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DEMOCRATIC AUTHORITY AND RESPECT FOR THE LAW

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ABSTRACT. In recent years, scholars have argued that democratic provenance of law establishes moral requirements to obey it. We argue against this view, claiming that, rather than establishing moral requirements to *obey* the law, democratic provenance grounds only requirements to *respect* it. Establishing what we view as this more plausible account makes clear not only exactly what democracy itself contributes to requirements to obey the law but also important difficulties proponents of democratic authority must overcome in order successfully to make their case. To establish our claims, we focus on Thomas Christiano's book, *The Constitution of Equality*, and a recent article by Daniel Viehoff.

In recent years, a number of scholars have argued that democratic provenance of law establishes moral requirements to obey it. These arguments are especially important at the present time, as over the last few decades, philosophical anarchists and other scholars have criticized the traditional grounds for political obligation. Positions based on consent, fair play, a natural duty of justice, and others have been subjected to severe scrutiny, leading many scholars to believe there is no successful theory of political obligation, which is probably now the dominant view in the literature. If a democratic argument could fill this gap, its contribution would be obvious. But before accepting such a claim, it should be carefully examined.

In this paper, we argue that democratic approaches do not establish moral requirements to obey the law. Although we believe that democratic provenance is necessary for the authority of law,¹ rather than establishing moral requirements to *obey* it, we believe it grounds only requirements to *respect* it. What respect entails will be discussed below. But for now, we should note that it extends beyond

¹ As we use the term, a law has "authority" if those subject to it have a correlative obligation to obey it.

obedience to requirements to take the law seriously in one's practical deliberations. This requirement is related to wider duties of citizenship that commentators discuss, such as attempting to understand the law and to further the rule of law.² Establishing what we view as this more plausible account will make clear not only what democracy contributes to requirements to obey the law, but important difficulties that proponents of democratic authority must overcome in order successfully to make their case. To establish our points, we will discuss the positions advanced in Thomas Christiano's important book, *The Constitution of Equality*, and a recent article by Daniel Viehoff.³ While we are unable to examine additional works in this paper, we believe our points hold generally in regard to proponents of democratic authority.

The argument in this paper proceeds over five sections. In section I, we distinguish first-order reasons and second-order, democratic, reasons to obey different laws and raise questions concerning the moral force of the latter. In section II, we explore the nature of respect. According to so-called 'recognition respect', certain valuable relationships between people establish expressive reasons for participants in the relationships to consider the interests and opinions of other participants. In section III, recognition respect is extended to relationships between citizens of a democratic polity, and so establishes second-order reasons carefully to consider the interests and opinions of one's fellow citizens. But in keeping with the discussion in section II, these second-order reasons are requirements to respect one's fellows' collective deliberations that eventuate in law, not to obey them. In section IV we argue that Christiano's and Viehoff's attempts to establish democratic authority do not succeed. In particular, even if either of these scholars is able to show that democratic procedures are able to establish content-independent reasons to obey the law, these reasons are too weak to be considered political obligations. Section V presents a brief conclusion.

² L. Green, 'Law and Obligations', in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, J. Coleman and S. Shapiro, eds. (Oxford: Oxford University Press, 2002), pp. 545–547. For the wider sense of political obligation, see B. Parekh, 'A Misconceived Discourse on Political Obligation', *Political Studies*, 41 (1993).

³ T. Christiano, *The Constitution of Equality* (Oxford: Oxford University Press, 2010); D. Viehoff, 'Democratic Equality and Political Authority', *Philosophy & Public Affairs* 42 (2014), 337–375.

I

Theorists who approach political obligation from democratic perspectives focus on the need that laws be made in ways that protect equality. Christiano argues from what he calls concerns of “public equality.” Viehoff makes similar claims on the basis of the need to exclude certain kinds of reasons from public deliberations in order to preserve equality. Similarly, Niko Kolodny claims that democracy is necessary to make sure that people are not ruled by others ‘above them’ without justification.⁴ To a large extent, we accept the main arguments in these pieces, in spite of their differences. But we believe these arguments accomplish less than their authors believe. We agree that there are strong moral reasons to view democratic origin as a necessary condition for the authority of law. But it has not been shown that democracy is a sufficient condition. In order to see this, we must be clear on the standards democratic arguments must meet. In addition to other requirements,⁵ a successful argument should establish reasons to obey democratic decisions *because they are democratically made*. This is in keeping with the traditional view of political obligations as content-independent requirements to obey the law because it is law.⁶ Accordingly, we must distinguish first-order reasons to obey laws, which are bound up with the content of particular laws, and second-order reasons rooted in democratic procedures. Having made this distinction, we will see that it is difficult to identify significant contributions that democratic procedures make to the force of moral requirements to obey their decisions.⁷

Although – as we will assume – philosophical anarchists and other scholars have defeated traditional grounds of political obligation, they do not contend that people do not have moral requirements to obey particular laws. In the absence of general obligations to obey

⁴ Christiano, *supra* note 3; Viehoff, *supra* note 3. N. Kolodny, ‘Rule Over None, I: Social Equality and the Justification of Democracy’, *Philosophy and Public Affairs* 42:2 (2014); ‘Rule Over None II: What Justifies Democracy?’ *Philosophy and Public Affairs* 42:3 (2014). See also D. Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2009).

⁵ For discussion of these, see A. J. Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979), Chap. 1; G. Klosko, *Political Obligations* (Oxford: Oxford University Press, 2005), pp. 9–12.

