of which has a distinctive point: the point of one sort is to *restrict* conduct to an acceptable range; the point of the other sort is to *expand* the repertoire of options by giving agents control of the distribution of some of the world's normative features.<sup>34</sup>

It seems to me that these two objections would also hold if the divine command theorist were to seize on this sort of strategy to accommodate the moral powers that we humans have—

powers of promising, of exercising authority (e.g. over one's children), of consenting, and so forth. The divine command theorist might suggest that the conferral of moral powers on us creaturely agents to be merely bits and pieces of divine communication that are simply fragments, introduced to qualify other divine commands, or as not really addressed to the holders of moral powers. But that would, just as in the Austinian case, require a wholesale ignoring of the surface features of these different sorts of moral rules—the rules that impose duties, and the rules that grant moral powers—as well as obscuring the very different points that these moral rules serve.

In any case, the divine command theorist would be introducing unintuitiveness and complication into the theory in order to accommodate the moral phenomena. If the only notion that we could employ within our theistic moral theory to portray God as a legislator were that of command, then we might accept this tangle as the cost of getting this attractive feature on board. But if there is a plausible theory to succeed Austin's, then we can build a theory of human law without appealing to command; we might be able to do the same in moral theory, offering an account of divine legislation that does not appeal to divine command. Hart offers such a successor theory to Austin's theory of human law. I say that theistic moral theory can coopt the benefits of this Hartian alternative in jurisprudence while preserving intact the theoretical attractions of divine command theory.

#### *§4 A Hart transplant for divine command theory*

The basic Hartian move is that we should abandon the notion that the key to jurisprudence is the idea of a *command*; the key to jurisprudence is, instead, the idea of a *rule*.<sup>35</sup> We had better get

comfortable with rules that are not analyzable in terms of commands, for there are rule-governed domains that are plainly not to be characterized in such terms. The rules of card games or sports are not analyzable in command terms. The rules of etiquette aren't either. One can have a club with rules, but no plausible commanding authority in sight. (The club and its rules may have come into existence bit-by-bit, organically rather than by some constituting acts; there may be no answer to the question "who founded this club?" or "who laid down these rules?") So one thing we already know is that no matter what we say about law in particular, we are not going to get rid of rules-that-aren't-reducible-to-commands from our social ontology.

One thing that we know by looking at these other sorts of rule-governed contexts is that a variety of types of rules is present in them. In the card game Crazy 8s, there are rules that restrict one's conduct: one may play only a card of the same suit as the card most recently played, or of the same denomination as the card most recently played, or an 8. That is a duty-imposing rule within the game. But there are also power-conferring rules in it. When one plays an 8, one has the power to determine what the suit to be followed is; this intervention changes what the next players may properly do in their turn.

Another thing that we know is that in these other contexts, rules can determine what are the other rules in those contexts. So a club may have a rule that a 2/3 vote of the members can add a rule to the club. This is power-conferring, but its effect is that a rule can validate other rules of the system. If we want to know why there is a rule that no one may smoke in the clubhouse, the answer may truly be that 2/3 of the members voted in favor of such a rule, and there is a rule that a 2/3 vote of the members can add a rule to the club.

It is not really negotiable that there are contexts in which rules cannot be identified with and are not reducible to commands; that these rules can be duty-imposing or power-conferring;

and that rules can validate other rules, that is, can make it the case that the latter are rules in that system. Hart argues that this is the most promising model we have for legal systems. The rules of legal systems are of distinct types, duty-imposing and power-conferring, no less varied than the rules of etiquette or morality or soccer or chess. By and large, legal rules have their existence by being *validated* under other legal rules<sup>36</sup>—that is, typically the existence and content of a legal rule is explained by that rule's being brought into existence by the criteria specified by some other rule in the system.

Of course, the validation of legal rules by other legal rules must come to an end somewhere. The most salient feature of Hart's theory of law is his account of the *rule of recognition*: that in every legal system the fundamental rule of that system is a rule that determines the basic criteria for rule-membership within that system.<sup>37</sup> This rule of recognition has an unusual place. It is a rule of the system, but not in virtue of being validated, for a rule's being validated requires its status as a rule to be fixed by some other rule. The rule of recognition's existence is fundamentally a matter of social practice: it counts as a rule because of its acceptance by the officials that administer that system.<sup>38</sup> If you want to know why some United States tax rule is law, the explanation may be that it was passed by Congress and signed by the President, and there is a rule in the Constitution that this is one way for something to become law; but if you want to know why the Constitution counts as law, it is due to the rule of recognition's including it as such, which rule of recognition exists due to the complex attitudes and behavior of officials. The rule of recognition serves the role that Austin's sovereign tries to play, but does not play well: that of explaining the existence and content of the laws in some legal system, and in providing an account of what unifies the various laws into a single system.

