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## OUGHT WE TO DO WHAT WE OUGHT TO BE MADE TO DO?

G.A. Cohen on the Political and the Personal

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*In warming himself at French social theories he had brought away no smell of scorching. We may handle even extreme opinions with impunity while our furniture, our dinner-giving, and preference for armorial bearings in our own case link us indissolubly with the established order. And Lydgate's tendency was not toward extreme opinions: he would have liked no barefooted doctrines, being particular about his boots....*

### MIDDLEMARCH<sup>1</sup>

In the tradition of criticism/self-criticism, Jerry Cohen interrogated his own way of living. He was a “red diaper baby” by birth, an egalitarian by conviction, and yet by vocation a longtime fellow of All Souls College, Oxford, by some measures perhaps the least egalitarian

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<sup>1</sup> Cohen quoted a different passage from *Middlemarch* as the epigraph to his essay “Political Philosophy and Personal Behavior” (2000, 148). In it, Eliot acquits the damned, self-righteous but self-deceived Bulstrode of “gross hypocrisy.”

institution in the history of the Western world. He was vexed by the difficulty of reconciling three propositions that had become true, as they applied to him.

[T]he triad which formulates ... the problem that exercises me:

1. (*A* believes that) *A*'s behavior is not out of line with his own principles.
2. *A* believes in equality.
3. *A* is rich (which means that *A* does not give a relevant amount of his money away).

It is an interesting question whether the behavior reported in 3 is congruent with the belief reported in 2. (2000, 156-57; original numbering adjusted)

In other words, the question is whether 1, which asserts that congruence, is consistent with the conjunction of 2 and 3. Leave out the parenthetical “*A* believes that” in 1, and –under certain plausible interpretations of the remaining language– there is an inconsistent triad. Consistency is restored by putting the parenthetical back in, but “logical consistency is a very thin thing,” (2000, 158). What we have is “an inconsistency in *A* herself” (2000, 156); or, in other words, an analogue of “Moorean’ incoherence” (Mark van Roojen’s (1996) phrase, in honor of Moore’s “*p*, but I don’t believe it”).

The triad Cohen discusses can be generalized.

COHEN’S TRIAD IN GENERAL FORM

1. (*A* believes that) *A*'s behavior is not out of line with his own principles.
- 2\* *A* believes in principle *P*, a principle of distributive justice.
- 3\* *A* is rich (which means only that *A* does not give away the difference between the amount of money *P* requires a just state to extract from *A* for the purpose of redistributive justice, and the smaller amount that the state in fact extracts).

This triad formulates an incongruity in the lives of egalitarians of all types, as Cohen notes, including Rawlsians. But also, as he might have noted, it poses a challenge to non-egalitarian prioritarrians, utilitarians of all varieties, sufficientarians and, in fact, anybody who believes in a principle of distributive justice that warrants redistributive taxation. The “difference” might be the product of regressive marginal tax rates, of unwarranted shelters, credits and deductions, of the tax basis itself (income, sales, property, etc.) or of some combination of these.

Although phrased in terms of an “amount of money,” the incongruity extends to other goods. Paid work, for example. There are few fields in which there is not a supply of younger, under- or unemployed people who may be equally as (or more) qualified than their elders. An older, well-provisioned employee might think it a shame that she is not made to retire in order to make way for one of the younger people who has had to postpone or pass up a career in a field (such as academics) where jobs are scarce. Such an older worker, even

if well-provisioned for retirement, and strongly persuaded of the justice of mandatory retirement, is unlikely to retire merely because she thinks it her duty (cf. Smilansky 2007).

Obviously, the Cohen Triad in General Form does not express an incongruity in the lives of those who are not rich (in the relevant sense), or who deny the existence of any principle of distributive justice. Nor does it capture any incongruity in the lives of those well-to-do believers in distributive justice whose principles do not warrant redistributive taxation. Believers in *laissez-faire*, for example, may give away nothing in good conscience, because on their principles the state cannot justly tax them at all for redistributive purposes. Similarly, those whose distributive principle *P* merely permits, but does not *require*, redistributive taxation seem to have nothing to have to justify.<sup>2</sup>

There is thus a *prima facie* difficulty facing anyone who does believe that justice requires the state to tax her at a rate higher than that at which she is currently being taxed. That takes in a lot of people, including me. But it is worth taking another step back. There may be an easy way to dispel this kind of uneasiness. Thomas Nagel was the first to allude to it (as far as I know).

Admittedly there are cases in which a person should do something although it would not be right to force him to do it. But ... I believe the reverse is true. Sometimes it

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<sup>2</sup> Anderson 1999 underlines the distinction between justice and compassion. The redistributarians at issue here are concerned with a “perfect” duty of justice rather than an “imperfect” duty of compassionate charity, which a tax system might reduce to a conveniently dischargeable quantity.

is proper to force people to do something even though it is not true that they should do it without being forced. (1981, 199-200)<sup>3</sup>

Nagel made the more general point in the context of taxation, too. In his view, “It is acceptable to compel people to contribute to the support of the indigent by automatic taxation, but unreasonable to insist that in the absence of such a system they ought to contribute voluntarily” (1981, 200). Cohen’s worry arose because many existing systems of “automatic” taxation ask less of the rich than what those systems could and ought to demand of them. The absence of compulsion both Nagel and Cohen had in their immediate sights is not a pre-political vacuum, but a failure of modern states to do what they could readily do and ought, in justice, to be doing.

Nagel suggested that the individual’s predicament in the midst of this kind of political failure should be assimilated to a more general pattern. I want to extract Nagel’s more general point, which can be stated in this abstract form:

#### NAGEL TRIAD

N1 There is a moral principle  $P$  that requires that  $A$  be made to  $\varphi$ .

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<sup>3</sup> Nagel noticed that the question whether one might have no duty to do what one ought to be made to do is the flip side of the question whether there can be a permission (much less, an obligation) to make someone do what she has no duty to do. The two questions have a common core: can there be an act  $\varphi$  and competent agents  $A$  and  $B$  such that  $A$  has no duty to  $\varphi$  but it is permissible (even obligatory) for  $B$  to coerce  $A$  to  $\varphi$ ? Nagel and Cohen think the answer is Yes. I say No.

N2  $A$  is not made to  $\varphi$ .

N3  $A$  has no duty to  $\varphi$ .

Nagel's general point is that this triad of propositions is jointly satisfiable. For simplicity, I will let "principle  $P$ " encompass both the abstract principle and the circumstances that, coupled with the abstract principle, trigger the requirement that  $A$  be made to  $\varphi$ . Wherever necessary, I say more elaborately what circumstances  $C$  obtain, such that, given  $P$  and  $C$ ,  $A$  ought to be compelled to  $\varphi$ .

Also for simplicity, I will stipulate that  $\varphi$  is to be interpreted flexibly enough to encompass both an institutional act, whose description implies institutional facts, and an extra-institutional act that could count as a substitute performance. For example, if  $A$  is not required to pay a tax, then nothing  $A$  could possibly do could count, strictly speaking, as paying that tax.<sup>4</sup> What  $A$  might do as a substitute performance would, strictly speaking, be a donation or voluntary transfer of some other kind in an amount equal to what  $A$  ought to be taxed, whether to the government or some other agency (Smilansky 1994). Abstractly, there is always a possibility that there will be no good-enough second-best to serve as a needed substitute. This could happen if, for example, the only available charitable channels were so corrupted that a voluntary transfer would have pernicious consequences. I will say no more about this somewhat valetudinarian concern. Although there are good reasons generally to

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<sup>4</sup> Luis Duarte d'Almeida forced me to acknowledge the need for this simplification.

be cautious before entrusting charities with one's money, it would be a world much worse than our own in which none could withstand due diligence.

So. If the Nagel Triad is satisfied with respect to  $A$ 's principle of distributive justice,  $P$ , then  $A$  can rightly be easy of mind in not  $\varphi$ ing.  $A$  awaits the call to  $\varphi$ , but the duty to  $\varphi$  does not arise until the call issues. It just happens that the call is not going to come. Because the call is not going to come, if  $A$   $\varphi$ s anyway,  $A$ 's  $\varphi$ ing is an act of supererogation, not one of discharging a duty. The quest is thus to find a case that satisfies the Nagel Triad, and which is similar enough to Cohen's worry to relieve it.

#### MAKING IT THE CASE VERSUS MAKING SOMEONE

Intuitively, the reasons that make it true I ought to be made to do something seem capable of differing from the reasons that have to do with what I ought to do. The reasons for the maker and the reasons for me can be different. Deontic logicians have noticed this. Paul McNamara (2006) calls it the "Leakage Problem" that arises under the so-called Meinong-Chisholm reduction of the idiom " $A$  ought to  $\varphi$ " to " $A$  ought to make it the case that  $A$   $\varphi$ s." The Meinong-Chisholm reduction makes Standard Deontic Logic stronger: the problem is that then it "will imply that if I am obligated to bring it about that someone else does some thing, then she is obligated to do that thing as well" (256). As McNamara points out, this does not follow. The reasons that obligate  $B$  to make it the case that  $A$   $\varphi$ s should not "leak"

over to  $A$  in a way that would obligate  $A$  to  $\varphi$ .<sup>5</sup> The reasons that apply to  $B$  may very well be inapplicable to  $A$ . Hospitality requires hosts to make it the case that their guests relax, but guests have no duty to relax if their hosts otherwise fail to get them to.

