Introduction: Seven Questions about What Is Fit for an Official to Do

In the early 1600s, America was young, and England was enjoying the golden age of its common law. This was an important time for what has become the law of the United States. England was in transition from the feudal to the modern order; the economy was driven less by produce from ancestral lands and more by money, trade, colonies, and technology. The monarchy was becoming more bureaucratic, and the English law courts and Parliament, which had long been more independent of the Crown than were their counterparts on the continent, asserted again and again their authority as the guardian of the liberties of the subject. The colonists leaving England for America brought with them these models of state and law and these ideas of legal order.

The great expositor of these ideas was the English lawyer, judge, and parliamentary leader Sir Edward Coke, who had consolidated the powers of the courts and written the case reports and textbook institutes that would be brought to American shores, rooting there a notion of what would later be called the Rule of Law.[1] In one of this notion's first tests, King James I of England asked Coke whether he would submit to hearing the king's opinion before deciding a case. Coke refused, replying he would "do that which should be fit for a judge to do."[2]

By this act, Coke condemned himself to retirement from the bench, but he also created an enduring symbol of the independence of the law from political power, an independence built on a complex understanding that officials *of* the law have special duties *to* the law. Such duties may range widely in their origin and in their meaning.

[1] See Steve Sheppard, "Introduction," in 1 *The Selected Writings of Sir Edward Coke* xxii (Steve Sheppard, ed.) (Liberty Fund, 2004). On the Rule of Law, see Brian Z. Tamanaha, *The Rule of Law: History, Politics, Theory* (Cambridge University Press, 2005).

[2] "Commendams and the King's Displeasure," 3 *Selected Writings of Sir Edward Coke* 1320. (The spelling above is modernized, and "which" is added for clarity.)

Not one law, but the law as a whole, gave rise to Coke's belief that he had an obligation to defy the King. His decision to do so was based on a broad understanding of the requirements upon him as judge. Only some of these requirements arose from the written legal materials; requirements from the unwritten law – the *lex non scripta* – were every bit as real to him and were acknowledged by many others of his time.[3]

WHAT SHOULD BE FIT FOR AN OFFICIAL TO DO?

Of course, there is a long tradition that the officials who create and carry out the law ought to perform their duties with particular care. Only a portion of this care is explained or written as law, and even less is enforceable according to law.

The sources for this care are neither law nor are they not law. They are essential to law but do not arise from the same sources of law in the ordinary way. They arise from our understandings of moral obligation – both those understandings that are grounded in the traditional discourse of morality and those understandings that arise from sources particular to this question of care by officials, including the law itself.

These requirements are controversial. In the case of Sir Edward Coke, the judge hardly persuaded James I at the time, though James had heard and accepted much more powerful statements of Coke's views before.[4] In our own day, the idea that officials might have any authority other than the law for their actions conflicts with one of the most basic doctrines of legal philosophy, that there is a fundamental rule in every legal system, according to which all other rules of law are recognized. Yet Ronald Dworkin has convincingly argued that the rules of the legal system may themselves provide for authority that does not wholly depend on the law.[5] Still, when we thread among such fierce arguments, we will, I think, find plenty of evidence that such requirements – requirements for officials to do the right thing that arise from sources besides the law alone – are indeed meaningful and are appropriate bases for thought and action.

Therefore, this book examines the question, "What are the moral obligations of legal officials?" by considering essential abstract principles as they can be understood in actual moments of practice in the law, echoed in our understandings of professional responsibility, official responsibility, the idea of the state, and the nature of law itself. The book seeks such answers in the

[3] See J. H. Baker, *The Law's Two Bodies: Some Evidential Problems in English Legal History* (Oxford University Press, 2001).

[4] See Steve Sheppard, "Editor's Note," in Sir Edward Coke, "Prohibition del Roy" (1607), in 1 *Selected Writings of Sir Edward Coke* 478.