⁶ For discussion of this requirement and further references, see Klosko, ‘Are Political Obligations Content Independent?’, *Political Theory* 39 (2011).

⁷ Empirical studies indicate that the existence of law *qua* law has extremely little effect on the behavior of actual people. See F. Schauer, *The Force of Law* (Cambridge, MA: Harvard University Press, 2015), Chaps. 4–5.

the law, we should consider whatever moral considerations bear on each particular law we encounter.⁸ These first-order considerations are not immediately concerned with law's democratic provenance. For instance, it is against the law for Adam to murder other people, and we generally believe that he has strong moral reasons not to do so.⁹ Clearly, weighty moral reasons forbid persons to kill one another. But it remains to be explained, what, if anything the fact that a law against killing is made by democratic procedures adds to these other considerations. In other words, in determining what we should do under given circumstances, we must explain why democratic provenance matters and how much weight to accord it, along with other factors.

Complexities are illustrated by examples. Consider laws against speeding. Assume that a properly democratic government makes a law according to which the speed limit on Highway H is sixty-five mph. Ordinarily Beth feels no compunction about going seventy mph. She does not feel that she is doing anything wrong, even though she is breaking the law. Very roughly, we can assess the strength of a moral requirement by considering the censure that would follow from knowledge that someone had violated it. In this case, it seems clear that there would be no censure. Moreover, ordinarily, Beth is not alone. Most drivers go five to ten mph over the limit without feeling the slightest guilt, although they also feel strongly that for Charles to violate another democratically made law and to go very fast, say one-hundred and twenty mph, on a crowded highway, is wrong, as is his going seventy mph on a city street, which also contravenes a law that is democratically made. Once again, it seems that most drivers would not be censured at all, while Charles would be strongly condemned. If the fact that Beth violates the speed limit appears to have little or no moral force, why is Charles condemned? Intuitively, it seems that the moral requirements in these cases can be explained by the way driving could affect other people, whether or not it might constitute a danger. But even if we grant this, what if anything is contributed by the fact that driving in a certain way violates second-order democratic reasons?

⁸ R. P. Wolff, *In Defense of Anarchism* (New York: Harper and Row, 1970), pp 18–19, 13–14; Simmons *Moral Principles*, Chap. 8; Simmons, 'Philosophical Anarchism', in *For and Against the State*, J. T. Saunders and J. Narveson, eds. (Lanham, MD: Rowman and Littlefield, 1996).

⁹ The moral reasons of interest in regard to political obligation are generally distinguished from prudential reasons [see H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), pp. 80–88].

Consider also what we may call useless laws. For example, laws against witchcraft are apparently still on the books in various localities.¹⁰ Even if they too were democratically made, we take it as obvious that, in spite of this provenance, such laws have no moral force. In this kind of case, a possible explanation is that the law in question has only *prima facie* force. One might contend that the evils of enforcing laws against witchcraft are sufficiently strong to override their legal standing. Something similar may be true of laws against various sexual practices, which are widely ignored and are viewed as lacking force, even if they are democratically made. Something similar likely holds of laws that are without any social value. Imagine that a democratic government passes law *W*, according to which everyone should think lovely thoughts on Tuesdays between 10:00 AM and 11:00 AM. It seems apparent that most people would feel no compunction about violating such a law, and would not regard the fact that *W* was legislated democratically as generating any moral reason to obey. In a case of this sort, could we still say that the silliness of the law overrides our obligation to comply?

As it seems to us, examples of silly laws make our problem especially clear. If the fact that laws are democratically made carries little or no normative force with laws that are useless, why do things change for laws that do fulfill useful functions? Why in their case does their democratic provenance take on moral force? In attempting to answer these questions, we agree that important moral reasons stem from the fact that the laws in question are products of democratic political systems. However, as we have noted, we believe that democratic origin does not create moral requirements to *obey* laws because they are democratically made, but only to *respect* them or to have regard for them in particular ways. It is to this subject that we now turn.

II

Our argument for respect for law is in three steps. After first briefly examining the nature of respect, we explain how certain relationships give rise to what are described as ‘expressive’ reasons, so called, according to Joseph Raz, ‘because the actions they require express the relationship or attitude involved’.¹¹ As we will see, the rela-

¹⁰ *Ibid.*, pp. 60–61.

¹¹ J. Raz, ‘Respect for the Law’, in *The Authority of Law* (Oxford: Oxford University Press, 1979), p. 255.

tionships we consider generate reasons for people to respect others in the relationships, and we explain what this entails. The third step is to establish that membership of a democratic polity generates expressive reasons of the relevant kind and to explore their effects. We begin with respect.

As theorists have shown, respect is complex. It sometimes refers to attitudes, sometimes to duties, sometimes to a kind of treatment, among other things. Following an important discussion by Stephen Darwall, we should distinguish two basic kinds of respect, to which he refers as 'appraisal respect' and 'recognition respect'.¹² As Darwall describes it, the former is a kind of regard that one holds for 'persons or features which are held to manifest their excellence as persons or as engaged in some specific pursuit' (Darwall: p. 38). On this account, for example, one admires a particular person's abilities as a musician, a baseball player, or a chef. In this type of respect, the positive appraisal itself constitutes the relevant respect (p. 39). Accordingly, for a baseball pitcher, the admiration one feels for him as an excellent practitioner of his sport is appraisal respect.