Our focus is not the logic of “making it the case that  $A$   $\varphi$ s,” but the logic of “making  $A$   $\varphi$ .” Leakage is significantly less likely to be objectionable here. For one thing, the reasons that favor  $A$ ’s  $\varphi$ ing have to be much stronger because they have to overcome a strong commonsense presumption of liberty. I can make it the case that you read this paragraph, for example, by writing it and publishing it in a journal you are likely to follow. But how would I make you read it, as distinct from making it the case that you do? Hold a gun to your head? There had better be some very powerful reasons at work. Moreover, those reasons would have to be ones equally available to you, if it is you who are to be made to read the paragraph. “Leakage” looks not to be a problem, but a justificatory requirement, if I am to truly to be obligated to make you read this paragraph.

#### MAKING SOMEONE DO SOMETHING V. GETTING SOMEONE TO DO IT

*Getting* someone to do something and making someone do something are also crucially different. They both differ from making it the case that someone does something. Getting someone to do something normally involves requesting and persuading, but making it the case that someone does something need not. *Making* someone do something normally

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<sup>5</sup> Measures to avoid the leakage have been proposed (Krough and Herrestad 1996).



involves a manifest readiness to go beyond persuasion to compel action if necessary. Typically, making others do something begins when getting them to do it has failed or would fail. These differences have a bearing on what is necessary to provide, say, a justification for getting someone to do something as opposed to a justification for making her do that something. A significantly stronger principle is needed to justify making someone do something than to justify getting her to do it.

What is at issue here is the logic of “making to do,” and not of “getting to do.” It is easy to devise examples in which a moral principle makes it the case that *A* ought to be gotten to  $\varphi$  that are not cases in which *A* has a duty to  $\varphi$ ; so, if the Nagel Triad were stated in terms of “gotten to” rather than “made to,” it would be fairly easy to satisfy. Here is one example. Suppose that the parents of Little Ricky, a very small child, have a parental obligation to get him to pick up his clothes from the floor. But suppose they don’t do that. It ought to be the case that Little Rick picks up his clothes, but it does not follow that Little Ricky has a duty to do it – not yet anyway.

But now add a few years to Little Rick’s age, enough to make it the case that he has a duty to do as he is told. If Little Ricky is old enough to have a duty to pick up his clothes from the floor when his mother tells him to, how can he not also have a duty to pick them out without being told? The answer here seems easy: Little Ricky’s mother has authority, which, when exercised, imposes on him a duty he would not otherwise have. But the case is not yet an instance of the Nagel Triad. To make it so, we must appeal to the duty Little

Ricky's mother has to *make* him pick up his clothes, which she (for whatever reason) neglects. Little Ricky's mother has a duty to make him pick up his clothes; but, for whatever reasons, she does not make him pick up his clothes. And Little Ricky has no duty to pick up his clothes? His duty is conditional upon being made to do it? It would seem that the reasons that are sufficiently important to impose on his mother a duty to make him pick up his clothes, and to impose on him a duty to pick up his clothes when told to, ought to be sufficiently important to impose upon him a duty to pick up his clothes whether or not his mother fulfills her duty. And if the underlying reasons are sufficient to do that, it looks as though they are sufficiently important to make it Little Ricky's duty to pick up his clothes, full stop.

#### THE PUZZLE

Here again is the puzzle that is at the root of Cohen's problem. How can anyone believe that others –parents and officials, principally– have a moral duty (and permission) to compel him to do something, *see* that those others are failing in their duty, and yet believe he has no duty to go ahead and *do* that something? Nagel alluded to the existence of a class of objective possibilities that, allegedly, satisfy what I have been calling the Nagel Triad, and I will call that class the Nagel Class. The Nagel Class is a class of cases, to repeat, such that someone *B* has a duty to compel someone *A* to  $\varphi$ , *B* will not compel *A* to  $\varphi$ , and yet *A* has no duty  $\varphi$ . With respect to the members of that class, it will of course be coherent for *A* to adopt the corresponding subjective view, viz., that things are so.

In what follows, I will further inquire whether the Nagel Class is populated or empty. If I am unable to show that it is empty, I will then ask whether the case of redistributive taxation is relevantly similar to the kinds of members that I conclude do belong. If I am able to show that redistributive taxation is not relevantly similar, then I will press the question whether a person *A*, believing in a principle *P*, can coherently (though erroneously) *believe* that it is. I believe I can make it plausible that the Nagel Class is a null set. Even if I fail in that, I believe I can make a plausible case that redistributive taxation, from the perspective of the rich redistributivist, is not relevantly similar to putative members of the Nagel Class. I conclude that, unless the rich redistributivist adopts something akin to the Rawlsian view that distributive justice is an institutional, not a personal virtue, she ought to be uneasy. Her life betrays her principles, exactly as Cohen worried.

Some last preliminaries. In Nagel's formulation, "sometimes it is proper to force people" is ambiguous between "sometimes permissible" and "sometimes *required*." Very strong reasons are needed in order to convey a permission to compel an unwilling person to do something.<sup>6</sup> But it would be a distraction to pursue here the question whether such reasons might be strong enough to permit compulsion without being strong enough to

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<sup>6</sup> We mustn't equate the strength of a "reason to compel" with that of a "reason to permit compulsion." Admittedly, reasons to permit compulsion generally – as in the case of seatbelt or bicycle-helmet laws – might not amount to much of a reason to compel any particular individual. But that doesn't mean that the reasons that convey the permission did not have to be very strong. Saul Smilansky alerted me to the need to address this point.

require compulsion (or vice versa). For simplicity, I take Nagel to refer the class of cases in which others are both morally required and morally permitted to compel one to act if one will not act without compulsion.

Let us also assume henceforth that *A* is a sane, competent adult capable of bearing duties. The question is, how can it be that sane, adult, competent *A* has no duty to act if others have a duty to compel him to act if he won't on his own? Most act-types  $\varphi$  that are permissible to compel –like not murdering, say– are permissible to compel because of the serious wrongness of not  $\varphi$ ing (not not-murdering, if you will excuse the double negative). But of course not-murdering is something one has a duty to *do* –if you will (as though the peaceable and law-abiding are on a rampage of not-murdering). How could the facts that suffice to make N1 and N2 true fail to falsify N3?

#### PRE-COMMITMENT CASES

Pre-commitment contracts might satisfy the Nagel Triad. Suppose Odysseus wants to hear the Sirens but knows doing so will ruin him. He orders his crew to bind him to the mast and, until they are well away from danger, to ignore his (foreseeable) orders to untie him. So, let  $\varphi$  = stay tied up. N1 is true, given the truth of the principle that, normally, a ship's crewmembers are morally required to obey lawful orders. Let N2 be true in virtue of the crew's failing to do as ordered. N3 is true, plausibly, even though his wriggling free of his bonds means his ruin.

So, arguably, this scenario belongs to the Nagel Class. But it seems somehow beside the point. That, I suspect, is because the facts that make N1 true depend exclusively on Odysseus having exercised a moral power he possesses, which no moral reasons impel him to exercise.<sup>7</sup> It is tricky to specify, but the feature that makes the case specious is that Odysseus gratuitously, and simultaneously, exercises powers to obligate his crew to act and to disable the power he would normally retain to cancel that obligation by countermand. The case of legal authority is similar, insofar as it involves the exercise of a moral power to impose duties. That cannot be set aside so quickly: it will be treated later.

#### “EXCESSIVE DEMAND” CASES

One might, with Nagel, say that there is no duty where acting without compulsion would require “excessive demands on the will” (1981, 199-200). If “excessive” means “impossible” then N3 is indeed satisfied –assuming Kant’s principle: “ought” only if “can.” But if the Nagel Class is made up only of cases of this kind, there is no solace for those troubled by Cohen’s problem, for there is nothing impossible about giving away one’s money. So, “excessive” has to mean, “possible but too difficult to be morally required.”

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<sup>7</sup> Someone *A* could have a duty to promise to  $\varphi$  and yet have no duty to  $\varphi$  unless and until the promise is in fact made. Now suppose that *A* ought to be *made* to promise. (Never mind whether a compelled promise is valid or not.) Isn’t it possible that *A* ought to be made to promise to  $\varphi$ , that *A* is not made to promise to  $\varphi$ , and that *A* nevertheless has no duty to  $\varphi$ ? Maybe, maybe not (see Enoch 2011b for analysis). But the relevantly analogous case is one in which *A* ought to be made to promise to  $\varphi$ , *A* is not made to promise to  $\varphi$ , and *A* is under no duty *to promise* to  $\varphi$ . My claim is that there is no such case as the latter.