This Hartian account of law is the dominant view among legal philosophers, succeeding far better than the Austinian view in accommodating obvious legal phenomena. I proposed earlier that some of Hart's objections to Austin's view of law also strike at divine command theories of morality. I propose now that divine command theory should take a positive lesson from Hart in how to frame their account of morality in a way that avoids these criticisms against their own position.

What would such a successor view look like? Think of morality's duty-imposing and power-conferring rules as composing a legal system. This is already something that divine command theorists, and theists generally, should be comfortable with—the idea of morality as constituting the moral law. We need make no effort to reduce these duty-imposing and power-conferring norms to a single type; each of these is a different type of rule, with a different intelligible point. They do form a unified system, though. And of these rules we can ask, following Hart: what *morally validates* these rules—that is, accounts for their being norms of the moral law?

If we follow the Hartian line, the answer will bottom out in a rule of recognition, the rule that ultimately validates any moral rule within the system. It is obvious what those sympathetic to divine command theory will want to say, given such a strategy: that the right way to characterize the rule of recognition in the system of the moral law is *to be a rule of morality is to be laid down by God*. Hart's point against Austinian sovereignty is not that it is impossible but that it is not a useful way to understand the law in contemporary legal systems. But there is nothing in the Hartian scheme that precludes legal systems from having a simple, personal source, and that's what those sympathetic to divine command theory will want to say about the

moral law. On this successor proposal, God's role with respect to the moral law is not that of a commander, but of a legislator, one who makes the rules.

Divine command theorists may object: This is not a *successor* view—all along we have been conceiving God as a lawmaker! But if law is not command but rule, then divine command theorists' descriptions of the moral law as the outcome of divine commanding and their descriptions of the moral law as the outcome of divine lawmaking are at odds with each other. If one aims to build a theory of morality around God as a maker of the moral law, one should characterize God's part with respect to the moral law not as that of giving the *commands* that bring it into existence but as that of establishing the *rules* that constitute it.

If divine command theorists were to take on this proposed amendment to the view—becoming *divine legislation theorists*—this would not make any of the other potential worries about divine command theory go away. They would still have to answer (e.g.) questions about the arbitrariness of morality, and about whether the view makes creaturely goods deontically inert.<sup>39</sup> To my mind this is not an objection to my proposal but an indication that it is entirely within the spirit of divine command theory. It incorporates the theocentrism and the ultimacy of the moral law's source in the divine will that makes some people find divine command theory very attractive and makes others find it seriously objectionable. Thus it really is still fully a form of theological voluntarism. And the fact that it relies on a divine act—that of legislating—to bring the moral law into existence shows that it is more similar to the divine command version of theological voluntarism than to, say, divine desire or divine intention formulations.<sup>40</sup> That should make divine command theorists more comfortable with the change in formulation. It should also help that moving to divine legislation theory does not take away any of the resources divine command theorists have appealed to in trying to respond to stock objections to divine

command theory. One can, for example, still appeal to the character of God as explaining why God legislates as God does, thus reducing worries about arbitrariness.<sup>41</sup>

There are two central tasks for one who accepts the proposal that a Hartian transformation in divine command theory needs to be carried out, and it might be thought that the fact that these are new tasks means that there is an additional and thus objectionable argumentative burden assumed when one moves from a divine command to a divine legislation theory of morality. I will describe the tasks, and then I will explain why dealing with them does not count as additional argumentative burdens for those considering a move from divine command to divine legislation theory.

Consider first a contrast between how Hart understands the rule of recognition for legal systems and how a divine legislation theorist would have to understand it. On Hart's view, law's existence is fundamentally a matter of social fact: it depends on the actual acceptance and use of the rule of recognition by officials. But theists will not want to say that God's status as the source of the moral law is dependent on whether those under that law, or any proper subset of them, are willing to treat divine activity as relevant for their conduct. That humans are stiff-necked and disobedient should do nothing, not a whit, to call into question God's status as maker of the moral law. One who is inclined to affirm a divine command account will not be inclined to think that God's ability to bring the moral law into existence is dependent on whether rational creatures are willing to accept God as providing the standard for right conduct or even willing to comply with such standards under sanction. What's more, it is clear that on the Hartian view, human law of necessity bears no more than *de facto* authority—that is, it is generally *believed to be* authoritative, or *claimed to be* authoritative, by some relevant group of insiders, but may massively fail to be *genuinely* authoritative over those who live under it.<sup>42</sup> It is plausible that it

is sufficient for human law to be *de facto* authoritative that it be socially accepted in the way that Hart fixes upon. *Moral* law is, however, supposed to be genuinely authoritative, so any account of what makes for something's having the status of moral law should make sense of the fact that it bears such authority. Thus it seems that Hart's way of establishing the presence of a rule of recognition — appeal to social facts regarding acceptance and use of some standard—would be neither necessary nor sufficient to establish a rule of recognition with respect to moral law.