Recognition respect differs, in having implications for one's deliberations and actions. In a case of this kind, to quote Darwall once again, the respect generally results 'in a disposition to weigh appropriately in one's deliberations some feature of the thing in question and to act accordingly'. As examples of objects of recognition respect, Darwall cites 'the law, someone's feelings, and social institutions' (p. 38). On this account, if Anne respects Ben's feelings, she takes them into account and gives them a certain weight in deciding how she should behave in some circumstances. If she knows that he objects to a certain coffee house because it treats its employees unfairly, she will consider this fact in deciding whether she should frequent the coffee house. How much weight she will, or should, accord this particular factor will depend on circumstances. But if she respects her friend, his feelings should be a significant consideration.

Building on Darwall's account, we are able to see that numerous familiar relationships give rise to recognition respect. Imagine a stranger, with whom Carla has no previous relationship, asks her to drive him to a doctor's appointment. There are various considera-

¹² S. Darwall, 'Two Kinds of Respect', *Ethics* 88 (1977). Unaccompanied page references in this section refer to this article.

tions she should take into account. These include whether she feels she should do a good deed, how important it is for the stranger that she drive him, and so on. For instance, if she doesn't drive him, how likely is it that someone else will? In addition, how great a burden would taking him be? Once again, considerations along these lines are first-order reasons. Carla's decision whether she should drive him depends on how she weighs them. Let us now alter the circumstances and assume that Carla's mother asks her to drive her to a doctor's appointment. We will assume that the same first-order considerations obtain, but also that Carla has a good relationship with her mother, who has been supportive and loving and helped her to grow into adulthood. It is obvious that this relationship commands recognition respect in the form of second-order reasons arising from the relationship carefully to consider and weigh her mother's request. Exactly what this entails and so how she should act depends on specific circumstances and need not be explored in detail here. But while she could presumably turn down the stranger's request for relatively slight reasons without doing wrong, simply to dismiss the similar request of her mother would indicate disrespect insofar as she failed to give due weight to the second-order reason provided by their relationship. We may go so far as to say that, ordinarily, these second-order reasons support Carla's complying with her mother's request, unless she has good reasons not to comply.

But the second-order reasons do not ground a simple requirement to comply. Rather, they require that Carla take the request seriously, that she give it careful consideration in determining how she should act, but her final decision should depend on the overall balance of reasons. For instance, if Carla's father – with whom she has an equally good relationship – requests that she no longer eat pancakes, which he views as unhealthy, Carla should consider the request and the reasons behind it carefully, but she should still make up her own mind about what to eat. If her father asks her to go to church on Sunday, we may assume that their relationship generates significant second-order reasons for Carla seriously to consider the request in deciding whether to go to church. But her decision should depend on her deliberations in regard to all relevant factors. Once again, out of respect for her father, Carla should carefully consider the request.

Not to do so, to dismiss it out of hand, would be disrespectful – but she should make up her own mind about her religious practice.

In these examples, the relationships between Carla and her parents are valuable, and because they are, the second-order expressive reasons to which the relationships give rise include reasons for each party in the relationship carefully to consider the requests and wishes of other parties. In such relationships, the fact that a certain way of considering a request would express respect or lack of respect should be a significant factor in how one deliberates about it. Circumstances are similar in other valuable relationships, for example, that between husband and wife. Ordinarily, expressive reasons appropriate to this relationship entail that each spouse respect the other and, in doing so, view the other's wishes and requests as considerations to be weighed carefully in his or her deliberations about how to act.

Something similar is true of friendship. Assume that Debby and Eric are friends. If she requests that he drive her to the airport, second-order reasons grounded in their friendship support complying with the request because she is his friend. He should take her request seriously and weigh it along with other reasons in his practical deliberations. As with the other examples we have noted, the relationship of friendship gives rise to second-order reasons appropriate to the relationship, which support seriously considering the wishes of one's friend. But once again, the reasons in question are not strong enough ordinarily to require that one friend simply obey the request of another. Clearly, in regard to driving Debby to the airport, it would seem strange to suggest that Eric has anything as strong as an obligation or duty to do so. One might object that in this particular case, the reasons to accede to her request are fairly weak, because the request is trivial. If the request were more stringent, in other words, if the balance of first-order reasons tilted more strongly in favor of compliance, we might feel differently. Perhaps if Debby had no other commuting options, and missing the flight would mean missing an interview for a highly desirable job, the situation might be different. However, although these additional first-order factors clearly strengthen the case for driving her, they still do not amount to anything like an obligation or duty as traditionally understood, nor do they if supported by appropriate second-order reasons. On the assumption that Eric carefully considers all factors

relevant to her request but concludes that his reasons for not complying are stronger, is he doing wrong in not driving her?

III

We believe these examples support the contention that certain valuable relationships give rise to second-order expressive reasons that require that participants in the relationships carefully consider the wishes and beliefs of other participants. On the assumption that these points hold, it remains to be shown that relationships between citizens in a democratic community function similarly, that they too generate recognition respect and so similar second-order reasons carefully to consider the beliefs and requests of other participants.

Christiano presents a strong case for the value of democracy.¹³ As noted above, he argues from what he calls ‘public equality’. He begins with the fundamental moral equality of individuals and so requirements that they be treated equally. ‘Public equality is a requirement’ that not only must people be treated as equals, but ‘the institutions of society must be structured so that all can see that they are being treated as equals’ (Christiano: p. 2). Central to our experience living in society is deep disagreements between people about moral questions, including the nature of justice and the common good, and the fact that each of us is deeply fallible, subject to cognitive errors and bias. Democracy is necessary in order to settle such disagreements in a way that treats people as equals. As long as all individuals are given opportunities to participate in debates about public issues and to vote on them, with decisions made according to fair procedures, then these procedures treat them as equal citizens. Only through democracy can people be treated as equals in the fundamental respect of having equal say in regard to shaping their common world. Democracy ‘pools the equal political rights of all the citizens’ into a decision making body (p. 247).