Here is a possible case. Pooh and dozens of children go spelunking. In the dark windings of a cave, they become lost.<sup>8</sup> But, at last, they are led by a slight current of air to the mouth of a narrow crawl-space. It is the only plausible way out. Unfortunately, Pooh, going first, gets stuck; and, even with everyone pulling and pushing, he cannot be unstuck. It so happens that one of the children has found a blasting cap, and Pooh, as all know, has matches. If the fuse of the cap is lit and it is wedged between Pooh and the passage wall, an explosion will clear the passage, allowing the dozens of children to escape to safety. But the explosion will be fatal to Pooh; and the children cannot bring themselves to hurt Pooh. Even if we assume merely for argument's sake that there is a true "Choice of Evils" principle that permits and even requires Pooh's being blasted out of the way, some will say it is too demanding of Pooh to say that it is his duty to give up the matches and submit to being blown up. I don't say that I would find it easy to do the right thing if I were Pooh; but it seems clear to me that Pooh's duty is to tell the children where to find the matches and to submit to being blown out of the way. Those who would insist that this would be merely supererogatory on Pooh's part are, I suspect, resisting the Choice of Evils principle. That they may do, but then they cannot say that the Pooh case is one that belongs in the Nagel Class: N3 is made true, N2 remains true, but N1 is no longer true without the support of something like the Choice of Evils principle. What set of reasons could require and permit the children to sacrifice Pooh without simultaneously requiring Pooh to submit to the

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<sup>8</sup> This is a variation of Philippa Foot (1967).

sacrifice? And any that could be strong enough to require Pooh to submit to being sacrificed, and require the children to carry it out, would have to be strong enough to require Pooh to do the deed if they can't.

I think Pooh's duty is clear; but some will not, and will count Pooh's case as one belonging in the Nagel Class. But even if it does, it is not an interesting member, in the context of this discussion anyway, because, as Cohen pointed out, there is a world of difference between difficulty and cost: writing a check is costly but not difficult. The Pooh's taking part in blowing himself up or even maiming himself is both costly and difficult in a way that a rich woman's writing a check is not.

Self-sacrifice can be demanding in different ways. Suppose *A* and his best friend *C* are in the battlefield and it becomes obvious that *C* is a traitor. Their commanding officer, *B*, orders *A* to execute *C* on the spot, as *C* poses an immediate risk to the entire unit. (Assume for the moment that in the circumstances *A* would have had standing authority to shoot *C* as a traitor anyway, without being ordered; and that neither *B* nor anyone else other than *A* is able to do the deed.) Suppose now though that *B* (for whatever reason) will not give the order. Surely *A* is not under a duty to shoot *C* on his own initiative; because, without the insulation provided by *B*'s order, *A* would not be able to shoot his best friend without undoing his very integrity as a person. "The order from above is what enables the agent to take shelter from his very self," is how Irit Samet puts it.<sup>9</sup> If the circumstances of the battlefield are sufficiently

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<sup>9</sup> I am indebted to her for the example.

exigent, *A* ought to be made to shoot *C*. But it would be contrary to *A*'s integrity for him to be obligated to shoot *C*, his best friend, without being made to.

My response here is to insist that, if *A* ought to be made to shoot his best friend, then he ought to shoot his best friend if he is not made to. Suppose the commanding officer, *B*, gravely places his hand upon *A*'s shoulder, preparing to discuss the needful thing. A shell bursts, killing *B*, and leaving *A* in command. Hard as it is, *A*'s duty is clear. If *A* ought to have been made to kill *C* before, *A* ought to kill *C* now. And if *A* ought to kill *C* now, he ought to have killed *C* before, while *B* still lived but negligently failed to issue the command.

But this response maybe misses the point. The point may be that it cannot be true that *A* ought to kill his friend *C*, in a *personal-* or *deliberative-*“ought” sense; even though it is true that it *ought to be the case* that *A* kills his friend, if *A* can be decently sheltered from his very self in doing so.<sup>10</sup> It's not that *A* should take the order as a factor in calculating what to do. The order functions differently: it makes the killing in some sense not fully *A*'s act. It would be better if the commanding officer could hypnotize *A* or drug *A* and have *A* do the killing at an even more vivid remove from *A*'s very self. But the command structure and the order, under the circumstances, suffice: it is still true that *A* ought to be made to kill *C*; and still not true that *A* ought to kill *C* if not made to. It is a Nagel case.

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<sup>10</sup> See the Appendix for more about the distinction.



A rich redistributivist is obviously far removed from the predicament of the unfortunate *A*. Writing a check in whatever amount is a sacrifice not quite of the order of shooting a best friend. This distance noted, I would still not admit the case as a member of the Nagel Class. For N1 and N3 to be true together, it ought to be the case that *A* is made to kill *C* while it is not the case that *A* ought to kill *C* absent the order. What is the magic of the order? The order distills a set of decisive moral reasons that are not merely excluded in a Razian sense but would be destructive of *A*'s integrity for *A* to ponder or to act upon directly. The order is supposed to spare *A*'s integrity in a way that *A*'s acting in direct response to *C*'s treachery and the necessity of saving the unit cannot. *A*, after the deed is done, can tell himself that he killed his best friend only because he was ordered to. I can't agree that *A*'s integrity is better preserved this way.

So far in discussing this example, I assumed that *A* was independently authorized to shoot *C*. Suppose, though, that *A* was not authorized to shoot *C* unless ordered to do so, and *B*, as before, does not and will not give the order. In this variation, it seems plausible to think the Nagel Triad is satisfied. *A* ought to be made to kill *C*; *A* will not be made to kill *C*; and *A* has no duty to kill *C*. But now the case is no longer an excessive-demand case, but an "authority" case—nothing turns on the fact that *C* is *A*'s best friend. I postpone treatment of that category of cases to a later section.

Here's another kind of possibility.<sup>11</sup> Pooh isn't stuck in the mouth of the cave, but a boulder is. Fortunately, a sturdy rope is tied around the boulder, and it can be moved away if all pull together. The children ought to make Pooh pull with them if he won't voluntarily; but the children are too dejected to do any pulling themselves, much less, to make Pooh do anything. So, N2 is satisfied, and N3 is too because Pooh's pulling won't accomplish anything (except maybe make the children even more despondent, seeing that the bear's efforts are for naught). But if matters are as dire as this, N1 is no longer satisfied. Unless there is no common effort in prospect, it is not true that Pooh ought to be made to pull on the rope.

Suppose a river is badly polluted and everyone ought to be made to stop dumping things into it. But nothing is being done to stop it, and Jonathan is tired of carrying the bag of orange peels he happens to be holding. Jonathan ought to be *made* not to throw the bag into the river, but why oughtn't he toss it in, if it makes no difference whether he does or not? N1, N2 and N3 are all satisfied –No? Well, no. If N1 is satisfied by some relevant principle *P* that –for some reason– *singles Jonathan out*, then Jonathan ought not to toss the bag; but then that falsifies N3. If, on the other hand, N1 is satisfied by a principle *P* that applies to Jonathan and a wider class to which he belongs, in order to achieve a good that requires universal or near-universal cooperation, that too appears to falsify N3. In a later section I will consider some embellishments that might tug intuition in a different direction: but as yet there is no Nagel case.

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<sup>11</sup> Matthew Hanser pointed out to me that I have to deal with this possibility.

The futility cases tend generally to involve some cooperative solution to a coordination problem, which is important enough that everyone ought to be made to perform some cooperative act  $\varphi$ . Then a lack of cooperation is assumed, which is supposed to leave untouched the obligatoriness of making agent  $A$   $\varphi$ , i.e., do what would be an act of cooperation, while simultaneously relieving  $A$  of any duty of  $A$ 's own to  $\varphi$ , i.e., to perform the cooperative act. Call the relevant threshold level of cooperation *level*  $L$ . If cooperation is below  $L$ , N3 is satisfied. Why ought  $A$  to  $\varphi$  if  $\varphi$ ing is futile? But, by the same token, why *make*  $A$  do what is futile? If  $A$ 's performing cooperative act  $\varphi$  is futile, then N1 is not satisfied. There is no Nagel case. Of course, if cooperation is *above*  $L$ , N1 is satisfied, but then N3 is not. Unless there is an argument to show that  $L$  is relevant to N1 but some different level  $L^*$  different from  $L$  is relevant to N3, there is no reason to think there are any coordination-problem Nagel cases.

So far, then, the Nagel class seems empty. Even if there were any futility cases in the Nagel Class, they would not offer any consolation to the rich redistributivist unless they could be combined with some powerful utilitarian argumentation. Giving money isn't like not tossing a bag of orange peels into a polluted river. Derek Parfit's (1984 78-86), and Peter Unger's ([cite]) counterarguments against "futility thinking" close off that possibility. Unlike Pooh's solitary yanks on the rope, giving to charity can go a small but significant way toward mitigating inequality.

These cases are similar to the futility cases. Nagel's discussion suggests that the three components of the Nagel Triad might be true together in cases instancing what John Rawls called "the assurance problem," viz.:

The sense of justice leads us to promote just schemes and to do our share in them when we believe that others, or sufficiently many of them, will do theirs. But in normal circumstances a reasonable assurance in this regard can only be given if there is a binding rule effectively enforced. (1971, 267)

The truth of N2 could be symptomatic of a general failure of assurance. If the reason  $A$  will not be compelled to  $\varphi$  is that no one will, or only a few will, then, insofar as  $\varphi$ ing represents  $A$ 's share in a just scheme governed by  $P$ ,  $A$  will not be led by the sense of justice to  $\varphi$  "off his own bat," in Cohen's phrase. And, if  $A$ 's sense of justice will not lead  $A$  to  $\varphi$ , then I think it is safe to conclude that  $A$  has no  $P$ -derived duty to  $\varphi$ .