[5] See Ronald Dworkin, *Law's Empire* (Duckworth, 1986).

same manner in which Coke did, by resorting to ancient and modern writers from whom we can find principles and ideas with which to resolve our practical difficulties, and then by threading that knowledge through cases and examples. Coke read the ancients, including Aristotle, Cicero, and Tacitus, as well as contemporaries such as Sir Thomas More, Selden, and Bacon, yet he juxtaposed their ideas with real cases and problems in the law.[6] He would not have imagined a lawyer to be learned in the law without such knowledge, both in its sources and applied to law cases. Neither should we.

SEVEN QUESTIONS

So, let us then consider what an official should do, considering both ideas in the literature of the law and of office and illustrations that arise from practical situations. There are innumerable approaches one might take to such a consideration, but for this book, I've chosen a progression of seven questions:

1. What are legal officials, the law, and the legal obligations of officials?
2. What is at stake? Why, or how, is it helpful to consider any obligations of officials other than those imposed exclusively by the laws?
3. Do officials have obligations arising from more than law alone?
4. If so, what is the content of these obligations upon legal officials?
5. How do obligations arising from the laws interact with those that do not?
6. What does it mean when an official breaches these obligations?
7. What tools assist an official to do justice and discourage injustice?

This book follows these questions. The arguments developed in response to them are very briefly summarized in the overview that follows.

A GUIDE TO THIS BOOK

An Overview of the Arguments Introduced

1. *What Are Legal Officials, the Law, and the Legal Obligations of Officials?*

Officials and laws are essential to each other, and understanding one requires understanding both. To consider "what law is," in the context of officials' obligations, we look to how officials see law and to how citizens see it, each

[6] See John Marshall Gest, "The Writings of Sir Edward Coke," 18 Yale Law Journal 504, 516–18 (1909). Readers of Coke will recognize references to Tully as references to Cicero. Moreover, Coke was fond of quoting Cicero in epigraphs at the start of his *Reports*, a practice that is followed here in each chapter of this book.

giving rise to certain understandings. Officials see the law as a set of rules arising from an archive created by earlier acts of officials, interpreted and applied according to the culture of contemporary legal officials. Subjects see a host of signs in the law that are to an extent amorphous and to an extent the result of individual acts, whether by identified individuals or by anonymous actors working through a corporate body. From these we can synthesize a single view of the legal official, in which legal officials are the individuals in whom all of the powers of the state are allocated, divided among many roles, in each of which the role is both empowered and limited by some archival statements of law and by legal customs and cultural expectations, but within which the official has the sole discretion to act or not to act.

Every legal official has a wide range of discretion. Although that discretion is bounded by the rules that give the office its powers as well as by a legal culture that creates a set of expectations, how the official exercises that discretion is largely a matter left to that official. The rules of law do not control how discretion is exercised.

Officials act with very few controls or penalties, other than their access to promotion or image. The selection of officials and culture of officials are therefore the most likely external influences on how an official exercises discretion.

2. *What Is at Stake? Why, or How, Is It Helpful to Consider Any Obligations of Officials Other than Those Imposed Exclusively by the Laws?*

The actions of legal officials, both individually and as part of a collective act, produce many distinct and profound effects in the lives of others. A perfect inventory of these effects is impossible, but they are here represented by a group of nine metaphors for ease of use: the sword (the monopoly of force), the shield (the duty to protect from others), the balance (the power of judgment), the coin (the power to alter the economy), the commons (the title to public goods), the guide (the signal of good and evil in private life), the mirror (the representation of the people and their identity), the seal (superior authority with little or no real oversight), and the veil (the anonymity of identity and lack of direct accountability to those harmed). Those who are subject to the law depend upon legal officials for everything in each of the domains these metaphors signify. Some of these powers, such as the power of the sword, the balance, and the coin, represent needed but dreadful powers that are prone to misuses that risk direct harm to those who are affected by bad acts and decisions made in the name of the law. Some, such as the shield, the coin, the commons, and the mirror, represent opportunities for a good life for the subjects that are either prudently exercised or negligently lost. Some, such as the guide and the mirror, represent indirect conditions of life

that frame identity and opportunity. Some, such as the seal and the veil, represent the danger of authority both to those who are subject to it and to the institutions (and other officials) that depend upon it to perform these functions.