We believe these arguments and others like them provide strong support for the claim that members of democratic societies participate in valuable relationships that give rise to expressive reasons carefully to consider the preferences and beliefs of other participants, along the lines of what we have seen in other relationships. With

¹³ Substituting the views of many other supporters of democracy – e.g., the ones cited above – would make little difference to our claims about respect in this section.

democracy, if anything, circumstances are clearer as established procedures translate the diverse preferences and beliefs of all citizens (all who participate) into law. Recognition respect requires that members of a democratic polity carefully consider such pronouncements in their practical deliberations.¹⁴

Because of second-order expressive reasons generated by democracies, for Anne unreflectively to dismiss the results of democratic procedures is to put herself and her own opinions above those of other citizens and so not to show them appropriate respect. If a particular law is produced in accordance with fair democratic procedures, then it reflects the opinions of one's fellow citizens on how some matter of public concern should be decided. As a citizen of a democracy, Anne should recognize that, on matters on public concern, her opinion is that of only one person, which should bear weight equal to the opinions of each other person. As Bentham said in a slightly different context: 'everybody to count for one, nobody for more than one'.¹⁵ Moreover, when a law is the result of a democratic legislative process, it represents an authoritative pronouncement of what one's elected representatives believe, which also includes difficult and delicate balancing of conflicting interests and beliefs. Unreflectively to follow one's own opinion is to disregard the views of one's fellow citizens, as reflected by the decisions of their authorized representatives. Failing to consider these reasons is to act or deliberate as if the democratic decision had never been made. It is to say to one's fellow citizens that their beliefs filtered through the democratic machinery made no difference to one's practical deliberation. Such neglect has the effect of expressing indifference towards one's fellow citizens, if not contempt.

Moreover, in addition to these second-order reasons based on relationships, actors also have second-order reasons based on epistemic concerns. For example, if Ben acts in this way, then he also ignores the possibility that his own reasoning could be mistaken as the result of bias in his own interests or familiar cognitive errors that could affect his decision making. Some examples of familiar cognitive errors discussed in a valuable recent paper by Noam Gur include

¹⁴ This is not to say democratic processes are *necessary* to respect for law; there could be grounds other than public equality for a duty to respect the law. We do not pursue this possibility.

¹⁵ Quoted by J. S. Mill, *Utilitarianism*, 2nd ed., G. Sher, ed. (Indianapolis: Hackett, 2002), p. 62.

the following.¹⁶ ‘Self-enhancement bias’ leads people to overestimate their own capabilities and to underestimate their own incompetence, poor judgment, and other limitations. ‘Hyperbolic discounting’ is the tendency to overvalue immediate benefits or gratifications, as opposed to more remote benefits. Thus a subject may overestimate the importance of getting to work five minutes earlier and to underestimate the possibility that in doing so he will cause an accident. These tendencies have been thoroughly documented empirically, and clearly indicate benefits of having people carefully consider the law’s demands, rather than dismissing them out of hand.

Consider the notorious example of the stop sign in the desert. Cathy is driving at 3:00 AM. The landscape is flat, and because there is a full moon, visibility is excellent. She sees no other cars on the road, in any direction. Scholars have used this example to argue against moral requirements to obey the law, claiming that in such a case, she would do no wrong if she simply went through the stop sign.¹⁷ We agree with this conclusion insofar as it concerns a moral requirement to obey the law. However, we also believe that existence of the law should affect Cathy’s practical deliberations. She should recognize the fact that the stop sign has been instituted according to a democratic procedure that has taken into account the views of her fellow citizens via their elected representatives in a fair manner. In deciding whether she should stop, she should carefully consider the reasons underlying their decision and take them into account along with other factors. To fail to consider these reasons when contemplating disobedience is to place one’s self above other citizens. Moreover, given complexities involved in making the proper decision in even this simple case, she should recognize that simply deciding to obey the law is likely a reasonably safe cognitive shortcut, if she is not inclined or does not have adequate time or other resources to deliberate fully about the matter before acting. Only after taking these considerations into account should she make her decision. To do otherwise would fail to show her fellow citizens proper respect. Such conduct would be akin to simply disregarding

¹⁶ N. Gur, ‘Actions, Attitudes, and the Obligation to Obey the Law’, *Journal of Political Philosophy*, 21 (2013).

¹⁷ See, e.g., M. B. E. Smith, ‘Is There a Prima Facie Obligation to Obey the Law?’, *Yale Law Journal*, 82 (1973), p. 971.

the beliefs and feelings of a parent or a friend, and so failing to respect those relationships.

However, we disagree with the view that possessing respect for the law constitutes moral reason to obey. (We return to this subject in the following section.) It might be puzzling to think that one could disobey the law and still respect it. However, as we have noted, respect for one's parents or one's friends does not require obedience. Circumstances are analogous with democratic laws. As Cathy approaches the stop sign, she should deliberate and consider the possible reasons of public safety for having a stop sign at that location. Because of the conditions we have described, she is in a position to know that there is no risk in not coming to a complete stop. But still, Cathy violates the law by running the stop sign. Contrast this with a case in which Daniel runs the stop sign without thinking twice about it. While from the outside these two cases look similar, the psychology of Cathy's and the psychology of Daniel's actions are very different. The former respects the law, and takes the reasons offered by law seriously, while the latter does not.