So, here is a type of case in which N2 and N3 are true, and there is a principle  $P$  in the neighborhood. But it isn't a type of case that can go into the Nagel Class unless N1 is satisfied too. But how could it be? How could  $P$  permit  $A$  to be compelled to  $\varphi$  if there is a general failure of an assurance that is a condition of  $P$ 's applicability? It can't. But suppose assurance is not a problem for  $A$ , because there is a failure of enforcement only in  $A$ 's and perhaps a few other cases. N1 is satisfied; but now it is difficult to understand why N3 is

not, by that very token, falsified. I conclude that there is no plausible scenario under this heading that can make N1, N2, and N3 true all at once.

#### RELATIVE-DISADVANTAGE CASES

Nagel's remarks also suggest that N1, N2, and N3 might be true together in case it might reasonably be thought that *A*'s uncompelled performance would leave her at a significant "relative disadvantage" vis-à-vis others. Cohen suggested that this might be the most eligible solution to the Cohen-Triad problem. It might also relieve the conceptual tension within the Nagel Triad; and, to the extent the tension can be resolved within the Nagel Triad, there is no call for worries about integrity and justice as a personal virtue in the case of the rich redistributivist.

The fact that the performance of a duty will leave one worse off than others who do not perform their similar duty cannot, as a general matter, relieve anyone of doing what there is decisive moral reason to do (cf. Murphy 1998).<sup>12</sup> Suppose Oliver has grown to adulthood making his way in the world by picking pockets. He lives with his family in a

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<sup>12</sup> Liam Murphy advocates a "cooperative principle" according to which the demands of beneficence cannot exceed one's fair share, as that is calculated with an assumption of compliance by others with what beneficence demands of them (1998, 278). Call this the *Murphy share*. Cohen's worry is not that our principles might demand more of us than our Murphy share if others fail to contribute theirs. The worry is whether we ought to contribute our Murphy share even if the state fails to demand it in full. My claim is that we have a duty to give our full Murphy share even if the state does not demand it, and even if (subject to the qualifications stated in the text) others are not giving theirs.

neighborhood where most residents are prosperous thieves. Oliver comes to believe that stealing is wrong and, moreover, that the constabulary and courts ought to put an end to theft. Oliver would gladly find another occupation if the police showed any serious interest in apprehending thieves, but they don't. If Oliver stopped stealing, however, his income would drop dramatically and his family would suffer. Their financial suffering would be aggravated by the fact that their friends, neighbors, and relations would remain at the level of affluence the Oliver family had grown accustomed to. In a poignant twist, Oliver's children would no longer be able to enjoy the schooling that Oliver hoped would equip them to live honestly some day; and Oliver's discreet financial contributions to the Law and Order Party would have to be discontinued. Despite all this, Oliver surely has a duty to stop stealing. The fact that doing so will leave him and his family worse off is neither here nor there, unless his ability to discharge other duties will be seriously impaired. If that is so, then Oliver has landed himself in a dilemma. But that dilemma presupposes, and does not cancel, his duty not to steal. On Nagel's behalf, one might respond that if indeed the enforcement of property rights is at such a low ebb, there is an assurance problem. But that type of case was examined in an earlier section, and the conclusion reached there was that assurance problems cannot supply examples in which N1, N2, and N3 are jointly satisfied.

Here's another possible case.<sup>13</sup> Kelly attends a rough, inner-city middle school. The Principal ought to make students leave their pocketknives at home. But the Principal is

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<sup>13</sup> I owe Annie Stilz for this one. Matt Smith suggested how I should handle it.

negligent, and pocketknives are commonplace. During intervals between classes, kids like Kelly are likely to be bullied and possibly even assaulted by tough kids bearing pocketknives. Not having a pocketknife might be seen as an invitation to be bullied. Complaining to the Principal will only make matters worse. And assume that the armed guards at the school are under the school board's instructions only to intervene in cases involving firearms (I jest). Surely, Kelly has no duty to go to school without a pocketknife.

It is important to be precise about the kind of wrong involved (if any) in bringing a pocketknife to school. Lawyers distinguish *malum in se* (acts wrong in themselves) and *malum prohibitum* (acts not wrong in themselves, but made wrongful by prohibition). Is there a rule against students having pocketknives at school? If there is not, there is a question how N1 is satisfied. If N1 is satisfied because taking pocketknives to school is wrong in itself, then the case is like Oliver's but with the additional suggestion that very dire harm will result by doing what duty would require if a duty is recognized. But the fact that very dire harm will likely be suffered by one who does as duty requires normally invites the further distinction between *pro tanto* and all-things-considered duties. If  $\varphi$ ing is *malum in se* but, in the circumstances, *A* would suffer great harm by  $\varphi$ ing, the usual thought is that *A* has a *pro tanto* duty to  $\varphi$ . But then N3 is falsified. Unless, that is, the Nagel Triad is only of interest if the duty in N3 is an all-things-considered duty. But that apparently wasn't Nagel's thought, or Cohen's. And the rich redistributivist will find no comfort in the whimsical possibility that a catastrophe might occur were she to give what she ought to be made to be giving. How

could it be that some catastrophe relieves her of any all-things-considered duty to give off her own bat but does not simultaneously defeat the supposed duty to make her give? (A later section considers such an example.)

So, taking pocketknives to school has to be understood as *malum prohibitum*, if we are to have a Nagel case that does not reduce to one of the types that have already been treated. Which means that it has to be understood that there is a rule against pocketknives that the Principal is failing to enforce. If the rule were generally enforced, then presumably Kelly would have a duty to obey it. Of course, even given generally effective enforcement, Kelly might one morning realize that a dire, emergency threat made it prudentially imperative to have a pocketknife at school that day. If that is the case, then Kelly's *pro tanto* duty is in conflict with a competing duty of self-preservation (or with countervailing, morally admissible reasons), and may have to yield. But that is not to deny that Kelly had a *pro tanto* duty not to take a pocketknife to school. What is the relevant difference between this case and the case of general but illegitimate non-enforcement of a valid rule? Why would Kelly not have a *pro tanto* duty in the non-enforcement case as well? If Kelly does have a *pro tanto* duty, N3 is falsified, and there is no Nagel case.

A rule had to be stipulated to move the pocketknife example along, but let's not make too much of that. To say that there ought to be a rule that makes students leave their pocketknives at home is not yet to say that students ought to be *made now* to leave their pocketknives at home. It certainly isn't generally true that if there ought to be a rule that



makes students  $\varphi$  then students ought to be *made now* to  $\varphi$ . Maybe there ought to be a dress code that requires students to wear uniforms. There is evidence to support this: uniforms discourage cliques and bullying. But it would be absurd to send a kid home *now* for not being in uniform, rule or no rule. Whether the reasons for a rule are compelling enough to dispense with the usual process for making a rule depends on the kind of rule it is and the kind and weight of the reasons that are the backing for the rule. But if those reasons are such that students ought to be *made now* to leave their pocketknives at home, then they ought *now* to leave their pocketknives at home, rule or no rule. To appreciate the point fully, I say again, requires considering the nature of authority, as I will do in a later section.

Here's another kind of relative-disadvantage case. In Luke's community there is a viral epidemic. Luckily, there is an effective vaccine that is almost universally safe. Luke knows, however, that he has a rare genetic susceptibility to having a serious adverse reaction to the vaccine. Mandating universal vaccination will save many lives, but it is not feasible to make allowances for individuals with Luke's condition. The condition is too rare and if exceptions start to be allowed there is a significant risk that the vaccination process will be slowed down enough to cost lives. Although Luke's condition is rare, the risk of death from the vaccine for anyone with the condition is high. On the day the vaccinations are given, however, Luke discovers that his name has been left off the list by mistake. Sufficiently many others will be vaccinated to stop the spread of the virus anyway. Here is a case in which Luke ought to be made to submit to vaccination, Luke will not be made to submit to

vaccination, but it seems not to be the case that Luke ought to submit to vaccination without being made to.

Isn't this a Nagel case? N2 and N3 are satisfied, but is N1? For N1 to be satisfied, it must be the case that it was wrong not to make Luke be vaccinated. The discussion assumes, however, that the "ought" involved here and throughout is an objective "ought." Understood this way, Luke ought not to have been made to submit to vaccination. Doing so would unnecessarily risk a life.<sup>14</sup> Arguments can be made against the objective "ought," and they will be discussed in a later section, in the context of another vaccination case. But, understanding "ought" objectively, this is not a Nagel case.<sup>15</sup>

Vary the case. Luke is a small child and it is Luke's parents who would be made to have Luke vaccinated. The worries about integrity that came up in the best-friend-battlefield-traitor case could have greater traction here, where an innocent child's life is in the balance. The parents ought not to vaccinate the child because the child might rightly feel betrayed if the parents decide to take the risk without being made to. The compelled

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<sup>14</sup> One might say it was unfair, and thus wrong, not to make Luke submit to vaccination. But if under a principle of fairness it is wrongful not to make Luke submit to vaccination, how would it not also be wrongful of Luke to fail to present himself to be vaccinated? If one were to insist that because of fairness there was a *pro tanto* duty to vaccinate him, the question becomes, why would Luke then not have a *pro tanto* duty of fairness to present himself for vaccination? To secure the point, there would need to be a fuller discussion of the cost proviso built into the more acceptable versions of a fairness principle, but I will not undertake that here.