The divine legislation theorist will thus want a different way of explaining what makes it true that the rule of recognition for moral law is that some norm belongs to the moral law if and only if enacted by God. The obvious beginning to a solution to both problems—the problem that the existence of the moral law cannot depend on contingent facts about social acceptance of divine rule and the problem that the moral law is supposed to be essentially genuinely authoritative over those subject to it—is to make the conditions normative rather than descriptive. While something is the rule of recognition within some human legal system if it is what those subject to that system *actually* accept and employ to distinguish laws from non-laws,<sup>43</sup> something counts as the moral rule of recognition if it is what those subject to that system *should* accept and employ to distinguish moral laws from non-(moral laws). The claim, then, is that *some norm belongs to the moral law if and only if enacted by God* is what those subject to the moral law should actually accept and employ to distinguish moral laws from non-(moral laws). To avoid objectionable circularity, the *should* here cannot be understood in terms of moral requirements. But one can feel free to make use of the full range of normative considerations other than those involving moral requirement to make the case that this is the moral rule of recognition.

This is a substantial task, and even a divine command theorist who has felt some of the attractiveness of the move to divine legislation theory might feel cheated that what has been advertised as a clear improvement comes with such a burden. My response is not to deny that it is a burden but to deny that it is a *new* burden. Every divine command theorist has to explain why it is that God has the particular normative power that God is alleged to have, which is to be the sole being with the capacity to give commands that give rise to moral requirements. To do so, one cannot rely on the existence of moral requirements explanatorily prior to God's commands, though one can feel free to make use of the full range of normative considerations other than those involving moral requirement.<sup>44</sup> So I say that the divine command theorist already faces a task of the same difficulty level, under the same constraints, and with the same available resources to perform it that the divine legislation theorist has, and thus that the proposed move from divine command theory to divine legislation theory does not involve an additional task which itself counts as an objection to making that move.

The other central task faced by a divine legislation theory of morality is that of identifying, as informatively as possible, what divine acts count as enacting moral rules, and why a particular divine act counts as enacting a moral rule with a particular content (rather than with some other content). This task, under a Hartian account of law, is handled by the rule of recognition and the rules of change that are validated under it. Thus social facts, which may be highly specific to a particular legal system, determine what counts as enacting some legal rule. By contrast, the divine ability to enact some rule is not going to be fixed by some such set of contingent social facts. Divine lawmaking may differ so much from human lawmaking that it may be hard to know what makes a divine act one of enactment and what makes it the enactment of a particular rule.

Again, I do not deny that this a substantial task, but I do deny that it is a *new* task, and so cannot count as an objection to the view that divine command theorists should move to divine legislation theory. Divine command theorists themselves face the task of figuring out what constitutes a divine command, given that the mechanisms of divine speaking are so different from those of human speaking. Such divine command theorists are correct not to despair on this score — they can take guidance from the human act of commanding, and the conditions that need to be met for a command not to count as a misfire, a failed illocutionary act, or otherwise defective in order to try to spell out what God would have to do to count as commanding us, and commanding us nondefectively. This is how Adams and Evans, for example, try to work out what a divine command is.<sup>45</sup> The same will be true of divine legislating. To humanly legislate is to intentionally make use of the rule of recognition or of valid rules of change in order to bring new legal norms into existence. To understand what an act of human legislation is, we see what humans need to do under some set of legal rules in order to exercise that normative power. In the divine case, it is not really a separate question what the moral rule of recognition is and what counts as divine enactment of moral rules—for divine enactment, we will be asking what we should be willing to take as God’s intentionally acting so as to place us under a moral rule. Again, this is a normative task, but the divine legislation theorist is free to rely on all normative resources (other than those of moral requirement and what is explanatorily posterior to moral requirement) in order to meet it, and it is no different in kind from the task that the divine command theorist has of explaining why we are to privilege the commands of God in identifying what is morally required.