In spite of the fact that the second-order reasons generated by democratic procedures do not give rise to reasons to obey their decisions, this does not amount to a license to disobey the law. Although we cannot discuss this point here in detail, we believe that in a democratic polity laws are generally made for good reasons, and so that there are generally good first-order reasons to obey them. While citizens should follow their own judgments as to what is right, this does not give them license to disregard these first-order concerns on light or transient grounds. Morality requires that they do what is right, not what they think is right. However, as discussed in section I, it is not clear how much force democratic origin of laws adds to other reasons to obey them.

Before moving on to the next section, we should confront a possible objection. Throughout our discussion, we note citizens' requirements to consider 'reasons behind the law' or 'the beliefs of citizens that underlie laws'. But in practice, how possible is it to discover or to understand these reasons and beliefs? As we have noted, our general assumption about democratic decision-making is that there usually are good reasons why laws are made. These reasons are expressed in public deliberations over the laws, and in many cases, first-order reasons are apparent. This is true of many criminal laws and laws that coordinate the actions of citizens, as in

laws concerning national defense, the environment, and traffic laws. But in other cases, underlying reasons may be less convincing. This may be the case with laws against various sexual practices among consenting adults, or a law such as the one against interracial marriage that was thrown out by the United States Supreme Court. In these cases too, Anne's obligations are clear. She should carefully consider the reasons for a given law with which she is confronted and weigh them in her practical deliberations, before determining how she should act. As we have said, simply to disregard the law without considering it is to show lack of respect for her fellow citizens, even though in certain cases she may well end up setting the law aside. There may well be cases in which she is not be able to understand the basis for the law, as perhaps with laws against marketing fantastically complicated financial instruments. If Anne cannot understand the government's reasoning – or does not have time or other resources necessary to research the matter properly – ordinarily she should defer to it. Since it was democratically made, it presumably reflects the preferences of her fellow citizens – although likely filtered through representative institutions and regulatory bodies. But if detailed investigation is unable to uncover convincing reasons for laws, then citizens may have reasons not to obey.

IV

In spite of our case for respecting the law, democratic theorists are likely to view respect as too weak. On their view, democratic origin is sufficient to ground requirements to obey.¹⁸ But is this true? Does the fact that a group of Adam's neighbors decides through some fair democratic process to go on a camping trip generate a requirement for him to go as well? Assume that Adam has not taken part in the

¹⁸ An additional view we should note is that of Joseph Raz that respect for the law grounds moral requirements to obey it. In 'Respect for the Law', Raz argues that reasons to respect the law vary from person to person. Although not everyone will have such reasons, it is permissible to have them (p. 250), and if one does have them, then he has expressive reasons to obey it: 'for the person who respects the law, there is an obligation to obey. His respect is the source of this obligation' (p. 260). Although we cannot discuss this matter in detail in this context, we believe Raz gets matters quite backwards. While he views respect as optional and obedience as required, we believe the opposite: respect is required but obedience is not. To the extent that Raz's argument depends on analogy between friendship and law, we should note that he provides no clear argument to support his claim that either requires obedience. As Green observes, '[L]oyalty to one's friends is not normally shown in *obeying* them. Why should loyalty to community be any different?' (Green, 'Legal Obligation and Authority', *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, <http://plato.stanford.edu/archives/win2012/entries/legal-obligation/>) (downloaded Nov. 2014).

deliberations. Obviously, in this case, the answer is, no. Imagine that all members of the group had equal opportunities to participate in the deliberative process. All had opportunities for their views to be heard, and the decision was made fairly. But this does not change things in regard to Adam. He is still not bound even if he was granted a right to participate in the deliberations. In order for the decision to bind him, at minimum, the issue in question must affect him or apply to him in some direct way. He must have reasons of sufficient weight to coordinate with his neighbors. Accordingly, imagine that Adam's community democratically decides that everyone should drive on the right hand side of the road. Unlike the proposed camping trip, this directly applies to him if he also drives.¹⁹ Adam therefore may have reasons to coordinate with his neighbors that are of sufficient weight, and so one can begin to make a plausible case that he has a moral requirement to accede to their decision. But exactly what role in his requirement to accept the decision is played by the fact that the decision was democratically made?

Both Christiano and Viehoff argue that democratic provenance creates reasons to obey decisions. As noted above, Christiano argues that people must not only be treated equally by public institutions, but also be seen to be treated equally.²⁰ Along with public equality, Christiano focuses on deep disagreements people have about moral questions, including the nature of justice and the common good. Democracy is necessary in order to settle such disagreements in a way that treats people as equals. Only if all individuals are given opportunities to participate in debates about public issues and to vote on them, with decisions made according to fair procedures, do people receive equal treatment in regard to shaping their common world. Democracy navigates our substantial disagreements about shaping this common world in a way that respects public equality (Christiano: pp. 78–85).

Because people are fallible, subject to cognitive errors and bias, public equality requires that all citizens accept the results of democratic decision-making. It follows that 'the democratic assembly has a right to rule that correlates with the duties of citizens to obey'

¹⁹ In this case, first-order reasons that apply to Adam include his duties concerning public safety, especially not to harm or constitute a danger to other people. In other cases in which democratic decisions apply to people, similar first-order reasons must be present.