<sup>15</sup> Saul Smilansky suggested this case, but in the form of the variation that follows.

performance lacks, in this particular, a crucial vice that the uncompelled performance happens to possess. And, in general, the circumstances that attend an uncompelled performance can vary from those attending a compelled one. But, to constitute a Nagel case, the difference has to supply a reason not merely to think that the duty to perform without compulsion is defeated, but that it was no duty at all, not even *pro tanto*. The vaccination case and variants do not supply this.

#### “IT’S THE MAKING-DO AND NOT THE DOING” CASES

One can imagine cases in which making someone do something –or, being made by someone to do something– has a value that is detachable from the value of the doing. Cases of the kind are not easy to come by, but no discussion of examples in ethics is complete without a visit from outer space.<sup>16</sup> Suppose that aliens from beyond the galaxy threaten to destroy the Machiguenga, an Amazonian tribe, unless Bobby makes Allie break Corky’s eyeglasses. To avoid this catastrophe, Bobby ought to make Allie break Corky’s eyeglasses, and thus Allie ought to be made to break Corky’s eyeglasses. Otherwise, the Machiguenga will be exterminated one and all. But Bobby is unshakably convinced that the aliens are bluffing, and so will not make Allie break Corky’s eyeglasses. Allie therefore has no duty to break Corky’s eyeglasses.

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<sup>16</sup> I thank Uwe Steinhoff for giving me this case to think about.

Why not? Because the aliens are not interested in what Allie does per se or with what happens to Corky's eyeglasses. The aliens are only interested in what they can get Bobby to do just by making a credible threat. Allie's breaking Corky's eyeglasses will save the Machiguenga only if Bobby makes Allie do it. The Machiguenga will die anyway if Allie breaks Corky's eyeglasses without Bobby having made her. If Allie breaks Corky's eyeglasses without having been made to, the world is out one South American tribe and one pair of eyeglasses, which is a worse outcome than the loss of the tribe coupled with the preservation of Corky's eyeglasses. Therefore, Allie ought not to break Corky's eyeglasses, even though she ought to be made to. (Assume that Allie cannot fool the aliens into thinking she has broken Corky's glasses because Bobby made her –they aren't that stupid and it might make them angry.)

The Nagel Triad is satisfied. Allie ought to be made to do something, she isn't going to be made to do it, and she ought not to do it without being made to. Two responses occur to me. The first is that the rich redistributivist's situation is not relevantly similar to Allie's. There is no need to belabor this point. The second is that the statement of the Nagel propositions perhaps should be tightened up to rule out this category of cases. I think they

easily can be tightened in a way that does not make our question any less interesting and yet does not invite other problems; and I will leave it at that.<sup>17</sup>

The example is interesting in another way. Suppose Bobby weren't skeptical and tried to make Allie break Corky's glasses. Bobby's success would depend upon Allie's breaking Corky's glasses. Allie would then have a duty to break Corky's glasses, but it is a contingent duty, in the sense that she has it only because she is made to perform it. So, Allie's duty, properly stated, isn't to break Corky's glasses, but to break Corky's glasses if, but only if, she is made to.

It could be consoling to think that certain grownup duties are such that having them is conditioned upon being made to perform them. Duties of this kind need not satisfy the Nagel Triad the way they do in this example, which is due to the peculiar fact that the performance has a negative value if it occurs in the absence of the making. In the aliens case, the making and the doing have a value together that they lack in isolation. But what of the vastly more common cases of performances that are independently valuable, such as giving away money to mitigate distributive injustice? Is it possible that the (net) positive value of

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<sup>17</sup> David Enoch has suggested to me a Kafkaesque scenario. The aliens demand, not that Allie break Corky's glasses, but that she *intend* to break Corky's glasses –credibly promising to depart the galaxy harmlessly the instant Allie forms the intention. She has one hour in which to do it. Are the Machiguenga doomed? The value of an intention is normally tied to the value of the action intended. So also, the value of making someone do something is normally tied to the value of the something to be done. But in either case the two normally tied things can come apart. Is there a deep connection?

some doing is not great enough, on its own, to trigger a duty to do, while at the same time the combined value of the doing and the making-to-do suffices to render the making-to-do obligatory for someone other than the doer, viz., the maker? I would assume that the value of a making-to-do is a function of the value of the thing done, and normally has no independent value.<sup>18</sup> So, I restate my confusion: how can a performance be valuable enough to support a duty to compel it, and at the same time not be valuable enough to support a duty to perform without the compulsion? This seems to me to be possible only if compulsion either had some independent value or contributed to a certain Moorean organic whole (viz., the performance + the compulsion to perform) whose value is enough to trigger the duty to compel. Could legitimate political authority instantiate this possibility?

#### LEGAL AUTHORITY CASES

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<sup>18</sup> Others may disagree. Suggesting an analogy to the value of being able to bind oneself by promising, Stephen Perry writes: “the capacity intentionally to impose obligations on others can also have intrinsic value” (2012, 36, n 50). Perhaps successful exercises of that capacity have value greater than the value of the obligor’s uncompelled performance. In a similar spirit, David Owens writes that “human beings have an interest in the possession of authority for its own sake, regardless of any further purpose this authority might serve” (2012, 146). Possibly this interest imparts additional value to effective exercises of authority endowing the compelled performance with a “duty-grade” value that the uncompelled performance would lack. Both suggestions are problematic, especially when brought to bear on the kinds of cases relevant here, in which an authority fails to do as it ought. Even if one believed that something’s merely being compliant with an authoritative directive adds value to it, it is a further question whether it generally, or ever, adds decisive value.

One last possible satisfier of the Nagel Triad has to be considered, and that is the case of legal or political authority itself. Legal authority is typically thought to consist, not only in the possession of a moral permission to compel, but also in the possession of a moral power to impose moral duties upon citizens.<sup>19</sup> Obversely, to be subject to such an authority simply consists in being morally liable to have moral duties thrust upon one, willy nilly, by the relevant legal authority's say-so, and to be permissibly compellable to perform them. This being the nature of authority, why is there any problem in holding that *B*, an authority, can have the moral power and duty to compel *A* to  $\varphi$ , where  $\varphi$  is something *A* has no duty to do absent the exercise of *B*'s moral power? That is, in a nutshell, what legal authorities (if any there be) do. That's not the whole of what they do, but it is surely (surely!) some of what they do,<sup>20</sup> and they do enough of it to supply a huge reserve of cases satisfying the Nagel Triad.<sup>21</sup> Not surprisingly, that reserve will almost certainly encompass matters of redistributive taxation.

This class of cases is unlike the older Little Ricky case considered above. In Little Ricky's case, the duty to pick up after oneself stands on its own legs. Legal authorities (and perhaps also parents) are not restricted to enforcing freestanding rules that penalize *malum in se*. An example may help. Suppose that circumstances are such that uniform traffic rules are

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<sup>19</sup> See Perry 2012.

<sup>20</sup> The commitments latent within this orthodoxy have been probed by David Enoch (2011a) and others, including me (2013a).

<sup>21</sup> Bob Goodin prodded me to address this case. I don't know that he would approve my treatment of it.

desperately needed. The content of some of these rules will be arbitrary, in the sense that an opposite rule might have done equally well. The stock example is dividing roadways to avoid head-on collisions. It matters little whether the rule is “Stay to the right” or “Stay to the left.” If the rule laid down by law is “Stay to the left,” then (assume) a duty arises to drive on the left. But only then. Isn’t this a kind of case satisfying the Nagel Triad?

It is not. Prior to the decree, N3 is satisfied –i.e., *A* has no duty to drive on the left. N2 is satisfied –i.e., *A* will not be compelled to drive on the left. But N1 is not satisfied. N1 is not satisfied because there is no principle *P* applicable to *A* that requires and permits *A*, prior to the decree, to be compelled to drive on the left. Of course, N1 is satisfied with respect to a more abstractly specified  $\varphi$  –i.e., it is required and permitted to compel *A* to drive on the side of the road *to be stipulated*. But, with  $\varphi$  so specified, N3 ceases to be satisfied, for *A* *does* have a duty to drive on the to-be-stipulated side of the road, once the stipulation is made. The same alternative attaches, I suspect, to any other proposed satisfier of the Nagel Triad: state  $\varphi$  concretely enough to make N3 true, at the cost of falsifying N1, or state  $\varphi$  abstractly enough to make N1 true, at the cost of falsifying N3. To have a name for it, this phenomenon could be called a “foregrounding effect.”