So these are not additional tasks that a divine legislation theorist will have to carry out beyond that which a divine command theorist is already on the hook for. This ends my case for

the thesis that divine command theorists should pick up stakes and move from divine command theory to divine legislation theory. Divine legislation theory enables the avoidance of the sort of deep and difficult problems that undermines Austinian theories of law. And the work that the divine legislation theorist will have to do to provide a defense of the foundations of that view is no different in kind or difficulty from the work that would have had to be done in defense of the foundations of a divine command view.

It has been central to the motivation for divine command theory that morality looks so very much like a system of law.<sup>46</sup> But the fact that morality looks so much like a system of law should lead divine command theorists to give up their divine command theory, and to instead accept a successor view built around a conception of God as the divine legislator, the one who makes the rules.<sup>47</sup>

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## NOTES

1. Alston, "Some Suggestions for Divine Command Theorists," 316–323; Adams, *Finite and Infinite Goods*; Evans, *God and Moral Obligation*, 53.
2. The premier example is the first few chapters of Adams, *Finite and Infinite Goods*.
3. See, for example, Adams, *A Theory of Virtue*.
4. Wolterstorff, for example, thinks that we cannot characterize commanding without appealing to an explanatorily prior moral requirements (see his *Justice*, 273–276), and it is a common view of *being God* that *being God* involves moral perfection, where moral perfection involves perfect conformity to a set of moral requirements.
5. See Murphy, "Restricted Theological Voluntarism," 680. It is true that moral requirements may also be explained, on the divine command view, by God's reasons for there being such moral requirements. But God's reasons enter the explanation only by way of those reasons' motivating God to issue the relevant commands.
6. In calling divine command theory a species of theological voluntarism, I do not mean to be claiming that divine command theories have any commitments with respect to the range of moral requirements the holding of which is contingent. Theological voluntarism is a claim about what the deontic aspect of morality depends on, that is, that it depends on some act of divine will. To what extent such moral requirements hold necessarily or contingently will depend on the extent to which God commands certain things necessarily or contingently as well as on the necessity or

contingency of the features of the world that determine what counts as complying with those commands. See Evans, *God and Moral Obligation*, 34–37.

7. See Quinn, “Divine Command Ethics” and “The Primacy of God’s Will”; Adams, *Finite and Infinite Goods*; Hare, *God’s Call and God’s Command*; Evans, *God and Moral Obligation*. See also Wierenga, “A Defensible Divine Command Ethics” and Plaisted, “On Justifying One’s Acceptance of Divine Command Theory.”

8. The central text is Austin, *Province*.

9. Hart, *Concept of Law*, chs. 2–4.

10. I have in mind in particular Austin’s analysis of commands, which basically identifies them with threats. The central objections Hart raises against Austin’s theory of law’s nature go through, I believe, even if we substitute a more plausible theory of what it is to be a command, so I will not rely on criticisms of that aspect of Austin’s view in what follows.

11. Austin clarifies that only general commands—e.g. not ‘you, do this’ but ‘you homeowners, pay property tax twice a year’—count as law. I will ignore that qualification as of no moment for the present discussion.

12. Austin, *Province*, 19.

13. Austin, *Province*, 167.

14. Austin, *Province*, 166.

15. Hart, *Concept of Law*, ch. 4. To take just one example: the United States has a legal system. Who is its Austinian sovereign? Whose commands could constitute United States federal law? Anyone who has a basic familiarity with the laws of the United States knows that no particular persons—the President, Congress, etc.—can be the sovereign. The readiest expedient is to declare that ‘the United States government’ or ‘the People’ is sovereign in the United States, but

apart from figuring out whether the relevant habits of obedience hold, we cannot even identify what would count as the United States government's or the People's commands except by appealing to the laws of the United States that identify what would count as the expression of the government's or the People's directives in some matters. See also, for a nice characterization of Hart's criticism here, Dworkin, "Model of Rules I," 18.

16. Austin, *Province*, 21.

17. Hart, *Concept of Law*, ch. 3.

18. Commands are a species of directives, where directives are illocutionary acts that have as their point "to get other people to do something for the speaker" (Crystal, *Dictionary of Linguistics and Phonetics*, 147).

19. Hart, *Concept of Law*, 44–48.

20. Hart, *Concept of Law*, 42–44.

21. Hart, *Concept of Law*, 27–42.

22. One relevant difference between the Austinian sovereign and the divine sovereign is that the Austinian sovereign is identified non-normatively, in terms of the habits of obedience, while the divine sovereign has a privileged place normatively. I put that difference to the side for the moment, and will return to it in §4.

23. I am assuming that the divine command theorist is not the error theorist sort, who holds that moral requirements of necessity arise from divine commands, but as there is no God, there are no moral requirements.