²⁰ Unaccompanied page references in the next two paragraphs are to, *The Constitution of Equality*.

(p. 249). Someone who acts according to his own favored conception of justice, rather than the considerations agreed upon by the community, treats other people unfairly: ‘only by obeying the democratically made choices can citizens act justly’ (p. 252). Christiano claims that citizens’ duties to comply with democratic decisions are content-independent. One is required to obey the results of such decisions simply because they are democratic. In his words: ‘[i]f democracy has authority then it implies a duty of citizens to obey the democratic decisions because of their democratic provenance. So the duties of democratic citizens are content independent duties’ (p. 244).

Viehoff defends a similar position.²¹ He claims that under certain circumstances, democratic procedures produce moral reasons that are preemptive and, as Christiano claims, content-independent.²² Briefly, Viehoff argues that democratic procedures provide citizens equal say in making laws, and that equality requires that we act on their decisions. More exactly, by obeying democratic laws, we avoid acting on considerations that should not be viewed as reasons for actions (Viehoff: p. 351). Following T. M. Scanlon, Viehoff contends that participating in certain relationships, for example, being a spouse, a friend, or a fellow citizen, involves ‘seeing reasons to exclude some considerations from the realm of relevant reasons’ (p. 351, emphasis removed). For example, in a properly constituted marriage relationship, both parties should be committed to equal power. Thus in deciding how to act, the participants should exclude from their considerations reasons that would threaten this equality (see pp. 355–356). Along similar lines, in order to relate to others as equals in a democratic polity, participants must exclude from their deliberations considerations that would confer unequal power advantages on themselves, that would ‘threaten [their] equal control over [their] common life’ (p. 353). In other words, only by obeying democratic decisions, do we make sure we are acting on legitimate

²¹ Unaccompanied page references in the following two paragraphs are to ‘Democratic Equality and Political Authority’, as are some unaccompanied page references below, which the context makes clear.

²² Preemptive moral requirements take precedence over others. According to Viehoff, ‘a reason for doing x is preemptive if it is both a reason for doing x and a (second-order) reason for not acting on certain otherwise relevant considerations against doing x, or for “excluding” them from among the reasons that figure in our deliberation’ (‘Democratic Equality and Political Authority’, supra note 1, at 341).

reasons, as opposed to those that should be excluded in egalitarian relationships.

Like Christiano, Viehoff appeals to ‘the fact of disagreement’ and adds ‘the need for coordination’, which corresponds to Christiano’s notion of shaping citizens’ common world (Viehoff: p. 364). In spite of modern citizens’ wide disagreements over moral and political matters, it is necessary that they settle on common rules to structure their interactions. This need can be met by obeying directives of a common authority. If each citizen follows her own judgment, successful coordination would not be achieved. But while this shows the need for coordination, it does not specify the necessary form this must take. For instance, if someone has the ability to impose coordination on other people because of his greater power, coordination would be achieved, but only with objectionable subjection. In order to achieve coordination without subjection, citizens cannot rely on inequalities in power and must ‘treat as authoritative the outcomes of egalitarian procedures’ (p. 370).

As noted, we accept central portions of both Christiano’s and Viehoff’s positions, that they have shown that decisions that affect some group should be made democratically rather than through other means.²³ But even if democracy is necessary if decisions are to preserve equality, in itself this does not explain why these decisions should be accepted as authoritative. Even if we accept that deep disagreements must be settled democratically if they are to be settled legitimately, it has not been explained why democratic decisions should be obeyed because they are democratic.

Once again, we should distinguish first-order reasons to comply with democratic decisions and second-order reasons to comply with these decisions because they are democratically made. We begin with Christiano. While we agree that he establishes claims that, under certain circumstance, democratic decisions should be complied with, he does not succeed in showing that the force of the obligation comes from the second-order reasons instead of the first-order reasons. As we have seen the wrong of disobedience, if in fact it is wrong, is based on violating first-order reasons.

²³ Democratic institutions may be structured in different ways, while still preserving equality. As long as the institutions treat all citizens fairly and equally, a democratic system establishes a valuable relationship between citizens that requires recognition respect. In addition to direct democracy or “first-past-the-post” election rules, democratic equality could be satisfied through such forms of democratic decision-making as a lottery system, though this may be undesirable for other reasons.

The primacy of first-order reasons is supported by analysis of coordination cases. Consider a democratically made rule to drive on the right. Clearly, one can make a plausible case that, once the decision is made, Beth will incur a moral requirement to drive on the right. One could also maintain that in such a case, democratic procedures yield an authoritative reason to abide by the decision. But is this a reason to abide by the decision *because it is democratically made*? Examination of the case tells against this conclusion. Let us stipulate that major first-order reasons to comply with traffic laws center upon the need for traffic regulations, for reasons of convenience and safety and the need for everyone to follow one set of regulations.