Acknowledging the foregrounding effect does not mean giving up on the possibility of locating an intermediate level of abstraction in which Nagel cases can be found. Suppose that the choice between side-of-the-road rules is not entirely arbitrary. Suppose that there is a significant advantage to driving, say, on the right. Most people are right-handed and it is



better that the stronger hand be closer to the midline of the vehicle, perhaps better to manage manual controls. Right is better than left. Suppose that right is so much better than left that drivers ought to be made to drive on the right. But, as it may happen, they are not. Either there is no rule, or the rule is: Drive on the left. In either circumstance, all of N1, N2, and N3 are satisfied. Driver *A* ought to be made to drive on the right; driver *A* is not made to drive on the right; and driver *A* has no duty to drive on the right. Nagel case.<sup>22</sup>

This example finesses the foregrounding effect by having just the right degree of what one could call *institutional proximity*. The term refers to the huge distance that separates what people in a rough state of nature would have to be made to do in order to realize any political ideal, and what people ought to be made to do in the actual or near-actual world. If we imagine a state of nature in which there is no property-rights regime, it would be fanciful to suggest that anyone there ought to observe the rules that would be laid down in a civil society –even if he (along with everyone else) ought in some slightly less fanciful sense to be made to observe them.<sup>23</sup> But if instead we imagine a property-rights regime that is up-and-running, but unjust in some serious regard, it does not seem fanciful at all to think that one ought to act, compelled or not, in a way that mitigates that very injustice. So, the rich redistributivist stands to derive greater reassurance the more an otherwise colorable Nagel example possesses institutional proximity. The rule-of-the-road example, as amended,

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<sup>22</sup> I owe the outline of this example to David Enoch.

<sup>23</sup> Matt Smith suggested this example to me.

exhibits institutional proximity, because its background has been enriched by supposing additional, morally relevant facts that are not merely fanciful.

What it does not exhibit, however, is an institutional failure of justice. Rather, the failure is a policy failure. What makes the example work is that it supposes that a superior policy is one that ought to be mandatory, in the strong sense that it would be wrong not to mandate it, that is, wrong not to make people comply with it or something closely resembling it. I doubt that reasons of mere policy rise to that level in the context of rules of the road, but never mind that. Surely, *some* policy reasons are so weighty that it would be wrongful not to make people do what the policy requires. To borrow David Enoch's useful term, sometimes duties have, as their "triggering principles," principles that have a welfare aim rather than a justice aim. It would be wrong not to enforce them even though no assignable person would be wronged by a failure to enforce. For example, it might be very wrong not to forbid airlines to transport certain flammable items. But if the practice is tolerated, it would be a stretch to say that an authority that failed to make airlines exclude those materials had wronged injured persons. In some cases, however, the risk of harm to others is serious enough to warrant saying that a negligent authority had committed a wrong. But, in cases of that sort, it is not easy to agree that the regulated party would not also have wronged those injured. If the airlines ought – and here, for emphasis, I will add ought *morally* – to have been forbidden to carry the items, they ought not to have carried the items, period.

Under examination, then, rules-of-the-road cases are not Nagel cases; and I hazard the claim that no other legislative example will survive scrutiny as a Nagel case. Legal authority does more than merely legislate, however, and it is possible that some of its other functions satisfy the Nagel Triad. Consider the “play to the whistle” convention followed in competitive football (aka soccer).<sup>24</sup> The sporting thing to do, in a friendly match, is to call one’s own fouls. If, for example, one handles the ball one ought to stop play and let the opposing team have the free kick the rules provide as the penalty for a “hand-ball.” Under the play-to-the-whistle convention, however, players are not to report their own fouls but are to play on until the referee whistles. If the referee fails to do detect the foul, play continues as though it had not occurred.

The play-to-the-whistle convention seems to create a numerous class of cases in which a player ought to be made to give up the ball, is not made to give it up, but ought not to give it up on her own motion. Of course, the assumption has to be that the play-to-the-whistle convention is practiced by the other team as well: for otherwise intuition would favor voluntarily giving up the ball in the spirit of fair play. This already points up an asymmetry with the case of taxation. In the football case, the aim is fair competition, pure and simple; in the case of redistributive taxation the aim is substantive justice, which makes demands independently of fair play. If Sally calls an undetected hand-ball on herself, her team suffers an unfairness (as she is likely to be reminded by her teammates). If Sally’s well-off mother

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<sup>24</sup> I owe this example to Chris Bennett.

Sarah sends the state a check in excess of what she's been assessed, Sally and family cannot complain to Sarah of unfairness. In the same vein, one could say (and this is my preferred response) that Sally has a *pro tanto* duty to give up the ball, which must yield, all-things-considered, to the weightier duty of loyalty to her team –whereas Sally's mother has no corresponding, overriding duty to treat distributive justice as if it were a competitive game.

So, there's little comfort for the rich redistributivist here; but I would rather not leave it at that. A closer look at the play-to-the-whistle cases raises a further reason to disallow them as Nagel cases. Notice that referees are subject to conventions of their own. One of them is the don't-call-it-if-you-didn't-see-it convention. Admittedly, it might not apply to self-reported fouls, but the competitors' play-to-the-whistle convention already minimizes the occurrence of those. If the referee is subject to the don't-call-it-unless-you-see-it convention, then it is not true, in the example, that the player ought to be made to give up the ball. And if it is not true that she ought to be made to give up the ball, the Nagel Triad is no longer satisfied.

This point might strike the reader as too easy, since what has been assumed throughout is an "objective" notion of "ought" (to be scrutinized in the next section). God, looking down from on high, sees perfectly clearly that under the official rules Sally's team ought to be made to give up the ball; and He also sees that under the play-to-the-whistle convention Sally and her team ought not to give it up. But God also sees that the referee did not see Sally handle the ball. So He sees that under the don't-call-it-unless-you-see-it

convention, Sally ought not to be made to give up the ball. Only the referee is authorized to make Sally do that. There is no Nagel case here: Sally ought not to give up the ball, Sally isn't made to give up the ball, but Sally ought not to be made to give up the ball.

What makes this example unusual is that it focuses not on the duty of primary conduct –i.e., don't handle the ball– but on the penalty for violating the primary duty – i.e., give up the ball. Surveying the wider normative universe, many duties are more-or-less naturally tied to a consequence to atone for or to remedy a breach. If I have taken your umbrella by mistake, I ought to give it back. So, it is easy to understand why I ought to give it back whether or not I am made to. But there are even more duties that are not naturally tied to any particular penalty or remedial response. If I have destroyed your umbrella not by mistake but by design, I have breached a “primary” duty, but the assignment of normative consequences is largely conventional. Suppose the legal consequence applicable to agent *A* is: thirty days in jail. *A* ought to be made to spend thirty days in jail. But suppose *A* isn't made to spend thirty days in jail. What then? It is absurd to think that *A* ought to spend thirty days in jail off his own bat. But it isn't odd to think that there is some substitute performance that *A* ought to perform.

What happens in the football example is that it draws on the official rules as the source both of what Sally ought to be made to do and the penalty for her failing to do it, while it simultaneously draws on an unofficial convention to negate any duty on her part to volunteer to be penalized. And there is no obvious substitute performance. (Maybe offer to

buy the other side an extra round after the game if the missed call was decisive?) I suspect that this odd combination of features contributes to my perplexity about how to dismiss this example. I would like to say that Sally has a *pro tanto* duty to turn over the ball, which is overridden by her duty of loyalty to her team. As such, it is not a Nagel case. But it is easy to imagine an amendment to the official rules that forbids players from taking it upon themselves to remedy their own unobserved infractions of the primary rules and also rejects don't-call-it-unless-you-see-it. Then, it would not be easy to maintain that Sally would still have a *pro tanto* duty to turn over the ball, or that she ought not to be made to turn it over. Some carefully narrowed definition of the Nagel Class, designed ad hoc to exclude this kind of case, could be concocted. But I will not do that here. For now, let it suffice that the matter of redistributive taxation is too dissimilar to Sally's case to comfort the uneasy, rich redistributivist.

#### “OBJECTIVE” VERSUS “SUBJECTIVE” OUGHT

The discussion so far has assumed an “objective” notion of duty and “ought.” The terminology can easily mislead, but I will not clarify it any more than the present topic demands. Doubt has been cast upon the objective “ought” in discussions of an example first put forward by Frank Jackson.<sup>25</sup> A variation on it may turn out to be a Nagel Case.

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<sup>25</sup> Jackson 1991, at 462-63.

First, Jackson’s “Jill” case, more-or-less as originally put: Jill is a doctor whose patient suffers from a serious health impairment that will become permanent and incurable unless quickly treated. Jill has only three treatments at her disposal: drug *A*, which she knows will safely effect an only partial cure; drug *B*, which will safely effect a complete cure; and drug *C*, which will be fatal. Unfortunately, although Jill knows that one of the two, *B* and *C*, is a safe and complete cure, and the other is deadly, she doesn’t know which is which. In these circumstances, there is a powerful intuition that Jill ought not to administer drug *B*, even though it will bring about the best outcome. Moreover, there is a powerful intuition that she ought to administer drug *A*, rather than do nothing. Poignantly, she concludes that she must do what she knows will not bring about the best outcome. Shouldn’t we agree? Let us assume, then, that this is a case in which Jill ought to administer drug *A* and not drug *B*, which, for all she knows, could be the fatal one. (Assume for the argument’s sake that there are no complications arising from the need to get the patient’s consent.)