24. This sort of objection is central to Erik Wielenberg's criticisms of divine command theory; see Wielenberg, *Robust Ethics*, 40–85.

25. My argument here is that if you are uncertain about whether God is subject to moral requirements, then you should take the successor theory that I will describe in the next section to be more likely to be true than divine command theory is. I will allow, though, that if one comes to be convinced on independent grounds that God is not under moral requirements, then divine command theory's having this entailment could end up counting as a mark in its favor.

26. Alston, "Some Suggestions for Divine Command Theorists," 317; Adams, *Finite and Infinite Goods*, 253–255.

27. Darwall, *The Second-Person Perspective*, 14.

28. Evans, "Accountability as Part of the Human Moral Condition and as a Moral Virtue."

29. Here is Evans:

Interpersonal accountability can be exhibited not only from a student toward a teacher, but also from a teacher toward a student; not only from a citizen toward a police officer, but also from an officer toward a citizen; not only from a grantee to a grantor, but also from a grantor to a grantee. Within peer relationships, people may welcome accountability on collaborative projects or have accountability partners. Religious people typically hold that, in addition to accountability to humans, there is also accountability to God ("Accountability as Part of the Human Moral Condition and as a Moral Virtue," 283).

We should ask: just as mutual accountability might be valuable in multiple ways in these relationships between humans, might there be ways in which mutual accountability between God and humans might be valuable?

30. See Murphy, *God's Own Ethics*, 70–75. You may think that this is foolishness, that divine sovereignty is no more threatened by God's being limited by moral requirements willy-nilly than divine sovereignty is threatened by God's being limited by logic willy-nilly. Recall the dialectical context: I am here arguing with divine command theorists, who think that moral requirements are brought into being by divine commands.

31. Hart, *Concept of Law*, 27–42.

32. It is this connection to moral duties that undermines the suggestions, proposed by both anonymous referees, that the divine command theorist might want to deny that these powers belong to the realm of the moral or might want to engage in yet another restriction maneuver such that divine command theory accounts only for moral duties and not for moral powers. The central worry for both proposals is that the exercise of moral powers analytically has moral entailments, the generating and suspending of moral duties. It would be no more plausible to deny that these are moral powers than to deny that the powers to make wills and contracts are legal powers, and it would be no more plausible to provide an account of moral powers disconnected from the account offered of moral duties than it would be to provide an account of legal powers disconnected from the account offered of legal duties.

33. Hart, *Concept of Law*, 35–38.

34. Hart, *Concept of Law*, 38–42.

35. Hart, *Concept of Law*, 79.

36. Hart, *Concept of Law*, 103.

37. Hart, *Concept of Law*, 100.
38. Hart, *Concept of Law*, 101–102.
39. See Murphy, *God and Moral Law*, 116–120.
40. For a discussion of these alternative theological voluntarist accounts, see Murphy, “Divine Command, Divine Will, and Moral Obligation,” Miller, “Divine Desire Theory and Obligation” and “Divine Will Theory,” and Jordan, “Divine Attitudes, Divine Commands, and the Modal Status of Moral Truths” and “Divine Commands or Divine Attitudes?”
41. See Adams, *Finite and Infinite Goods*, 253–255.
42. Genuine (sometimes called “legitimate” or “*de jure*”) authority involves one’s having the ability to give others new normative reasons to  $\phi$  by one’s telling them to  $\phi$ ; *de facto* authority may involve no more than habitually affirming or being taken to have or being treated as if genuinely authoritative. For discussion, see Raz, *The Authority of Law*, 3–28.
43. Hart’s account focuses on the use of the rule of recognition by officials; see *Concept of Law*, 114.
44. As Adams does in *Finite and Infinite Goods*, 252–258, Evans does in *God and Moral Obligation*, 61–68, 98–101, and Hare does in *God’s Command*, 16–25.
45. Adams, *Finite and Infinite Goods*, 262–270; Evans, *God and Moral Obligation*, 37–45. Hare gives a sophisticated account of the various species of command, including some speech-acts that he allows are not strictly speaking commands at all (*God’s Command*, ch. 2). But all of the speech acts that he considers have the features that lay divine command theory open to the two Hart-inspired objections that I press in this paper.
46. Evans, *God and Moral Obligation*, v.

47. I presented an earlier version of this paper at St. Joseph's University and was greatly benefited by the critical discussion that followed; I owe special thanks to Nathaniel Bulhuis, Joseph Corabi, John Keller, Lorraine Keller, Andrew Payne, and Caleb Zimmerman for their comments. I also received good counsel from two anonymous referees at *Faith and Philosophy* and from the editor, Tom Senior.