The relevant rules are then made by democratic procedures. Under these circumstances, although Beth may have many reasons to obey, her main moral reason is to avoid endangering and inconveniencing other people and herself. But this rationale is based on predictions about how other people will behave – that they will drive on the right – rather than that the provision in question is democratically made. If we distinguish between (i) reasons to obey because of others' behavior and (ii) reasons to obey because of others' behavior determined by democratic procedures, in this case the relevant reasons are (ii). But this is not enough to support a claim that the main reasons motivating Beth's behavior are second-order considerations in regard to democratic procedures. Both (i) and (ii) should be distinguished from (iii), reasons to obey because of democratic provenance *simpliciter*. Although general patterns of behavior may be traced back to the existence of the decision in question, it is still this general behavior rather than a requirement to comply with the decision because it is democratically made that provides moral reasons to obey. As Larry Alexander writes, if for some reason I do not predict that a given law will affect other people's behavior, 'my reason for and against [it] remain exactly as they were before the law was enacted'.²⁴ Considerations are similar in other coordination cases. In these too, moral reasons to obey result from combinations of first-order considerations that are taken into account by democratic procedures and predictions about how other people will behave. In such cases, the fact that a given pro-

²⁴ L. Alexander, 'Law and Exclusionary Reasons', *Philosophical Topics* 18 (1990), 8.

vision is democratically made itself appears to provide little or no moral reason to obey.

In this coordination case, one could question the role of first-order concerns and maintain that citizens are following the law as law. The question is: what exactly is the law? One could argue that general practice, for example, customary law, has taken the place of what was legislated. However, whatever we decide on the identity of the law in question, it is clear that democratic provenance has been left behind. Even if driving on the left could now be viewed as the essence of the law, it was not decided on through democratic procedures. Presumably, for some first-order reasons, people began to drive on the left rather than the right, a practice that eventually spread.

Viehoff's position too may be countered. In his case, problems with democratic authority are especially clear. As we have seen, he argues that democratic reasons are not only content-independent but preemptive. As noted above, if laws are preemptive, they take precedence over other moral considerations. But as we have seen, this is clearly not the case with democratic decisions. Rather than democratic provenance adding overwhelming force to what is decided, we have seen that it is difficult to identify any force at all that it adds.

If our analysis of the force of reasons to comply with democratic procedures is accepted, then we should note an important implication. If virtually all moral force of reasons to comply stems from first-order considerations, it follows that, in the absence of suitable first-order concerns, there will be little or no reason to accede to democratic procedures. As we have said, democratic decision-making must apply to us in some strong and direct way. Thus in the traffic examples, duties not to endanger other people do virtually all of the moral work. In the absence of such reasons, for example, in Adam's neighbors' planned camping trip, there are no real reasons to comply. According to Viehoff, democracy is necessary to settle certain disagreements, in order to attain 'certain valuable ends' (Viehoff: p. 352), which include rules concerning property rights, and assignment of tax burdens (p. 364). Thus he recognizes 'instrumental reasons to obey a common authority' in regard to important collective ends (p. 366). To use Christiano's language, first-order reasons

establish a ‘common world’ or ‘a set of circumstances among a group of persons in which the fundamental interests of each person are implicated in how the world is structured in a multitude of ways’ (Christiano: p. 80). Thus while this standard is met in regard to traffic cases, the lack of first-order reasons in the case of Adam’s neighbors means that, as far as the camping trip goes, Adam and his neighbors do not share a common world.

We agree that both disagreements and the need to attain important collective ends are central to the need for democracy, but we of course do not agree with the two theorists’ account of how this works. Consider reasons to coordinate in order to secure essential public goods. In such cases, the relevant first-order reasons combine need for the goods in question and the need to provide them fairly, which leads to political obligations in accordance with the principle of fair play (or fairness).²⁵ For example, take demands of national defense. We assume that, in the modern world, some adequate system of defense is necessary for acceptable lives, and that, because of what it takes to fulfill this function adequately, there must be a single, tightly integrated system coordinated by an effective authority. We also assume that providing national defense is costly, and so those citizens who participate in providing it bear significant costs. Fair play comes in, because national defense is a public good, the benefits of which fall on both citizens who participate and those that do not. Because these benefits are unavoidable, as well as non-excludable, it is not clear how Beth could avoid receiving them even if she wished to. However, because, as we assume, the benefits are indispensable to her welfare, we may presume that she *would* receive them (and bear the associated costs) if this were necessary for their being received. If we imagine an artificial choice situation analogous to a state of nature or Rawls’s original position, it seems clear that under almost all circumstances Beth would choose to receive the benefits at the prescribed cost, if she had the choice. Because of the indispensability of national defense, it would not be rational for her to choose otherwise. But in the case under consideration, her obligation to the providers of defense does not stem from hypothetical consent – that she would consent to receive the benefits under some circumstances – but from the fact that she receives them. If she did

²⁵ The argument here follows Klosko, *The Principle of Fairness and Political Obligation* (Savage, MD: Rowman and Littlefield, 1992).

not comply with coordination rules, she would be taking advantage of the contributions of her fellow citizens, in other words, contravening the principle of fair play.²⁶

In this example, we believe Beth's requirement to contribute to national defense follows mainly from first-order concerns of fair play and the need for the benefits. Democratic decision-making is also necessary. But as one may see, in this particular case, its role is to settle disagreements under public equality, and so to determine the form in which defense is provided. In a large modern society, we may assume that citizens disagree about defense. Some people support a large, traditional military, while others prefer heavy use of targeted drones and increased reliance on special forces. Because we assume that disagreement on matters such as these is reasonable as well as inevitable, decisions must be made democratically. But as the examples we have just seen show, even though democratic procedures are necessary, it is difficult to identify the force of their contributions to Beth's moral reasons to comply with such decisions.