3. ***Do Officials Have Obligations Arising from More than Law Alone?*** Considering the relationship of the official to the law and also to the people regulated by law, it becomes easier to answer the question of whether official obligations arise from more than the law alone. Of course they do, particularly from the promises made in oaths of office, from the special risks created by office, from the expectations created by professional culture, from the implications of volunteering, from the reliance of others they have thus knowingly accepted, and from general principles of morality.

Understanding the extent of this responsibility is complicated because officials have a share of personal responsibility for every collective decision of the system as a whole. Although this responsibility matters most for actions or duties within a range of discretion, or within the boundary of the powers of every official, the obligations are greater than that and may require an official to alter the scope of discretion in order to satisfy very important obligations.

In this way, officials may be bound not only to carry out the law but also to do right by law. In this way, too, arguments from grand theory for fairness and justice in the law can be restated as arguments for actions not by "the state" or "the law" but as arguments for retail justice by individual officials. Arguments of justice, such as to be free of prejudice or bias, or to pursue freedom or economic justice, are much clearer seen in this light. Indeed, in this light, it appears that there can be no meaningful argument for any definition or claim of justice, unless that argument can sensibly be applied as an obligation of officials.

4. ***If so, What Is the Content of These Obligations upon Legal Officials?*** Officials must use their discretion in certain manners and toward certain ends. What these manners and ends are is deeply controversial, and in the controversy, just discerning which voices one should hear can be difficult. After considering this difficulty, the chapter then inventories different forms of moral obligation, including obligations arising from institutional sources of personal moral obligation that underpin the law itself. These obligations take personal, institutional, procedural, and substantive forms, and like all ideals are nearly impossible to fully satisfy. This book cannot fully explore any (much less all) of these obligations, but the personal obligation of charity, the oldest in the literature, is considered in a little more detail.

5. ***How Do Obligations Arising from the Laws Interact with Those that Do Not?***

The problem of official action is easiest when the official's legal and moral obligations are compatible. This is the case fairly often, a fact that is largely overlooked by many observers. The more dramatic questions that arise when they conflict give rise to a limited number of choices, which are first explored here by looking at the more familiar grounds of conflict among obligations for citizens. Officials have a greater range of choices than one might think. The patterns between incompatible obligations must result in changing the obligations, in changing one's role, in breaching one or the other, or in resignation from office.

6. ***What Does It Mean When an Official Breaches These Obligations?***

There is very little legal oversight of officials, and yet officials inevitably breach their duties under both the law and morality. The problem of dirty hands, the condition in which immoral decisions are unavoidable, arises because the demands of moral behavior are so extensive that they cannot be satisfied completely: they are ideals that can only be partially met in the practical world of human affairs. Thus, the best one can hope for in most instances is that the official will reach the least unjust result possible.

The problem of remedies for breach is difficult, mainly because the remedies in law are so rarely available or used, and the remedies for immorality are social and psychological, not legal or physical. Other officials, or (less likely) the citizenry, may condemn an immoral official like any bad person, and one tool that is out of fashion is shame, which is more important but less likely now than offense.

The most significant remedy is for those aware of moral breaches by an official to interfere with the advancement or reappointment of that official. This form of interference occurs in the realm of politics, and those with the power to decide or influence the decision to appoint one person or another to office are morally obligated to make moral judgments in doing so, which is to say to promote those who use their powers for the good rather than for the sake of power alone. This is the moral basis for the exercise of the vote by the people governed by officials.

7. ***What Tools Assist an Official to Do Justice and Discourage Injustice?***

There is no perfect calculus that can relieve an official of the duty of discretion. Each official must work to act in the least immoral manner in every opportunity for action. Traditionally, moral obligations have been distilled into aphorisms that allow assessment of a decision or action, and the book presents several maxims, with illustrations of their manifestation and of their breach. Yet tools

for assessment need to be both positive and negative, and fallacies, illustrations of false or misleading reasoning, are also catalogued.