Now, the variation.<sup>26</sup> Jack is a brilliant colleague of Jill’s. Jack knows (for reasons he is unable to communicate in time) that drug *B* will safely cure the patient. Jack has a disability (think “House”) and cannot administer treatment himself. Jill’s esteem for Jack is such that he can make Jill administer drug *B*; yet he (for whatever reason) does not. Jack ought to make Jill administer drug *B*, but Jill –as intuition told us– ought not to administer

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<sup>26</sup> I owe the variation to Bas van der Vossen.

drug *B* but drug *A*. Here, then, is a case satisfying the Nagel Triad: Moral principle requires that Jill be made to administer drug *B*; Jill is not made to administer drug *B*; and it is not the case that Jill ought to administer drug *B* (in fact, Jill ought *not* to administer drug *B*).

An interesting feature of this example is that it is not only a possible Nagel case, it suggests certain relevant similarities to Cohen's predicament. If distributive justice is as much a matter of uncertainty as Rawls believed (1996, 229-30), and if democratic authority has epistemic credentials as solid as David Estlund (2009, *passim*) has argued they can be, then an under-taxed redistributivist could be positioned as Jill is, with respect to a greater epistemic authority, such as Jack. Jack might be falling down on the job, and Jill might even *know* that Jack is falling down on the job, while Jill has no duty to do what she ought to be made to do –not even if she has a hunch about what that is. Jill ought to do the safe thing and not follow her hunch (“A tingling in my bones tells me it's drug *B*!” she might be thinking).

But the analogy falls apart the moment we recall that it isn't going to kill anyone if the rich redistributivist takes a chance that her duty of distributive justice is more exacting than what the state will enforce. Furthermore, thoughtful redistributivists are unlikely to concede that their epistemic situation, relative to the state's, is relevantly similar to Jill's with respect to Jack's. It is unnecessary to contest the analogy, however, if further reflection undermines the intuition that Jill ought not to give drug *B*. Certainly, Jill could not be blamed for giving drug *A* and not *B*. Indeed, Jill could be reproved if she gave drug *B*, for she



would thereby have taken a huge, unjustifiable chance with the patient's life. But wrongness and blameworthiness are distinct moral properties, each capable of attaching where the other is absent. Suppose high-schooler Hattie's mis-thrown spitball happens to draw – and in the circumstances was the only thing that could have drawn – bus driver Henry's attention to an out-of-control semi-trailer in time for him to avoid it. It was fortuitously the right thing but Hattie may justly be blamed for doing what she did.

As for Jill: It may indeed be “appalling” and “unconscionable” (as Michael Zimmerman<sup>27</sup> has argued) of Jill to administer drug *B* –but if in a set of circumstances we ought to be made to do what it would be unconscionable for us to do without having been made to, my intuition is that we must say that we sometimes ought to do what is unconscionable, just as we quite readily recognize that sometimes (albeit rarely) we ought to do what we are blamable for doing (particularly where we ought to be made to do it by one who may blamelessly make us do so).

Jackson rightly says “we would be horrified” if Jill gave drug *B* or drug *C* (1991, 466); but that reaction will yield, sooner or later, to one of relief if Jill administers drug *B* rather than *C*. Jackson and Zimmerman are correct about what intuition we ought to have at the moment drug *B* or drug *C* is given, if we know no more than Jill does at that moment; but much more is needed to nourish the separate intuition that it would not only be safer but “ought-er” that the patient be given drug *A*. Of course, if it is *very* wrong to take risks of this

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<sup>27</sup> Zimmerman 2006 at 342.

sort involved in ignoring the safer alternative drug *A*, then a proper adjustment of the relevant value function could easily unravel the hypothesis that the “objectively” best outcome is to be had by means of Jill’s giving drug *B*. Suppose that, in giving drug *B* and effecting a complete cure, Jill had ignored the patient’s express refusal of treatment with drug *B*. It would be wooden in the extreme not to discount the value of the outcome in some measure to reflect the rights-violation by means of which the complete cure was effected. But the Jill case serves Jackson’s and Zimmerman’s purpose of undermining the “objective” view only if the drug *B* treatment involves the highest-valued outcome.

Pace Zimmerman, I conclude that Jackson’s “Jill” case is insufficient to overthrow the dominant view<sup>28</sup> that duty and “ought” are to be understood objectively rather than “decision-theoretically”; and, even if it were sufficient, the “Jack” variant of Jackson’s “Jill” is too far removed from the situation of the rich redistributivist to furnish her any comfort. Moreover, if it were correct to insist that “ought” be understood in some subjectivized way, the Jack variant of the Jill case would still fail as a Nagel case. Jackson’s decision-theoretic “ought,” for example –like subjective “oughts” as a class– is tacitly subscripted to the epistemic situation of the duty-bearer. So, Jack ought<sub>Jack</sub> to make Jill give drug *B*, Jack fails to make Jill give drug *B*, and it is not the case that Jill ought<sub>Jill</sub> to give drug *B*. But this is not a Nagel case: the subscripted oughts differ in N1 and N3.<sup>29</sup>

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<sup>28</sup> Jackson, unlike Zimmerman, is willing to let a hundred “oughts” bloom (Jackson 1991, 471-72).

<sup>29</sup> David Enoch suggested that I emphasize this.

## THE “SUBJECTIVE” CASE

I have surveyed Pre-commitment cases, Excessive-demand cases, Futility cases, Assurance-problem cases, Relative-disadvantage cases, “It’s-the-making-do-and-not-the-doing” cases, Legal-authority cases, and –finally– cases meant to call the “objective” ought into question. I am persuaded that any other, putative Nagel case will be fairly assimilable to one or more of these categories and, as such, will yield to the same type of treatment as that given above. I am also persuaded that a genuine Nagel case is a metaphysical impossibility: the Nagel Triad is satisfied in no possible world, if the qualifications I have made along the way are considered. I have not proved that, of course. But I think what I’ve said so far should make the fair-minded reader less easy in the assumption that there are such cases.

Cohen concluded his desultory look at the problem by acknowledging that “a rich egalitarian may have good reasons for not giving extravagantly [*sic*] in an unequal society” (2000, 179). If by this he was adverting to some safe haven among the Nagel cases, I think I have shown those reasons to be specious at best. This brings us to Cohen’s original problem, the “subjective” case (where the “ought” remains as fully objective as you may like). This is where the worry about hypocrisy and integrity comes in. To make it more perspicuous, I will state it in four propositions rather than three.

TRoublesome Tetrad (subjective form of the Nagel Triad):

- S1.  $A$  believes there is a moral principle  $P$ , applicable to  $A$ , that morally both requires and permits  $A$ 's being made to  $\varphi$ .
- S2.  $A$  believes that  $A$  will not be made to  $\varphi$ .
- S3.  $A$  believes  $A$  has no duty to  $\varphi$ .
- S4.  $A$  believes  $A$ 's not  $\varphi$ ing is not out of line with  $A$ 's own principles.

Of course, all of S1-S4 may be true. But again, as Cohen rightly says, "logical consistency is a very thin thing." In saying " $A$  believes that ( $p$  &  $\neg p$ ),"  $A$  does not contradict himself; but  $A$  doesn't show himself to his best advantage, either. The question is whether the actor,  $A$ , can coherently hold together the beliefs stated by S1-S4. The Nagel Triad, consisting of the objective correlates of S1-S3, cannot be (relevantly) true together; and S4 states in effect that  $A$  thinks there is no inconsistency in her holding the beliefs specified by S1-S3.

But being mistaken is one thing, holding inconsistent beliefs another, and being a hypocrite is still another. Cohen is right to insist that what matters is "the reason [the actor] would give in support of her belief" (2000, 158) in the truth of moral principle  $P$  that features in S1. The tetradic formulation brings out the peculiarity of  $A$ 's attitude toward the set of moral reasons consisting of the principle  $P$  and the facts that make  $P$  applicable to  $A$ . In  $A$ 's view, this set of reasons is insufficient to impose upon  $A$  duty to  $\varphi$ , but *is* sufficient to impose upon others both a duty and a permission to compel  $A$  to  $\varphi$  if  $A$  does not  $\varphi$ . How

can *A* honestly believe (especially, after she reads this paper) that she has no duty to do what she ought to be compelled to do?

The inescapable consequence for persons of integrity is that they accept that they have a duty to do whatever the regime they inhabit – if decently just – would compel them, as a matter of substantive justice, to do. And substantive justice encompasses distributive justice. Doing these things is what *justice* compels. A person of integrity avoids the Troublesome Tetrad by dropping the belief described by S3. Or is there another way?