If these points hold, they are damaging to the view that democratic procedures require obedience to their decisions. While Christiano and Viehoff argue that to disobey violates norms of equality, we believe, once again, that democracy establishes only reasons to respect its decisions. Consider common ways of breaking the law. Many citizens jaywalk, speed, violate regulations surrounding apartment occupancy-limits, engage in recreational drug usage, cut hair for money without the proper license, etc. When they do so, are these acts subject to public censure? Do they themselves feel that they are doing something wrong? We believe the answer to both these questions is, no. As we have noted, the moral requirements in question are extremely weak, even if they are made through impeccable democratic procedures. While people are both subject to censure and feel that they have done wrong if they violate more significant laws – against murder, theft, assault, etc.—in these cases, virtually all, if not all moral force stems from first-order concerns. What, if anything, democratic provenance contributes to this moral force is not clear.

A defender of democratic authority could respond that, even if the moral requirements to obey the law created by democratic

²⁶ For other necessary conditions for political obligations under the principle of fair play, see *ibid.*, Chap. 2.

procedures are extremely weak, they are still content-independent reasons to obey the law, and so *prima facie* obligations. The reason we feel no guilt about violating a law against jaywalking (on an empty street in the middle of the night) and are not subject to censure for doing so is that the requirement to obey the law is only a *prima facie* obligation and so easily overridden by countervailing considerations. The same is true of the other laws we have noted. Although the requirements in question are weak, they are still *prima facie* political obligations, and so a view based on democratic authority successfully responds to the criticisms of the philosophical anarchists by establishing general political obligations.

This response raises a number of complex issues that cannot be pursued in this brief paper.²⁷ However, the moral phenomenology of these cases tells against it. As it seems to us, when theorists talk of ‘political obligations’, they have in mind moral requirements that are of significant strength, requirements that are able to generate compliance with whatever laws in question. Call this the strength criterion. This requirement is in keeping with a traditional understanding of political obligations as of practical significance. Such a construal can be traced back historically to the idea that political obligations originate in consent. Throughout much of Western history, political obligations were viewed as based on consent, which is the main source of modern theories of political obligation, including the belief that such requirements are of significant strength.²⁸ But in view of the criticisms above, it seems clear that an argument based on democratic authority does not satisfy this criterion. Democratic requirements are in fact so weak that they should not count as obligations at all. This can be shown by a brief look at *prima facie* obligations.

Consider a familiar example. Assume that Anne promises to meet Ben after class. On the way to the meeting, she sees Claude who has had a heart attack. By rushing Claude to the hospital, she could save his life. Clearly, under these circumstances, Anne would be wrong to keep the appointment. Although the moral requirement generated by the promise is outweighed by a duty to save the victim’s life, evidence that

²⁷ For one, we question whether democratic authority can satisfy a requirement of comprehensiveness, i.e., whether it can ground requirements to obey the entire range of laws in a contemporary state.

²⁸ Klosko, ‘Political Obligation’, in *Oxford Handbook of the History of Political Philosophy*, Klosko, ed. (Oxford: Oxford University Press, 2011).

it was a genuine obligation is the fact that Anne owes Ben an apology for missing their meeting. But evidence that she has done the right thing is that Ben would be wrong not to accept her apology. As this example shows, when a *prima facie* obligation is outweighed, a residue of an obligation remains, which gives rise to an element of sorrow or regret – something for which the person who has not kept her obligation owes an apology. But in many of the cases discussed above, violations of democratic precepts do not generate such feelings. When Anne jaywalks, violates speed limit laws, or laws against witchcraft or against various sexual practices, she feels no regret and does not believe anyone is owed an apology. In addition, in these cases, there is generally no censure if her conduct is discovered. Something similar is true of many other laws discussed above. Even if the laws Anne breaks were passed by exemplary democratic processes, the moral requirements to obey them are not of sufficient force to merit being called ‘obligations’, if we mean by that term obligations as traditionally understood, which meet the strength criterion. We agree that in these cases democratic procedures produce content-independent reasons, as Christiano and Viehoff argue. But as we have said, this is only in regard to filling in the content of pre-existing first-order moral requirements. Although these reasons are content-independent, in themselves they are not of sufficient strength to be called obligations.

However, one will note that, even though the requirements in question should not be construed as obligations to obey the law, they are consistent with moral requirements to respect it. If Anne goes through the red light in the desert without giving it a second thought as opposed to deliberating about it, then she clearly is liable for an explanation. In keeping with our discussion in section III, the moral phenomenology of such examples is consistent with requirements to respect the law because it is democratically made rather than to obey it for that reason.

V

In conclusion, we have seen that democratic provenance is not sufficient to establish moral requirements to obey laws *because they are democratically made*. While a balance of first-order reasons require that we obey many laws, examination of particular cases demonstrates that democratic origin adds little or no force to these

requirements. Rather than establishing requirements to obey the laws in question, we have attempted to show that democratic provenance establishes requirements to respect them. In keeping with Stephen Darwall's analysis of recognition respect, because of the valuable moral relationships in which we stand with our fellow citizens, we should recognize that democratically established laws encapsulate their judgments concerning common affairs, our 'common world', as Christiano would have it. But requirements to respect laws do not entail obedience. Rather we should take the laws seriously, consider their underlying rationales, and take these into account in our practical reasoning. Although democratic provenance does not generate requirements for us to obey the law, simply to ignore it or not adequately to include it in our practical deliberations is to show our fellow citizens disrespect.²⁹

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²⁹ Previous versions of this paper were presented at Harvard University, a conference on political obligation at the University College London, and a meeting of the American Political Science Association. We are grateful to the audiences at these sessions, especially Stephanie Collins and Jane Mansbridge, for valuable comments and criticisms. We also wish to thank to our anonymous referees for helpful criticisms and suggestions.