The Severability of These Questions

These questions are answered here with some attempt at an overview of a single problem. That does not really mean that the answers developed from one question are essential to the next. It is quite likely that you will find one argument, or several, unpersuasive but find some merit in the others. This is to be expected, and you could, for instance, accept the usefulness of the maxims and fallacies at the end of the book having rejected all of the arguments that led me to them. A lawyer might think of this book as a series of severable arguments; even if some fail, the merit of the others might be sufficient for them to work. A philosopher might consider it all either as a structured system of rational conclusions derived from observable premises or as a jumble of aphorisms, but in either case the aphorisms or the conclusions must stand on their own.

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Law and Office

> The administration of the government, like the office of a trustee, must be conducted for the benefit of those entrusted to one's care, not of those to whom it is entrusted.
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> Cicero, *On Duties*, Book I, Chapter XXV[1]

At the outset, we must deal with two fundamental questions: what is the law, and what are officials? We must have a common understanding of the law and the people who work with it, if we are to consider what implications there are for us, and for them, in what they do. Thus, we must consider what we imagine when we think of laws and officials.

There is a tension between two visions of the law in America, and these views of law color our view of the official. On the one hand, we see the law as a Romantic ideal. Two lawyers stand like gladiators, each fighting for a cause before a judge who decrees a winner and a loser. A president or a senator stands like a Roman of old, pronouncing the law. In each picture, the individual appears as the source of the law, the person acting upon the law and the law acting through the person.[2] Yet we also see a classical ideal, our laws framed and shaped by famous institutions in vast marble buildings, great armies of experts in which the efforts of each individual are only a portion of the whole.[3]

[1] Marcus Tullius Cicero, *De Officiis* 87 (Walter Miller, trans.) (Loeb edn.) (Cambridge, MA: Harvard University Press, 1913).

[2] This thin depiction is taken from George Fletcher's meditations on Isaiah Berlin's model of Romanticism. See George P. Fletcher, "Liberals and Romantics at War: The Problem of Collective Guilt," 111 Yale Law Journal 1499, 1505 (2002), developed further in –, *Romantics at War: Glory and Guilt in the Age of Terrorism* (Princeton University Press, 2002).

[3] This model benefits from Mary Ann Glendon's contrast between the classical and the Romantic model of judges. Her classical judge is objective and rule-centered, whereas her Romantic judge is passionate and above legal technicalities; she prefers the first ideal. See Mary Ann Glendon, *A Nation under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society* (Farrar, Straus, and Giroux, 1994). I suggest that both the classical and the Romantic aesthetics are needed in all legal systems, across all offices (including each judgeship). I think it is better not to consider the Romantic individual overly isolated from the professional institutions and culture that give that individual's

The classical model understands the law to act through "the process," a system of competing groups of officials working among many institutions.[4]

Both visions are accurate to an extent, but each depends on the other for completeness. It is impossible to think meaningfully of the institution without thinking of the individual officials, just as it is impossible to think meaningfully of the officials without considering their institutions. When seen in this light, neither the individuals nor the institutions can disappear. The officials have roles in the institution, and how each person carries out those roles gives the institution meaning.

The institutions of the law are the apparatus of the modern state. They are the bureaucracy, a corporate enterprise, in which every official must act (but within a particular domain) and in which no one official has a claim – or should have a claim – to final authority.[5] Bureaucracy in its fullest sense includes all offices – those who make laws, administer them, adjudicate them. It is the means by which the state achieves anything. Thus judges are a type of bureaucrat, and "legal official" includes a wide variety of administrators, including those who administer the law for individuals, the private attorneys.