I think the maneuvers discussed with respect to the Nagel Triad –excessive demands, assurance problems, relative disadvantages– are of no more avail here, especially not to anyone who has read this far. One might insist that all relevant duties of distributive justice are of conditional form. Never, “*A* ought to part with *n*,” but “*A* ought to part with *n* if but only if made to.” But this desperate move runs afoul of the fact that duties of distributive justice do not seem to be of this form, and surely are not generally. If a chunk of manna that would feed starving *A* and *B* falls into *A*’s lap, *A* has a duty to part with enough to feed *B* whether or not *B* or anyone else is in a position to make *A* share. That leaves one final out: to deny that principles of justice are generally applicable to individuals. For example, to insist that society-wide principles of distributive justice apply not to individuals but to institutions or to a “basic structure.” This is the Rawlsian move that Cohen criticized with such acumen

and determination.<sup>30</sup> But the very success of that critique brought Cohen's triad into sharp relief. Has Cohen, like Samson, not brought the temple down upon himself?

A rich Rawlsian escapes the doxastic condition described by S1-S4, because the difference principle, her *P*, does not apply to her at all. It only applies to the basic structure of her society, and she has no duties of distributive justice other than those that are coercively instituted. She lacks belief S1. The only political duty incumbent upon her is to "support and comply with just institutions that exist and apply" to her, and to "further just arrangements not yet established ... when this can be done without too much cost" to herself (1971, 115). Hers is designedly not among those "barefooted doctrines" that would deprive her of designer footwear. Cohen's doctrine, however, should, unless the "personal prerogative" (the heavy-footed deus ex machina whose tracks mar crucial pages of his final book, *Rescuing Justice and Equality*), can decently be invoked. The personal prerogative – deriving from Scheffler (1982)– is nothing other than a moral permission to do other than what morality would otherwise require. Normally, the personal prerogative is conceived as constraining the demands not only of morality but also those of the state, and on the same

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<sup>30</sup> John Mikkail has made this observation:

[One major] shortcoming [in Rawls's early approach to moral theory] concerns how Rawls understands the relationship between the moral principles that apply to institutional arrangements and those that apply to the actions of individuals. According to Rawls, the first set of principles is primary, and the second derivative.... From a naturalistic point of view, this seems implausible. It seems more likely that the principles that generate considered moral judgments about the basic structure of society are themselves rooted in principles that apply to the acts of conspecifics, rather than the other way around. (2011, 34-35)

I try to press a related though more general point in Edmundson 2013b.

rationale: the importance of liberty to live autonomously, by one's own lights. How then could a personal prerogative dissolve a personal duty to  $\varphi$  and not, in the same stroke, render unjust the imposition of any political duty to  $\varphi$ ? If a personal prerogative indeed sheltered the sum one ought to have paid if properly taxed, it would seem also to condone avoiding any tax increase of that same amount—which obviously is not a consequence that a redistributivist can accept.

The fundamental issue is not “practicing what one preaches,” or hypocrisy. It may be that there ought to be more hypocrisy than less: and anyway keeping one's thoughts to oneself does not render those thoughts any more coherent or more accurate. The issue is rather one of integrity and justice. If justice is a personal virtue, and encompasses matter classified under the heading “distributive justice,” it will make demands of us independently of, even in advance of, institutional sanctions. Eliot's lesson was: choose theories and principles wisely, for if we don't, and sit by them for long, we are liable to get “scorched,” in the sense that we may feel a sharpening sense of discomfort in remaining in what we thought was an agreeably righteous posture. But of course it would be craven to choose our principles mainly to suit our comfort and convenience. In deliberating, we sometimes wish that our better angels would be more forceful with us if they mean to be so strict; and, by imagining them to be *making* us do what they propose we do, we are sometimes able to fortify ourselves. Aren't they telling us that what we've decided we ought to be made to do is what we ought to be doing anyway?

## APPENDIX

## POLITICAL VERSUS PERSONAL “OUGHTS”

The quest has been characterized as one for satisfiers of the Nagel Triad. But there is another way of describing the quest, which will bring out a possible objection to the whole enterprise. Consider the following proposition:

O.            If  $A$  ought to be made to  $\varphi$ , then  $A$  ought to  $\varphi$ .

Nagel’s Triad is satisfiable just in case O is false for some  $A$  and  $\varphi$ . But O is peculiar in a way that needs attending to, for it could be objected that it involves a confusion. Consider the following:

$O_{\text{political}}$         If it ought to be the case that  $A$  is made to  $\varphi$ , then it ought to be the case that  $A$   $\varphi$ s.

Here, the “ought” is a propositional operator, and is of a type that Sidgwick (1907) called the “political ‘ought,’” and I will stick with Sidgwick’s expression, although the term “evaluative” (Schroeder 2011, 4) has more recently been used to pick out what also could equally well be called the “ought to be” sense of “ought.”<sup>31</sup> Construed this way, is what O states generally true? It seems pretty uncontroversially so; for it could not be the case that  $A$  is made to  $\varphi$  unless  $A$   $\varphi$ s. But now consider:

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<sup>31</sup> Schroeder’s terminology contrasts “evaluative” and “deliberative oughts.”



$O_{\text{mixed}}$  If it ought to be the case that  $A$  is made to  $\varphi$ ,  $A$  ought to  $\varphi$ .

The antecedent is political, and the consequent is “deliberative,” that is, it states a relation between an actor and an action. To exploit the contrast, I will call the consequent an instance of a “personal” ought. (“Is the political personal?” frames the topic more sharply than “Is the political deliberative?” –and it resonates nicely with the 1960s slogan: “The personal is *political!*”) Cohen’s worry was that a personal ought might be detachable in a case of special concern to himself, a rich egalitarian worried about his integrity; and Nagel’s view (translated into this terminology) was that, generally, sometimes the a personal “ought” is detachable and sometimes it isn’t. Cohen’s worry and its situation within Nagel’s view are what I want to inquire into.

Allowing the personal and the political “oughts” to mix in combinations is not necessarily to confuse them. Combination and confusion are two different things. In what follows, I will assume that the personal “ought” is viable and meaningfully combinable with political “oughts.” “If there ought to be no killing, then I ought not to kill” is meaningful, surely, and its consequent just as surely can be validly detached if the antecedent is posited as true –although how to represent that inference as syntactically valid is a further issue. So also with  $O$ . The issue in dispute is not whether  $O_{\text{mixed}}$  is true in virtue of its logical form: it is whether  $O_{\text{mixed}}$  is generally true, and if not generally true, whether that lack of general truth allays Cohen’s worry. One might think that any superficial plausibility that  $O$  had is owing to  $O_{\text{political}}$ , and that  $O_{\text{mixed}}$  (universally quantified) loses all plausibility once the

distinction between the political and the personal “oughts” is highlighted. But that remains to be seen.

#### WIDE-SCOPE VERSUS NARROW-SCOPE

Another possible objection deserves attention. This one arises from the fact that conditionals involving “ought” can be rendered in either of two ways. “Ought” has a narrow scope if it governs the consequent of the conditional: it has a wide scope if it governs the conditional itself. Represented schematically:

$$O_{\text{narrow}} \quad \text{If } p, \text{ then } O(q)$$

This schema could be used, for example, to render something apparently truistic, like “If you will the end, you ought to will the means.” But if the truism is rendered this way, it is no longer true. An aspiring bank robber ought not to will that he find a bank to rob (Schroeder 2004). But the unwelcome implication is avoided if the truism is rendered according to a wide-scope schema:

$$O_{\text{wide}} \quad O(\text{If } p, \text{ then } q)$$

So rendered, the truism tells us that it ought not to be the case both that the would-be robber wills robbing a bank and does not will finding a bank to rob. The truth of the antecedent in a narrow-scope rendering allows the detachment of a personal “ought.” But the truth of the antecedent in a wide-scope rendering does not. So, in general, a wide-scope

rendering of an ought-conditional recommends itself, pro tanto, to anyone worried about having to live with a detachable ought-consequent.

In the present case, someone might dismiss Cohen's worry as valetudinarian, insofar as the troublesome conditional,

$O_{\text{mixed}}$  If it ought to be the case that  $A$  is made to  $\varphi$ ,  $A$  ought to  $\varphi$

could be rendered in a wide-scope way:

$O_{\text{mixed-wide}}$  It ought to be the case that, if  $A$  ought to be made to  $\varphi$ ,  $A$   $\varphi$ s.

Under the rendering,  $O_{\text{mixed-wide}}$ , nothing could license detaching the personal-ought consequent, " $A$  ought to  $\varphi$ ." Problem solved.

Or, the problem would be solved if  $O_{\text{mixed-wide}}$  were a plausible rendering of  $O_{\text{mixed}}$ . But it is not. What  $O_{\text{mixed-wide}}$  states is the mere truism that it ought to be the case that if  $A$  ought to be made to do something,  $A$  does it. This is not an eligible alternative reading of  $O_{\text{mixed}}$ ; for it would be silly to think of  $O_{\text{mixed-wide}}$  as capturing "the truth in"  $O_{\text{mixed}}$  while neatly factoring out a repugnant implication.  $O_{\text{mixed}}$  has to be challenged some other way; and the "Wide-Scope program" (Schroeder 2004, 337) does not offer an easy solution to Cohen's worry.

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