With the demise of the traditional kingdom and the rise of the modern state, an evolution that happened in most of Europe and America between about 1450 and 1800, the identification of law, states, and officials became complete. The nature of offices, which in Europe had decayed from the civil service of the Roman Empire to hereditary kingships and personal agents, became robust, independent, and defined by law.[6] Further, the law was created more often by

actions subjective meaning. See Steve Sheppard, "Passion and Nation: War, Crime, and Guilt in the Individual and the Collective," 78 Notre Dame Law Review 751 (2003). Conversely, it is a mistake to pretend an official should make decisions that are dispassionate toward those who are affected by them; that way lies efficiency over right conduct.

4 "The process" became the popular label for the institutional aspects of the long-running investigation and impeachment of President Clinton in 1998. See, for example, G. B. Trudeau, *Buck Wild Doonesbury* 63 (Andrews McMeel Publishing, 1999). The term was corrupted from a more noble tradition in U.S. law. See, for example, Henry M. Hart, Jr., & Albert Sacks, *Hart & Sacks' The Legal Process: Basic Problems in the Making and Application of Law* (William Eskridge, Jr., & Phillip Frickey, eds.) (Foundation Press, 2001).

5 The description of the legal system in this section is built on the bureaucratic model of the state developed by Max Weber, influenced by both Aristotelean ideas of the law and Dicean notions of the rule of law. See Max Weber, *Economy and Society* 212–26, 956–63 (Guenther Roth & Claus Wittich, eds., 1978); Jeremy Waldron, *The Law* (Routledge, 1990); Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* (9th ed.) (Macmillan, 1939). See also Steve Sheppard, "The Rule of Law," in *UNESCO Encyclopedia of Life Support Systems* (EOLSS, 2002).

6 The kings were officials, as were their counselors. See Fritz Kent, *Kingship and Law in the Middle Ages* (Greenwood Press, 1985); Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton University Press, 1997). The primary distinction, which Weber discusses at length, is the move from a charisma to bureaucracy, in which the official no longer is thought to own an office as a grant or patrimony. Yet even the notion of ownership was never without considerable duties and limits implied upon it.

those in legal offices than by those in personal service to an overlord, and by the eighteenth-century dawn of the United States, nearly everything done by the state was done and described through law. Indeed, it was such an increase in legalization of the state that led to a written constitution intended to structure the whole of the new government by law. In America, as in Europe, laws were created and enforced by acts of officials in the name of the people or the prince or the state, even as the prince himself had decreasing influence on their content or their enforcement.

The increase in official management corresponded with a rise in official populations – lawyers, sheriffs, clerks, and other assistants became more specialized and professional, and the officials whose offices were hereditary or honorific increasingly relied on these professionals or accepted some training in their roles. The law became more complicated, particularly given that it was required more often to regulate ever more complicated human activity as trades, technology, and the economy grew and evolved.

The growth in the population of legal officials did not, however, mean that the rules of the law were divorced from the wider culture. Indeed, officials relied then (as now) on the subjects themselves as sources of legal obligation. Laws evolved to enforce private agreements and to recognize customary understandings of reasonable care in what we would now call tort. Some portion of these customary or deliberate extralegal obligations became routinely accepted by officials on behalf of the state from sources among states, as in the treaties and customs of international law. Yet all of it was ratified or created by officers, and everything the officers did was governed by laws.

The offices of contemporary legal systems are public; no official owns the office or may use it with unlimited discretion. With rare exception, there is no sovereign person, no last word. Every decision must be made in accord with the mechanisms of the legal bureaucracy, and every decision is subject to reversal, amendment, or rejection, if not at the time of one dispute then later. The ability to act within the whole of the system is fragmented among hosts of officials, each official having obligations that must be carried out in order for the system to accomplish its goal, and every decision is revisited again and again over time. What defines an official is the holding of an office with this type of power to carry out a function within the bureaucracy of the legal system; and these powers are inherently corporate, contributing to an act by a collective of officials, or acting upon powers conferred by a collective of officials, or directing others among the collective of officials.

Seen this way, the building blocks of a modern legal system are offices, and the essential purpose of offices is to fulfill tasks of the legal system. As Karl Llewellyn quite forcefully put it in explaining that the best way to understand the rules of law was to understand how officials use those rules,